Hastings Business Law Journal

Volume 13
Number 1 *Fall 2016*

Article 1

Fall 2016

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I. INTRODUCTION

The new federal Defend Trade Secrets Act[1] is like a surprise addition to a family: a happy though puzzling event followed by a genuine concern about how it is going to be cared for and fed over the next twenty-five or so years.[2] That is because while trade secrets have always been considered part of intellectual property law,[3] the secrets have never been protected by federal legislation, unlike patents,[4] trademarks,[5] and copyrights.[6] The law in those traditional IP areas is fairly mature in the federal courts, though certainly not orderly or structured. Civil trade secret cases have always been local, state court matters, placed on the same docket as tenant disputes and custody fights, unless a case has landed in federal court under diversity jurisdiction.[7] The typical trade secret case is welcome in federal court now,

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1. *See* Defend Trade Secrets Act of 2016, Pub. L. No. 114-53, 130 Stat. 376 (amending the Economic Espionage Act to allow private parties to seek civil remedies in Federal Court for trade secret misappropriation and codified as amended at 18 U.S.C.A. § 1836 *et. seq.* (2015)).

2. It took more than twenty-five years for Congress to amend Title VII of the Civil Rights Act of 1964 in a meaningful way. *See* Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071.

3. "This is an important case because trade secret protection is an important part of intellectual property, a form of property that is of growing importance to the competitiveness of American industry." Rockwell Graphic Sys., Inc. v. DEV Inds., Inc., 925 F.2d 174, 180 (7th Cir. 1991); *but see* Defend Trade Secrets Act of 2016, Pub. L. No. 114-53, § 2(g), 130 Stat. 376, 382. ("This section and the amendments made by this section shall not be construed to be a law pertaining to intellectual property for purposes of any other Act of Congress.").

4. *See* 35 U.S.C. § 101 *et. seq.* (2015).

5. *See* 17 U.S.C. § 1051 *et. seq.* (2015).

6. *See* 17 U.S.C. § 102(a) (2015).

7. On the criminal side, the misappropriation of trade secrets has been a federal crime since 1996 by virtue of the Economic Espionage Act of 1996, Pub. L. No. 104-294, § 101, 110 Stat. 3488 (codified

and given its long wait for that kind of acceptance, it might be forgiven for saying thanks, but no thanks.

Eventually, though, trade secret practitioners will find their way to federal court, if not by plaintiffs then by defendants through the removal process. And when they get there, they will find federal judges who no longer need to be worried about what the highest court in a particular state would say, as they usually must when sitting in diversity.[8] Attorneys will find judges who are free to start creating a federal common law to support trade secret litigation just as they have done in other areas, such as under Title VII of the Civil Rights Act of 1964 over the last fifty years.[9]

Congress passes spare laws, leaving the work of interpretation to the Courts. So the work of these judges will be long-term and slow moving.

The issue for these federal courts is the same issue facing the surprised parent: what are our hopes for this new addition and how might we correct the mistakes we made the last time? The answer to the first question should be simple: it should live up to its name and help trade secret owners stop theft. Their secrets might not be registrable in Washington like patents, trademarks, and copyrights are,[10] but their competitive value is no less and in some instances much more.

The answer to the second question is to decide soon what will be expected of litigants to win these cases. It has taken a half-century of litigating employment discrimination cases to determine what fundamental terms mean, starting with the word sex,[11] and whether a defendant can be liable if it makes an employment decision for more than one reason and at least one of those reasons is lawful.[12] Similarly, litigants waded through the federal courts for decades before the Supreme Court determined who can be liable for certain bad acts such as harassment.[13] Even long after Title VII's passage, it is fair to say that proving a discrimination case is neither orderly nor particularly understandable. In fact, it is a hodgepodge

at 18 U.S.C. §§ 1831-1839 and *amended* by Defend Trade Secrets Act of 2016, Pub. L. No. 114-53, 130 Stat. 376).

8. *See* Allstate Ins. Co. v. Menards, Inc., 285 F.3d 630, 633-35 (7th Cir. 2002) (applying Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)).

9. As one example of federal common law creation under Title VII, *see* Meritor Savings Bank v. Vinson, 477 U.S. 57, 72 (1986) (instructing courts to "look to [common law] agency principles" in determining the scope of employer liability in hostile environment harassment cases).

10. Indeed, "[t]rade secrets often are unpatentable." Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 497 n.3 (1974).

11. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 239-40 (1989) (interpreting "because of . . . sex" in Title VII to also prohibit employment discrimination based upon someone's "gender").

12. *See id.* at 252 (discussing the switching burden of proof in mixed-motive cases).

13. *See* 18 U.S.C. § 1836(b)(3)(A) (2015).

of proof patterns and presumptions, and it would not be unfair to call it a mess.

It does not have to be that way when it comes to federal trade secret cases. Federal courts may not have asked for this new law, and whether it has been welcomed may be disputable, but it is here now. At this point, the goal should be to raise it the right way and to avoid the mistakes learned after the passage of other major legislation.

Courts can start by giving the Defend Trade Secrets Act causation standard that makes sense and gives plaintiffs a reasonable chance to prove their cases. When it comes to damages, that means shifting the burden to the defendant to prove that the plaintiff's loss (or the defendant's gain) would have occurred anyway, even without the defendant's theft. As it presently stands and as discussed below, courts impose a "but for" causation standard that means a defendant can easily take advantage of the disruptive effects of its misappropriation. The change is simple: Where the plaintiff's loss is the natural result of the defendant's bad act, but the defendant points to other causes, it is the plaintiff who should get to say "prove it."

The new Federal Trade Secrets Act is an opportunity for federal courts to get things right the first time and avoid the mistakes that state courts have made in deciding trade secret cases. Big fixes should come first, which means admitting that the reason so many cases lose is because when it comes to causation we have it mostly wrong.

II. STRAIGHT TO THE PROBLEM

The first decision that a plaintiff typically makes in a trade secret misappropriation case is whether to try to stop the defendant immediately from disclosing or using the stolen trade secret or whether to treat the problem as a straightforward damages matter. If the disclosure or use can be stopped, and if an injury would be difficult to repair and compensate, then the plaintiff will pursue a preliminary restraining order and an injunction.[14] Proceeding quickly to stop an injury before it takes hold makes sense, but it is also risky: a judge may just as quickly decide that what the plaintiff thought was a trade secret is not one after all, in which case the plaintiff is in a worse position because it has forfeited any deterrence leverage resulting from threatening the defendant with litigation.[15]

14. *See* 18 U.S.C. § 1836(b)(3)(A) (2015).

15. For that reason, if it is not a case where the Coke formula is at risk, a plaintiff often chooses to communicate with the misappropriator in writing by sending cease and desist letters. One tactical

Because misappropriation cases often emerge gradually as a plaintiff learns more about what a defendant is doing and seeking an early injunction carries risks, a plaintiff may decide to sue for trade secret misappropriation and seek damages instead.

If the plaintiff sues, he must not only prove the existence of a trade secret, and theft of it, but also that the theft actually caused his injury. In these cases, injury takes the form of either the plaintiff's loss in profits or the unjust enrichment that the defendant enjoyed, but not both so as to avoid the problem of overcompensation.[16]

Causation is one of the first tort elements taught to law students, and it has been helpful for courts to think of misappropriation as a tort that is similar to other employment-related wrongs. But causation is difficult to prove[17] and, as it stands, it is too difficult for many misappropriation plaintiffs.[18]

A typical misappropriation case involves the following scenario: a commercial insurance agent abruptly leaves his job to work for a competitor agency and brings with him all the knowledge, including customer information, that he needs to start immediately binding insurance for his new employer.[19] The problem is that his former employer treats customer information as confidential, including the names of its commercial customers, and in addition, the employee signed a confidentiality agreement promising to treat the information as confidential both during and after his employment. After starting at the new agency, the employee sends out what he considers to be a new address announcement but his former employer considers a solicitation. The letter highlights all the things the agent can do "now" and how advanced his new employer is, which is just an indirect way of digging at his former employer and telling his former customers that he wants them back.[20]

The easy issue is whether the letter to the customers is a solicitation, which matters if in addition to confidentiality the employee signed a

advantage of sending such a letter is the following: if the misappropriation continues, then the plaintiff can argue that it was willful and malicious, which opens up the possibility of exemplary damages and recovering attorneys' fees. *See* 18 U.S.C. § 1836 (b)(3)(C)(D) (2015).

16. *See* 18 U.S.C. § 1836(b)(3)(B)(i)(I)(II) (2015).

17. Causation is a problem in insider trading cases involving misappropriation too. *See* United States v. O'Hagan, 521 U.S. 642, 675-76 (1997) (discussing a "disclose or abstain from trading" rule in the context of a proof problem).

18. *See infra* Part III.

19. *See, e.g.*, Am. Fam. Mut. Ins. Co. v. Roth, 485 F.3d 930, 933 (7th Cir. 2007).

