

October 27, 2020

# Trade Secret Damages



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# Agenda

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- **Damages – Why Should You Care?**
- **The Basics**
  - DTSA v UTSA v NY
  - The Fig Spread Case
- **Has the DTSA Achieved Uniformity?**
  - Extraterritoriality
  - Inevitable disclosure
  - Right of Action by Non-Owners
- **Right to “Trial by Jury” in Unjust Enrichment Cases**
- **Damages for Anticipated Future Use of Trade Secrets**
- **“Head Start” Damages**
- **Allocation of Damages Across Multiple Trade Secrets**
- **“Bet the Company” Stakes in Unjust Enrichment Cases**
- **Procedural Traps**

# Damages – Why Should You Care?

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## 2020's Biggest Trade Secrets Damages Award to Date:

*Motorola Solutions Inc. v. Hytera Communications Corp.*,  
U.S. District Court, Northern District of Illinois (Chicago)

- Suit against Chinese manufacturer under DTSA/Illinois UTSA
- Jury returned damages verdict of \$764 million (\$345 million in compensatory damages, and almost \$419 million in punitive damages) based on trade secret misappropriation
- Court held that DTSA allows recovery of extraterritorial damages in theft of trade secrets cases and entered judgment on the jury verdict

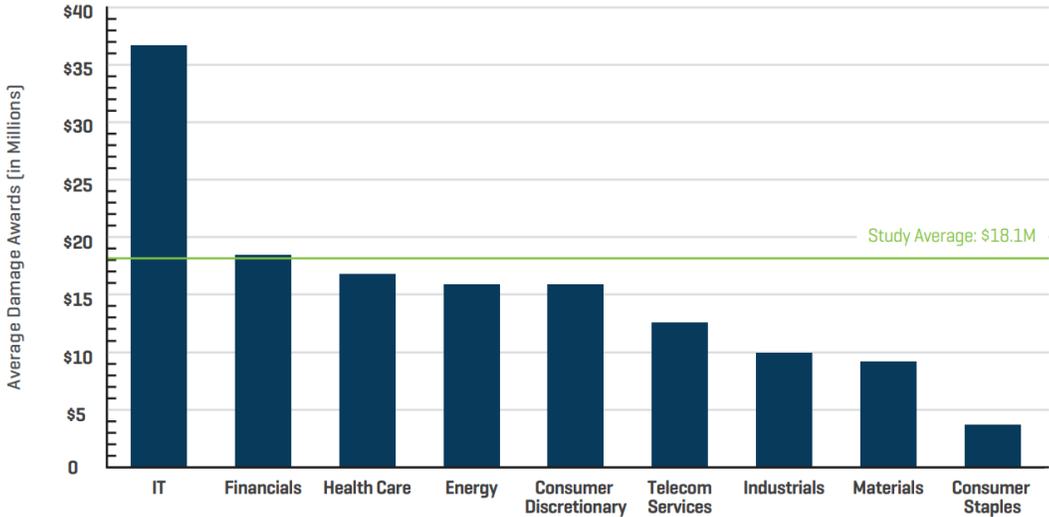
We'll hear more about this case later . . .

# Damages – Why Should You Care?

CASE	DAMAGES AWARDED	STATE (DISTRICT)	YEAR
<i>E. I. duPont de Nemours and Co. v. Kolon Industries, Inc. and Kolon USA, Inc.</i>	\$919,990,000	Virginia (Eastern)	2011
<i>Epic Systems Corporation v. Tata Consultancy Services Limited and Tata American International Corp.</i>	\$420,000,000	Wisconsin (Western)	2017
<i>Cadence Design Systems, Inc. v. Avant! Corp., et al.</i>	\$265,000,000	California (Northern)	2002
<i>Bancorp Services, LLC v. Hartford Life Insurance, et al.</i>	\$118,338,000	Missouri (Eastern)	2002
<i>X-IT Products, LLC v. Walter Kidde Portable Equipment, Inc.</i>	\$116,000,000	Virginia (Eastern)	2002
<i>Brocade Communications Systems, Inc. v. A10 Networks, Inc.</i>	\$112,373,822	California (Northern)	2013

