Doctrine of Inevitable Disclosure

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EXECUTIVE SUMMARY

The doctrine of inevitable disclosure, which has its source in trade secret law, holds that in rare circumstances an individual possesses such critical knowledge of a company's trade secrets he can be temporarily or even permanently banned from working in a specific job, because doing so would inevitably lead to disclosure of his former employer's trade secrets. The doctrine has been a source of controversy among courts and legal commentators, in part because of strong policy considerations on both sides of the debate, and in part because of inconsistent treatment by federal and state courts.

State law governs trade secrets, unlike most areas of intellectual property law, which are governed by federal statute. The vast majority of states—at last count, 46—have adopted laws based on the Uniform Trade Secrets Act (UTSA), which provides for injunctive relief in the event of "actual or threatened misappropriation" of trade secrets. The remaining states have civil statutes unrelated to the UTSA.

The inevitable disclosure doctrine proposes, in the words of one appellate court, that an employee may be prevented from working for another company if "the employee's new job duties will inevitably cause the employee to rely upon knowledge of the former employer's trade secrets." Originally, courts applied the doctrine only to technical fields, but it has been expanded to include a variety of trade secrets, including financial, manufacturing, production and marketing information.

Although the doctrine can be traced to 1919, the seminal inevitable disclosure case is *PepsiCo, Inc. v. Redmond*. In a 1995 decision, the U.S. Court of Appeals for the Seventh Circuit affirmed a preliminary injunction temporarily enjoining a former PepsiCo employee from working at a competing company, Quaker. Defendant Redmond had been a member of upper management at PepsiCo and signed a confidentiality agreement, but not a noncompete agreement. After he accepted a similar position at Quaker, PepsiCo brought an action to enjoin him from assuming his duties or divulging trade secrets, mainly strategic sales, marketing, logistics and financial information.

In its decision, the district court that first issued the injunction said, "unless Redmond possessed an uncanny ability to compartmentalize information, he would necessarily be making decisions . . . by relying on his knowledge of [PepsiCo] trade secrets." The Seventh Circuit, upholding that injunction, said, "a plaintiff may prove a claim of trade secret misappropriation by demonstrating that the defendant's new employment will inevitably lead to [the disclosure of trade secrets]."

As in *PepsiCo*, courts most frequently discuss inevitable disclosure in the context of temporary injunction motions, which generally require a party seeking an injunction—usually a former employer—to show: 1) the likelihood of success at trial, 2) the potential

for irreparable injury absent the injunction, 3) a balancing of the relevant equities and 4) the effect on the public interest. The doctrine affects all four requirements.

Although the inevitable disclosure doctrine is generally considered as flowing from the UTSA's "threatened misappropriation" language, courts and commentators differ in their analysis of the relationship between the two. One court, for example, said, "the inevitable disclosure doctrine appears to be aimed at preventing disclosures despite the employee's best intentions, and the threatened [misappropriation] doctrine appears to be aimed at preventing disclosures based on the employee's intentions." Conversely, a court in Florida described inevitable disclosure as a separate and distinct theory—a hybrid "third type" of misappropriation. In that court's analysis, the main distinction between inevitable disclosure and threatened misappropriation was the level of proof required. And a California court rejected inevitable disclosure, saying it "cannot be used as a substitute for proving actual or threatened misappropriation of trade secrets."

In determining "inevitability," courts have tended to apply four general approaches: 1) a general fact-intensive analysis, 2) a focus on bad faith, 3) a requirement of technical information or 4) an analysis of competition and similarity of position.

At a minimum, all jurisdictions that have adopted the doctrine "require the employer to prove the existence of a trade secret and that the employee possessed the trade secret in some manner." Beyond that, courts and scholars have considered a variety of factors: 1) the existence of a restrictive covenant; 2) the degree of competition between the former and new employer; 3) bad faith behavior by either the former employee or the new employer; 4) type, identification and extent of the employee's knowledge; 5) policy considerations; 6) the new employer's efforts to safeguard the former employer's trade secrets; 7) similarity between the employee's previous and current positions; and 8) whether the trade secrets at issue are highly valuable to both employers. Many courts also consider case-specific factors, such as the nature of the industry and the trade secrets.

Of those factors, courts generally consider the first five to be the most important. But here, too, their interpretations vary.

Restrictive covenants. Most courts require, at a minimum, a nondisclosure agreement in order to issue an injunction, even under the theory of inevitable disclosure. But at least one has found the existence of a nondisclosure agreement to be a factor against inevitable disclosure because it shows the employer "clearly anticipated" that the former employee might want to work for a different company after acquiring confidential information. Courts generally seem more willing to grant an injunction based on inevitable disclosure in cases where the former employee has also signed a noncompete agreement. But one appeals court found the absence of such an agreement to be irrelevant because liability under the UTSA is premised on the defendant's use of the plaintiff's confidential information, not the existence of a competitive relationship.

One argument in favor of requiring restrictive covenants is that application of the inevitable disclosure doctrine otherwise effectively imposes a noncompete restriction without the employee having had an opportunity to negotiate for and receive additional consideration from the employer.

Competition. In most inevitable disclosure cases, the new and old employers are competitors. However, direct competition is not necessarily a requirement. If the employers are competitors, courts have considered the degree to which they are competitive as a factor in determining whether or not disclosure is inevitable.

Bad faith. Some courts require evidence of bad faith conduct on the part of the defendant before they will issue an injunction under a theory of inevitable disclosure. Critics of that view argue, however, that it fails to recognize the rationale underlying the doctrine, i.e. that disclosure is inevitable, regardless of an employee's intentions. Some courts also consider bad faith by the new employer.

Type and extent of knowledge. An employee has the right to use general knowledge, skills and experience, but not confidential or trade secret information. In inevitable disclosure cases, a key challenge is distinguishing between general knowledge and trade secret information. In cases such as PepsiCo, where the claimed secrets are "soft" knowledge, such as marketing and sales information, one could argue it is simply general industry knowledge and therefore unprotectable. Likewise, knowledge can be "general" not because everyone has it, but because it is not *exclusive* to the employer. The mere fact that an employee gained skills while working for an employer does not make them trade secrets, and an employee is free to sell those skills in the marketplace.

Whether the defendant is able to recall the knowledge and whether it is specific enough to constitute a trade secret are also factors in inevitable disclosure cases. In some situations, courts have declined to issue an injunction because the information a plaintiff claimed to be trade secrets was too broad. Another consideration is the employee's possession of negative trade secrets—knowledge of what does not work.

Policy considerations. The balancing of policy considerations is a major factor in most inevitable disclosure cases. Employers clearly have an interest in being able to hire employees with specific skills. They also have an interest in protecting and pursuing investments in innovation. Without legal protection, employers would have little incentive to make investments in economically valuable trade secrets.

Employees have an interest in being able to market their skills to the highest bidder and to choose where to work. Opponents of the inevitable disclosure doctrine argue it is unfair to prevent employees from choosing where to work, particularly when they did not sign a non-compete agreement, and when case law is inconsistent. As a court in North Carolina, which rejected the doctrine, noted, "it creates an after-the-fact covenant not to compete." Injunctions based on this doctrine may also conflict with an employee's First Amendment rights.

Society has an interest in encouraging competition in order to foster innovation and create a competitive market for goods and services. Another policy consideration, one analyst notes, is encouraging “fair business practices and business ethics and the endorsement of a greater commercial morality.”

Hoping to balance these various interests, some courts have, in the words of one scholar, “used the inevitable disclosure doctrine as the foundation for the evaluation of the merits of the case but have gone on to craft injunctions in a way that minimizes the burden on the employee’s right to be employed.”

Although states’ interpretation of inevitable disclosure has been inconsistent, the majority of courts that have addressed the doctrine have endorsed it. In those states, the uneven application is due primarily to disagreements about the relationship between inevitable disclosure and threatened misappropriation. On the other hand, a few—most prominently, California—have “offered significant resistance to the inevitable disclosure principle itself, as opposed to its application to particular facts.”

In light of the UTSA’s specific reference to threatened misappropriation, one might assume states that have adopted this model law would also embrace inevitable disclosure. But here too, consistency is lacking. For instance, California has adopted the UTSA, but rejected inevitable disclosure. Alternatively, New York and New Jersey have not adopted the UTSA, but have recognized the doctrine.

A. Introduction

The doctrine of inevitable disclosure has been a topic of controversy among courts and commentators over the past several years, in part because of strong policy considerations on both sides of the debate, and in part because of inconsistent treatment by the judiciary.[1] Intensifying the debate are the divergent definitions of the doctrine being utilized. This commentary seeks to give an overview of the doctrine, factors considered in application, and an overview of state stances on the issue.[2]

1. Sources of Trade Secret Law

The doctrine of inevitable disclosure has its origins in trade secret law. Therefore, an overview of the sources of this area of law is a helpful starting point. State law governs trade secrets, unlike most other areas of intellectual property law, which are governed by federal statute.[3] Until 1979, state common law was primarily based on the Restatement (First) of Torts.[4] In that year, the National Conference of Commissioners on Uniform State Laws published the Uniform Trade Secrets Act (UTSA), and since then a majority of states have codified a version of the UTSA.[5] At last count, 46 states had adopted a version of the UTSA.[6] A minority of states still continues to follow the Restatement (First) of Torts or the Restatement (Third) of Unfair Competition (the successor to the Restatement (First) on the topic of trade secrets), or have adopted civil statutes unrelated to the UTSA.[7] In addition to the civil liability provided under the UTSA and common law, Congress passed the Economic Espionage Act in 1996. That federal law provides criminal penalties for misappropriation of trade secrets.

