Trending Issues in Trade Secrets
The DTSA in Review

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Agenda

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  - Civil Notice Pleading
- From the Courts of Appeal
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Starting Points

Features of DTSA Litigation

As with prior trade secret litigation under state UTSA laws, most DTSA litigation involves "someone the trade secret owner knew"

- 66% of DTSA disputes involve a current or former employee of the alleged trade secret owner
- 26% involve a current or former business partner
- Less than 10% of DTSA claims involve parties who lack a prior relationship

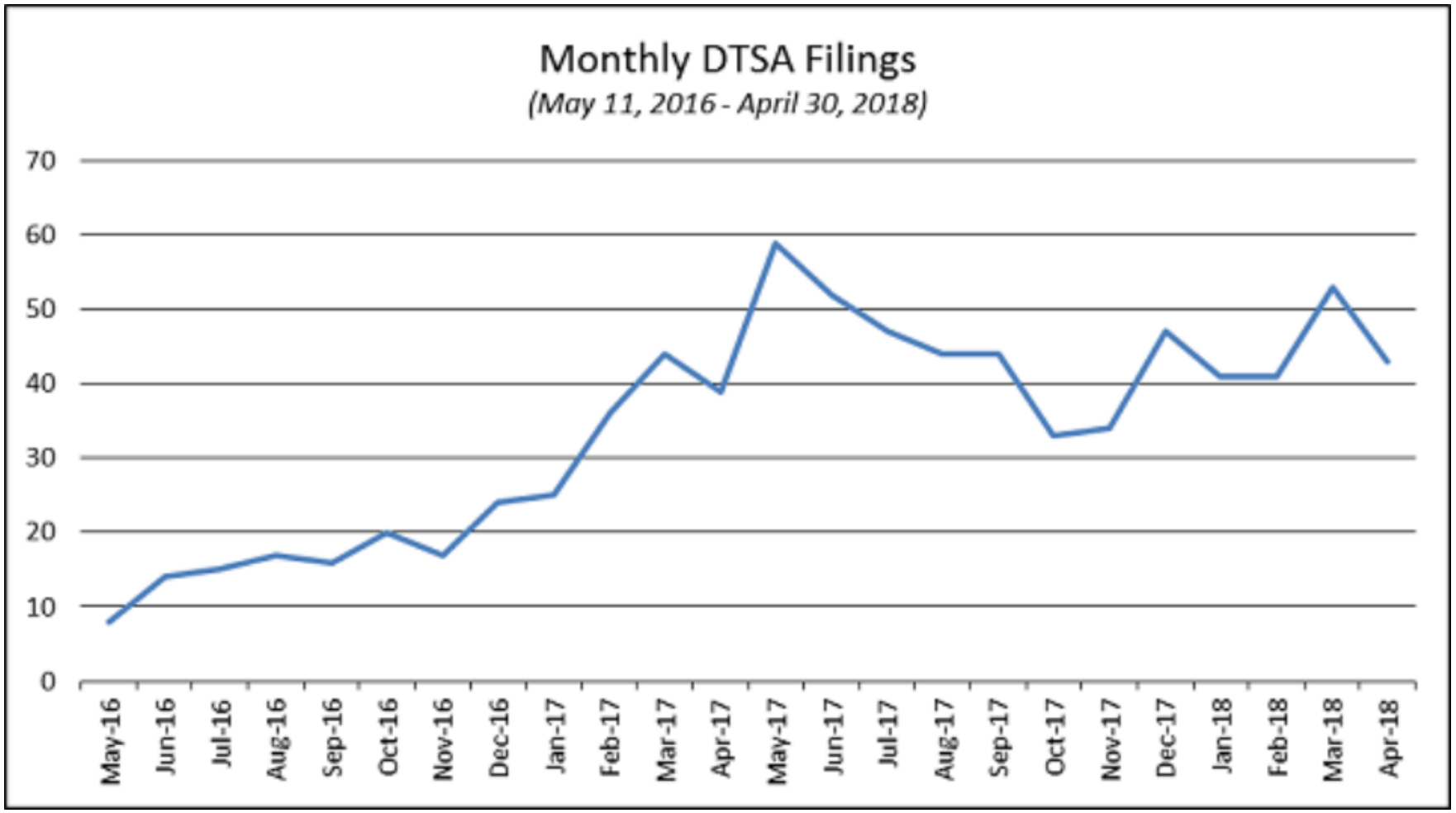
Source: ***Levine & Seaman, 53 WAKE FOREST L. REV. 106 (2018)***