# Damages – Why Should You Care?

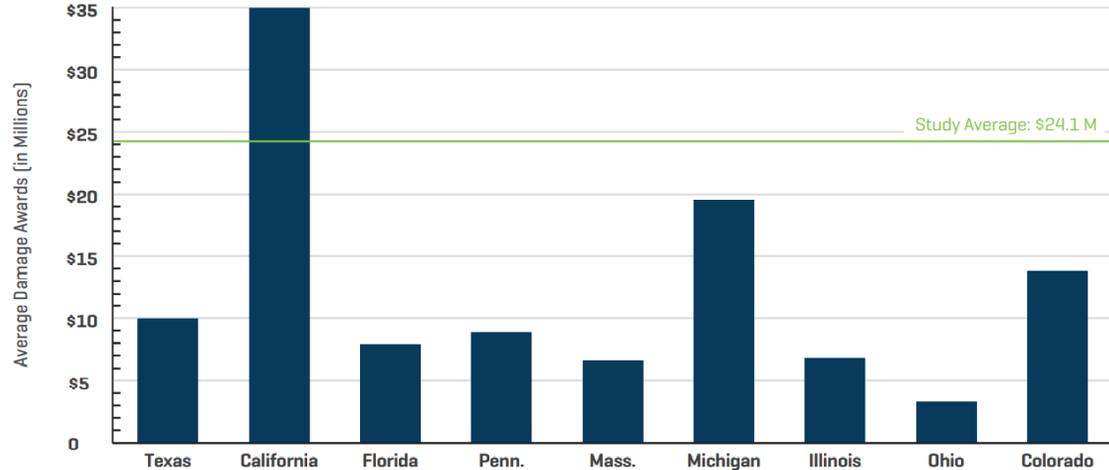
Average Damage Awards by Industry\*



\*Excluding E.I. duPont v. Kolon Industries

Source: *Trends in Trade Secrets Litigation: 2020*  
[www.stout.com](http://www.stout.com)

Average Damage Awards by Most Active States



Source: *Trends in Trade Secrets Litigation: 2020*  
[www.stout.com](http://www.stout.com)

# The Basics

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## Damages Under the DTSA

- (i) Damages for actual loss caused by the misappropriation of the trade secret, *and*
- (ii) Damages for unjust enrichment caused by the misappropriation that is not addressed in computing damages for actual loss, *or*
- (iii) In lieu of damages measured by any other method, the damages caused by the misappropriation, measured by imposition of liability for a reasonable royalty for the appropriator's unauthorized disclosure or use of the trade secret.

## Damages Under the UTSA

Damages can include both the actual loss caused by misappropriation *and*

the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss, *or*

In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

# The Basics

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## Causation Made Simple: The “But For” Rule

“**The but-for rule** — that the fundamental principle of damages is to restore the injured party, as nearly as possible, to the position [they] would have been in had it not been for the wrong of the other party—is **the essence of compensatory damages.**”

**-Douglas Laycock, Remedies (4<sup>th</sup> ed. 2010)**

# The Basics – Exemplary Damages

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## Exemplary Damages Under the DTSA

If the trade secret is willfully and maliciously misappropriated, award exemplary damages in an amount not more than 2 times the amount of the damages awarded under subparagraph (B)

## Exemplary Damages Under the UTSA

If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (a)

# The Basics

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## The Sole Outlier: New York (the only non-UTSA State)



# The Basics – New York

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## *E.J. Brooks Co. v. Cambridge Sec. Seals* (N.Y. Ct. App. 2019)

### **Trade Secret:**

Fully-automated process for manufacturing plastic indicative security seals

### **Trial in Federal Court:**

- Claims under New York law
- Plaintiff won on the merits
- Court awarded damages for costs the Defendant avoided by misappropriation

