

Year In Review: Significant Developments Under EEA

Law360, New York (January 24, 2012, 1:24 PM ET) -- The past year has been the most active and productive one since the enactment of the Economic Espionage Act (EEA) more than 15 years ago.[1]

In 2011, several significant convictions were obtained, and some of the highest sentences to date were imposed. Since the inception of the EEA, there have been eight foreign economic espionage (Section 1831) prosecutions. Two convictions were obtained in 2011, in Huang and Doxer. A bench trial in a third foreign economic espionage case (Jin) concluded in November, and a ruling is anticipated shortly. A conviction in a fourth foreign economic espionage case (Chung) was affirmed on appeal in the first federal appellate court ruling involving Section 1831.

Several significant trade secret (Section 1832) cases were also prosecuted and sentenced. The Senate Judiciary Committee also reported out a measure to the full Senate that would enhance sentences under the EEA.

Background: Prior Section 1831 Prosecutions

The EEA was enacted in 1996 to promote and protect national economic security.[2] The statute established two distinct crimes involving the misappropriation of a trade secret, under Section 1831 (foreign economic espionage) and Section 1832 (traditional trade secret misappropriation).

The first EEA crime, known as foreign economic espionage (under Section 1831), involves the misappropriation of a trade secret with the intent to benefit a foreign government or foreign instrumentality or foreign agent. Under U.S. Department of Justice policy, Section 1831 cases may not be charged without prior approval by the assistant attorney general for the National Security Division.[3] Since 1996, there have been eight foreign economic espionage (Section 1831) cases authorized for prosecution under the EEA.

Significant Convictions for Foreign Economic Espionage (Section 1831)

On Sept. 26, 2011, the Ninth Circuit issued the first appellate court decision in the country addressing foreign economic espionage (Section 1831) issues on the merits in *United States v. Chung*, 659 F.3d 815 (9th Cir. 2011). The case involved appellate review of the first foreign economic espionage trial and affirmed the convictions of a former Boeing Co. engineer and contractor, which included 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.

The defendant had misappropriated restricted technology and trade secrets related to the space shuttle

program and Delta IV rocket. In its opinion, the Ninth Circuit affirmed the highest foreign economic espionage sentence to date, 188 months in prison. The opinion also considered the “intent to benefit a foreign government” element and reviewed the reasonable measures standard and the definition of a trade secret, among other issues.[4]

On Oct. 18, 2011, defendant Kexue Huang, a Chinese national and research scientist, pled guilty to one count of foreign economic espionage to benefit foreign instrumentalities of the Chinese government involving trade secrets of Dow AgroSciences LLC, a leading international agricultural company based in Indianapolis that provides agrochemical and biotechnology products, and a separate count for the theft of trade secrets from Cargill Inc. in Minneapolis. The charges were originally filed in the Southern District of Indiana and the District of Minnesota. See *United States v. Kexue Huang* (S.D. Ind. No. 10-cr-0102, D. Minn. 11-cr-00163).[5]

According to public information, defendant Huang had sent the Dow trade secrets to China and Germany and the Cargill trade secrets to China. He was directing active research on the trade secrets. On Dec. 21, the defendant was sentenced to an 87-month prison term.

A second foreign economic espionage plea conviction was obtained last year in *United States v. Elliot Doyer* (D. Mass. No. 11-CR-10268). The defendant was prosecuted for providing trade secrets of Akamai Technologies Inc. to an undercover federal agent who posed as an Israeli intelligence officer. The defendant initially sent an email to the Israeli consulate in Boston offering to provide information that might help Israel. He later confirmed his objective “was to help our homeland and our war against our enemies.” He also requested payment.

Prosecutors urged a sentence of 36 months in prison, a term within the sentencing guideline range. However, on Dec. 19, 2011, the district court imposed a lenient sentence of six months in prison, followed by six months in home confinement and electronic monitoring, and a fine of \$25,000.[6]

In November 2011, prosecutors presented evidence in the bench trial in *United States v. Hanjuan Jin* (N.D. Ill. No. 08 CR 192). The case involves a Motorola Inc. senior software engineer who allegedly stole trade secrets and attempted to take them with her on a one-way trip to China after accepting employment in that country. U.S. customs officials seized the documents as the defendant tried to depart Chicago’s O’Hare International Airport for China.

The defendant is charged with three counts of possessing trade secrets that were obtained without authorization, for the benefit of the foreign government of the People’s Republic of China (under Section 1831) and three counts of unlawfully possessing trade secrets that were obtained without authorization, for the benefit of someone other than the owner of the trade secrets (under Section 1832). The trial concluded in November, and the court’s verdict is expected soon.

