

Inevitable Disclosure of Trade Secrets: Employee Mobility v. Employer's Rights

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I. INTRODUCTION

Trade secret law possesses increasing importance with the globalization of the economy and the increase in employee mobility.² State law, rather than federal law, governs trade secrets and most states follow the Uniform Trade Secrets Act (U.T.S.A.), created in 1979 by the National Conference of Commissioners on Uniform State Laws.³ States, therefore, exhibit a high degree of consistency in their definitions of a trade secret, including the elements of which a trade secret is comprised.⁴

Despite the adoption of the U.T.S.A., the range of remedies available to the trade secret holder after misappropriation of his or her trade secret remains unclear.⁵ Most commonly, a trade secret plaintiff will obtain injunctive relief, prohibiting the disclosure or use of the trade secret.⁶ Where injunctions prohibiting the use or disclosure of the trade secret do not suffice to correct the

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2. Linda K. Stevens, *Special Litigation Issues Pertaining to Trade Secrets*, 719 PLI/Pat 197, 210 (2002) (stating speed of modern communication renders geographic limitations on national and global economy meaningless).

3. See *Enterprise Leasing Co. of Phoenix v. Ehmke*, 3 P.3d 1064, 1068 (Ariz. Ct. App. 1999); see also *Dicks v. Jensen*, 768 A.2d 1279, 1282 (Vt. 2001) (stating majority of states have adopted some version of U.T.S.A.); see also MARK RADCLIFFE & DIANE BRINSON, *THE MULTIMEDIA LAW AND BUSINESS HANDBOOK* (Ladera Press 1999), available at http://profs.lp.findlaw.com/patents/patents_3.html.

4. See MARK RADCLIFFE & DIANE BRINSON, *THE MULTIMEDIA LAW AND BUSINESS HANDBOOK* (Ladera Press 1999), available at http://profs.lp.findlaw.com/patents/patents_3.html (providing Uniform Trade Secret Act's definition of trade secret, used by majority of states).

5. Stevens, *supra* note 2, at 211.

6. *Id.* at 212.

misappropriation, courts grant injunctions preventing competition entirely, even in the absence of non-competition agreements.⁷ Finally, some courts apply the doctrine of inevitable disclosure, which allows for an injunction against competition, even in the absence of actual misappropriation, based on the presumption that the defendant employee's new duties cannot be performed without disclosure of the plaintiff's trade secret.⁸

Courts remain inconsistent in defining the required elements of inevitable disclosure.⁹ Some courts require a finding of bad faith on the part of the defendant or a showing of irreparable harm by the plaintiff before granting injunctive relief, while others merely require the inevitable disclosure or use of the plaintiff's trade secret.¹⁰ Further complicating the situation, the standard for determining the inevitability of disclosure varies from jurisdiction to jurisdiction.¹¹ This note will examine and discuss the various approaches taken by the courts and suggest possible alterations to the doctrine of inevitable disclosure that would simplify its application.

7. *Id.* See, e.g., *PepsiCo v. Redmond*, 54 F.3d 1262 (1995) (granting injunction against competition where ex-employee with knowledge of trade secret attempted to work in similar position for competitor).

8. David Lincicum, *Inevitable Conflict?: California's Policy of Worker Mobility and the Doctrine of Inevitable Disclosure*, 75 S. CAL. L. REV. 1257, 1260 (2002) (stating doctrine of inevitable disclosure allows employer to get injunction even in the absence of actual misappropriation). Courts can enjoin a former employee from working for competitor if the new employment inevitably leads to disclosure of the trade secret. *Id.* Courts often apply the doctrine of inevitable disclosure even without evidence of bad faith or intent to disclose the secret on the part of the employee. *Id.*

9. Lincicum, *supra* note 8, at 1263-64 (discussing lack of agreement regarding how to analyze and apply doctrine of inevitable disclosure).

10. Compare *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1271 (7th Cir. 1995) (reasoning inevitable disclosure of trade secret combined with employee's lack of candor and good faith justified application of the doctrine of inevitable disclosure), with *Patio Enclosures, Inc. v. Herbst*, 39 Fed.Appx. 964, 969, 2002 WL 1492101 (6th Cir. 2002) (holding district court properly disregarded doctrine of inevitable disclosure because defendant did not possess any trade secret that could create injury). See also *Campbell Soup Co. v. Giles*, 47 F.3d 467, 471-72 (1st Cir. 1995) (affirming district court's denial of plaintiff's request for preliminary injunction preventing defendant employee from commencing his new position based in part upon fact plaintiff would not suffer irreparable harm).

11. Stevens, note 2, at 223 (discussing variation amongst jurisdictions in standard for evaluating whether disclosure of trade secret rises to level of inevitability). Courts have considered factors such as whether the new employer operates as a competitor, the scope and duties of the new job, the honesty of the employee, the trade secrets at risk and how clearly they are defined by the plaintiff, the existence of a non-disclosure or non-competition agreement, etc. *Id.*

II. GENERAL OVERVIEW OF TRADE SECRET LAW

Every one of the U.S. states offers some form of trade secret protection.¹² Trade secret law exists only as state law, and each state develops its own definitions and rules.¹³ The Restatement (First) of Torts, published in 1939, provided the first uniform model of trade secret law.¹⁴ The Restatement (First) of Torts defined a trade secret as “any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to gain an advantage over competitors who do not know or use it.”¹⁵ The Restatement (First) of Torts provided the model for state trade secret law until the approval of the Uniform Trade Secrets Act in 1979 by the National Conference of Commissioners on Uniform State Law.¹⁶

Although each state creates its own trade secret laws, most states model their laws after the Uniform Trade Secrets Act.¹⁷ According to the U.T.S.A., the term trade secret refers to information, including a formula, pattern, compilation, program, device, method, technique, or process, that derives independent economic value, actual or potential, from not being generally known to, and not being generally ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.¹⁸ In other words, to qualify as a trade secret something must consist of information with economic value derived from the fact that it is not

12. ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 34 (Aspen Law & Business 2d ed. 2000).

13. Susan Whaley, Comment, *The Inevitable Disaster of Inevitable Disclosure*, 67 U. CIN. L. REV. 809, 812 (1999) (discussing disparities in state laws governing trade secrets and attempts to arrive at consistent definitions and legal standards). Trade secret law originally arose at common law and states eventually each developed their own codified version. See Lincicum *supra* note 8, at 1259.

