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## The Long Shadow Of Inevitable Disclosure

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*Abstract. A growing body of evidence has highlighted the human and economic costs associated with contractual restrictions on employee mobility. News accounts describe abusive use of non-compete clauses to prevent low wage workers from seeking better options. Economists, meanwhile, have demonstrated that innovation and economic dynamism may suffer when employers can easily prevent their employees from changing jobs. While state legislatures have attempted to address these concerns by restricting employers' use of non-compete agreements, the Federal Trade Commission recently announced a plan to prohibit them altogether. As policymakers focus attention on contractual limits on employment mobility, however, a more insidious threat to employee mobility has flown below the radar. Trade secret law's Inevitable Disclosure Doctrine ("IDD") comes in many shapes and sizes, but at its most extreme, it empowers courts to enter employment-blocking injunctions based on the threat that an employee will use her former employer's secrets in her new job. In jurisdictions that adopt this version of the doctrine, employees exposed to trade secrets face the risk of a lawsuit if they leave to work for a competitor. Even in states that use the doctrine more sparingly, its definitional ambiguity increases the uncertainty and cost of job transitions, which in turn affects mobility in the state. This Article will contend that the IDD requires attention as a mobility-limiting doctrine, even in states that have not yet applied it in that way. In a moment of heightened awareness of the human and economic price of mobility-restricting contracts, this non-contractual, ex post restraint looks increasingly suspect. As policymakers narrow the circumstances in which employers can contractually limit their employees' future prospects, they should repudiate the IDD, lest it undermine their reforms.*

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## Introduction

The Inevitable Disclosure Doctrine (“IDD”) is one of the most controversial and poorly understood doctrines in trade secret law.<sup>1</sup> The doctrine permits courts to block employees from taking a new position even in the absence of a contractual non-compete commitment, based on the notion that they cannot help but use or disclose their former employer’s trade secrets in the new job.<sup>2</sup> Courts apply the IDD most often in cases involving senior executives or others with intimate knowledge of time-sensitive, competitively important information, relying on it to intervene in the tricky balancing act between employers seeking to protect their trade secrets and highly skilled employees who want the freedom to change jobs.<sup>3</sup> The IDD is so contentious because it allows courts to impose un-bargained-for restrictions on employment mobility, thus implicating a heightened version of the concerns raised by other restrictive devices, such as non-compete and no-poach agreements.<sup>4</sup>

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<sup>1</sup> See, e.g., Shannon Aaron, Note, *Using the History of Noncompetition Agreements to Guide the Future of the Inevitable Disclosure Doctrine*, 17 LEWIS & CLARK L. REV. 1191, 1192 (2013); Mat D. Carlson, Recent Development, *Trade Secrets: Is the “Inevitable Disclosure Doctrine” Inevitable?*, 1 U.S.F. INTELL. PROP. L. BULL. 11, 11 (1996); Johanna L. Edelstein, Note, *Intellectual Slavery?: The Doctrine of Inevitable Disclosure of Trade Secrets*, 26 GOLDEN GATE U. L. REV. 717, 735 (1996); M. Claire Flowers, Note, *Facing the Inevitable: The Inevitable Disclosure Doctrine and the Defend Trade Secrets Act of 2016*, 75 WASH. & LEE L. REV. 2207, 2211 (2018); John H. Matheson, *Employee Beware: The Irreparable Damage of the Inevitable Disclosure Doctrine*, 10 LOY. CONSUMER L. REV. 145, 165 (1998); Elizabeth A. Rowe, *When Trade Secrets Become Shackles: Fairness and the Inevitable Disclosure Doctrine*, 7 TUL. J. TECH. & INTELL. PROP. 167, 170 (2005); Peter Huang, Comment, *Preventing Post-PepsiCo Disaster: A Proposal for Refining the Inevitable Disclosure Doctrine*, 15 SANTA CLARA COMPUT. & HIGH TECH. L.J. 379, 381 (1999); Daniel Hegner, Comment, *Steering Clear of the Inevitable Disclosure Doctrine: Placing the Burden Where It Belongs*, 88 U. DET. MERCY L. REV. 611, 629 (2011); Jacqueline R. Mancini, Note, *Nothing Is Inevitable: A Rejection of the Inevitable Disclosure Doctrine Under the Defend Trade Secrets Act*, 94 ST. JOHN’S L. REV. 205, 206 (2020); Joseph F. Phillips, Note, *Inevitable Disclosure Through an Internet Lens: Is the Doctrine’s Demise Truly Inevitable*, 45 WM. & MARY L. REV. 395, 395 (2003); Susan Street Whaley, Comment, *The Inevitable Disaster of Inevitable Disclosure*, 67 U. CIN. L. REV. 809, 811 (1999).

<sup>2</sup> *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1272 (7th Cir. 1995).

<sup>3</sup> See *infra* Sections II.A-B.

<sup>4</sup> See, e.g., Norman D. Bishara & Michelle Westermann-Behaylo, *The Law and Ethics of Restrictions on an Employee’s Post-Employment Mobility*, 49 AM. BUS. L.J. 1, 24 (2012) (noting that application of the IDD should concern critics of non-compete agreements even more, because the IDD places unbargained-for restrictions on employees); Russell Beck, Hannah Joseph, Josh Davis & Andrew O’Connor, *The Inevitable Disclosure Doctrine in Employment Litigation: Two Perspectives*, 66 BOS. BAR J. 7, 7, 12 (2022) (Beck and Joseph arguing that Massachusetts law contemplates the IDD; Davis and O’Connor arguing that employers should bear the burden of negotiating contractual non-compete agreements with employees and should not be allowed to fall back on the IDD to protect their trade secrets where they fail to do so); cf. Rebecca J. Berkun, Comment, *The Dangers of the Doctrine of Inevitable Disclosure in Pennsylvania*, 6 U. PA. J. LAB. & EMP. L. 157, 157 (2003) (arguing that

The ongoing debate over the IDD sits within a broader reckoning over the wisdom and consequences of a whole class of laws that allow employers to block workers from taking new jobs. Such restrictions on mobility, which most commonly come in the form of express contractual non-compete clauses, “have the potential to profoundly impede individual workers’ access to economic opportunity . . . [and thus] pose an especially high risk of economic harm to the individual employees who sign them, as well as the broader harms to society that flow from any private agreement in restraint of trade.”<sup>5</sup> A growing awareness of these harms has brought non-compete clauses under increasing scrutiny in recent years. A 2020 letter to the Federal Trade Commission (“FTC”) signed by nineteen state attorneys general, for example, noted that non-compete clauses can be abused by employers to prevent their employees from seeking out more attractive employment opportunities, rather than to protect trade secrets or to vindicate other legitimate corporate interests.<sup>6</sup> When considering low-wage workers, who lack the bargaining power to resist onerous contract terms and whose earning potential demonstrably suffers when they’re blocked from considering alternative jobs, these concerns are especially acute.<sup>7</sup> In response to these and related concerns, in January 2023, the FTC proposed a nationwide ban on non-competes.<sup>8</sup> In its Notice of Proposed Rulemaking, the agency noted evidence that non-compete clauses have had negative effects on competition in labor, product, and service markets, and proposed treating them as an “unfair method of competition” under section 5 of the FTC Act.<sup>9</sup>

Even before the FTC’s action, non-compete agreements had faced increasing scrutiny in the states. Since 2007, myriad state legislatures have

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the IDD serves as a “safety net” for employers who failed to negotiate effective non-compete agreements during their employee hiring process).

<sup>5</sup> Rachel Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision*, 50 SETON HALL L. REV. 1223, 1227–28 (2020).

<sup>6</sup> OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA, PUBLIC COMMENTS OF 19 STATE ATTORNEYS GENERAL IN RESPONSE TO THE FEDERAL TRADE COMMISSION’S JANUARY 9, 2020 WORKSHOP ON NON-COMPETE CLAUSES IN THE WORKPLACE (Mar. 12, 2020), <https://perma.cc/7FLP-NFKD>. See generally Matthew T. Bodie, *Taking Employment Contracts Seriously*, 50 SETON HALL L. REV. 1261, 1261–62 (2020).

<sup>7</sup> See, e.g., Tyler Boesch, Katherine Lim & Ryan Nunn, *Non-Compete Contracts Sideline Low-Wage Workers*, FED. RSRV. BANK MINNEAPOLIS (Oct. 15, 2021), <https://perma.cc/G4E8-8QTJ>.

<sup>8</sup> See Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910); see also Press Release, Federal Trade Commission, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), <https://perma.cc/V2G6-J53G>.

<sup>9</sup> Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3499–500 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

amended their laws to limit the use of non-competes in various contexts.<sup>10</sup> This movement has seen renewed energy in recent years. Illinois's 2021 amendments to its Freedom to Work Act, for example, prohibit non-compete agreements for employees with annual earnings of \$75,000 or less<sup>11</sup> and for most workers covered by collective bargaining agreements.<sup>12</sup> A 2018 Massachusetts law forbids the use of non-compete agreements for student interns, minors, and employees classified as non-exempt under the Fair Labor Standards Act ("FLSA").<sup>13</sup> A recent amendment to Oregon law tightens the duration of non-compete agreements and allows them only for exempt employees earning over \$100,533 per year.<sup>14</sup> Washington, D.C. limits non-competes to professionals earning \$150,000 or more (\$250,000 for doctors).<sup>15</sup> Several new laws strengthen employee protections by demanding specific consideration, advance notice,<sup>16</sup> or more precise articulation of the business interest underlying any non-compete.<sup>17</sup> While these and other state laws have mostly limited the terms of non-compete agreements and the types of employees that they cover, California, North Dakota, and Oklahoma have gone further and treat all non-compete agreements—with certain narrow, enumerated exceptions—as unenforceable.<sup>18</sup>

This disparity in approach to employment restrictions reflects a more general divergence over core philosophical and economic questions about the employment relationship and its role in the economy. California's commitment to employee mobility, which dates back to the late

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<sup>10</sup> Russell Beck, *A Brief History of Noncompete Regulation*, FAIR COMPETITION L. (Oct. 11, 2021), <https://perma.cc/XT6F-WTD8>.

<sup>11</sup> 820 ILL. COMP. STAT. ANN. 90/10(a) (West 2019). The annual salary threshold is set to increase by \$5,000 every five years through 2037. *Id.* For non-solicitation agreements, the 2022 threshold is \$45,000. *Id.* at 90/10(b).

<sup>12</sup> *Id.* at 90/10(d). Certain employees in the construction industry are not covered by this exemption. *Id.* ("This subsection (d) does not apply to construction employees who primarily perform management, engineering or architectural, design, or sales functions for the employer or who are shareholders, partners, or owners in any capacity of the employer."). The law also prohibits the enforcement of non-compete agreements against employees who were furloughed due to the COVID-19 crisis or other similar events. *Id.* at 90/10(c).

<sup>13</sup> MASS. GEN. LAWS ANN. ch. 149, § 24L(c) (West 2013).

<sup>14</sup> OR. REV. STAT. ANN. § 653.295(1)(e), .295(3) (West 2011).

<sup>15</sup> See D.C. CODE §§ 32-581.01(6), (10), (12)–(13), 32-581.02(a) (2023).

<sup>16</sup> See, e.g., 820 ILL. COMP. STAT. ANN. 219/90 (West 2018); ME. REV. STAT. ANN. tit. 26, § 599-A(4) (West 2022); WASH. REV. CODE ANN. § 49.62.020(1)(a) (West 2022); D.C. CODE § 32-581.03(a)(2) (2023).

<sup>17</sup> See, e.g., ARK. CODE ANN. § 4-75-101(a)–(b) (2022); MASS. GEN. LAWS ANN. ch. 149, § 24L(b)(iii) (West 2013).

<sup>18</sup> Ban on Non-Compete Agreements Amendment Act of 2020, 68 D.C. Reg. 782 (Jan. 15, 2021) (codified as amended at D.C. CODE §§ 32-581.01–.05); CAL. BUS. & PROF. CODE § 16600 (West 2017); N.D. CENT. CODE ANN. § 9-08-06 (West 2008); OKLA. STAT. ANN. tit. 15 § 219A (West 2013).

nineteenth century, began as a principle to protect “open competition” and employees’ autonomy,<sup>19</sup> but has evolved into a model for an innovation-driven startup ecosystem. The knowledge spillovers that result from fluid movement between firms have been credited with spurring and sustaining California’s start-up economy.<sup>20</sup> The skepticism of non-competes thus has economic dimensions that go beyond a desire to protect vulnerable workers against exploitation. Even so, the strict ban on non-competes is the exception: at least for now,<sup>21</sup> the majority of states, operating within different ecosystems and traditions, enforce non-compete agreements that meet the state’s standard for “reasonableness” and satisfy requirements such as notice, consent, and consideration.<sup>22</sup> Generally, “reasonableness” turns on whether the employee has access to trade secrets, confidential information, or goodwill that could be threatened if she went to work with a competitor, and whether the agreement’s duration and geographic scope are tailored to protect those interests. While some of these states have exempted certain workers from the reach of non-competes,<sup>23</sup> all of them embrace the general principle

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<sup>19</sup> See, e.g., *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 290–91 (Cal. 2008) (explaining that California has refused to uphold non-compete agreements since its legislature first adopted a “legislative policy in favor of open competition and employee mobility” in the 1872 California Civil Code).

<sup>20</sup> See ORLY LOBEL, *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 2* (2013); Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 578 (1999); Mark Lemley & Orly Lobel, *Supporting Talent Mobility and Enhancing Human Capital: Banning Noncompete Agreements to Create Competitive Job Markets*, DAY ONE PROJECT (Jan. 2021), <https://perma.cc/8DVS-SVP2>; see also ANNALÉE SAXENIAN, *REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128*, at 2, 9 (1994).