Features of DTSA Litigation

- **Although much of the support for DTSA enactment included concern about foreign misappropriation, foreign actors have made up quite a small share of DTSA defendants**
- Only 6% of DTSA cases alleged that a foreign citizen or national had committed the trade secret misappropriation
- Among the subset of cases involving foreign actors, China is most represented (about a quarter)
- Other countries that are represented in multiple cases include Canada, Singapore, France, India, and Taiwan

Source: ***Levine & Seaman, 53 WAKE FOREST L. REV. 106 (2018)***

DTSA Filings in the First Two Years of the DTSA



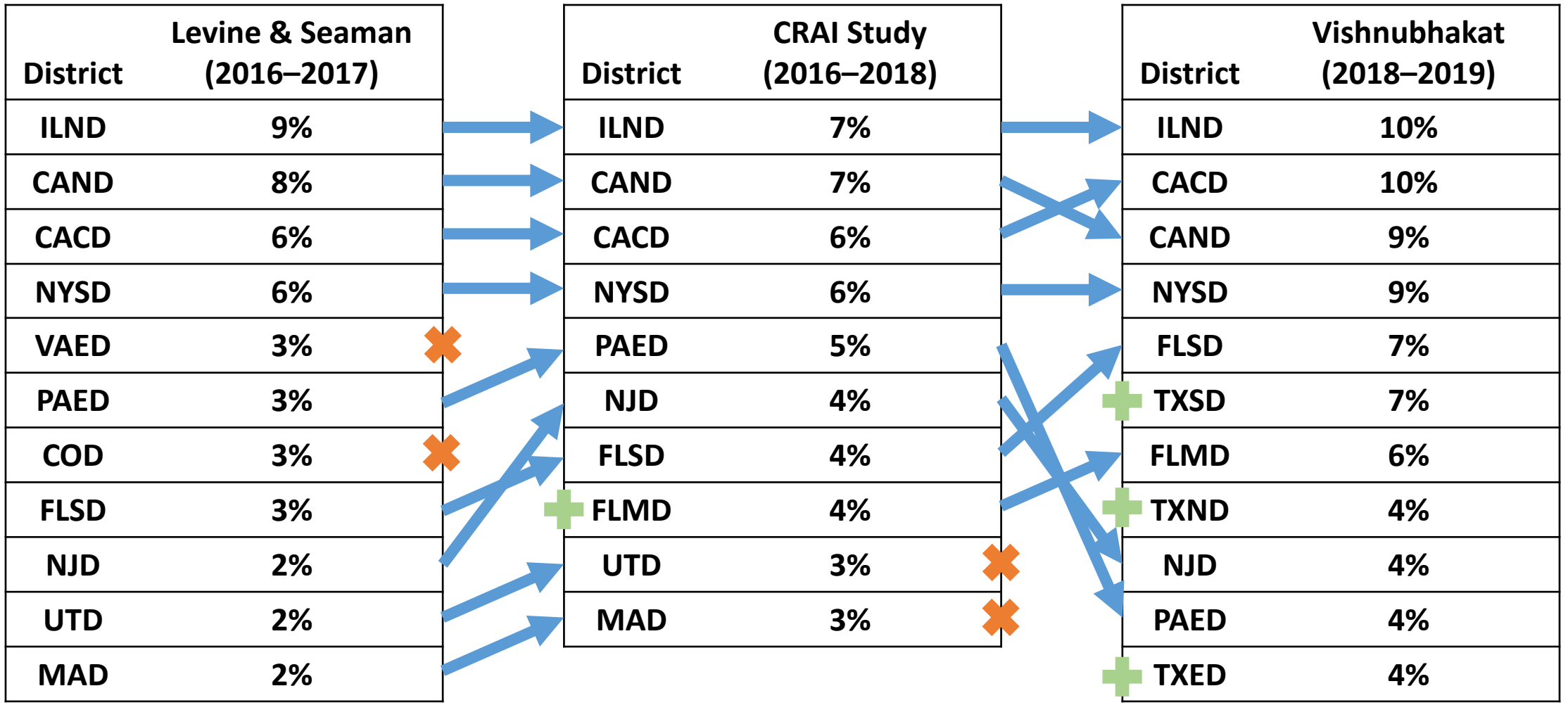
Source: ***Study by Charles River Associates (2018)***

DTSA Filing Distribution Across the U.S.

