

Comments

THE DANGERS OF THE DOCTRINE OF INEVITABLE DISCLOSURE IN PENNSYLVANIA

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The doctrine of inevitable disclosure restricts an employee's future employment if that employee will inevitably use a former employer's trade secrets in the course of the future employment. This principle is not new, but the number of courts applying it has risen in recent years. The Seventh Circuit case *PepsiCo, Inc. v. Redmond*¹ has led to the doctrine's increased popularity in trade secrets cases in several states. Since this 1995 case, the doctrine has been expressly adopted by many states, including Pennsylvania, and thus has become a new factor with which employers and employees must contend.

Inevitable disclosure has serious ramifications for the employment and intellectual property worlds. On one hand, a strong policy exists in many states for freedom of employment and employee mobility, thus favoring the rights of employees over employers. Intellectual property rights, however, rival these policies as employer trade secrets deserve protection under intellectual property laws. As a result, there is a tension between freedom of employment and protection of trade secrets. Inevitable disclosure favors the latter of the two policies and thus shifts the balance of power toward employers. The doctrine can act as a covenant not to compete or in place of a non-disclosure agreement. In this way, the doctrine is effectively a fallback provision for employers who neglected other means of trade secret protection. Employers who were careless during their hiring process or contractual negotiations are now equipped with the inevitable disclosure safety net. This gives an incentive to employers to be more cavalier in not protecting their trade secrets ahead of time and seriously hinders employee mobility and freedom of contract.

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1. 54 F.3d 1262 (7th Cir. 1995).

The doctrine also has serious potential for abuse when used as a litigation maneuver. As with many litigation tactics, inevitable disclosure can become a tool for employers to bide their time. This is especially true in technical fields where time is of the essence. Employers can bring litigation under the guise of inevitable disclosure. Then, through a preliminary injunction, employers can protect their trade secrets until the secrets have become outdated due to superior technology. In the meantime, the employer has the power to restrict the employee's freedom to work in certain capacities.

In Pennsylvania, the doctrine of inevitable disclosure was expressly adopted in the 1982 case *Air Products & Chemicals, Inc. v. Johnson*.² However, Pennsylvania has since been reluctant to apply the doctrine because of the state's history of favoring employee mobility. Since the doctrine limits freedom of employment, Pennsylvania courts have hesitated to find instances of inevitable disclosure.

Consonant with Pennsylvania's pro-employee policies, Pennsylvania has not adopted the Uniform Trade Secrets Act (UTSA)—an act that favors employers. Consequently, Pennsylvania does not appear ready to alter its support of employee freedom.

This comment will address the doctrine of inevitable disclosure in Pennsylvania. Section I delineates the three definitions of trade secrets and how they compare with each other in light of Pennsylvania's trade secret law. Section II delves into the doctrine of inevitable disclosure, examining the *PepsiCo* case and its application in several subsequent cases. Section III focuses on Pennsylvania's treatment of the doctrine and outlines a number of Pennsylvania cases addressing the issues behind inevitable disclosure. Finally, Section IV is an attempt to understand why Pennsylvania is reluctant to apply the doctrine it expressly adopted. This section examines Pennsylvania employment policies and delineates Pennsylvania's specific interpretation of the doctrine. This section also explains how inevitable disclosure might negatively affect employees in Pennsylvania and determines that the doctrine must continue to be narrowly interpreted and applied.

I. TRADE SECRETS IN PENNSYLVANIA

Trade secrets may include any information that is not generally known and that has value to a competitor.³ This may include software, techniques,

2. 442 A.2d 1114 (Pa. Super. Ct. 1982).

3. Stephen L. Sheinfeld & Mark A. Konkel, *Protecting Employer Secrets and the "Doctrine of Inevitable Disclosure,"* 650 PRAC. L. INST., LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 411, 431 (2001).

plans, designs, details about customers, or any combination thereof.⁴ The three major definitions of a trade secret are found in the Restatement (First) of Torts, the UTSA, and the Restatement (Third) of Unfair Competition.

Pennsylvania follows the original definition of trade secrets found in the Restatement (First) of Torts.⁵ Trade secrets were first defined in this restatement in 1939.⁶ The definition states that “[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.”⁷ Along with the definition, the drafters included six factors to help determine whether something qualifies as a trade secret:

- (1) the extent to which the information is known outside of his business;
- (2) the extent to which it is known by employees and others involved in his business;
- (3) the extent of measures taken by him to guard the secrecy of the information;
- (4) the value of the information to him and to his competitors;
- (5) the amount of effort or money expended by him in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.⁸

These factors guide Pennsylvania courts applying the Restatement (First) definition of a trade secret.⁹

The Restatement (Second) of Torts, published in 1979, did not mention trade secrets at all.¹⁰ Rather, the UTSA was published that same year, and it contained this definition of trade secrets:

[I]nformation, 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

4. *Id.* at 431-34.

5. *See* First Health Group Corp. v. Nat’l Prescription Adm’rs, Inc., 155 F. Supp. 2d 194, 217 n.4 (M.D. Pa. 2001) (stating that Pennsylvania uses the definition of a trade secret found in the RESTATEMENT (FIRST) OF TORTS § 757 (1939)).

6. John H. Matheson, *Employee Beware: The Irreparable Damage of the Inevitable Disclosure Doctrine*, 10 LOY. CONSUMER L. REV. 145, 147 (1998).

7. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

8. *Id.*

9. *See* SI Handling Sys., Inc. v. Heisley, 753 F.2d 1244, 1256 (3d Cir. 1985) (using the six factors to help determine if certain information is a protectable trade secret).

