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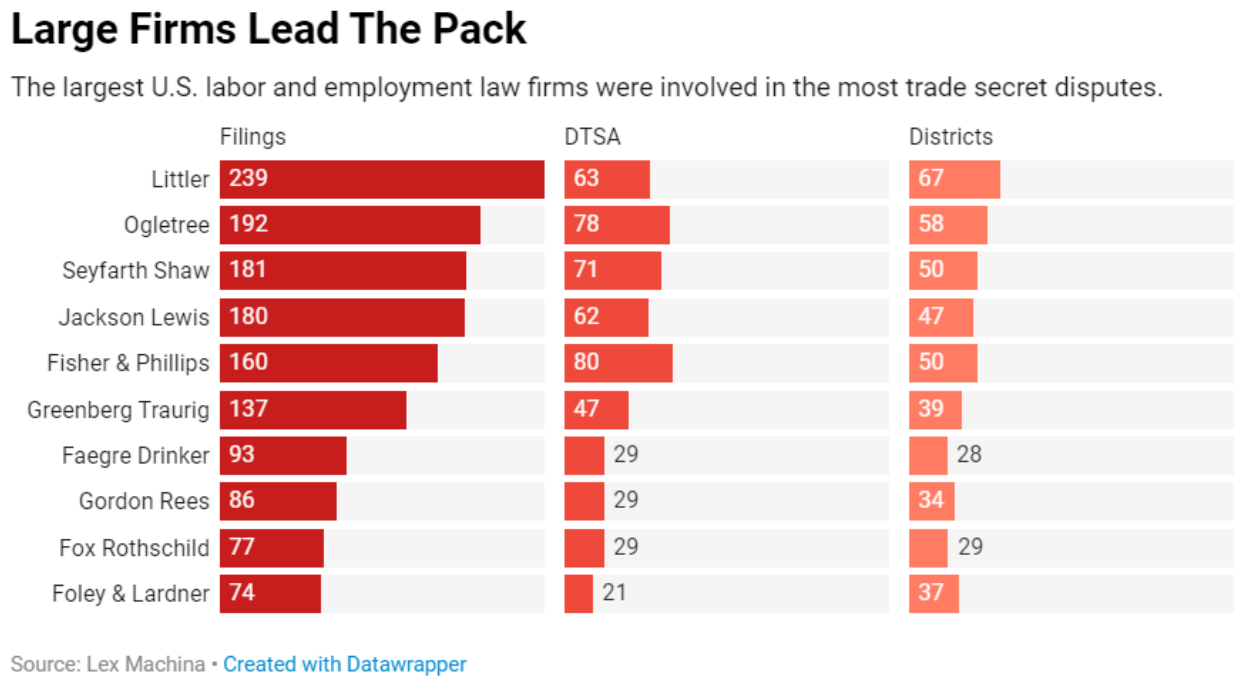
Littler, Ogletree Pace Firms As Trade Secret Suits Hold Steady

By **Braden Campbell**

Law360 (April 20, 2020, 11:07 PM EDT) -- Employment law giants Littler Mendelson PC, Ogletree Deakins Nash Smoak & Stewart PC, Seyfarth Shaw LLP and Jackson Lewis PC were called in to help clients protect trade secrets in federal court more than any other firms over the last decade, according to a new report by Lex Machina.