District	Levine & Seaman (2016–2017)
ILND	9%
CAND	8%
CACD	6%
NYSD	6%
VAED	3%
PAED	3%
COD	3%
FLSD	3%
NJD	2%
UTD	2%
MAD	2%

District	CRAI Study (2016–2018)
ILND	7%
CAND	7%
CACD	6%
NYSD	6%
PAED	5%
NJD	4%
FLSD	4%
FLMD	4%
UTD	3%
MAD	3%

District	Vishnubhakat (2018–2019)
ILND	10%
CACD	10%
CAND	9%
NYSD	9%
FLSD	7%
TXSD	7%
FLMD	6%
TXND	4%
NJD	4%
PAED	4%
TXED	4%



DTSA Filing Distribution Across the U.S.

- Northern District of Illinois has consistently been the leading district
- Additional leading district include the Northern and Central Districts of California and the Southern District of New York
- Some districts that saw notable filing volume early on have dropped out of the top 10 (Eastern District of Virginia, District of Colorado)
- Districts in Texas (Southern, Northern, and Eastern) have begun taking a leading role, but only more recently

From the District Courts

Civil Notice Pleading

The text of the DTSA does not impose heightened requirements for pleading with particularity (by contrast, some states like California do require this)

- Describing the trade secrets that were allegedly misappropriated in general terms is specific enough to state a claim under the DTSA
- Northern District of Illinois case law has been influential in this regard
  - It is not enough to point to broad areas of technology and assert that something there must have been secret and misappropriated
  - However, trade secrets need not be disclosed in detail in a complaint—that could result in public disclosure of the very thing being protected

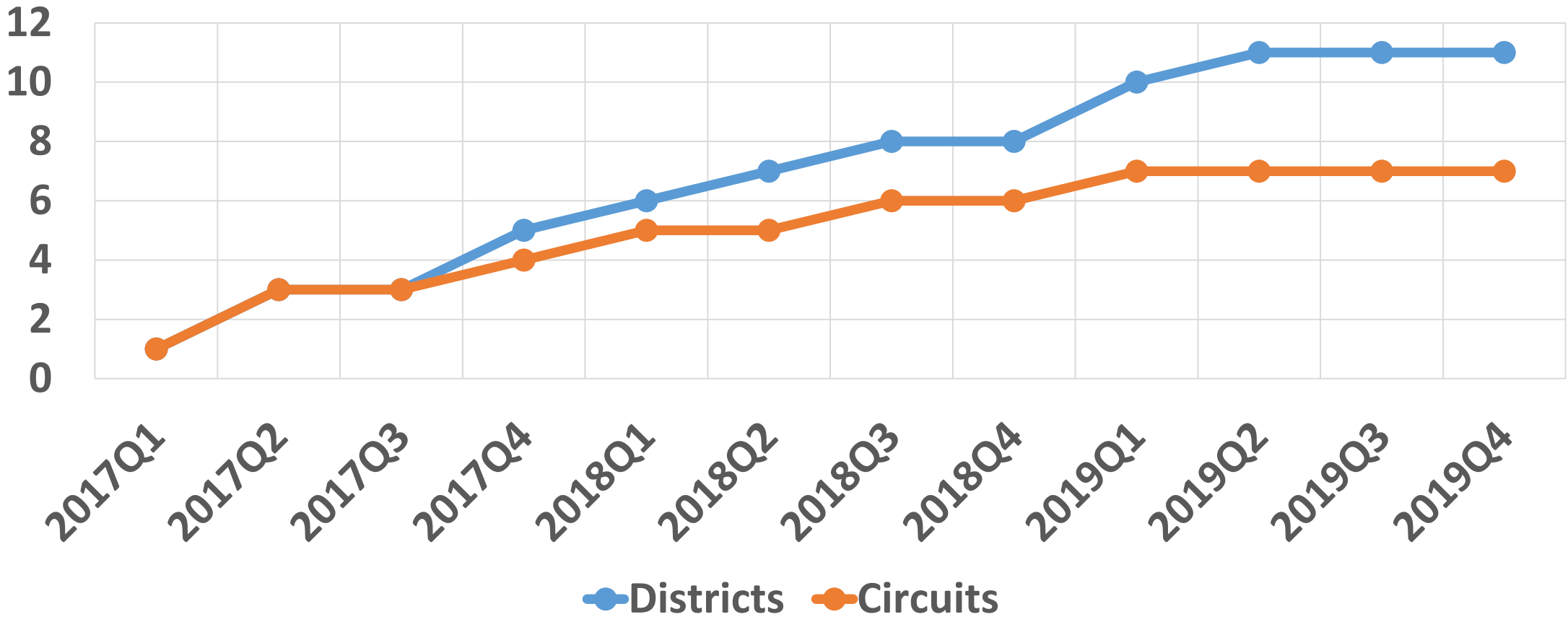
Mission Measurement v. Blackbaud Case No. 1:16-cv-06003