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[1] The authors wish to thank Monica M. Downs, Jeffrey J. Recher and Bree C. Peterson for their valuable assistance in preparing this white paper.

[2] It is important to note that although inevitable disclosure is referred to interchangeably as both a "doctrine" and a "theory" throughout this white paper, the two concepts are arguably different. Related issues that are beyond the scope of this white paper include expansion into the international arena and application to remedies.

[3] 35 U.S.C. §§ 1-42 (2000) (patent statutes); 17 U.S.C. §§ 101-1132 (2000) (copyright statutes); 15 U.S.C. §§ 1051-1141n (2000) (trademark statutes). *See* Stephen L. Sheinfeld & Mark A. Konkel, *What Plaintiffs and Defendants Have to Know—Protecting Employer Secrets and the "Doctrine of Inevitable Disclosure,"* PRACTISING LAW INSTITUTE, HANDLING WRONGFUL TERMINATION CLAIMS 2001 411, 424 (March-April 2001).

[4] Adam Gill, *The Inevitable Disclosure Doctrine: Inequitable Results Are Threatened But Not Inevitable*, 24 HASTINGS COMM. & ENT. L.J. 403, 407 (Spring 2002).

[5] *Id.*

[6] *Jurisdictions Where the Uniform Trades Secrets Act Has Been Adopted*, CALLMAN ON UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES Appendix 20 § 20:3 (Thomson Reuters 2008). Wyoming adopted the Uniform Trade Secrets Act in 2006. Wyo. Stat. Ann. §40-24-101 (2008).

[7] Texas, Massachusetts, New York and New Jersey have not adopted the UTSA. Texas, New York and New Jersey protect trade secrets under common law. BRIAN MALSBERGER, TRADE SECRETS: A STATE-BY-STATE SURVEY 2803, 2263, 2191 (Robert Blackstone et al. eds., 3rd ed., BNA Books 2006). Massachusetts statutes regulate the embezzlement, stealing and unlawful taking, carrying away, copying or obtaining by fraud or deception of any trade secret. Mass. Gen. Laws ch. 93, §§42,42A (2008).

In short, the UTSA defines a "trade secret" and "misappropriation," and provides injunctive relief for actual or threatened misappropriation of trade secrets. For reference, selected sections of the UTSA are included in Appendix A.

2. The Inevitable Disclosure Doctrine

The inevitable disclosure doctrine arises out of the concept of threatened misappropriation, although there is debate about precisely *how* the doctrine relates to threatened misappropriation. The doctrine proposes that an employee "may be enjoined by demonstrating that the employee's new job duties will inevitably cause the employee to rely upon knowledge of the former employer's trade secrets."[8] Originally, the doctrine was applied only to employees in technical fields, but courts have expanded it to include employees in possession of a variety of trade secrets, including financial, manufacturing, production and marketing information.[9]

3. Summary of *PepsiCo* Case

The seminal inevitable disclosure case is *PepsiCo, Inc. v. Redmond*, in which the United States Court of Appeals for the Seventh Circuit affirmed a preliminary injunction temporarily enjoining a former PepsiCo employee from assuming a new job at a competing company.[10] Defendant Redmond had been a member of upper management at PepsiCo and had signed a confidentiality agreement, but not a noncompete agreement.[11] After Redmond left his job at PepsiCo for a similar position at competing company Quaker, PepsiCo brought an action to enjoin him from assuming his duties or divulging trade secrets.[12] The trade secret information PepsiCo was interested in protecting concerned mainly strategic sales, marketing, logistics and financial information.[13]

In its decision, the district court highlighted Redmond's bad faith conduct before accepting his job at Quaker, then concluded (in the Seventh Circuit's words) that "unless Redmond possessed an uncanny ability to compartmentalize information, he would necessarily be making decisions . . . by relying on his knowledge of [PepsiCo] trade secrets."[14] Quaker was competing in the same narrow market segment of "sports drinks" and Redmond's new position was very similar to his old position at PepsiCo.[15]

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8 *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1446 (2002).
9 Eleanore R. Godfrey, *Inevitable Disclosure of Trade Secrets: Employee Mobility v. Employer's Rights*, 3 J. High Tech. L. 161, 166 (2004).
10 54 F.3d 1262, 1272 (7th Cir. 1995).
11 *Id*. at 1264.
12 *Id*.
13 *Id*. at 1266.
14 *Id*. at 1267.
15 *Id*. at 1266.

When upholding the district court's injunction, the Seventh Circuit emphasized that "a plaintiff may prove a claim of trade secret misappropriation by demonstrating that the defendant's new employment will inevitably lead [to the disclosure of trade secrets]," but the mere fact that the defendant assumed a similar position at a competitor does not alone make disclosure inevitable.[16] Also, although the trade secrets at issue were not in the common technical and scientific categories, the information at issue was not "general skills and knowledge," but rather "particularized plans and processes . . . which give the employer an advantage over his competitors."[17]

Although the inevitable disclosure doctrine can be traced back to the 1919 case of *Eastman Kodak Co. v. Powers Film Products, Inc.*,[18] it has gained popularity since the *PepsiCo* decision, which may be because the court considered the doctrine under a new set of circumstances. *PepsiCo* arose under the UTSA, involved a non-technical field, and established a standard by which inevitable disclosure could be evaluated.[19] Further detail on the *PepsiCo* case and other major cases is included in Appendix B.

4. Application of the Doctrine

Courts most frequently discuss inevitable disclosure in the context of temporary injunction motions.[20] Generally, in order for a court to issue a preliminary injunction, the movant must show: 1) the likelihood of success at trial, 2) the potential for irreparable injury absent the injunction, 3) a balancing of the relevant equities, and 4) the effect on the public interest.[21] The inevitable disclosure doctrine affects all four of these requirements. For the first requirement, the court typically reviews the analysis a court would undertake in a trade secret case. With respect to the second factor, courts differ on whether irreparable harm is presumed from a showing of inevitable disclosure.[22] For instance, some courts follow the *PepsiCo* finding that "irreparable harm flows necessarily from the actual or threatened loss of the important protectable business interests at stake."[23] In other cases, however, "courts have not automatically presumed irreparable harm based upon a plaintiff's argument that disclosure of its trade secrets is inevitable."[24] With respect to the third requirement, courts pay special attention to policy concerns of inevitable disclosure, because preliminary injunctions are issued before a trial on the

[16] *Id*. at 1269.
[17] *Id*.
[18] 179 N.Y.S. 325 (N.Y. App. Div. 1919).
[19] Brandy L. Treadway, *An Overview of Individual States' Application of Inevitable Disclosure: Concrete Doctrine or Equitable Tool?* 55 SMU L. Rev. 621, 624 (Spring 2002).
[20] The phrase "temporary injunction hearing," as used in this white paper, is inclusive of both temporary restraining orders and preliminary injunctions. *See*, e.g., Fed. R. Civ. P. 65.
[21] *See*, e.g., *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496 (N.Y. 1981). *See also* Troy A. Martin, Comment, *The Evolution of Trade Secret Law in Texas: Is It Time to Recognize the Doctrine of Inevitable Disclosure?* 42 S. Tex. L. Rev. 1361, 1380 (2001).
[22] Linda K. Stevens, *Trade Secrets and Inevitable Disclosure*, 36 Tort & Ins. L.J. 917, 934 (2001).
[23] 54 F.3d at 1272.
[24] Stevens, *supra* note 21, at 934.

merits, and often have serious consequences for at least one of the parties.[25] Finally, in granting injunctions, courts also consider the effects of the injunction on society as a whole. For example, enjoining a highly skilled individual from future employment in a similar industry may have negative economic and social impacts for the public at large.[26]

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[25] *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 308 (S.D.N.Y. 1999) (calling preliminary injunctions an "extraordinary and drastic remedy" that is only granted where movant can demonstrate imminent irreparable harm).
[26] John Dwight Ingram, *Covenants Not to Compete*, 36 Akron L. Rev. 49, 74 (2002).

