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Supreme Court declines to weigh in on notice required to trigger statute of limitations for trade secret misappropriation claims

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Introduction

The Supreme Court recently denied a petition for certiorari in *Zirvi v Flatley* (Case 20-1612) by Monib Zirvi and others. The petitioners sought the Supreme Court's intervention regarding the notice required to trigger the statute of limitations for trade secret misappropriation claims. The case arose out of a 2018 lawsuit in which four self-described inventors of DNA arrays brought a suit against Illumina, a multibillion, global player in genetic analysis. The suit alleged that Illumina and its associates conspired to steal the petitioners' trade secrets and covertly conceal the information in patent applications. According to the petitioners, the DNA arrays at issue are now used to help detect:

- cancer;
- inherited genetic defects; and
- viral infections such as covid-19.

Facts

The petitioners alleged that in 2015 they discovered that Illumina and the other respondents had been engaged in a 25-year conspiracy to steal their inventions, including by fraudulently concealing the misappropriated IP in multiple patent applications, from as early as the late 1990s. While the petitioners alleged that they did not have the requisite notice to trigger the statute of limitations until 2015, the District Court for the Southern District of New York found that that information and inventor names in the publicly available patent applications from the late 1990s and early 2000s should have put them on notice. The Court further held that patent interference proceedings in 2006 and a patent infringement action in 2010 involving the same patents at issue and some of the named respondents gave the petitioners "inquiry, if not actual, notice" of the misappropriation. The Court dismissed the petitioners claims as time barred under any conceivably applicable statute of limitations; this decision was affirmed by the Second Circuit.

The petitioners contend that the Second Circuit should have applied the Federal Circuit's notice standard as set out in *Coda v Goodyear*, where the Court reversed the dismissal of a trade secret misappropriation claim as time barred because the requisite notice was not triggered by publication of a patent application containing the trade secrets at issue. In *Coda,* the Federal Circuit rejected the defendants' theories based on "the purported ease of discovering new patents and patent applications". The Court would not "infer that Plaintiffs were looking for SIT patents (or should have been doing so) at a certain time and that they would have found the 586 patent application at the time it was published".[(1)]

Comment

Unlike in *Coda*, the issue here was that the petitioners may have had more reason to be on notice of Illumina's alleged misappropriation, particularly because of the 2006 patent interference proceedings and the 2010 patent infringement litigation that involved the same patents at issue and some of the named defendants. These facts were central in determining whether this case presented a true circuit split that should have been resolved by the Supreme Court. However, the Supreme Court clearly did not believe this to be the case.

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Endnotes

(1) 916 F3d 1350, 1361 n8 (Fed Cir 2019).