# The historical development of the inevitable disclosure doctrine

**By R. Mark Halligan, Esq., FisherBroyles LLP**

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The "inevitable disclosure" doctrine is as old as the law of trade secrets. It is a coined term used to describe the entry of injunctive relief to prevent the *threatened* misappropriation of trade secrets. Whether the record in a trade secret lawsuit establishes an *inherent* risk of disclosure, a *probable* risk of disclosure, an *inevitable* risk of disclosure, or an *imminent* risk of disclosure, the trade secret owner is entitled to injunctive relief to protect the trade secrets at risk.

This article summarizes the key cases that establish the contours of the inevitable disclosure doctrine.

Courts of equity have centuries of experience with granting and fashioning injunctive relief narrowly tailored to protect the employer's legitimate interest in protecting trade secrets. Overbroad injunctions are routinely overruled.

In any case in which injunctive relief is sought, the courts have fashioned rulings based upon carefully weighing both the employer and employee's interests and the public interest in free and fair competition.

Using injunctive relief to protect trade secrets can be traced back to the early English cases in the 19th century. In 1820, in *Youvatt v. Winyard*, the court enjoined a former employee from the further use of or disclosure of medicinal formulas. In 1851, in *Morison v. Moat,* the court enjoined a third party who had acquired the trade secret through another's breach of confidence. In 1837, in *Vickery v. Welsh,* the court issued an injunction to protect trade secrets rights in a contract for the sale of a chocolate factory. In 1868, in *Peabody v. Norfolk,* the court affirmed an injunction to protect the trade secrets of a former employer.

In 1902, the 7th U.S. Circuit Court of Appeals addressed the issuance of an injunction to protect the threatened misappropriation of trade secrets against disclosure or use by a former employee in *Harrison v. Glucose Sugar Refining Company:*

"Under the circumstances it would require something more than his mere denial to convince us that in the manufacture of glucose he would not employ the secrets of the business of the appellee which had been confidentially communicated to him. He could not well do otherwise. He was employed by the rival for that purpose. He was to give over the skill, including the knowledge, confidentially acquired in the business of the appellee, to his new master. He could not in good faith serve the one without breach of duty to the other."

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In 1919, the New York Appellate Division addressed the protection of trade secrets in *Eastman Kodak v. Power Film Products.* The court held that the value of Defendant's services to the defendant company arises from his experience while in the plaintiff's employ, growing out of the practical application of Plaintiff's trade secrets. If the defendant is permitted to enter this new employment, injunctive relief in form against the imparting of such special knowledge is more than likely to prove inefficient. The Defendant cannot be loyal both to his promise to his former employer and to his new obligations to the defendant company. Injunction granted to enjoin the threatened misappropriation of Plaintiff's trade secrets.

Other notable decisions:

- In 1978, the Texas Court of Appeals observed in *Weed Eater, Inc. v. Dowling:* "Even in the best of good faith, Dowling can hardly prevent his knowledge of his former employer's [proprietary] methods from showing up in his work."
- In 1982, the 5th U.S. Circuit Court of Appeals in *FMC v. Varco* observed: "Even assuming the best of good faith, [the former employee] will have difficulty preventing his

knowledge of FMC's manufacturing techniques from infiltrating his work."

- In 1995, the United States District Court for the District of Massachusetts observed in *Marcam Corp. v. Orchard:* "Even if Orchard thinks he is keeping Marcam's secrets, he will, as DataLogix's employee, inevitably, even if inadvertently, be influenced by the knowledge he possesses of all aspects of Marcam's development efforts."

These two cases are excellent examples of the "inevitable disclosure" doctrine.

### *B.F. Goodrich v. Wohlgemuth* (1963)

The modern era of the "inevitable disclosure" doctrine begins with the *B.F. Goodrich v. Wohlgemuth* decision in the Ohio Court of Appeals in 1963.

*The 7th Circuit affirmed the entry of injunctive relief by the trial court using the following analogy: "PepsiCo finds itself in the position of a coach, one of whose players has left, playbook in hand, to join the opposing team before the big game."*

Donald Wohlgemuth worked for his entire career in the "pressure-space suit department" at B.F. Goodrich and he had risen through the ranks to be manager of this highly specialized department in charge of all research and development regarding space suits.

In 1962, Wohlgemuth announced his resignation to work for International Latex Corporation in their space suit department, which was 14 years behind B.F. Goodrich in the development of this specialized technology.

B.F. Goodrich sued Wohlgemuth to protect its trade secrets. There was no evidence of "actual" misappropriation of any trade secrets, although Wohlgemuth was reported to have said to a fellow employee that "loyalty and ethics had their price; insofar as he was concerned, International Latex was paying that price." The trial court denied the preliminary injunction. B.F.Goodrich appealed.