B. Threatened Misappropriation Versus Inevitable Disclosure

Courts and commentators differ in how they consider threatened misappropriation in reference to inevitable disclosure. Some treat the two as the same theory, others believe that the two are separate and distinct theories, and a third group considers inevitable disclosure to be a method of establishing threatened misappropriation.[27]

For example, in *Barilla Am., Inc. v. Wright*, the court pointed out that "the inevitable disclosure doctrine appears to be aimed at preventing disclosures despite the employee's best intentions, and the threatened [misappropriation] doctrine appears to be aimed at preventing disclosures based on the employee's intentions."[28] The court went on to hold that it would "simply enforce a stricter standard on inevitable disclosure, and then treat it and the threatened disclosure doctrine as variations of the same standard."[29]

Conversely, in *Del Monte Fresh Produce Co. v. Dole Food Co.*, the court described inevitable disclosure as a separate and distinct theory from threatened misappropriation.[30] As interpreted by that court, "the Uniform Trade Secrets Act explicitly provides for two types of misappropriations—actual and threatened." The *Del Monte* court also noted that "some courts [] have derived a third type [of misappropriation]—inevitable disclosure/misappropriation."[31] The court found that the main distinction between the two theories was the level of proof required. Inevitable disclosure requires a demonstration of "a real and present danger of disclosure,"[32] while threatened misappropriation requires "proof beyond inevitability."[33]

Similarly, the court in *Whyte v. Schlage Lock Co.* held that the doctrine "cannot be used as a substitute for proving actual or threatened misappropriation of trade secrets."[34] This language indicates that the court also viewed the doctrine as a separate concept from threatened misappropriation. In *Central Valley General Hospital v. Smith*, California courts reaffirmed this principle.[35] The court in that case concluded that inevitable disclosure is an "alternative to proof of actual or threatened misappropriation," and in rejecting the inevitable disclosure doctrine, the court did not reject threatened misappropriation as a basis for injunctive relief.[36]

Finally, some courts view inevitable disclosure as a unique method of establishing threatened misappropriation. In the seminal inevitable disclosure case, *PepsiCo*, the court

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[27] Elizabeth A. Rowe, *When Trade Secrets Become Shackles: Fairness and the Inevitable Disclosure Doctrine*, 7 Tul. J. Tech. & Intell. Prop. 167, 181 (Spring, 2005).
[28] No. 4-02-CV-90267, 2002 U.S. Dist. LEXIS 12773 at *25 (S.D. Iowa July 5, 2002).
[29] *Id*. at *26.
[30] 148 F. Supp. 2d 1326, 1335 (S.D. Fla. 2001).
[31] *Id*.
[32] *Id*.
[33] *Id*. at 1338.
[34] 101 Cal. App. 4th at 1464.
[35] 162 Cal. App. 4th 501, 523-525 (Cal. Ct. App. 2008).
[36] *Id*. at 524-525 (quoting *Whyte*, 101 Cal. App. 4th at 1458).

found that "a plaintiff may prove a claim of trade secret misappropriation by demonstrating that a defendant's new employment will inevitably lead him to rely on the plaintiff's trade secrets."[37] Inevitable disclosure, therefore, is not a separate basis for action, but rather a basis upon which threatened misappropriation can be proven.[38]

One commentator points out that inevitable disclosure and threatened disclosure should be considered distinct theories for several reasons. First, she argues that threatened disclosure is already clearly provided for by statute and common law, and is easily analyzed under regular trade secret analysis.[39] Therefore, inevitable disclosure must be a theory that fills a "gap" between actual misappropriation and employee general knowledge by "addressing non-malicious or unintentional but nonetheless inevitable disclosure."[40] Second, she notes that an important distinction between inevitable disclosure and threatened misappropriation is the remedy that is applied in each case.[41] In a threatened misappropriation case, the court can simply issue an injunction against disclosure.[42] On the other hand, in an inevitable disclosure situation, because the knowledge of trade secrets is inseparable from the employee's activities, the remedy must be "an injunction against the employee working in some defined sector of his or her field."[43]

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[37] 54 F.3d at 1269. *See also* Rowe, *supra* note 26, at 181 (noting that *PepsiCo* makes clear inevitable disclosure is a way of establishing threatened misappropriation).

[38] *See Novell, Inc. v. Timpanogos Research Group, Inc.*, 46 U.S.P.Q.2d 1197, 1215-1216 (Utah Dist. Ct. 1998).

[39] Jennifer L. Saulino, *Locating Inevitable Disclosure's Place in Trade Secret Analysis*, 100 MICH. L. REV. 1184, 1192 (2002).

[40] *Id.* at 1193.

[41] *Id.*

[42] *Id.*

[43] *Id.*

C. Factors Considered When Applying Inevitable Disclosure

According to one author, courts have tended to apply four general approaches to determine "inevitability": 1) a general fact-intensive analysis, 2) a focus on bad faith, 3) a requirement of technical information, or 4) an analysis of competition and similarity of position.[44] Under a general fact-intensive approach, a court does not have a set standard or list of factors to consider, but rather makes a decision about inevitability on a case-by-case basis.[45] The second approach is also fact-intensive, but "focuses on evidence of bad faith or intent on the part of either the employee or the prospective employer."[46] Using the third approach, a court would find inevitable disclosure only if the employee either "has highly technical skills or will be required to use technical information in her new employment."[47] Finally, the fourth and most complicated approach "focuses on the objective competitiveness of an industry, and the similarities between new and old positions."[48]

Although many cases fall into one of those four categories, courts and scholars have discussed a variety of factors that should be considered when applying the inevitable disclosure doctrine. At a minimum, all jurisdictions that have adopted the doctrine "require the employer to prove the existence of a trade secret and that the employee possessed the trade secret in some manner."[49] Examples of other factors that courts have considered when applying the doctrine include:

1) the existence of a restrictive covenant;
2) the degree of competition between the former and new employer;
3) bad faith behavior by either the former employee or the new employer;
4) type, identification and extent of knowledge of the employee;
5) policy considerations;
6) the new employer's efforts to safeguard the former employer's trade secrets;
7) similarity between the employee's previous and current positions; and
8) whether the trade secrets at issue are highly valuable to both employers.

Many courts also consider case-specific factors, such as the nature of the industry and the trade secrets at issue.[50] The first five factors listed are the most widely discussed, and are summarized in greater detail below.

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[44] Jay L. Koh, *From Hoops to Hard Drives: An Accession Law Approach to the Inevitable Misappropriation of Trade Secrets*, 48 AM. U.L. REV. 271, 286 (1998).
[45] *Id.*
[46] *Id.* at 288.
[47] *Id.* at 291.
[48] *Id.* at 294.
[49] Keith A. Roberson, *South Carolina's Inevitable Adoption of the Inevitable Disclosure Doctrine: Balancing Protection of Trade Secrets with Freedom of Employment*, 52 S.C. L. REV. 895, 898 (2001).
[50] *EarthWeb*, 71 F. Supp. 2d at 310.

1. Restrictive Covenants

Restrictive covenants generally fall into two categories: confidentiality/nondisclosure agreements and noncompete agreements. A nondisclosure agreement is a promise by the employee to keep the employer's information confidential.[51] A noncompete agreement prevents an employee from working for a competitor for a certain period of time, and is usually limited to a specific geographical area. States vary on whether and to what extent noncompete agreements may be enforced.[52] Regardless of whether an employee is bound by a restrictive covenant, in many states he or she is still prohibited from revealing trade secrets by a common law "duty not to disclose."[53]

Technically, the existence of a restrictive covenant simply adds a breach of contract claim to the plaintiff's complaint.[54] In consideration of an inevitable disclosure claim of trade secret misappropriation, however, some courts "have shown a willingness to impose a higher expectation of loyalty on employees who agreed at the outset of their employment to safeguard their employer's secrets . . . conversely, the absence of a [restrictive covenant] can favor the departing employee."[55] Most courts require, at a minimum, a nondisclosure agreement in order to issue an injunction, even under the theory of inevitable disclosure.[56] But at least one court has found the existence of a nondisclosure agreement to be a factor against inevitable disclosure because the agreement shows the employer "clearly anticipated that [the former employee] may change his employment . . . after acquiring [the employer's] confidential information."[57] Although not required, courts seem to be more willing to grant an injunction based on inevitable disclosure in cases where the former employee has also signed a noncompete agreement.[58] Alternatively, the court in *Doebler's Pennsylvania Hybrids, Inc. v. Doebler Seeds, LLC* found the absence of a noncompete agreement to be irrelevant because "[the defendants'] liability is not premised on the fact that they competed with [the plaintiff], but rather on the fact that they used [the plaintiff's] own confidential information to compete against them."[59]

One argument that courts present in favor of requiring restrictive covenants is that application of the inevitable disclosure doctrine effectively imposes a noncompete

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[51] *See*, e.g., Sheinfeld & Konkel, *supra* note 2, at 441.
[52] *Id.* at 449.
[53] *Standard Brands, Inc. v. Zumpe*, 264 F. Supp. 254, 269 (E.D. La. 1967).
[54] D. Peter Harvey, *"Inevitable" Trade Secret Misappropriation After PepsiCo, Inc. v. Redmond*, PRACTISING LAW INSTITUTE, LITIGATING COPYRIGHT, TRADEMARK & UNFAIR COMPETITION CASES FOR THE EXPERIENCED PRACTITIONER 199, 228 (1998).
[55] *Id.*
[56] Rowe, *supra* note 26, at 208.
[57] *Marietta Corp. v. Fairhurst*, 301 A.D.2d 734, 738 (N.Y. App. Div. 2003).
[58] *Id.* at 209.
[59] 88 Fed. Appx. 520, 523 (3d Cir. Feb. 12, 2004).

restriction on an employee without consideration by the employer.[60] Noncompete agreements have historically been disfavored in the U.S. because of their restrictions on employee freedom.[61] In *LeJeune v. Coin Acceptors, Inc.*, the court rejected the inevitable disclosure doctrine, noting that recognizing it would "allow [the plaintiff] the benefit of influencing [the defendant's] employment relationship with [the new employer] even though [the plaintiff] chose not to negotiate a restrictive covenant or confidentiality agreement with [the defendant]."[62] In *IBM Corp. v. Seagate Tech., Inc.*, the Eighth U.S. Circuit Court of Appeals neither accepted nor rejected the doctrine, but did note that "a claim of trade secret misappropriation should not act as an *ex post facto* covenant not to compete."[63] One commentator has suggested that employers attempting not to deter talented employees with noncompete agreements are intentionally relying on courts to impose *ex post facto* restrictive covenants.[64]

