

CRIMINAL PENALTIES UNDER THE ECONOMIC ESPIONAGE ACT (1996-2017)

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Business owners interested in pursuing criminal charges against a trade secret thief under the federal Economic Espionage Act (EEA) might want to think twice.¹ Not only must the business owner be concerned that the government might not take the case,² but even if the government does take the case, the punishment is not significant. Although the EEA provides substantial maximum penalties against those charged with trade secret theft, the actual penalties assessed are much lower. For business owners weighing the benefits and risks of pursuing criminal versus civil action, this information can be quite useful. Therefore, this article reviews the penalties available under the EEA and surveys the actual penalties assessed in those cases disposed through sentencing from 1996 through 2017.

I. THE ECONOMIC ESPIONAGE ACT (EEA)

In October 1996, the EEA was enacted as a means to combat federal economic espionage.³ There are two sections within the statute that address criminal penalties. Section 1831 provides criminal penalties for trade secret theft when a foreign entity benefits.⁴ On the other hand, Section 1832 of the

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¹ For a comprehensive discussion of the background and provisions of the EEA, *see generally* William J. Edelman, *The "Benefit" of Spying: Defining The Boundaries Of Economic Espionage under the Economic Espionage Act Of 1996*, 63 STAN. L. REV. 447 (2011); James H.A. Pooley et al., *Understanding the Economic Espionage Act of 1996*, 5 TEX. INTELL. PROP. L.J. 177 (1997); Nicola Searle, *The Criminalization of the Theft of Trade Secrets: An Analysis of the Economic Espionage Act*, 2 IP THEORY (2012), <http://www.repository.law.indiana.edu/ipt/vol2/iss2/2>; Spencer Simon, *The Economic Espionage Act of 1996*, 13 BERKELEY TECH. L.J. 305, 306, 309-10 (1998).

² The government reviews five factors when determining whether to prosecute a defendant under the EEA. These factors include a) the scope of the criminal activity, including evidence of involvement by a foreign government, foreign agent or foreign instrumentality; b) the degree of economic injury to the trade secret owner; c) the type of trade secret misappropriated; d) the effectiveness of available civil remedies; and e) the potential deterrent value of the prosecution. *See* H. MARSHALL JARRETT & CAMERON G. CHANDLER, PROSECUTING INTELLECTUAL PROPERTY CRIMES 378 (4th ed. 2013).

³ Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3489 (codified as amended at 18 U.S.C. §§ 1831-39 (2017)).

⁴ 18 U.S.C. § 1831 (2017).

Economic Espionage Act (EEA) provides criminal penalties at the federal level for commercial trade secret theft without concern for who benefits.⁵ This article focuses on Section 1832 actions.⁶

The information that constitutes a trade secret under Section 1832 is very broad. For purposes of this statute, a trade secret means:

all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.⁷

Under Section 1832 of the EEA, a person or organization can be charged for five different acts.⁸ Specifically, charges can be brought under the EEA when a person, “with intent to convert a trade secret, that is related to a product or service used in or intended for use in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret, knowingly:

- (1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains such information;
- (2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies,

⁵ 18 U.S.C. § 1832 (2017).

⁶ A study in 2012 found that there had been only 124 criminal prosecutions under the EEA since its enactment, with only 9 brought under Section 1831. See Peter J. Toren, *An Analysis of Economic Espionage Act Prosecutions: What Companies Can Learn From It and What the Government Should Be Doing About It!*, 84 BNA'S PAT. TRADEMARK & COPYRIGHT J. 884, 886 (2012).

⁷ 18 U.S.C. § 1839(3) (2017).

⁸ 18 U.S.C. § 1832(a) (2017).

- replicates, transmits, delivers, sends, mails, communicates, or conveys such information;
- (3) receives, buys, or possesses such information, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;
 - (4) attempts to commit any offense described in paragraphs (1) through (3); or
 - (5) conspires with one or more other persons to commit any offense described in paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy.”⁹

Information that constitutes a trade secret under the EEA for purposes of filing criminal charges is the same information that would support a civil action under the federal Defend Trade Secrets Act (DTSA).¹⁰ In addition, the same information that would support criminal charges under the EEA would likely fall within the definition of a trade secret under the Uniform Trade Secrets Act (UTSA) because the definitions are substantively similar.¹¹ Furthermore, the acts of misappropriation which support a civil claim for damages under the UTSA and the DTSA can support charges under the EEA. Five of the acts that constitute misappropriation under the UTSA require use or disclosure of the trade secret by the offender, whereas one act only requires acquisition of the trade secret.¹² Similar to the UTSA, acquisition of a trade secret alone is sufficient for criminal liability under the EEA.¹³

⁹ 18 U.S.C. § 1832(a) (2017).

