



## Market Value Still Best Proof of Lost Business Value

### *Wellogix, Inc. v. Accenture, LLP, 2011 WL 4915862 (S.D. Tex)(Oct. 14, 2011)*

The plaintiff's attorneys and experts in this trade secrets case made some critical decisions early in the proceedings, which may have determined the outcome at trial and on appeal. First, the plaintiff asserted that by stealing the source code to its patented software, the defendant destroyed its fledgling business. Accordingly, it requested lost business value as the measure of its damages.

Second, to prove damages, the plaintiff's primary expert relied more on evidence of contemporaneous market value than on an independent appraisal, also performed at the time of misappropriation, which relied on projections of future profits.

**Distinction is critical, but somewhat cloudy.** Texas law, like that of most U.S. jurisdictions, measures damages for the complete destruction of a business as "the difference between the value of the business before and after the injury or destruction." Accordingly, a plaintiff may not seek damages for both lost business value and lost future profits, but must choose between the two measures of recovery.

Cognizant of this precedent, the plaintiff in this case submitted evidence of its lost business value through two financial experts. The first testified that the plaintiff's value in late 2005—or just prior to the defendant's alleged misappropriation—was approximately \$27.8 million. He derived this value primarily from a contemporaneous transaction in which a private investment group, after conducting due diligence, purchased 31% of the plaintiff's shares for \$8.5 million. This type of transaction, coming so close in time to the alleged injury and based on an independent review of the plaintiff's financial projections and performance, was a "good" indication of the plaintiff's value in late 2005, the expert maintained. To support this value, the expert also reviewed an independent appraisal, performed in early 2005, that valued the plaintiff's equity at \$17.2 million to \$17.9 million.

In addition to this evidence, the plaintiff's second financial expert testified that the value of plaintiff dropped to zero after the misappropriation. In response, the defendant presented evidence that the plaintiff still retained some value based on its remaining patents. The jury discredited this evidence, however, and awarded the plaintiff \$26.2 million in compensatory damages. It also awarded \$68.2 million in exemplary or punitive damages, or \$50 million more than the \$18.2 million that the plaintiff requested at trial, and the defendant appealed.

**Clarifying the basis for lost business value.** The defendant claimed that, through its experts' testimony, the plaintiff impermissibly sought lost profits damages rather than lost business value. The defendant reasserted its own evidence at trial, that the plaintiff retained some value, and cited cases in

Texas as well as the Fifth Circuit, including *Fluorine*, which preclude using lost profits as a measure for lost business value.

As a preliminary matter, the court found that the jury was entitled to reject the defendant's contention that the plaintiff retained some value and to accept the opinion of its second expert that the business was completely destroyed by the defendant's conduct. As a result, the plaintiff "was entitled to a damages award based upon lost business value," the court held.

Second, the cases cited by the plaintiff addressed damages awards that were based exclusively on future lost profits and did not encompass lost business value as the appropriate measure of damages.

Here, future profits were part of the valuations performed by the investment group, prior to its acquisition of the plaintiff in late 2005, the court observed. Future profits were also part of the independent appraisal conducted earlier that year. Both served as part of the basis for the lost business value asserted by the plaintiff's first expert. At the same time, however, the expert testified that the "best and primary evidence supporting his opinion" was the \$8.5 million purchase price by the private investors for 31% of the company. "This investment, and [the expert's] reliance upon it, is neither speculative nor uncertain," the court ruled, and affirmed the \$26.2 million award for lost business value.

Relying on evidence of the defendant's willful and malicious conduct in stealing the trade secrets, the court also upheld the jury's finding that the plaintiff was entitled to punitive damages. The court reduced the \$68.2 million award to \$18.2 million, however, based on the plaintiff's request at trial and the facts supporting the same.