2. Degree of Competition Between Previous Employer and New Employer

In most cases that involve a claim of inevitable disclosure, the new and old employers will be competitors. However, competition between the two is not necessarily a requirement to show inevitable disclosure.[65] As the court in *Southwestern Energy Co. v. Eickenhorst* pointed out, "the fact that the defendant may not have disclosed the material for competitive reasons is immaterial . . . if the [UTSA] allowed the information to freely pass into the public arena so long as the messenger had no anti-competitive reasons, then the Act would provide no real protection at all."[66] Nonetheless, if the old and new employers are competitors, courts have considered the degree to which they are competitive as a factor in whether or not disclosure is inevitable.[67] In *Earthweb, Inc. v. Schlack*, the court listed whether "the employers in question are direct competitors providing the same or very similar products or services" as one of the main factors it took into account when considering application of the doctrine.[68]

In *Standard Brands, Inc. v. Zumpe*, the court found that disclosure was not inevitable because the new employer was a small firm in comparison to the old employer, and was not competing in the same market segment.[69] In *PepsiCo*, however, the court pointed out that there was "fierce beverage-industry competition" between the parties, especially in the market niche at issue.[70] The court in *Merck & Co. v. Lyon* also found

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[60] Jessica Lee, *The Inevitable Disclosure Doctrine: Safeguarding the Privacy of Trade Secrets*, COLORADO LAWYER, October, 2004, at 17. *See also Earthweb*, 71 F. Supp. 2d at 310.
[61] *Id. See also Standard Brands, Inc.*, 264 F. Supp. at 263.
[62] 849 A.2d 451, 471 (Ct. App. Md. 2004).
[63] 941 F. Supp. 98, 101 (D. Minn. 1992).
[64] Jules S. Brenner, *The Doctrine of Inevitable Disclosure and Its Inevitable Effect on Companies and People*, 7 L. & BUS. REV. AM. 647, 664 (Fall 2001).
[65] Harvey, *supra* note 53, at 226.
[66] 955 F. Supp. 1078, 1085 (D. Ark. 1997).
[67] Harvey, *supra* note 53, at 226.
[68] 71 F. Supp. 2d at 310.
[69] 264 F. Supp. at 261.
[70] 54 F.3d at 1263.

degree of competition to be a persuasive factor, pointing out that the competition between the new and old employers' products "is intense and the stakes are high."[71]

3. Evidence of Bad Faith on the Part of the Employee and/or New Employer

Some courts require evidence of bad faith conduct on the part of the defendant before they will issue an injunction under a theory of inevitable disclosure. For instance, in *FMC Corp. v. Cyprus Foote Mineral Co.*, the court refused to enjoin an employee from working for a competitor under the doctrine of inevitable disclosure "absent some showing of bad faith, underhanded dealing, or employment by an entity so plainly lacking comparable technology that misappropriation can be inferred."[72] Some commentators argue that this view fails to recognize that the rationale underlying the doctrine of inevitable disclosure is that disclosure is *inevitable*, regardless of an employee's intentions.[73]

Other courts merely view bad faith as an aggravating factor.[74] In *Merck & Co.*, the court found that if the possibility of disclosure was high and the value of the trade secrets was significant, "a showing of bad faith or underhanded dealing by the former employee or new employer would not necessarily be required."[75] That court found that the defendant "was not entirely forthright in his representations to plaintiffs," which provided a "basis for questioning his ability to keep his word with respect to [his confidentiality agreement with the plaintiffs]."[76]

Bad faith by the new employer is also a factor some courts consider. For example, in *Liebert Corp. v. Mazur*, the court found that evidence showing the defendant's new employer wanted to "cripple [the former employer] . . . by convincing its sales representatives to switch companies," together with evidence that the new employer began soliciting the former employer's clients shortly before the defendant started work at his new job, supported a finding of inevitable disclosure.[77]

Courts do not always use the specific phrase "bad faith," but still cite behavior on the part of an employee or employer as a factor in their decision. For instance, in *Novell, Inc. v. Timpanogos Research Group, Inc.*, the court found the departing employees' "malicious intent" and "cavalier attitude" to be persuasive factors in granting a preliminary injunction.[78] In *Standard Brands, Inc.*, the court decided against issuing an injunction, in part because there was "no evidence of wrongdoing or dishonesty" on the

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[71] 941 F. Supp. 1443, 1461 (M.D.N.C. 1996).
[72] 899 F. Supp. 1477, 1483 (W.D.N.C. 1995).
[73] Stevens, *supra* note 21, at 933.
[74] *Id*.
[75] 941 F. Supp. at 1460.
[76] *Id*. at 1461.
[77] 827 N.E.2d 909, 929 (Ill. App. Ct. 2005).
[78] 46 U.S.P.Q.2d at 1211.

part of the employee.[79] The district court in *PepsiCo* found that the defendant's "lack of forthrightness on some occasions, and out and out lies on others . . . leads the court to conclude that defendant Redmond could not be trusted to act with the necessary sensitivity and good faith . . . ."[80]

4. Type, Identification, and Extent of Knowledge

An employee has the right to use general knowledge, skills and experience, but may not use confidential or trade secret information.[81] The question then becomes, where is the line between general knowledge and trade secret information? In cases such as *PepsiCo*, where the claimed trade secrets are "soft" knowledge, such as marketing and sales information, one could argue that this information is simply general knowledge of the industry and therefore unprotectable.

The *FMC Corp.* decision pointed out that knowledge can be general, not because everyone has that knowledge, but because it is not exclusive to the employer.[82] The mere fact that an employee gained skills while working for an employer does not make them trade secrets, and an employee is free to sell those skills in the marketplace.[83]

Whether the defendant is able to recall the knowledge and whether the knowledge is specific enough to constitute a trade secret are also factors in inevitable disclosure cases. In *FSI Int'l, Inc. v. Shumway*, the United States District Court for the District of Minnesota declined to issue an injunction because the categories of information the plaintiff claimed to be trade secrets were too broad.[84] Also, the court found that the plaintiff failed to show that the defendant had "detailed knowledge of facts that are not generally known or otherwise readily ascertainable."[85]

Another consideration is the employee's possession of negative trade secrets—knowledge of what does *not* work. In *Novell, Inc.*, the court found the employees' close work in developing a technology made it nearly impossible that they would not disclose negative trade secrets: "While it is one thing for [the former employees] to claim they will not use [the plaintiff's] trade secrets, it is inconceivable to believe that if they are designing a [similar product] they ever would start down any of the blind alleys that they already know won't work."[86]

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79 264 F. Supp. at 271.
80 54 F.3d at 1270.
81 Rowe, *supra* note 26, at 184.
82 899 F. Supp. at 1483.
83 *Id.*
84 No. 02-402, 2002 U.S. Dist. LEXIS 3388 at *29 (D. Minn. Feb. 26, 2002).
85 *Id.*
86 46 U.S.P.Q.2d at 1217.

5. Policy Considerations

The balancing of policy considerations is a major factor in most inevitable disclosure cases. As one court put it, "protection given to trade secrets is a shield, sanctioned by the courts, for the preservation of trust in confidential relationships; it is not a sword to be used by employers to retain employees by the threat of rendering them substantially unemployable in the field of their experience should they decide to resign."[87]

a. Employer Interests

There are several policy considerations that support adoption of the inevitable disclosure doctrine. Employers have an interest in being able to obtain employees with specific skills.[88] They also have an interest in protecting and pursuing investments in innovation.[89] Without the benefit of legal protection, employers would have little incentive to make investments in economically valuable trade secrets.[90]

b. Employee Interests

Alternatively, there are policy considerations that support rejecting the inevitable disclosure doctrine. Opponents of the doctrine argue that it is not fair to prevent employees from choosing where they wish to work, particularly when there is not a noncompete agreement, and when the case law regarding inevitable disclosure is inconsistent.[91] As the court in *Merck & Co.* put it, "a long-standing public policy against noncompete agreements exists in the law, which favors rejection of the [inevitable disclosure] doctrine because it creates an after-the-fact covenant not to compete" without bargained-for consideration.[92] Employees have an interest in being able to market their skills to the highest bidder and to choose where they work.[93]

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[87] *E.W. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F.2d 1108, 1112 (8th Cir. 1969).
[88] Lee, *supra* note 59, at 17.
[89] *Id.*
[90] Brenner, *supra* note 63, at 664.
[91] Rowe, *supra* note 26, at 167.
[92] 941 F. Supp. at 1462.
[93] Lee, *supra* note 59, at 17.