### **Appeal – 2<sup>nd</sup> Circuit Court of Appeals:**

- Certified Three Questions to N.Y. Court of Appeals



# The Basics – New York (*E.J. Brooks Co.*)

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## Majority Opinion:

“Under our common law, **compensatory damages must return the plaintiff, as nearly as possible, to the position it would have been in had the wrongdoing not occurred—but do no more** \* \* \* \*

“[T]he measure of damages in a trade secret action must be designed, as nearly as possible, **to restore the plaintiff to the position it would have been in but for the infringement.** Whether those losses are measured by the defendant's profits, revenues, cost savings or any other measure of unjust gain, there is ‘no presumption of law or of fact’ that such a figure will adequately approximate the losses incurred by the plaintiff \* \* \* \* **A plaintiff therefore may not elect to measure its damages by the defendant's avoided costs in lieu of its own losses.**”



***If you're a plaintiff filing a trade secrets case in N.Y. and intend to seek damages for unjust enrichment (or “disgorgement” or “restitution”), consider filing your case in Federal Court and adding a DTSA claim so you won't be hamstrung by the majority's holding in the E.J. Brooks case.***

# The Basics

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## The First DTSA Jury Verdict: The “Fig Spread” Case

*Dalmatia Import Group, Inc. v. Foodmatch, Inc. et al.*,  
U.S. District Court (E.D. Pa.), Feb. 24, 2017



v.



# The Basics - The Fig Spread Case

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- Dalmatia Import Food Group contended that Foodmatch, Inc. and a number of other defendants had misappropriated Dalmatia's fig spread recipe
- A federal court jury awarded Dalmatia \$2.5 million in damages, \$500,000 of which was related to a claim under the DTSA
- The defendants complained that:
  - The Court failed to limit DTSA damages to those incurred after the effective date of the Act (May 16, 2016), a few months after suit was filed
  - Although the DTSA's statutory language was in many ways similar to the Pa. UTSA, the Court charged the jury utilizing the language of the PUTSA, not the DTSA language

# Has the DTSA Achieved Uniformity?

## There was one Congressional goal in passing the DTSA: Uniformity

114TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT  
2d Session } { 114-529

### DEFEND TRADE SECRETS ACT OF 2016

APRIL 26, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

### R E P O R T

[To accompany S. 1890]

[Including cost estimate of the Congressional Budget Office]

“This narrowly drawn legislation will provide a single, national standard for trade secret misappropriation with clear rules and predictability for everyone involved.”

# Has the DTSA Achieved Uniformity?

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**No – many courts have applied various UTSA principles in interpreting the DTSA**

***Veronica Food Co. v. Ecklin*, 2017 WL 2806706, at 13 (N.D. CA, June 29, 2017):**

Due to the overlap between the statutes, ***several courts have addressed DTSA claims in conjunction with claims under the CUTSA and other states' versions of the Uniform Trade Secrets Act.*** For example, in considering whether or not to enjoin continued use of trade secrets, ***courts have analyzed likelihood of success on the merits with respect to the DTSA and CUTSA simultaneously***, see, e.g., *Henry Schein*, 191 F. Supp. 3d at 1077; *Waymo*, 2017 WL 2123560, at \*7–10, and ***another district court considered likelihood of success on DTSA and Nevada UTSA claims together*** because “[b]oth statutes create causes of action for the misappropriation of trade secrets when the owner of the information took reasonable measures to secure that information,” *Protection Techs., Inc. v. Ribler*, No. 3:17-cv-00144-LRH-WGC, 2017 WL 923912 at \*2 (D. Nev. Mar. 8, 2017)

# Has the DTSA Achieved Uniformity?

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## Most DTSA Plaintiffs Also Assert State Law Claims

One survey of the first approximately 120 DTSA complaints filed in 2019 showed that over 80% of the plaintiffs also asserted state trade secrets law claims (and sometimes claims under more than one state's trade secrets law).



