

Unfair Play: Unjust Enrichment for Copying and Using Non-Trade-Secret Spreadsheet

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The US Court of Appeals for the Second Circuit reversed a district court's dismissal of an unjust enrichment claim, finding that unjust enrichment claims do not necessarily rise or fall with trade secret misappropriation claims and may be advanced where there is a dispute as to whether a contract's scope covers the parties' disagreement. *Pauwels v. Deloitte LLP*, Case No. 22-21 (2d Cir. Oct. 6, 2023) (**Sacks**, Robinson, JJ.) (Jacobs, J., dissenting in part).

Andre Pauwels is a contractor who was retained without written agreement by The Bank of New York Mellon and its parent company (collectively, BNYM) to work on investment valuation. In 2014, while working for BNYM, Pauwels developed the "Pauwels Model" for valuation, which was implemented in Excel spreadsheets. Pauwels typically would send BNYM only the outputs from the Pauwels Model. According to Pauwels, the Pauwels Model and spreadsheets were confidential and proprietary, although the spreadsheets were not password-protected, encrypted or labeled confidential, and Pauwels sometimes shared the spreadsheets with BNYM.

In 2016, BNYM engaged Deloitte and related entities (collectively, Deloitte) to take over Pauwels's duties. Pauwels never authorized BNYM to share the Pauwels Model spreadsheets with Deloitte, and

BNYM assured Pauwels that Deloitte was not using those spreadsheets. In April 2018, Pauwels discovered that BNYM had given Deloitte the spreadsheets and that Deloitte had copied the Pauwels Model. BNYM terminated its relationship with Pauwels in May 2018.

In March 2019, Pauwels sued BNYM and Deloitte for trade secret misappropriation, unfair competition and unjust enrichment and further alleged that BNYM committed fraud and negligent misrepresentation. After BNYM and Deloitte moved to dismiss, the district court granted the motion in relevant part. The district court dismissed the unjust enrichment claim as duplicative of the trade secret misappropriation claim, citing the 2009 Second Circuit case *Faiveley Transp. Malmö v. Wabtec* for the proposition that “where an *unfair competition* claim, and a misappropriation claim arise from the same factual predicate . . . the two claims generally rise or fall together.” The district court dismissed the remainder of the claims for failure to plausibly allege the existence of trade secrets, that BNYM and Deloitte had “misappropriated” anything, or that Pauwels suffered damages. Pauwels appealed.

The Second Circuit reversed the dismissal of Pauwels’s unjust enrichment claim as to BNYM. Initially, the Court found that Pauwels’s unjust enrichment claim was not duplicative of his trade secret misappropriation claim, distinguishing *Faiveley Transp.* and explaining that misappropriation is not an element of unjust enrichment claims. The Court rejected BNYM’s argument that Pauwels’s unjust enrichment claim was precluded by the contract between the parties. The Court found that Pauwels could maintain his claim because there was “a *bona fide* dispute . . . whether the scope of an existing contract covers the disagreement between the parties.” According to Pauwels, he was engaged and paid for his advice and expertise only, meaning that BNYM had no right to benefit from the Pauwels Model spreadsheets by sharing them with Deloitte. According to BNYM, Pauwels was engaged and paid to develop and deliver the Pauwels Model spreadsheets.

The Second Circuit also affirmed the district court's dismissal of the unjust enrichment claim against Deloitte on alternative grounds, finding that a "plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party." Pauwels failed to allege facts establishing a sufficient relationship with Deloitte and mere knowledge that Pauwels created the spreadsheets was insufficient.

In dissent, Judge Jacobs disagreed with the majority's unjust enrichment analysis, contending that any contract dispute could be described as a dispute over whether the contract's scope covered the parties' disagreement. According to Judge Jacobs, if BNYM received more than the contract allowed, Pauwels should have asserted a breach of contract claim rather than unjust enrichment.

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