Issuance of injunctions based on the inevitable disclosure doctrine may also conflict with an employee's First Amendment rights.[94] Injunctions restricting an employee's speech, without direct evidence of actual or threatened misappropriation, must be used sparingly by courts and only where evidence indicates a high degree of likelihood of misappropriation and irreparable harm.[95]

c. Societal Interests

Society has an interest in encouraging competition in order to encourage innovation and create a competitive market for goods and services.[96] There is also a policy consideration of encouraging "fair business practices and business ethics and the endorsement of a greater commercial morality."[97]

Policy considerations relating to the inevitable disclosure doctrine are not necessarily all-or-nothing propositions. In an effort to balance interests, "some courts have used the inevitable disclosure doctrine as the foundation for the evaluation of the merits of the case but have gone on to craft injunctions in a way that minimizes the burden on the employee's right to be employed."[98] For instance, in *Merck & Co.*, the court stated that it was able to craft the injunction in order to promote the interests on both sides of the debate.[99]

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[94] Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147, 232 (1998).
[95] Pamela Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, 58 Hastings L.J. 777, 781 n.19 (2007).
[96] Lee, *supra* note 59, at 17.
[97] Nathan Hamler, *The Impending Merger of the Inevitable Disclosure Doctrine and Negative Trade Secrets: Is Trade Secrets Law Headed in the Right Direction?* 25 J. CORP. L. 383, 388 (2000).
[98] Martin, *supra* note 20, at 1379.
[99] 941 F. Supp. at 1462.

D. Summary of State Stances

Although state acceptance of the doctrine of inevitable disclosure has been varied and inconsistent, the majority of courts that have addressed the doctrine have endorsed it.[100] A few jurisdictions, namely California, have "offered significant resistance to the inevitable disclosure principle itself, as opposed to its application to particular facts."[101] Even in states that have accepted the doctrine, application in the courts has been uneven, primarily due to misunderstandings regarding the role of the doctrine in reference to threatened misappropriation, as discussed above.

In light of the UTSA's specific reference to threatened misappropriation, one might assume states that have adopted the UTSA would also embrace inevitable disclosure. But that has not consistently been the case.[102] For instance, California has adopted the UTSA, but has rejected the inevitable disclosure doctrine.[103] Alternatively, New York and New Jersey have not adopted the UTSA, but have recognized the doctrine.[104] A number of courts have agreed with the doctrine, but have chosen to distinguish it or have decided their cases on other grounds.[105]

Below are short summaries of current stances in 24 states. Relevant information, by state, is also summarized in Appendix C.

1. Arkansas

The Supreme Court of Arkansas recognized and applied the doctrine of inevitable disclosure in *Cardinal Freight Carriers, Inc. v. J.B. Hunt Transport Servs.*[106] The court's view was that "a plaintiff may prove a claim of trade-secret misappropriation by demonstrating that a defendant's new employment will inevitably lead him to rely on the plaintiff's trade secrets."[107]

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[100] William Lynch Schaller, *Trade Secret Inevitable Disclosure: Substantive, Procedural & Practical Implications of An Evolving Doctrine* (Part I), 86 J. PAT. & TRADEMARK OFF. SOC'Y 336, 345 (May 2004).
[101] *Id.* at 343.
[102] Rowe, *supra* note 26, at 197.
[103] *Whyte*, 101 Cal. App. 4th at 1461.
[104] *National Starch & Chemical Corp. v. Parker Chemical Corp.*, 530 A.2d 31, 33 (N.J. Super. Ct. App. Div. 1987); *DoubleClick, Inc. v. Henderson*, No. 116914/97, 1997 N.Y. Misc. LEXIS 577 at *15 (Sup. Ct. N.Y. Co. Nov. 7, 1997).
[105] *Whyte*, 101 Cal. App. 4th at 1461.
[106] 981 S.W.2d 642, 647 (Ark. 1999).
[107] *Id.* at 646. *See also Southwestern Energy Co.*, 955 F. Supp. at 1078 (misappropriation may be proven under a theory of inevitable disclosure).

2. California

California has a strong public policy favoring employee mobility, as expressed in the California Business and Professions Code, which states that "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[108] In keeping with this philosophy, the California Court of Appeal summarily rejected the inevitable disclosure doctrine in *Whyte*, holding that it is "contrary to California law and policy because it creates an after-the-fact covenant not to compete restricting employee mobility."[109] California courts have been clear that though inevitable disclosure has been rejected, California law does not prohibit issuance of injunctions based on threatened misappropriation of trade secrets.[110]

3. Connecticut

The doctrine of inevitable disclosure has been applied by Connecticut courts only where an employee was bound by a noncompete covenant. The district court in *Branson Ultrasonics Corp. v. Stratman* granted a preliminary injunction after finding that it was "likely, if not inevitable, that such use and disclosure will occur."[111] The court held that "when, as here, a high degree of similarity between an employee's former and current employment makes it likely that the former employer's trade secrets and other confidential information will be used and disclosed by the employee in the course of his new work, enforcement of a covenant not to compete is necessary to protect against such use and disclosure."[112] Connecticut courts have not expressly accepted or rejected the theory of inevitable disclosure where the former employee does not have a covenant not to complete.[113]

4. Delaware

Delaware adopted the inevitable disclosure doctrine in *E.I. DuPont de Nemours & Co. v. American Potash & Chemical Corp.*[114] In this 1964 decision, the court applied a liberal view of the doctrine, stating, "the degree of probability of disclosure, whether amounting to an inevitability or not, is a relevant factor to be considered in determining whether a 'threat' of disclosure exists."[115]

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[108] *Cal. Bus. & Prof. Code 16600.*
[109] 101 Cal. App. 4th at 1447.
[110] *Cent. Valley Gen. Hosp. v. Smith*, 162 Cal. App. 4th 501, 524-525 (Cal. Ct. App. 2008) (stating, "the principle that threatened misappropriation of trade secrets may be enjoined is the law of California despite the rejection of the inevitable disclosure doctrine").
[111] 921 F. Supp. 909, 913 (D. Conn. 1996).
[112] *Id.*
[113] *Aetna Inc. v. Fluegel*, 2008 WL 544504, at *5-8 (Conn. Super. Ct. Feb. 7, 2008).
[114] 200 A.2d 428, 436 (Del. Ch. 1964).
[115] *Id.*

5. Florida

In *Del Monte*, a federal district court declined to recognize the doctrine of inevitable disclosure under Florida state law, because Florida state courts had not yet discussed the doctrine.[116] The court noted that Del Monte had not entered into a noncompete agreement with the employee and that it was therefore reluctant to issue an injunction that would effectively create a noncompete agreement *ex post facto*.[117]

6. Illinois

In *PepsiCo*, discussed above, the Seventh Circuit, applying Illinois law, recognized the doctrine. Since that decision, the Appellate Court of Illinois in *Strata Mktg., Inc. v. Murphy* agreed with the decision, stating, "we believe *PepsiCo* correctly interprets Illinois law and agree that inevitable disclosure is a theory upon which a plaintiff in Illinois can proceed under the [UTSA]."[118]

7. Indiana

In the key Indiana case on the topic, *Bridgestone/Firestone, Inc. v. Lockhart*, the court did not reject the doctrine, but stated that the facts of the case did not "warrant a finding of inevitable disclosure."[119] The court found that the following facts distinguished the case from *PepsiCo* and precluded a finding of inevitable disclosure: The defendant did not take any documents with him; he had only a "general familiarity" with financial information that could not be remembered with precision; and the new employer had taken steps to ensure that the defendant would not violate the terms of his noncompete agreement.[120]

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[116] 148 F. Supp. 2d at 1337.
[117] *Id.*
[118] 740 N.E.2d 1166, 1178 (Ill. App. Ct. 2000). *See also Liebert Corp. v. Mazur,* 827 N.E.2d 909 (Ill. App. Ct. 2005) (reaffirming *Strata Mktg. Inc.* and *PepsiCo*).
[119] 5 F. Supp. 2d 667, 682 (S.D. Ind. 1998).
[120] *Id.*

8. Iowa

The Iowa Supreme Court has not specifically addressed the inevitable disclosure doctrine, but state and federal district courts in Iowa have applied the doctrine as a way of demonstrating threatened misappropriation.[121] The primary Iowa case is *Barilla Am., Inc.*[122] The court in this case interpreted the inevitable disclosure doctrine as requiring the plaintiff to prove "not only that the employee had access to or knowledge of trade secrets and that the duties of his or her next job overlap with the duties of his or her previous job, but that he or she would be able to remember the trade secret information in a usable form."[123] Although defendant Wright did not sign a noncompete or a confidentiality agreement (despite being asked to do so by the plaintiff), the court applied the doctrine and issued a broad injunction, preventing Wright from taking any job in the pasta industry for a year.[124]

9. Kansas

Kansas courts have not directly addressed the inevitable disclosure doctrine.[125] In *Sprint Corp. v. DeAngelo*, however, the court found that, because the parties were not current competitors, the defendant would not necessarily use his knowledge of the plaintiff's trade secrets in the performance of his duties at his new employer.[126]

10. Louisiana

In *Standard Brands, Inc.*, the court rejected the inevitable disclosure doctrine.[127] The court stated, "while it does not appear here that the disclosure of confidential information by [the defendant] will inevitably result from his employment by [a competitor], even if this were the consequence, no remedy could be afforded."[128] In deciding, the court cited Louisiana's statutory prohibition on noncompete agreements and strong public policy of free labor.[129]

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[121] *Interbake Foods, L.L.C. v. Tomasiello*, 461 F. Supp.2d 943, 969-975 (D. Iowa 2006).
[122] 2002 U.S. Dist. LEXIS 12773.
[123] *Id.* at *28.
[124] *Id.* at *35.
[125] *Bradbury Co. v. Teissier-Ducros*, 413 F. Supp. 2d 1203, 1209 (D. Kan. 2006).
[126] 12 F. Supp. 2d 1188, 1194 (D. Kan. 1998).
[127] 264 F. Supp. at 265.
[128] *Id.*
[129] *Id.* at 264.