¹⁰ The definition of a trade secret under the EEA is identical to that of the DTSA as it is found in the same statutory section. *See* 18 U.S.C. § 1839(3) (2017).

¹¹ Under the UTSA, a “trade secret” is defined as: information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 538-39 (2005). *See* Michelle Evans, *Plausibility under the Defend Trade Secrets Act*, 16 J. MARSHALL REV. INTELL. PROP. L. 188, 189 (2017) (comparing the DTSA definition to that of the UTSA).

¹² *See* UNIF. TRADE SECRETS ACT § 1(2) (amended 1985), 14 U.L.A. 537 (2005). For a detailed analysis of the UTSA, *see* Ramon A. Klitzke, *The Uniform Trade Secrets Act*, 64 MARQ. L. REV. 277 (1980). These same six situations are covered by the DTSA. Specifically, under the DTSA “misappropriation” means “(A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (B) disclosure or use of a trade secret of another without express or implied consent by a person who--

(i) used improper means to acquire knowledge of the trade secret; (ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was (I) derived from

II. PURSUING CRIMINAL CHARGES UNDER THE EEA

Given the similarities between the EEA definitions and those used in civil trade secret theft statutes, such as individual state UTSAs¹⁴ and the federal DTSA, it stands to reason that a business owner interested in pursuing a trade secret thief might opt to pursue criminal penalties instead of civil damages.¹⁵ A decision to pursue criminal penalties might be made in order to avoid incurring attorney's fees as well as to have some retribution, particularly in a homestead state where damages judgments are rarely collectible against individual judgment debtors.¹⁶ But therein lies the rub. Not

or through a person who had used improper means to acquire the trade secret; (II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or (III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or

(iii) before a material change of the position of the person, knew or had reason to know that (I) the trade secret was a trade secret; and (II) knowledge of the trade secret had been acquired by accident or mistake." See 18 U.S.C. § 1839(5) (2017).

¹³ See 18 U.S.C. § 1832 (2017).

¹⁴ For a list of statutory citations for states that have adopted the Uniform Trade Secrets Act, see UNIF. TRADE SECRETS ACT Refs & Annos, 14 U.L.A. 529 (2005). For further discussion of some of these state-specific Uniform Trade Secrets Acts, see generally Milton E. Babirak, Jr., *The Virginia Uniform Trade Secrets Act: A Critical Summary of the Act and Case Law*, 5 VA. J.L. & TECH. 15 (2000); Michelle Evans, *The Uniform Trade Secrets Act Makes Its Way to Texas*, 23 TEX. INTELL. PROP. L.J. 25 (2014); Thomas W. Foley, *Keeping a Company's Confidences Secret: Trade Secret Enforcement Under Iowa's Uniform Trade Secrets Act*, 59 DRAKE L. REV. 1 (2010); Douglas F. Halijan, *The Past, Present, and Future of Trade Secrets Law in Tennessee: A Practitioner's Guide Following the Enactment of the Uniform Trade Secrets Act*, 32 U. MEM. L. REV. 1 (2001); Kollin L. Rice, *Ohio Law Governing Employee Covenants Not to Compete: A Practitioner's Guide to Current Trends and the Impact of Ohio's Adoption of the Uniform Trade Secrets Act*, 23 OHIO N.U. L. REV. 347 (1996); C. Geoffrey Weirich & Daniel. P. Hart, *Protecting Trade Secrets and Confidential Information in Georgia*, 60 MERCER L. REV. 533 (2009).

¹⁵ See Michelle Evans, *Trade Secret Misappropriation in Texas*, 24 S. L.J. 67, 87 (2014) (discussing the use of federal and state criminal penalties for trade secret theft against judgment proof debtors); Kurt M. Saunders & Michelle Evans, *A Review of State Criminal Trade Secret Theft Statutes*, UCLA J. L. & TECH., Dec. 2017, at 1 (discussing state criminal penalties for trade secret theft).