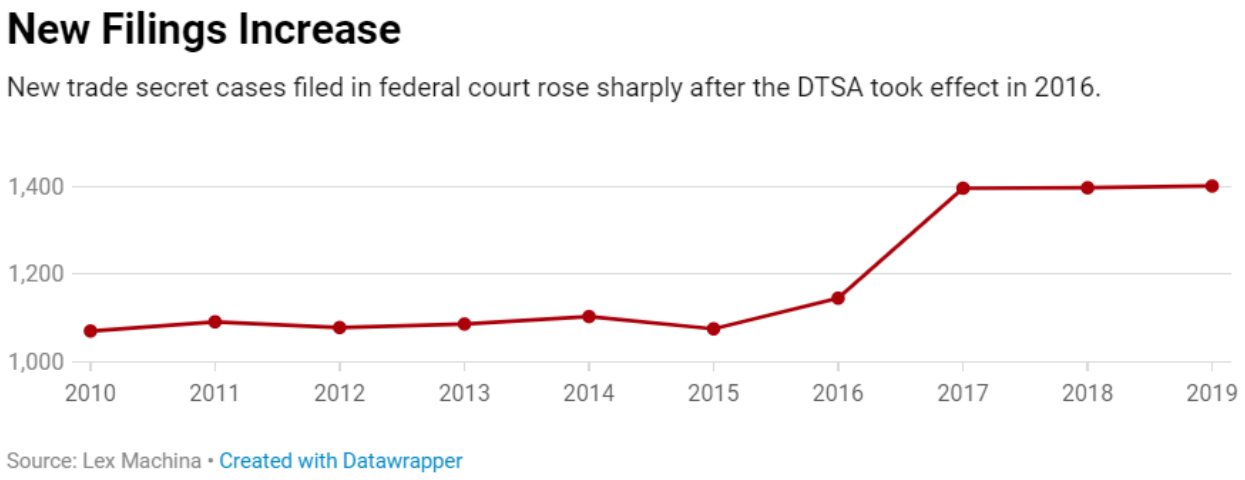
Littler represented plaintiffs in 239 federal disputes from 2010 to 2019, Ogletree was involved in 192 cases, and Seyfarth and Jackson Lewis were in on 181 and 180, respectively, Lex Machina said in its latest report. The list of the most prolific firms largely tracks the ranking of firms by number of employment attorneys.



The legal analytics firm released these findings Tuesday in a report examining various trade secrets litigation trends in federal court over the last decade. The report looks at several data points, including the number of annual filings and the breakdown of case outcomes.

Lex Machina found that the number of new trade secrets cases filed in federal courts has leveled off following a sudden surge after the Defend Trade Secrets Act took effect in 2016. It tracked a rise in the number of new cases from about 1,100 a year between 2010 and 2016 to about 1,400 per year from 2017 on.

Lex Machina, which gathers new federal case data from courts' PACER systems, defines a "trade secret case" for the purposes of the report as a federal court dispute in which "the pleadings contain at least one claim for trade secret misappropriation under federal, state, or common law."



The data show that about two-thirds of the new cases filed between 2017 and 2019 included claims under the DTSA, which gave litigants a right to file trade secret claims in federal court. Before the DTSA's May 2016 effective date, they could get into federal court if they filed state trade secrets claims alongside other federal claims, or if the dispute invoked "diversity" jurisdiction because the parties span multiple states and the dispute involves enough money.

"What you have are a lot of cases that were filed in the state courts that are now being filed in federal court under the DTSA, whereas before they were just in state court under the [Uniform Trade Secrets Act]," Cozen O'Connor PC IP litigation group co-chair James Gale said. The UTSA is a law that most states passed, creating a common standard for trade secret disputes.

Gale said it was odd that the number of DTSA filings leveled off.

"I see them as increasing significantly, [but] maybe I'm just getting a bigger share of them as time goes on," he said.

Most federal trade secret disputes include other claims, the report shows. About 13% of cases included only trade secret claims, while nearly 82% had a contract claim. That slice includes several types of dispute, including alleged breaches of nondisclosure agreements and covenants not to compete, as well as shareholder disputes in which one party accuses another of acting unfairly, Gale said.

A decent chunk of the last decade's trade secret disputes also included an intellectual property claim: Lex Machina found about 18% of cases had a trademark claim, about 9% had a copyright claim and about 5% had a patent claim. Only a fraction of 1% included a traditional employment claim, such as a discrimination or wage theft allegation, Lex Machina found.

Trade Secrets And Contracts Strongly Linked

Many trade secret disputes in the last decade also include contract claims, and a decent chunk include intellectual property claims.

Case Type	Cases	Percent
Trade Secret	11,842	100.0%
Trade Secret Alone	1,494	12.6%
Contracts	9,696	81.9%
Trademark	2,119	17.9%
Copyright	1,034	8.7%
Patent	568	4.8%
Antitrust	158	1.3%
Employment	47	0.4%
ERISA	29	0.2%
Securities	25	0.2%

Source: Lex Machina • Created with Datawrapper

While many trade secret litigants are one-offs, the last decade saw some repeat players, most notably insurance and financial services companies, Lex Machina found. These suits often arise when a larger company licenses or franchises its system, and then accuses the licensee of continuing to use its name or materials when the relationship ends.