14. See generally RESTATEMENT (FIRST) OF TORTS §§ 757-59 (1939).

15. RESTATEMENT (FIRST) OF TORTS §757(b). The Restatement of Torts states that examples of trade secrets include “a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.” *Id.* The Restatement also noted, however, that the concept of trade secret is not capable of precise definition, and therefore the list of examples provided is not meant to be exhaustive. *Id.*

16. Lincicum *supra* note 8, at 1259 (discussing attempted standardization of trade secret law through creation of Uniform Trade Secrets Act).

17. *Id.* Forty-two states and Washington, D.C adopted the U.T.S.A. *Id.* The eight states that did not adopt the U.T.S.A. are Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, Texas and Wyoming. Brandy L. Treadway, Comment, *An Overviable of Individual States’ Application of Inevitable Disclosure: Concrete Doctrine or Equitable Tool?*, 55 SMU L. REV. 621, 626 (2002).

18. U.T.S.A. §1 (4) (1979).

known or readily ascertainable, and the trade secret holder must take reasonable security measures to protect the trade secret.¹⁹ A trade secret claim consists of three essential elements: qualification of the subject matter for trade secret protection, misappropriation of the trade secret by the defendant, and the exercise of reasonable security measures by the plaintiff.²⁰

Trade secret protection accrues automatically when its owner protects valuable information.²¹ Trade secrets holders may bar an employee from disclosing trade secrets even in the absence of an express confidentiality contract.²² Commonly, however, trade secret holders use non-disclosure or non-competition agreements to secure the secrecy of their trade secret.²³

III. TRADE SECRET MISAPPROPRIATION AND POSSIBLE REMEDIES

A. Misappropriation Defined

A trade secret owner has the right to prevent others from misappropriating and using his trade secret.²⁴ Not all use of another person's trade secret constitutes misappropriation.²⁵ Certain circumstances exist under which use of another person's trade secret information does not represent misappropriation.²⁶ Misappropriation consists of the acquisition, disclosure, or use of a trade secret by *improper means or breach of duty of confidentiality*.²⁷

"Improper means" includes any conduct below reasonable

19. *Id.*

20. Merges, *supra* note 12, at 35 (discussing elements of trade secret claim). The subject matter must be valuable and not generally known or ascertainable. *Id.* Misappropriation requires some deception or underhanded practice, so that the defendant has acquired the information wrongfully. *Id.* Reasonable security measures are judged on a case-by-case basis. *Id.* See also *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 179 (7th Cir. 1991) (denying defendant summary judgment in misappropriation action because of existence of genuine issue of fact regarding reasonable security measures). The court stated that the determination of reasonableness of security involves balancing the cost of the security measure against the benefit in terms of security enhancement. *Id.*

21. Radcliffe, *supra* note 4.

22. See *Jet Spray Cooler, Inc. v. Crampton*, 385 N.E.2d 1349, 1354 (1979).

23. See, e.g., *Barilla America, Inc. v. Wright*, No. 4-02-CV-90267, 2002 WL 31165069 (S.D. Iowa Jul. 5, 2002).

24. Radcliffe, *supra* note 4.

25. Merges *supra* note 12, at 64.

26. See, e.g., *Patio Enclosures, Inc. v. Herbst*, No. 01-3674, 2002 WL 1492101 (6th Cir. Jul. 10, 2002) (finding no inevitable misappropriation where ex-employee only used trade secret information while employed by trade secret holder and signed non-compete agreement).

27. *Id.*

standards of commercial morality, including bribery.²⁸ A duty of confidentiality may arise in several ways. Commonly, a duty of confidentiality is created through contract.²⁹ For example, an employer may have employees sign a contract for confidentiality.³⁰ A long-standing business relationship between two parties may also establish a duty of confidentiality.³¹ Finally, a duty of confidentiality may be evaluated according to the “reasonable person standard.”³² If a reasonable person would know that there was a duty of confidentiality then such a duty exists.³³

When a trade secret misappropriation occurs, the owner of the trade secret has several remedies available. If an express confidentiality or non-compete contract exists, the trade secret owner can bring a breach of contract claim.³⁴ Regardless of the existence of an express contract, the trade secret owner can bring an action for the misappropriation of the trade secret under applicable state law.³⁵ In a successful action for misappropriation, the court may grant relief in

28. See *E.I. du Pont de Nemours & Co. v. Christopher*, 431 F.2d 1012, 1016 (5th Cir. 1970) (discussing standard for finding of improper means). The court applied the Texas rule, which states “one may use his competitor’s secret process if he discovers the process by reverse engineering applied to the finished product; one may use a competitor’s process if he discovers it by his own independent research; but one may not avoid these labors by taking the process from the discoverer without his permission at a time when he is taking reasonable precautions to maintain its secrecy. To obtain knowledge of a process without spending the time and money to discover it independently is improper unless the holder voluntarily discloses it or fails to take reasonable precautions to ensure its secrecy.” *Id.*

29. *Merges*, *supra* note 12, at 71.

30. See, e.g., *Patio Enclosures, Inc. v. Herbst*, No. 01-3674, 2002 WL 1492101, at *1 (6th Cir. Jul. 10 2002) (stating defendant signed non-compete agreement as condition of employment with trade secret holder).

31. *Smith v. Dravo Corp.*, 203 F.2d 369, 376 (7th cir. 1953) (finding duty of confidentiality where plaintiff revealed trade secret to defendant for business purposes, even absent express promise of confidentiality).

32. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §41 (1995). A confidential relationship may be established where there is an express promise of confidentiality, or the trade secret was disclosed under circumstances that would justify the conclusion that the defendant knew or had reason to know the disclosure was intended to be confidential, or the trade secret holder was reasonable in believing that the defendant consented to a duty of confidentiality. *Id.*

33. *Id.*

34. See generally, e.g., *Safety-Kleen Sys., Inc. v. McGinn*, 233 F. Supp. 2d 121 (2002) (allowing plaintiff employer to bring action against defendant employee for breach of contract and taking of trade secrets).

