Enhancing Economic Espionage And Trade Secret Sentences

Law360, New York (January 05, 2012, 5:14 PM ET) -- The United States Senate will soon consider the enhancement of sentences in economic espionage and trade secret cases. While leaving the merits of the proposed amendments to policymakers, this article seeks to provide a fuller understanding of the sentencing process in both types of cases, including a discussion of the unique challenges presented and a review of some of the sentences imposed.

Overview: Economic Espionage Act

The Economic Espionage Act (EEA) of 1996 was enacted to promote and protect national economic security. Two separate provisions apply to the misappropriation of trade secrets.

Section 1832 covers the misappropriation of a trade secret with the intent to injure the trade secret owner — industrial or commercial espionage.

Section 1831 applies to the misappropriation of a trade secret with the intent to benefit a foreign government or foreign instrumentality — foreign economic espionage.

In signing the legislation into law, President William Clinton noted the statute’s necessity to protect trade secrets, which “are an integral part of virtually every sector of our economy and are essential to maintaining the health and competitiveness of critical industries operating in the United States.”

The EEA has not been amended since it was enacted.

Background of Current Amendment


Kohl noted the importance of protecting our country’s trade secrets: “The economic strength, competitiveness and security of our country rely upon the ability of industry to compete without unfair interference from foreign governments and from their own domestic competitors. Without freedom from economic sabotage, our companies lose their hard-earned advantages and their competitive edge.”

The measure increases the maximum penalty for Section 1831 from a maximum of 15 years to 20 years per count. The legislation also directs the U.S. Sentencing Commission to consider and identify other factors that may be appropriate for theft of trade secrets and economic espionage cases.
On Dec. 8, 2011, the legislation was amended and reported out of the Senate Judiciary Committee by voice vote and is pending consideration by the full Senate.

**Present Sentencing Law**

Since a 2005 U.S. Supreme Court ruling providing district courts with more sentencing discretion, there are now two parts to the sentencing process.

The first part involves a district court’s application of the U.S. Sentencing Guidelines to determine an initial sentence. “As a matter of administration and to secure nationwide consistency,” the Supreme Court has held, “the [Sentencing] Guidelines should be the starting point and the initial benchmark.”

After the initial sentence is determined under the advisory sentencing guidelines, the second part involves consideration of a host of enumerated sentencing factors. During this phase, the sentencing court may exercise its discretion in whether to depart from the initial guidelines sentence.

The factors include the nature and circumstances of the offense, history and characteristics of the defendant, the need to reflect the seriousness of the offense, deterrence, the need to protect the public, the need to avoid unwarranted disparity in sentences, and the need for restitution.

As a practical matter, the advisory guidelines sentence in trade secret and economic espionage cases is substantially driven by the loss or value of the trade secret. Initially, a base offense level of six applies. Apart from loss, other enhancements may also apply.

For example, a two-level increase applies where “the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality or foreign agent.” Another two-level increase applies for an abuse of position or trust or use of a special skill.

In determining loss, under the guidelines, “[t]he court need only make a reasonable estimate of the loss.” The loss table includes ranges, such as $400,000 to $1 million and $1 million to $2.5 million, so precision is not required.

Loss is also defined as “the greater of actual loss or intended loss.” As a practical matter, it is rare that a fair market value may be identified. The guidelines provide a nonexhaustive list of factors that can be used to estimate the loss amount.

Although there was previously no guidance for valuing trade secrets, a 2009 amendment specifically provided that the value of “proprietary information (e.g., trade secrets)” may be based on “the cost of developing that information or the reduction in the value of that information that resulted from the offense.” Development costs are typically used as the primary measure.

**Sentencing Case Examples**

What are some of the sentences imposed in trade secret and economic espionage cases? What are some of the factors influencing the final sentence? The following are some examples, ranked from the higher to lower sentences:
- United States v. Chung (C.D. Cal. No. SACR 08-00024) (sentenced Feb. 8, 2010) (188 months following bench trial conviction on six counts of foreign economic espionage, one count of conspiring to commit economic espionage, one count of acting as an unregistered foreign agent, and one count of making a false statement to federal agents for misappropriating restricted technology and trade secrets related to the space shuttle program and Delta IV rocket from his employer) (estimated trade secret value exceeded $20 million); see also United States v. Chung, 659 F.3d 815 (9th Cir. 2011) (affirming conviction and sentence).