<sup>21</sup> If the FTC’s rulemaking results in a final rule prohibiting non-compete clauses, that federal law will preempt any state law permitting them. See *Non-Compete Clause Rule*, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

<sup>22</sup> See e.g., FLA. STAT. ANN. § 542.335(1) (LexisNexis 2022); HAW. REV. STAT. ANN. § 480-4(c) (LexisNexis 2022); MD. CODE ANN., LAB. & EMPL. § 3-716 (LexisNexis 2022). See generally Alan J. Meese, *Don’t Abolish Employee Noncompete Agreements*, 57 WAKE FOREST L. REV. 631, 642, 676 (2022).

<sup>23</sup> E.g., MASS. GEN. LAWS ANN. ch. 149, § 24L(c) (West 2013); 28 R.I. GEN. LAWS § 28-59-3(a) (2022); 820 ILL. COMP. STAT. ANN. 90/10 (West 2019). The list of exemptions is often idiosyncratic and likely reflects particular local industries’ influence over the drafting process. For example, while it is common for states to favor enforcement of non-competes against professionals and high-income earners (who presumably have more leverage to negotiate their terms), Alabama has done the opposite, making non-compete agreements enforceable against all classes of employees *except* professionals. See ALA. CODE § 8-1-190(b) (2022). Other states’ exemptions include physicians, for example, FLA. STAT. ANN. § 542.336 (West 2013); N.H. REV. STAT. ANN. § 329:31-a (2017), and other specific occupations. E.g., ARIZ. REV. STAT. § 23-494 (LexisNexis 2022) (broadcasters); LA. STAT. ANN. § 23:921(l)(1) (2010) (automobile salespeople), VT. STAT. ANN. tit. 26, § 281(c) (2022) (beauticians and cosmetologists). Some states, such as Oregon, have opted to list categories of employees that may be

that (some) employees can contractually commit to limit their employment options, at least for a time. When a court enjoins an employee from working in violation of a non-compete agreement, it is thus enforcing the terms of a contract that is deemed valid under the relevant state law.

The IDD, in contrast, does not involve a contractual promise not to compete. In IDD cases, the employee is usually bound by a different contract—a trade secret non-disclosure agreement—in which the employee promises not to use or disclose trade secrets or other confidential information obtained in the course of the employment.<sup>24</sup> Injunctions in standard trade secret cases forbid the use or disclosure of trade secrets in situations where such use is imminent, or order the return or destruction of materials that have already been divulged. A typical trade secret injunction involving a former employee, for example, might require the employee to relinquish confidential documents or customer lists from the former employer, to prevent their use for the benefit of a competitor.<sup>25</sup> Whereas non-compete agreements involve duties with respect to *employment relationships*, trade secret non-disclosure agreements involve duties with respect to *information*. The IDD conflates these two types of duties and imposes a restriction on employment without even the fiction of a consideration-based contract to that effect. As a result, even in states that enforce contractual non-compete agreements, the IDD has proven controversial. The doctrine is used sparingly in jurisdictions that adopt it,<sup>26</sup> and outright rejected in others.<sup>27</sup> The majority of states, however, have either not yet addressed the doctrine or discussed it in equivocal or confusing ways, leading to uncertainty about the doctrine's viability across jurisdictions.<sup>28</sup>

The confusion over the IDD arises from a combination of definitional ambiguity regarding the doctrine itself, and widespread use of IDD-like language in related but distinct doctrinal contexts. As a definitional matter, courts appear uncertain about whether the IDD relates to the

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covered by non-compete agreements, rather than listing those excluded. See OR. REV. STAT. §§ 653.020, .295(1)(b) (2022).

<sup>24</sup> See, e.g., *infra* notes 223–226 and accompanying text (discussing *Emery Industries, Inc. v. Cottier*, No. C-1-78-474, 1978 WL 21419 (S.D. Ohio Aug. 18, 1978)); see also *infra* note 202 (discussing *RKI, Inc. v. Grimes*, 177 F. Supp. 2d 859 (N.D. Ill. 2001)).

<sup>25</sup> E.g., *Avnet, Inc. v. Wyle Lab'ys, Inc.*, 437 S.E.2d 302, 304 (Ga. 1993) (affirming trial court decision that limited “grant of injunctive relief to ‘handwritten, typed, printed or written information’ regarding [plaintiffs’] customers and in holding that their former employees were otherwise free to use such customer information as they might have ‘in their minds’”).

<sup>26</sup> See *infra* Section II.B.2.

<sup>27</sup> See *infra* Section II.B.1.

<sup>28</sup> See *infra* Section II.B.3.

merits of a trade secret claim, the appropriate remedy, or both.<sup>29</sup> Relatedly, they often sidestep the question of whether the IDD is limited to situations involving injunctions against employment.<sup>30</sup> The prototypical IDD case involves an injunction against future employment to avert the imminent threat of trade secret misappropriation. In the classic *PepsiCo, Inc. v. Redmond*<sup>31</sup> case, for example, a senior sales executive in a sports drink division had accepted a similar role at a direct competitor.<sup>32</sup> The Seventh Circuit upheld the district court's conclusion that the employee's "extensive and intimate knowledge" of the former employer's strategic goals for the upcoming year would inevitably shape his strategic advice at the competing firm, making an act of misappropriation unavoidable.<sup>33</sup> This conclusion was buttressed by the trial court's finding that neither the employee nor his new employer had given reason to trust that they would make efforts to avoid use of the information.<sup>34</sup> Inevitability thus played a role in the court's decision on the merits of the trade secret misappropriation claim. It also shaped the decision as to remedy: despite recognizing "some merit" in the employee's charge that the injunction was overbroad, the court pointed to the inevitability of disclosure as a reason to uphold a court-imposed five-and-a-half-month delay in the employee's assumption of his new job.<sup>35</sup>

In the wake of *PepsiCo*, courts have invoked the IDD in a wide variety of contexts, but have rarely applied it to the prototypical case involving *both* a finding that trade secret misappropriation is inevitable but has not yet occurred, *and* an injunction against employment.<sup>36</sup> Under that interpretation, only a handful of states have actually adopted the doctrine,

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<sup>29</sup> See *infra* Section II.B.4.

<sup>30</sup> See *infra* Section II.B.4.a.

<sup>31</sup> 54 F.3d 1262 (7th Cir. 1995).

<sup>32</sup> *Id.* at 1264. *PepsiCo* was not the first court to allow an injunction against employment as a remedy for threatened trade secret misappropriation, see, e.g., *Emery Indus., Inc. v. Cottier*, No. C-1-78-474, 1978 WL 21419, at \*1 (S.D. Ohio Aug. 18, 1978), but it has been treated as seminal, no doubt in part because it was decided by a prominent federal appeals court.

<sup>33</sup> *PepsiCo*, 54 F.3d at 1269–71.

<sup>34</sup> *Id.* at 1271.

<sup>35</sup> *Id.* at 1272.

<sup>36</sup> Compare *Branson Ultrasonics Corp. v. Stratman*, 921 F. Supp. 909, 913–14 (D. Conn. 1996) (applying an IDD-influenced analysis to uphold valid non-compete and confidentiality agreements), and *Fountain v. Hudson Cush-N-Foam Corp.*, 122 So.2d 232, 234 (Fla. Dist. Ct. App. 1960) (applying an IDD analysis to uphold a valid non-compete agreement), and *Kempner Mobile Elecs., Inc. v. Sw. Bell Mobile Sys., LLC*, No. 02 C 5403, 2003 WL 1057929, at \*22 (N.D. Ill. Mar. 10, 2003) (applying IDD reasoning "in the specific context of a noncompete case that involves confidential (and not trade secret) information . . . [to assess] the interest to be protected and the reasonableness of the restraints imposed"), with *Pepsico*, 54 F.3d at 1272.

rather than discussing it in dictum.<sup>37</sup> Similarly, only two states have definitively rejected the doctrine.<sup>38</sup> Even so, the case law is littered with ambiguous or imprecise references to the IDD, which has blurred the contours of the doctrine and led some courts to view it as a more general tool for considering “inevitability” in trade secret (and, indeed, non-compete) cases.<sup>39</sup> Indeed, the vast majority of courts have invoked the IDD in this way, without conclusively adopting or rejecting it. Some courts, for example, discuss the doctrine to support their conclusion that an employee’s past misappropriation suggests that future misappropriation will likely also occur, thus mingling findings about actual and threatened misappropriation.<sup>40</sup> Other courts rely on the doctrine to find a likelihood of misappropriation, but enter an injunction focused on *use* of trade secrets, rather than the employee’s ability to take a new job.<sup>41</sup> Still other courts purport to invoke the doctrine in cases involving non-compete or non-solicitation agreements—contexts in which inevitability may well bear upon the “reasonableness” of the contract, but the IDD as a doctrine is unnecessary and indeed irrelevant to the merits of the case.<sup>42</sup> Compounding all of this confusion, courts frequently discuss the IDD approvingly in *dictum* even while finding it inapplicable to the case before them,<sup>43</sup> leaving tantalizing tea leaves for employers, employees, and scholars trying to gauge the state’s position on the question at the heart of

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<sup>37</sup> See *infra* Section II.B. See generally *Strata Mktg., Inc. v. Murphy*, 740 N.E.2d 1166 (Ill. App. Ct. 2000); *Emery Indus., Inc. v. Cottier*, No. C-1-78-474, 1978 WL 21419 (S.D. Ohio Aug. 18, 1978); *E.I. duPont de Nemours & Co. v. Am. Potash & Chem. Corp.*, 200 A.2d 428 (Del. Ch. 1964).

<sup>38</sup> See *infra* Section II.B.1.

<sup>39</sup> *E.g.*, *Sw. Energy Co. v. Eickenhorst*, 955 F. Supp. 1078, 1085 (W.D. Ark. 1997) (using IDD language in the context of an actual misappropriation claim); *Lombard Med. Techs., Inc. v. Johannessen*, 729 F. Supp. 2d 432, 438–39 (D. Mass. 2010); *U.S. Elec. Servs., Inc. v. Schmidt*, No. 12-10845, 2012 WL 2317358, at \*7 (D. Mass. June 19, 2012).

<sup>40</sup> *E.g.*, *Sw. Energy Co.*, 955 F. Supp. at 1085.

<sup>41</sup> *E.g.*, *Travenol Lab’s Inc. v. Turner*, 228 S.E.2d 478, 485–86 (N.C. Ct. App. 1976); *The RightThing, LLC v. Brown*, No. 09 CV 135, 2009 WL 249694, at \*9 (N.D. Ohio Feb. 2, 2009) (affirming lower court’s injunction against the former employee’s use and disclosure of her former employer’s trade secrets based in part on an IDD analysis); *cf. Vendavo, Inc. v. Long*, 397 F. Supp. 3d 1115, 1142 (N.D. Ill. 2019) (finding that defendant former employee’s misappropriation of plaintiff company’s trade secrets was “inevitable,” then enjoining her from working with certain clients for one year, along with some other behavioral remedies).

<sup>42</sup> See, *e.g.*, *Branson Ultrasonics Corp. v. Stratman*, 921 F. Supp. 909 (D. Conn. 1996); *Fountain v. Hudson Cush-N-Foam Corp.*, 122 So. 2d 232 (Fla. Dist. Ct. App. 1960); *C.R. Bard, Inc. v. Intoccia*, No. 94-11568-Z, 1994 U.S. Dist. LEXIS 15368 (D. Mass. Oct. 13, 1994).

<sup>43</sup> *E.g.*, *Teradyne, Inc. v. Clear Commc’ns Corp.*, 707 F. Supp. 353, 356 (N.D. Ill. 1989); *Uncle B’s Bakery v. O’Rourke*, 920 F. Supp. 1405, 1433 n.17 (N.D. Iowa 1996); *H & R Block E. Tax Servs. Inc. v. Enchura*, 122 F. Supp. 2d 1067, 1076 (W.D. Mo. 2000).



the IDD: whether a risk of future misappropriation can justify an injunction against employment, even in the absence of a non-compete.

It is this feature of the IDD—its function as a judicially constructed, non-bargained-for limitation on employee mobility—that makes it a game changer in jurisdictions that adopt it. In states that apply the IDD in its purest form, the risk of an injunction against employment undoubtedly shapes employees' risk-benefit calculations as they consider potential new jobs. Whereas employees in non-IDD states can pursue opportunities with confidence as long as they have not signed a contract not to compete, in strong-form IDD states—and those that have flirted with the doctrine—employees (and their future employers) must factor the risk of an injunction into the calculus.<sup>44</sup> Research has demonstrated that a state's adoption (or perceived adoption) of the IDD shrinks executive mobility within the state.<sup>45</sup> Given the connection between untrammelled employee mobility and economic dynamism, this forced stability may impede innovation and economic growth.<sup>46</sup> The slipperiness of the IDD as a doctrine—and the uncertainty about its validity and scope in individual states—thus has real consequences for individuals, businesses, and the broader economy.<sup>47</sup> Particularly in a moment of increased concern about limitations on employee mobility, the IDD requires attention and clarification to minimize those effects.

Indeed, as states and the federal government move toward narrowing or eliminating contractual non-compete clauses, they fortify the case for rejecting the IDD altogether. If the legislature has determined that employers cannot restrict certain classes of employees through an express contract, it cannot mean to allow them to end-run that restriction by asserting a claim under trade secret law. On the other hand, if the law *does* allow certain employees to be constrained by non-competes, their employers' failure to obtain such an agreement indicates either neglect or an inability to obtain the employees' consent to the restrictive term. Either way, applying the IDD would undermine the existence and limits of the

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<sup>44</sup> See generally *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999) (noting that the threat of a lawsuit “can be a powerful weapon in the hands of an employer; the risk of litigation alone may have a chilling effect on the employee,” and concluding that “[s]uch constraints should be the product of open negotiation”).