35. *Smith v. Dravo Corp.*, 203 F.2d 369, 376 (7th Cir. 1953). Cf. *Jet Spray Cooler, Inc. v. Crampton*, 282 N.E.2d 921, 924 (Mass. 1972) (stating employer may enjoin departing employee from using or disclosing trade secrets or confidential information based on implied contract theory resulting from employer-employee relationship). The absence of an express contract did not prevent the employer from bringing an action for misappropriation. *Id.*

the form of monetary damages or an injunction prohibiting use or disclosure of the trade secret.³⁶ The plaintiff may also seek a preliminary injunction prohibiting use or disclosure of the trade secret pending the trial. Courts, however, infrequently grant preliminary injunctive relief in most jurisdictions.³⁷

IV. INTRODUCTION TO THE DOCTRINE OF INEVITABLE DISCLOSURE

The courts use the doctrine of inevitable disclosure as an equitable tool to grant injunctions on competition in the absence of actual misappropriation.³⁸ Section 2 of the U.T.S.A. provides legislative support for the doctrine of inevitable disclosure, stating, "actual or threatened misappropriation may be enjoined."³⁹ In applying the doctrine of inevitable disclosure, courts often cite the U.T.S.A.'s prohibition of threatened use for statutory support.⁴⁰

As a rationale for the doctrine of inevitable disclosure, employers argue that in many situations unavoidable disclosure or use of their trade secrets would occur if employees with knowledge of trade secrets enter the employ of competitors.⁴¹ The doctrine first applied to employees in technical fields, but courts expanded the doctrine to apply to employees with knowledge of any trade secret, including financial information, as well as strategies for manufacturing, production, and marketing.⁴² Although the doctrine prohibits employees from using or disclosing any trade secrets of a former

36. Stevens, *supra* note 3, at 211-12.

37. *Marietta Corp. v. Fairhurst*, 754 N.Y.S.2d 62, 64 (2003) (stating preliminary injunctions not routinely granted); *see American Hoechst Corp. v. Nuodex, Inc.*, No. 7950, 1985 WL 11563, at *1 (Del. Ch. Apr. 23, 1985) (denying plaintiff preliminary injunction preventing former employee from working for competitor). The court stated that a plaintiff must meet an extraordinary burden in order to receive a preliminary injunction against competition by demonstrating a reasonable probability of success on the merits of the case. *Id.* *But see* *Branson Ultrasonics Corp. v. Stratman*, 921 F. Supp. 909, 912 (D. Conn. 1996) (granting motion for preliminary injunction where necessary to avoid irreparable harm).

38. *See PepsiCo., Inc. v. Redmond*, 54 F.3d 1262, 1269 (1995) (holding courts may enjoin employee from working for competitor in order to avoid inevitable disclosure of trade secrets). *See also* Stevens, *supra* note 3, at 213-15.

39. U.T.S.A. § 2 (a).

40. Stevens, *supra* note 3, at 216.

41. *See PepsiCo Inc.*, 54 F.3d at 1269 (arguing employee would inevitably disclose trade secrets if court did not grant injunction). The court found that unless the defendant possessed an unusual ability to compartmentalize information, he would necessarily make decisions for his new employer based on knowledge of trade secrets of his former employer. *Id.* The court held that the defendant's knowledge of specific plans and processes developed by his former employer, which would automatically give him an advantage over others in the same industry, constituted a protectable trade secret. *Id.*

42. *See id.* at 1265.

employer, it does not prevent employees from using any skills or general knowledge that they acquired through their work experience.⁴³

Not surprisingly, states do not enforce the doctrine consistently and jurisdictions never developed a consistent set of criteria for its application.⁴⁴ Some states clearly subscribe to the doctrine, others apply a restricted version of the doctrine, and others reject the doctrine entirely.⁴⁵ A small group of states possess too little relevant case law to come to any definitive position on the issue.⁴⁶

Public policy concerns relating to employee mobility and freedom of employment provide the primary opposition to the doctrine of inevitable disclosure.⁴⁷ By nature, the American economy depends on competition, which in turn depends to some degree upon employee mobility.⁴⁸ Without the doctrine of inevitable disclosure, companies might hire employees based on their loyalty rather than their ability, in order to protect company trade secrets.⁴⁹ This result would defeat the purpose for which intellectual property laws exist: the promotion of innovation.⁵⁰

In applying the doctrine of inevitable disclosure, courts must balance employers' interests in protecting their trade secrets against

43. *Wexler v. Greenberg*, 160 A.2d 430, 437 (Pa. 1960) (denying motion to enjoin former employee from working for competitor). The court found that the employer had no legally protectable trade secret. *Id.* The employee's skill, knowledge, and mental abilities developed while employed are not the property of his employer, and the employee may use such skills and knowledge unless he has signed an express agreement otherwise. *Id.*

44. Brandy L. Treadway, Comment, *An Overview of Individual States' Application of Inevitable Disclosure: Concrete Doctrine or Equitable Tool?*, 55 SMU L. REV. 621, 623 (2002) (stating no two states enforce same version of inevitable disclosure).

45. *See id.* at 626.

46. *Id.* at 632-35.

47. *See Patio Enclosures, Inc. v. Herbst*, 39 Fed. Appx. 964, 970, 2002 WL 1392101, at * 6 (6th Cir. Ohio 2002) (allowing defendant, successful salesman, to continue to practice his trade would best advance public interest).

48. *See Whaley, supra* note 13, at 811 (arguing courts traditionally favor employee mobility over protection of trade secrets). *See also Campbell Soup Co. v. Giles*, 47 F.3d 467, 469 (1st Cir. 1995) (discussing public interest in favor of employee mobility).

49. ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 32 (Aspen Law & Bus. 2d ed. 2000).

50. *See id.* at 36 (discussing utilitarian premise underlying trade secret law, protecting information against theft will encourage investment in research and innovation). *See also PepsiCo Inc. v. Redmond*, 54 F.3d 1262, 1268 (7th Cir. 1995) (discussing purpose of trade secret law). The court stated "trade secret law serves to protect standards of commercial morality and encourage invention and innovation while maintaining the public interest in having a free and open competition in the manufacture and sale of unpatented goods." *Id.*

the interests of the employees in working at the company of their choosing.⁵¹ Despite the public interest in favor of employee mobility, the public also has a strong interest in the protection of trade secrets, as evidenced by the passage of a trade secret statute in almost every state.⁵²

V. CASE LAW ON INEVITABLE DISCLOSURE

Traditionally, the courts favored employee mobility over the rights of employers to protect their trade secrets.⁵³ When an employer identifies a specific trade secret which a former employee has learned of by reason of his employment, and the employee's subsequent employment will necessarily disclose such trade secret, the courts will, however, grant an injunction prohibiting the employee from commencing his subsequent employment.⁵⁴ For decades, courts have recognized that relief in the form of an injunction against use or disclosure does not offer effective relief in some situations.⁵⁵

