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Arbitrator Awards Company $155M for Competitor's Use of Its Confidential Information

Minding Your Business on **March 13, 2024**

An American Arbitration Association arbitrator recently awarded Black Knight, Inc. (BK) $155M stemming from Pennymac Loan Services, LLC's (Pennymac) alleged use of its mortgage-loan servicing platform to develop its own competing product. Though the arbitrator did not find Pennymac liable for trade secret misappropriation, they found that the use of BK's product accelerated the development of Pennymac's product and caused BK to lose licensing profits.

In 2008, Pennymac contracted with Fidelity Information Services, Inc. to use a mortgage-loan servicing platform (MSP) that enables mortgage-loan servicers like Pennymac to track and store loan data and transactions in their portfolios and to manage servicing activities. The parties' agreement included a section on ownership, confidentiality, and non-disclosure that identified confidential information, required Pennymac's subservices to have limited access to the confidential information, and identified the exceptions to confidentiality. The agreement prevented Pennymac from modifying the confidential information or creating any derivative works, but it listed as an exception to confidentiality any information developed independently.

Over the span of the agreement, Pennymac allegedly began developing software of its own called Servicing Systems Environment (SSE). Additionally, Fidelity's spin-off company, BK, became a successor-in-interest in the agreement with Pennymac in 2017. In October 2019, Pennymac informed BK that it did not intend to renew its license. According to Pennymac, MSP could not keep up with Pennymac's needs as it grew as a company. Though it wanted to continue licensing other applications apart from the proprietary platform, BK was unwilling to split up the licenses.

A few days later, BK filed suit in Florida state court seeking $340M for breach of contract and misappropriation of its confidential MSP. The Florida judge ordered the lawsuit proceed via arbitration and stayed the litigation.

On November 28, 2023, after more than three years of arbitration, the arbitrator rejected BK's claims of trade secret misappropriation, but partially granted its breach of contract claim. The arbitrator affirmed Pennymac's ownership over its SSE mortgage servicing platform and allowed it to continue using SSE. Though the arbitrator did not find Pennymac's use of MSP to amount to trade secret misappropriation, they concluded that Pennymac's access to MSP accelerated its development of SSE. Thus, it awarded $155M (plus interest and attorney's fees) to BK as lost profits in the form of licensing fees it would have otherwise received from Pennymac over a longer development period.

This case is instructive given that BK recovered lost profits—even in the absence of showing trade secret misappropriation—but Pennymac still was able to develop a competing product that it is free to use going forward.

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