

## ARTICLES

# The Debate Over Avoided Cost Damages in Trade Secret Misappropriation Cases

By Laura Danielle Smolowe, Kyle Cummings, Alec Farr, and Eric R. Nitz— March 20, 2026

The scope and nature of available damages in trade secret misappropriation cases is not straightforward. In addition to actual losses caused by misappropriation, the federal Defend Trade Secrets Act (DTSA) permits a plaintiff to recover damages on an unjust enrichment theory—meaning the harm measured by the unfair benefit conferred on the wrongdoer. Most states have similar laws. In cases where actual losses are difficult to quantify, an “unjust enrichment” theory may be particularly relevant.

Unjust enrichment damages can take many forms. Recovering a defendant’s profits from using a misappropriated trade secret is front and center, but some savvy plaintiffs have also sought the research and development costs a defendant avoided by resorting to misappropriated trade secrets. Where allowed, these “avoided costs” damages can offer a valuable theory, especially where a defendant has not yet substantially profited from the misappropriation—for example, in cases where a misappropriator uses a trade secret to develop a competing product that has not yet made significant profits.

Practitioners should be cautious—courts have split over if and when avoided costs damages are available. In the last five years, the Third Circuit has held that, among the many ways of measuring unjust enrichment, avoided cost damages are an appropriate method for valuing the benefit conferred on the defendant from the misappropriation, and can be recovered without a showing that the plaintiff has suffered actual losses or that the defendant has made actual profits. The Second and Seventh Circuits, on the other hand, have held that avoided cost damages are only available where the losses are not otherwise covered in the damages calculation, such as where the misappropriation has diminished or destroyed the value of the trade secret. This uncertainty makes the avoided cost theory an intriguing, but by no means reliable, tool for plaintiffs.

## ***The Epic Systems Corp. Case***

The Seventh Circuit authorized broad “avoided cost” damages when it upheld a \$140 million award by a Wisconsin jury in *Epic Systems Corp. v. Tata Consultancy Services Ltd.*, 980 F.3d 1117 (7th Cir. 2020). Epic Systems had alleged that a Tata Consultancy Services (TCS) employee obtained unauthorized access to its systems and absconded with thousands of files, which TCS then used to develop a comparative analysis contrasting Epic Systems’ product against its own. TCS then used the analysis for a number of commercial purposes, such as (i) attempting to enter the US markets to compete with Epic Systems, (ii) addressing gaps in TCS’s software products, and (iii) attempting to sell TCS products to at least one of Epic Systems’ customers. In effect, TCS’s misappropriation gave it a “head start” in developing its competing product and marketing it in the United States, and Epic Systems sought damages on an avoided costs theory.

To value that head start, Epic Systems presented evidence on the comparative costs of researching and developing the misappropriated trade secrets, and TCS's expert then testified that the number should be reduced by 30-40% because of lower labor costs overseas (where TCS is based). Based on this, the court awarded Epic Systems \$140 million in compensatory damages.

Applying Wisconsin law, the Seventh Circuit upheld this portion of the damages award (while rejecting other portions). The court found that unjust enrichment damages are an available remedy for trade secret misappropriation claims, calculated by "the value of the benefit conferred upon the defendant." The research and development costs TCS avoided by "gaining a significant head start in [its] operation" were a viable way to award damages, as they calculated "the benefit TCS received from avoided research and development costs, not the cost Epic incurred when creating the same information."

## The *PPG Industries* Case

The Third Circuit has taken a similar approach. In *PPG Indus. Inc v. Jiangsu Tie Mao Glass Co. Ltd.*, 47 F.4th 156 (3d Cir. 2022), that court upheld summary judgment against Jiangsu Tie Mao Glass Co. (JTMG) for more than \$26 million in damages based on the research and development costs JTMG avoided by misappropriating information regarding a new kind of plastic for airplane windows developed by PPG. JTMG purportedly induced a former PPG Industries employee to give it a proprietary PPG report on PPG's Opticor technology. Using the proprietary report, JTMG made plans to produce its own Opticor quality windows, including by reaching out to the subcontractor that made PPG's Opticor window molds and asking it to manufacture "the same molds" for JTMG. That subcontractor alerted PPG to the possible theft of its trade secrets, and PPG sued JTMG.