11. Maryland

In *LeJeune*, discussed above, the Court of Appeals of Maryland chose to reject the doctrine of inevitable disclosure, citing its concern over imposing a restrictive covenant where the previous employer had not taken the opportunity to negotiate for one.[130] The court also took the opportunity to point out Maryland's policy towards employee mobility is similar to that of California.[131]

12. Massachusetts

Massachusetts state courts have not accepted or rejected the inevitable disclosure doctrine.[132] But the First U.S. Circuit Court of Appeals, applying Massachusetts law, declined to use the doctrine of inevitable disclosure in *Campbell Soup Co. v. Giles*[133] and a federal district court applied the doctrine in *Marcam Corp. v. Orchard*.[134] In *Marcam*, the court stated that "the harm to the plaintiff cannot be avoided simply by the former employee's intention not to disclose confidential information, or even by his scrupulous efforts to avoid disclosure . . . it is difficult to conceive how all of the information stored in [the defendant's] memory can be set aside as he applies himself to a competitor's business and its products."[135]

13. Michigan

In *Leach v. Ford Motor Co.*, the district court rejected the application of the inevitable disclosure theory based on dicta from a Michigan Court of Appeals case stating that "for a party to make a claim of threatened misappropriation, whether under a theory of inevitable disclosure or otherwise, the party must establish more than the existence of generalized trade secrets and a competitor's employment of the party's former employee."[136] Subsequent Michigan cases have also declined to adopt the doctrine.[137]

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[130] 849 A.2d at 471.
[131] *Id.*
[132] *Architext, Inc. v. Kikuchi*, No. 0500600, 2005 WL 2864244, at *3 (Mass. App. Div. May 19, 2005).
[133] 47 F.3d 467, 472 (1st Cir. 1995).
[134] 885 F. Supp. 294, 297 (D. Mass. 1995).
[135] *Id.*
[136] 299 F. Supp. 2d 763, 775 (E.D. Mich. 2004), citing *CMI Intern. Inc. v. Internet Inter. Corp.*, 649 N.W.2d 808 (Mich. Ct. App. 2002).
[137] *Degussa Admixture, Inc. v. Burnett,* 471 F.Supp.2d 848, 856 (W.D. Mich. 2007); *Degussa Admixture, Inc. v. Burnett*, 2008 WL 1960861 (6th Cir. May 5, 2008); *Kelly Serv., Inc. v. Greene*, 535 F. Supp.2d 180, 187-188 (D. Me. 2008) (applying Michigan law).

14. Minnesota

Although no Minnesota court has specifically enjoined an employee from working for a competitor based on the inevitable disclosure doctrine, a line of federal cases and a recent state case seem to accept the doctrine.[138] In *Surgidev v. Eye Tech. Inc.*, a federal district court found that a trade secret cause of action could be sustained where "there is a high degree of probability of inevitable disclosure."[139] *Surgidev* has been cited with approval by state and federal courts applying Minnesota law. The doctrine's use has been limited, however, to cases where the employee has "intimate knowledge"[140] of the plaintiff's business practices and a "substantial threat of impending injury . . . exist[s]."[141]

15. Missouri

Missouri courts have neither expressly accepted nor rejected the doctrine of inevitable disclosure. In *Conseco Finance Servicing Corp. v. North American Mortgage Co.*, the court declined to apply the doctrine in the absence of any authority from the Eighth Circuit.[142] In the same year, another district court in *H&R Block Eastern Tax Services, Inc. v. Enchura* discussed the doctrine, but declined to apply it, stating, "even if demonstrated inevitability of disclosure is enough to justify injunctive relief, [the plaintiffs] still do not prevail because they have not proved it exists."[143]

16. New Jersey

New Jersey adopted the doctrine in *National Starch & Chemical Corp. v. Parker Chemical Corp.*[144] The court in that case upheld a preliminary injunction, stating that "there was sufficient likelihood of 'inevitable disclosure,' with consequent immediate and irreparable harm to [the plaintiff]."[145]

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[138] *Surgidev Corp. v. Eye Tech. Inc.*, 648 F. Supp. 661, 695 (D. Minn. 1986) *aff'd*, 828 F.2d 452 (8th Cir.); *IBM Corp. v. Seagate Tech. Inc.*, 941 F.Supp. 98, 100 (D. Minn. 1992); *LEXIS-NEXIS v. Beer*, 41 F. Supp. 2d 950, 958 (D. Minn. 1999); *United Prod. Corp. of America, Inc. v. Cederstrom*, No. A05-1688, 2006 WL 1529478, at *5 (Minn. Ct. App. Jun. 6, 2006).

[139] 648 F. Supp. 661, 695 (D. Minn. 1986).

[140] *La Calhene, Inc. v. Spolyar*, 938 F. Supp. 523, 531 (W.D. Wis. 1996) (applying Minnesota law); *LEXIS-NEXIS v. Beer*, 41 F. Supp. 2d 950, 959 (denying injunctive relief because the employee did not have an "intimate familiarity with corporate policies and strategies"); *see also* Brandy L. Treadway, Comment, *An Overview of Individual States' Application of Inevitable Disclosure: Concrete Doctrine or Equitable Tool?* 55 SMU L. REV. 621, 629 (2002) (describing Minnesota's inevitable disclosure doctrine).

[141] *IBM*, 941 F.Supp. at 101.

[142] No. 00CV1776, 2000 WL 33739340 at *12 (E.D. Mo. Dec. 6, 2000).

[143] 122 F.Supp.2d 1067, 1075 (W.D. Mo. 2000).

[144] 530 A.2d at 33.

[145] *Id.*

17. New York

In *DoubleClick, Inc. v. Henderson*, the Supreme Court of New York for New York County enjoined two employees based, in part, on the fact that there was a "high probability of inevitable disclosure of trade secrets."[146] However, in *Earthweb, Inc. v. Schlack*, a New York federal district court described *DoubleClick* as "a high water mark for the inevitable disclosure doctrine in New York," noting that "its holding rests heavily on evidence of the defendants' overt theft of trade secrets and breaches of fiduciary duty."[147] The court chose not to apply the doctrine of inevitable disclosure in this case, finding that "absent evidence of actual misappropriation by an employee, the doctrine should be applied in only the rarest of cases."[148]

Since *Earthweb*, state courts have not granted injunctive relief based on the inevitable disclosure doctrine and have gone as far as saying that the doctrine is "disfavored."[149] Moreover, at least one state appellate court has held that marketing strategies do not constitute trade secrets.[150] In sharp contrast, a New York federal district court recently enjoined an employee from working for a competitor for six months, in part because of his knowledge of the company's marketing strategy.[151] While the court found the employee "lacked credibility," it said it would have ordered the injunction "even assuming the best of good faith."[152] This case seems to be in direct conflict with previous cases, and therefore, it is unclear how future cases might be decided.

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[146] 1997 N.Y. Misc. LEXIS at *15.
[147] 71 F. Supp. 2d at 310.
[148] *Id.*
[149] *Marietta*, 301 A.D.2d at 737-738 (further finding that "in those rare cases where such doctrine is applied, it is further cautioned that the proponent should not be permitted to make an end-run around the confidentiality agreement by asserting the doctrine of inevitable disclosure as an independent basis for relief"); *L-3 Commc'n Corp. v. Kelly*, 809 N.Y.S.2d 482, 2005 WL 3304130, at *4 (N.Y. Sup. Ct.); *Boston Laser, Inc. v. Zu*, 2007 WL 2973663 at *9, n.12 (N.D.N.Y. Sept 21, 2007).
[150] *Marietta*, 301 A.D.2d at 738.
[151] *Estee Lauder Co. v. Batra*, No. 06 Civ.2035(RWS), 2006 WL 1188183 (S.D.N.Y. May 4, 2006) (proof of inevitable disclosure is a basis for enforcing restrictive employment covenants); *see also Spinal Dimensions, Inc. v. Chepenuk*, 2007 WL 2296503 at *6-9 (N.Y. Sup. Ct. Aug. 9, 2007) (finding the doctrine of inevitable disclosure consistently used by New York courts to demonstrate a legitimate employer interest in enforcing the restrictive covenant).
[152] *Estee Lauder Co.*, 2006 WL 1188183 at *16-17.

