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# Healthcare Industry Increasingly Using Trade Secret Litigation to Protect Intellectual Property Rights

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A recent report from Lex Machina shows that an increasing number of companies (no doubt including those in the healthcare industry) are turning to the assertion of trade secret claims to protect their intellectual property rights in federal courts – in large part thanks to the passage of the Defend Trade Secret Acts ("DTSA"). Between 2009 and 2016, trade secret suit filings were relatively constant, with an average of approximately 900 cases per year. In 2017 (the first full year the DTSA was in effect), that number increased to 1,134 cases filed, and the filings through the first half of 2018 shows similar growth.

The DTSA, passed in May 2016, allows plaintiffs to file trade secret misappropriation claims in federal court if the claim is "related to a product or service used in, or intended for use in, interstate or foreign commerce." 18 U.S.C. § 1836(b)(1). Previously, trade secret misappropriation claims were state law claims only, and could be raised in federal court only if federal jurisdiction was otherwise established. Importantly, DTSA provides prospective plaintiffs some powerful remedies, including the ability to obtain ex parte seizure, an award punitive damages, and enhanced damages in certain circumstances. Industries on the cutting edge of healthcare and biotechnology innovations can take advantage of the DTSA and these remedies.

The healthcare industry's increased reliance on the DTSA also coincides with uncertainties facing the patent infringement litigants. Prior to the passage of the DTSA, companies used patent infringement claims alone to protect intellectual property and related assets. As the DTSA has broadened scope of potential trade secret misappropriation claims, the Supreme Court and the Federal Circuit have narrowed the scope of what types of inventions are protected by the Patent Act. For example, a unanimous Supreme Court held in *Mayo Collaborative Services v. Prometheus Labs.,* that the claimed invention related to a personalized medicine dosing process was not eligible for patent protection because the process is effectively an unpatentable "law of nature." This case had serious repercussions for the healthcare and pharmaceutical industries. As one leading expert stated when the decision came out: "Those in the biotech, medical diagnostics and pharmaceutical industries have just been taken out behind the woodshed and summarily executed by the Supreme Court this morning. An enormous number of patents will now have no enforceable claims. Hundreds of billions of dollars in corporate value has been erased."

The combination of the broadened rights of the DTSA and the narrowed scope of the Patent Act, may be leading more companies to use claims for trademark misappropriation to protect their rights in federal court—and healthcare companies appear to be at the forefront of this movement. Trade secrets—confidential and proprietary information that could cause harm if in the hands of competitors—can run the gamut in the healthcare industry from customer lists and account histories to confidential information about newly developed industry products. And healthcare and life science companies are taking advantage of the the DTSA to protect such confidential information.

As the Lex Machina report suggests, most of the DTSA cases filed have not yet reached a reached final resolution. As more cases run their course, practitioners will we have a better understanding of the impact of the DTSA on the industry and on companies' abilities to protect their intellectual property through the DTSA.



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