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PERSPECTIVES

TRADE SECRET DAMAGES: UNJUST ENRICHMENT AS AN EQUITABLE REMEDY

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For many trade secret litigants, unjust enrichment is the difference between a modest and potentially mammoth recovery.

The Defend Trade Secrets Act (DTSA) authorises recovery for “any unjust enrichment caused by the misappropriation of the trade secret that is not addressed in computing damages for actual loss”. In practice, that measure often captures the defendant’s avoided development costs or other benefits derived from the misappropriation. Where a plaintiff’s provable loss is limited – for example, a start-up with thin profits, or a licensor whose

contract damages are capped – unjust enrichment may represent the most significant component of the damages claim.

The statute, however, offers little guidance about the principles that govern an unjust enrichment award. Congress placed unjust enrichment alongside actual loss and reasonable royalty within the DTSA’s “award” provision, suggesting that it operates as a remedy in law. But unjust enrichment is historically an equitable remedy, rooted in principles of restitution and disgorgement, and subject to equitable principles. It is unclear from the

statute whether these principles are incorporated into the DTSA. That is, does the DTSA adopt unjust enrichment as a full-fledged equitable remedy, bringing its defences and judicial discretion along with it, or does it use the term only as shorthand for an otherwise legal remedy? The question was left to the courts.

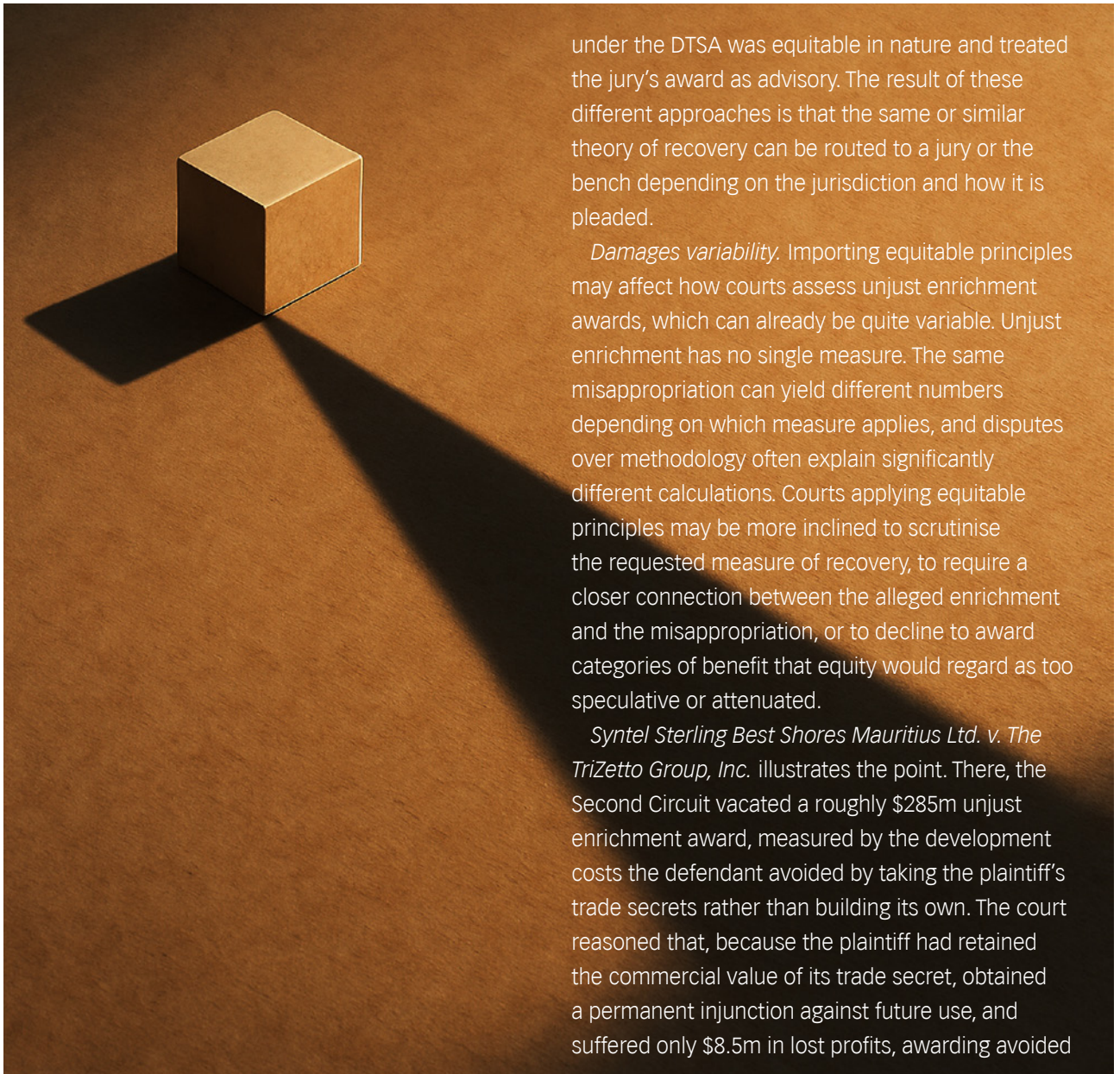
At least one court has chosen to read that equitable lineage into the DTSA, particularly where the relief sought resembles an accounting or disgorgement of profits rather than a conventional damages award. That instinct has roots in the Supreme Court's recognition, in *Liu v. SEC*, that a profit-based remedy does not shed its equitable character merely because a statute gives it a different label (though Justice Thomas, concurring in *Sripetch v. SEC*, recently expressed that SEC disgorgement should be treated as legal because it does not resemble a traditional equitable remedy). Once a court views the DTSA claim through an equitable lens, the inquiry can extend well beyond the ordinary rules governing legal damages. Questions may arise regarding who decides the award (a judge or jury), whether the recovery is subject to certain equity-specific limitations, and, potentially, whether other equitable defences are