<sup>45</sup> See Sandy Klasa, Hernan Ortiz-Molina, Matthew Serfling & Shweta Srinivasna, *Protection of Trade Secrets and Capital Structure Decisions*, 128 J. FIN. ECON. 266, 272 (2018).

<sup>46</sup> See LOBEL, *supra* note 20, at 67–72.

<sup>47</sup> In some instances, the economic effects of injunctions that fall short of a bar on employment may be the same as if the court had enjoined the employee from taking a new job. For example, an injunction that prohibits a sales employee from engaging with her principal accounts at her former employer may dramatically reduce her prospects and her value to the new employer. See, e.g., *Vendavo, Inc., v. Long*, 397 F. Supp. 3d 1115, 1146 (N.D. Ill. 2019).

specialized rules governing non-compete agreements. State legislatures can resolve this conflict by amending their trade secret law to prohibit employment-limiting injunctions, as Congress did in the federal Defend Trade Secrets Act of 2016.<sup>48</sup>

In addition to its threat to employee interests, the muddled state of the IDD also complicates efforts to study the doctrine and measure its impact. In finance and economics journals alone, the past decade has generated at least three different lists of the dates on which various states have adopted or rejected the IDD, with disparities from one list to the next.<sup>49</sup> While the details of these disparities vary from chart to chart (and state to state), at least some of them result from an apparent assumption by some scholars that a court's discussion of "inevitable disclosure," as a factual matter, means that the court has adopted or rejected the IDD as a legal doctrine.<sup>50</sup> Clarification about the meaning and consequences of the IDD would enable a more informed and accurate assessment of its prevalence and economic effect.

This Article has three goals: to provide an accurate picture of the role of the IDD in state laws across the United States; to demonstrate the economic costs of the current disarray; and to propose a framework to fix the problem. We focus less on normative critique of the doctrine itself, as others have ably covered that ground.<sup>51</sup> Instead, we seek to limit the negative consequences that have resulted from its ambiguous penumbra.

We begin in Part I with an introduction to trade secret and non-compete law, which provide a legal backdrop to the IDD. Part II turns to the doctrine itself. It shows that, while "inevitability" pervades judicial opinions in trade secret and non-compete cases, courts only rarely use it as a basis to enjoin employment in trade secret cases—the classic IDD case and the one that raises the greatest concerns about chill. Even so, the frequent casual and non-specific reference to the doctrine has created uncertainty about its definition and status under various states' laws. That

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<sup>48</sup> Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (2016).

<sup>49</sup> See Klasa et al., *supra* note 45; Ke Na, *CEOs' Outside Opportunities and Relative Performance Evaluation: Evidence from a Natural Experiment*, 137 J. FIN. ECON. 679, 694 tbl.7 (2020); Caroline Flammer & Aleksandra Kacperczyk, *Corporate Social Responsibility as a Defense Against Knowledge Spillovers: Evidence from the Inevitable Disclosure Doctrine*, 40 STRATEGIC MGMT. J. 1243, 1252-53 (2019); Mong Shan Ee & He Huang, *Labor Mobility Restrictions and Debt Choice: Evidence from the Inevitable Disclosure Doctrine* 32 (Oct. 2021) (unpublished manuscript), <https://perma.cc/6X28-DCDD>.

<sup>50</sup> See, e.g., Klasa et al., *supra* note 45, at 272 tbl.1 (listing *Fountain v. Hudson Cush-N-Foam Corp.*, 122 So.2d 232 (Fla. Dist. Ct. App. 1960), as adopting the IDD, when the court considered inevitability in the context of interpreting a non-compete agreement; and listing *Surgidev Corp. v. Eye Technology Inc.*, 648 F. Supp. 661 (D. Minn. 1986), as adopting the IDD, when the case involved a finding of actual misappropriation).

<sup>51</sup> See, e.g., Edelstein, *supra* note 1; Hegner, *supra* note 1; Whaley, *supra* note 1.

uncertainty has led to a mistaken impression that the IDD is widespread,<sup>52</sup> when in fact only a handful of jurisdictions have adopted its most extreme form, and even those states rarely apply it. Part III reviews recent empirical research that demonstrates that executive mobility suffers in states where the IDD appears viable. Given the individual and economic costs associated with restraints on employee mobility, it's important that states clarify their position on the IDD. Part IV proposes mechanisms to do so. The most straightforward option is for state legislatures to address the doctrine in connection with their reform of non-compete law and other mobility restraints. The rationales supporting the move to narrow or block non-compete enforcement apply even more forcefully to the IDD. As a result, we suspect that state legislatures confronted with the issue would find the IDD incompatible with state law or would limit it to extreme cases.<sup>53</sup> Either way, employees would benefit from clarity about whether and when employers can sue to limit their employment options in the absence of a non-compete. Even without legislative action, however, courts can help by using more rigor and precision in their treatment of the IDD. We propose an analytical framework to provide greater clarity about what the doctrine means and what function it serves in a particular state's law, to limit its most pernicious effects. The Article then concludes.

## I. The Law of Trade Secrets and Non-Compete Agreements

Because the IDD sits near the intersection of trade secret law and the law governing enforcement of non-compete agreements, this Part offers an overview of those areas of law. Understanding the scope and the limits of employers' (and employees') rights under these legal regimes helps to explain the pressure for courts to recognize the IDD. As we will see, traditional trade secret doctrine seeks to protect employers' secret information, while at the same time preserving the ability of employees to

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<sup>52</sup> See, e.g., *Nucor Corp. v. Bell*, No. 06-CV-02972, 2008 WL 9894350, at \*15 (D.S.C. Mar. 14, 2008) (declaring that courts in twenty-one states have adopted the IDD and "[o]nly two states' appellate courts have rejected the doctrine"); *Phoseon Tech., Inc. v. Heathcote*, No. 19-CV-2081, 2019 WL 7282497, at \*11 (D. Or. Dec. 27, 2019) (concluding that seventeen states have adopted the doctrine "in [some] form," five "appear to have rejected" it, and the remaining twenty-eight states, including Oregon, "have not yet decided whether to follow the inevitable disclosure doctrine"); see also *Klasa et al.*, *supra* note 45.

<sup>53</sup> *Phoseon Tech., Inc.*, 2019 WL 7282497, at \*11 (reviewing Oregon's recent laws scaling back the use of noncompete agreements and concluding, "[i]f one evaluates the likelihood of the Oregon Supreme Court adopting the inevitable disclosure doctrine by considering the history of legislation over the years, the result does not yield confidence that the doctrine will be adopted in Oregon anytime soon").

sell their skills in the marketplace. Non-compete agreements, in contrast, involve explicit promises by employees not to accept certain jobs in competition with their former employer. The assumption (or in most cases, the legal fiction) is that employees enter into such restrictive agreements in exchange for other valuable benefits, and that non-compete agreements protect legitimate business interests of the employer and do not unduly restrict employees from using their general skills.<sup>54</sup> As we discuss below, however, each of these assumptions has come under increasing scrutiny in recent years. Critics and regulators have questioned whether non-compete agreements are indeed freely bargained for and have scrutinized their impact on labor markets, product markets, and the broader economy. In doing so, they have found a troubling mismatch between the purported purpose of noncompetition agreements and their real-world effects, prompting a re-evaluation of non-compete doctrine at both the state and federal level. This process has important implications for the IDD.

#### A. *Trade Secret Law*

Trade secret law provides a tool for parties to protect against disclosure and use of their valuable, closely held confidential information. Although Congress passed a federal trade secrets law—the Defend Trade Secrets Act (“DTSA”)—in 2016,<sup>55</sup> trade secret law is principally a creature of state law, where it has its origins.<sup>56</sup> Employment-related trade secret disputes reflect a persistent struggle between employers’ interest in protecting their secrets and employees’ desire for economic self-determination. While recognizing that employees often have duties with respect to trade secrets, both state and federal law try to enforce those duties without unduly interfering with employees’ employment prospects. As a result, successful trade secret plaintiffs may be entitled to an injunction against the use or disclosure of their secret information, but trade secret injunctions usually do not limit a former employee’s ability to seek new employment.<sup>57</sup> The federal DTSA is explicit on this point,

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<sup>54</sup> *E.g.*, Meese, *supra* note 22, at 677–91.

<sup>55</sup> 18 U.S.C. § 1836. For an overview of the DTSA’s complex legislative history, see Sharon K. Sandeen & Christopher B. Seaman, *Toward a Federal Jurisprudence of Trade Secret Law*, 32 BERKELEY TECH. L.J. 829, 845–58 (2017).

<sup>56</sup> BRIAN T. YEH, CONG. RSCH. SERV., R43714, PROTECTION OF TRADE SECRETS: OVERVIEW OF CURRENT LAW AND LEGISLATION 5 (2016) (“Unlike other forms of intellectual property that can trace their origins back several hundreds of years, trade secret law is a creation of state court opinions from the middle of the 19th century.”).

<sup>57</sup> The DTSA’s remedies provision appears to limit itself to injunctions related directly to use of the trade secret, rather than more general injunctions regarding employment, solicitation, or the like.

authorizing courts to grant injunctions “to prevent any actual or threatened misappropriation,” but only so long as such injunctions do not “prevent a person from entering into an employment relationship, and that conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on the information the person knows.”<sup>58</sup> While the Uniform Trade Secrets Act (“UTSA”) lacks such an express prohibition, most states’ case law reflects a strong presumption against employment-related injunctions. Occasionally, however, courts have stretched the law to meet the perceived equities of the case before them, and have granted injunctions prohibiting an employee from taking a new job. The IDD reflects one such extension, which we will explore in Part II. We begin here with the basics: trade secret law’s traditional subject matter, scope, and remedies.

Today, most states have adopted some version of the UTSA,<sup>59</sup> with just one state, New York, still grounding its state trade secret doctrine in state common law.<sup>60</sup> The UTSA defines “trade secret” as confidential business information that (a) provides a business with a competitive advantage because of its secrecy, and (b) is the subject of reasonable efforts to maintain that secrecy.<sup>61</sup> Courts in New York use the definition of trade secret from the Restatement of Torts as “any formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] an opportunity to obtain an advantage over competitors who

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The UTSA authorizes courts to enjoin “[a]ctual or threatened misappropriation,” as well as to compel “affirmative acts to protect . . . trade secret[s]” in “appropriate circumstances.” UNIF. TRADE SECRETS ACT § 2(a), (c) (UNIF. L. COMM’N 1985).

<sup>58</sup> Defend Trade Secrets Act § 3(A)(i)(I)–(II). As discussed below, some courts have flouted this limitation, but the statutory language is clear. *See infra* note 98; *see also* Flowers, *supra* note 1, at 2211; Mancini, *supra* note 1, at 208 (arguing that “application of the [IDD] is inconsistent with both the text and legislative history of [the DTSA]”).

<sup>59</sup> *See Trade Secrets Laws and the UTSA: 50 State and Federal Law Survey*, BECK REED RIDEN LLP, <https://perma.cc/7FCD-DTDA>.

<sup>60</sup> *See Integrated Cash Mgmt. Servs., Inc. v. Digit. Transactions, Inc.*, 920 F.2d 171, 173 (2d Cir. 1990). *See generally Trade Secrets Law in New York*, DIGITAL MEDIA LAW PROJECT, <https://perma.cc/7ZX2-8BP4>.

<sup>61</sup> “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.

UNIF. TRADE SECRETS ACT § 1(4) (UNIF. L. COMM’N 1985); *see also* CAL. CIV. CODE § 3426.1(d) (West 2016); *Viken Detection Corp. v. Videray Techs. Inc.*, 384 F. Supp. 3d 168, 177 (D. Mass. 2019); *Kana Energy Servs., Inc. v. Jiangsu Jinshi Mach. Group Co.*, 565 S.W.3d 347, 355 (Tex. App. 2018).

do not know or use it.”<sup>62</sup> Like other states, New York law puts secrecy at the core of the definition, insisting that “a trade secret must first of all be secret.”<sup>63</sup> In other words, every state’s trade secret law excludes generally known business information from the definition of trade secret. Nor does the law protect information that the owner treats with casual disregard; only when businesses actively work to keep the information secret can they qualify for trade secret protection.<sup>64</sup> The “reasonable efforts” requirement serves two functions: it ensures that those seeking trade secret protection have earned the right to that protection, by acting within reason to protect themselves first,<sup>65</sup> and it gives notice to employees (and others) of which aspects of the trade secret holder’s business fall within the scope of a duty not to disclose.<sup>66</sup>

Trade secrets can be immensely valuable, and companies will go to great lengths to protect them. At the same time, not all business information meets these two requirements, and courts are skeptical of attempts by businesses to protect non-secret and non-proprietary information as trade secrets.<sup>67</sup> Overly broad trade secret claims can impede employees and others from applying their general skills and knowledge to new tasks, which not only harms the employees’ autonomy and earning power, but can also hamper the kind of knowledge spillovers that often spur innovation.<sup>68</sup> Given these costs, and the difficulty that courts have in

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<sup>62</sup> *Ashland Mgmt. Inc. v. Janien*, 624 N.E.2d 1007, 1012–13 (N.Y. 1993) (quoting RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. L. INST. 1939)).

<sup>63</sup> *Ashland*, 624 N.E.2d at 1013.

<sup>64</sup> See UNIF. TRADE SECRETS ACT § 1(4)(ii) (UNIF. L. COMM’N 1985).

<sup>65</sup> See *BondPro Corp. v. Siemens Power Generation, Inc.*, 463 F.3d 702, 708 (7th Cir. 2006) (“Courts are entitled . . . to economize on their scarce resources of time and effort by refusing to help a secret holder who failed to take minimum steps to protect his secret before running to court.”).

