

## Trade Secrets in Wellogix v. Accenture

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The court battle between Wellogix and Accenture regarding stolen and misappropriated Wellogix trade secrets carries on with the U.S. Supreme Court being asked to review the *judge's role* in assessing the factual basis for expert testimony under Rule 702 of the Federal Rules of Evidence. *Accenture, LLP v. Wellogix, Inc.* (U.S., No. 13-1051, *review sought* 3/4/14). The question presented is whether Rule 702 requires a court, and not the jury, to decide whether expert testimony is “based on sufficient facts or data” and “reliably applie[s] ... principles and methods to the facts of the case,” and to set aside a jury verdict that rests on expert testimony that fails to meet these fundamental requirements.

### Background

On May 15, 2013 the Fifth Circuit affirmed a \$44.4 million trade secrets award in Wellogix, Inc. v. Accenture, L.L.P., 716 F.3d 867 (5th Cir.). Wellogix, Inc. had developed a complex services software targeting the oil and gas industry. To promote its software, Wellogix entered into several confidential agreements with Accenture, L.L.P. and launched a pilot project with BP America, Inc. Wellogix shared source code and access to its technology with both Accenture and BP, subject to their confidentiality agreements. Because of “cost and internal integration issues,” BP discontinued its collaboration with Wellogix and asked Accenture to develop a similar complex services software. In its lawsuit, Wellogix alleged that Accenture had stolen and misappropriated Wellogix trade secrets while creating their version of complex services software. The District Court awarded \$44.4 million to plaintiff and the Fifth Circuit affirmed the judgment.

### Takeaways

#### 1. Misappropriation of Trade Secrets:

*Take measures to dispose of your business partner's trade secrets after the end of a joint venture. Advise your employees to stop using the confidential information and confirm its destruction.*

Trade secret misappropriation under Texas law is established by showing: (a) a trade secret existed; (b) the trade secret was acquired through a breach of a confidential relationship or discovered by improper means; and (c) use of the trade secret without authorization from the plaintiff. The Court of Appeals found that:

- Wellogix's technology contained trade secrets. Wellogix was the only company offering that type of software from 2000 to 2005 and it took appropriate measures to guard its trade secrets from competitors;
- Accenture improperly acquired Wellogix's trade secrets; and
- Accenture used its trade secrets by relying on Wellogix's dynamic template source code to develop its own software.

## 2. Compensatory & Punitive Damages:

*The courts recognize a variety of formulae for measuring compensatory damages – a defendant is at a disadvantage once misappropriation has been established.*

The standard for measuring compensatory damages in misappropriation cases is very flexible and it can take several forms: (a) the value of plaintiff's lost profits, (b) the defendant's actual profits from the use of the secret, the value that a reasonably prudent investor would have paid for the trade secret, (c) the development costs the defendant avoided incurring through misappropriation; and (d) a reasonable royalty. The court of appeals also found that:

- Jury's \$26.2 million compensatory damage award was supported, including expert testimony regarding the value of Wellogix in 2005 and post misappropriation;
- Accenture acted with malice, meaning that the defendant showed specific intent to cause substantial injury to the claimant. In a much revealing e-mail, Accenture recognized: "[w]e may be at risk if Wellogix claims that we used knowledge of their product through involvement with eTrans to design and develop a solution for BP."

## 3. Patent Destruction of Trade Secrets:

*Trade secrets may survive disclosures in patents. Defendant must show that patent disclosure destroys the secret.*

A patent destroys the secrecy necessary to maintain a trade secret only when the patent and the trade secret "both cover the same subject matter." Furthermore, the Fifth Circuit seemed to agree with the District Court in that "it is for the defendant, once a plaintiff makes a prima facie case for the existence of a trade secret, to show that disclosure destroys the secret."