Significant Trade Secret Prosecutions and Sentences (Section 1832)

The second EEA crime is traditional trade secret misappropriation (under Section 1832). Federal criminal trade secret misappropriation includes proof of the “intent to convert a trade secret ... to the economic benefit of anyone other than the owner” and “intending or knowing that the offense will, injure any owner of that trade secret.” Section 1832 normally applies to the theft of a trade secret by an employee or competitor.

During the past year, some significant convictions and sentences were obtained by federal prosecutors.

On March 18, 2011, a 97-month sentence was imposed following the jury trial conviction of a defendant who misappropriated the proprietary computer code concerning a high-frequency trading platform from his former employer, Goldman Sachs Group Inc. See *United States v. Sergey Aleynikov* (S.D.N.Y. No. 10 CR 96). This is the highest Section 1832 sentence to date. The only higher sentence under the EEA was the 188-month foreign economic espionage sentence in Chung, noted above.

On April 12, 2011, another significant trade secret sentence of 70 months was imposed in *United States v. Xiang Dong Yu* (E.D. Mich. No. 09-20304) (Apr. 12, 2011). The defendant pled guilty to misappropriating trade secrets, including Ford Motor Co. design documents, which he took to China after accepting a new position in China with a direct competitor of Ford. When the defendant was arrested, he was found to possess numerous Ford system design specifications documents on his laptop of his Chinese employer.

On Feb. 7, 2011, a jury convicted a former Dow Chemical Company research scientist of conspiring to steal trade secrets and perjury. The trade secrets involved Dow's elastomeric polymer, chlorinated polyethylene, a substance used in automotive and industrial hoses, electrical cable jackets and vinyl siding applications. The evidence at trial showed that the defendant traveled to China to market the misappropriated trade secrets. The defendant was recently sentenced to serve 60 months in prison and ordered to forfeit \$600,000. See *United States v. Wen Chyu Liu, aka David W. Liou* (M.D. La. No. 05-CR-00085).

Two other cases also resulted in substantial sentences. On March 8, 2011, in *United States v. Samarth Agrawal* (S.D.N.Y. No. 10 CR 417), a former trader received a 36-month prison term after his jury trial conviction for misappropriating proprietary computer code used in the high frequency trading business of his employer, Societe Generale. The defendant negotiated employment terms with another company and disclosed confidential details about the SocGen trading system.

On Feb. 11, 2011, a defendant who pled guilty to conspiring to steal trade secret information concerning thin film transistor liquid crystal display glass production process belonging to Corning Inc., received a 30-month prison term in *United States v. Lin* (W.D.N.Y. No. 07 CR 6083). The defendant admitted that he acted on behalf of a Taiwanese competitor of Corning.

Pending Congressional Action

Last year, legislation was introduced to allow for higher EEA sentences. On March 30, 2011, Sens. Herb Kohl, D-Wis., Sheldon Whitehouse, D-R.I., and Chris Coons, D-Del., introduced S. 678, the Economic Espionage Penalty Enhancement Act.[7] The legislation increases the maximum penalty for Section 1831 from a maximum of 15 years to 20 years per count.

The measure also directs the U.S. Sentencing Commission to identify other factors that may be appropriate for consideration in theft of trade secrets and economic espionage cases. On Dec. 8, 2011, the legislation was amended and reported out of the Senate Judiciary Committee and is now pending consideration by the full Senate.

Conclusion

These recent cases demonstrate the ability of federal prosecutors to work with investigators on a variety of trade secret matters, including the misappropriation of trade secret and confidential information for transfer to a foreign nation. The convictions obtained and significant sentences imposed in the past year

send a strong message of general and specific deterrence.

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[1] See 18 U.S.C. §§ 1831-1839. The case information in this article is based upon information from the public record.

[2] See, e.g., H. Rep. No. 104-788, at 4 (1996) (noting “the development of proprietary economic information is an integral part of America’s economic well-being” and “threats to the nation’s economic interest are threats to the nation’s vital security interests”).

[3] See USAM § 9-59.100.

[4] See M. Krotoski & R. Scott, Expert Analysis: “US v. Chung -- A Study Of Economic Espionage,” Law360 (Dec. 20, 2011), available at:<http://www.law360.com/articles/294952/us-v-chung-a-study-of-economic-espionage>.

[5] See also “Dow Scientist Gets 7 Years For Trade Secret Theft,” Law360 (Dec. 21, 2011), available at: <http://www.law360.com/articles/284933/dow-scientist-gets-7-years-for-trade-secret-theft>.

[6] See “Ex-Akamai Employee Sentenced For Economic Espionage,” Law360 (Dec. 20, 2011), available at: <http://www.law360.com/articles/295071/ex-akamai-employee-sentenced-for-economic-espionage>.

[7] See M. Krotoski & R. Scott, Expert Analysis: “Enhancing Economic Espionage And Trade Secret Sentences,” Law360 (Jan. 5, 2012), available at:<http://www.law360.com/articles/296238/enhancing-economic-espionage-and-trade-secret-sentences>.