¹⁶ For further discussion of the judgment proof problem, see generally Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603 (2006); Kyle D. Logue, *Solving the Judgment-Proof Problem*, 72 TEX. L. REV. 1375 (1994); Steven Shavell, *The Judgment Proof Problem*, 6 INT'L REV. L. & ECON. 45 (1986). For further discussion of state level criminal penalties in two homestead states, see generally Michelle Evans & Kurt M. Saunders, *Criminal Trade Secret Theft Cases against Judgment Proof Defendants in Texas and California*, 10 WM. & MARY BUS. L. REV. (forthcoming 2019).

all cases under the EEA are prosecuted by the government.¹⁷ And for those cases that are prosecuted, the punishment is not significant, as this Article will demonstrate.

A search for Section 1832 violations from years 1996 through 2017 revealed 277 EEA case dockets¹⁸ that were either pending or disposed.¹⁹ Of these cases, 67 have been dismissed from twenty-three states and 67 cases are still pending. From the remaining 143 EEA cases that have been disposed, 138 offenders have been sentenced. The data comparison in Table 1 provides a breakdown by state of total EEA cases filed along with the number of dismissals and sentences.²⁰ Furthermore, of those 138 offenders sentenced, 108 offenders were sentenced for one or more violations of Section 1832 exclusive of any other federal statutes.²¹ These sentences are explored in the next sections.

III. INDIVIDUAL VIOLATIONS OF THE EEA

Commercial trade secret theft under 18 U.S.C. § 1832 of the EEA is a Class C felony.²² However, sentencing varies based on whether the offender is an individual or an organization. Of the 108 offenders sentenced exclusively under Section 1832 of the EEA, 102 were individuals.²³ According to federal law an individual found guilty of an offense must be

¹⁷ See JARRETT & CHANDLER, *supra* note 2; Geraldine S. Moohr, *The Problematic Role of Criminal Law in Regulating Use of Information: The Case of the Economic Espionage Act*, 80 N.C. L. REV. 853, 884 (2002).

¹⁸ Several of the case dockets were protected by a court order of non-disclosure so that only the docket sheets, without any case documents, for those individual cases were available. While the limited information concerning assessed penalties available on these docket sheets was used for purposes of this data analysis, it is important to note that it may not contain all of the information that would otherwise be available from a final judgment.

¹⁹ See Michelle Evans, *Effectiveness of Available Civil Remedies as a Factor Influencing Prosecution of Economic Espionage Act Cases*, 57 WASHBURN L.J. 463, 465 (2018).

²⁰ This table is a modification of Table 1, containing total EEA case data by state, first published in Michelle Evans, *Effectiveness of Available Civil Remedies as a Factor Influencing Prosecution of Economic Espionage Act Cases*, 57 WASHBURN L.J. 463, 479-80 (2018).

²¹ Ninety-six of those 108 offenders sentenced exclusively under Section 1832 were sentenced on only one count under Section 1832. The remaining 12 offenders were sentenced on two counts (7/12), three counts (2/12), four counts (1/12), five counts (1/12), and ten counts (1/12) of violating Section 1832. Sentencing did not vary significantly based on the number of counts; therefore, variances in the data will be addressed in footnotes throughout.

²² 18 U.S.C. § 3559(a)(3) (2017).

²³ The twelve offenders sentenced on multiple counts of violating Section 1832 were all individuals.

sentenced to (1) a term of probation; (2) a fine; or (3) a term of imprisonment.²⁴

When considering the term of probation, the federal guidelines state that probation is permitted for not less than one year or for more than five years.²⁵ A majority of the individuals sentenced in the EEA case files did not receive probation (62/102).²⁶ For those 40 individuals who did receive probation, the probation terms ranged from 12 months (3/40), 24 months (12/40),²⁷ 36 months (11/40), 48 months (2/40), and 60 months (12/40).²⁸ In addition, another mandatory condition of probation is that the defendant pays a special assessment.²⁹ For individuals, this special assessment is \$100 for each felony count.³⁰ Of the 102 individuals sentenced exclusively under Section 1832 of the EEA, 100 individuals were charged the special assessment.³¹ The assessments ranged from \$100 (86/100),³² \$200 (9/100),³³ \$300 (2/100),³⁴ \$400 (1/100),³⁵ and \$500 (2/100).³⁶

Furthermore, community service may be a discretionary condition added to the probation.³⁷ However, only 9 individuals from the EEA case files were required to perform community service.³⁸ The majority of these

²⁴ 18 U.S.C. § 3551(b) (2017).