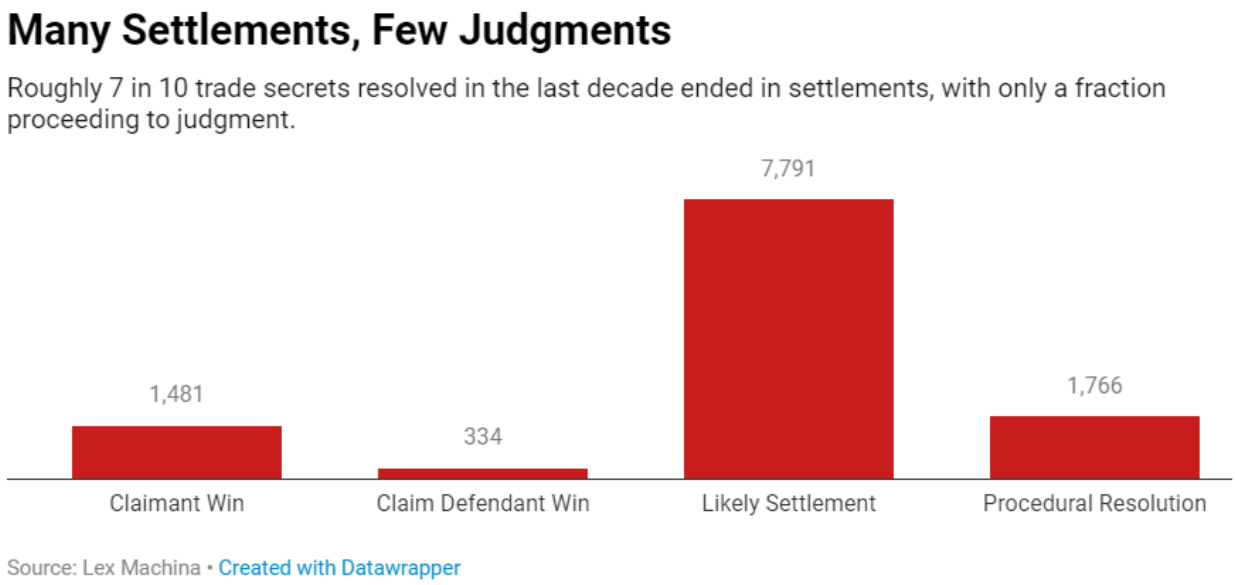
Baker McKenzie trade secrets litigator Bradford Newman described such property as “soft” trade secrets, in contrast with “hard” trade secrets such as the formula for Coca-Cola or other valuable, hard-won industrial information. These soft secrets, which also include customer lists, make up the bulk of federal trade secret disputes, he said.

“The federal courts are quick to separate the real cases from the fluff, and most of the DTSA cases aren’t going to trial,” said Newman, who chairs Baker McKenzie’s North American trade secrets practice. Parties to state disputes often dig in for trials, he said, while busy federal judges typically push disputants to settle.

Lex Machina data on case outcomes bear out Newman’s experience. Of the more than 10,000 cases that resolved from 2010 to 2019, close to 70% ended in a voluntary dismissal by the plaintiff or a stipulated dismissal by both parties, which the group terms a “likely settlement.” An additional 16% ended in a dismissal ruling or other procedural resolution, while about 16% saw a court judgment or trial ruling. Claimants won about 80% of judgments, Lex Machina found.

Because many trade secret suits seek the return of physical or intellectual property, litigants often seek injunctions. Lex Machina found courts debated the merits of roughly 1,000 preliminary injunction motions and a similar number of motions for a temporary restraining order. Parties asking for temporary

restraining orders won about 68% of the time, while those asking for preliminary injunctions won at a roughly 55% clip. Moving parties won 80% of about 150 permanent injunction motions, Lex Machina found.



Elsewhere, Lex Machina found that the total amount of damages awarded in trade secret misappropriation judgments fluctuated wildly from year to year, from a low of about $12 million in 2013 to a high of about $1.2 billion in 2011.

A jury verdict making up more than $900 million of the 2011 sum was later wiped out by the Fourth Circuit.

Other portions of the report look at which federal district courts and judges handled the most trade secrets cases, how long disputes lasted from filing to various milestones, including trial and summary judgment, and how often courts made certain findings.

--Editing by Peter Rozovsky.

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