Source: Duszczyszyn & Roland, *Three Years Later: How the Defend Trade Secrets Act Complicated the Law Instead of Making It More Uniform*, IP LITIGATOR (July/August 2019)

**The NY/NJ CLE CODE IS 122**

# Has the DTSA Achieved Uniformity?

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**No - there are important differences between the DTSA and State Trade Secrets Laws**

- **Extraterritorial scope of the DTSA**
- **No inevitable disclosure provision under the DTSA**
- **No right of action by “non-owners” of trade secrets**

# Application of DTSA to Extraterritorial Conduct

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***Motorola Solutions, Inc. v. Hytera Communications Corp. Ltd.***,  
436 F.Supp.3d 1150 (N.D. Ill. 2020)

**Facts:** Motorola alleged that Hytera, a Chinese electronics manufacturer, hired three Motorola engineers who brought with them thousands of confidential technical documents that enabled Hytera to manufacture functionally identical 2-way radios, which were sold throughout the world, including the USA.

**Issue:** Almost two weeks into a three-month trial, Hytera filed a motion to exclude evidence of damages incurred outside the USA. The Court denied the motion, ruling that the evidence would be provisionally admitted but agreeing to determine prior to charging the jury whether and to what extent they would be allowed to consider evidence of extraterritorial damages.



# Application of DTSA to Extraterritorial Conduct

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## ***Motorola Solutions, Inc. continued***

**Ruling:** Noting that relevant U.S. Supreme Court authority begins with a presumption that U.S. statutes have no extraterritorial application, this presumption can be overcome if it's clear that Congress intended for the statute in question to apply to conduct occurring **outside** the U.S. affecting interests **inside** the U.S. falling within the scope of the statute's principal focus.

The Court pointed out that the actual statute passed by Congress, Public Law 114-153, contained two pertinent sections ***in a single chapter*** -- § 1836 (the DTSA's damages provisions) and § 1837, amending criminal provisions of the Economic Espionage Act and saying: "***This chapter also applies to conduct occurring outside the United States if . . . an act in furtherance of the offense was committed in the United States.***" Since "use" of the trade secrets inside the U.S. would be "in furtherance of" the offense" of misappropriation, and since "it has been undisputed throughout trial that Defendants have advertised, promoted, and marketed products embodying the allegedly stolen trade secrets ***domestically*** at numerous trade shows" ***the Court held that the damages provisions of § 1836, being in the same chapter as the extraterritoriality provisions of § 1837, would permit the recovery of damages throughout the world.***

# Application of DTSA to Extraterritorial Conduct

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## *Motorola Solutions, Inc. continued*

**Verdict:** Although the trial lasted three months, the jury deliberated for less than three hours before returning a **damages verdict of \$764 million (\$345 million in compensatory damages, and almost \$419 million in punitive damages) based on trade secret misappropriation.**

**Status:** On Oct. 22, 2020, the Court overruled Hytera’s Motion for New Trial, which argued that the damages award was “monstrously excessive” and argued that the issue of disgorgement damages should properly be decided by the Court, not the jury, since it is an equitable remedy. The Court agreed with the latter point, saying that the jury’s award was merely “advisory,” but went on to say that the Court agreed with the jury’s assessment of disgorgement damages and would address that issue in a subsequent order.

**The Court still has not ruled on Motorola’s request for a permanent injunction and has not entered a final judgment.**

# Application of DTSA to Extraterritorial Conduct

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*Luminati Networks Ltd. v. BScience Inc.*, 2019 WL 2084426 (E.D. TX 2019)

## ISSUE:

- “The defendant in this DTSA suit argued that the plaintiff had failed to state a claim because ‘Luminati fails to allege any conduct occurring in the U.S. relating to the alleged misappropriation,’ as required under the [DTSA].”
- “Luminati responds that ‘the sale of [BScience's] competing ‘Geosurf’ residential proxy service using [Luminati's] trade secrets causing harm to Luminati in the United States was clearly in furtherance of its misappropriation of Luminati's trade secrets,’ and thus such a claim is actionable under the DTSA.”