Based upon the record, the appellate court determined that Goodrich possessed numerous trade secrets in the high-altitude pressure suit technology sector known to Wohlgemuth from his years of experience in his positions as a materials engineer, product engineer, sales engineer, technical manager and department manager.

The court of appeals concluded that there was clear and convincing evidence that Wohlgemuth possessed Goodrich's trade secrets; that disclosure of trade secrets to a direct competitor is threatened; and that B. F. Goodrich may suffer irreparable injury without the entry of injunctive relief.

There was no evidence before the court that trade secrets had been disclosed by Wohlgemuth to Latex. But that did not deter the appellate court from the entry of an injunction to prevent the threatened misappropriation of trade secrets: An injunction may issue in a court of equity to prevent a future wrong although no right has yet been violated.

### *PepsiCo v. Redmond* (1995)

The 7th U.S. Circuit Court of Appeals addressed the "inevitable disclosure" doctrine in the now famous case of *PepsiCo Inc. v. Redmond.* Although this case has received much fanfare in the press and the bar, an analysis demonstrates that it is a straightforward application of centuries-old trade secrets law to issue injunctive relief to protect against the threatened misappropriation of trade secrets by a former employee.

#### Factual background

PepsiCo (All Sport) and Quaker Oats (Gatorade) were fierce competitors in the "sports drink" market. Redmond was a high level manager at PepsiCo's with intimate knowledge of PepsiCo's upcoming 1995 strategy business plans, "attack" plans and annual operating plan (AOP) for various markets.

For example, Redmond knew when PepsiCo would dedicate extra funds to support its brands in certain markets. "To use a hypothetical example, [PepsiCo] might budget an additional $500,000 to spend in Chicago at a particular time to help All Sport close its market gap with Gatorade." Testimony and documents demonstrated Redmond's awareness of these plans and his participation in drafting some plans.

Redmond resigned on November 10, 1994, to join Quaker Oats as the Vice President: Field Operations for Gatorade. Less than a week later, on November 16, 1994, PepsiCo sued Redmond from disclosing PepsiCo's trade secrets. A preliminary injunction hearing was held from November 23, 1994, to December 1, 1994. The trial court granted injunctive relief, and Quaker appealed to the 7th Circuit.

Redmond signed an agreement with Quaker Oats that he would not disclose or use PepsiCo's trade secrets. There was no evidence of actual misappropriation of trade secrets in the record. There was evidence of a "lack of candor" by Redmond and Quaker Oats regarding the circumstances of Redmond's employment by Quaker Oats. None of these facts were dispositive.

#### Court ruling

At issue was whether the record supported the trial court's conclusion that there was threatened or inevitable

misappropriation of PepsiCo's trade secrets by Quaker Oats.

The Court of Appeals recognized that there was no allegation that Quaker Oats actually had misappropriated any trade secrets. The Court also recognized that Quaker Oats and Redmond testified that they did not intend to use PepsiCo's confidential information. But these facts were not dispositive because Redmond carried in his head detailed information about how PepsiCo would price, distribute and market its products in 1995.

The 7th Circuit concluded that, even assuming the best of good faith, this intimate knowledge of PepsiCo's trade secrets would infiltrate Redmond's work at Gatorade.

PepsiCo argued that Redmond "could not help but rely upon" PepsiCo's trade secrets as he helped plot Gatorade's new course because he knew how PepsiCo would price, distribute and market its products during the next year.

The 7th Circuit affirmed the entry of injunctive relief by the trial court using the following analogy: "PepsiCo finds itself in the position of a coach, one of whose players has left, playbook in hand, to join the opposing team before the big game."

## Conclusion

The analysis of the historical development of the inevitable disclosure doctrine demonstrates that the protection of trade secrets requires emergency injunctive relief. The actual or threatened misappropriation of trade secrets may be enjoined to prevent irreparable injury to the trade secret owner. A trade secret once lost is lost forever.

The inevitable disclosure doctrine is alive and well. At least 17 states have adopted the inevitable disclosure doctrine and that number is increasing because the Federal Defend Trade Secrets Act (DTSA) provides statutory protection to prevent the actual or threatened misappropriation of trade secrets.

*R. Mark Halligan is a regular contributing columnist on trade secrets law for Reuters Legal News and Westlaw Today.*

## About the author

**R. Mark Halligan** is a partner at **FisherBroyles LLP** in Chicago, focusing on intellectual property litigation and trade secret management systems. He teaches advanced trade secrets law at the University of Illinois Chicago School of Law and is the lead author of the "Defend Trade Secrets Act Handbook," 4th Edition, published by Wolters Kluwer. He can be reached at rmark.halligan@fisherbroyles.com.

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