- United States v. Aleynikov (S.D.N.Y. No. 10 CR 96) (Mar. 18, 2011) (97 months following a jury trial conviction for one count of theft of trade secrets and one count of transportation of stolen property for misappropriating proprietary computer code concerning a high-frequency trading platform from his former employer, Goldman Sachs) (estimated trade secret value between $7 million to $20 million).

- United States v. Williams (N.D. Ga. No. 1:06-CR-313-03) (May 23, 2007) (96 months following a jury trial conviction for conspiring to misappropriate trade secrets from her employer, Coca Cola) (intended loss of $1.5 million was determined to “under represent the seriousness of the offense”); United States v. Williams, 526 F.3d 1312, 1321 n.2 (11th Cir. 2008) (affirming conviction and sentence). Companion cases: United States v. Dimson (sentenced June 5, 2007, to 60 months following plea to conspiracy); United States v. Duhaney (sentenced June 7, 2007, to 24 months following plea to conspiracy and included a downward departure for substantial assistance under U.S.S.G. § 5K1.1).

- United States v. Ameri (E.D. Ark. No. 02 CR 00182) (Sept. 10, 2004) (96 months following a jury trial conviction for stealing software from his employer, which was used to produce false identification documents and engage in fraud) (trade secret loss determined to be $1.4 million); see also United States v. Ameri, 412 F.3d 893, 899-901 (8th Cir. 2005) (affirming conviction and sentence).

- United States v. Huang (S.D. Ind. No. 10-cr-00102, D. Minn. 11-cr-00163) (Dec. 21, 2011) (87 months following his plea conviction to foreign economic espionage in Indiana and trade secret theft in Minnesota in consolidated cases; misappropriating trade secrets from Dow AgroSciences and Cargill) (the Dow trade secrets were misappropriated with the intent to benefit the People’s Republic of China and its foreign instrumentalities) (stipulated trade secret value between $7 million and $20 million).

- United States v. Hallstead (E.D. Tex. No. 98-41070) (Dec. 15, 1998) (77 months after guilty plea to conspiring to commit a theft of trade secrets of Intel Corp.) (estimated trade secret value
between $40 million and $80 million); see also United States v. Hallstead, 189 F.3d 468 (5th Cir. 1999) (per curiam) (affirming conviction and sentence), cert. denied, 529 U.S. 1079 (2000).

- United States v. Yu (E.D. Mich. No. 09-20304) (Apr. 12, 2011) (70 months after pleading guilty to misappropriating trade secrets, including Ford design documents, which he took to China after accepting a new position in China) (stipulated trade secret value between $50 million to $100 million).

- United States v. Sanders (W.D.N.Y. No. 06 CR 6005) (Apr. 18, 2006) (48 months after pleading guilty to conspiring to possess trade secrets concerning Corning Inc.’s Thin Film Transistor Liquid Crystal Display glass production process) (stipulated trade secret value was more than $100 million). The sentence included a downward departure for substantial assistance under U.S.S.G. § 5K1.1. Companion case, United States v. Lin (W.D.N.Y. No. 07 CR 6083) (Feb. 11, 2011, sentenced to 30 months) (trade secrets valued in excess of $50 million; a sentence below the guidelines was apparently based in part on the defendant’s age and poor health).

- United States v. Crow (M.D. Ga. No. 10−CR−00013) (Dec. 16, 2010) (36 months after pleading guilty to theft of trade secrets, including computer discs, blueprints, and cost and pricing information from his former employer) (stipulated trade secret value was $14 million).

- United States v. Agrawal (S.D.N.Y. No. 10 CR 417) (Mar. 8, 2011) (36 months following a jury trial conviction for theft of trade secrets and interstate transportation of stolen property; misappropriated proprietary computer code used in high frequency trading business of Societe Generale, his employer) (estimated trade secret value of $10 million based on development costs).

- United States v. Lange (E.D. Wis. No. 99-cr-00174) (Mar. 2, 2000) (30 months following bench trial conviction for attempting to sell trade secrets and fraud counts; stole computer data from his former employer, Replacement Aircraft Parts Company Inc., and attempted to sell it to the company’s competitors for $100,000); see also United States v. Lange, 312 F.3d 263 (7th Cir. 2002) (conviction and sentence affirmed).

