

# Trade Secret Damages – Software Cases

Award	Case	Post-Verdict Result
<b>\$400 million</b> (settlement)	<b>Alleged theft of mainframe software tools and source code.</b> <i>Compuware Corp. v. IBM Corp.</i> , No. 2:02-cv-70906-GCS (E.D. Mich. 2005).	Appeal terminated.
<b>\$94.4 million</b> (verdict)	<b>Alleged theft of cost management software.</b> <i>Wellogix, Inc. v. Accenture, L.L.P.</i> , No. 3:08-cv-119 (S.D. Texas 2011).	Trial court reduced award to \$44.4M. Fifth Circuit affirmed reduced award.
<b>\$40.7 million</b> (total settlements and verdict)	<b>Alleged theft of high-frequency trading source code.</b> <i>Quantlab Tech. v. Vitality Godlevsky</i> , No. 4:09-cv-04039 (S.D. Tex. 2015).	Trial court refused to disturb verdict after trial.
<b>\$26.3 million</b> (verdict)	<b>Alleged theft of design simulation software and related trade secrets.</b> <i>MSC Software Corp. v. Altair Engineering, Inc.</i> , No. 2:07-cv-12807 (E.D. Mich. 2014).	Trial court ordered new damages trial.
<b>\$15 million</b> (verdict)	<b>Alleged theft of software used with RFID tags.</b> <i>Globeranger Corp. v. Software AG USA, Inc.</i> , No. 3:11-cv-0403-B (N.D. Texas 2015).	Trial court refused to disturb verdict after trial.