<sup>66</sup> *Id.* (“Failure to take protective steps also sets a trap, since a company that ferrets out information that the originator does not think special enough to be worth incurring any costs to conceal will have no reason to believe that it is a trade secret.”).

<sup>67</sup> See, e.g., *Avnet, Inc. v. Wyle Lab’ys, Inc.*, 437 S.E.2d 302, 303, 306 (Ga. 1993) (upholding denial of injunction against the use of a wide range of information—including “the identity of . . . suppliers, customers’ identities, customer needs, business practices and patterns which include the type products clients purchase, the products sold but not delivered, specific client relations problems, client preferences, cost pricing, sales volume information, the amount clients are willing to pay, cost profit and price computation information as well as employee compensation capabilities and performances”—if the former employee possessed it only in his mind and not in physical form); see also *Manuel v. Convergys Corp.*, No. 04-CV-1279, 2004 WL 5545025, at \*7 (N.D. Ga. Oct. 18, 2004), *aff’d*, 430 F.3d 1132 (11th Cir. 2005) (noting “the well-settled rule in Georgia that an employee’s knowledge gained from his employment with a former employer is not considered to be a trade secret.”) (quoting *Tom James of Atlanta, Inc. v. McClure*, No. 01-cv-2655, 2002 WL 31749558 (N.D. Ga. Jan. 16, 2002)).

<sup>68</sup> See generally LOBEL, *supra* note 20.

distinguishing between business information that does or does not qualify as a trade secret, some scholars have urged courts to delineate a negative space of content that trade secret claims cannot reach—that is, a “public domain for trade secret law.”<sup>69</sup>

To make out a trade secret misappropriation claim, plaintiffs must demonstrate that they possessed a trade secret, that the defendant improperly obtained, used, or disclosed the trade secret (or threatens to do so), and that they were (or will be) damaged as a result of the defendant’s conduct.<sup>70</sup> The clearest case of an “improper use” is one that breaches a duty, such as a fiduciary duty, or a contractual agreement, such as a trade secret non-disclosure clause in an employment contract.<sup>71</sup> In the employment context, common disputes involve a departed employee accused of using their former employer’s confidential information while employed by a competitor.<sup>72</sup>

Both the UTSA and the DTSA (discussed below) authorize courts to enjoin “actual or threatened misappropriation,” and thus target continuing misappropriation that has already occurred as well as the threat of misappropriation that has not yet taken place. In evaluating claims of “threatened” misappropriation, courts generally apply an exacting standard, requiring plaintiffs to show a specific “threat, manifested by words or conduct, that would indicate imminent misuse.”<sup>73</sup> It is not enough that the defendant has knowledge of the information and an incentive to use it against the former employer’s interests.<sup>74</sup> In the

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<sup>69</sup> Charles Tait Graves, *Trade Secrets as Property: Theory and Consequences*, 15 J. INTELL. PROP. L. 39, 86–89 (2007).

<sup>70</sup> See, e.g., *Viken Detection Corp. v. Videray Techs. Inc.*, 384 F. Supp. 3d 168, 177 (D. Mass. 2019); see also CAL. CIV. CODE § 3426.1 (West 2016) (defining trade secret, improper means, and misappropriation).

<sup>71</sup> See, e.g., *Rapco Foam, Inc. v. Sci. Applications, Inc.*, 479 F. Supp. 1027, 1029 (S.D.N.Y. 1979) (defining improper use as “using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means”); *Kaldi v. Farmers Ins. Exch.*, 21 P.3d 16, 23 (Nev. 2001) (misappropriation involves breach of an express or implied contract); *Infinity Fluids Corp. v. Gen. Dynamics Land Sys., Inc.*, 210 F. Supp. 3d 294, 305 (D. Mass. 2016) (misappropriation includes the use of “improper means, in breach of a confidential relationship, to acquire and use that trade secret” (citation omitted)).

<sup>72</sup> See generally YEH, *supra* note 56, at 3.

<sup>73</sup> *Edifecs Inc. v. TIBCO Software Inc.*, 756 F. Supp. 2d 1313, 1320 (W.D. Wash. 2010); see also *Ciena Commc’ns, Inc. v. Nachazel*, No. 09-CV-02845, 2010 WL 3489915, at \*5 (D. Colo. Aug. 31, 2010) (“Without assertions of *fact* from which the Court could [conclude] . . . that [the defendant] was threatening” to use the plaintiff’s trade secrets, the plaintiff “has failed to adequately plead a claim under the Uniform Trade Secrets Act.”).

<sup>74</sup> See *Int’l Bus. Mach. Corp. v. Seagate Tech., Inc.*, 941 F. Supp. 98, 101 (D. Minn. 1992) (“Merely possessing trade secrets and holding a comparable position with a competitor does not justify an injunction.”); *MSC Software, Inc. v. Altair Eng’g, Inc.*, No. 07-12807, 2009 WL 1856222, at \*4 (E.D.

context of employment relationships, courts trust that employees can fulfill their duty not to use or disclose trade secrets, even when they go to work for a competing employer.<sup>75</sup> As a result, they rarely find “threatened” misappropriation in the absence of evidence that the employee has absconded with documents or files, demonstrated an intent to misuse secrets, or is otherwise acting in bad faith.<sup>76</sup> The IDD, as discussed below, is sometimes treated as a variant of “threatened misappropriation.”<sup>77</sup>

Not surprisingly, the line between trade secrets, on the one hand, and an employee’s general knowledge and skills, on the other, plagues the inquiry into misappropriation. Trade secret defendants commonly contend that the information they supposedly misappropriated was not a trade secret, but rather falls “within the realm of general skills and knowledge in the industry . . . .”<sup>78</sup> Courts must make nuanced inquiries to determine whether a piece of information qualifies as a trade secret, which makes it hard to dismiss trade secret lawsuits at the preliminary injunction stage. Employees bound by trade secret non-disclosure agreements thus face a risk in taking positions with their employer’s competitors. Even employees who have no intention of misusing secret information can face legal action by former employers, based on broad

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Mich. June 25, 2009) (“The individual Defendants have knowledge of MSC’s alleged trade secrets, MSC and Altair are strong competitors, and the individual Defendants may perform the same type of work at Altair that they performed at MSC, and use general knowledge gained from MSC at Altair. However, the fact that trade secrets may exist, and the fact that Altair employs the individual Defendants, who have knowledge of the alleged trade secrets are insufficient to allege a threatened misappropriation claim.”).

<sup>75</sup> *E.g.*, *Del Monte Fresh Produce Co. v. Dole Food Co.*, 148 F. Supp. 2d 1326, 1339 (S.D. Fla. 2001) (finding “no evidence that [the employee] is unwilling to uphold the terms of his confidentiality agreement,” then concluding that the “circumstances indicate that misappropriation is not threatened in this case”); *see also* *H & R Block E. Tax Servs., Inc. v. Enchura*, 122 F. Supp. 2d 1067, 1075–76 (W.D. Mo. 2000).

<sup>76</sup> *Cf.* *Cent. Valley Gen. Hosp. v. Smith*, 75 Cal. Rptr. 3d 771, 791 (Ct. App. 2008) (finding no threatened misappropriation absent evidence that the defendant had either “misused the information in the past,” or “intend[ed] to improperly use or disclose some of th[e] trade secrets”).

<sup>77</sup> *See generally* *Holton v. Physician Oncology Servs., LP*, 742 S.E.2d 702, 705 (Ga. 2013) (noting variability among states “about whether the doctrine is recognized . . . and, if it [is], whether it is a separate claim . . . or instead is evidence to support an element of a claim of a threatened misappropriation” (citation omitted)); *Del Monte*, 148 F. Supp. 2d at 1338 (noting “some confusion as to whether threatened disclosure and inevitable disclosure are two different theories of recovery or whether inevitable disclosure is a way of establishing threatened disclosure”).

<sup>78</sup> *See* *Sys. Dev. Servs., Inc. v. Haarmann*, 907 N.E.2d 63, 73 (Ill. App. Ct. 2009) (quoting *Pope v. Alberto-Culver Co.*, 694 N.E.2d 615, 617 (Ill. App. Ct. 1998)); *see also* *E. W. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F.2d 1108, 1112–13 (8th Cir. 1969) (“This 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.”).



assertions about their use of information learned or acquired during their employment. Even when courts ultimately resolve the claim in the employee's favor, the time, expense, and vexation of litigation may well chill the decision to change jobs.

The UTSA provides an arsenal of remedies for successful trade secret plaintiffs, including injunctive relief,<sup>79</sup> actual damages,<sup>80</sup> and punitive damages and attorneys' fees in cases of "willful and malicious" misappropriation.<sup>81</sup> Although the UTSA contemplates injunctions only against "misappropriation" (and does not mention "employment"), it does not—unlike the DTSA—explicitly prohibit courts from imposing employment-related injunctive relief.<sup>82</sup> The case law, however, shows a strong commitment to employee mobility: injunctions in trade secret misappropriation cases generally target use of the trade secret without

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<sup>79</sup> For example, in Massachusetts:

(a) Actual or threatened misappropriation may be enjoined upon principles of equity, including but not limited to consideration of prior party conduct and circumstances of potential use, upon a showing that information qualifying as a trade secret has been or is threatened to be misappropriated. 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 any economic advantage that otherwise would be derived from 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.

MASS. ANN. LAWS ch. 93, § 42A (West 2019); *see also* CAL. CIV. CODE § 3426.2 (West 2016).

<sup>80</sup> *E.g.*, CAL. CIV. CODE § 3426.3(a) (West 2016). Damages are usually measured by the harm to the plaintiff or the amount that the defendant profited through their use of the trade secret. When "a plaintiff demonstrates that a defendant made a profit from the sale of products produced by improper use of a trade secret," the court may award those profits to the plaintiff as monetary damages. *USM Corp. v. Marson Fastener Corp.*, 467 N.E.2d 1271, 1276 (Mass. 1984). In such cases, "[t]he guiding principle is to order the wrongdoing defendant to give up all gain attributable to the misuse of the trade secret and to measure that gain as accurately as possible." *Id.* at 1277. When actual damages are uncertain or difficult to prove, states often allow damages based on reasonable royalties; for willful or malicious behavior, exemplary or punitive damages may be available. *E.g.*, CAL. CIV. CODE § 3426.3(b)–(c) (West 2016).

<sup>81</sup> UNIF. TRADE SECRETS ACT §§ 3(b), 4 (UNIF. L. COMM'N 1985).

<sup>82</sup> *Id.* § 2(a).

jeopardizing the employee's ability to continue to sell their labor in the marketplace.<sup>83</sup>

The reluctance to grant employment-related injunctions in trade secret cases reflects two interrelated philosophical commitments: one intrinsic to trade secret law, and another focused on the relationship between trade secret and non-compete law. First, as a matter of trade secret principles, it reinforces the law's emphasis on duties with respect to *information*, while leaving alone individuals' right to practice their livelihood by utilizing their general knowledge and skills. The law assumes that individuals can fulfill their duties to maintain the confidentiality of information, even after joining a competitor that might benefit from knowledge of the secret.<sup>84</sup> Second, it serves a kind of channeling function, by forcing employers to use non-compete agreements as the exclusive device for limiting their workers' future options.<sup>85</sup> In jurisdictions that enforce non-compete agreements, this channeling function ensures that restrictions on employment meet the state's requirements for enforcement of such terms, and prevents the employer from imposing "an after-the-fact non-compete agreement to enjoin an employee from working for an employer of his or her choice."<sup>86</sup> In jurisdictions that *don't* enforce non-compete agreements, courts recognize that granting employment-related injunctions in trade secret cases would effectively abrogate that policy choice, by allowing employers to achieve through

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<sup>83</sup> See, e.g., *Bridgestone/Firestone, Inc. v. Lockhart*, 5 F. Supp. 2d 667, 681 (S.D. Ind. 1998) ("The trade secret statute does not prohibit a former employee who has knowledge of trade secrets from going to work for a competitor."); *Fleming Sales Co. v. Bailey*, 611 F. Supp. 507, 514 (N.D. Ill. 1985) ("Any other rule would force a departing employee to perform a prefrontal lobotomy on himself or herself. It would disserve the free market goal of maximizing available resources to foster competition. Or to frame the issue in the way discussed earlier in this opinion, it would not strike a proper balance between the purposes of trade secrets law and the strong policy in favor of fair and vigorous business competition."); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 44 cmt. d (AM. L. INST. 1995) ("An injunction ordinarily prohibits only use or disclosure of the trade secret and information substantially derived from the trade secret."). See generally James Kachmar & Weintraub Tobin, *Challenging a Trade Secret Injunction? Better Come Loaded for Bear*, JDSUPRA (Dec. 13, 2019), <https://perma.cc/HY3X-HUGC>.

<sup>84</sup> E.g., *Del Monte Fresh Produce Co. v. Dole Food Co.*, 148 F. Supp. 2d 1326, 1339 (S.D. Fla. 2001) (denying injunction after finding "no evidence that [the former employee] is unwilling to uphold the terms of his confidentiality agreement").

<sup>85</sup> *Interbake Foods, L.L.C. v. Tomasiello*, 461 F. Supp. 2d 943, 977–78 (N.D. Iowa 2006).