A. *Eastman Kodak Co. v. Power Film Products, Inc. (1919)*

The doctrine of inevitable disclosure originated in the 1919 New York state court decision *Eastman Kodak Co. v. Power Film Products, Inc.*⁵⁶ The defendant, Harry Warren, worked as an employee of the plaintiff, Eastman Kodak Co.⁵⁷ Eastman Kodak brought an action to prevent Warren from disclosing their trade secrets to a competitor that offered Warren employment.⁵⁸ During his

51. See Stevens, *supra* note 2, at 223.

52. Barilla Am., Inc. v. Wright, No. 4-02-CV-90267, 2002 WL 31165069, at *11 (S.D. Iowa Jul. 5, 2002) (stating Iowa legislature articulated public interest in protection of trade secrets by enacting Iowa Trade Secrets Act). See also William G. Porter & Michael C. Griffaton, *Identifying and Protecting Employees' Interests in Trade Secrets and Proprietary Information*, 68 DEF. COUNS. J. 439, 439 (2001) (stating only eight states protect trade secret under common law: Michigan, Missouri, New Jersey, New York, Pennsylvania, Tennessee, Texas and Wyoming).

53. Whaley, *supra* note 13, at 811 (arguing courts traditionally favored employee mobility over protection of trade secrets).

54. See E.I. DuPont de Nemours & Co. v. American Potash & Chem. Corp., 200 A.2d 428, 436 (Del. Ch. 1964).

55. See *Eastman Kodak Co. v. Powers Film Prod., Inc.*, 179 N.Y.S. 325, 330 (1919) (enjoining employee of plaintiff from working for competitor). The court found that an injunction against use or disclosure of trade secret would be inefficient. *Id.* The court granted an injunction against competition because in performing his new job duties for Powers Film Products the defendant would necessarily reveal some of Kodak's trade secrets. *Id.*

56. *Id.*; see Whaley, *supra* note 13, at 820 (discussing early case law of doctrine of inevitable disclosure).

57. *Eastman Kodak Co.*, 179 N.Y.S. at 327.

58. *Id.*

employment with Kodak, Warren signed both a non-competition agreement and a confidentiality agreement.⁵⁹ Despite the confidentiality agreement, Kodak argued that Warren would necessarily and unavoidably reveal Kodak's trade secrets in the course of his future duties with the competitor, if allowed to commence employment.⁶⁰

Even though Kodak did not establish actual misappropriation of their trade secrets, the court upheld the non-competition and confidentiality agreements, recognizing that allowing the defendant to commence employment with a competitor would result in disclosure of Kodak's trade secrets and irreparable injury to Kodak.⁶¹ The court went on to say that injunctive relief merely prohibiting disclosure would be ineffective because in performing services for a competitor Warren would necessarily impart trade secrets belonging to Kodak.⁶² Although this case established the doctrine of inevitable disclosure, courts rarely applied it in the following decades.⁶³

B. E.I. duPont de Nemours & Co. v. American Potash & Chemical Corp. (1964)

Use of the phrase "inevitable disclosure" first occurred in *E.I. duPont de Nemours & Co. v. American Potash & Chemical Corporation* in 1964.⁶⁴ The plaintiff, E.I. duPont de Nemours & Company ('duPont'), brought an action against American Potash & Chemical Corporation ('Potash') and Donald Hirsch ('Hirsch'), a former employee of duPont.⁶⁵ The action sought a restraining order preventing Hirsch from disclosing or using duPont's trade secrets and

59. *Id.* The non-compete agreement stated that upon termination of his employment with Kodak, the defendant would not work for anyone in the photographic business in the United States, except in Alaska, for a period of two years. *Id.* The confidentiality agreement documented that the plaintiff revealed trade secrets to the defendant and recited an agreement on his part not to reveal those trade secrets to anyone. *Eastman Kodak Co.*, 179 N.Y.S. at 327.

60. *Eastman Kodak Co.*, 179 N.Y.S. at 327.

61. *Id.*

62. *Id.* The court found that Warren could not remain loyal to his former employer in the course of performing the job duties of his prospective employer. *Id.* at 330.

63. Whaley, *supra* note 13, at 821-22.

64. Treadway, *supra* note 38, at 622. See *E.I. duPont de Nemours & Co. v. Am. Potash & Chemical Corp.*, 200 A.2d 428, 435-36 (Del. Ch. 1964) (stating court can consider degree of probability, whether amounting to an inevitability or not, in determining if threat of disclosure exists). The court held that preliminary injunctive relief in the form of a temporary restraining order was justified because the defendants did not foreclose the possibility of a finding of real and substantial threat of use or disclosure. *Id.* at 436.

65. *E.I. duPont de Nemours & Co.*, 200 A.2d at 429.

from accepting any employment with Potash in connection with the development of a chloride, despite the fact that Hirsch never signed a non-compete agreement while employed at duPont.⁶⁶ After the court issued a preliminary injunction on behalf of the plaintiff's, the defendants filed for summary judgment to dismiss the case for lack of legal merit.⁶⁷

The plaintiff argued that the risk of inevitable disclosure posed by Hirsch's employment with Potash justified injunctive relief.⁶⁸ Alternatively, they argued that Hirsch owed them a fiduciary duty, created by the employer-employee relationship, which would justify the injunction.⁶⁹ The court denied the defendant's motion for summary judgment because factual issues existed that could justify finding an imminent threat of violation of Hirsch's fiduciary duty to his employer.⁷⁰ Although the court decided the case on the basis of a violation of Hirsch's fiduciary duty, the court stated that in determining whether a threat of misappropriation exists, courts may properly consider the probability that the defendant's employment by the competitor would inevitably cause disclosure of the plaintiff's trade secrets.⁷¹

C. PepsiCo Inc. v. Redmond (1995)

In *PepsiCo v. Redmond*, the Seventh Circuit applied the doctrine of inevitable disclosure, confirming it as a legitimate basis for issuing injunctive relief in a trade secret misappropriation action.⁷² PepsiCo

66. *Id.* The Plaintiff existed as the only successful manufacturer of titanium dioxide pigments by a chloride process. *Id.* at 430. The restraining order prevented Hirsch from accepting any offer of employment with Potash related to the development of a chloride process or the manufacture of titanium dioxide pigments by a chloride process. *Id.*

67. *E.I. duPont de Nemours & Co.*, 200 A.2d at 430.