²⁵ 18 U.S.C. § 3561(c)(1) (2017).

²⁶ This was the same trend even for those sentenced on multiple counts of violating Section 1832. Eight of the twelve individuals sentenced on multiple counts of violating Section 1832 did not receive probation.

²⁷ Two of the twelve individuals sentenced on multiple counts of violating Section 1832 were given 24 months' probation each for violating two counts.

²⁸ Two of the twelve individuals sentenced on multiple counts of violating Section 1832 were given 60 months' probation- one for violating two counts and one for violating four counts.

²⁹ 18 U.S.C. § 3563(a)(6)(B) (2017).

³⁰ 18 U.S.C. § 3013(a)(2)(A) (2017).

³¹ All of the twelve individuals who were sentenced on multiple counts of violating Section 1832 were charged the special assessment.

³² Two of the twelve individuals sentenced on multiple counts of violating Section 1832 were charged the base rate of \$100 for the special assessment.

³³ Six of the twelve individuals sentenced on multiple counts of violating Section 1832 were charged \$200 for the special assessment, which is consistent with the charge of \$100 per count. There was no explanation concerning why this higher amount was assessed for the remaining three individuals who were only sentenced on one count of violating Section 1832.

³⁴ One of the twelve individuals sentenced on multiple counts of violating Section 1832 was charged \$300 for the special assessment, which is consistent with the charge of \$100 per count. However, there was no explanation given concerning why this higher amount was assessed for the other individual who was only sentenced on one count of violating Section 1832.

³⁵ The individual charged the \$400 special assessment was sentenced for violating four counts of Section 1832, which is consistent with the charge of \$100 per count.

³⁶ The two individuals charged the \$500 special assessment were sentenced for violating multiple counts of Section 1832- one on three counts and the other on five counts.

³⁷ 18 U.S.C. § 3563(b)(12) (2017).

³⁸ Only one of these individuals was sentenced on multiple counts of violating Section 1832.

individuals were required to perform 100 hours (6/9) with the remaining individuals required to perform from 200 to 300 hours (3/9)³⁹ of community service.

The court is also authorized to order restitution as a sanction against the offender.⁴⁰ When setting a restitution amount, the court must consider the amount of the loss sustained by the victim as a result of the trade secret theft and “the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents,” as well as other factors the court deems appropriate.⁴¹ Although these considerations are not expressly addressed in the EEA case files for the individual offenders, restitution was ordered against 35 individuals.⁴² Ideally, restitution involves return of the stolen trade secret information.⁴³ Unfortunately however, return of the information is often “impossible, impractical, or inadequate.”⁴⁴ In these cases, the restitution amount will be measured by the value of the property on the date of the damage, loss, or destruction.⁴⁵ The restitution amounts ordered ranged from \$5,000 to \$100,000 (16/35),⁴⁶ \$100,001 to \$200,000 (8/35),⁴⁷ \$200,001 to \$500,000 (3/35), \$500,001 to \$1,000,000 (2/35),⁴⁸ and over \$1,000,001 (6/35).⁴⁹ From the EEA case review, the largest restitution amount ordered was \$7,655,155 against Jack Shearer in the Northern District of Texas.⁵⁰

Along with probation, regardless of whether the probation involved community service or a restitution award, a sentence to pay a fine may be imposed.⁵¹ A fine for an individual is not more than the greatest of \$250,000⁵² or an alternative fine based on the gain to a third party or the loss

³⁹ One individual sentenced on three counts of violating Section 1832 was required to perform 200 hours of community service.

⁴⁰ 18 U.S.C. §§ 3551(b), 3556, 3663 (2017).

⁴¹ 18 U.S.C. § 3663(a)(1)(B)(i) (2017).

⁴² Eight of the twelve individuals sentenced on multiple counts of violating Section 1832 were ordered to pay restitution.

⁴³ 18 U.S.C. § 3663(b)(1)(A) (2017).

⁴⁴ 18 U.S.C. § 3663(b)(1)(B) (2017).