10. Nathan Hamler, Note, *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, 386 (2000).

reasonable under the circumstances to maintain its secrecy.¹¹

This definition bears a close resemblance to the Restatement (First) of Torts definition but differs from it in three ways.¹² First, the UTSA does not require a trade secret to be “in use” as the Restatement (First) does.¹³ Second, under the UTSA, the information can merely have potential value, rather than requiring actual value.¹⁴ Consequently, negative trade secrets—knowledge of what not to do—may be considered protectable under the UTSA.¹⁵ Third, *any* valuable information meets the definition of a trade secret for the UTSA, even information that only relates to a single event.¹⁶

The UTSA has been adopted in some form by forty-two states and the District of Columbia, but not in Pennsylvania.¹⁷ Still, many courts follow the guidelines of the Restatement (First) of Torts, despite their legislatures having adopted the UTSA, because the definitions are so similar.¹⁸

The most recent definition, the Restatement (Third) of Unfair Competition, published in 1995, defines a trade secret as “[a]ny information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.”¹⁹

All three trade secrets definitions emphasize good faith and fair dealing. The Restatement (Third) of Unfair Competition and the UTSA state that good faith and fair dealing are implied for both the employer and the employee.²⁰ Under the UTSA, misappropriation of a trade secret occurs when a trade secret is used or disclosed through “improper means.”²¹ Under the Restatement (First) of Torts and Pennsylvania law, misappropriation of a trade secret occurs when

[o]ne who discloses or uses another’s trade secret, without privilege to do so, is liable to the other if (a) he discovered the

11. UNIF. TRADE SECRETS ACT § 1 (amended 1985).

12. James Pooley, *Trade Secrets*, 10 L.J. PRESS § 2.04[2] at 2-32-33 (2003); Sheinfeld & Konkel, *supra* note 3, at 427.

13. James Pooley, *Trade Secrets*, 10 L.J. PRESS § 2.04[2] at 2-33 (2003).

14. *Id.*

15. *Id.* For an illustration of the consequences of the doctrine of inevitable disclosure meeting the doctrine of negative trade secrets, see Hamler, *supra* note 10.

16. Hamler, *supra* note 10, at 387.

17. Sheinfeld & Konkel, *supra* note 3, at 428 (listing the state statutes that have adopted the UTSA).

18. Susan Street Whaley, Comment, *The Inevitable Disaster of Inevitable Disclosure*, 67 U. CIN. L. REV. 809, 812-13 (1999) (citing JERRY COHEN & ALAN S. GUTTERMAN, *TRADE SECRETS PROTECTION AND EXPLOITATION* 8-9 (1998) and PAUL GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES: CASES AND MATERIALS ON THE LAW OF INTELLECTUAL PROPERTY* 123 (4th ed. 1997)).

19. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995).

20. Whaley, *supra* note 18, at 815.

21. UNIF. TRADE SECRETS ACT § 1 (amended 1985).

secret by improper means, or (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him.²²

Thus, the Restatement (First) of Torts also stresses good faith and fair dealing.

II. THE DOCTRINE OF INEVITABLE DISCLOSURE

Trade secrets of a former employer can be protected by the doctrine of inevitable disclosure when an employee will inevitably use or disclose knowledge of such trade secrets in the course of new employment.²³ A plaintiff may be entitled to a preliminary injunction upon a showing that (1) the former and new employers are competitors, (2) the employee's new responsibilities are so similar to the former responsibilities that disclosure of the former employer's trade secrets is inevitable, and finally, (3) the new employer has not taken proper steps to ensure against misappropriation of the trade secrets.²⁴

The theory attempts to strike a balance between actual appropriation of trade secrets and the mere possibility of such appropriation. While actual appropriation is not required to meet the doctrine, potential appropriation is insufficient.²⁵ The principle demands the inevitability of misappropriation and the presence of a real and imminent threat.²⁶ The former requirement has been harshly criticized, however, due to the impossibility of consistently applying a term as vague as "inevitable."²⁷

The theory is also broad enough to cover instances in which restrictive covenants or non-disclosure agreements do not exist.²⁸ The effect is a doctrine that acts as a non-competition agreement in cases where such an agreement was never created.²⁹ The doctrine may also act to create a non-disclosure agreement where one did not previously exist.³⁰

22. *First Health Group Corp. v. Nat'l Prescription Adm'rs, Inc.*, 155 F. Supp. 2d 194, 218 n.5 (M.D. Pa. 2001) (quoting RESTATEMENT (FIRST) OF TORTS § 757 (1939)).

23. *See PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1269 (7th Cir. 1995).

24. *Sheinfeld & Konkel*, *supra* note 3, at 475.

25. *Id.* at 476.

26. *Id.*

27. *See, e.g.*, Benjamin E. Emmert, Comment, *Keeping Confidence with Former Employees: California Courts Apply the Inevitable Disclosure Doctrine to California Trade Secret Law*, 40 SANTA CLARA L. REV. 1171, 1198 (2000) (describing the "mixed reviews" the inevitable disclosure doctrine has received); Hamler, *supra* note 10, at 396 (analyzing the inconsistency in the interpretation and application of the inevitable disclosure doctrine).

28. *Sheinfeld & Konkel*, *supra* note 3, at 477.

29. *Id.*; Emmert, *supra* note 27, at 1202.

30. 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).

A. PepsiCo v. Redmond

Though the doctrine of inevitable disclosure has existed for years,³¹ it has become much more prevalent in the wake of the Seventh Circuit case *PepsiCo, Inc. v. Redmond*.³² The battle in *PepsiCo* was waged between beverage companies PepsiCo and Quaker.³³ PepsiCo manufactured a product called All Sport, a competitor of Quaker's product Gatorade.³⁴ Defendant Redmond had worked for PepsiCo in its Pepsi-Cola North America division for ten years, serving first as the general manager of the northern California business unit, and later as the general manager for all of California.³⁵ Redmond signed a confidentiality agreement with PepsiCo providing that he would not disclose any confidential information relating to company business.³⁶

Redmond then began negotiations with Uzzi, the head of Quaker's Gatorade division, regarding the possibility of Redmond becoming vice president of on premise sales for Gatorade.³⁷ Redmond did not inform PepsiCo about his discussions with Uzzi.³⁸ In fact, even after Redmond had accepted an offer to be the vice president of field operations for Gatorade, Redmond told PepsiCo that he was merely debating whether or not to accept an offer from Gatorade.³⁹ Once Redmond revealed that he was leaving PepsiCo to join Quaker, PepsiCo sought a temporary restraining order to prevent him from working at Quaker and disclosing any confidential information to Quaker.⁴⁰ Emphasizing Redmond's bad faith, the district court issued an order permanently enjoining Redmond from using or disclosing any PepsiCo trade secrets or confidential information.⁴¹

PepsiCo appealed, arguing that in the course of his new employment at Quaker, Redmond would inevitably disclose several trade secrets he had become privy to while at PepsiCo.⁴² PepsiCo claimed that this information would give Quaker an unfair advantage.⁴³ The Seventh Circuit agreed, defining the doctrine of inevitable disclosure as applicable when "a plaintiff may prove a claim of trade secret misappropriation by

31. See Hamler, *supra* note 10, at 391-94 (recounting the earliest manifestations of the inevitable disclosure doctrine).