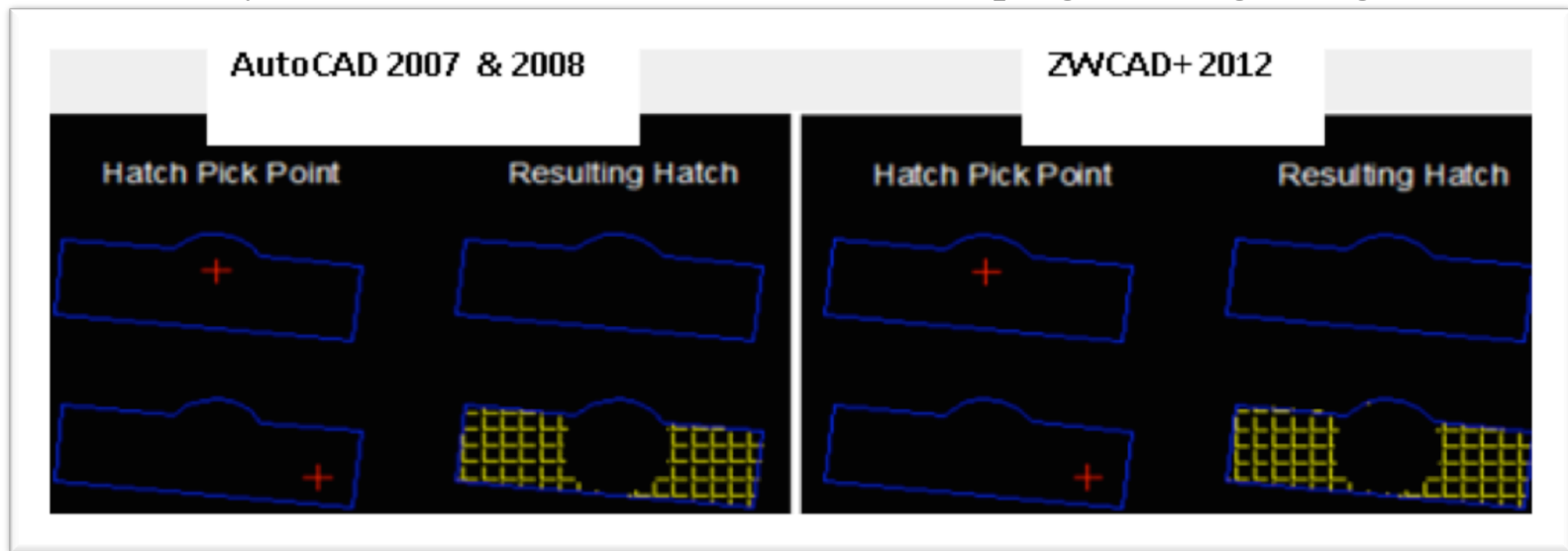
# A Trade Secret Cautionary Tale

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- FLIR Systems, Inc. accused former employees of starting new business using trade secrets relating to night vision technology.
- Trial court not only found **no trade secret misappropriation**, but that FLIR had also brought its claims in **bad faith**.
  - No evidence of misappropriation or economic harm.
  - FLIR had anticompetitive motive for filing suit.
  - FLIR sought to enjoin products that did not use trade secrets.
- Trial court assessed **\$1.6M in attorneys' fees** against FLIR.
- Former employees then sued FLIR's counsel for **malicious prosecution**. The trial court's dismissal on an anti-SLAPP motion to strike is currently being reviewed by the California Supreme Court.

# Case Study: Autodesk v. ZWCAD Software

- Trade secret misappropriation of AutoCAD® source code
- Proof of copying through common quirks
  - “[I]diosyncrasies in software code can establish programming lineage. All software



- Both could be provoked in a specific way, when applying a command meant to create a right angle between two polyline segments, to result in an acute angle
- The offending product displayed a warning message for an AutoCAD feature called “Plot in Background” that the *offending product does not have*

# Defend Trade Secrets Act of 2016

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- Passed Senate on April 4, 2016 by unanimous vote
- Key Features
  - Creates a federal private right of action for trade secret misappropriation
  - Trade secret must relate to a product or service in interstate or foreign commerce
  - Remedies include *ex parte* seizure, injunction, and damages
  - Injunction cannot prevent a person from entering a new employment relationship
  - Provides immunity for persons reporting a suspected violation of law
  - Claim must be brought within five years from the date of discovery

# Ex Parte Seizure Provisions

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- Civil Seizure
  - A “court may, upon ex parte application but only in **extraordinary circumstances**, issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret.”
  - **CUTSA has no counterpart**
- How will seizure work against information stored on **the cloud**?
  - “If the seized material includes a storage medium . . . the court shall prohibit the medium from being connected to a network or the Internet . . . .”
  - Can the court disconnect a data center from the Internet? Unlikely.
    - Harm to applicant must “substantially outweigh” harm to **third parties** by the seizure
    - Seizure must minimize “interruption of the business operations of **third parties**”
  - “Best Practices” Provision
    - Within 2 years of enactment, the Federal Judicial Center “shall” develop recommended best practices for “the seizure of information and media storing the information.”

# Defend Trade Secrets Act vs. CUTSA

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- Comparison to the California Uniform Trade Secrets Act (CUTSA)
  - No preemption of similar tort claims?
  - Longer statute of limitations
  - No specification requirement?
- “Preemption” of Similar Tort Claims (Civ. Code § 3426.7)
  - CUTSA “preempts” tort claims based upon the same nucleus of operative facts as a claim for misappropriation of trade secret. *K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.*, 171 Cal. App. 4th 939 (2009).
  - **Federal Act has no explicit counterpart** and thus arguably allows pleading related tort claims
- Statutes of Limitation
  - 3 years (California) vs. 5 years (Federal). Both apply the “discovery rule.”

# Defend Trade Secrets Act vs. CUTSA

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- CUTSA's Specification Requirement
  - Under CUTSA, a claimant must “identify the trade secret with ‘reasonable particularity’” before commencing discovery. Cal. Code Civ. Proc. § 2019.210.
- Federal Courts apply CCP § 2019.210
  - Held to be a **substantive** rule, not procedural, under *Erie*. See *Computer Economics, Inc. v. Gartner Group*, 50 F. Supp. 2d 980, 986-92 (S.D. Cal. 1999).
  - “The statute promotes well-investigated claims, frames the appropriate scope of discovery, prevents needless discovery disputes, and enables defendants to form complete and well-reasoned defenses.” *Id.* at 992.
- The Federal Act has no explicit counterpart
  - Effect in the software context could be significant, as source code is private

# The Increasing Importance of Trade Secrets

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**MORRISON**  

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**FOERSTER**