⁴⁵ 18 U.S.C. § 3663(b)(1)(B)(i) (2017).

⁴⁶ Three of the eight individuals sentenced on multiple counts and ordered to pay restitution were ordered to pay restitution in this range.

⁴⁷ Two of the eight individuals sentenced on multiple counts and ordered to pay restitution were ordered to pay restitution in this range.

⁴⁸ One of the eight individuals sentenced on multiple counts and ordered to pay restitution was ordered to pay restitution in this range.

⁴⁹ Two of the eight individuals sentenced on multiple counts and ordered to pay restitution were ordered to pay restitution in this range.

⁵⁰ Shearer was sentenced on two counts of violating Section 1832. *USA v. Shearer et al.*, No. 3:99-cr-00433-D (N.D. Tex. June 19, 2000).

⁵¹ 18 U.S.C. § 3551(b) (2017).

⁵² 18 U.S.C. § 3571(b)(3) (2017).

to a third party other than the defendant.⁵³ Specifically, if any person derives pecuniary gain from the trade secret theft, or if the trade secret theft “results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of such a fine would unduly complicate or prolong the sentencing process.”⁵⁴ From the EEA cases, 40 individuals were assessed a fine.⁵⁵ It does not appear as though the alternative fine based on gain or loss is used, but rather the maximum fine applied appears to be \$250,000. A majority of the fines were \$10,000 or less (30/40).⁵⁶ Of the remaining cases, the fines ranged from \$10,001 to \$20,000 (5/40),⁵⁷ \$20,001 to \$50,000 (2/40), \$50,001 to \$100,000 (1/40), and \$100,001 to \$250,000 (2/40).

A person convicted under this statute can be imprisoned for up to 10 years in addition to the fine.⁵⁸ From the EEA cases, 62 individuals were sentenced to prison terms.⁵⁹ In the majority of cases, individuals were sentenced to less than two years in prison. Prison sentences ranged from time served (5/62),⁶⁰ 90 days to 12 months (14/62),⁶¹ 12 months and one day to 24 months (31/62),⁶² 24 months and one day to 36 months (4/62),⁶³ 36 months and one day to 48 months (2/62), 48 months and one day to 60 months (3/62),⁶⁴ and 60 months and one day to 87 months (3/62).⁶⁵ The maximum prison term does not appear to have been assessed yet under the EEA for those individuals exclusively charged under Section 1832.⁶⁶

⁵³ 18 U.S.C. § 3571(d) (2017).

⁵⁴ 18 U.S.C. § 3571(d) (2017).

⁵⁵ Only four of the twelve individuals sentenced on multiple counts of violating Section 1832 were assessed a fine.

⁵⁶ Two of the four individuals who were assessed a fine on multiple counts of violating Section 1832 were assessed a fine within this range.

⁵⁷ Two of the four individuals who were assessed a fine on multiple counts of violating Section 1832 were assessed a fine within this range.

⁵⁸ 18 U.S.C. § 1832(a) (2017).

⁵⁹ Eight of the twelve individuals sentenced on multiple counts of violating Section 1832 were sentenced to prison terms.

⁶⁰ One of the eight individuals sentenced to a prison term on multiple counts of violating Section 1832 received this prison term.

⁶¹ One of the eight individuals sentenced to a prison term on multiple counts of violating Section 1832 received this prison term.

⁶² Three of the eight individuals sentenced to a prison term on multiple counts of violating Section 1832 received this prison term.

⁶³ One of the eight individuals sentenced to a prison term on multiple counts of violating Section 1832 received this prison term.

⁶⁴ One of the eight individuals sentenced to a prison term on multiple counts of violating Section 1832 received this prison term.

⁶⁵ One of the eight individuals sentenced to a prison term on multiple counts of violating Section 1832 received this prison term.