32. 54 F.3d 1262 (7th Cir. 1995).

33. *Id.* at 1263-64.

34. *Id.* at 1264.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 1264-65.

41. *Id.* at 1267.

42. *Id.* at 1266.

43. *Id.*

demonstrating that defendant's new employment will inevitably lead him to rely on the plaintiff's trade secrets."⁴⁴ Though there was no evidence that Redmond took any physical materials from PepsiCo when he left, the court found the situation to be a classic case of inevitable disclosure: "Redmond cannot help but rely on [PepsiCo's] trade secrets . . . [and] these secrets will enable Quaker to achieve a substantial advantage . . ."⁴⁵ The court analogized the case to a situation in which a team player leaves to join the opposing team right before the big game, taking the playbook with him.⁴⁶

Affirming the district court's injunction, the Seventh Circuit analyzed several factors including: the existence of trade secrets, whether Redmond had knowledge of these trade secrets, competition between PepsiCo and Quaker, similarities between Redmond's new and former duties, and Redmond's intent and bad faith.⁴⁷ Regarding the district court's finding of Redmond's intent to use PepsiCo's trade secrets as evidenced by his bad faith, the Seventh Circuit did not find an abuse of discretion and placed less emphasis on this aspect of the case.⁴⁸ The court found, however, that Redmond's potential use of PepsiCo's trade secrets amounted to "threatened misappropriation" under the Illinois Trade Secrets Act.⁴⁹ Thus, the doctrine of inevitable disclosure was reborn.

B. Cases Following PepsiCo

1. *Merck v. Lyon*

In the aftermath of *PepsiCo*, several other jurisdictions applied the doctrine of inevitable disclosure. One such case, very similar to *PepsiCo*, is *Merck & Co. v. Lyon*.⁵⁰ This case involved a confidentiality agreement, but not a non-competition agreement.⁵¹ Inevitable disclosure was found by the court.⁵²

Plaintiff Merck made prescription drugs available over the counter before the patents for the prescriptions expired.⁵³ Defendant Glaxo

44. *Id.* at 1269.

45. *Id.* at 1270.

46. *Id.*

47. *Id.* at 1265-66, 1270-71.

48. *Id.* at 1270-71.

49. *Id.* at 1269. The Illinois Trade Secrets Act permits a court to enjoin either "actual or threatened misappropriation" of trade secrets, provided that the party seeking the injunction can show that a protectable trade secret exists and that misappropriation has occurred. *See id.* at 1267-68.

50. 941 F. Supp. 1443 (M.D.N.C. 1996).

51. *Id.* at 1454.

52. *Id.* at 1460 ("[S]ome misappropriation [of trade secrets] is likely").

53. *Id.* at 1446.

Wellcome marketed these types of products, known as “switch products.”⁵⁴ Lyon, an original defendant later dismissed for lack of personal jurisdiction, worked for Merck for four years and was responsible for the launch and marketing of Pepcid AC in Canada.⁵⁵ Lyon had signed a confidentiality agreement with Merck.⁵⁶ Lyon then accepted a position with Glaxo to “oversee [over the counter] commercial activities outside the Americas.”⁵⁷ Multiple sources at Merck stated that Lyon did not admit to Merck that he was going to a competitor, but in his deposition, Lyon claimed that he had admitted he was joining a competitor.⁵⁸

Balancing harms to determine whether an injunction was proper, the court found that Merck could potentially suffer irreparable harm if trade secrets were disclosed, whereas Glaxo would not suffer greatly if an injunction was imposed.⁵⁹ Under the North Carolina Trade Secret Protections Act, a plaintiff must demonstrate the existence of a trade secret, as well as a legitimate threat of misappropriation.⁶⁰ The court found that Merck had established a likelihood of success in proving the existence of protectable trade secrets.⁶¹

To determine Merck’s likelihood of success regarding misappropriation, the court held that even without bad faith, the doctrine of inevitable disclosure is applicable in North Carolina where “[a] likelihood of disclosure could be shown by the degree of similarity between the employee’s former and current position, and the value of the information.”⁶² Other factors were borrowed from *PepsiCo*, such as competition between the two employers, the new employer’s efforts to prevent the disclosure of the former employer’s trade secrets, and fair dealing.⁶³ Applying these factors to Merck’s situation, the court found that misappropriation was likely due to the similar responsibilities held by Lyon at Glaxo.⁶⁴ The court found Lyon’s lack of forthrightness to be a basis for a narrow injunction, because the relevant trade secrets mostly concerned

54. *Id.* (explaining that switch products are “products that were once available only by prescription, but are now or will be made available for over-the-counter purchase”).

55. *Id.* at 1447.

56. *Id.* at 1454. The court found that Merck’s failure to require Lyon to sign a non-competition agreement was not unreasonable because Merck did not know Lyon was going to a competitor. *Id.*

57. *Id.* at 1448.

58. *Id.* The court did not find Lyon’s testimony credible. *Id.* Since Lyon would have been denied his severance package if Merck had discovered he was going to a competitor, the court considered this a possible reason for his dishonesty. *Id.* at 1448-49.

59. *Id.* at 1456.

60. *Id.* at 1456-57.

61. *Id.* at 1457.

62. *Id.* at 1460.

63. *Id.*

64. *Id.*

general business information not necessarily unique to Glaxo.⁶⁵

2. *T-N-T Motorsports v. Hennessey Motorsports*

Another notable inevitable disclosure case is *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*⁶⁶ In this case there were no confidentiality or non-competition agreements, yet inevitable disclosure was still found.⁶⁷

Plaintiff Hennessey Motorsports specialized “in high performance upgrades for a variety of vehicles.”⁶⁸ Defendant Terpstra assisted Hennessey in times of high demand.⁶⁹ Terpstra ended his employment with Hennessey without notice, and then began working full-time for T-N-T Motorsports, which manufactured and designed products for Hennessey’s use in conjunction with the upgrades.⁷⁰ Terpstra then started advertising T-N-T’s own high performance upgrades, but at a lower price than that of Hennessey’s.⁷¹

Hennessey claimed Terpstra learned trade secrets during his employment with Hennessey, and the use of this information to directly compete with Hennessey amounted to misappropriation.⁷² Although there was no covenant not to compete and no confidentiality agreement between Terpstra and Hennessey, the court held that trade secrets might still be protected if a confidential relationship existed between employer and employee.⁷³

The court held that Hennessey had shown a likelihood of success in proving that it had protectable trade secrets that were misappropriated by Terpstra.⁷⁴ Despite the lack of non-disclosure or non-competition agreements, “a former employee may not use, for his own advantage and to the detriment of his former employer, confidential information or trade secrets acquired by or imparted to him in the course of his employment.”⁷⁵ The court found it likely that Terpstra would use Hennessey’s trade secrets in the course of his new employment, thus harming Hennessey so as to warrant an injunction.⁷⁶

65. *Id.* at 1461.