**HOLDING:** The Court (Gilstrap, J.) held that while *the fact that damages were incurred by Luminati in the U.S. would not be acts “in furtherance of” BScience’s misappropriation*, Luminati’s allegation [in its First Amended Complaint] that, *by “using . . . [Luminati's] trade secrets, [BScience] has committed acts in the State of Texas and the United States” would suffice*

# Application of DTSA to Extraterritorial Conduct

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If you, as a trade secrets plaintiff, hope to seek damages based on the defendant's *global* sales of its products incorporating your trade secrets, be sure to nail down the fact of the *USE* of your trade secrets *within* the U.S.A.

# No Inevitable Disclosure Provision Under the DTSA

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Under 18 U.S.C. § 1836(b)(3)(A), a court in a civil proceeding under the DTSA may grant injunctive relief, *provided that* the injunction does not:

“(I) prevent a person from entering into an employment relationship, and that ***conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on the information the person knows***

# No Inevitable Disclosure Provision Under the DTSA

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**But**, remember that the DTSA does **not** preempt state trade secrets laws (18 U.S.C. § 1838)

Since most suits filed under the DTSA also include claims under the trade secrets laws of one or more states, the ability of plaintiffs to rely on the inevitable disclosure doctrine boils down to a question of what state law applies.

Thus, federal courts in California have barred reliance on inevitable disclosure:

- *UCAR Tech. (USA) Inc. v. Yan Li*, No. 5:17-CV-01704-EJD, 2017 WL 6405620 (N.D. Cal. Dec. 15, 2017)
- *Human Longevity, Inc. v. J. Craig Venter Inst., Inc.*, No. 18CV1656-WQH-LL, 2018 WL 6617633 (S.D. Cal. Dec. 18, 2018)

# No Inevitable Disclosure Provision Under the DTSA

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On the other hand, federal courts in other jurisdictions have declined to dismiss inevitable disclosure claims. *See, e.g.,*

- *Packaging Corp. of Am., Inc. v. Croner*, No. 19-CV-03286, 2020 WL 43011 (N.D. Ill. Jan. 3, 2020)
- *Gen. Elec. Co. v. Uptake Techs., Inc.*, 394 F. Supp. 3d 815 (N.D. Ill. 2019)
- *Jazz Pharm., Inc. v. Synchrony Grp., LLC*, 343 F. Supp. 3d 434 (E.D. Pa. 2018)
- *Pittsburgh Logistics Sys., Inc. v. LaserShip, Inc.*, No. 2:18-CV-1382, 2019 WL 2443035 (W.D. Pa. June 12, 2019) (dismissing plaintiff's DTSA/PUTSA claims without prejudice to repleading with greater specificity)

# Right of Action by “Non-Owners” of Trade Secrets



S. 1890

One Hundred Fourteenth Congress  
of the  
United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Monday,  
the fourth day of January, two thousand and sixteen*

An Act

To amend chapter 90 of title 18, United States Code, to provide Federal jurisdiction for the theft of trade secrets, and for other purposes.

*Be it enacted by the Senate and House of Representatives of  
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the “Defend Trade Secrets Act of 2016”.

SEC. 2. FEDERAL JURISDICTION FOR THEFT OF TRADE SECRETS.

(a) IN GENERAL.—Section 1836 of title 18, United States Code, is amended by striking subsection (b) and inserting the following:

“(b) PRIVATE CIVIL ACTIONS.—

“(1) IN GENERAL.—An owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce.

By its terms, the DTSA, 18 U.S.C. § 1836(b)(1) provides that “[a]n **owner** of a trade secret may bring an action under this subsection . . .”

So what about suits by “non-owners”?