⁶⁶ In *USA v. Liew et al.*, No. 4:11-cr-00573-JSW (N.D. Cal. July 10, 2014), the defendant Walter Liew was sentenced to 120 months for two counts of violating Section 1831 and for six

The maximum ten-year term of imprisonment for an EEA violation may be followed by a period of supervised release. Since theft of trade secrets under 18 U.S.C. §1832 is a Class C felony the maximum authorized term for a supervised release is three years.⁶⁷ From the EEA cases, fifty-five individuals were sentenced to supervised release following their prison terms.⁶⁸ Over half (35/55) were sentenced to the maximum term for supervised release,⁶⁹ while about one-third (18/55) were sentenced to two years.⁷⁰ The remaining individuals were sentenced to at least one year, but less than two years of supervised release (2/55).⁷¹

IV. ORGANIZATION VIOLATIONS OF THE EEA

In addition to the 102 individuals sentenced under the EEA, six organizations were sentenced.⁷² An organization found guilty of an offense must be sentenced to (1) a term of probation, and/or (2) a fine.⁷³ The term of probation is the same as that for individuals. A probation term would be for not less than one year or for more than five years.⁷⁴ Five organizations were assessed the maximum probationary term for their EEA violations.⁷⁵

In addition, a mandatory condition of probation is that the defendant pays a special assessment.⁷⁶ For organizations, this special assessment is \$400 for each felony count.⁷⁷ Of the six organizations sentenced exclusively under Section 1832 of the EEA, all were charged the special assessment.

A sentence to pay a fine may be imposed against an organization in addition to a sentence to probation. An organization that commits an offense under this section can be fined no more than “the greater of \$5,000,000 or 3 times the value of the stolen trade secret to the organization, including

counts of violating Section 1832. It is unclear from the judgment the number of months of imprisonment accorded merely to Section 1832.

⁶⁷ 18 U.S.C. § 3583(b)(2) (2017).

⁶⁸ Seven of the twelve individuals sentenced on multiple counts of violating Section 1832 were given supervised release.

⁶⁹ Five of the seven individuals who received supervised release on multiple counts of violating Section 1832 received the maximum term.

⁷⁰ Two of the seven individuals who received supervised release on multiple counts of violating Section 1832 received two years supervised release.

⁷¹ One individual was sentenced to five years of supervised release; however, as the judgment is sealed it is unclear what factors led to this sentence. *See USA v. Sun*, No. 3:02-cr-00106-MMC (N.D. Cal. June 18, 2003).

⁷² None of the organizations were sentenced on multiple counts of violating Section 1832.

⁷³ 18 U.S.C. § 3551(c) (2017).

⁷⁴ 18 U.S.C. § 3561(c)(1) (2017).

⁷⁵ The remaining organization did not receive probation. *See USA v. Jes Suppliers, LLC*, No. 3:11-cr-00135-KI (D. Or. Apr. 4, 2011).

⁷⁶ 18 U.S.C. § 3563(a)(6)(B) (2017).

⁷⁷ 18 U.S.C. § 3013(a)(2)(B) (2017).

expenses for research and design and other costs of reproducing the trade secret” that the organization has avoided by stealing the trade secret.⁷⁸ In the EEA cases against organizations reviewed only two organizations were fined. The largest fine assessed was \$85,000,000 against Kolon Industries, Inc.⁷⁹ and the smallest fine was \$50,000 against C-More Systems, Inc.⁸⁰

The court is also authorized to order restitution as a sanction against the offender.⁸¹ As with sentences against individuals, the court must consider the amount of the loss sustained by the victim as a result of the trade secret theft and “the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents,” as well as other factors the court deems appropriate.⁸² Although these considerations are not expressly addressed in the EEA case files for the offending organizations, restitution was ordered against five of the organizations. Ideally, restitution involves return of the stolen trade secret information.⁸³ Unfortunately however, return of the information is often “impossible, impractical, or inadequate.”⁸⁴ In these cases, the restitution amount will be measured by the value of the property on the date of the damage, loss, or destruction.⁸⁵ From the EEA case review, the largest restitution amount ordered was 275 million dollars against Kolon Industries Inc.⁸⁶ The next largest restitution amount was against Tejas Procurement Services Inc., Tejas Compressor Systems Inc., and Procurement Solutions International LLC for \$7,655,155.⁸⁷ The remaining restitution amount ordered was much lower in comparison. Restitution for \$5,000 was assessed against Jes Suppliers, LLC.⁸⁸

V. CONCLUSION

In conclusion, business owners may consider filing criminal charges against a trade secret thief under the EEA, but it is noteworthy that the penalties actually assessed are not as stringent as the maximum penalties provided in the statute. If the government pursues an EEA charge against an individual, for example, it is likely that any sentence will result in a special assessment, but it is not likely that probation will be assessed nor is it likely

⁷⁸ 18 U.S.C. § 1832(b) (2017); 18 U.S.C. § 3571(c) (2017).