20. *See* Am. Fam. Mut. Ins. Co. v. Roth, No. 05 C 3839, 2005 WL 3700232, at *16 (N.D. Ill. Aug. 5, 2005).

restrictive covenant that prohibited post-employment solicitation.[21] Of course it is a solicitation;[22] if it were not, it would have been sent to the employee's family and minister too.[23] But assume in this case that the former agency is able to prove that its commercial customer list is valuable and confidential, meaning the solicitation amounts to a misappropriation whether or not a non-solicitation agreement also exists.[24]

The difficult question arises when the agent's customers start leaving the former agency to sign up with him, which of course results in less money and commissions for that agency. Why did they leave? The answer to that question should tell us what caused the agency's loss. Certainly part of the reason is the agent's solicitation because the customers would not have even known to move their business without it.[25] But it is highly likely that at least for some of the customers, there were other considerations at play: they have a relationship with the agent and are loyal to him; he has moved before and he brought the customers to the former agency in the first place; and perhaps they are not pleased that the former agency has made an issue of the agent's leaving and threatened litigation, which makes them resolute to leave with him.

Sorting through multiple reasons to explain an injury is the function of a jury, so the case should not be suited for summary judgment.[26] As it stands in these cases, the defendant will argue that the plaintiff cannot prove that taking or reproducing the plaintiff's customer list was the actual

21. Whether such a covenant would be enforceable is beyond the subject of this article.

22. *See* Am. Loan Corp. v. Cal. Comm'l Corp., 211 Cal. App. 2d 515, 523-24 (1963) ("He sent letters to all those on the list as well as monthly bulletins. It would be naïve indeed to assume that the letter or bulletins were intended merely as general information.").

23. Actually, some former employees try to lessen the obviousness of the mailing by sending it to family and friends, too. *See Am. Fam. Mut. Ins. Co.*, 2005 WL 3700232, at *16.

24. Of course it's valuable, otherwise it would not have been stolen in the first place. *See id.* at *13 ("If the 1700 pages of data had no utility, they simply would not have been downloaded, copies would not have been retained, and the information would not have been used."). And its value is corroborated by the fact that the plaintiff kept it hidden from view. *See* Rockwell Graphic Sys., Inc. v. DEV Inds., Inc., 925 F.2d 174, 179 (7th Cir. 1991) ("The information contained in the drawings cannot have been worth much if Rockwell did not think it worthwhile to make serious efforts to keep the information secret.").

25. *See* Planmatics v. Showers, 137 F. Supp. 2d 616, 623 (D. Md. 2001) ("[I]n the context of a contract not to compete, it has been found that the fact of a breach accompanied by the directing of profits to the breaching party can provide the requisite casual nexus even when the injured party has no prior business relationship with the customers in dispute.").

26. *But see Id*. at 624 (granting summary judgment on breach of contract claim on basis of evidence that a "disputed customer voiced a strong objection to any future business dealings with the Plaintiff independent of any alleged breach by [Defendant]," so a reasonable jury could not find that the alleged breach "caused" Plaintiff's loss of the customer), *aff'd*, 30 F. App'x. 117 (4th Cir. 2002).

cause of plaintiff's loss. The defendant will, after all, be able to point to other possible explanations and perhaps even produce affidavits from customers explaining the reasons why they left.[27] The problem is that there can be no controlled experiment here to determine whether they would have left in the ordinary course of business without the agent's hasty solicitation and breach of his confidentiality agreement. He did in fact solicit and in so doing he has in effect tampered with the crime scene. The burden to prove one cause for its loss (the agent's solicitation) and also to disprove all other causes (loyalty or friendship to the agent, for example) becomes an impossible one for the plaintiff.

III. IN SEARCH OF DIRECT EVIDENCE

In fact, many damages cases die at the causation stage. Sometimes the reason is that the one true cause is simply untraceable under the circumstances. Take the case of Nancy Harris' late husband, who worked around asbestos for years before dying from lung cancer.[28] She sued one of the makers of the asbestos, Owens-Corning, but numerous other companies also manufactured asbestos-containing insulation. In addition, Harris worked around other asbestos products, some of which produced dust.[29] It was certainly possible that Harris developed cancer from Owens-Corning products, but it was also possible that it came from something else, which made the odds evenly balanced at best. That was enough for the Seventh Circuit to affirm summary judgment in favor of Owens-Corning. The court held that, "When, at best, the possibilities are evenly balanced, the court should enter judgment for the defendant on the ground that causation cannot be proved."[30]

In some respects, trade secret misappropriation cases are even harder to prove than Nancy Harris' case. In Harris' case, all of the possible explanations for her husband's death pointed to a wrongful act (asbestos dust in the air). In the misappropriation case described above, only one reason is wrongful (taking the customer list) while the other possible explanations are legitimate. In *PFS Distribution Co. v. Raduechel*, two managers left their employer, a food distributor, and started their own

27. *See, e.g.*, Hearn Insulation & Improvement Co. v. Bonilla, No. AW-09-990, 2010 WL 3069953, at *8 (D. Md. Aug. 5, 2010) (denying claim for lost profits in part on basis of affidavit from customer explaining reasons it stopped working with contractor-plaintiff, in particular that it had become dissatisfied with plaintiff's quality of work).

28. Harris v. Owens-Corning Fiberglas Corp., 102 F.3d 1429, 1431 (7th Cir. 1996).

29. *See id.*

30. *Id.* at 1433.

competing company after they were unhappy with their new salary offers and the time it took to receive them.[31] Within a month, two of their largest customers at their old job started buying poultry from their new company. What followed was predictable: their former employer sued for misappropriation of trade secrets and numerous other claims.[32]

After the district court granted partial summary judgment to the plaintiff on the misappropriation claim (and also found the managers breached their fiduciary duties), the issues for the jury were causation and damages.[33] The jury returned a verdict for the managers and specifically found that the misappropriation was not the proximate cause of any losses experienced by the plaintiff. The Eighth Circuit affirmed and, citing trial testimony, pointed to other possible causes for the losses. Among them were quality issues with the plaintiff's chicken; one customer would have followed one of the defendants anywhere (a loyalty issue); and the defendant's decision to slow-walk the managers' new salary offers.[34] Two of these reasons pointed the finger squarely at the plaintiff and suggested that its injuries were self-inflicted.

The result in *PFS Distribution* is not unusual in misappropriation cases and can even be called ordinary. It played out according to form in a California case, *Aerotek, Inc. v. Johnson Group Staffing*, in which an account manager for the plaintiff, a staffing company, quit and thereafter took a job with a competitor.[35] Once at his new job, he visited a number of companies, including three former customers identified simply as Companies A, B, and C. At trial, the account manager claimed that the visit was not a solicitation, but agreed that its purpose was to make "an announcement in general" and to provide a chance for the companies to offer him business.[36] The parties stipulated that the former employer's customer list was a trade secret; in addition, the manager had signed a nondisclosure agreement that prohibited him from revealing the customers' names.[37]

Apparently the timing of the manager's departure and his personal visits to Companies A, B, and C were not enough to persuade the trial court that he had solicited them.[38] And representatives for two of the companies

31. 574 F.3d 580, 587 (8th Cir. 2009).
32. *Id.*
33. *PFS Distribution Co.*, 574 F.3d at 587.
34. *See id.* at 590.
35. No. C 070832, 2014 WL 1978016, at *3 (Cal. Ct. App. May 13, 2014).
36. *Id.* at *3.
37. *See id.*
38. *See id.* at *6 (referencing Aerotek's attempts to show solicitation).

testified that they did not want to work with the man hired to replace him. So there was a good reason for the jury to conclude the plaintiff could not prove that any misappropriation of the customers' identities caused the plaintiff any loss (in fact, the plaintiff's expert's calculations were based on faulty assumptions and bad information).[39]

The misappropriation claim was undeniably weak, but it is concerning that the California Court of Appeal made it a point that "[plaintiff] did not call as a witness a single representative of any company for which it alleged misappropriation."[40] When the plaintiff tried to get hearsay evidence in through its own witness, the district court jumped on the attorney:

> *The Court*: I have to interrupt you to ask for, what is it, the fifth time, why don't you bring in [Customer C] or [Customer A] or [Customer B] or whoever else has been the hearer of . . . said solicitation?
> *Plaintiff's Attorney*: Well, Your Honor, I'm entitled –*The Court*: Why don't you do that?
> *Attorney*: I am entitled to put on the case that my client wants to put on and –
> *The Court*: You are entitled to put it on with the rules of evidence. Just because your client wants it in the record does not mean it is going in.[41]

Of course it is true that hearsay evidence in the nature of "what did the customer give as its reason for leaving" is inadmissible in these cases.[42] At another point in the same trial, the plaintiff's lawyer made the same mistake and the court again called for the customers:

> *Q.* [From Plaintiff's counsel to its own company witness]: [C]an you characterize for me how those conversations went?
> *Defendants' counsel*: Objection.
> *The Court*: [Counsel], what is it that I have to tell you to get you to leave this area of inquiry. I have said you can't bring to this jury out of court statements. Those customers are not

39. *See id.* at *10 (noting that trial court found the expert testimony to be "an embarrassment" on the issue of lost profits).

40. *Aerotek, Inc.*, 2014 WL 1978016 at *6.