# Right of Action by “Non-Owners” of Trade Secrets

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## *Advanced Fluid Systems, Inc. v. Huber*, 958 F.3d 168 (3<sup>rd</sup> Cir. 2020)

- Under Pennsylvania’s UTSA (“PUTSA”) a party need not be the “owner” of a trade secret in order to bring an action against the misappropriating parties, as long as the plaintiff was a lawful “possessor” of the trade secrets in question.
- The 3<sup>rd</sup> Circuit relied in part on a similar holding by the 4<sup>th</sup> Circuit in a case applying Maryland’s identically worded UTSA. ***DTM Research, L.L.C. v. AT & T Corp.*, 245 F.3d 327 (4th Cir. 2001).**

# Right to “Trial by Jury” in Unjust Enrichment Cases

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## 7th Amendment

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Two Federal Circuit Court of Appeals panels have reached **opposite conclusions** regarding **whether there is (or isn't) a right to a jury trial** in cases seeking “disgorgement” or “restitution” to **return to a plaintiff a defendant's ill-gotten gains.**

# Right to “Trial by Jury” in Unjust Enrichment Cases

**NO: *Texas Advanced Optoelectronic Solutions, Inc. v. Renesas Electronics America, Inc.***  
895 F. 3d 1304 (Fed. Cir. 2018)

“For Seventh Amendment purposes, claims for patent, copyright, or trademark infringement are appropriate analogues of the trade secret claim here. From all we have seen, **no disgorgement remedy was available at law in 1791 for the former claims. We conclude that no such remedy would have been available at law for the trade secret misappropriation here, either.**”



**YES: *TCL Technology Services, Ltd. v. Telefonaktiebolaget LM Ericsson***  
943 F. 3d (Fed. Cir. 2019)

“**And even if the monetary relief can be characterized as restitution, as TCL advocates here, that does not end the inquiry, because restitution can be either legal or equitable.** *Great-West Life*, 534 U.S. at 212, 122 S.Ct. 708 (“In the days of the divided bench, **restitution was available in certain cases at law, and in certain others in equity.**”). To determine which type of common law restitution the release payment is more analogous to, we focus on “the basis of [Ericsson’s] claim” and “the nature of the underlying remedies sought.”

# Right to “Trial by Jury” in Unjust Enrichment Cases

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If you are the plaintiff in a combined patent/trade secrets case (and thus know any appeal is headed to the Fed. Cir.), submit your “unjust enrichment” damages claim to the jury. **BUT**, if the jury finds damages, then **ALSO** submit the “unjust enrichment” claim to the Court post-trial so that you’ve covered all bases.

# Damages for Anticipated Future Use of Trade Secrets

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## *Steves and Sons, Inc. v. JELD-WEN,* 2018 WL 2172502 (E.D. Va. 2018)

**Background:** Steves and JELD-WEN were competitors in the manufacture/sale of plastic molded “door skins” for interior household doors. Steves sued JELD-WEN, alleging antitrust violations, and JELD-WEN counterclaimed, asserting trade secrets claims based on Steves’ having hired JELD-WEN employees who allegedly gave Steves JELD-WEN’s trade secret financial data that enabled Steves to prepare a “Feasibility Study” analyzing the potential advantages of building a manufacturing facility to better compete against JELD-WEN, its supplier.

**Issue:** Steves moved for summary judgment, contending that as a matter of law JEN-WELD could not seek to recover damages for Steves’ *future use* of JELD-WEN’s trade secrets.

**Holding:** The Court held that given the SJ evidence offered by JEN-WELD’s damages expert, reasonable royalty damages, in particular, could be appropriately awarded for Steves’ future use of JEN-WELD’s trade secret financial data.

# “Head Start” Damages

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*Liqwd, Inc. v. L’Oreal America, Inc.*,  
2018 U.S. Dist. LEXIS 162347 (D. Del. 2018)

- Plaintiff had developed “Olaplex” – a “bonding building” solution designed to protect hair from chemicals contained in other hair products.
- The plaintiff’s licensor had filed a patent application on the product that had not yet been published, but meanwhile had been approached by L’Oreal about a possible acquisition, and disclosed its unpublished application to L’Oreal under an NDA.
- L’Oreal declined to acquire the Plaintiff and soon thereafter introduced its own version of a similar product, at which point Liqwd filed suit asserting claims for patent infringement trade secrets misappropriation and breach of contract.



