



You Won Your Trade Secret Case . . . and Got Nothing?

A recent Fifth Circuit decision demonstrates that even when former employees clearly misappropriate confidential information, companies can still walk away with nothing if they don't get their damages strategy right.

In *Trinseo Europe GmbH v. Kellogg Brown & Root, L.L.C, et al.*, a jury found that defendants, which included a former employer turned consultant, misappropriated trade secrets and awarded the plaintiff over \$75 million in damages. The victory was short-lived. The district court vacated the entire award, and the Fifth Circuit affirmed, leaving the plaintiff with only an injunction.

The Problem: Bundled Damages

The case arose from allegations that a former Dow Chemical engineer, after retirement, began consulting in the polycarbonate industry and assembled a team of other ex-Dow employees who allegedly used confidential plant designs and proprietary processes. Trinseo alleged misappropriation of ten distinct trade secrets. After trial, however, the jury only found four of those ten qualified as trade secrets.

Here is where the damages strategy became an issue. Trinseo's expert valued the case based on misappropriation of all ten alleged trade secrets and "did not individually value each of the trade secrets or any specific combination of trade secrets, nor did he provide a method for the jury to do so." When the jury found misappropriation of only four secrets, there was no evidentiary basis to support any award.

The Legal Standard: Apportionment Is Required

The Fifth Circuit explicitly aligned trade secret damages with patent apportionment doctrine, holding that "trade secret misappropriation damages must reflect the value attributable to the information or technology that is misappropriated by the defendant." Where a plaintiff alleges multiple trade secrets, "the jury must have a reasonable basis to award damages attributable only to the information or technology that actually qualifies as a trade secret".

The court rejected Trinseo’s argument that flexibility in damages calculation should save the award, emphasizing that while some estimation is inherent in these cases, “estimation of damages should not be based on sheer speculation” (citation modified). Awarding damages for four misappropriated secrets based on a model that presumed ten is exactly that—speculation.

Practical Takeaways

For employers and labor and employment practitioners, this case offers critical guidance:

- 1. Build secret-by-secret damages models.** When pursuing claims against former employees for trade secret misappropriation, work with damages experts to value *each* alleged trade secret individually or provide the jury a clear methodology to allocate damages if liability is found on only some claims.
- 2. Anticipate partial wins.** Never assume a jury will validate every claimed trade secret. Experts should offer alternative calculations so the case survives even if some claims fail.
- 3. Consider compiling damages.** Where appropriate, arguing the value of any individual trade secret is inseparable from the other trade secrets may help escape apportionment arguments. The thought is that the trade secrets, when compiled, create the trade secret value.
- 4. Defendants should challenge all-or-nothing damages.** Defense counsel should attack defective damage models at trial. Failure to disclose economic damage calculations may warrant preclusion. Cross-examining experts to obtain admissions that they neglected individual trade secret valuations can prove decisive. If no evidence of individual trade secret values emerges by the close of evidence, a directed verdict or JNOV may be appropriate.

Conclusion

The *Trinseo* decision is a cautionary tale that resonates particularly in trade secret disputes. Former employees often have access to numerous categories of confidential information, making it tempting to plead broad claims. But taking the easy road to argue an “all-or-nothing” damage model could result in zero damages. Careful planning at the damages stage is no longer optional—it’s essential to protecting your verdict on trade secret cases.

For further information on these developments, please contact [Adam Robertson](#).