41. *Id.*

42. *See* FED. R. EVID. 801(c) (defining hearsay as a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement).

> here in front of us. You could have subpoenaed those customers . . . and put them here on the stand and everybody could have been listening to them and then they could have been cross-examined. Absent that, having declined to do that, you can't bring it in through some other witness.
>
> You can't do it by what they said, what they looked [at], how they felt, how he felt, how – what the generic – where are you going with this, [Counsel]? I am ordering you to leave this area of inquiry because there is nothing that you can bring in that is allowed by the hearsay rules of evidence.[43]

The trial court was correct on the issue of hearsay. But both the trial court and the plaintiff's lawyer appear to be calling for direct evidence of causation when such evidence is almost always lacking.[44] The jury found no misappropriation or violation of the nondisclosure agreement had taken place. The trial court sanctioned the plaintiff by awarding the defendant attorney's fees. The trial court also found it important that the plaintiff and its lawyers never "sought out the customers in question" to find out why they had stopped doing business with the plaintiff.[45] The reasons ranged from a business downturn to one of the customers moving from the area.

Without direct evidence of causation, plaintiff may lose on appeal even after winning lengthy trials. Indeed, in *Hunter Buildings & Manufacturing v. MBI Global*, a Texas appeals court reversed a $4.4 million verdict against corporate defendants and two former officers of a building manufacturer even though the jury found the defendants misappropriated plaintiff's trade secrets.[46] The appeals court principally objected to expert testimony in support of the damages award. The plaintiff called only one expert to support its claim of lost profits; he calculated a loss of over $26 million but he could not tell the jury precisely

43. *See Aerotek, Inc.*, 2014 WL 1978016, at *6.

44. *See* First Fin. Bank v. Bauknecht, 71 F. Supp. 3d 819, 845 n.8 (C.D. Ill. 2014) ("Plaintiffs in trade secret cases most often rely upon 'a web of perhaps ambiguous circumstantial evidence' of misappropriation rather than 'convincing direct evidence'" quoting PepsiCo., Inc. v. Redmond, No. 94 C 6838, 1996 WL 3965, at *15 (N.D. Ill. Jan. 2, 1996)). These cases are similar to conspiracy cases, which are often "purposely shrouded in mystery" and where direct evidence is rare because most of the "necessary information" to prove a case "is within the knowledge and control of the defendant and unknown to the plaintiff." *See* Adcock v. Brakegate, 164 Ill.2d 54, 66 (1995).

45. *See Aerotek, Inc.*, 2014 WL 1978016, at *7.

46. 436 S.W.3d 9, 23 (Tex. App. 2014).

why some projects were won and some projects or accounts were lost.[47] According to the expert, it would have been difficult to tie the lost- profits calculation to specific contracts that were lost because there was a "disrupted market after the events," which the appeals court stated was "apparently a reference to the conduct alleged in [plaintiff's] petition."[48]

A further problem was that the before and after periods included some acts by the defendants that were not unlawful; mixing lawful and unlawful acts together before calculating lost profits does not answer the real question, which is how much the unlawful acts alone cost the plaintiff.[49] That may seem to be an impossible task for an expert because it is, but it did not stop the appeals court from distinguishing a case where "the trial court awarded [plaintiff] lost profits from a single client and there was direct evidence that the client specifically indicated it would no longer be working with [plaintiff] because of [defendant's] involvement with one of that client's competitors."[50]

When federal courts take the lead in deciding trade secret misappropriation cases, they should rule out the notion that a plaintiff needs direct evidence of causation, either through expert testimony or lost customers, to prove its case.[51]

IV. LOOKING TO CONTRACT LAW FOR HELP

It may be more appropriate to treat misappropriation of trade secrets as closer to a breach of contract claim than a tort. Many misappropriation cases also involve breach of contract claims because the former employee is accused of violating a confidentiality or non-solicitation agreement.[52] But even if they did not, misappropriation disrupts an implied contract

47. *Id.* at 18-21.

48. *Id.* at 19.

49. *Id.* at 20.

50. *Hunter Bldgs. & Mfg.*, 436 S.W.3d 9, at 22 n. 21.

51. Direct evidence is a common term in employment law after *Price Waterhouse*, at 275-79 (1989). But the Court did not define the term "direct evidence." Federal Courts have in general set the bar very high. *See* Damon v. Fleming Supermkts of Fla., Inc., 196 F.3d 1354, 1359 (11th Cir. 1999) (giving an example of direct evidence as "fire Earley – he is too old"); *see also* Hasham v. Cal. State Bd. of Equalization, 200 F.3d 1035, 1044 (7th Cir. 2000) (giving as an example a supervisor's statement, "I did not promote you because of your national origin").

52. *See* Alan J. Tracey, *The Contract in the Trade Secret Ballroom – A Forgotten Dance Partner?* 16 TEX. INTELL. PROP. L.J. 47, 69 (2007) ("It is common for an information owner to use a contract to identify and protect trade secret information. When the information is used in conflict with the contract, then the contract may be used as the basis for both a trade secret claim and a breach of contract action.").

between an employer and employee even if it is not intentional.[53] At a minimum, the implied contract is an agreement not to steal.[54]

An additional reason to treat these cases as quasi-contractual: causation is easier to prove in those cases. For most courts, a tort requires proof of proximate cause, which includes "but for" causation,[55] and it is not easy to prove. Consider an employment law case where an employer gives two reasons behind its decision to fire an older employee with poor computer skills: the lack of skills and a bias that older employees are less likely to ever be as good with computers as younger employees.[56] It sounds like a reasonably strong case, but the plaintiff still loses unless she can prove that the employer would not have fired her if she had been younger and equally unskilled.[57] In other words, her age must be the real, "but for" reason for her employer's decision, as in the one that tips the balance against her.[58] (That is not true in Title VII discrimination cases, which only require evidence that one of the reasons was unlawful even if it was not the most important reason.)[59]

When misappropriation is seen as a breach of contract, the discussion of damages is entirely different. Take the case of Merritt Lane, an accountant who signed a four-year non-solicitation agreement with his new employer, which had purchased his old one.[60] Only four months later, he opened up his own competing accounting service in the same building and sent over 100 letters to his former clients.[61] In the letters, he included his fee schedule, a letter to engage him, and a disengagement letter for the

53. *See id.* at 65 ("Before the UTSA came into effect courts frequently relied upon a contract, either express or implied, to afford trade secret protection to information.").

54. *See* Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 438 (7th Cir. 1987) ("Employment creates occasions for opportunism" and "[o]ne term implied in every written contract and therefore, we suppose, every unwritten one, is that neither party will try to take opportunistic advantage of the other.").

55. *See* Ciomber v. Coop. Plus, Inc., 527 F.3d 635, 640 n.1 (7th Cir. 2008).

56. Employment cases are similar to misappropriation cases in the sense that there is usually more than one reason behind an employer's job action against an employee, just as there is usually more than one reason that explains why a business has lost customers.

57. *See* Gross v. FBL Fin'l Servs., Inc., 557 U.S. 167, 174 (2009).

58. *Id.* (explaining that under the ADEA, the key is which of the employer's reasons had a determinative influence).

59. *See* 42 U.S.C. § 2000e-2(m) (codifying the mixed motive or motivating factor standard).

60. *See* Totaro, Duffy, Cannova & Co., LLC v. Lane, Middleton & Co., LLC, 2006 WL 4543337, at *2 (N.J. Super. Ct. App. Div. Feb. 27, 2006), *aff'd in part and rev'd in part*, 921 A.2d 1100 (2007).

61. *See Totaro*, 2006 WL 4543337, at *2. (Lane identified his clients by using his employer's software and then obtaining copies of its client list, which he did without his employer's approval. It may not have been necessary: "Ironically, Lane had most of his client names available to him in his Quick Books program created prior to the merger" between his old and new employer.).

clients to send to his former employer.[62] The communications worked and within a few weeks his former employer received 159 of these disengagement letters.[63]

Lane's former employer sued him for breach of contract but the evidence at trial heavily favored Lane on the causation issue. Approximately twenty-five clients testified similarly: they stayed with Lane because of continuity, their personal relationship with him, and dissatisfaction with his former employer's services.[64] Several testified that they did not even remember receiving Lane's solicitation. Both parties stipulated that the testimony and experiences of other clients would be substantially the same if they were called to testify.[65]

There could be no dispute that Lane violated his non-solicitation agreement.[66]

But how could there be any damages? The clients who testified stated they were not induced to move by Lane's solicitation packet. As the appellate court stated, "there appears at least at first blush to be no rational basis from which to link Lane's breach of contract to quantifiable damages sustained by [plaintiff]."[67]

Nevertheless, the appellate court upheld the damages awarded by the trial court and even agreed that Lane's former employer had been "unquestionably economically injured" by his actions.[68] It explained: "The close temporal proximity between the mailing of the solicitation letters and [plaintiff's] receipt of 159 *Lane-crafted* disengagement letters, is sufficient evidence to infer that, had there been no interference, plaintiff would have received the economic benefit of servicing these clients."[69]

Though the Supreme Court of New Jersey reduced the damages award to only one year, it agreed with the trial court and appellate court that the key to the case was its grounding in contract, not tort.[70] Proximate cause,

62. *Id.*

63. *See id.*

64. *Id.*

65. *See id.* at *3. (Parties can stipulate over any facts, which makes them proven). *See* H. Hackford & Co. v. United States, 197 U.S. 442, 447 (1905) ("We think the parties were entitled to have this case tried upon the assumption that these ultimate facts, stipulated into the record, were established, no less than the specific facts recited.").