# “Head Start” Damages

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## *Liqwd, Inc. continued*

**The Jury Verdict** – The jury returned a verdict totaling over \$91 million, of which \$22 million was for the trade secrets claim.

**The Judgment:** Although the evidence established that L’Oreal had a “head start” of 20 to 32 months because of its having learned from Liqwd’s unpublished patent application the active ingredient in Olaplex, the Court held that **the “secrecy” of this “trade secret” information had been lost once the patent application was published** – the “secrecy” period was just under six months. Accordingly, the Court reduced the \$22 million verdict to \$9.5 million.

# “Head Start” Damages

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## Other Courts Have Allowed Damages Beyond Loss of Secrecy

- ***TurnKey Sols. Corp. v. Hewlett Packard Enter. Co.***, 2017 U.S. Dist. LEXIS 126076, at \*18 (D. Colo. Aug. 9, 2017): In denying Defendant’s motion for summary judgment: “To the extent HPE is requesting that this Court limit TurnKey’s damage award based on the publication of the patent application, the Court declines to do so. ***The patent application does not necessarily absolve HPE of all post-publication damages that flow from its alleged pre-publication misappropriation.***
- ***Federal Express Corporation v. Accu-Sort Systems, Inc.***, 2005 WL 8156707 at \*15 (W.D. TN 2005): “[S]everal courts have found that an act of misappropriation can cause a plaintiff to lose profits, or a defendant to receive illicit gains, after the trade secret is made public [Citations omitted] \* \* \* It follows ***that if the “head start” gained by the defendant through misappropriation continues to disadvantage the plaintiff after the date the plaintiff receives its patent, the plaintiff may collect damages for profits that accrue during this “extra” limited time period.***”.\*

\*See further discussion of this issue in D.S. Amerling et al., “Disputed Issues in Awarding Unjust Enrichment Damages in Trade Secret Cases,” THE SEDONA CONFERENCE JOURNAL Vol. 19, No. 2 (2018) at 680 *et seq.*

# Should Damages Be Allocated Among Trade Secrets?

**YES: *O2 Micro Intern. Ltd. v. Monolithic Power Systems, Inc.*, 399 F.Supp.2d 1064 (N.D. Cal. 2005)**

***“The Court warned O2 Micro of the dangers of bundling all of its alleged trade secrets damages together \* \* \* \****

O2 Micro now wrongly contends that the damages award is supported by the evidence.”



**NO: *Bladeroom Group Ltd. v. Facebook, Inc.*, 2018 U.S. Dist. LEXIS 57730; 2018 WL 1611835 (N.D. Cal. April 3, 2018)**

It is true that under CUTSA, damages claimed for actual loss or unjust enrichment must be caused by the misappropriation alleged. Cal. Civ. Code § 3426.3. ***This portion of CUTSA does not require, however, that an expert assign damages amongst the trade secrets for his or her opinion to be admissible.*** Nor must an expert provide separate estimations of misappropriation and breach of contract damages for an opinion to assist the jury.

# “Bet the Company” Stakes in Unjust Enrichment Cases

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*Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867 (2013)

**The Trade Secrets**: software enabling oilfield drilling companies to vastly improve the challenging process of estimating, procuring and paying for – all online – the costs of certain well construction costs known in the industry as “complex services



**The Misappropriation**: Wellogix entered into a consulting arrangement with Accenture to help promote the Wellogix software. Over time Accenture began working with other companies to misappropriate Wellogix’s trade secrets and develop competing products

**The Trial**: Wellogix’s damages expert testified that at the time of the misappropriation the company was valued by potential investors at \$27.8 million, but that after losing exclusivity in the market, it’s value fell to zero. The jury awarded \$26.2 million in damages based on that evidence.

