

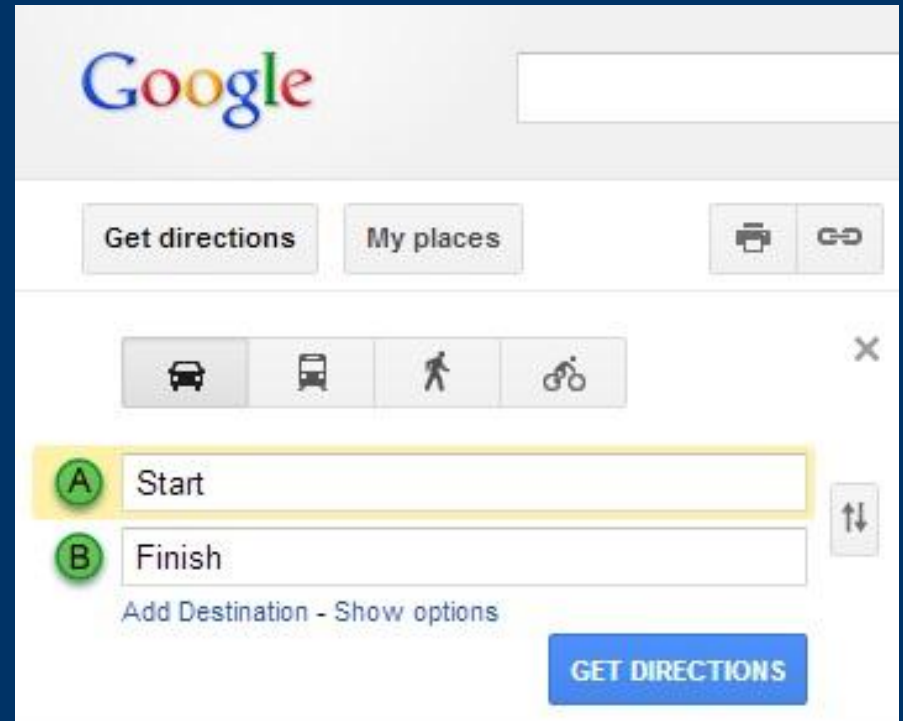


TRADE SECRETS DAMAGES: A FRAMEWORK FOR SUCCESS AT TRIAL

ROBERT J. HANNA
TUCKER ELLIS LLP
AIPLA ANNUAL MEETING
OCTOBER 25, 2013

Roadmap

- Overview of trade secret remedies
- The nuts and bolts of some legal issues to consider: reasonable certainty
- Best practices for proving or defending damages at trial



Overview of trade secrets remedies

- The Uniform Trade Secrets Act provides the legal framework of the trade secrets laws
- The UTSA lists three basic categories of remedies
 - Injunctive relief
 - Attorney's fees
 - Damages

Injunctive relief

- UTSA § 2(a) allows for injunctive relief from actual or threatened trade secrets misappropriation
- No adequate remedy at law

Attorney's fees

- UTSA § 4 states that a court may award attorney's fees where misappropriation has been made in bad faith or willfully and maliciously
- Courts look to their jurisdictions' statutory and common law definitions of the terms

Damages

Three types of trade secrets damages:

- Actual loss
 - Typically calculated by determining a plaintiff's lost profits
- Unjust enrichment
 - Can include a defendant's increased revenues, decreased production costs, avoided development costs, or advantages caused by the headstart in the market
- Reasonable royalties
 - The royalty that a plaintiff and defendant would have agreed upon for use of the trade secret: actual or hypothetical



Nuts and bolts of some legal issues to consider

Elements

Plaintiff must prove:

- the existence of a legally protectable trade secret;
- a nexus between the misappropriation and the asserted harm or unjust gain; and
- damages caused by defendant's misappropriation

Opinion testimony

- Expert testimony is usually required
- Framework for the opinion
 1. Helps the trier of fact
 2. Is based on sufficient data
 3. Is the product of reliable methods
 4. Applies methods to facts of case
- Damages must be proven with “reasonable certainty”

The struggle to define “reasonable certainty” has resulted in...



“I must confess . . . that I have no more idea what reasonable certainty means than I have as to the meaning of certainty. I would assume that it is some lesser quantum of proof than . . . beyond a reasonable doubt, or to a moral certainty.”

Hardwick v. Dravo Equip. Co., 569 P.2d 588, 594 (Or. 1977) (Lent, J., concurring)

Comprehensive attempt to interpret the requirements

Robert M. Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What it Really Means*, 12 TRANSACTIONS: TENN J. BUS. L. 11 (2010)

Posited that courts use six factors to determine whether a plaintiff has proven lost profits with reasonable certainty

Lloyd's six factors

1. The court's confidence that the estimate is correct
2. Whether the court is certain that the injured party suffered at least some damage
3. The degree of blameworthiness or moral fault on the part of the defendant
4. The extent to which the plaintiff produced the best available evidence of lost profits
5. The amount at stake
6. Whether there is an alternative method of compensating the injured party

Overall conclusions for the test of reasonable certainty

- Is there sufficient evidence to make it fair
- Can you measure damages without undue speculation or conjecture
- Does it rest on a stable foundation of facts

Best practices for proving or defending damages at trial





The jury

Proving or defending damages
begins with Voir Dire

Gathering information

- Stereotypes from clothing, piercings, tattoos, hair styles.
- What do they tell you?
- Education. Do you want college graduates?
- Occupations. Do you want an accountant?
- Attitudes toward lawsuits, damage awards. What do they mean? Are they truthful?
- “If the evidence supported it, would you award \$ X million.”

Just the facts, ma'am



Anticipate or use *Daubert* challenges

- Consider the timing of a *Daubert* motion
- Keep in mind that a true expert is usually an expert in a narrow field of the litigation
- Analyze the evidence on which the expert's testimony is founded

Different damages calculations for different theories and parties

- Double recovery is more likely when a plaintiff is seeking damages under multiple theories
- Separate trade secrets and separate parties complicate the analysis

Additional matters to consider before you conclude your case

- It is generally true that a jury will—out of sympathy for a “good guy” or “little guy” plaintiff wronged by a “bad guy” defendant—grant a large damage award
- Defense counsel should resist any urge to argue that damages are zero
- Punitive damages usually but not always are decided by the court
- Make your record

Victory is Mine!





TRADE SECRETS DAMAGES: A FRAMEWORK FOR SUCCESS AT TRIAL

ROBERT J. HANNA
TUCKER ELLIS LLP
AIPLA ANNUAL MEETING
OCTOBER 25, 2013