66. 965 S.W.2d 18 (Tex. App. 1998).

67. *Id.* at 22, 24.

68. *Id.* at 20.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 21.

73. *See id.* at 21-22 (explaining that a duty not to use confidential or proprietary information “survives termination of employment”).

74. *Id.* at 23-24.

75. *Id.* at 24.

76. The court held that the injunction issued by the lower court was overbroad and affirmed a modified version of the injunction. *Id.* at 25.

3. *EarthWeb v. Schlack*

In *EarthWeb, Inc. v. Schlack*,⁷⁷ inevitable disclosure was not found in a case that included both a confidentiality agreement and a covenant not to compete.⁷⁸ The United States Court of Appeals for the Second Circuit held that Plaintiff EarthWeb did not show sufficient irreparable harm to enjoin the defendant from his new employment at EarthWeb's competitor.⁷⁹ EarthWeb provides online products and services to information technology professionals.⁸⁰ Defendant Schlack worked as one of ten vice presidents of EarthWeb and was responsible for the content of its websites.⁸¹ Schlack had signed an employment agreement, which included a broad non-disclosure agreement and a covenant not to compete.⁸² Schlack left EarthWeb to work for ITworld.com, a subsidiary of the leading provider of print-based information technology.⁸³ EarthWeb claimed that Schlack's new position at ITworld.com would inevitably lead him to disclose EarthWeb's trade secrets.⁸⁴

The United States District Court for the Southern District of New York described the history of the doctrine of inevitable disclosure and recognized that, if there is no actual misappropriation, the doctrine should be applied only in rare cases.⁸⁵ The district court listed several factors to weigh when deciding whether to grant injunctive relief: whether the parties are direct competitors, the similarities between the new and old jobs, the value of the trade secrets, and the nature of the industry and of the trade secrets.⁸⁶ The court found that protectable trade secrets existed, but that EarthWeb did not show a risk of inevitable disclosure so as to warrant an injunction.⁸⁷ While ITworld.com and EarthWeb both involve the information technology market, Schlack's new responsibilities would not involve matters relating to his former employment.⁸⁸ The Second Circuit affirmed this holding.⁸⁹

77. No. 99-9302, 2000 WL 1093320 (2d Cir. May 18, 2000).

78. *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 306-07 (S.D.N.Y. 1999); *EarthWeb*, 2000 WL 1093320, at *2.

79. *EarthWeb*, 2000 WL 1093320, at *2.

80. *EarthWeb*, 71 F. Supp. 2d at 302.

81. *Id.* at 303.

82. *Id.* at 306-07.

83. *Id.* at 303.

84. *Id.* at 307-08.

85. *Id.* at 309-10.

86. *Id.* at 310.

87. *Id.* at 314, 316.

88. *Id.* at 316.

89. *EarthWeb v. Schlack*, No. 99-9302, 2000 WL 1093320, at *3 (2d Cir. May 18, 2000).

III. PENNSYLVANIA'S TREATMENT OF THE DOCTRINE OF INEVITABLE DISCLOSURE

Pennsylvania has adopted the doctrine of inevitable disclosure. However, several cases that touched upon issues accompanying the doctrine have shown the courts' reluctance to apply the policy.

A. *Wexler v. Greenberg*

Pennsylvania policy regarding the tension between employee mobility and protection of employer's trade secrets was laid out in *Wexler v. Greenberg*.⁹⁰ The Supreme Court of Pennsylvania found that trade secrets could be protected if a confidential relationship existed between employee and employer or if a restrictive covenant existed.⁹¹ To maintain its trade secrets, an employer must show that there is a legally protectable trade secret and that there is a legal basis for relief.⁹²

Buckingham Wax Company manufactured chemicals, and Defendant Greenberg was their chief chemist for eight years.⁹³ There was no restrictive covenant between them.⁹⁴ Greenberg eventually left and went to work for Brite Products Company, a company that purchased from Buckingham and sold a line of chemicals.⁹⁵ When Greenberg joined Brite, the company expanded into manufacturing chemicals.⁹⁶

The issue facing the Supreme Court of Pennsylvania was whether a confidential relationship existed between Greenberg and Buckingham such that Greenberg could be prevented from disclosing Buckingham's trade secrets to Brite.⁹⁷ The court analyzed the policies that protect against unfair competition and contrasted them with the policies protecting employee mobility.⁹⁸ The court recognized the benefits of confidentiality and fair competition but also acknowledged the notion of personal freedom and equal bargaining positions:

[T]he optimum amount of "entrusting" will not occur unless the risk of loss to the businessman through a breach of trust can be held to a minimum. On the other hand, any form of post-employment restraint reduces the economic mobility of employees and limits their personal freedom to pursue a preferred

90. 160 A.2d 430 (Pa. 1960).

91. *Id.* at 433-34.

92. *Id.* at 434.

93. *Id.* at 431.

94. *Id.* at 432.

95. *Id.*

96. *Id.*

97. *Id.* at 434.