# “Bet the Company” Stakes in Unjust Enrichment Cases

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## *Wellogix, Inc.* continued

### The 5<sup>th</sup> Circuit Appeal

Citing its own landmark trade secrets decision in *Computing Co. v. Lykes–Youngstown Corp.*, 504 F.2d 518,535 (5th Cir.1974), which advocated “imaginative and creative” approaches to determining damages in such cases, the Court wrote:

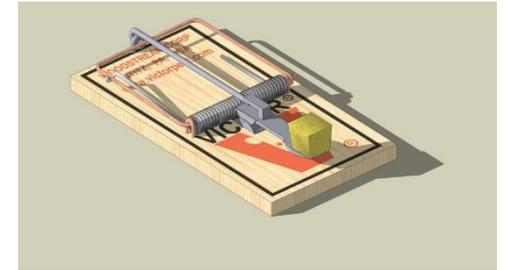
Here, Wellogix presented sufficient evidence and testimony to support the jury's \$26.2 million compensatory damages award to Wellogix. ***Wellogix introduced testimony by damages expert Michael Wagner that the company was worth \$27.8 million in 2005—the amount, apparently after deducting for licensing fees, that the jury awarded Wellogix.*** Wellogix showed that Wagner based his valuation, in part, on the decision by venture capital groups to invest \$8.5 million in Wellogix in exchange for a 31% percent equity stake \* \* \* \*

***Reasonable jurors could \* \* \* find, under the “‘flexible’ approach used to calculate damages, [citation omitted], that there was sufficient evidence to support a \$26.2 million compensatory damages award.***

# Procedural Traps for the Unwary

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***ResMan, LLC v. Karya Property Management, LLC and Scarlet Infotech, Inc. d/b/a Expedien, Inc.***, No. 4:19-CV-00402, 2020 WL 5884820 (E.D. Tex. Oct. 1, 2020)



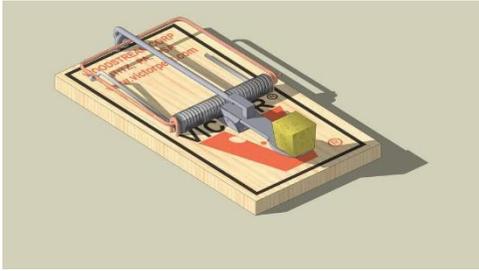
In this trade secrets case set to be tried in the ED-TX-(Sherman) in November, ***the Defendant moved to exclude the Plaintiff's claim for lost profits damages, claiming (correctly) that the Plaintiff had failed to supplement its initial Rule 26(a) disclosures.***

Ruling that ResMan should have supplemented its disclosures, the Court noted that ResMan had at least disclosed in both its First Amended Complaint and Interrogatory Answers that it was seeking lost profits damages. But, the Court also noted that Karya had failed to question ResMan's witnesses about lost profits in their depositions and waited until a month before trial to file its motion

The Court **denied** the motion to exclude.

# Procedural Traps for the Unwary

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***Title Source, Inc. v. House Canary, Inc.***, \_\_ S.W.3d \_\_  
2020 WL 5027667 (Tex. Civ. App. Aug. 26, 2020)

In this appeal by Title Source from a state court judgment on a jury verdict awarding \$740 million in damages, the San Antonio Court of Appeals ***reversed*** the trial court judgment because of errors in the lower court’s jury charge. ***The jury charge incorporated the statutory definition of “improper means” under TUTSA, which included the words “bribery” and “espionage.”*** However, there was no evidence presented to the jury during the trial that the Defendant Title Source, Inc. had ever engaged in either “bribery” or “espionage.” Accordingly, the Court of Appeals ***reversed*** the trial court’s judgment, saying: ***“Because those theories are not supported by the evidence, they should have been omitted from the “improper means” definition that was submitted to the jury.”***

Questions?



**THANK YOU!**

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