18. North Carolina

While no state courts in North Carolina have specifically ruled on the issue of inevitable disclosure, a district court applying state law predicted that North Carolina "would enjoin threatened misappropriation based upon an inevitable disclosure theory where the injunction is limited to protecting specifically defined trade secrets, but the trade secret will have to be clearly identified and of significant value."[153] The court further found that a showing of bad faith on the part of either the employer or the employee would not necessarily be required.[154] The likelihood of disclosure could be evidenced by "the degree of similarity between the employee's former and current position, and the value of the information."[155] In order to obtain a broader injunction that would effectively preclude employment, "North Carolina courts would probably require a showing of bad faith . . . and that the competitor lacked comparable levels of knowledge and achievement."[156]

19. Ohio

The court in *Procter & Gamble Co., v. Stoneham* stated that, although the specific phrase "inevitable disclosure" has not been used, Ohio courts have held that "an actual threat of harm exists when an employee possesses knowledge of an employer's trade secrets and begins working in a position that causes him or her to compete directly with the former employer or the product line that the employee formerly supported."[157] The court found that grounds for a permanent injunction existed when "[the defendant's] use or disclosure of [the plaintiff's] information was not just a threat, it was a substantial probability."[158] In *ExtraCorporeal Alliance, L.L.C. v. Rosteck*, the court said proof that inappropriate use of information is inevitable does not meet the plaintiff's burden for a claim based on misappropriation of trade secrets.[159]

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[153] *Merck & Co.*, 941 F. Supp. at 1460.
[154] *Id.*
[155] *Id.*
[156] *Id. See also FMC Corp.*, 899 F. Supp. at 1477 (inevitable disclosure cannot be applied absent some showing of bad faith, underhanded dealing, or employment by an entity so plainly lacking comparable technology that misappropriation can be inferred).
[157] 747 N.E.2d 268, 278 (Ohio Ct. App. 2000).
[158] *Id.* at 279. *See also Dexxon Digital Storage, Inc. v. Haenszel,* 2005 Ohio 3187 (Ohio Ct. App. 2005) (reaffirming *Procter & Gamble Co.*).
[159] *ExtraCorporeal Alliance, L.L.C. v. Rosteck*, 285 F.Supp.2d 1028, 1042 (N.D. Ohio 2003) (stating, "it is not enough for [plaintiff] to simply state that [defendant's] use of this information is inevitable. [Plaintiff] has the burden to establish misappropriation has actually occurred or is threatened."); *see also Prosonic Corp. v. Stafford*, 539 F.Supp.2d 999, 1005 (S.D. Ohio 2008) (reaffirming *ExtraCorporeal Alliance, L.L.C. v. Rosteck*).

20. Pennsylvania

Pennsylvania state courts have not explicitly adopted the inevitable disclosure doctrine. In *Air Products & Chemical, Inc. v. Johnson*, the superior court factored in the "likelihood" of disclosure, but stopped short of saying disclosure was "inevitable."[160] Based on this decision, however, the Third U.S. Circuit Court of Appeals, applying Pennsylvania law, predicted that the state would adopt the inevitable disclosure doctrine.[161]

21. Utah

In *Novell, Inc.*,[162] a Utah district court expressly adopted the doctrine, citing similarities to the *DoubleClick* case.[163] The court was persuaded to issue a preliminary injunction because the defendants had "retained trade secret documents or confidential information" and maintained a "cavalier attitude." In addition, there was "no question that there was a high probability that [the] defendants would use or disclose [the plaintiff's] trade secrets."[164]

22. Virginia

In a 1999 Virginia state court decision, the court found that Virginia does not recognize the inevitable disclosure doctrine, and that in order to prove a claim for breach of confidentiality, a plaintiff would have to allege either direct or indirect disclosure of confidential information.[165] While this case did not involve a claim of misappropriation of trade secrets, it indicates that Virginia may not recognize the doctrine in that situation, either.

23. Washington

In a 2000 decision, an Oregon district court applying Washington law reaffirmed an earlier, unpublished, decision, upholding an injunction "because of [the defendant's] extensive knowledge of [the plaintiff's] products, and the limited endorsement by the Washington courts of the 'inevitable disclosure' theory of trade secret misappropriation."[166]

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[160] 442 A.2d 1114, 1124 (Pa. Super. Ct. 1982). *See also Orthovita, Inc. v. Erbe*, 2008 WL 423446 at *6, *10 (E.D. Pa. Feb. 14, 2008) (citing *Air Prod. & Chem., Inc* for recognition of the inevitable disclosure doctrine as a basis for equitable remedy).
[161] *Doebler's Pennsylvania Hybrids*, 88 Fed. Appx. at 522.
[162] 46 U.S.P.Q.2d at 1217.
[163] 1997 N.Y. Misc. LEXIS at *15.
[164] *Novell*, 46 U.S.P.Q.2d at 1217.
[165] *Gov't Tech. Serv., Inc. v. Intellisys Technology Corp.*, 51 Va. Cir. 55 (Va. Cir. Ct. Oct. 20, 1999).
[166] *Temco Metal Prod. v. GT Dev. Corp.*, No. 99-755-KI, 2000 U.S. Dist. LEXIS 6305 at *8 (D. Or. May 5, 2000).

APPENDIX A

SELECTED SECTIONS OF THE UNIFORM TRADE SECRETS ACT

§ 1. Definitions.

As used in this [Act], unless the context requires otherwise:

(1) “Improper means” includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means;

(2) “Misappropriation” means:

> (i) 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
>
> (ii) disclosure or use of a trade secret of another without express or implied consent by a person who
>
> > (A) used improper means to acquire knowledge of the trade secret; or
> >
> > (B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was
> >
> > > (I) derived from or through a person who had utilized improper means to acquire it;
> > >
> > > (II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
> > >
> > > (III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
> >
> > (C) before a material change of his [or her] position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(3) “Person” means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(4) “Trade secret” means 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.

§ 2. Injunctive Relief.

(a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

(b) In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

(c) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

APPENDIX B

SUMMARY OF MAJOR INEVITABLE DISCLOSURE CASES

Case	Restrictive Covenant	Finding of Bad Faith	Type of Knowledge	Misappropriation vs. Inevitable Disclosure	Accepted/ Rejected	Remedy
PepsiCo v. Redmond, 54 F.3d 1262, 1272 (7th Cir. 1995).	Confidentiality Agreement	On Part of Employee	Strategic Sales, Marketing, Logistics and Financial Information	Inevitable disclosure is a method by which misappropriation can be proven.	Accepted, Applied	Injunction enjoining defendant from assuming responsibilities at new employer for five months and permanently enjoining him from disclosing the trade secrets.
Barilla Am., Inc. v. Wright, No. 4-02-CV-90267, 2002 U.S. Dist. LEXIS 12773 at *1 (S.D. Iowa July 5, 2002).	None	On Part of Employee	Technical Manufacturing Process Information	Inevitable disclosure is a method by which misappropriation can be proven.	Accepted, Applied	Enjoined from being employed in the pasta industry for a year and from misappropriating trade secrets or copying any information containing trade secrets.
Del Monte Fresh Produce Co. v. Dole Food Co., 148 F. Supp. 2d 1326 (S.D. Fla. 2001).	Acknowledged receipt of a company-wide confidentiality policy.		Managerial-Level Research and Development and Quality Control Information	Concepts are separate doctrines.	Rejected	
Merck & Co. v. Lyon, 941 F. Supp. 1443 (M.D.N.C. 1996).	Confidentiality Agreement	On Part of Employee	Technical Pharmaceutical Information	Inevitable disclosure is a method by which misappropriation can be proven.	Accepted, Applied	Enjoin defendant from discussing topics of trade secrets with the employee for 1-2 years.

Case	Restrictive Covenant	Finding of Bad Faith	Type of Knowledge	Misappropriation vs. Inevitable Disclosure	Accepted/ Rejected	Remedy
EarthWeb, Inc. v. Schlack, 71 F. Supp. 2d 299 (S.D.N.Y. 1999).	Confidentiality and Noncompete Agreements		Strategic Planning, Advertising and Technical Information	Concepts are separate doctrines, either of which may be used to establish "irreparable harm."	Accepted, Not Applied	
Cardinal Freight Carriers, Inc. v. J.B. Hunt Transport Servs, 981 S.W.2d 642 (Ark. 1999).	Confidentiality Agreement		Strategic Marketing, Business Operations and Customer Information	Inevitable disclosure is a method by which misappropriation can be proven.	Accepted, Applied	Injunction enjoining defendant from conducting any new business with four customers for one year.
DoubleClick, Inc. v. Henderson, No. 116914/97, 1997 N.Y. Misc. LEXIS 577 (Sup. Ct. N.Y. Co. Nov. 7, 1997).	Both defendants signed confidentiality agreements, and one signed a non-compete agreement.	On Part of Employee	Strategic Sales, Marketing, Logistics and Financial Information	Concepts are separate doctrines.	Accepted, Applied	Injunction enjoining defendants from taking a job which competes with the plaintiff for six months.
Novell Inc. v. Timpanogos Research Group, Inc., 46 U.S.P.Q.2d 1197 (Utah Dist. Ct. 1998).	Confidentiality and Noncompete Agreements	On Part of Employee	Technical Computer Information	Inevitable disclosure is a method by which misappropriation can be proven.	Accepted, Applied	Preliminary injunction preventing defendants from working in same area of technology for nine months.
Standard Brands, Inc. v. Zumpe, 264 F. Supp. 254 (E.D. La. 1967).	Confidentiality Agreement		Technical Manufacturing Process Information	Concepts are separate doctrines.	Rejected	