66. *See Totaro*, 2006 WL 4543337, at *3 ("The trial court's conclusion [that Lane breached his agreement] is amply supported by competent credible evidence.").

67. *Totaro*, 2006 WL 4543337, at *3.

68. *See id.*

69. *See id.* (emphasis unchanged).

70. *See Totaro*, 191 N.J. at 12.

the Court stated, is a matter of tort law.[71] The Court quoted from the well-known English case, *Hadley v. Baxendale*, which stated that contract damages "should be such as may fairly and reasonably be considered as either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the beach of it."[72] For the Court, that meant Lane lost even if the testimony was overwhelming that his customers would have left anyway, so long as their leaving was a "natural and probable" (not but-for) consequence of the solicitation letter.[73] Maybe Lane's clients would have found him on their own, but that is the way it is supposed to be in these cases: "the issue is not whether the clients would have left eventually, but whether they would have left when they did."[74]

The point is that in misappropriation cases involving solicitations or breaches of confidentiality, there will always be multiple reasons for a loss in business, and many of them will have nothing to do with the defendant's breach. But they have a common denominator: the breach itself, followed by the loss in business. The amount of damages can be questioned at that point, but it is hard to imagine that the breach itself did not play a major role. One last case on this issue illustrates the point and involves a familiar fact pattern. In *Ohrn v. JP Morgan Chase & Co.*, a banker left JP Morgan to work for Wells Fargo but was restricted by a valid non-solicitation agreement and confidentiality agreement protecting customer names.[75] Nevertheless, once at his new employer, the banker "announced" his new position by mailing a postcard from Wells Fargo to 500 Chase customers.[76] He provided Wells Fargo with these customers' names and addresses, which he knew from his work at JP Morgan.[77]

The federal district court found that the banker breached his agreement and rejected the argument that evidence of causation was lacking. There was no need for expert testimony (or even non-expert), the Court stated; noting that this was not a products liability case, nor a medical case in which the "final cause" of a disease is important.[78] The Court saw it as a simple contracts case, and the breach combined with the

71. *Id.*
72. *Id.* at 13 (*quoting* Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (1854)).
73. *See id.* at 15.
74. *Id.* at 16.
75. No. 13-80136-Civ., 2014 WL 3809181, at *5 (S.D. Fla. Aug. 1, 2014).
76. *See id.* at *2.
77. *Id.*
78. *See id.* at *6.

fact that "millions of dollars of customer accounts were transferred to Wells Fargo within six months after Plaintiff resigned . . . permits the reasonable conclusion that the breach of the Agreement by Plaintiff caused Defendants' damages."[79]

So the proper approach to damages in these misappropriation cases is to ask whether they naturally flow from the defendant's bad act, even when other reasons also play a role, however large.[80] In fact, it may be an impossible burden for a plaintiff to prove "but for" causation in these cases.

It is possible that a former employee's customers had other, legitimate reasons (loyalty, desire for continuity, displeasure with service) to follow him to his new job, and that those reasons would have caused them to do so even without solicitation. But we will never know in the same way that we cannot know if a physician who failed to diagnose a patient's serious illness really shortened her life. She might have died anyway, even with the correct diagnosis.[81] Back to the lost customer case: perhaps if the plaintiff produced testimony from every single former customer, who testified that the solicitation caused their decision to make a move, the testimony would be conclusive. But the plaintiff should not need to produce conclusive evidence of that sort.[82]

V. SHIFTING THE BURDEN

It may be helpful to think of causation in these cases as "probabilistic,"[83] which is to say that the plaintiff probably but not necessarily caused the defendant's loss. "Probably" is enough, as we can see from the way courts approach causation in other business cases. Consider the case in which bidders for tax liens at a county auction cheat

79. *Id.*

80. There may be more than one proximate cause for an injury. *See* Bentley v. Saunemin Twp., 83 Ill. 2d 10, 16 (1980).

81. This is Judge Posner's point in *BCS Services Inc. v. Heartwood 88, LLC*. *See* 637 F.3d 750, 758 (7th Cir. 2011) ("Otherwise how could a person obtain a judgment for medical malpractice based on a failure to diagnose a disease that proved fatal but had it been diagnosed earlier might have been cured?").

82. The very nature of the civil standard (preponderance of the evidence) rules out conclusive proof. *See generally* John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 67 FLA. L. REV. 1569, 1573 (2015) (noting that California has "devoted much attention to its jury instructions [and] has adopted what may be the clearest and simplest formulation: 'A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not,' adding that the jury should consider all the evidence, and that the reasonable doubt standard does not apply to civil trials.").

83. *See BCS Servs., Inc.*, 637 F.3d at 758.

by flooding the room with too many bidders, meaning they have more arms in the air when the auctioneer decides who won the right to pay the delinquent taxes on a property and in exchange receive the county's lien.[84] The property owner either pays the back taxes to the new lien holder or the holder can obtain a tax deed on the property, thereby becoming the property's owner. Because some property owners cannot pay the back taxes, winning at the auction can be very profitable later on.[85]

What if the "bids" are not really competitive at all because most of the bids are the same: they agree to pay the full amount of the back taxes in exchange for the lien with no reduction. In that case, the auctioneer has no real basis to choose one hand in the air over another, especially when they are raised quickly and at the same time.[86]

Flooding the rooms with extra hands should result in more "winning" bids, albeit by cheating.[87] The odds are very small that the cheating would have no effect on the other bidders, especially when it can be proven that they make bids on the same liens as the cheaters, who win over 40% of the time when they have four times as many hands in the air (13) than they should have (3).[88] It is possible the plaintiff-bidders in this case would not have won some of the bids anyway, even if the defendants had not cheated.

For example, the plaintiffs might not have been noticed by the auctioneer (randomness), or might have been slow to raise their hands, but the Seventh Circuit asked: "How likely is it that they lost *no* bids to bidders who had 13 arms in the room but should have had only three?"[89]

The same question can be asked in misappropriation cases dealing with customer lists and unlawful solicitations: Yes, it is possible that some customers would have left anyway or moved their business for legitimate reasons and in those cases the plaintiff may have no one but itself to blame, but how likely is it that the former employer lost no business at all due to the breach? It would be one thing if the numbers in that case were small (few customers solicited, little business moved), but in many of these cases hundreds of customers are solicited and millions of dollars are moved.[90]

There may still have been a chance to keep the customers, or even win them back, but those are arguments about mitigation and not causation. As

84. *See id.* at 752-53.

85. *See id.*

86. *See id.* ("How is the auctioneer to pick the winner in such a case? It's difficult!")

87. *Id.*

88. *Id.* at 760.

89. *Id.* at 758.

90. *See, e.g.*, *Ohrn, JP Morgan Chase & Co.*, No. 13-80136-Civ., 2014 WL 3809181, at *5 (S.D. Fla. Aug. 1, 2014).

the Seventh Circuit stated, "Once a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, he has done enough to withstand summary judgment on the ground of absence of causation."[91] Indeed, he has done enough to win at trial too, as the same evidentiary standard applies no matter what stage the litigation is in after the complaint.[92]

A major problem in these cases is when the defendant seeks to confuse causation with the other possible reasons for the plaintiff's injury. In essence, the defendant in a misappropriation case is saying "no harm, no foul" when pointing to other reasons for the plaintiff's losses.[93] In the case of an unlawful solicitation or misappropriation, the main alternative reason may be allegiance to the former employee.[94] Or it could be distrust of a business that would seek to impose a restriction on a former employee. Or it could be both reasons, and several others that are only limited by one's imagination.[95]

But a plaintiff in these cases should not be asked to "prove a series of negatives" or "positively exclude every other possible cause" of his injury.[96] Indeed, once the plaintiff has established one unlawful reason for his loss, the burden should shift to the defendant to prove that the same loss

91. *See BCS Servs*., 637 F.3d at 758.

92. *See* Mayer v. Gary Partners & Co., Ltd., 29 F.3d 330, 335 (7th Cir. 1994) ("We now adopt the federal reasonable-person standard across the board: pre-trial, mid-trial, post-trial, and on appeal, for evaluating both the merits and quantum of relief.").

93. The "no harm, no foul" standard sounds close to the notion of harmless error. But at least in criminal cases when a court reviews a district court's jury instructions for harmless error, the burden is on the state, not the appellant. In other words, the defendant is not expected to prove that he would not have been convicted but for the error. Rather, the burden is on the state to prove that he would have been convicted anyway. *See* Chapman v. California, 386 U.S. 18, 26 (1967) ("[I]t is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to the petitioner's convictions.").