PPG subsequently obtained a default judgment on its claims after JTMG failed to appear in the suit. PPG then presented evidence showing its damages, including the cost of creating, researching, and developing the Opticor technology. Four months later, JTMG finally appeared in the case and moved to set aside the default judgment. After a hearing, the district court declined to set aside the default judgment, holding that PPG had alleged facts establishing JTMG's liability and that PPG was entitled to treble damages. The Court also held that PPG's evidence regarding its research and development costs could provide "an appropriate measure of [JTMG's] unjust enrichment, and therefore [of] PPG's damages," but deferred ruling on damages to allow the parties time to mediate and so that PPG could submit more specific evidence of its damages. The district court ultimately awarded PPG actual damages of \$8,805,929, which it trebled to \$26,417,787.

On appeal, JTMG argued that "it obtained no commercial benefit from any use of PPG's trade secrets." The Third Circuit agreed, but held that JTMG was nevertheless unjustly enriched because, under Pennsylvania law, "unjust enrichment required that the defendant pay to plaintiff the value of the benefit conferred" and "that benefit need not be a profit that was realized, [but] can be a cost that was avoided." Accordingly, the Third Circuit found district court's damages

award was “on firm ground in considering costs that [JTMG] would have incurred to develop its own version of the Opticor technology but which it avoided because it had the Proprietary Report and other confidential PPG material.”

## The *Syntel Sterling* Case

In the *Syntel Sterling Best Shores Mauritius Ltd. v. The TriZetto Grp., Inc.*, 68 F.4th 792 (2d Cir. 2023) case, the Second Circuit disagreed with the Seventh and Third Circuits and articulated a different rule—avoided costs damages are only available where a plaintiff suffers actual losses not otherwise addressed in the damages calculation, such as where the misappropriation has diminished or destroyed the value of the trade secret.

The TriZetto Group (TriZetto) sued Syntel Sterling Best Shores Mauritius Ltd. (Syntel), its former subcontractor, alleging that Syntel had continued to use TriZetto’s trade secrets after TriZetto had revoked Syntel’s right to use them. At trial, TriZetto’s expert testified that Syntel avoided expending around \$285 million in research and development costs to independently develop the information it misappropriated. The expert also testified that TriZetto had lost around \$8.5 million in profits from work Syntel performed using TriZetto’s trade secrets. The jury ultimately found Syntel liable on all counts and awarded TriZetto \$284,855,192 in compensatory damages and \$569,710,384 in punitive damages.

On appeal, the Second Circuit held that, under the DTSA, avoided costs damages were available only to the extent “not addressed in computing damages for [their] actual loss”—i.e., in instances where the value of the secret is damaged, or worse yet—destroyed.” The Second Circuit further explained that awarding avoided costs damages whenever there was misappropriation, without any association to harm suffered by the trade secret owner, “unhinges avoided costs from the DTSA’s compensatory moorings” and would “effectively award[] punitive damages under the guise of compensatory damages.”

While there was “no dispute that Syntel unjustly benefited from misappropriating TriZetto’s trade secrets,” those unjust benefits “were addressed in computing damages for [TriZetto’s] actual loss.” As a result, the Second Circuit held that “TriZetto suffered no compensable harm supporting an unjust enrichment award of avoided costs” because “Syntel’s misappropriation did not diminish, much less destroy, the secrets’ continued commercial value to TriZetto.” And so, the Second Circuit reversed the award.