68. *Id.* at 432. The plaintiff argued that Hirsch's employment at Potash would inevitably cause disclosure of its trade secrets, and that such fact alone warranted injunctive relief. *Id.* Rather than deciding the case on the basis of the inevitable disclosure doctrine alone, the court relied on the well-established rule that courts may enjoin a threatened breach of a fiduciary duty at equity. *Id.*

69. *E.I. duPont de Nemours & Co.*, 200 A.2d at 432.

70. *Id.*

71. *Id.* at 436. The court stated that they are often called upon to draw conclusions as to the probable future consequences of certain courses of action. *Id.* The court is entitled to predict the likely results of a certain situation and grant legal remedies on that basis. *E.I. duPont de Nemours & Co.*, 200 A.2d at 436.

72. *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995). The court stated that a showing that the defendant's new employment will inevitably cause him to use or disclose the plaintiff's trade secret may support a claim of trade secret misappropriation. *Id.* at 1269. See Stevens, *supra* note 2, at 215 (discussing reemergence of doctrine of inevitable disclosure).

brought an action seeking a preliminary injunction against Redmond, a former high-level PepsiCo employee, and Quaker Oats, a direct PepsiCo competitor, after Quaker Oats recruited Redmond to join their company.⁷³ In order to obtain a preliminary injunction, the party seeking the injunction must show the existence of a trade secret and an actual or threatened misappropriation.⁷⁴ The district court granted the preliminary injunction and the defendants appealed.⁷⁵ The defendants based their appeal on lack of actual or threatened misappropriation; they did not contest the existence of a trade secret.⁷⁶ The court of appeals affirmed the district court's decision to grant the preliminary injunction enjoining Redmond from entering the employ of Quaker Oats.⁷⁷

Recognizing that the Indiana Trade Secrets Act expressly grants the court authority to enjoin both actual and threatened misappropriation of trade secrets,⁷⁸ the court turned to the issue of what constitutes threatened or inevitable misappropriation.⁷⁹ At the

73. *PepsiCo, Inc.*, 54 F.3d at 1263. PepsiCo employed Redmond as the General Manager of their California Business Unit, which had annual revenues of more than \$500 million dollars, representing 20% of PepsiCo's profit within the United States. *Id.* at 1264. As a result of his position, Redmond possessed detailed knowledge of various PepsiCo trade secrets, including PepsiCo's annual strategic plan and the annual operating plan, documents that set forth pricing structures, plans to compete, financial goals, and sensitive manufacturing, production, marketing, and distribution information. *Id.* at 1265. After an offer from a competitor of PepsiCo, Redmond accepted the position of Vice President of Field Operations for Quaker's Gatorade division. *Id.* at 1264.

74. *PepsiCo Inc.*, 54 F.3d at 1268. *See also* E.I. duPont de Nemours & Co. v. Am. Potash & Chem. Corp., 200 A.2d 428, 434 (Del. Ch. 1964) (discussing existence of plaintiff's trade secrets and disclosure problems presented by defendants new employment as a basis for a preliminary injunction).

75. *PepsiCo Inc.*, 54 F.3d at 1266. The district court found that the defendant's employment with Quaker posed a clear threat of misappropriation of trade secrets that could be appropriately enjoined under Illinois statutory and common law. *Id.* at 1267. The district court held that PepsiCo satisfied the requirements for a preliminary injunction based on three reasons: no sufficient alternative legal remedy existed such that PepsiCo would be irreparably harmed if the injunction did not issue, the threatened injury to PepsiCo outweighed the threatened injury to the defendants caused by the preliminary injunction, and the granting of the preliminary injunction would not go against the public interest. *Id.*

76. *Id.* at 1268. The Seventh Circuit treated this as a "threatened misappropriation" case even though Redmond signed a confidentiality agreement with PepsiCo and an agreement with Quaker providing that he would not disclose any confidential information belonging to any third party. *See id.* at 1264. *See also* Lincicum, *supra* note 8, at 1262.

77. *PepsiCo Inc.*, 54 F.3d at 1272.

78. UNIFORM TRADE SECRETS ACT § 2(a) (1979) (stating "actual or threatened misappropriation may be enjoined").

79. *PepsiCo Inc.*, 54 F.3d at 1268 (acknowledging that very little law exists in Illinois or in Seventh Circuit addressing question of what constitutes threatened or

time of the *PepsiCo* decision, very little case law existed defining what constitutes threatened misappropriation.⁸⁰ The *PepsiCo* court, however, considered *Teradyne, Inc. v. Clear Communications Corp.*, 707 F.Supp. 353 (N.D. Ill. 1989), which held that “[t]hreatened misappropriation can be enjoined under Illinois law [if the court finds] a high degree of probability of inevitable and immediate . . . use of . . . trade secrets.”⁸¹

PepsiCo set forth the elements for inevitable disclosure. First, the court looked for the existence of trade secrets and required that Redmond possessed knowledge of the trade secret information.⁸² Next, the court discussed the strong similarities between Redmond’s position at PepsiCo and his new position at Quaker.⁸³ While similarity of job description alone does not suffice, a showing of the existence of a trade secret combined with actual or threatened misappropriation of that trade secret justifies an injunction preventing a defendant from working for a competitor.⁸⁴ Despite the fact that the defendants denied any intention to use PepsiCo’s trade secrets, the Seventh Circuit applied the doctrine of inevitable disclosure, relying on the district court’s finding that Redmond would “necessarily” make future decisions for his new employer by relying on his knowledge of PepsiCo trade secrets.⁸⁵ Finally, the court discussed the lack of good faith on the part of the defendants and the irreparable harm that PepsiCo would suffer if the injunction did not issue.⁸⁶ The court reasoned that despite the fact that Redmond signed a confidentiality agreement with PepsiCo, he presented himself as

inevitable misappropriation). The ITSA preempts any common law remedies contradicting its own terms. *PepsiCo Inc.*, 54 F.3d at 1269.

80. *PepsiCo Inc.* at 1268.

81. *Teradyne, Inc. v. Clear Communications Corp.*, 707 F. Supp. 353, 356 (N.D. Ill. 1989).

82. *PepsiCo Inc.*, 54 F.3d at 1267.