94. Individuals are free to compete against their former employers, of course, so long as they do not start doing so while they are still employed. *See* RKI, Inc. v. Grimes, 177 F. Supp. 2d 859, 877 (N.D. Ill. 2001); *see also* Veco Corp. v. Babcock, 243 Ill. App. 3d 153 (Ill. App. Ct. 1993). And competition, without some breach of a fiduciary duty, is a "boon to society" even though it is also often "ruthless, unprincipled, uncharitable, unforgiving." Composite Marine Propellers, Inc. v. Van Der Woude, 962 F.2d 1263, 1268 (7th Cir. 1992) (the counterbalance to the "moral shortcomings" of a former employee is "to obtain no-competition agreements.").

95. For a discussion that covers the common causation arguments in business cases, see Testosterone Replacement Therapy Prods. Liability Litigation Coordinated Pretrial Proceedings, Med. Mut. of Ohio v. Abbvie, Inc., No. 14 C 8857, 2016 WL 427553, at * 10-14 (N.D. Ill. Feb. 5, 2016).

96. *See BCS Servs.,* 637 F.3d at 757.

would have occurred in the absence of, or "but for," the unlawful act.[97]

A. SHIFTING THE BURDEN IN OTHER CASES

Shifting the burden of proving causation would be new to misappropriation cases but not new in the law:

1. Discrimination Cases

Burden-shifting has been the method of proof in employment law cases for years.[98] Once a plaintiff has established that race, color, sex, religion, or national origin was a motivating factor (not the only factor) in an employment decision, he has established an unlawful employment practice.[99] He is not required nor expected to rule out other reasons for the employer's decision, of which there might be several.[100] Still, he would collect no money damages if his employer can prove that it would have taken the same action in the absence of the impermissible motivating factor.[101] In that case, the plaintiff can collect his attorneys' fees and a reinstatement order, but nothing else.[102] The important point is that it is the defendant, not the plaintiff, who bears the burden to prove that its unlawfulness did not matter anyway.[103]

97. As explained below, this approach does not conflict with the "common law's universal requirement that the tort plaintiff prove causation," or, put even more bluntly: "No hurt, no tort." Bastian v. Petren Res. Corp., 892 F.2d 680, 684 (7th Cir. 1990).

98. The burden shifting can be dated to the Supreme Court's decision in *Price Waterhouse v. Hopkins*. *See* 490 U.S. 228, 258 (1989). In *Price Waterhouse*, a plurality of the Court decided that a plaintiff could prevail on a discrimination claim if she could show that the protected characteristic was a "motivating" or "substantial" factor in the employer's decision, in which case the burden of persuasion would shift to the employer, which could escape liability if it could prove that it would have taken the same employment action in the absence of all discriminatory animus. *Id.* at 258. Two years after *Price Waterhouse*, the Supreme Court passed the Civil Rights Act of 1991, which "substituted a new burden-shifting framework for the one endorsed by Price Waterhouse." *See* U. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2526 (2013). Under the 1991 Act, an employer's proof that it would have taken the same action saves it from money damages but not a finding of liability.

99. 42 U.S.C. § 2000e-5(g)(2)(B) (2015).

100. The 1991 Civil Rights Act explicitly states that a motivating factor of race, color, religion, sex, or national origin is unlawful "even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

101. 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (2015).

102. 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2015); *see also Nassar*, 133 S. Ct. at 2526.

103. *See Nassar*, 133 S. Ct. at 2526.

2. Corporate Law

In cases in which directors are sued for breaching their duty of loyalty, they typically rely on the business judgment rule, which is a presumption that their decision was made in good faith.[104] But the presumption can be rebutted by proof of a breach of a fiduciary duty.[105] In that case, the burden shifts to the defendant-directors to establish that their decision was fair despite their breach, which it would be if it caused the plaintiff no damages.[106] Shifting the burden to prove causation in that circumstance is not "heresy"[107] any more than it is in employment discrimination cases,[108] and any more than it would be in misappropriation cases.

One might argue that the burden shift in employment law is statutory, and it is true that aspects of the business judgment rule are also codified.[109] But the Supreme Court introduced shifting the burden to prove causation in employment cases before Congress formalized it.[110]

3. Trusts

Under the common law of trusts, "in matters of causation, when a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach."[111] For this reason, courts have held that defendants in ERISA and other employment laws, such as the Labor Management Reporting Act, bear the burden of proving that their breaches of fiduciary duties did not cause loss to the plaintiff.[112] So there can be no suggestion that a federal court would not be able to find support in the common law for shifting the burden in misappropriation cases.

In fact, breach of fiduciary duty claims are often brought alongside trade secret misappropriation claims because they are close cousins. An employee who steals a company's trade secrets has likely breached his

104. CDX Liquidating Tr. v. Venrock Assoc., 640 F.3d 209, 215 (7th Cir. 2011).

105. *Id.*

106. *Id.*

107. *Id.* at 217.

108. *Id.*

109. *See* MODEL BUS. CORP. ACT §§ 8.30-8.31 (AM. BAR FOUND. 2003).

110. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 292 (1989) (referring to a "Price Waterhouse" instruction).

111. Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 362 (7th Cir. 2014) (quoting RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. f).

112. *See id.* (listing cases).

fiduciary duty of loyalty,[113] and even if he has not, he has taken advantage of his position of trust and done a bad act. That is the essence of the type of claim in which courts shift the burden.

4. Wage and Hour Cases

A prime example of burden shifting exists in wage and hour cases litigated under the Fair Labor Standards Act.[114] In these cases, the precise number of hours a plaintiff worked can be critical to the issue of wages, overtime, and damages. The employer is in a better position to know the number, along with the nature of the work, than an employee is.[115] Moreover, by the time the employee would know enough to dispute the amount she has been paid, which she would not know until she is actually paid, it would be too late to make a record of her hours or document them in real time. For these reasons, "once an employee proves he or she 'has in fact performed work' that was improperly compensated, and presents enough evidence to allow an inference as to the amount of this work, the burden shifts to the employer to prove the precise amount of work performed or to negate the inference drawn from the employee's evidence."[116] Any other result would be backwards[117] as it would punish

113. Under many state laws, which are modeled on the Uniform Trade Secrets Act, that overlap means the fiduciary claim is preempted or displaced by the trade secrets claim. *See generally* Robert C. Denicola, *The New Law of Ideas*, 28 HARV. J.L. & TECH. 195, 213-14 (2014) (discussing how the fiduciary duty claim is preempted if it is another attempt at complaining about the misappropriation); *see also* Composite Marine Propellers, Inc. v. Van der Woude, 962 F.2d 1263, 1265 (7th Cir. 1992). But some courts make the mistake of tying the two claims together. A defendant does not get to steal information just because it is not secret any more than it can steal office equipment. *See* Hecny Trans., Inc. v. Chu, 430 F.3d 402, 404 (7th Cir. 2005) ("If Hecny had put its customer list on its web site for the world to ogle, that would not have permitted its managers to go into covert competition using Hecny's own depot and staff, or to walk off with computers and fax machines, as Hecny alleges Chu did."). In addition, the fiduciary duty claim should not be preempted at all by any post-employment misappropriation because a typical employee's fiduciary duty ends once the employment is over. Jostens, Inc. v. Kauffman, 842 F. Supp. 352, 354 (C.D. Ill. 1994).

114. Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et. seq.* (2012).

115. The employer has a statutory duty to keep such records. *See* 29 C.F.R. 516.2-516.6.

116. Amaral v. Cintas Corp. No. 2, 163 Cal. App. 4th 1157, 1189 (Cal. Ct. App. 2008) (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946), *superseded in part by statute*, 29 U.S.C. §§ 251-62 (2015), *as recognized in* Integrity Staffing Sols., Inc. v. Busk, 135 S. Ct. 513, 516-17 (2014)).

117. It would be simpler if Congress amended the FLSA to codify this sensible burden-shifting. By contrast, sometimes a statute contains burden shifting even when it makes little sense. Consider an obscure Illinois Drainage Code that shifts the burden to objector-plaintiffs once the drainage district commissioners vote to increase the fee paid by taxpayers. In that case, the objectors must produce

the employee for her employer's shoddy records and enable the employer to get away with not paying an employee what she earned.[118]

5. Legal Malpractice Cases

The burden of proof also shifts in professional negligence or malpractice cases. Imagine a case in which an attorney fails to preserve his plaintiff's automobile after a wreck.[119] His negligence means that she cannot prove the car was defective, so it is impossible for her to prove her products liability case.[120]

But would she have won anyway? A better way to phrase it is this: we don't know whether she would have won if she still possessed the car; maybe there were other reasons against her that would have defeated her claim, in which case the lawyer's negligence resulted in no real injury or damages. But we do know for certain that without the car she must lose. In that case, it is reasonable to shift the burden to the lawyer to prove that she would have lost in all events.[121] Otherwise, the attorney's destruction leaves her with no remedy whatsoever because it has killed off both her claims: the products liability case and the negligence claim against him.[122]

6. Trade Secret Cases

Even in trade secret cases it is not unheard of to shift the burden. Consider the case where a plaintiff points to evidence that a defendant had access to secret product designs, perhaps because they were considering a joint venture.[123] If the defendant then produces the same design but claims it was accomplished through reverse engineering, then a court has held that

evidence to rebut the commissioner's decision, perhaps by showing that the fee increase is too much or that what the commissioners would do with the fee is too risky. But if they cannot prove their objection has merit, then commissioners who must petition the court for the fee increase win simply because their say-so is treated as a "prima facie case." *See* Upper Salt Fork Drainage Dist. v. DiNovo, 904 N.E.2d 84, 95-96 (Ill. Ct. App. 2008). That's much stronger footing than a plaintiff in a federal discrimination case enjoys. In the discrimination case, an unrebutted prima facie case does not require a verdict in her favor. She still has to prove discrimination.