<sup>86</sup> *Del Monte*, 148 F. Supp. 2d at 1337; see also *Interbake Foods*, 461 F. Supp. 2d at 967 ("[T]he court notes that drafting a covenant not to compete . . . would not be a great undertaking and would have been the best (and least onerous) way to protect the highly sensitive information that has now hauled the parties into court.").

non-negotiated trade secret remedy what they could not legally accomplish through contract.<sup>87</sup>

B. *The DTSA & Federal Trade Secrets Law*

The DTSA, passed in 2016, provides private plaintiffs with a federal civil cause of action for trade secret misappropriation.<sup>88</sup> The DTSA does not preempt state trade secret laws, but provides an additional option for plaintiffs whose trade secrets relate to interstate commerce.<sup>89</sup> Plaintiffs may bring DTSA claims in either state or federal court,<sup>90</sup> where plaintiffs may sue under the relevant state law, the DTSA, or both.<sup>91</sup> Courts have interpreted the DTSA to apply to misappropriation both in and outside of the United States.<sup>92</sup> This makes it a powerful tool for U.S.-based plaintiffs seeking relief for misappropriation that occurs in foreign jurisdictions. The DTSA authorizes a slate of remedies, including injunctive relief and damage awards that may be enhanced “if the trade secret is willfully and maliciously misappropriated.”<sup>93</sup> Thus, while the DTSA does not radically alter the U.S. trade secrets legal terrain, it elevates misappropriation claims by affording them a federal venue and signals Congressional concern about the theft of commercial secrets.

Most relevant for the purposes of this paper, the statutory language appears to preclude injunctions against employment in DTSA cases. The remedies provision of the statute provides:

(3) Remedies.—In a civil action brought under this subsection with respect to the misappropriation of a trade secret, a court may—

(A) grant an injunction—

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<sup>87</sup> See *Whyte v. Schlage Lock Co.*, 125 Cal. Rptr. 2d 277, 293 (Ct. App. 2002); *Cypress Semiconductor Corp. v. Maxim Integrated Prods., Inc.*, 186 Cal. Rptr. 3d 486, 504 (Ct. App. 2015) (noting that IDD “would contravene” California’s “strong public policy in favor of employee mobility”).

<sup>88</sup> Defend Trade Secrets Act, 18 U.S.C. § 1836. The federal definition of “trade secret” aligns with most pre-existing state law definitions. See 18 U.S.C. § 1839(3). See generally Ben Natter & Xincheng Ma, *The Defend Trade Secrets Act: An Overview and Key Developments*, JDSUPRA (July 16, 2020), <https://perma.cc/3HG7-NMTA> (“The majority of courts have implied or even expressly held that the definition of a trade secret is the same under the DTSA and state trade secret law.”).

<sup>89</sup> 18 U.S.C. § 1836(b)(1).

<sup>90</sup> Edwin F. Chociey, Jr., *The Defend Trade Secrets Act of 2016: An Overview and Analysis of the Statute Establishing a Federal Civil Cause of Action for Trade Secret Misappropriation and Notable Case Law to Date*, RIKER DANZIG (Mar. 8, 2018), <https://perma.cc/8U9K-Y4WM>; see also Mancini, *supra* note 1, at 213 (noting that Congress aimed to facilitate a “speedy remedy” for plaintiffs in trade secret cases).

<sup>91</sup> 18 U.S.C. § 1838.

<sup>92</sup> *Motorola Sols., Inc. v. Hytera Comm’cns Corp.*, 436 F. Supp. 3d 1150, 1162 (N.D. Ill. 2020).

<sup>93</sup> 18 U.S.C. § 1836(b)(3)(C). The DTSA also authorizes the seizure of misappropriated trade secrets in “extraordinary circumstances.” *Id.* § 1836(b)(2)(A)(i).

(i) to prevent any actual or threatened misappropriation described in paragraph (I) on such terms as the court deems reasonable, *provided the order does not—*

*(I) prevent a person from entering into an employment relationship, and that conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on the information the person knows; or*

(II) otherwise conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business;

(ii) if determined appropriate by the court, requiring affirmative actions to be taken to protect the trade secret, and

(iii) in exceptional circumstances that render an injunction inequitable, that conditions future use of the trade secret upon payment of a reasonable royalty for no longer than the period of time for which such use could have been prohibited . . . .<sup>94</sup>

The italicized language is clear on its face: injunctions must not “prevent a person from entering into an employment relationship.”<sup>95</sup> And while courts may place “conditions” on a new employment relationship—by, for example, restricting the employee from working on a particular technology, or from participating in strategic planning in markets that directly overlap with the former employer—even these restrictions require evidence of actual or threatened wrongdoing (with “threat” based on facts rather than speculation).<sup>96</sup> Regardless of how much knowledge the employee might have about her former employer’s products and operations, her mere possession of such knowledge cannot justify an injunction that limits her future employment prospects. At least one district court, in Oregon, has recognized that the DTSA precludes the use of the IDD to justify injunctions against employment.<sup>97</sup>

Despite this unambiguous language, however, a handful of opinions have invoked the IDD in DTSA cases, leading to some confusion over the doctrine’s viability as a matter of federal trade secret law.<sup>98</sup> These cases generally involve claims under both state and federal law, with the court blending the two in its substantive analysis and failing to address the limiting language of the DTSA.

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<sup>94</sup> *Id.* § 1836(b)(3) (emphasis added).

<sup>95</sup> See *Kinship Partners, Inc. v. Embark Veterinary, Inc.*, No. 21-CV-01631, 2022 WL 72123, at \*7 (D. Or. Jan. 3, 2022) (“Pursuant to federal law, the DTSA specifically forecloses courts from granting relief based on the inevitable disclosure doctrine *because* such relief restrains employment.”).

<sup>96</sup> 18 U.S.C. § 1836(b)(3)(A)(i)(I).

<sup>97</sup> *Kinship*, 2022 WL 72123, at \*7.

<sup>98</sup> In a recent law review Note, M. Claire Flowers discusses some of these cases and contends that they result from ambiguity in the statutory language of the DTSA, which leads her to call for a statutory fix. See *Flowers, supra* note 1, at 2213–14, 2240. The statutory language, however, is clear and appellate courts will ultimately correct the erroneous interpretations.

For example, in *Molon Motor and Coil Corp. v. Nidec Motor Corp.*,<sup>99</sup> the plaintiff, Molon, brought both DTSA and Illinois state trade secrets claims against a former employee, Manish Desai, alleging that he had used and was continuing to use its trade secrets at a new job.<sup>100</sup> In responding to Desai's motion to dismiss, the Illinois district court invoked the IDD to conclude that "Molon's allegations . . . are enough to trigger the circumstantial inference that the trade secrets inevitably would be disclosed by Desai."<sup>101</sup> The court did not distinguish between Molon's DTSA and Illinois state law claims, creating the potential for confusion about whether the IDD applies under the DTSA. This ambiguity has persisted in subsequent Illinois federal case law.<sup>102</sup> In other states, courts have sometimes combined DTSA and state trade secret analysis in rejecting IDD claims on the merits, often expressing skepticism about the doctrine but failing to rule it out entirely under either state or federal law.<sup>103</sup>

To the extent that these opinions (and others like them) suggest that the DTSA may provide the basis for an injunction against employment, they are flatly inconsistent with the statutory language, and we trust that appeals courts will correct the error in time. To the extent that the opinions blend analysis of state and federal trade secret law and fail to distinguish between the remedies available under each regime, they reflect sloppy reasoning but don't necessarily commit legal error in interpreting the federal statute. In other words, if a court finds threatened misappropriation under both state law and the DTSA, and the state has

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<sup>99</sup> No. 16 C 03545, 2017 WL 1954531 (N.D. Ill. May 11, 2017).

<sup>100</sup> *Id.* at \*7.

<sup>101</sup> *Id.*

<sup>102</sup> See, e.g., *Aon PLC v. Infinite Equity, Inc.*, No. 19-cv-07504, 2021 WL 4034068, at \*12–13 (N.D. Ill. Sept. 3, 2021) (stating that differences between the DTSA and Illinois state trade secret law can be elided for the purpose of analyzing a 12(b)(6) motion, and relying on the IDD to analyze whether the plaintiff pled sufficient facts to survive defendant employee's motion to dismiss); *Vendavo, Inc. v. Long*, 397 F. Supp. 3d 1115, 1129 n.5, 1146–47 (N.D. Ill. 2019) (analyzing DTSA and Illinois trade secret claims together, and using the IDD as a basis for an injunction governing conditions of employment but not prohibiting employment itself); *Gen. Elec. Co. v. Uptake Techs., Inc.*, 394 F. Supp. 3d 815, 834 (N.D. Ill. 2019) (finding that "a DTSA claim based on inevitable disclosure may survive a motion to dismiss," but deferring a decision on whether the IDD could justify an injunction (citing *Molon*, 2017 WL 1954531, at \*7; *Indus. Packaging Supplies, Inc. v. Channell*, No. 18 CV 165, 2018 WL 2560993, at \*3 (N.D. Ill. June 4, 2018))); *Packaging Corp. of Am., Inc. v. Croner*, 419 F. Supp. 3d 1059, 1069–70 (N.D. Ill. 2020) (discussing *PepsiCo* while considering an IDD claim as part of its DTSA analysis, but finding plaintiff's allegations inadequate under Illinois law).

<sup>103</sup> E.g., *Cambria Co. LLC v. Schumann*, No. 19-CV-3145, 2020 WL 373599, at \*5 (D. Minn. Jan. 23, 2020) (analyzing claims under DTSA and Minnesota law: "The Court here assumes without deciding that the inevitable-disclosure doctrine could be appropriately applied in the correct case. This is not such a case.").

adopted the IDD, an injunction against employment may be legally authorized as a matter of state law, even though the DTSA precludes it. This is because the DTSA explicitly declines to alter state trade secret law, including states' position on the IDD.<sup>104</sup> Congress's decision not to preempt state trade secret or employment law means that individual states retain their ability to decide the IDD's status under their laws.<sup>105</sup>

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This brief survey of trade secret law underscores several key points that inform our discussion of the IDD. First, trade secret doctrine provides circumscribed protection to discrete, firm-specific information that is both secret and guarded by its owner. It does not generally allow courts to constrain employee mobility or to interfere with a former employee's ability to use the general skills and knowledge that she developed in the workplace, even though those skills and knowledge may have come at the employer's expense. Courts in trade secret cases repeatedly emphasize the importance of allowing employees to change jobs and to realize the benefits of their general knowledge and skills.

Second, to make a successful case for trade secret misappropriation, companies must prove that their trade secrets have already been wrongly misappropriated, or that the defendant's behavior demonstrates that misappropriation is about to occur. The law generally trusts that people have the capacity to meet their commitment to avoid using protected secrets, even in circumstances that might invite such use.<sup>106</sup> But when a party signals an intention to betray that trust, courts do not hesitate to bolster the contractual commitment with a court-ordered mandate not to use or disclose. Even so (and third), as a matter of remedy, traditional trade secret injunctions focus on use or disclosure of information, rather than prohibitions on employment. The IDD's principal departure from traditional trade secret law, in jurisdictions that have adopted it, is to expand the available remedies to include injunctions against employment. Because the IDD allows courts to enjoin former employees from accepting new employment under the theory that they will "inevitably" disclose their former employer's trade secrets in their new position, it poses a

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<sup>104</sup> See generally Russell Beck, *Defend Trade Secrets Act and What It Means*, FAIR COMPETITION L. (May 11, 2016), <https://perma.cc/LUF9-9NDY>.

<sup>105</sup> *Id.* ("In addition, the [Economic Espionage Act]'s language does not appear to preclude reliance on the inevitable disclosure doctrine under state trade secret laws."); Editorial Board, *Does the Inevitable Disclosure Doctrine Apply Under the DTSA? It Depends on the State*, ORRICK TRADE SECRETS WATCH (Apr. 1, 2020), <https://perma.cc/QSC2-L5YW>.

<sup>106</sup> Indeed, the federal statute says this explicitly, barring injunctions based "merely on the information the person knows." Defend Trade Secrets Act, 18 U.S.C. § 1836(b)(3)(A)(i)(I).

distinct threat to the personal and economic freedoms of individual employees.

### C. *Non-Compete Agreements*

Employers have been attempting to constrain their employees' post-employment behavior for centuries, and scholars have located some of the earliest instances of non-compete agreements in English contracts dating back to the 1700s.<sup>107</sup> While English courts deemed these earliest non-compete agreements "per se void as against public policy," by the 1890s they were beginning to enforce these clauses regularly on freedom of contract grounds.<sup>108</sup> Today, employment agreements commonly include non-compete clauses,<sup>109</sup> which require employees not to work for a competitor of their employer for some period of time after their employment has ceased. These agreements are powerful because they place contractual restrictions on an employee's future behavior, even after the employment relationship has ended. Such clauses are reassuring to employers who worry about former employees absconding with their valuable trade secrets, on-the-job training, and consumer good will, but can have a negative impact on individual employees' ability to choose the job that maximizes their economic prospects and personal fulfillment; the friction that results from these agreements, moreover, can serve as a drag on the broader labor market and economy. For this reason, non-compete agreements "have been contentious in the common law for centuries,"<sup>110</sup> and courts have long evaluated them for reasonableness, rather than applying the traditional contract interpretation standard that focuses on the intent of the parties.<sup>111</sup>

In the United States, employment contracts—including non-compete agreements—are principally governed by state employment law, although federal law imposes its own requirements in areas such as wages and

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<sup>107</sup> Arnow-Richman, *supra* note 5, at 1223–24.

<sup>108</sup> See generally Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 642 (1960).

<sup>109</sup> A survey conducted in 2014 found that "38.1 percent of US labor force participants have agreed to a noncompete at some point in their lives and that 18.1 percent, or roughly 28 million individuals, currently work under one." Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the US Labor Force*, 64 J.L. & ECON. 53, 55, 60 (2021).

<sup>110</sup> Bishara & Westermann-Behaylo, *supra* note 4, at 2.