- United States v. Meng (N.D. Cal. No. CR 04-20216) (June 18, 2008) (24 months after pleading guilty to committing foreign economic espionage and violating the Arms Export Control Act; misappropriated a trade secret from his employer with the intent to benefit the People’s Republic of China Navy Research Center; the trade secret and defense article involved visual simulation software for commercial and military customers) (stipulated trade secret value
between $400,000 and $1 million). The sentence included a downward departure for substantial assistance under U.S.S.G. § 5K1.1.

- United States v. He (E.D. Pa. No. 09-424) (Nov. 3, 2009) (24 months after pleading guilty to theft of trade secrets, including proprietary computer source code for medical software programs from his employer) (estimated trade secret value between $2.5 million and $7 million).

- United States v. Genovese (S.D.N.Y. No. 05 CR 0004) (Jan. 27, 2006) (24 months after pleading guilty to theft of trade secrets involving the unlawful sale and attempted sale of source code for the computer programs Microsoft Windows NT 4.0 and Windows 2000).

- United States v. Kissane (S.D.N.Y. No. 02 CR 626) (Oct. 16, 2002) (24 months after pleading to theft of trade secrets involving defendant’s post-termination attempt to sell his former employer’s source code for custom software program used to monitor large computer networks).

- United States v. Mitchell (E.D. Va. No. 09-cr-00425-JRS) (Mar. 18, 2010) (18 months after pleading guilty to theft of trade secrets and obstruction of justice; the defendant emailed the contents of a proprietary spreadsheet containing Dupont trade secrets involving Kevlar to a Korean company) (sentence a product of the uncertainty in determining the value of the trade secrets; the court used an alternative “proxy” for the loss based on the more than $200,000 in legal fees incurred by the victim company).

- United States v. Min (D. Del. No. 06 CR 121) (Nov. 6, 2007) (18 months after pleading guilty to theft of trade secrets from DuPont (stipulated loss of $180,513.67). The defendant proffered with the government nine times and the court gave a sentence six months below the guidelines.

- United States v. Lee (N.D. Ill. No. 09 CR 290) (Dec. 8, 2010) (15 months after pleading guilty to theft of trade secrets involving numerous secret formulas for paints and coatings and other proprietary information from his employer Valspar Corp., a paint manufacturing company) (stipulated trade secret value between $7 million and $20 million). The court gave a sentence substantially below the sentencing guidelines, apparently based in part on the fact that the defendant had prostate cancer and was stopped before traveling to the competitor in Shanghai, China.

Summary
Other cases resulted in comparable or lower sentences. This review shows that five primary factors typically influence the sentence in economic espionage and trade secret cases.

First, higher sentences usually resulted after a trial. Not only did the defendant avoid a reduction for acceptance of responsibility by pleading before trial, the courts presumably had a fuller understanding of the conduct based on the trial evidence. Examples include Chung, Williams and Aleynikov. One notable exception is Agrawal.

Second, loss or valuation has been the primary factor influencing the sentence, particularly during the first phase of the sentencing process in determining the advisory guidelines. The loss generally sets the benchmark from which the final sentencing decision is made.

Third, some cases resulted in lower sentences based on substantial assistance provided to the government. Examples include Duhaney, Sanders and Meng.

Fourth, some courts exercised their discretion to impose a lower sentence under the section 3553 discretionary factors. This occurred in Lee, Agrawal, Lin and Min. However, the sentencing courts exercised their discretion to impose higher sentences in Chung and Williams.

Fifth, in some cases, because additional offenses were charged, other factors and guidelines impacted the final sentence. For example, in Meng, a higher sentence resulted under the guidelines for the Arms Export Control Act conviction than for the EEA conviction.

A fuller understanding of sentencing under the EEA may guide the congressional consideration on whether and how much to increase the maximum sentence for economic espionage and whether other specific factors should be considered at sentencing in these important cases.

--By Mark L. Krotoski and Richard S. Scott, U.S. Department of Justice

Richard Scott is in the counterespionage section of the U.S. Department of Justice. Mark Krotoski is in the DOJ’s national criminal enforcement section. Both authors have been active on federal trade secret and economic espionage cases, including prosecuting government cases and assisting other federal prosecutors around the country.

Mark Krotoski was one of three prosecutors in the United States v. Huang economic espionage case and the sole prosecutor in United States v. Meng, also an economic espionage case.

The opinions expressed are those of the authors and do not necessarily reflect the views of the U.S. Department of Justice or Portfolio Media, publisher of Law360. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2014, Portfolio Media, Inc.