83. *PepsiCo Inc.*, 54 F.3d at 1266 (discussing similarities in Redmond’s positions at PepsiCo and at Gatorade).

84. *Id.*

85. *PepsiCo Inc.*, 54 F.3d at 1269 (affirming Redmond could not avoid disclosure and use of PepsiCo trade secrets because he could not compartmentalize trade secret specific knowledge when performing his new duties).

86. *PepsiCo Inc.*, 54 F.3d at 1271. Redmond intentionally misled his superiors at PepsiCo, telling them that Quaker had only offered him a job, when in reality he already accepted the position. *Id.* at 1264. The district court did not abuse its discretion in concluding that Quaker intentionally recruited PepsiCo employees and that both defendants lacked candor regarding Redmond’s new job description. *Id.* at 1271. The court inferred that Redmond would not refrain from disclosing PepsiCo trade secrets in his new position, based upon his previous lack of forthrightness. *Id.* Redmond provided Quaker with an unfair advantage in competition with PepsiCo if allowed to commence employment. *Id.* at 1266.

untrustworthy and unlikely to uphold his non-disclosure agreement.⁸⁷

VI. INEVITABLE DISCLOSURE AFTER PEPSICO

After the *PepsiCo* decision, use of the doctrine of inevitable disclosure increased significantly for several reasons. The adoption of the U.T.S.A. broadened the definition of trade secret and allowed for injunctions against threatened misappropriation of trade secrets, thereby expanding the range of situations in which trade secrets law applies and allowing for a remedy without a showing of actual misappropriation.⁸⁸ Additionally, the nature of business changed with the rise in information technology, rendering traditional geographically limited non-compete agreements almost useless.⁸⁹

Even after the *PepsiCo* decision, the doctrine of inevitable disclosure remains controversial.⁹⁰ Not all courts recognize the doctrine as a legitimate equitable remedy.⁹¹ Among the courts that do recognize inevitable disclosure, disagreement continues regarding what elements must exist in order to apply the doctrine. Some courts focus only on the inevitability of the disclosure, while others consider factors such as the existence of bad faith and lack of candor on the part of the defendants or the showing of irreparable harm to the trade secret holder.⁹² Although application of the doctrine serves to protect

87. *PepsiCo Inc.*, 54 F.3d at 1271. The Seventh Circuit concluded that the district court did not abuse its discretion in doubting that Redmond would refrain from disclosing PepsiCo's trade secrets, given his lack of candor in the events leading up to the trial and his testimony at the trial. *Id.*

88. See Whaley, *supra* note 13, at 836. Before the adoption of the U.T.S.A. only actual misappropriation of trade secrets could be enjoined. *Id.* The U.T.S.A. expanded definition of trade secret beyond technical processes and formulas to include more information such as customer lists, financial information, production and manufacturing information, etc. *Id.* See also Treadway *supra* note 45, at 626 (stating while doctrine of inevitable disclosure originally applied to technical workers, its application has expanded to cover personnel with knowledge of such trade secrets as strategic or marketing plans).

89. See Stevens, *supra* note 2, at 208. Imposing geographic limitations to confidentiality agreements renders protection illusory because protection in one state will not prevent use in another state. *Id.*

90. Lincicum, *supra* note 8, at 1263. See also Treadway, *supra* note 45, at 623 (stating no two states enforce doctrine of inevitable disclosure in same way).

91. Treadway, *supra* note 45, at 643. States that reject the doctrine of inevitable disclosure include California, Florida and Virginia. *Id.*

92. *Campbell Soup Co. v. Giles*, 47 F.3d 467, 472 (1st Cir. 1995) (denying preliminary injunction requested to prevent employee from working for competitor). The court based the denial on a failure to show irreparable harm to plaintiff and on the fact that the record contained no indication of bad faith on part of departing employee. *Id.* The court considered the lack of bad faith as well as the failure of Campbell Soup Co. to demonstrate irreparable harm when denying an injunction prohibiting Giles from working for a competitor. *Id.* See Patio

“commercial morality” and protect the public interest in encouraging innovation, it also impairs employee mobility, a policy traditionally favored and protected by the courts.⁹³

A. The Meaning of Inevitable

Courts must consider the probability of disclosure when evaluating whether or not there is a threatened misappropriation, as prohibited by the U.T.S.A.⁹⁴ If the probability of disclosure of trade secrets is inevitable, granting an injunction against competition is justified.⁹⁵ A likelihood, possibility, or suspicion of misappropriation does not warrant an injunction.⁹⁶

The requirement of true inevitability limits the application of the doctrine of inevitable disclosure.⁹⁷ Unfortunately, the degree of probability required for a showing of inevitability remains a source of confusion among the courts.⁹⁸ No uniform definition of inevitability exists, causing courts to apply different definitions of inevitability.⁹⁹

Some courts require a “high degree of probability of inevitable disclosure”.¹⁰⁰ In such jurisdictions the fact that a defendant is a

Enclosures, Inc. v. Herbst, No. 01-3674, 2002 WL 1492101, at *5 (6th Cir. Jul. 10, 2002) (stating in order to receive preliminary injunction, plaintiff must show actual or threatened irreparable injury by clear and convincing evidence).

93. Lincicum, *supra* note 8, at 1268 (discussing purposes of trade secret law).

94. *See* PepsiCo Inc. v. Redmond, 54 F.3d 1262, 1271 (7th Cir. 1995) (stating inevitability Redmond would disclose PepsiCo trade secrets at his new job combined with his questionable veracity lead court to affirm district court’s issuance of temporary injunction).

95. *Id.*

96. *See* Int’l Bus. Mach. Corp. v. Seagate Tech., Inc., 941 F. Supp. 98, 101 (D. Minn. 1992) (stating plaintiff must show “high degree of probability” of inevitable disclosure).

97. Stevens, *supra* note 2, at 221-22. Among jurisdictions that apply the doctrine of inevitable disclosure, some courts have made it clear that they intend for the use of the doctrine only in situations where disclosure is literally inevitable. *Id.*

98. *Id.*

99. *See, e.g.,* Treadway, *supra* note 45, at 649.