<sup>111</sup> *Id.*

hours,<sup>112</sup> health and retirement benefits,<sup>113</sup> workplace safety,<sup>114</sup> and antitrust and unfair competition.<sup>115</sup> Although industry-wide non-compete practices have sometimes caught the attention of antitrust regulators,<sup>116</sup> the enforceability of non-compete agreements has historically been addressed by state law. Most states give non-competes less deference than other forms of contract because of their impact on employee mobility, individual autonomy, and the balance of power between employees and employers. Three states—California, North Dakota, and Oklahoma—have endorsed complete employee mobility, finding non-compete agreements unenforceable except in limited circumstances, such as the sale of a business.<sup>117</sup> Most states, however, have tried to craft a balance between employer and employee interests, and will enforce non-compete agreements that are “reasonable” as defined by the state’s statutory and common law.<sup>118</sup> For example, Massachusetts will enforce non-compete agreements that are: “(1) necessary to protect a legitimate business interest, (2) reasonably limited in time and space, and (3) consonant with the public interest.”<sup>119</sup> In Idaho, non-compete agreements “are . . . disfavored and will be strictly construed against the employer.”<sup>120</sup> Idaho courts will enforce these agreements only against “key employee[s]” and only if the restrictions are “(1) . . . ancillary to a lawful contract, 2) . . . supported by adequate consideration, and 3) . . . consistent with public policy.”<sup>121</sup> Colorado law declares non-compete agreements generally void, but provides a fairly broad set of exceptions, including agreements designed to protect trade secrets and certain investments in employee

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<sup>112</sup> *E.g.*, Fair Labor Standards Act, 29 U.S.C. §§ 206(a), 207(a).

<sup>113</sup> *See, e.g.*, Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001; Patient Protection and Affordable Care Act, 42 U.S.C. § 18001.

<sup>114</sup> *E.g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. § 651.

<sup>115</sup> *See* Sherman Antitrust Act of 1890, 15 U.S.C. § 1; Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12–27, 29 U.S.C. § 52.

<sup>116</sup> *E.g.*, *United States v. Am. Tobacco Co.*, 221 U.S. 106, 155 (1911); *cf.* U.S. DEPT OF JUST. ANTITRUST DIV. & FED. TRADE COMM’N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3–4(2016) (noting actions by FTC and DOJ Antitrust Division against companies that enter no-poach agreements with their competitors, in which the firms agree not to recruit one another’s employees).

<sup>117</sup> CAL. BUS. & PROF. CODE §§ 16600–16602.5 (West 2017); N.D. CENT. CODE ANN. § 9-08-06 (West 2008); OKLA. STAT. tit. 15, §219A (West 2013).

<sup>118</sup> *Noncompete Agreements and American Workers Before the S. Comm. on Small Business and Entrepreneurship*, 116th Cong. 72 (2019) (written testimony of Russell Beck, Partner, Beck Reed Riden LLP) (noting that “[n]oncompetes are generally disfavored in the law, and, as a result, unlike most contracts, they are reviewed by courts for reasonableness”).

<sup>119</sup> *Automile Holdings, LLC v. McGovern*, 136 N.E.3d 1207, 1218 (Mass. 2020) (citation omitted).

<sup>120</sup> *Idaho Tr. Bank v. Ross*, No. CV 2013 1285, 2013 Ida. Dist. LEXIS 46, at \*10 (1st Jud. Dist. Ct. Idaho June 27, 2013).

<sup>121</sup> *Id.*



training and education, as well as agreements that bind “executive and management personnel” and their staff.<sup>122</sup> Such agreements must be “reasonable and narrowly drafted.”<sup>123</sup>

States that enforce some non-compete agreements do so at least in part because they accept them as legitimately bargained-for contracts between consenting parties. Under this conception, employees accept restrictions on their future employment mobility in exchange for employment benefits, such as a higher salary or a more attractive benefits package.<sup>124</sup> While this image may well describe some employment relationships, there is reason to doubt that it captures the dynamics underlying non-compete agreements generally. First, for many workers, this imagined bargaining process never occurs.<sup>125</sup> Instead, many employees sign their employment agreements without engaging in any negotiation at all over salary or other terms of employment.<sup>126</sup> The data suggests that these employees lack, or feel that they lack, the legal sophistication or bargaining power to engage in such negotiations, and at least 20% of employees who reported not negotiating said that they were worried about “creating tension with their employers or simply being fired if they try to negotiate.”<sup>127</sup> This is particularly true for low-wage workers, who may not feel they possess any real bargaining power.<sup>128</sup> Second, as Rachel Arnow-Richman has demonstrated, many employers do not even allow the fiction of a bargaining process, because they require employees to sign non-compete agreements after they have accepted the job, and without any offer of enhanced benefits or pay.<sup>129</sup> Even outside the context of low-wage workers, economists, policymakers, and legal scholars have begun to question the economic role of non-compete agreements, particularly in the context of fast-paced innovation economies. In her 2013 book *Talent*

<sup>122</sup> COLO. REV. STAT. § 8-2-113 (2022).

<sup>123</sup> 23 LTD v. Herman, 457 P.3d 754, 758 (Colo. App. 2019).

<sup>124</sup> See generally Meese, *supra* note 22, at 650–51.

<sup>125</sup> Arnow-Richman, *supra* note 5, at 1232 (“Vulnerable workers are . . . less likely than their better-paid, higher-skilled counterparts to comprehend the legal significance of a noncompete or object to its imposition as a condition of employment.”); see also Starr et al., *supra* note 109, at 69, 72 tbl.7 (reporting that only 10.1% of workers with non-compete clauses have bargained over them).

<sup>126</sup> See Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In*, N.Y. TIMES (May 13, 2017), <https://perma.cc/DEL5-CF9K>. See generally Abigail Johnson Hess, *Less Than 40% of Workers Negotiated Their Salary During Their Last Job Offer*, CNBC MAKE IT (Feb. 8, 2018), <https://perma.cc/5Y86-TQ52>.

<sup>127</sup> Starr et al., *supra* note 109, at 72.

<sup>128</sup> Dougherty, *supra* note 126.

<sup>129</sup> Arnow-Richman, *supra* note 5, at 1252–53; see also Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOCIO. REV. 695, 706 & tbl.4 (2011) (reporting results of a study in which only 30.54% of electrical engineers subject to a non-compete clause had signed it before accepting their job offer).

*Wants to Be Free*, Orly Lobel surveys the literature and concludes that states with restrictive non-compete laws perform poorly on a number of metrics relative to states that enforce non-competes rarely or not at all.<sup>130</sup> Indeed, she goes further to contend—perhaps paradoxically—that the benefits of employee mobility flow to *all* firms in a fluid market, including those that may feel stung by the loss of top talent in the short term. Some of these benefits come from the growth of a firm’s social capital as its alumni disperse within and across industries and retain connections with their former colleagues; some arise from the observed increase in complementary technological innovation as employees move between firms; others result from “boomerang hiring” as firms rehire departed employees; and more generally, all firms gain from the collective buzz that occurs in a dynamic geographic community of thinkers, creators, and entrepreneurs.<sup>131</sup>

A 2015 study by Matt Marx, Jasjit Singh, and Lee Fleming provides empirical support for the theory that enforcement of non-compete agreements can have a negative impact on entrepreneurship and innovation within a state.<sup>132</sup> The authors took advantage of the “natural experiment” that occurred when, in 1985, the Michigan legislature accidentally abandoned the longstanding state law against enforcement of non-competes.<sup>133</sup> Earlier studies had shown that the legal change not only shrunk employment mobility within the state, but also dampened the

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<sup>130</sup> LOBEL, *supra* note 20, at 68–72.

<sup>131</sup> *Id.* at 41–46, 91; see also Sharon Belenzon & Mark Schankerman, *Spreading the Word: Geography, Policy, and Knowledge Spillovers*, 95 REV. ECON. & STAT. 884, 886, 896–97 (2013) (demonstrating that enforcement of non-competes reduces knowledge diffusion and spillovers, which can have a dampening effect on innovation).

<sup>132</sup> Matt Marx, Jasjit Singh & Lee Fleming, *Regional Disadvantage? Employee Non-Compete Agreements and Brain Drain*, 44 RSCH. POL’Y 394, 395, 403 (2015).

<sup>133</sup> The accident happened in connection with the Michigan Antitrust Reform Act (“MARA”), which overhauled the state’s antitrust law. The MARA repealed a number of older antitrust-related statutes, including a 1905 law that had a provision declaring non-competes “illegal and void.” Act of June 20, 1905, no. 329, 1905 Mich. Pub. Acts 507, *repealed by* Michigan Antitrust Reform Act, MICH. COMP. LAWS ANN. §§ 445.771–88 (West 2023) (“All agreements and contracts by which any person, co-partnership or corporation . . . agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void.”). The legislature apparently did not realize that it was changing Michigan’s non-compete law, although two years later it appeared to ratify the change by codifying a “reasonableness” standard for the enforcement of non-competes in the state. For an account of the legislative history, along with interviews by lawyers involved in the drafting process, see Matt Marx, Deborah Strumsky & Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT SCI. 875, 877 (2009).

diffusion of knowledge and innovation.<sup>134</sup> The 2015 project extended these findings to demonstrate that Michigan's change of law triggered a "brain drain" of innovators to more mobility-oriented states. The departing workers, moreover, were often the most "collaborative" employees, "whose work has greater impact."<sup>135</sup> As the authors point out, "Such workers may be particularly painful for a state to lose, given their roles both as 'carriers' of the knowledge involved in spillovers and as sources of entrepreneurial activity."<sup>136</sup> The Marx study is not definitive; another recent study by the Federal Reserve Bank of Philadelphia found no negative impact on the start-up ecosystem from the enforcement of non-competes in Pennsylvania.<sup>137</sup> Even so, the available economic evidence suggests at least a possible inverse relationship between employee mobility restrictions and economic dynamism within a state.

For these reasons and others, employee advocates, scholars, and policymakers have begun to question the value of non-competes and the wisdom of state laws that enforce them.<sup>138</sup> Recent years have seen an uptick in government challenges to non-competes, particularly those that bind low-wage workers. The Illinois attorney general's office, for example, sued the fast-food chain Jimmy John's for a standard franchisee policy that required "all employees . . . irrespective of title or job function" to agree not to work for a competing sandwich shop for two years after leaving their employment with a Jimmy John's franchise.<sup>139</sup> The attorney general challenged the non-compete agreements as "unreasonable, unconscionable, and unenforceable" under Illinois law, because they served no legitimate business interest, were not supported by consideration, and were not narrowly tailored to any defensible corporate goal.<sup>140</sup> Jimmy John's ultimately settled the lawsuit by agreeing not to

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<sup>134</sup> Marx et al., *supra* note 133, at 882 (showing the change in law reduced employment mobility in Michigan); Belenzon & Schankerman, *supra* note 131, at 896 (demonstrating the negative impact of non-compete enforcement on knowledge spillovers).

<sup>135</sup> Marx et al., *supra* note 132, at 395–96.

<sup>136</sup> *Id.*

<sup>137</sup> See Gerald A. Carlino, *Do Non-Compete Covenants Influence State Startup Activity? Evidence from the Michigan Experiment* 18, 37 tbl.3 (Fed. Rsv. Bank Phila., Working Paper No. 21-26, 2021).

<sup>138</sup> See Sharon K. Sandeen & Elizabeth A. Rowe, *Debating Employee Non-Competes and Trade Secrets*, 33 SANTA CLARA HIGH TECH. L.J. 438, 441, 455 (2017) (providing an overview of the contemporary debate around the merits of non-compete agreements).

<sup>139</sup> Complaint for Declaratory Judgment, Injunctive Relief, and Other Equitable Relief at 5–6, *People v. Jimmy John's Enters., LLC*, No. 2016 CH 07746 (Ill. Cir. Ct. June 8, 2016); see also Press Release, Illinois Attorney General, *Madigan Sues Jimmy John's for Imposing Unlawful Non-Compete Agreements on Sandwich Makers and Delivery Drivers* (June 8, 2016), <https://perma.cc/E379-KJHY>.

<sup>140</sup> Complaint, *supra* note 139, at 11–14.

enforce the restrictions and promising to inform its employees that the agreements were unenforceable.<sup>141</sup>

In addition to litigation challenging non-compete agreements under existing state law, many state legislatures have amended their laws to limit the use of non-competes. In Massachusetts, for example, a reform bill that took effect on October 1, 2018, prohibits the enforcement of non-compete agreements against non-overtime-exempt employees, short-term graduate or undergraduate student workers, employees that have been laid off or fired without cause, and employees under the age of eighteen.<sup>142</sup> The law also limits the duration of non-competes,<sup>143</sup> requires employers to disclose them to employees at least 10 days before the employment begins, and demands a written contract signed by both parties.<sup>144</sup>

More recently, both Illinois and Washington, D.C. passed bills that likewise limit the existence and scope of non-competes. Illinois' bill extends the state's *Freedom to Work Act's* prohibition against non-compete agreements with "low wage" employees to cover all employees earning \$75,000 or less per year. "This revised language means that the new law will apply to the majority of Illinois' 5.5 million employees."<sup>145</sup> The act also mandates that "non-competition agreements cannot be enforced against furloughed or laid off employees unless the agreement provides for payment of the employee's base salary for a period of time."<sup>146</sup> Washington, D.C.'s *Ban on Non-Compete Agreements Amendment Act* forbids the use of non-compete agreements as applied to D.C. workers making less than \$150,000 per year, and requires other protections such as notice and an

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<sup>141</sup> See Daniel Wiessner, *Jimmy John's Settles Illinois Lawsuit Over Non-Compete Agreements*, REUTERS (Dec. 7, 2016), <https://perma.cc/4FRW-QCGM>. The New York attorney general achieved a similar outcome after threatening litigation over the non-compete clause. See Daniel Wiessner, *Jimmy John's to Stop Non-Compete Agreements at Other Sandwich Shops*, REUTERS (June 22, 2016), <https://perma.cc/JZR9-YJNS>.

