Professional Perspective

Eye-Popping Verdicts on Unjust Enrichment Theories in Trade Secret Litigation

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Bloomberg Law

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Contributed by C. Bryan Wilson, Williams & Connolly

Since 2021, juries considering cases alleging misappropriation of trade secrets have returned verdicts in eye-popping amounts, often in cases where the actual losses suffered by the plaintiffs have been eclipsed by the asserted unjust enrichment of the defendants.

For example, on May 9, 2022, in *Appian Corp. v. Pegasystems Inc.*, No. 2020-07216 (Va. Cir. Ct. Fairfax Cty. May 9, 2022), a Virginia jury awarded the plaintiff $2.04 billion in damages for trade secret misappropriation in violation of the Virginia Trade Secrets Act and the Virginia Computer Crimes Act, as well as for willful and malicious misappropriation.

In 2021, in a federal court case brought under the Defend Trade Secrets Act (DTSA), a jury returned a $140 million damages award. *Epic Systems Corp. v. Tata Consultancy Services*, 2017 BL 351842 (W.D. Wis. Sept. 29, 2017). In both cases, the judgment turned on unjust enrichment.

Large unjust enrichment verdicts in trade secret cases are recent developments. Whether this is a lasting trend, and how appellate courts will judge these verdicts, remains to be seen. To date only one appellate court, the US Court of Appeals for the Seventh Circuit in *Epic*, has issued a written decision reviewing one of these decisions.

This article looks at the unjust enrichment remedy available under the DTSA and comparable state statutes when the situation is not straightforward: the plaintiff does not have lost profits as a result of the misappropriation; the defendant has not profited financially from the misappropriation; or the defendant has, in any event, not impaired the value of the trade secret (for example, it does not compete directly with the plaintiff).

In these circumstances, some courts have found that the DTSA and state trade secret laws still provide powerful remedies for trade secret misappropriation.

The Defend Trade Secrets Act & State Equivalents

The DTSA was enacted in 2016, and provides a civil action in federal courts for misappropriation of trade secrets. To prevail on a claim for violation of the DTSA, a plaintiff must demonstrate that it owns a trade secret, and that there has been an improper acquisition, disclosure, or use in interstate commerce of the trade secret by the defendant. 18 U.S.C. § 1836(b)(1).

Under the DTSA, as well as most state statutes adopting the Uniform Trade Secrets Act (which has been adopted by 47 states and the District of Columbia), the monetary relief available includes the actual losses caused by the misappropriation, the unjust enrichment of the defendant or—"in lieu of" the aforementioned measures—a reasonable royalty for the unauthorized use of the trade secret. See 18 U.S.C. § 1836(b)(3)(B).

For example, the Virginia Uniform Trade Secrets Act, which supplied the cause of action in the *Appian* litigation, provides, "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 actual loss." Further, "[i]f a complainant is unable to prove a greater amount of damages by other methods of measurement, the damages caused by misappropriation can be measured exclusively by imposition of liability for a reasonable royalty." Va. Code Ann. § 59.1-338.

Unjust Enrichment

In recent years, juries in some jurisdictions have been generous in awarding damages in trade secret misappropriation cases if the defendant's benefit is in the form of avoided research and development costs. The damages available under this theory "derive from a policy of preventing wrongdoers from keeping ill-gotten gains, and therefore do not require a corresponding loss to the plaintiff." *Syntel Sterling Best Shores Mauritius Limited v. TriZetto Group*, 2021 BL 144726 (S.D.N.Y. Apr. 20, 2021).

As the Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. a (Am. L. Inst. 2011), has put it: It is "clear not only that there can be restitution of wrongful gain exceeding the plaintiff's loss, but that there can be restitution of wrongful gain in cases where the plaintiff has suffered an interference with protected interests but no measurable loss whatsoever." How to measure that restitution remains hotly disputed.

Several recent decisions illustrate the point. In *Epic Systems Corp. v. Tata Consultancy Services*, defendant's efforts to steal a client from Epic, which included downloading trade secrets and other confidential information, were unsuccessful. Accordingly, Epic sought "the value TCS received by avoiding research and development costs they would have incurred without the stolen information." This resulted in a $140 million damages verdict from the jury and a $280 million punitive damages award.

The Seventh Circuit found the punitive damages award constitutionally excessive, but affirmed the compensatory damages award based on unjust enrichment. The court of appeals held that "a jury could conclude that TCS had a free shot—using stolen information—to determine whether it would be profitable to improve Med Mantra and implement a variety of tactics to enter the United States electronic-health-record market." *Epic Systems Corp. v. Tata Consultancy Services*, 980 F.3d 1117, 1132 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1400 (May 21, 2022). Therefore, a jury could determine that a reasonable valuation of this benefit is the cost TCS avoided by not having to develop this information by itself."