- Mission Measurement developed a proprietary database of info on outcomes and impacts in philanthropy and social change programs
- MicroEdge tried to engage Mission, and the companies tried to develop a joint project under confidentiality and NDAs
- Blackbaud acquired MicroEdge and allegedly tried to use the results of the joint efforts as its own product
- Mission sued for misappropriation, and Blackbaud argued that Mission “failed to specifically identify the exact trade secrets at issue”

Mission Measurement v. Blackbaud

- Mission specified the following information about its trade secrets:
  (1) a specialized Outcomes Taxonomy
  (2) a method for collecting standardized data
  (3) a method for calculating grantee impact
  (4) software design specifications
  (5) impact reports and analytics
  (6) business models for selling access to metrics databases
  (7) drawings, sketches, designs, screen mock-ups, measurement concepts/calculations, business plans, product development plans
- **The district court held in Oct. 2016 that this was particular enough**

Citation of Mission Measurement by Other Federal Districts and Circuits Over Time



From the Courts of Appeal

Injunctive Relief

Can irreparable harm be presumed in DTSA cases?

- Courts can presume irreparable harm only if a party seeks an injunction under a statute that ***requires*** injunctive relief as a remedy
- When a statute merely ***authorizes*** injunctive relief, courts retain their discretion and cannot presume irreparable harm—that would be contrary to traditional principles of equity
- DTC Energy Group v. Hirschfeld, 912 F.3d 1263 (10th Cir. 2018)
- First Western Capital v. Malamed, 874 F.3d 1136 (10th Cir. 2017)

DTC Energy and First Western

The DTSA authorizes—but does not require—injunctive relief

- DTSA states that "a court ***may*** ... grant an injunction ... to prevent any actual or threatened misappropriation" 18 U.S.C. § 1836(b)(3)(A)
- This is permissive, discretionary language

DTC Energy and First Western

The DTSA also provides other means for enforcement

- The court may award "damages for actual loss caused by the misappropriation of the trade secret" 18 U.S.C. § 1836(b)(3)(B)
- The court may award "damages for unjust enrichment caused by the misappropriation of the trade secret that is not addressed in computing damages for actual loss" 18 U.S.C. § 1836(b)(3)(C)
- The availability of these remedies at law further undermines the notion that harm from misappropriation is presumptively irreparable

Fee Shifting

Can fee shifting be obtained after a dismissal without prejudice?

- Generally, no: dismissal without prejudice does not make the defendant a “prevailing party”
- Dunster Live v. LoneStar Logos, 908 F.3d 948 (5th Cir. 2018)

Dunster Live

- Dunster and LoneStar used to be members of the same LLC, and had a state government contract
- After the contract expired, LoneStar formed a new company without Dunster
- Dunster sued, alleging that LoneStar stole proprietary software and a database
- Dunster sought a preliminary injunction, which was denied, and then obtained court permission to dismiss the case without prejudice
- LoneStar sought attorney fees as “prevailing party” after dismissal

Dunster Live

- Most federal fee statutes provide for attorney fees only to a "prevailing party"—a dismissal w/o prejudice means no one prevailed
- LoneStar argued that this would allow plaintiffs to seek opportunistic dismissals once they realize a suit is doomed, and evade paying fees
- 18 U.S.C. § 1836(b)(3)(D) provides that

  > if a claim of the misappropriation is made in bad faith . . . a motion to terminate an injunction is made or opposed in bad faith, or the trade secret was willfully and maliciously misappropriated, [a court may] award reasonable attorney's fees to the prevailing party

Dunster Live

- Some state jurisdictions understand “prevailing party” more broadly in the context of UTSA claims
- However, as the Fifth Circuit explained, the “prevailing party” language of the DTSA should be understood more narrowly
- Congress enacted the DTSA against the backdrop of other existing statutes that use the term “prevailing party”
  - The relevant backdrop is not other ***trade secrecy***-related statutes that use the term (whether state or federal)
  - Instead, it is other ***federal*** statutes that use the term (whether trade secrecy-related or not)—and those other federal statutes use the term narrowly

Conclusion

- There are other emerging issues that are now percolating through the courts but are not addressed here, such as how the DTSA's statute of limitations can be tolled under the discovery rule
- The procedural and remedial issues discussed here are especially likely to pose important strategic concerns for litigants
- In particular, the body of empirical research on the DTSA and trade secrets in general (of which only a small sample is cited here) will continue to grow

Questions welcome

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