<sup>142</sup> An Act Relative to Economic Development in the Commonwealth, ch. 228, 2018 Mass. Acts 1060 (codified at MASS. GEN. LAWS ch. 149, § 24L (2022)). In a state known for its high concentration of colleges and universities, this prohibition on the enforcement of non-compete agreements against short-term student workers is significant, freeing summer interns from the fear that their choice of internship host might impact their future employment options. Lauren Hoepfner, *Massachusetts Non-competition Reform: Students Exempt Starting October 1*, B.U. SCH. L. TECH. L. CLINIC: BLOG (Sept. 26, 2018), <https://perma.cc/WU8W-DBAQ>.

<sup>143</sup> The bill mandates that non-compete agreements entered into after October 1, 2018, last no longer than one year after the employment relationship ends (or two years, if the employee is found to have "breached his or her fiduciary duty to the employer or . . . unlawfully taken, physically or electronically, property belonging to the employer"). MASS. GEN. LAWS ch. 149, § 24L(b) (2022).

<sup>144</sup> *Id.*

<sup>145</sup> Joshua Liebman & Stephanie Moon, *Illinois Amended Freedom to Work Act – What Employees and Employers Need to Know*, JDSUPRA (Sept. 1, 2021), <https://perma.cc/PXC5-VQLE>.

<sup>146</sup> *Id.*

opportunity to consult counsel.<sup>147</sup> Lots of other states have gotten into the action, passing or considering legislation to curtail the use of non-competes involving physicians<sup>148</sup> advanced practice registered nurses,<sup>149</sup> employees “terminat[ed] or furlough[ed] as the result of . . . the COVID-19 pandemic,”<sup>150</sup> and low-wage workers.<sup>151</sup> Such legislation also commonly includes more rigorous review of the rationale for particular agreements, as well as procedural protections such as advance notice requirements.<sup>152</sup>

Even as states curtail the enforceability of non-compete agreements, many employment contracts continue to feature non-compete clauses that are patently unenforceable under relevant state law.<sup>153</sup> As Professor Charles Sullivan points out, the very existence of these clauses likely chills employee movement: most employees probably assume they are valid, and many others (and their prospective employers) are deterred by the cost of litigating.<sup>154</sup> Until recently, employers have had nothing to lose—and lots to gain—by including these unenforceable terms in employment contracts, especially when dealing with legally unsophisticated employees. That calculus may be changing, as state attorneys general begin to challenge the legality of non-compete clauses as applied to certain categories of workers, and the FTC threatens to ban them altogether.<sup>155</sup> Even so, the existence of these provisions undoubtedly discourages some employees from leaving their jobs, leading not only to lost opportunities for them, but to misallocation of workers across the economy.

This review of the law of non-compete agreements—including the current foment over their legality and scope—has important implications for the IDD. First, it demonstrates that, in most states, employers have a contractual mechanism to limit key employees from jumping ship and working for a competitor, at least for limited times. Although many states have tightened the class of employees that can be subject to these restrictions, most have retained the option for executives and others who are likely to have access to the type of time-sensitive, confidential

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<sup>147</sup> D.C. CODE §§ 32-581.01–581.03a (2023).

<sup>148</sup> CONN. GEN. STAT. ANN. § 20-14p(a) (West 2022).

<sup>149</sup> 225 ILL. COMP. STAT. ANN. 510/14(g) (West 2014).

<sup>150</sup> 820 ILL. COMP. STAT. ANN. 90/10 (West 2019).

<sup>151</sup> VA. CODE ANN. § 40.1-28.7:8.

<sup>152</sup> See, e.g., D.C. CODE § 32-581.02 (2023); 820 ILL. COMP. STAT. ANN. 90/20 (West 2019); MASS. GEN. LAWS ANN. ch.149, § 24L(b)(ii) (West 2013).

<sup>153</sup> Starr et al., *supra* note 109, at 57 tbl.1.

<sup>154</sup> Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1134–39 (2009).

<sup>155</sup> See, e.g., *supra* notes 8–9, 25 and accompanying text.

information that would give a “substantial advantage” to a competitor.<sup>156</sup> Second, and relatedly, the existence of this contractual option suggests that employers who don’t utilize it—either because they failed to propose a non-compete clause, or because the employee didn’t agree to one—cannot later claim that such a limitation was implicit in the arrangements between the parties.<sup>157</sup> Third, as more states abandon or severely limit the availability of non-compete agreements based on concerns about their impact on individuals and the economy, those same considerations counsel a skeptical approach to other, non-consensual restraints like the IDD.

## II. The Nature of and Confusion over the IDD

As the above discussion illustrates, both trade secret and non-compete cases frequently involve factual questions about the risk (and sometimes the inevitability) of disclosure of confidential information. In trade secret disputes between employers and former employees, the imminent threat of disclosure can justify an injunction prohibiting the employee from using or disclosing trade secrets in her new job.<sup>158</sup> And the reasonableness of non-compete agreements may turn, at least in part, on a conclusion that an employee’s knowledge of confidential, time-sensitive information would create a high risk of harm to the employer if the employee took a similar position in a competing firm. In both of these contexts, inevitability plays a factual role in evaluating the merits of a standard doctrinal claim. It does not, however, alter the essential terms of the parties’ rights and responsibilities as reflected in the employment contract. As a result, while courts sometimes purport to invoke the inevitable disclosure doctrine in these cases, the doctrine itself does little independent work.

The strong-form version of the inevitable disclosure doctrine, in contrast, involves a distinct, judicially created form of relief in trade secret cases: an injunction against employment rather than merely against disclosure or use. Because this doctrine applies when the parties have *not* agreed, *ex ante*, to restrictions on the employee’s future prospects, it raises concerns that go beyond the general objections to non-compete clauses

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<sup>156</sup> *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1270 (7th Cir. 1995); *see id.* (“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.”).

<sup>157</sup> *See EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999) (noting that implying a non-compete obligation “runs counter to New York’s strong public policy against such agreements and circumvents the strict judicial scrutiny they have traditionally required”).

<sup>158</sup> *See* UNIF. TRADE SECRETS ACT § 2(a) (UNIF. L. COMM’N 1985) (authorizing injunctions against “[a]ctual or threatened misappropriation”).

and poses a unique threat to principles of employee mobility. As a result, courts have approached this version of the doctrine with caution and have applied it sparingly.<sup>159</sup> Yet the case law and literature leave the impression of a doctrine with a strong foothold across the states—undoubtedly because of courts’ widespread use of the “IDD” terminology in different factual and doctrinal contexts.<sup>160</sup>

The fact that the IDD means different things, to different courts, in different contexts, has real costs for employees.<sup>161</sup> Imagine that a state court announces its adoption of the doctrine in the context of evaluating the reasonableness of an express non-compete agreement. By declaring “the IDD” as a valid doctrine under the relevant state law, the court generates uncertainty over which version of the doctrine prevails in the state. In particular, employees (and their lawyers) may reasonably worry that employers could wield the IDD as a weapon to prevent them from taking a new job, even in the absence of a non-compete agreement. Indeed, recent empirical work demonstrates that a state’s stated adoption of “the IDD” has a demonstrable negative impact on executive mobility in the state.<sup>162</sup>

We consider the implications of this problem, and potential solutions, in Parts III and IV. This Part describes the current status of the IDD. We begin with the classic *PepsiCo* case, which first called widespread attention to the idea that “inevitable” disclosure might justify an injunction against employment in trade secret cases. Section II.B then turns to the range of scenarios in which courts have purported to address the inevitable disclosure doctrine. We separate the cases into four clusters, based on the extent to which they impose ex post restrictions on employees’ mobility. Our first two clusters of cases involve the prototypical version of the IDD, which allows an injunction against employment based solely on a prospective risk that misappropriation or disclosure will occur if the employee is allowed to assume a new job. This version presents the gravest threat of chill, because it raises the risk that an employee could be enjoined from a new position despite having breached no legal duty to her former employer. As a result, some states have expressly ruled it out, while a handful of others have recognized it, though even the adopters apply it only rarely. The third cluster of cases involves the use of employment-related injunctions against defendants who have already misappropriated

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<sup>159</sup> See *infra* Section II.B.2.

<sup>160</sup> See *infra* Section II.B.3.

<sup>161</sup> See generally Brandy L. Treadway, Comment, *An Overview of Individual States’ Application of Inevitable Disclosure: Concrete Doctrine or Equitable Tool?*, 55 SMU L. REV. 621, 649 (2002) (“[T]he ephemeral nature of . . . [the IDD] does not hinder its application. As with pornography, courts recognize inevitable disclosure when they see it although they are unable to agree on its definition.”).

<sup>162</sup> See *infra* Part III; see also Klasa et al., *supra* note 45.

the trade secrets of their former employer, or committed acts that demonstrate an intention to do so. While this form of the doctrine raises similar concerns about ex post employment restrictions, it does not base those restrictions on an inference that an employee will necessarily violate her trade secret commitments. As a result, it poses less of a risk to parties who have acted in good faith to avoid misuse of trade secrets that they learned in their prior job. Finally, the fourth cluster of cases involves the IDD as an evidentiary tool to evaluate the merits of trade secret or non-compete agreement claims. In these cases, inevitability does not alter the contractual obligations of the parties or expand available remedies beyond those set forth in the employment contract. However, in our view, the use of IDD terminology in these contexts creates unnecessary confusion by conflating inevitability as a factual question with inevitability as a separate doctrine. By bundling these widely disparate cases under the IDD label, courts have created a cloud of uncertainty about the meaning of the doctrine and its implications for employee mobility.

A. *PepsiCo v. Redmond*

Although American courts have applied variations of what we now call the IDD for well over a century,<sup>163</sup> the doctrine remained largely confined to the “fringes of jurisprudence”<sup>164</sup> until the famous *PepsiCo v. Redmond* case was decided by the Seventh Circuit Court of Appeals in 1995.<sup>165</sup> In *PepsiCo*, Redmond, a PepsiCo executive with access to “inside information and trade secrets,” accepted a job at Quaker, maker of the Gatorade sports drink and a direct PepsiCo competitor, during a time of intense competition in the beverage industry.<sup>166</sup> The Northern District of Illinois entered a preliminary injunction that forbade Redmond from assuming his new position for five months.<sup>167</sup> On appeal, the Seventh Circuit affirmed, concluding that an injunction was warranted because of the “inevitab[ility]” that Redmond would use or disclose PepsiCo’s trade secrets if allowed to take the new job.<sup>168</sup>

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<sup>163</sup> See, e.g., Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800–1920*, 52 HASTINGS L.J. 441, 507 (2001) (describing opinions in the late 1800s that hinted at IDD-like reasoning); cf. Charles Tait Graves, *Is There an Empirical Basis for Predictions of Inevitable Disclosure?*, 18 WAKE FOREST J. BUS. & INTELL. PROP. L. 190, 199 n.29 (2018) (setting 1919 as the first adoption of the strong-form IDD).

<sup>164</sup> William Lynch Schaller, *Trade Secret Inevitable Disclosure: Substantive, Procedural & Practical Implications of an Evolving Doctrine* (pt. 1), 86 J. PAT. & TRADEMARK OFF. SOC’Y 336, 340 (2004).

<sup>165</sup> *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1271 (7th Cir. 1995).

<sup>166</sup> *Id.* at 1264.

<sup>167</sup> *Id.* at 1267.

<sup>168</sup> *Id.* at 1272.



The court began its opinion with a nod to the “tension” between the normative goals of trade secret protection<sup>169</sup> and the interests of employees in “pursuing their livelihoods when they leave their current positions.”<sup>170</sup> Nonetheless, the court concluded that Illinois trade secret law allowed a finding of misappropriation if a plaintiff “demonstrat[es] that defendant’s new employment will inevitably lead him to rely on the plaintiff’s trade secrets.”<sup>171</sup> Two factors persuaded the court that the plaintiff had met this standard. First, the court emphasized Redmond’s intimate familiarity with PepsiCo’s trade secrets and confidential business information that bore directly on the roles he would perform at Quaker. In particular, Redmond knew “important and sensitive information about [PepsiCo’s] ‘pricing architecture’” and distribution plans for its beverages, which he could not help but take into account in performing his new job.<sup>172</sup> Second, the court found support—albeit not “ineluctabl[e]” proof—for the trial court’s finding that Redmond and his new employer had shown “lack of candor” that suggested a “willingness to misuse [PepsiCo’s] trade secrets.”<sup>173</sup> Significantly, the district court did *not* find any evidence that Redmond had absconded with documents or already misused any of PepsiCo’s secret information. Instead, the bad-faith finding had to do with (a) Redmond’s misleading statements to PepsiCo colleagues about whether and when he accepted the Quaker job, (b) a discrepancy in how Redmond and his new boss described his new position at Quaker, and (c) the fact that his supervisor at Quaker had shown an “unnatural interest in hiring [PepsiCo] employees”—which the trial court saw as evidence that Quaker sought employees for their knowledge of confidential information, rather than their professional skills.<sup>174</sup> The Seventh Circuit concluded:

Thus, when we couple the demonstrated inevitability that Redmond would rely on [PepsiCo] trade secrets in his new job at Quaker with the district court’s reluctance to believe that Redmond would refrain from disclosing these secrets in his new position (or that Quaker would ensure Redmond did not disclose them), we conclude that the district

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<sup>169</sup> *Id.* at 1268 (“Trade secret law serves to protect ‘standards of commercial morality’ and ‘encourage[ ] invention and innovation’ while maintaining ‘the public interest in having free and open competition in the manufacture and sale of unpatented goods.’” (quoting 2 MELVIN F. JAGER, TRADE SECRETS LAW § 1L.03, at 1L-12 (rev. ed. 1994))).