98. *Id.* at 434-35.

course of livelihood. The employee's bargaining position is weakened because he is potentially shackled by the acquisition of alleged trade secrets; and thus, paradoxically, he is restrained, because of his increased expertise, from advancing further in the industry in which he is most productive. Moreover . . . society suffers because competition is diminished by slackening the dissemination of ideas, processes and methods.⁹⁹

The court weighed the merits of both positions and decided that the law favored employee mobility over protecting businesses from unfair competition.¹⁰⁰ Accordingly, a court should look to the reasonableness of any restrictive covenant, or to any relationship when such an agreement does not exist.¹⁰¹

The court did not find that a confidential relationship existed between Buckingham and Greenberg because Greenberg was not part of research or experimentation at Buckingham.¹⁰² Therefore, there was no misappropriation or improper disclosure of trade secrets.¹⁰³

B. Air Products & Chemicals v. Johnson

Pennsylvania courts again dealt with inevitable disclosure in *Air Products & Chemicals, Inc. v. Johnson*.¹⁰⁴ The court of common pleas issued an injunction to prevent inevitable disclosure of trade secrets, and though the Superior Court of Pennsylvania did not expressly adopt this language, they did not find reversible error.¹⁰⁵

Air Products and Liquid Air were manufacturers and distributors of industrial gases.¹⁰⁶ Defendant Johnson worked for Air Products for fifteen years, starting out in charge of on-site sales and later becoming a vice president.¹⁰⁷ Johnson then accepted a position with Liquid Air as president of its Canadian subsidiary, a job that included overseeing Liquid Air's on-site mode of delivery.¹⁰⁸

Air Products sought an injunction to prevent Johnson from disclosing trade secrets involving "technical data concerning the methods of delivery of on-site gas, status of negotiations with customers, and the analysis of

99. *Id.* at 435.

100. *Id.*

101. *Id.*

102. *Id.* at 436.

103. *Id.* at 436-37.

104. 442 A.2d 1114 (Pa. Super. Ct. 1982).

105. *Id.* at 1124.

106. *Id.* at 1116.

107. *Id.*

108. *Id.* at 1116-17.

market opportunities.”¹⁰⁹ Though Johnson did not sign a covenant not to compete, he had signed a confidentiality agreement with Air Products, and the record indicated that Johnson’s move to Liquid Air was in good faith.¹¹⁰ However, Air Products feared that Johnson would inevitably disclose valuable trade secrets due to the nature of his new responsibilities at Liquid Air.¹¹¹

The Superior Court of Pennsylvania found that a confidential relationship existed between Johnson and Air Products, and Air Products’ information of which Johnson had knowledge amounted to trade secrets under the Restatement (First) of Torts § 757.¹¹² Regarding the lower court’s determination that “[i]t would be impossible [for Johnson] to perform his managerial functions in on-site work without drawing on knowledge he possesses of Air Products’ confidential information,” the Superior Court stated that it did not “adopt the reasoning of the trial court or its use of the term inevitable,” though the lower court’s “determination of the likelihood of disclosure was proper.”¹¹³

C. SI Handling Systems v. Heisley

The United States Court of Appeals for the Third Circuit in *SI Handling Systems, Inc. v. Heisley*¹¹⁴ recognized that trade secrets may be protected by an injunction, but they did not find the scope of the district court’s injunction to be proper.¹¹⁵ Therefore, they remanded the injunction to the district court to reconsider its finding of inevitable disclosure.¹¹⁶

Plaintiff SI Handling Systems made machines to transport materials between warehouses or factories.¹¹⁷ One of SI’s product lines was called “CARTRAC.”¹¹⁸ It was very valuable to competitors because its unique features distinguished it from other car-on-track systems.¹¹⁹ SI sells the CARTRAC system to General Motors.¹²⁰ SI took several measures to maintain CARTRAC’s secrecy, including limiting the information given to GM regarding CARTRAC’s operation and maintenance.¹²¹

Defendant Heisley was SI’s president for approximately five years

109. *Id.* at 1117.

110. *Id.* at 1117-18, 1120.

111. *Id.* at 1117.

112. *Id.* at 1120-22.

113. *Id.* at 1124 (alteration in original).

114. 753 F.2d 1244 (3d Cir. 1985).

115. *Id.* at 1265.

116. *Id.*

117. *Id.* at 1248-49.

118. *Id.* at 1249.

119. *Id.*

120. *Id.* at 1250.

121. *Id.* at 1250-51.

before leaving to form Heico, Inc.¹²² Defendant Dentner, SI's vice president of operations and the "father" of CARTRAC, also left SI.¹²³ Together, the defendants and other former SI employees developed ROBOTRAC, a car-on-track system based largely on CARTRAC.¹²⁴ The prospectus for ROBOTRAC stated that "[a]lmost all of the senior management personnel from SI Handling, who developed [CARTRAC], are part of the ROBOTRAC team."¹²⁵ The ROBOTRAC team targeted GM, and they attempted to invent around CARTRAC's patent.¹²⁶

SI filed suit against defendants for several claims, including misappropriation of trade secrets.¹²⁷ SI moved for a preliminary injunction to enjoin the use and disclosure of its trade secrets.¹²⁸ The district court granted SI's motion for a preliminary injunction, and defendants appealed.¹²⁹

The Third Circuit vacated and remanded the preliminary injunction stating that it was too vague and broad in scope.¹³⁰ Applying the Restatement (First) of Torts, the court affirmed and reversed several of the lower court's findings concerning SI's trade secrets.¹³¹ The court weighed the factors for a preliminary injunction and held that SI had made a showing of irreparable harm without the injunction, and public policy supported injunctions to protect trade secrets.¹³² Regarding inevitable disclosure, however, the Third Circuit held that the lower court's injunction was too broad because it was "predicated on erroneous legal conclusions."¹³³ Therefore, the court vacated the order and remanded the case for modification.¹³⁴

IV. PENNSYLVANIA'S RELUCTANCE TO APPLY THE DOCTRINE OF INEVITABLE DISCLOSURE

It is evident from case law that Pennsylvania recognizes the doctrine of inevitable disclosure, but is determined to apply it narrowly.

122. *Id.* at 1251.

123. *Id.*

124. *Id.*

125. *Id.* at 1252.

126. *Id.*

127. *Id.* at 1254.

128. *Id.*

129. *Id.*

130. *Id.* at 1248.

131. *Id.* at 1263.

132. *Id.* at 1263-65 (considering the following factors to determine whether or not to grant a preliminary injunction: "(1) the threat of irreparable harm to the movant if relief is denied; (2) the balance of harms; and (3) the public interest").

133. *Id.* at 1266.

134. *Id.*

Pennsylvania strongly favors employee mobility, and while the state acknowledges protection of employer trade secrets, it is not yet willing to broadly apply a policy that will severely hamper employees' freedom.