100. *See* Marietta Corp. v. Fairhurst, 754 N.Y.S.2d 62, 65 (2003) (reversing a preliminary injunction issued by district court preventing plaintiff’s former employee from commencing employment with competitor). The court reversed the injunction because the plaintiff offered no evidence to show that the former employee, Fairhurst, intentionally disclosed any trade secret information. *Id.* While the court found that Fairhurst possessed access to confidential trade secret information and intended to leave to work for a competitor, they refused to find inevitable disclosure because a valid confidentiality contract existed to protect the plaintiff’s trade secrets. *Id.* *See also* Bridgestone/Firestone, Inc. v. Lockhart, 5 F. Supp. 2d 667, 682 (S.D. Ind. 1998) (holding that the likelihood of disclosure did not reach the level of inevitability). The court stated that the trade secret statute does not prevent an employee from working for a competitor, but only from

former employee with knowledge of the plaintiff's trade secrets who accepts a job offer from a competitor does not justify application of the doctrine of inevitable disclosure without something more.¹⁰¹ Therefore, a plaintiff must make some further showing that disclosure will be truly inevitable.¹⁰²

Other jurisdictions only require a substantial likelihood of disclosure in order to make a finding of inevitability.¹⁰³ Various jurisdictions require or consider different factors when making a determination of inevitability.¹⁰⁴ Some possible factors include the nature of the trade secrets at risk, whether the new employer is a competitor, the defendant's new job duties, the candor of the departing employee, the existence of a confidentiality agreement or non-competition agreement, and measures taken by the new employer to prevent the unintentional disclosure of others' trade

misappropriating a trade secret. *Id.* Only exceptional circumstances warrant the granting of injunctive relief. *Id.* The findings of fact did not support the conclusion that the departing employee would fail to honor his obligation to keep his prior employer's confidential information secret. *Id.* at 682.

101. See *Superior Consultant Co. Inc. v. Bailey*, No. CIV.A.3:02CV2110-D, 2000 WL 1279161, at *11 (E.D. Mich. Aug. 22, 2000). The court denied in part a preliminary injunction preventing the plaintiff's former employee from working for a competitor. *Id.* The court based its refusal on the fact that the plaintiff failed to show that misappropriation of its trade secret was truly inevitable, although the court recognized that the plaintiff demonstrated a "substantial likelihood that defendant Bailey posed a threatened" misappropriation. *Id.* See also *Abbott Labs v. Chiron Corp.*, No. 97-C 0519, 1997 WL 208369, at *3 (N.D. Ill. Apr. 23, 1997) (stating even if job accepted by former employee with competitor displays similarities to his previous position, disclosure of trade secrets does not reach the level of inevitability). See also *PepsiCo Inc. v. Redmond*, 54 F.3d 1262, 1269 (quoting *Teradyne Inc. v. Clear Communications Corp.*, 707 F. Supp. 353 (N.D. Ill. 1989)). The *Teradyne Inc.* court held that a defendant's conduct consisting of working for the plaintiff, knowing its business, leaving the employ of the plaintiff, and accepting a job in the same field, will not create a valid claim of threatened misappropriation. *Id.* But see *Procter & Gamble Co. v. Stoneham*, 747 N.E. 2d 268, 277 (Ohio Ct. App. 2000) (Painter, J., concurring) "An employer should not have to demonstrate any actual or overtly threatened harm—the fact that an ex-employee, possessed of a substantial amount of confidential information, is now with a competitor in a position where that knowledge would produce a competitive advantage should be sufficient to require an injunction." *Id.*

102. See, e.g., *Universal Hosp. Services, Inc. v. Henderson*, No. CIV.02-951, 2002 WL 1023147, at *4 (D. Minn. May 20, 2002). The court denied the plaintiff's motion for an injunction prohibiting defendant Henderson from entering the employment of a competitor based on the fact that possessing trade secrets and working in a similar position for a competitor does not justify an injunction. *Id.*

103. *Procter & Gamble Co. v. Stoneham*, 747 N.E.2d 268, 275 (Ohio Ct. App. 2000). See also *La Calhene, Inc. v. Spolyar*, 938 F. Supp. 523, 531 (W.D. Wis. 1996) (finding real threat of misappropriation where former employee with intimate knowledge of plaintiff's trade secrets left to work for competitor and would inevitably rely on knowledge of plaintiff's trade secrets).

104. Stevens, *supra* note 2, at 221.

secrets.¹⁰⁵

B. Bad Faith Required

Courts interpret the Seventh Circuit's comments regarding bad faith in different ways. While some courts treat bad faith as a required element of inevitable disclosure, other courts merely consider bad faith as one of many factors that support issuing an injunction against competition.¹⁰⁶ The *PepsiCo* court failed to state clearly whether bad faith constitutes a required element of inevitable disclosure or merely one of many factors that support granting injunctive relief.¹⁰⁷ Attempting to clarify the situation, many courts held that if disclosure truly reaches the level of inevitability, then the employee's good intentions become irrelevant.¹⁰⁸

105. See *Maxxim Med., Inc. v. Michelson*, 51 F. Supp. 2d 773, 786 (S.D. Tex. 1999) (citing D. Peter Harvey, "Inevitable" Trade Secret Misappropriation after *PepsiCo, Inc. v. Redmond*, 537 PLI/PAT 199, 226 (1998)). The court found that all the factors "weighed heavily in favor of a finding of inevitable disclosure." *Id.* See also *Procter & Gamble Co. v. Stoneham*, 747 N.E. 2d 268, 276 (Ohio Ct. App. 2000) (adopting the inevitable disclosure rule). In granting injunctive relief, the court considered factors including the employee's knowledge of valuable trade secrets, the new employer's direct competition with the trade secret holder, the similarity of the two jobs descriptions, and the departing employee's non-competition agreement with his former employer. *Id.*

106. See *Lumex, Inc. v. Highsmith*, 919 F. Supp. 624, 636 (E.D.N.Y. 1996) (upholding non-competition agreement through application of doctrine of inevitable disclosure despite finding no bad faith on employee's part). The court stated that the employee was highly credible, suggesting that the intentions of the employee are not determinative. *Id.* at 630. But see *Bridgestone/Firestone, Inc. v. Lockhart*, 5 F. Supp. 2d 667, 682 (S.D. Ind. 1998) (finding disclosure not inevitable, or even seriously threatened, noting former employee and new employer both failed to display any bad faith). The court distinguished the present case from *PepsiCo Inc. v. Redmond* based on the fact that the court found the defendant's testimony regarding his lack of memory of the plaintiff's trade secrets credible. *Id.* at 681-82.