118. *See Anderson*, 328 U.S. at 688 (noting that the burden shifting is also fair because in an unpaid wage case "damage is . . . certain" and the "uncertainty lies only in the amount of damages").

119. *See e.g.*, Galanek v. Wismar, 68 Cal. App. 4th 1417, 1425-26 (Cal. Ct. App. 1999).

120. *Id.*

121. *Id.*

122. *Id.* at 1426.

123. *See* Bolt Assoc., Inc. v. Alpine Geophysical Assoc., Inc., 365 F.2d 742, 749 (3rd Cir. 1966).

it has the burden of proof to show independent development.[124] That's true whether or not the a court treats the independent development argument as an affirmative defense,[125] and it is also true if the defendant says it actually followed the design specifications of a third party who also had access to it. In that case, the defendant should prove that both its and the third party's designs were "free from misappropriation" because they each had access to a trade secret in "high confidence" and "to hold otherwise would leave a door open for an entrusted party to make a plaintiff's proof problems insuperable through the collaboration of a third party."[126]

7. Sanctions

Lawyers themselves are sometimes on the receiving end of burden-shifting in the form of sanctions. A court always has the inherent authority to sanction lawyers for misconduct,[127] but as a general rule it is not to be done without notice and an opportunity for the lawyer to be heard.[128] It is called a "rule to show cause,"[129] and under the rule the lawyer must prove a negative: that he should not be sanctioned for his conduct.[130] Sometimes the court goes ahead with the sanction, sometimes not. But in either case, the burden is on the lawyer, who is like a defendant

124. *See id.*; *see also* Droeger v. Welsh Sporting Goods Corp., 541 F.2d 790, 793 (9th Cir. 1976) ("[D]isclosure of the [trade] secret to the defendant, followed by manufacture of a closely similar device by the defendant, shifts to the defendant the burden of going forward with evidence to prove, if it can, that it arrived at the process by independent invention.").

125. *But see* Sargent Fletcher, Inc. v. Able Corp., 110 Cal. App. 4th 1658, 1669-70 (Cal. Ct. App. 2003) (court would not shift the burden to defendant but it "acts at its peril" if it fails to produce its own evidence of independent development and noting that improper use and independent development are simply "opposite sides of the same coin"). *See also* Moore v. Kulicke & Soffa Inds., Inc. 318 F.3d 561, 568-69 (3rd Cir. 2003) (noting "no consensus on the issue" of who has the burden to prove independent development and also "not[ing] that the authors of the major treatises dealing with trade secret misappropriation come to different conclusions").

126. *See Bolt Assoc.*, 365 F.2d at 749 (referring to the defendant's burden as a heavy "burden of persuasion," not just a burden of production).

127. *See* Methode Elec., Inc. v. Adam Tech., Inc., 371 F.3d 923, 927 (7th Cir. 2004) ("Rule 11 has not robbed the district courts of their inherent power to impose sanctions for abuse of the judicial system."). *See* Chambers v. NASCO, Inc., 501 U.S. 32, 49 (1991).

128. *See Methode Elec.,* 371 F.3d at 928.

129. *See* Carr v. O'Leary, 167 F.3d 1124, 1128 (7th Cir. 1999); *see also* FED. R. APP. P. 38 (frivolous appeal may result in sanctions, including awarding double costs to the appellee, in which case the court may issue an order to show cause; *see In re* Messina, 437 Fed. App'x. 478, 480 (7th Cir. 2011)).

130. *See Carr*, 167 F.3d at 1128 ("We shall therefore issue to the attorney general's office a rule to show cause why the authors of the brief should not be sanctioned for unethical advocacy.").

in the matter.[131]

8. Some Tort Cases

As a further example of shifting the causation burden, defendants often confuse the causation issue (either intentionally or not) by arguing that the plaintiff's own actions, or other external factors such as market conditions, are the real causes for the plaintiff's loss. They say these are supervening causes, but really they are not. Supervening causes come after the initial culpable act and usually culpable themselves. When a truck leaks gasoline and a plaintiff is injured after a lighted match is dropped into the pool of gasoline formed from the leak, the second event is supervening and it makes the plaintiff's injury unforeseeable and dooms his claim.[132] In fact, the defendant in a misappropriation case is really proposing alternative or joint causes for the plaintiff's loss. But it would not matter if the causes were treated as supervening because in those cases the burden of proving the cause is also on the defendant, not the plaintiff.[133]

9. Patent Cases

There is one final comparison that is helpful so the complaint cannot be made that any burden-shifting in these cases would be unprecedented. Patent cases often involve similar issues of causation; indeed, when it comes to lost profits in patent cases, the real question is: "had the infringer not infringed, what would the patentee holder-licensee have made?"[134] As the Court of Appeals for the Federal Circuit stated, "[t]his surely states a 'but for' test."[135] But burden-shifting occurs after the plaintiff in a patent case establishes demand for its product, a capability to exploit the demand, its profit, and the absence of non-infringing substitutes.[136] In that case,

131. *Id.*

132. *See* Scottsdale Ins. Co. v. Subscription Plus, Inc., 299 F.3d 618, 621 (7th Cir. 2002).

133. *See BCS Servs. Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 757 (7th Cir. 2011) ("In technical legal terms the burden of proving an 'intervening cause' – something that snaps the 'causal chain' (that is, operates as a 'supervening cause,' wiping out the defendant's liability, *see* RESTATEMENT (SECOND) OF TORTS § 440 (1965)) that connects the wrongful act to the defendant's injury – is on the defendant.").

134. *See* Rite-Hite Corp. v. Kelley Co., Inc., 56 F.3d 1538, 1545 (Fed. Cir. 1995), *quoting* Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 507 (1964).

135. *See Rite-Hite Corp.*, 56 F.3d at 1545.

136. *See id.* (describing the so-called "*Panduit* test" in patent cases, which is one way for a patent plaintiff to prove it is entitled to lost profit damages); *see* Panduit Corp. v. Stahlin Bros. Fibre Works, Inc., 575 F.2d 1152 (6th Cir. 1978).

courts have held that the plaintiff has established a prima facie case on the "but for" causation issue and the "burden then shifts to the infringer to show that the inference is unreasonable for some or all of the lost sales."[137]

For the patent plaintiff the wrinkle is sometimes showing the absence of substitutes, or, in other words, that it was the only other place the infringer's sales could have landed. But in so doing, it is not the plaintiff's burden to disprove every possibility, however remote. "A patentee need not negate every possibility that the purchaser might not have purchased a product other than its own, absent the infringement."[138] The "but for" standard is one based on reasonable probability.[139] Both words, 'reasonable' and 'probability,' dilute but-for causation down to simply a strong inference. Indeed, "inference" is the word the Federal Circuit has used before shifting the causation burden to the defendant.[140]

If the causation burden can shift in employment, trust, malpractice, and other IP patent cases,[141] to name a few,[142] then it can shift under the

137. *Rite-Hite Corp*., 56 F.3d at 1545.

138. *Id.*

139. *Id.*

140. *Id.*

141. In some cases, courts say that what shifts to the infringer in a patent case is the burden of production, or the burden of "going forward," not the ultimate burden of persuasion. *See, e.g*., Micro Chem., Inc. v. Lextron, Inc., 318 F.3d 1119, 1125 (Fed. Cir. 2003) (once plaintiff advances a prima facie case of lost profits, burden on infringer to show that the patentee would not have made all the diverted sales "but for" the infringement, which might happen if there were other suppliers or if the infringing supplier had two available alternatives on the market and only one was infringing; in that latter scenario, "even absent the infringement, customers may have selected the infringer's available, non-infringing alternative over the patented invention"); *see also* SEVENTH CIR. FED. CIV. JURY INSTRUCTIONS § 11.4.3.1 [hereafter FED. CIV. JURY INSTRUCTIONS] (detailing so-called "*Panduit* test" and including a Committee Comment No. 7: "The burden of proof shifts to the defendant to disprove lost sales once the patent owner introduces sufficient evidence to satisfy the *Panduit* test"; citing *Rite-Hite*, 56 F.3d at 1545). It remains to be seen whether burden shifting under *Panduit* in patent cases survives the Supreme Court's recent patent decision in *Medtronic, Inc*. *v*. *Mirowski Family Ventures, LLC*. *See* 134 S. Ct. 843, 849-50 (2014). In *Medtronic*, the Supreme Court held that the plaintiff in a patent case always has the burden of persuasion to prove infringement, even if it is the potential infringer who brings the case and seeks a declaration that it did not infringe. *Id.* The Court did allow, however, that there could be exceptions to the rule that plaintiffs always bear the burden of proof if an element of a claim is closer to an affirmative defense. And "based on considerations of fairness" the rule "does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *Id.* Under this standard, in a trade secret misappropriation case it is fair to make the defendant prove the plaintiff would have suffered the same losses absent the theft, especially when the plaintiff's lost customers are most likely now the defendant's customers, which means the defendant has more knowledge about how they became customers than the plaintiff.

