

#### 4 KEY TAKEAWAYS

# Trade Secret Update: 2024 Legal Developments and Trends

Kilpatrick partners [Joel Bush](#) and [Michele Floyd](#) recently presented at the 20th annual KTIPS (Kilpatrick Townsend Intellectual Property Seminar) on “**Trade Secret Update: 2024 Legal Developments and Trends.**” This session provided an overview of some recent trade secret decisions, a preview of consequential decisions expected in 2024, and trade secret best practices. In particular, Joel and Michelle addressed recent decisions involving the extraterritorial reach of the Defend Trade Secrets Act, the current split in federal circuit courts about the recovery of avoided costs as a proxy for unjust enrichment damages, and the pending appeal from the \$2 billion jury verdict in 2022 in the *Appian Corporation v. Pegasystems* case. Finally, the session discussed the FTC’s recent rule banning non-compete agreements, best practices for non-disclosure agreements, and trade secret considerations.

Key takeaways from their presentation include:

1

**Extraterritorial reach of the DTSA.** The federal Defend Trade Secrets Act has extraterritorial reach and damages can be calculated on worldwide sales as long as an act “in furtherance” of the misappropriation occurred in the United States. On July 2, 2024, the Seventh Circuit affirmed a district court’s finding that distribution of product brochures at trade shows in the US of a product containing stolen trade secrets was an act in “furtherance” of the theft sufficient to support a \$407 million damage award based entirely on (non-US) world-wide sales. *Motorola v. Hytera*, 108 F.4th 458 (7th Cir. 2024).

2

**Appellate courts continue to grapple with unjust enrichment awards.**

On July 30, 2024, a Virginia appellate reversed and remanded a May 2022 jury award for \$2.1 billion for trade secret theft in *Appian v. Pegasystems* that was based on unjust enrichment. The trial court had instructed the jury that the plaintiff had the burden of establishing the defendant’s sales, and that the defendant then had the burden of showing sales that were not attributable to the trade secret theft. The appellate court concluded, among other things, that the trial court had improperly failed to place the burden of proving *causation* on the plaintiff, who should “have been required to carry the burden of proving that the misappropriation *caused* the damages – and to prove its damages and their cause with reasonable certainty.”

3

**Circuit court split on avoided costs as proxy for unjust enrichment.**

As for avoided R&D costs as a proxy for unjust enrichment, a recent Second Circuit opinion created a federal circuit split on the propriety of using avoided costs as a proxy for unjust enrichment when it concluded that awarding avoided costs without corresponding harm to the trade secret owner “unhinges avoided costs from the [DTSA]’s compensatory moorings.” Compare *Syntel v. TriZetto*, 68 F.4th 792, 813 (2nd Cir. 2023) with *Epic Systems v. Tata Consultancy Systems*, 980 F.3d 1117 (7th Cir. 2020) and *PPG Industries v. Jiangsu Tie Mao Glass*, 47 F.4th 156 (3rd Cir. 2023).

4

**The language of nondisclosure agreements matters.** In *SiOnyx LLC v. Hamamatsu Photonics K.K.*, 981 F.3d 1339, 1352 (Fed. Cir. 2020), the court –as a remedy for breach of an NDA -- transferred ownership of both domestic and foreign patents to the disclosing party because the NDA expressly placed ownership of “*all patent, copyright, trademark, trade secret, and other intellectual property rights in, or arising from, such Confidential Information*” in the hands of the Disclosing Party, i.e., the plaintiff.

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