⁷⁹ USA v. Kolon Industries Inc. et al., No. 3:12-cr-00137-AJT (E.D. Va. May 1, 2015).

⁸⁰ USA v. C-More Systems, Inc., No. 1:06-cr-00925-SWK (S.D. N.Y. Jan. 10, 2007).

⁸¹ 18 U.S.C. §§ 3551(c), 3556, 3663 (2017).

⁸² 18 U.S.C. § 3663(a)(1)(B)(i) (2017).

⁸³ 18 U.S.C. § 3663(b)(1)(A) (2017).

⁸⁴ 18 U.S.C. § 3663(b)(1)(B) (2017).

⁸⁵ 18 U.S.C. § 3663(b)(1)(B)(i) (2017).

⁸⁶ USA v. Kolon Industries Inc. et al., No. 3:12-cr-00137-AJT (E.D. Va. May 1, 2015).

⁸⁷ USA v. Shearer et al., No. 3:99-cr-00433-D (N.D. Tex. June 19, 2000).

⁸⁸ USA v. Jes Suppliers, LLC, No. 3:11-cr-00135-KI (D. Or. Apr. 4, 2011).

that restitution will be available. In addition, any fine assessed will likely be under \$10,000 compared to the statutory maximum of \$250,000. Furthermore, any prison term is not likely to exceed two years compared to the statutory maximum of ten years. These are important considerations for a business owner to take into account when assessing the risks and benefits associated with pressing criminal charges under the EEA versus filing a civil action for damages.

STATE	TOTAL EEA CASES		EEA DISMISSALS		EEA SENTENCES	
	Frequency	Percent Frequency	Frequency	Percent Frequency	Frequency	Percent Frequency
Cal.	69	24.91%	20	29.85%	31	22.46%
N.Y.	19	6.86%	1	1.49%	13	9.42%
Tex.	17	6.14%	0	----	16	11.59%
Pa.	17	6.14%	3	4.48%	5	3.62%
Mich.	14	5.05%	5	7.46%	6	4.35%
Wis.	12	4.33%	4	5.97%	3	2.17%
N.J.	9	3.25%	2	2.99%	4	2.90%
Va.	9	3.25%	1	1.49%	3	2.17%
Del.	8	2.89%	4	5.97%	3	2.17%
Miss.	8	2.89%	8	11.94%	0	----
Iowa	8	2.89%	0	----	2	1.45%
Ohio	8	2.89%	1	1.49%	3	2.17%
Ill.	8	2.89%	2	2.99%	4	2.90%
Ky.	7	2.53%	1	1.49%	3	2.17%
Conn.	7	2.53%	0	----	5	3.62%
Fla.	6	2.17%	0	----	6	4.35%
Or.	5	1.81%	2	2.99%	3	2.17%
N.C.	5	1.81%	1	1.49%	3	2.17%
Md.	5	1.81%	2	2.99%	3	2.17%
Kan.	4	1.44%	1	1.49%	1	0.72%
Ga.	3	1.08%	1	1.49%	2	1.45%
Ind.	3	1.08%	2	2.99%	1	0.72%
Utah	3	1.08%	1	1.49%	1	0.72%
Nev.	3	1.08%	0	----	2	1.45%
Ark.	3	1.08%	0	----	3	2.17%
Mass.	2	0.72%	1	1.49%	1	0.72%

STATE	TOTAL EEA CASES		EEA DISMISSALS		EEA SENTENCES	
	Frequency	Percent Frequency	Frequency	Percent Frequency	Frequency	Percent Frequency
Mo.	2	0.72%	0	----	2	1.45%
Tenn.	2	0.72%	0	----	2	1.45%
S.C.	2	0.72%	2	2.99%	0	----
Minn.	2	0.72%	0	----	2	1.45%
Wash.	2	0.72%	0	----	2	1.45%
Maine	2	0.72%	0	----	2	1.45%
Ariz.	1	0.36%	1	1.49%	0	----
La.	1	0.36%	0	----	1	0.72%
Hawaii	1	0.36%	1	1.49%	0	----
	277	100.00%	67	100.00%	138	100.00%