107. *PepsiCo Inc. v. Redmond*, 54 F.3d 1262, 1271 (7th Cir. 1995). The court stated "when we couple the demonstrated inevitability that Redmond would rely on PCNA trade secrets in his new job at Quaker with the district court's reluctance to believe that Redmond would refrain from disclosing these secrets in his new position . . . we conclude that the district court correctly decided [to grant the injunction]". See also *Stevens supra* note 2, at 218 (discussing lack of certainty regarding whether the Seventh Circuit would have ruled in favor of *PepsiCo* absent Redmond's bad faith).

108. See *Aetna Ret. Servs. v. Hug*, No. CV970479974S, 1997 WL 396212, at *11 (Conn. Super. June 18, 1997) (holding employees good intentions and integrity irrelevant). See also *Integrated Cash Mgmt. Servs. v. Digital Transactions*, 732 F. Supp. 370, 379 (S.D.N.Y. 1989) (finding employee could not possibly perform job duties for new employer without relying on knowledge of former employer's trade secrets). The court granted an injunction because the employee would inevitably disclose trade secrets, regardless of the former employees good intentions. *Id.*

C. Irreparable harm

Most intellectual property laws originate in the laws of real property, meaning that like the owner of real property, an owner of intellectual property has the right to obtain an equitable remedy in the form of an injunction against future interference.¹⁰⁹ The doctrine of inevitable disclosure, like all equitable remedies, applies where traditional legal remedies will not sufficiently protect the trade secret holder.¹¹⁰ Injunctive relief is justified where required to prevent the employer from suffering irreparable harm or injury that cannot be compensated by monetary damages.¹¹¹

In some cases, courts presume irreparable harm will result from the disclosure of valuable trade secrets.¹¹² In other cases, courts refuse to presume irreparable harm and require the plaintiff to make a showing that such harm will result in the absence of an injunction.¹¹³ This issue remains a source of confusion amongst jurisdictions today.

109. ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 113 (Aspen Law & Business 2d ed. 2000). U.T.S.A. § 2(a) gives trade secret owners the right to an injunction in response to actual or threatened misappropriation. *Id.*

110. *See id.*

111. *See, e.g.,* Dr. Seuss Enter. v. Penguin Books USA, 109 F.3d 1994, 1397 n.1 (9th Cir. 1997) *quoting* Big Country Foods Inc. v. Board of Educ., 868 F.2d 1085, 1088 (9th Cir. 1989) (stating requirements for justification of injunctive relief).

112. *See* Barilla Am., Inc. v. Wright, 2002 WL 31165069, at *4 (S.D. Iowa July 5, 2002). The court found that disclosure of Barilla's trade secrets would cause irreparable harm to Barilla. *Id.* *See* Eastman Kodak Co. v. Powers Film Prods., 179 N.Y.S. 325, 329 (1919) (reinstating injunction because failure to enforce injunction would cause irreparable injury to plaintiff). *See also* E.I. duPont de Nemours & Co. v. Am. Potash & Chem. Corp., 200 A.2d 428, 432 (Del. Ch. 1964) (finding disclosure of plaintiff's trade secrets would damage plaintiff in way that would not be compensable by monetary damages). *See also* FMC Corp. v. Varco Intern Inc., 677 F.2d 500, 503 (5th Cir. 1982) (holding threat of irreparable harm exists where single trade secret may be disclosed).

113. *See* Marietta Corp. v. Fairhurst, 754 N.Y.S.2d 62, 65 (N.Y. App. Div. 2003) (stating court must determine whether plaintiff demonstrated irreparable harm will result absent injunction). *See also* IBM Corp. v. Seagate Tech., Inc., 941 F. Supp. 98, 100-01 (D. Minn. 1992) The court held that in order to apply the doctrine of inevitable disclosure a plaintiff must show a "substantial threat of impending injury" in addition to demonstrating that the employee has knowledge of a trade secret and accepted a similar job with a competitor. *Id.* *See also* E.R. Squibb & Sons, Inc. v. Hollister, Inc. 1991 WL 15296, at *9 (D.N.J. Feb. 5, 1991), *aff'd*, 941 F.2d 1201 (3d Cir. 1991) (stating plaintiff must demonstrate more than risk of irreparable harm). An injunction does not constitute an appropriate remedy for a possible "remote future injury or a future invasion of rights." *Id.* Courts should not issue injunctions as a response to a trade secret holder's mere concern about possible disclosure. *Id.*

VII. CONCLUSION

The doctrine of inevitable disclosure possesses a legitimate statutory basis in the Uniform Trade Secret Acts' prohibition against threatened disclosure of trade secrets. The doctrine of inevitable disclosure, however, developed in a very inconsistent manner. Modern applications of the doctrine expanded the application of the doctrine from purely technical fields to allow for injunctions against employees with commercial information, such as marketing strategies. Without further refinement of the doctrine and the situations to which it applies, unnecessary litigation yielding uncertain outcomes will result and employee mobility will be sacrificed without a counterbalancing benefit to employer trade secret protection.

Although employers require protection of their trade secrets, employees have the right to use their skill and knowledge to earn a living. The doctrine of inevitable disclosure, as it exists today, threatens employee mobility by restricting an employee's ability to leave his or her current employer. Additionally, it causes employers to shy away from the use of non-competition or confidentiality contracts, which typically must contain time limits and geographic limits in order to be enforceable. In those states that adopted the doctrine of inevitable disclosure, an injunction obtained through application of the doctrine affords better protection to employers than a traditional non-compete or confidentiality contract. Further, the doctrine may prevent smaller companies from obtaining employees with experience, thereby inhibiting innovation, against the purpose of trade secret law. The continued expansion of the doctrine could create a disparity in bargaining power, so that employees are unable to leave employers of their own free will for fear of litigation. Although the doctrine of inevitable disclosure assists companies in the protection of their trade secrets, it often creates an unreasonable restriction on employee mobility.

Courts should only apply the doctrine of inevitable disclosure in rare cases. The doctrine serves a legitimate purpose where the employer possesses a specific and identifiable trade secret and the defendant employee attempts to work for a direct competitor, such that the employee could not help but disclose the trade secret. Use of the doctrine outside of technical fields should be extremely limited. Application of the doctrine to obtain injunctive relief in order to prevent *any* type of competitive employment causes serious harm to employees' rights without creating corresponding benefits to employers in the form of enhanced trade secret protection.

Injunctions should only issue when the departing employee exhibits bad faith or the truly unavoidable and inevitable disclosure exists.