Nevertheless, the Second Circuit did not shut the door entirely on avoided costs damages and provided some guidance on when such damages could be available. It opined:

To be sure, future cases may present a range of factual scenarios concerning a defendant who has realized only modest profits from its misappropriation of trade secrets but has, nevertheless, been enriched by avoided costs in a larger amount at the expense of the secret holder. This might depend on, for example, the extent to which the defendant has used the secret in developing its own competing product, the extent to which the defendant’s misappropriation has destroyed the

secret's value for its original owner, or the extent to which the defendant can be stopped from profiting further from its misappropriation into the future.

In making this ruling, the Second Circuit acknowledged that its ruling was in possible tension with the *Epic Systems* and *PPG Industries* cases. But it concluded that requiring a connection with compensable harm—such as a showing that the value of a trade secret has been damaged or destroyed—provides substantially narrower grounds to seek such damages.

## The *Motorola Solutions* Case

Perhaps in recognition of the tension between *Epic Systems* and *Syntel Sterling*, the Seventh Circuit has more recently addressed the availability of avoided cost damages in *Motorola Sols., Inc. v. Hytera Commc'ns Corp. Ltd.*, 108 F.4th 458 (7th Cir. 2024). In that matter, a jury determined that Hytera Communications Corporation Ltd. (Hytera) misappropriated Motorola Solutions, Inc.'s (Motorola) source code and various technical documents relating to Motorola's commercial-grade digital mobile radio. Hytera then used this misappropriated information to develop its own, competing digital mobile radio, which it used to compete with Motorola. Following the plaintiff's successful trial for its misappropriation claims under the DTSA and Illinois Trade Secrets Act, the jury awarded \$345.8 million in unjust enrichment damages for both Hytera's profits and avoided cost damages, and \$418.8 million in punitive damages. Following the trial, the district court treated the unjust enrichment damages awarded by the jury verdict as advisory and, after further briefing, reduced the jury award to \$135.8 million in compensatory damages and \$271.6 million in DTSA punitive damages.

The Seventh Circuit's opinion encompassed a broad array of issues, including the constitutionality of punitive damages awarded under the DTSA's exemplary damages provision. The Seventh Circuit held that unjust enrichment damages, including avoided cost damages, could be considered harm for purposes of determining the propriety of an award of DTSA punitive damages. In reaching that holding, the Seventh Circuit, citing *Syntel Sterling*, affirmed the award of avoided cost damages and noted “[w]e have already found that Hytera’s misappropriation harmed Motorola beyond its actual loss[.]” The Seventh Circuit further explained in a footnote that “[w]e agree with the Second Circuit that avoided costs are recoverable as damages for unjust enrichment under the DTSA when the defendant’s ‘misappropriation injure[s] the plaintiff] beyond its actual loss.’” Here, avoided cost damages were permissible because Hytera’s “misappropriation injured Motorola beyond its actual losses” because “Hytera used the claimant’s trade secrets in developing its own product, thereby diminishing the value of the trade secret to the claimant.”

## Takeaways

Notwithstanding the back-and-forth between the circuits on the availability of avoided cost damages, this issue is unlikely to be clarified in the immediate future. On October 30, 2023, the Supreme Court denied TriZetto's writ of certiorari from the *Syntel Sterling* decision, and on

February 24, 2025, the Supreme Court likewise denied certiorari from the *Motorola Solutions* decision.

So, where does that leave litigants? Litigants should take avoided cost theories into account when assessing their claims or defenses, as these damages can present a significant source of recovery and, therefore, risk. Plaintiffs seeking avoided costs damages should also argue, to the extent possible, that the defendant's misappropriation diminished or destroyed the value of the trade secret. Doing so can result in recovery of avoided cost damages even in those circuits, like the Second, that are more skeptical of such recovery. Defendants should also consider whether and to what extent avoided costs are disconnected from compensable harm, such that they are arguably more akin to disguised punitive damages. And of course, litigants should stay tuned. With four Circuit courts weighing in on this issue in the last five years, *Motorola Solutions* will almost certainly not be the final word on avoided costs.

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