available. These issues can materially affect both litigation strategy and the value of the case.

Who decides the award. A claim for legal damages ordinarily carries a right under the Seventh

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Amendment to a jury determination of damages. At common law, however, equitable remedies were generally decided by the court. Under the DTSA, some courts have submitted unjust enrichment claims to the jury, while others have decided the issue themselves. In *Medidata Solutions, Inc. v. Veeva Systems, Inc.*, for example, the court explained that monetary awards for unjust enrichment based on a theory of avoided costs under the DTSA had been consistently determined by a jury and not the court. By contrast, in *Motorola Solutions, Inc. v. Hytera Communications Corp.*, the court agreed with the defendant that the award for unjust enrichment



under the DTSA was equitable in nature and treated the jury's award as advisory. The result of these different approaches is that the same or similar theory of recovery can be routed to a jury or the bench depending on the jurisdiction and how it is pleaded.

Damages variability. Importing equitable principles may affect how courts assess unjust enrichment awards, which can already be quite variable. Unjust enrichment has no single measure. The same misappropriation can yield different numbers depending on which measure applies, and disputes over methodology often explain significantly different calculations. Courts applying equitable principles may be more inclined to scrutinise the requested measure of recovery, to require a closer connection between the alleged enrichment and the misappropriation, or to decline to award categories of benefit that equity would regard as too speculative or attenuated.

Syntel Sterling Best Shores Mauritius Ltd. v. The TriZetto Group, Inc. illustrates the point. There, the Second Circuit vacated a roughly \$285m unjust enrichment award, measured by the development costs the defendant avoided by taking the plaintiff's trade secrets rather than building its own. The court reasoned that, because the plaintiff had retained the commercial value of its trade secret, obtained a permanent injunction against future use, and suffered only \$8.5m in lost profits, awarding avoided

costs would produce a windfall rather than further the DTSA's compensatory scheme. Although the court grounded its analysis primarily in the statute's remedial framework, it looked to the restitutionary origins of unjust enrichment in assessing the proper scope of recovery. Even where liability is established, then, the equitable character of the remedy may, at least as some courts have approached it, shape both the measure and the magnitude of recovery.

Exposure to equitable defences. Characterising the remedy as equitable has prompted defendants to raise defences that otherwise have no place in an ordinary damages claim. Whether such defences ultimately apply under the DTSA remains unsettled, but they represent issues that practitioners should evaluate where the requested relief is likely to be treated as equitable. A defendant who can persuade the court that it is sitting in equity may gain arguments to reduce or defeat recovery based on the plaintiff's conduct, delay or relative fault, rather than on the merits of the misappropriation. Where the plaintiff's own behaviour in the parties' relationship reflects, for example, bad faith, this exposure can be significant. *Harry Miller Corp. v. Mancuso Chemicals Ltd.* arose under state trade secret law rather than the DTSA but is perhaps instructive. There, the plaintiff sued a competitor for misappropriation and sought to recover the defendant's profits. The court dismissed the plaintiff's standalone unjust enrichment claim (as time-barred)

but allowed the trade secret claim to proceed. It then took up whether laches – an equitable defence akin to a statute of limitations – barred that claim but left the question for trial. That a court entertained such a defence at all suggests that a trade secret claim seeking profit-based relief may be treated as equitable and thus exposed to equitable defences.

Takeaways

The characterisation of unjust enrichment under the DTSA is more than a matter of legal taxonomy. Because damages amounts can vary dramatically depending on the measure of damages used, whether a court applies traditional equitable principles can shape both the course of the litigation and the ultimate award.

Accordingly, litigants should begin by understanding how courts in their jurisdiction have approached the issue. Where the requested relief resembles an accounting, disgorgement or other traditional equitable remedy, counsel should consider whether the court is likely to evaluate unjust enrichment through an equitable lens and plan their case accordingly. That assessment may influence not only the requested measure of recovery, but also the development of the factual record and the framing of related arguments.

Finally, unjust enrichment theories should be tested from multiple angles. Different measures of recovery can produce substantially different results,

and courts may scrutinise those measures differently depending on the nature of the requested relief. Recognising early that equitable considerations may shape the remedy can help avoid strategic missteps and place practitioners in a strong position to litigate the most consequential components of a DTSA damages claim. **CD**

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