



Criminal Sanctions in a Trade Secret Dispute

Insights

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Just a few days after the Major League Baseball season opens next month, former St. Louis Cardinals scouting director Chris Correa will attend a sentencing hearing where he faces up to five years in prison, a \$250,000 fine, and payment of restitution to the Houston Astros. Correa pleaded guilty earlier this year to criminal charges brought against him under the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030. Trade secret lawyers, baseball fans, and "Moneyball" enthusiasts are familiar with the allegations. Correa used the password of a former Cardinals employee now working for the Astros to access the Astros' scouting database and obtain confidential player evaluation data.

This case reminds us that civil courts are not the exclusive forum to prosecute a trade secrets theft. In addition to the CFAA, which criminalizes the unauthorized access of a protected computer, the Economic Espionage Act, 18 U.S.C. § 1831 et seq., criminalizes the misappropriation of trade secrets. In addition to these federal statutes, many states also have criminal laws against trade secret theft and computer hacking. For companies that have been victimized by trade secret theft, what are the pros and cons of pursuing criminal charges in lieu of, or in addition to, a civil lawsuit?

- *Emergency injunctive relief:* In a civil case, a successful plaintiff can obtain emergency injunctive relief at the outset of the lawsuit that prohibits the defendant from using, disclosing, or retaining the trade secrets at issue. While a defendant may be deterred from using or disclosing the trade secrets after law enforcement comes knocking at his door, the defendant will not technically be subject to any court order restricting his use of the trade secret information.
- *Fifth Amendment assertions:* When a civil case proceeds concurrently with a criminal investigation, expect Fifth Amendment assertions from the defense that will impede discovery in the civil case. This may be particularly frustrating for a company in "damage control mode" that needs to find out to whom the trade secrets were revealed, and where the trade secrets have been stored or sent.
- *"Discovery" through warrants:* As a civil trade secrets lawyer, I can't surprise the defendant at his house, flash a warrant, and take his computers, external hard drives, or other data storage devices with me. Typically, I have to battle with the defendant's lawyer, negotiate forensic protocols, and perhaps convince a judge that I should be allowed greater access to the devices than my opponent is willing to offer. As I work through the civil discovery processes, time passes and there is a risk that key documents or data will be destroyed or altered. Law enforcement, on

the other hand, can swiftly obtain computers and data storage devices through warrants that minimize the opportunity for evidence to be destroyed.

- *Cost savings versus control:* A company that relies on law enforcement, rather than its own attorneys, to build the case against a defendant can save money on attorneys' fees. But when a company looks to law enforcement for help in a trade secrets dispute, it also relinquishes control over timing, case strategy, and outcome. More critically, if law enforcement isn't making the case a priority and there is no parallel civil case, the company risks substantial delays in obtaining effective relief. Having the direct line of an FBI agent who is dedicated to trade secrets cases, instead of taking a shot in the dark by calling a general intake line, can make a big difference in the utility of filing a criminal complaint.

There is no one-size-fits-all approach to litigating trade secrets claims. Of the trade secrets cases I have handled, only a small fraction have involved a criminal charge. Although most trade secrets lawsuits will be litigated exclusively in civil courts, our strategic assessments in every trade secrets case should consider the option of filing a criminal charge in lieu of, or in addition to, a civil lawsuit. Depending on the facts of a situation, sometimes it makes sense to involve law enforcement in addition to pursuing civil remedies.