142. The burden of proof shifts under the Trademark (Lanham) Act, too: "In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or

new Trade Secrets Act, too.

B. When Does the Plaintiff's Injury Occur Anyway?

For the reasons discussed above, there should be little reluctance to shift the causation burden once liability is settled and only the issue of damages remains. And there should be no hesitation at all in cases where the defendant's actions mean the plaintiff has lost exclusivity over a thing of value.[143] Say a person's option to buy a property is stolen by another.[144] Thereafter the property increases in value and the person sues over the lost opportunity.[145] There is no question about the wrongful act, but there is no guarantee that the plaintiff would have exercised his option to buy or even sell the property later at the correct time. It is hard to prove that either would have happened, which makes it particularly difficult to prove damages.[146] In that case, maybe nothing shifts to the defendant in the first place and the lost opportunity is enough for the jury to quantify.[147]

In fact, perhaps it is a mistake for the plaintiff to worry about establishing monetary damages in the first place when economic injury should be enough.[148]

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deduction claimed." 15 U.S.C. § 1117(a) (2015). Even before the Lanham Act, the Supreme Court stated that in trademark cases "[i]f it can be shown that the infringement had no relation to profits made by the defendant, that some purchasers bought goods bearing the infringing mark because of the defendant's recommendation or his reputation or for any reason other than a response to the diffused appeal of the plaintiff's symbol, the burden of showing this is upon the poacher."). Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 206 (1942), *superseded by statute*, Lanham Act, § 35,15 U.S.C. § 1117 (1946), *as recognized by* Banff, Ltd. v. Colberts, Inc., 996 F.2d 33, 35 n.1 (2nd Cir. 1993) ("To the extent that Mishawaka is inconsistent with § 35 of the Lanham Act it is no longer good law.").

143. *See* FMC Corp. v. Boesky, 852 F.2d 981, 994 (7th Cir. 1988) (referring to plaintiff's injury in a misappropriation case as the loss of the exclusive use of its confidential business information).

144. Trade secrets are property too. *See* Carpenter v. United States, 484 U.S. 19 (1987); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-04 (1984).

145. Whether the option would count as property would depend on state law. For example, California recognizes an unexercised option to purchase real estate as a property right; Indiana does not. *See* Pro-Eco, Inc. v. Bd. of Commrs. of Jay Cty., 57 F.3d 505, 509 (7th Cir. 1995).

146. Even when an actual investment (not an option) is wiped out, it is difficult to prove why, which is the essence of causation. *See* Bastian v. Petren Res. Corp., 892 F.2d 680, 684 (7th Cir. 1990) (plaintiffs' losses may be explained by fact that "[i]t happens that 1981 was a peak year for oil prices and that those prices declined steady in the succeeding years").

147. At a certain point a loss or lost opportunity is too indirect to be compensable. *See* O'Bannon v. Twn. Ct. Nursing Ctr., 447 U.S. 773, 787-88 (1980) (nursing home patients had no property right after government rescinded license of nursing home).

148. Like the state statutes, the new Defend Trade Secrets Act of 2016 provides for injunctive relief. 18 U.S.C.A. § 1836 (West 2016).

Someone who steals another's enjoyable artwork can be sued even if it is returned shortly after the theft. The loss of enjoyment may not be easy work for the jury to put a number to, but the need for imagination is not a good reason for a plaintiff, who has unquestionably been wronged, to lose.[149] It would create the wrong incentives if that were the case.[150]

For that reason, it is fair to question the understanding that the injury in trade secret misappropriation cases is the use of the secret and not its theft in the first place.[151]

A burglar who steals and later returns an owner's best silverware has injured the owner whether or not he ever uses the silverware (and for that matter whether or not the owner would have used the silverware).[152] Otherwise, the owner could lose his case for the following reasons: he cannot prove that he would have held a dinner party, or that his guests would have accepted, or that, if he went ahead and held the party without his best silverware, anyone noticed or cared about the cheap silverware that he used. And if he actually chose not to hold the party on account of the burglary, then he cannot prove that weather would not have kept some of the same guests away or that they would not have canceled for other reasons. There are lots of ways to throw sand at the eyes of a judge or a jury.[153]

A business may be more likely to sue over a stolen trade secret such as a customer list than the host who is upset over his silverware, but the

149. While the damages numbers can be tied to different theories, they still have to be calculated correctly. *See* Taylor v. Meirick, 712 F.2d 1112, 1119-22 (7th Cir. 1983) (discussing value of copyrighted maps that were infringed upon).

150. As the Supreme Court has stated, "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise." Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931).

151. *See* U.S. Gypsum Co. v. Lafarge N. Am. Inc., No. 03 C 6027, 2009 WL 3871824, at * 2 (N.D. Ill. Nov. 16, 2009) ("Absent evidence that Defendants did, in fact, use USG information in some way, Plaintiff's monetary recovery for misappropriation will be limited to nominal damages.").

152. If this were not true, then there would be no suit for a trespasser's interference with the private use and enjoyment of land. But there is. *See* San Diego Gas & Elec. Co. v. Super. Ct., 920 P.2d 669, 696 (Cal. 1996) ("liability for nuisance does not require proof of damage to the plaintiff's property; proof of interference with the plaintiff's use and enjoyment of that property is sufficient").

153. *See* BCS Servs. Inc. v. Heartwood 88, LLC, 637 F.3d 750, 758 (7th Cir. 2011).

thinking should be the same.[154] Once the secret has been stolen, the injury is done.[155] Forcing the plaintiff to disprove a series of negatives, or rule out speculative what-ifs, means more testimony (much of it expert), much more expense,[156] and less protection for the owner. The interests of justice weigh in here, and those are the owner's interests, too.

C. NOT HALLOWED GROUND

There may be arguments against shifting the causation burden in these cases, but one of them cannot be that the notion of causation is well-defined and sacrosanct in the first place. One need look no further than employment law court decisions,[157] and law review articles about them[158] over the past several decades. The simplest words, "because of" (sex, race, color, religion, and national origin) have turned out to be confounding.[159]

154. The silverware owner, in theory, should be more willing to sue as no one questions whether the silverware is property, while the customer list is only property if it is a trade secret.

155. "The proper criterion is not 'actual use' but whether the trade secret is 'of value' to the company." Learning Curve Toys, Inc. v. Playwood Toys, Inc., 342 F.3d 714, 727 (7th Cir. 2003). *See also* Parus Holdings, Inc. v. Banner & Witcoff, Ltd., 585 F. Supp. 2d 995, 1004-05 (N.D. Ill. 2008) (misappropriation under the Illinois Trade Secrets Act, which was modeled after the Uniform Act, does not require use of the trade secret; use of the trade secret is "just one of three ways – improper acquisition, unauthorized use, or unauthorized disclosure – in which misappropriation can be shown").

156. Too many of these cases take years to litigate as it is, which violates the first Federal Rule of Civil Procedure. *See* FED. R. CIV. P. 1 (instructing courts and litigants that the Rules should be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding").

157. *See* Richard A. Epstein, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 357 (1992) ("The early cases under Title VII did not regard sexual harassment as a form of sex discrimination because acts of harassment did not reflect official firm policy but were only the individual actions of company personnel exercised for their own benefit.").

158. *See* Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 346 (1990) (arguing that "Congress would have been quite surprised to learn that they had contemplated including sexual harassment within the confines of sex discrimination – especially since the term 'sexual harassment' did not come into currency until the late 1970s").

159. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 237 (1989) (containing a discussion of the term "because of sex"). While "because of" would seem to imply that motive matters, that has not always been the case in federal courts. *See, e.g.*, Doe v. City of Belleville, 119 F.3d 563, 576 (7th Cir. 1997) (stating that "[i]t is not clear" why proof of motivation is needed "when the harassment has explicit sexual overtones"). *See also* Ocheltree v. Scollon Prods., Inc., 308 F.3d 351, 375 (Michael, J., dissenting) ("I believe, however, that the 'because of sex' requirement allows for more interpretive flexibility than the majority recognizes."), *vacated*, 335 F.3d 325 (4th Cir. 2003) (en banc). *But see* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (citing *Doe* as a decision suggesting "workplace harassment that is sexual in content is always actionable, regardless of . . . motivations" and rejecting such an "automatic[] discrimination" rule). *Oncale*, 523 U.S. at 80.

Does it mean "but for" causation and does it mean that motive matters?[160] In the case of sexual harassment, some courts[161] and scholars[162] read out motive entirely and essentially argue for a disparate impact claim.[163] And in the case of sexual orientation discrimination, which is not explicitly prohibited under federal employment law, the issue is whether "because of . . . sex" is open-ended enough to include a gender nonconformity lawsuit, or can be interpreted to include sexual orientation discrimination in any case.[164] In other words, causation is already a mess;[165] shifting the burden in trade secret cases is not tampering with perfection.