APPENDIX C

SUMMARY OF STATE STANCES ON INEVITABLE DISCLOSURE AND THE UTSA

State	Primary Cases	UTSA	Accepted	Rejected	Unclear	Not Considered
Alabama		X				X
Alaska		X				X
Arizona		X				X
Arkansas	*Southwestern Energy Co. v. Eickenhorst*, 955 F. Supp. 1078 (D. Ark. 1997). *Cardinal Freight Carriers, Inc. v. J.B. Hunt Transport Servs.*, 981 S.W.2d 642 (Ark. 1999).	X	X			
California	*Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443 (2002).	X		X		
Colorado		X				X
Connecticut	*Branson Ultrasonics Corp. v. Stratman*, 921 F. Supp. 909 (D. Conn. 1996).	X	X—where an employee was bound by non-compete covenant		X—courts undecided where there is no non-compete covenant	

State	Primary Cases	UTSA	Accepted	Rejected	Unclear	Not Considered
Delaware	*E.I. DuPont de Nemours & Co. v. American Potash & Chemical Corp.*, 200 A.2d 428 (Del. Ch. 1964).	X	X			
District of Columbia		X				X
Florida	*Del Monte Fresh Produce Co. v. Dole Food Co.*, 148 F. Supp. 2d 1326 (S.D. Fla. 2001).	X		X		
Georgia		X				X
Hawaii		X				X
Idaho		X				X
Illinois	*PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1272 (7th Cir. 1995). *Strata Mktg., Inc. v. Murphy*, 740 N.E.2d 1166 (Ill. App. Ct. 2000). *Liebert Corp. v. Mazur*, 827 N.E.2d 909 (Ill. App. Ct. 2005).	X	X			
Indiana	*Bridgestone/Firestone, Inc. v. Lockhart*, 5 F. Supp. 2d 667 (S.D. Ind. 1998).	X			X	

State	Primary Cases	UTSA	Accepted	Rejected	Unclear	Not Considered
Iowa	*Barilla Am., Inc. v. Wright*, No. 4-02-CV-90267, 2002 U.S. Dist. LEXIS 12773 at *1 (S.D. Iowa July 5, 2002).	X	X			
Kansas	*Sprint Corp. v. DeAngelo*, 12 F. Supp. 2d 1184 (D. Kan. 1998).	X			X	
Kentucky		X				X
Louisiana	*Standard Brands, Inc. V. Zumpe*, 264 F. Supp. 254 (E.D. La. 1967).	X		X		
Maine		X				X
Maryland	*LeJeune v. Coin Acceptors, Inc.*, 381 Md. 288 (Md. 2004).	X		X		
Massachusetts	*Campbell Soup Co. v. Giles*, 47 F.3d 467 (1st Cir. 1995). *Marcam Corp. v. Orchard*, 885 F. Supp. 294 (D. Mass. 1995).		X			
Michigan	*CMI Intern. Inc. v. Internet Inter. Corp.*, 649 N.W.2d 808 (Mich. Ct. App. 2002). *Leach v. Ford Motor Co.*, 299 F. Supp. 2d 763 (E.D. Mich. 2004).	X		X		

State	Primary Cases	UTSA	Accepted	Rejected	Unclear	Not Considered
	Degussa Admixture, Inc. v. Burnett, 471 F.Supp.2d 848, 856 (W.D. Mich., 2007), *aff'd,* 2008 WL 1960861 (6th Cir. May 5, 2008).					
Minnesota	*Surgidev Corp. v. Eye Tech., Inc.*, 648 F. Supp. 661 (D. Minn. 1986). *IBM Corp. v. Seagate Tech., Inc.*, 941 F. Supp. 98 (D. Minn. 1992). *La Calhene, Inc. v. Spolyar*, 938 F. Supp. 523 (W.D. Wis. 1996). *Lexis-Nexis v. Beer*, 41 F. Supp. 2d 950 (D. Minn. 1999). *United Products Corp. of America, Inc. v. Cederstrom,* No. A05-1688, 2006 WL 1529478 (Minn. Ct. App. Jun. 6, 2006).	X	X			
Mississippi		X				X
Missouri	*Conseco Finance Servicing Corp. v. North American Mortgage Co.*, No. 00CV1776, 2000 WL 33739340 (E.D. Mo. Dec. 6, 2000). *H&R Block Eastern Tax Services, Inc. v. Enchura*, 122 F.Supp.2d 1067 (W.D. Mo. 2000).	X			X	
Montana		X				X

State	Primary Cases	UTSA	Accepted	Rejected	Unclear	Not Considered
Nebraska		X				X
Nevada		X				X
New Hampshire		X				X
New Jersey	*National Starch & Chemical Corp. v. Parker Chemical Corp.*, 530 A.2d 31 (N.J. Super. Ct. App. Div. 1987).		X			
New Mexico		X				X
New York	*DoubleClick, Inc. v. Henderson*, No. 116914/97, 1997 N.Y. Misc. LEXIS 577 (Sup. Ct. N.Y. Co. Nov. 7, 1997). *Earthweb, Inc. v. Schlack*, 71 F. Supp. 2d 299 (S.D.N.Y. 1999). *Marietta Corp. v. Fairhurst,* 301 A.D.2d 734 (N.Y. App. Div. 2003). *Estee Lauder Co. Inc. v. Batra*, 430 F. Supp.2d 158 (S.D.N.Y. 2006).		X			

State	Primary Cases	UTSA	Accepted	Rejected	Unclear	Not Considered
North Carolina	*FMC Corp. v. Cyprus Foote Mineral Co.*, 899 F. Supp. 1477, 1483 (W.D.N.C. 1995). *Merck & Co. v. Lyon*, 941 F. Supp. 1443 (M.D.N.C. 1996).	X—portions of UTSA adopted at N.C. Stat. § 66-152	X			
North Dakota		X				X
Ohio	*Procter & Gamble Co., v. Stoneham*, 747 N.E.2d 268 (Ohio Ct. App. 2000). *Dexxon Digital Storage, Inc. v. Haenszel*, 2005 Ohio 3187 (Ohio Ct. App. 2005).	X	X			
Oklahoma		X				X
Oregon		X				X
Pennsylvania	*Air Products & Chemical, Inc. v. Johnson*, 442 A.2d 1114 (Pa. Super. Ct. 1982). *Doebler's Pennsylvania Hybrids, Inc. v. Doebler Seeds, LLC*, 88 Fed. Appx. 520 (3d Cir. Feb. 12, 2004).	X	X			
Rhode Island		X				X

State	Primary Cases	UTSA	Accepted	Rejected	Unclear	Not Considered
South Carolina		X				X
South Dakota		X				X
Tennessee		X				X
Texas					X	
Utah	*Novell, Inc. v. Timpanogos Research Group, Inc.*, 46 U.S.P.Q.2d 1197 (Utah Dist. Ct. 1998).	X	X			
Vermont		X				X
Virginia	*Government Technology Services, Inc. v. Intellisys Technology Corp.*, 51 Va. Cir. 55 (Va. Cir. Ct. Oct. 20, 1999).	X		X		
Washington	*Temco Metal Prod. v. GT Dev. Corp.*, No. 99-755-KI, 2000 U.S. Dist. LEXIS 6305 (D. Or. May 5, 2000).	X	X			
West Virginia		X				X
Wisconsin		X				X

State	Primary Cases	UTSA	Accepted	Rejected	Unclear	Not Considered
Wyoming		X				X

About the Authors

Randall E. Kahnke is a partner in Faegre and Benson's Minneapolis office and focuses his practice on complex commercial litigation and intellectual property litigation. He has extensive consulting, pretrial, trial and arbitration experience with complex trade secret disputes. He has achieved numerous victories in trade secret disputes for clients in a variety of industries, including medical devices, pharmaceuticals, computer hardware and food manufacturing. Randy has spoken dozens of times, locally and nationally, on enforcing trade secret rights and defending against trade secret claims. He has a special interest in the interface between trade secret, patent and employment law and provides legal counsel in the area of protecting trade secrets during employee transitions.

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Kenneth A. Liebman is chair of Faegre & Benson's intellectual property practice. The focus of his practice is on the representation of companies and institutions in the medical technology and information technology fields. He served as lead counsel for the University of Minnesota in its patent licensing litigation with Glaxo Wellcome over the AIDS drug Ziagen™. The case settled with the defendant recognizing the validity of the university's patents and agreeing to pay royalties estimated to total $300 million over the life of the patents. The Ziagen case is reportedly the second largest case in Minnesota history, after the tobacco litigation. *The Wall Street Journal* reported that the University of Minnesota has "won the largest settlement of a patent infringement case of any U.S. university."

About Faegre & Benson

The Faegre & Benson intellectual property team routinely handles the most challenging intellectual property matters for clients ranging from high-tech entrepreneurs to Fortune 500 companies. The IP team consists of nearly 70 lawyers who provide a full range of intellectual property services, including complex IP litigation, patent prosecution, trademark and brand management, and technology and licensing transactions.

Faegre & Benson LLP offers a full complement of legal services to clients ranging from emerging enterprises to multinational companies. Its more than 525 lawyers are experienced in handling complex transactions and litigation matters throughout the United States, Europe and Asia. Established in Minneapolis in 1886, the firm has evolved into one of the 100 largest law firms in the United States and has the largest number of lawyers in Minnesota. The firm also has offices in Colorado, Iowa, London, Frankfurt and Shanghai. From these locations, Faegre & Benson has served clients across the United States and in more than 60 countries. For more information, please visit: www.faegre.com.