A. *Pennsylvania Employment Laws and Public Policy*

The Supreme Court of Pennsylvania upheld employee mobility over the protection of employer trade secrets in *Wexler*.¹³⁵ This precedent affects all employment law in Pennsylvania. *Wexler* sets a very strong pro-employee tone, and through its language, it seems clear that Pennsylvania is unwilling to hinder employees' freedom of contract: "We must therefore be particularly mindful of any effect our decision in this case might have in disrupting this pattern of employee mobility, both in view of possible restraints upon an individual in the pursuit of his livelihood and the harm to the public . . ." ¹³⁶ Since the doctrine of inevitable disclosure often acts in place of non-disclosure or non-competition covenants, Pennsylvania courts are appropriately hesitant when applying it.

Further evidence of Pennsylvania's unwillingness to apply the policy of inevitable disclosure is Pennsylvania's refusal to adopt the UTSA. The UTSA is more favorable to employers, since it covers a broader range of trade secrets than the Restatement (First) of Torts does. As aforementioned, the UTSA includes trade secrets that are not in use as well as trade secrets with mere potential but not necessarily actual value.¹³⁷ Thus, a state legislature's adoption of the UTSA expresses a readiness to give greater protection to employers.

However, the Pennsylvania Superior Court's decision in *Air Products* demonstrates sound recognition and adoption of the doctrine of inevitable disclosure, and it has been interpreted as such.¹³⁸ Applying Pennsylvania law, the Middle District of Pennsylvania held that "this Court may enjoin [a defendant's] employment in that capacity under the doctrine of inevitable disclosure," citing *PepsiCo* and *Air Products*.¹³⁹ The Superior Court of Pennsylvania noted that Pennsylvania allows for an injunction in the case of inevitable disclosure.¹⁴⁰ Nevertheless, neither court found inevitable

135. *Wexler v. Greenberg*, 160 A.2d 430, 437 (Pa. 1960).

136. *Id.* at 433.

137. UNIF. TRADE SECRETS ACT § 1(4)(i) (amended 1985).

138. See Brandy L. Treadway, Comment, *An Overview of Individual States' Application of Inevitable Disclosure: Concrete Doctrine or Equitable Tool?*, 55 SMU L. REV. 621, 635 (2002) (noting that Pennsylvania adopted the doctrine of inevitable disclosure in *Air Products*).

139. *First Health Group Corp. v. Nat'l. Prescription Adm'rs, Inc.*, 155 F. Supp. 2d 194, 236 (M.D. Pa. 2001).

140. *Oberg Indus., Inc. v. Finney*, 555 A.2d 1324, 1326-27 (Pa. Super. Ct. 1989).

disclosure on the facts of those cases.¹⁴¹ These holdings again emphasize Pennsylvania's reluctance to apply the doctrine.

B. *Pennsylvania's Version of Inevitable Disclosure*

Pennsylvania's version of inevitable disclosure does not vary greatly from the doctrine laid out in *PepsiCo*. In order for a Pennsylvania court to apply the doctrine of inevitable disclosure, both a confidential relationship and highly valuable information must be present.

As laid out in *Wexler*, a court will look to a confidential relationship first and foremost. This step was evident in *Air Products*, as the court laid out the entire confidentiality agreement between Johnson and Air Products.¹⁴² In *SI Handling*, the court detailed the measures that SI took to maintain the secrecy of the CARTRAC product information.¹⁴³ If a confidential relationship does not exist, the court is not likely to apply the doctrine.¹⁴⁴

The other condition that a Pennsylvania court will look at is the value of the trade secret. The trade secret must be protectable under the Restatement (First) of Torts adopted by Pennsylvania.¹⁴⁵ General knowledge or skill will not qualify.¹⁴⁶

However, Pennsylvania courts do not necessarily require that a restrictive covenant be in place. In *Air Products*, there was no covenant not to compete.¹⁴⁷ Nor was there one in *Wexler*.¹⁴⁸ Thus, it appears that while Pennsylvania may not apply the doctrine of inevitable disclosure to replace non-disclosure agreements, Pennsylvania may apply it to replace non-competition agreements.

C. *How Inevitable Disclosure May Negatively Affect Pennsylvania Employees*

Pennsylvania's adoption of the doctrine of inevitable disclosure means that employers have an increased likelihood of obtaining an injunction,

141. *First Health*, 155 F. Supp. 2d at 237; *Oberg*, 555 A.2d at 1327.

142. *Air Prods. & Chems., Inc. v. Johnson*, 442 A.2d 1114, 1117 n.7 (Pa. Super. Ct. 1982).

143. *SI Handling Sys., Inc. v. Heisley*, 753 F.2d 1244, 1250-51 (3d. Cir. 1985).

144. See *Oberg*, 555 A.2d at 1327 (emphasizing the absence of a restrictive covenant or a confidential relationship).

145. See *Wexler v. Greenberg*, 160 A.2d 430, 434 (Pa. 1960) (listing the first of the employer's burdens as showing the presence of a "legally protectable trade secret").

146. See *Air Prods.*, 442 A.2d at 1121-22 (delineating the difference between general information and trade secrets); *SI Handling*, 753 F.2d at 1255 (noting that public knowledge is not protectable under trade secret law).

147. *Air Prods.*, 442 A.2d at 1119.

148. *Wexler*, 160 A.2d at 432.

regardless of whether a restrictive covenant exists. Though Pennsylvania precedent clearly favors employee mobility, inevitable disclosure is a step toward greater leniency for employers. Still, since the Pennsylvania courts seem so reluctant to apply the doctrine, it is not a major victory for employers *yet*. It is presently unclear whether or not Pennsylvania will broaden its application of the policy.

Employees in Pennsylvania may be hurt by the doctrine in two major ways. One is that the doctrine can be used to create a *de facto* covenant not to compete. As stated earlier, Pennsylvania courts seem willing to apply the doctrine when a non-competition agreement does not exist. This enables the employer to be slack in their contracting process with their employees, because the employer has the added safeguard of resorting to litigation under inevitable disclosure once the employee leaves to work for a competitor. The second problem for employees is that the doctrine may be used by employers to buy time, especially in technology industries. In the name of inevitable disclosure, employers are able to wait until their product becomes surpassed by more advanced technology, and in the meantime they restrain their employees from disclosing trade secrets.