Further, on the factual record, the jury could value that benefit—avoided research and development costs—at $140 million. The court, therefore, rejected the defendant's argument that the district court improperly focused on Epic's development costs, as opposed to the defendant's benefit: "The jury could base its award on the benefit TCS received from avoided research and development costs, not the cost Epic incurred when creating the same information."

In *Syntel Sterling Best Shores Mauritius*, the court approved the jury award of head start damages, observing that TriZetto "sought the amount that Syntel saved in development costs and used TriZetto's actual development costs as a proxy, which is a common way to determine a wrongdoer's avoided costs." 2021 BL 144726 (S.D.N.Y. Apr. 20, 2021). That Syntel's revenue from the misappropriation could not be determined, the court observed, did not preclude the use of avoided costs as a measure of damages. "Both are a form of unjust enrichment, but avoided costs may be a more appropriate measure of damages when the wrongdoer made only a modest profit—as Syntel did here—or no profit from the use of the trade secrets."

Similarly, in *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 2018 BL 167924 (E.D. Va. May 10, 2018), the court held that avoided costs are "appropriately considered" a part of the trade secret plaintiff's unjust enrichment damages recoverable under the DTSA, and that unjust enrichment damages could consider the actual and future use of a misappropriated trade secret. On the other hand, in *Medidata Solutions v. Veeva Systems*, the court took the position that permitting a plaintiff to recover a defendant's "hypothetical future profits under an unjust enrichment theory would contravene" the definition of unjust enrichment, which is "'one party has received money or a benefit at the expense of another.'" 2021 BL 320796 (S.D.N.Y. Aug. 25, 2021) (quoting *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 259 (S.D.N.Y. 2012)).

The most significant damages award on an unjust enrichment theory of liability occurred in *Appian v. Pegasystems*, a case tried in the Circuit Court for Fairfax County, Virginia. Appian alleged that Pegasystems, its direct competitor, conspired with an individual who had previously worked on Appian's development platform and possessed a copy of Appian's software to disclose what he knew about the workings of that software. Pegasystems' product development team then reviewed this confidential information, and these trade secrets, and reengineered its own product to better compete with Appian.

Pegasystems argued that the company was not net profitable during the damages period and argued that it had not, therefore, been unjustly enriched. The jury rejected this argument. Following the court's instructions on unjust enrichment, the jury awarded Appian $2.04 billion in damages, finding violations of the Virginia Trade Secrets Act, the Virginia Computer Crimes Act, and determining that punitive damages were appropriate for an appropriation that it deemed willful and malicious. The verdict will almost certainly be appealed. See Kyle Jahner, "Pegasystem's $2 Billion Appian Loss Harder to Cut Than Epic Case," *Bloomberg Law* (May 17, 2022).

Like Virginia, most states have adopted the UTSA. Several UTSA jurisdictions have permitted unjust enrichment awards if the misappropriated trade secrets gave the defendant a "head start" in research and development. See, e.g., *Epic Systems*, 980 F.3d 1117 (applying the Wisconsin UTSA); *3M v. Pribyl*, 259 F.3d 587, 595–97 (7th Cir. 2001) (Wisconsin UTSA); *Children's Broadcasting Corp. v. Walt Disney Co.*, 357 F.3d 860, 865–66 (8th Cir. 2004) (construing the Minnesota UTSA).

New York, however, has not permitted unjust enrichment awards. In a 4–3 ruling in 2019, the New York Court of Appeals held that avoided development costs are not recoverable under any legal theory under New York law. *E.J. Brooks Co. v. Cambridge Security Seals*, 105 N.E.3d 301, 304 (N.Y. 2018). Accordingly, in New York, "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." Those damages cannot extend to the hypothetical amount saved by the alleged infringer on research and development." Whether any other state follows this decision remains to be seen.

The Take-Away

There are several lessons to be learned from these decisions. First, depending on the jurisdiction, unjust enrichment damages may provide a greater recovery than actual damages, particularly if the misappropriated information has given the defendant a "head start" by saving research and development costs. New companies, moreover, may have no significant profits—and it is often the case that the trade secret misappropriation was discovered before the owner, or the party that allegedly stole the trade secret, established a market for the new product. Because trade secrets are confidential, it may be challenging or impossible in such circumstances to assign a market value with any precision.

Second, particularly in the modern information economy, research and development costs can be significant barriers to entry. A competitor in these industries may, accordingly, be tempted to avoid these costs through trade secret misappropriation. Large jury verdicts, such as those in *Appian* and *Epic*, may deter such behavior.

Third, once there is litigation, the available remedies, and the prospect of large unjust enrichment damages awards, increases the potential value of a trade secrets case.

Finally, these lawsuits demonstrate that the relatively new DTSA—enacted in 2016—and its state law counterparts are now recognized as potentially powerful mechanisms for remedying trade secret misappropriation, even in the absence of actual damages.