Nor, as discussed above, can the arguments be that shifting the burden is never done, or is not fair, or is against public policy. It is done in some cases, including employment law cases, which essentially is what trade secret cases are when they involve former employees. It is fair, too,

160. The most useful description of what "because of" means comes from *Price Waterhouse*: "The critical inquiry, the one commanded by the words of [the statute], is whether gender was a factor in the employment decision at the moment it was made." 490 U.S. at 241 (emphasis in original).

161. *See supra* note 133.

162. *See* Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 772 (1997) ("The wrong of sexual harassment must consist of something more than that the conduct would not have occurred 'but for' the sex of the target. . . . [S]exual harassment is sex discrimination precisely because its use and effect police heteropatriarchal gender norms in the workplace.").

163. For a critique of these efforts, *see generally*, Robert A. Kearney, *The Disparate Impact Hostile Environment Claim: Sexual Harassment Scholarship at a Crossroads*, 20 HOFSTRA LAB. & EMP. L.J. 185, 210-21 (2003) (discussing the suggestion that all sexual conduct is because of sex and asking "How could that be?").

164. The Circuits are in conflict over the issue. For a review of the cases and the issues, see Hively v. Ivy Tech., No. 15-1720, 2016 WL 4039703 at *10 (7th Cir. July 28, 2016) (following Circuit precedent and ruling that Title VII does not cover sexual orientation discrimination but quoting Chief Justice John Roberts from an oral argument in Obergefell v. Hodges, 235 S. Ct. 2584 (2015): "[I]f Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can't. And the difference is based upon their different sex. Why isn't that a straightforward question of sexual discrimination?").

165. The best evidence of the mess, or at least messiness, comes from this summary in the Supreme Court's *Nassar* opinion: "In sum, Title VII defines the term 'unlawful employment practice' as discrimination on the basis of any of seven prohibited criteria: race, color, religion, sex, national origin, opposition to employment discrimination, and submitting or supporting a complaint about employment discrimination. The text of § 2000e–2(m) mentions just the first five of these factors, the status-based ones; and it omits the final two, which deal with retaliation. When it added § 2000e–2(m) to Title VII in 1991, Congress inserted it within the section of the statute that deals only with those same five criteria, not the section that deals with retaliation claims or one of the sections that apply to all claims of unlawful employment practices. Based on these textual and structural indications, the Court now concludes as follows: Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e–2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." U. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013).

because once the defendant steals a trade secret, it becomes the most obvious source of the plaintiff's resulting loss and the defendant's gain.[166] Is it any different from the famous case *Summers v. Tice*, in which the burden is put on the defendants to prove which of the hunters fired the shot that struck the plaintiff?[167] Not really, because in that case the burden is placed on the bad actors to sort it out.[168] In a trade secret misappropriation case, there is only one bad actor, so once theft is established, the burden should be all his to prove he is not to blame.

Shifting the burden to the defendant does not excuse the plaintiff from proving that it was injured. And it is less aggressive than excluding the defendant's evidence altogether on the issue of causation, which has been done.[169]

D. WRITING THE JURY INSTRUCTION

The final test is whether shifting the burden can be reflected in a jury instruction that a jury would understand. As it stands, jury instructions in trade secret cases are not uniform. In the mid-1980s, the American Bar Association proposed jury instructions in trade secret litigation cases and[170] when it came to damages, the ABA's version did not even use the word cause: "The amount [of damages] may be based on the loss plaintiff has suffered from the misappropriation, or from the gain defendant has procured, or from some combination of the two."[171] By any standard,

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166. There is a tendency in these cases to look beyond the obvious and to imagine other causes for an injury. But that should be the Defendant's burden to prove, not the Plaintiff's job to disprove.

167. 199 P.2d 1, 4 (Cal. 1948). In *Summers*, plaintiff was shot in the eye (and once in the lip) on a quail hunting trip; the shot in the eye produced most of plaintiff's damages and could not have come from both hunters. Rather, "[i]t was from one or the other only." *Id.* Because both hunters were wrongdoers, "it should rest with them each to absolve himself if he can." *Id.* "It is up to defendants to explain the cause of the injury." *Id.*

168. *See id.* (explaining why "defendants are in a far better position to offer evidence to determine which one caused the injury").

169. *See* GE Betz Inc. v. Conrad, 231 N.C. App. 214, 232 (2013) (finding no error in trial court's decision to exclude evidence that may have shown other reasons GE customers moved their business away from GE, because "such evidence would not negate the fact that individual defendants improperly solicited and unjustly profited . . . thus causing some amount of injury to GE and therefore meeting the element of causation"); *see also* Dowd & Dowd v. Gleason, 181 Ill.2d 460, 484-85 (1998) (the "focus here is not on the conduct of the client in terminating the relationship, but on the conduct of the party inducing the breach or interfering with the expectancy").

170. *See* Lawrence J. Siskind, *ABA Proposes Jury Instructions for Trade Secret Litigation*, TRADE SECRET REPORTER, July 1985, at 56.

171. *Id.* at 60.

"suffered from" is more passive and less direct than "caused by."[172]

Jury instructions should track the language of a statute whenever possible (otherwise they run the risk of lawyers re-writing the statute during jury instruction conferences).[173] So the instructions under the federal act should use the word "caused by" in this way, "If you find that defendant misappropriated plaintiff's trade secret, you may award damages. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not addressed in computing damages for actual loss."[174]

For the reasons explained above, once the plaintiff has proven misappropriation, say by establishing a defendant's use of a secret customer list or strategic plan, how can it prove what would have happened had the theft not occurred? And, more importantly, why should it have to?[175]

Once a plaintiff in a trade secret misappropriation case has proven injury in the form of damages, then the burden should shift to the defendant to prove that the plaintiff would have suffered the same losses even if the defendant had not misappropriated. In employment discrimination cases the burden shifts in this way in the Seventh Circuit: "If you find that Plaintiff has proved that his [protected class] contributed to Defendant's decision to [adverse employment action] him, you must then decide whether Defendant proved by a preponderance of the evidence that it would have [adverse employment action] him even if Plaintiff was not [protected class]."[176] In that case, the jury "must enter a verdict for the Plaintiff but you may not award him damages."[177]

The equivalent instruction in a trade secret misappropriation case

172. *Suffer*, vt. "to submit to or be forced to endure." *Cause*, n. "something that occasions or effects a result." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 133, 878 (1967).

173. *See* United States v. Paul, 217 F.3d 989, 997 (8th Cir. 2000) ("The best way to comply with [the Federal Death Penalty Act] is to actually use the language of the statute in the jury instruction."); *see also* Gacy v. Welborn, 994 F.2d 305, 312 (7th Cir. 1993) (legal rules are hard enough to understand without rewriting them, which is "one reason why this court strongly discourages efforts to define 'reasonable doubt'" for juries).

174. *See* 18 U.S.C. § 1836(b)(3)(B) (2015).

175. In addition to the reasons explained above, consider what happens in an investor fraud case, which often involves complicating causation issues because markets are naturally volatile. But in those cases, "[t]he requirement, if any, to plead a causal link [between the fraud and the losses] does not place on Plaintiffs a further pleading obligation to rule out other contributing factors or alternative causal explanations." Loreley Financing (Jersey) No. 3 Ltd. v. Wells Fargo Secs., LLC, 797 F.3d 160, 189 (2nd Cir. 2015).

176. FED. CIV. JURY INSTRUCTIONS, *supra* note 141, § 3.01, Comm. comment c.

177. *See id.*

should be, "If you determine that Plaintiff has proved misappropriation of its trade secrets and has been damaged, you must determine whether Defendant proved by a preponderance of the evidence that Plaintiff's losses, or Defendant's gain, would have resulted even if Defendant had not misappropriated. In that case, you must enter a verdict for Plaintiff but you may not award him damages."

VI. CONCLUSION

Once a plaintiff has established a loss, or a defendant's gain, that would naturally result from the defendant's misappropriation, its job should be done. The plaintiff has proven all the necessary elements of the misappropriation claim. If the defendant has other theories as to why the losses occurred, then let it say so, and then prove them. In that case, it may escape paying some damages. However, the defendant has still misappropriated, and remains liable.

For years courts have filled up a graveyard with cases that did not account for every possible alternative cause of the plaintiff's losses. The result is perverse: the more disruptive the misappropriation, the less likely the plaintiff will be able to show the jury a clear picture of what happened and prove "but for" causation. But the new federal law frees courts from those cases and from the state misappropriation statutes that produced them.[178] What is needed now is a shift in thinking, and a shift in a burden.

178. It is not the only step that federal courts should take in these cases. Among the other steps: adopting the *Restatement (Second) of Agency*'s framework for respondeat superior liability and when an employer can be liable for an agent's misappropriation, even if it occurred outside the scope of the agent's employment; and quickly determining that there are no limits to the definition of "trade secret" so long as the information is, in fact, kept secret.