Furthermore, these problems are exacerbated by a weak economy as more employees find themselves out of work.¹⁴⁹ This leads to increased litigation when employees attempt to get out of covenants not to compete, and employers scramble to protect their trade secrets when these employees go to work for their competitors.¹⁵⁰

1. The Doctrine as a De Facto Covenant Not to Compete

Pennsylvania courts have applied the doctrine of inevitable disclosure in place of non-competition agreements.¹⁵¹ By using the doctrine as a *de facto* covenant not to compete, employers are let off the hook if they did not properly protect their trade secrets or their confidential relationships with their employees. A hastily drafted employment contract omitting a covenant not to compete becomes less important if an employer successfully argues for an injunction to prevent inevitable disclosure. As a result, Pennsylvania employers may become more lax in their hiring processes.¹⁵²

149. Due to layoffs, cutbacks, and downsizing, employees are more likely to be out of a job or looking for a better one. See Thomas W. Brooke, *Trade Secret Protection Through Internal Policies and Employment Agreements*, 9 METRO. CORP. COUNS. 9, Sept. 2001.

150. See *id.* (“A slower economy often means more litigation as companies in trouble are willing to turn to the courts to curtail the activities of competitors, especially competitors who hire former employers.”).

151. See *Air Prods.*, 442 A.2d at 1119, 1122.

152. As a partner in the employment law group of Morris, Manning & Martin in Atlanta stated, “We’re seeing more companies using this doctrine, especially when they don’t have

If Pennsylvania courts impose an injunction under inevitable disclosure in cases where there is no non-competition agreement, they are essentially writing one. This judicial rewriting severely hampers employee bargaining power and allows the employer to reap “the benefit of a contractual provision it did not pay for.”¹⁵³ It gives the former employer all the bargaining power in negotiations with the employee, because whether or not the employer seeks a covenant not to compete, the employer can simply seek one that is judicially crafted after the employee leaves to work for a competitor.

Giving the employer so much dominance over the employee in the contractual setting can only lead to employer laziness. It creates an incentive for employers to be lackadaisical in their hiring process, because they still have the safety net of employing the doctrine of inevitable disclosure as a tactic to protect their trade secrets. With its increased popularity in recent years, employers are aware of the doctrine and what it can do for them, and therefore are not afraid of using it to their advantage.

These consequences of the doctrine harm employees even more when combined with Pennsylvania’s nominal support of covenants not to compete. The Pennsylvania Supreme Court has stated that “an employer who fears this kind of future competition must protect himself by a preventative contract with his employee.”¹⁵⁴ Consequently, a specialized employee is placed in a difficult position after leaving an employer.

If an employer wishes to prevent litigation involving the possibility of inevitable disclosure, the employer should be careful to limit disclosure of trade secrets. It is imperative that protectable trade secrets are disclosed only to employees who require such information. Trade secrets should be labeled as confidential so that employees are aware of their classified nature.

Employers should also use the termination process to their advantage to prevent inevitable disclosure. At an exit interview, the employee should be reminded of trade secrets and any covenants not to compete or non-disclosure agreements. An employer should also obtain information regarding the employee’s future employment, including job responsibilities. If an employee is not upfront about where he or she will be employed, this may be useful as evidence of bad faith in the instance of later litigation.

an employment agreement or restrictive covenant with the former employee.” Tammy Joyner, *Fired Workers Fight Firms’ Restriction—Suits Growing: Employees Try to Resist Companies Limiting Where They Can Work in New Jobs*, ATLANTA J. CONST., June 26, 2001, at D1, D4. There is no reason to believe this will not happen in Pennsylvania as well.

153. Matheson, *supra* note 6, at 160.

154. *SI Handling Sys., v. Heisley*, 753 F.2d 1244, 1259 (3d Cir. 1985) (citing *Spring Steels v. Molloy*, 162 A.2d 370, 375 (Pa. 1960)).

Armed with these protections for employers' trade secrets, the additional application of inevitable disclosure becomes dangerous.¹⁵⁵ Employers are already able to protect their trade secrets in a prophylactic manner by negotiating covenants not to compete, limiting access to trade secrets, or using exit interviews to remind employees about restrictive covenants and agreements not to disclose confidential information. Pennsylvania employers should not be given an incentive to ignore such measures by using inevitable disclosure.

2. Using the Doctrine to Buy Time in Litigation

The doctrine can easily become a litigation tactic in the technological industries in Pennsylvania, for which time is essential. For example, an employer may want to protect trade secrets while a product is valuable and on the market. In a short period of time, however, the employer's product will become outdated by technological advances. Therefore, the employer needs only to bide time, waiting until the product is no longer the hottest product on the market. In the meantime, the employer can use the doctrine of inevitable disclosure as a basis for litigation, obtaining a preliminary injunction or a temporary restraining order to prevent an employee from leaving for a competitor.¹⁵⁶ While the litigation is pending, the employee is out of work and out of money, and the employer is patiently waiting for market forces to make the litigation pointless. For instance, an employer might exploit the key moment right before the employee begins work with the new employer.¹⁵⁷

155. As Judge Pauley in the Southern District of New York said when deciding *EarthWeb*:

[The doctrine's] application is fraught with hazards. Among these risks is the imperceptible shift in bargaining power that necessarily occurs upon the commencement of an employment relationship marked by the execution of a confidentiality agreement. When that relationship eventually ends, the parties' confidentiality agreement may be wielded as a restrictive covenant, depending on how the employer views the new jobs its former employee has accepted. This can be a powerful weapon in the hands of an employer; the risk of litigation alone may have a chilling effect on the employee. Such constraints should be the product of open negotiation.

EarthWeb, Inc. v. Schlack, 71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999). This is an incredibly strong denunciation of inevitable disclosure, as the term "chilling effect" is generally reserved for areas of constitutional law such as free speech. See generally *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (stating that content-based regulations of speech raise "special First Amendment concerns because of [their] obvious chilling effect on free speech").

156. See Sheinfeld & Konkel, *supra* note 3, at 504-06 (listing cases in which the employer sought a TRO as a tactical weapon).

157. See *id.* (citing to *FMC Corp. v. Varco Int'l, Inc.*, 677 F.2d 500, 501 (5th Cir. 1982) (granting an employer a TRO four days before an employee began work with the new employer)).

This time tactic was described in an interview with representatives from several corporations, including VoiceStream Wireless and Quest Diagnostics.¹⁵⁸ During the discussion about protecting trade secrets through the doctrine of inevitable disclosure, the senior vice president and general counsel of Valley National Bank said, “[S]ometimes even if you ultimately lose, you still win because you’ve gotten yourself time, simply gotten time through temporary restraining orders, for example, even if you end up negotiating a settlement or losing a case. You’ve gained yourself enough time to solve the problem you were facing.”¹⁵⁹ In response, the moderator of the interview said, “Or for that generation of DSL circuits to become last year’s circuits?”¹⁶⁰ The general counsel and secretary for Globespan answered, “Yes.”¹⁶¹

Inevitable disclosure can thus become a brilliant litigation tool for employers in Pennsylvania, especially for those in the technological fields, to bide time until their product no longer requires such ardent protection.¹⁶² But this tactic leaves employees with the short end of the stick. Most likely, an individual employee will have difficulty obtaining money to pay for an attorney and the other costs involved in litigation, whereas an employer usually does not have these financial hurdles. Add to that the fact that the employee is now without a job because he or she is temporarily restrained from working for the new employer and is no longer working for the litigious former employer either. This can all be incredibly devastating to an individual employee, and yet the former employer is hardly inconvenienced.

Some opponents of inevitable disclosure take this argument even further and claim that such abuse will lead to a paucity of competition as well as a lack of new development in technological areas. “If employees are threatened and consequently fail to acquire more skills or develop better ideas, society might feel the repercussions of this behavior through slowed competition and the lack of interchange of ideas, processes, and methods . . . economic growth will decline . . . [and] may stagnate.”¹⁶³ This argument is prevalent in many technologically related debates, such as the deliberation regarding the open nature of the development of the Internet,

158. *From Money Laundering to Sex Harrassment, Corporate Counsels Confront New Challenges*, 14 BUS. NEWS N.J. 47 (2001).

159. *Id.*

160. *Id.*

161. *Id.*

162. *See Matheson, supra* note 6, at 161 (stating that employers have an incentive to seek injunctive relief because it is such a fact-intensive and fact-specific process that even if the employer loses the litigation, “the former employer has hampered the former employee and the new employer through the cloud of the litigation process”).

163. Whaley, *supra* note 18, at 844.

as well as the ongoing dispute about open source software.¹⁶⁴

While this argument sounds plausible in the context of inevitable disclosure, it is inconsistent with the way Pennsylvania courts have been applying the doctrine. Pennsylvania courts seem to recognize the implications of the doctrine and have thus been reluctant to apply it. Therefore, it is unlikely that competition and industry development in Pennsylvania will be stifled because of inevitable disclosure. And even if Pennsylvania increasingly applies the doctrine, it still seems like somewhat of a stretch to predict that the doctrine will impair competition and industry development. Antitrust law can probably solve any major anticompetitive effects the doctrine might cause.

But the fact remains that inevitable disclosure is a devastating litigation weapon against individual employees. Employees have a paucity of economic resources and are no match for employers who utilize litigation tactics such as abusing the doctrine of inevitable disclosure to buy time. This imbalance creates an incentive for employers to abuse the legal process to their advantage. As this country is already notoriously litigious, no further incentives to seek out lawsuits are necessary. This abuse surely does not reflect the original intent of inevitable disclosure, a doctrine that purportedly seeks to protect employer trade secrets via intellectual property law. The doctrine thus has a negative by-product when it generates such tactical litigation.

VI. CONCLUSION

The doctrine of inevitable disclosure in Pennsylvania has shifted Pennsylvania policy slightly away from favoring employee mobility and freedom. Pennsylvania courts, however, are not yet ready to make the shift complete. They are still reluctant to give up pro-employee policies. Consequently, they have struck a balance by adopting the doctrine of inevitable disclosure while severely limiting its application.

It is probable that over time Pennsylvania will continue to lean toward

164. It is believed that the Internet would not have developed as rapidly as it did had it not been developed with open standards. See Sharon Eisner Gillett & Mitchell Kapur, *The Self-Governing Internet: Coordination by Design*, Prepared for Coordination and Administration of the Internet: Workshop at Kennedy School of Government, Harvard University, Sept. 8-10, 1996, reprinted in *COORDINATING THE INTERNET* 3, 9 (Brian Kahin & James H. Keller eds., 1997). Proponents of open source software similarly argue that technology can advance when software codes are made available to the public. They argue that intellectual property regulations can stifle and cripple development. See Richard Stallman, *Why Software Should Be Free*, in *COMPUTERS, ETHICS, AND SOCIAL VALUES* (Deborah Johnson & Helen Nissenbaum eds., 1995) reprinted in *INTELLECTUAL PROPERTY: MORAL, LEGAL AND INTERNATIONAL DILEMMAS* 283, 290-91 (Adam D. Moore ed., 1997).

favoring employers and protecting their trade secrets.¹⁶⁵ Eventually, Pennsylvania may use inevitable disclosure more often and more broadly, resulting in the further erosion of employee rights. Employees might receive increasingly less protection from Pennsylvania courts, as they have in other states.

On one hand, employees are faced with a difficult predicament in light of inevitable disclosure, especially those employees with specialized training and access to confidential trade secrets. On the other hand, employers are better off with the doctrine in place. Employers are given more latitude in their hiring processes and are provided with a safety net in case of contracting mistakes or errors. Employers certainly need trade secret protection.¹⁶⁶ But do they need so much more protection at the cost of so much more harm to employees?

The doctrine of inevitable disclosure should continue to be hesitantly applied in Pennsylvania. As Pennsylvania courts seem willing to apply the doctrine in cases in which there is no non-competition agreement in place, employees are hampered in the bargaining process when the doctrine creates a de facto covenant not to compete. Furthermore, Pennsylvania employers in technological industries are able to use the doctrine as a litigation tactic to bide time to wait out market forces.

It is unclear what the future of employment law in Pennsylvania will look like. It is clear, however, that the doctrine of inevitable disclosure has already altered the face of employment law in Pennsylvania and will continue to do so at the rate it is going.

165. See Treadway, *supra* note 138, at 635 (“Predictions about Pennsylvania’s future treatment of inevitable disclosure are uncertain but appear favorable.”).

166. According to the American Society for Industrial Security, Fortune 1000 companies lost more than \$45 billion in 1999 due to trade secret disclosures. See Joyner, *supra* note 152.