<sup>170</sup> *Id.*

<sup>171</sup> *PepsiCo*, 54 F.3d at 1269.

<sup>172</sup> *Id.* at 1265.

<sup>173</sup> *Id.* at 1270–71.

<sup>174</sup> *Id.* (noting that “all three of the people interviewed for the position Redmond ultimately accepted worked at [PepsiCo]”).

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court correctly decided that PepsiCo demonstrated a likelihood of success on its statutory claim of misappropriation.<sup>175</sup>

In affirming the injunction, the Seventh Circuit never discussed the fact that PepsiCo could have achieved its objectives more directly through an express non-compete agreement, nor whether its failure to obtain one should influence the analysis of its trade secret claim.

The *PepsiCo* case brought the inevitable disclosure doctrine into the jurisprudential mainstream and simultaneously provoked outrage among scholars and advocates for employee rights.<sup>176</sup> Critics charged the court with rewriting trade secret and non-compete law for the benefit of employers, and warned that the doctrine would chill employee mobility by raising the specter of injunction for employees not bound by any non-compete.<sup>177</sup> Despite these concerns, the opinion—by one of the most influential federal courts of appeals in the country—caught the attention of other state and federal courts, and led them to consider the role of inevitability under their own jurisdictions' law.

Some of these cases involved comparable factual and doctrinal scenarios, but many others did not. By citing *PepsiCo* with apparent approval, courts sometimes created an impression that they had adopted the IDD, even when they were addressing a completely different doctrinal context. Other courts rejected the doctrine as inconsistent with their state law. Even courts that explicitly adopted the IDD have struggled to define limiting principles that might cabin its most pernicious effects. Without such principles, misuse of the IDD would be practically certain, as “[e]very former employer, of course, wants to prevent an ex-employee from working in any capacity for a rival.”<sup>178</sup> Despite these efforts to constrain the doctrine, its very existence creates uncertainty about employees' legal right to change jobs; that uncertainty, in turn, likely impairs not only mobility, but also innovation spillovers and economic dynamism in IDD states.<sup>179</sup>

#### B. *The IDD post-PepsiCo: Oft-Invoked, Rarely Applied, and Source of Confusion*

Despite the frequent reference to *PepsiCo* in the case law, only a few states have considered the doctrine in its purest form—in which the risk of disclosure, alone, justifies an injunction against employment. Of these,

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<sup>175</sup> *Id.* at 1271.

<sup>176</sup> See generally sources cited *supra* note 1.

<sup>177</sup> *E.g.*, Whaley, *supra* note 1.

<sup>178</sup> Schaller, *supra* note 164, at 353.

<sup>179</sup> *Cf.* Marx et al., *supra* note 133, at 887.

two states have rejected the doctrine, and four have applied it (albeit rarely). Another handful of states have used inevitability as a basis for injunction, but only after concluding that the former employee has already committed an act of trade secret misappropriation. In the remainder of states, courts have either not addressed the IDD at all, have discussed it in *dictum*, or have used IDD terminology in such disparate contexts that they have created confusion about the meaning of the doctrine and its implications for employee mobility.

### 3. States that Reject the IDD Wholecloth

Courts in two states—California<sup>180</sup> and Maryland<sup>181</sup>—have flatly rejected the IDD as inconsistent with state policy in favor of employee mobility.

Given California’s near-absolute ban on mobility restrictions, its rejection of the IDD should come as no surprise. In *Whyte v. Schlage Lock Co.*,<sup>182</sup> a California appeals court described the doctrine as “contrary to [both] California law and policy because it creates an after-the-fact covenant not to compete restricting employee mobility,”<sup>183</sup> by which “the employer obtains the benefit of a contractual provision it did not pay for, while the employee is bound by a court-imposed contract provision with no opportunity to negotiate terms or consideration.”<sup>184</sup> By this reasoning, the IDD not only offends California’s policy against restraints on employment, but also violates basic principles of fair contracting, including the requirements of consideration and meeting of the minds.<sup>185</sup>

In *Lejeune v. Coin Acceptors, Inc.*,<sup>186</sup> the Maryland Court of Appeals aligned itself with this analysis, citing extensively to the *Whyte* decision in refusing to adopt the IDD.<sup>187</sup> Like *Whyte*, the court cited state policy favoring employee mobility as one reason for skepticism of the IDD. The fact that Maryland enforces non-compete agreements, moreover, did not counsel in favor of an injunction; to the contrary, the court viewed the

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<sup>180</sup> See, e.g., *Whyte v. Schlage Lock Co.*, 125 Cal. Rptr. 2d 277, 293 (Ct. App. 2002) (stating definitively, “Lest there be any doubt . . . our rejection of the inevitable disclosure doctrine is complete.”).

<sup>181</sup> *Lejeune v. Coin Acceptors, Inc.*, 849 A.2d 451, 472 (Md. 2004).

<sup>182</sup> 125 Cal. Rptr. 2d 277 (Ct. App. 2002).

<sup>183</sup> *Id.* at 281.

<sup>184</sup> *Id.* at 281, 293 (“The doctrine of inevitable disclosure permits a trade secret owner to prevent a former employee from working for a competitor despite the owner’s failure to prove the employee has taken or threatens to use trade secrets.”).

<sup>185</sup> See *id.* at 293.

<sup>186</sup> 849 A.2d 451 (Md. 2004).

<sup>187</sup> *Id.* at 472.

plaintiff's failure to obtain such an agreement as further reason to resist its attempt to use trade secret law to achieve an "ex post facto covenant not to compete."<sup>188</sup>

## 2. States That Have Applied the Strong Version of the IDD

At the other extreme, courts in four states—Illinois,<sup>189</sup> Ohio,<sup>190</sup> Delaware,<sup>191</sup> and Pennsylvania<sup>192</sup>—have applied the IDD in its strongest form: to enjoin employment before any misappropriation has occurred, based on the "inevitability" that the employee will use its employer's trade secrets in performing the new job.<sup>193</sup> In most of these states, the doctrine was adopted decades ago and is treated as good law but applied sparingly "due to its significant potential to curb employee mobility among competitors."<sup>194</sup> Courts have developed limiting principles that reserve the doctrine for unusual situations involving head-to-head competition, identical jobs, and (at least implicitly) evidence of bad faith.<sup>195</sup> Even then, modern cases rarely apply the doctrine to block employment altogether, opting instead for an injunction limiting the scope of the employee's duties, her ability to solicit former clients, or other conditions of employment.<sup>196</sup> Yet the threat of an employment-related injunction lurks

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<sup>188</sup> *Id.* at 471 (quoting *Int'l Bus. Mach. Corp. v. Seagate Tech., Inc.*, 941 F. Supp. 98, 101 (D. Minn. 1992)).

<sup>189</sup> *Strata Mktg. v. Murphy*, 740 N.E.2d 1166, 1178 (Ill. App. Ct. 2000); *see also* *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1271 (7th Cir. 1995).

<sup>190</sup> *See* *Emery Indus., Inc. v. Cottier*, No. C-1-78-474, 1978 WL 21419, at \*9 (S.D. Ohio Aug. 18, 1978); *see also* *Procter & Gamble Co. v. Stoneham*, 747 N.E.2d 268, 275–76 (Ohio Ct. App. 2000).

<sup>191</sup> *E.I. duPont de Nemours & Co. v. Am. Potash & Chem. Corp.*, 200 A.2d 428, 436–37 (Del. Ch. 1964).

<sup>192</sup> *Air Prods. & Chems. Inc. v. Johnson*, 442 A.2d 1114, 1124–25 (Pa. Super. Ct. 1982).

<sup>193</sup> Another state, Georgia, has flirted with the doctrine. In *Essex Group, Inc. v. Southwire Co.*, 501 S.E.2d 501, 505–06 (Ga. 1998), the Georgia Supreme Court used IDD-like reasoning to affirm a five-year injunction prohibiting an employee from working on projects related to his work at his former firm. In a subsequent opinion, however, the Court disavowed any intention to adopt the IDD in *Essex*, and rejected the IDD as an independent claim under Georgia state law. *Holton v. Physician Oncology Servs., LP*, 742 S.E.2d 702, 706 (Ga. 2013).

<sup>194</sup> *Packaging Corp. of Am., Inc. v. Croner*, 419 F. Supp. 3d 1059, 1070 (N.D. Ill. 2020).

<sup>195</sup> *E.g., id.* (suggesting that IDD should not apply absent "a showing of intent or other high probability that [the former employee] will use [the employer's] trade secrets, especially in light of the skepticism other courts in this district have shown toward the inevitability doctrine").

<sup>196</sup> *E.g., Vendavo, Inc. v. Long*, 397 F. Supp. 3d 1115, 1142, 1148 (N.D. Ill. 2019) (finding that an employee had previously misappropriated by using her employer's trade secrets to service her former clients in her new job and enjoining employee from working with her former clients for one year); *cf.* *Liebert Corp. v. Mazur*, 827 N.E.2d 909, 930 (Ill. App. Ct. 2005) (finding in favor of plaintiff in IDD claim and remanding to trial court to determine appropriate injunctive relief).

in the background, and every once in a while, a court will follow through with the threat.<sup>197</sup> Indeed, in at least one state—Pennsylvania—a federal appeals court affirmed an IDD-based injunction against employment as recently as 2010.<sup>198</sup> In other states, the doctrine may cast an outsized shadow because courts routinely describe it as a well-established feature of state law, even while usually rejecting its application to the case at hand.<sup>199</sup>

a. *Illinois*

Illinois, whose law was at issue in *PepsiCo*, is illustrative. Since *PepsiCo*, state and federal courts in Illinois have affirmed the IDD as the law of the state, routinely invoking a three-part inquiry that considers

“(1) the level of competition between the former employer and the new employer; (2) whether the employee’s position with the new employer is comparable to the position he held with the former employer; and (3) the actions the new employer has taken to prevent the former employee from using or disclosing trade secrets of the former employer.”<sup>200</sup>

Taken at face value, this standard might allow an injunction any time a former employee jumps ship for an identical job with a competitor, and the competitor takes no affirmative actions to protect against use of the former employer’s trade secrets. In practice, however, courts have applied the standard narrowly, insisting on proof that the employee “could not operate or function” without relying on the former employer’s trade secrets, and usually finding that standard satisfied only in the face of evidence that the employee actually misappropriated or otherwise breached its duties to its former employer.<sup>201</sup>

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<sup>197</sup> *E.g.*, *Surgipath Med. Indus., Inc. v. O’Neill*, No. 09-C-02453, 2009 WL 10713821, at \*6–7 (N.D. Ill. June 19, 2009); *Tate & Lyle Ingredients Ams. LLC v. Craig*, No. 4-16-0886, 2017 WL 1555907, at \*7–8 (Ill. App. Ct. Apr. 28, 2017); *Cerro Fabricated Prods. LLC v. Solanick*, 300 F. Supp. 3d 632, 658 (M.D. Penn. 2018); *Doebler’s Penn. Hybrids, Inc. v. Doebler Seeds, LLC*, 88 Fed. App’x 520, 522–23 (3d Cir. 2004).

<sup>198</sup> *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 113 (3d Cir. 2010).

<sup>199</sup> *E.g.*, *Mario Tricoci Hair Salons & Day Spas v. Sloat*, No. 20-C-7196, 2021 WL 4711507, at \*6–7 (N.D. Ill. Oct. 8, 2021) (noting that “[t]he Illinois courts have adopted *PepsiCo v. Redmond* as accurately describing Illinois law regarding injunctions based on a claim of inevitable disclosure of trade secrets,” but concluding that, “[o]n the present record, this is not a case in which the defendants ‘could not operate or function’ in their [new] positions . . . without relying on [the] trade secrets”).

<sup>200</sup> *Vendavo*, 397 F. Supp. 3d at 1140 (quoting *Saban v. Caremark Rx, L.L.C.*, 780 F. Supp. 2d 700, 734–35 (N.D. Ill. 2011)).

<sup>201</sup> *E.g.*, *id. Compare Liebert Corp. v. Mazur*, 827 N.E.2d 909, 930 (Ill. App. Ct. 2005), with *Triumph Packaging Grp. v. Ward*, 834 F. Supp. 2d 796, 813 (N.D. Ill. 2011) (“Here, Triumph does not argue, and has presented no evidence, that Mr. Ward obtained Triumph’s trade secrets through improper means or that he accessed Triumph’s confidential information and subsequently tried to hide his tracks.

*RKI, Inc. v. Grimes*,<sup>202</sup> for example, involved a dispute between two firms that sold equipment used in pipe manufacture.<sup>203</sup> Grimes, who had entered into both a non-compete and a non-disclosure agreement with RKI, had worked in sales for the plaintiff for over two years when he decided to accept an identical job with its direct competitor.<sup>204</sup> In the weeks between accepting his new job and resigning from the old one, he copied voluminous data onto his home computer.<sup>205</sup> The record contained forensic evidence demonstrating that, around the time that his home computer was being inspected for purposes of the litigation, he had deleted large quantities of data from the computer and defragmented it, both acts that “raise[d] a red flag of eliminating data or concealing electronic data.”<sup>206</sup> RKI brought trade secret misappropriation, breach of non-compete agreement, and breach of confidentiality agreement claims against Grimes.<sup>207</sup> Citing *PepsiCo*, the court concluded that, while it did not have direct evidence of particular trade secrets that were misappropriated, the employee’s actions suggested that he either “ha[d] violated or inevitably w[ould] violate” his employer’s trade secret rights.<sup>208</sup> The doctrine, in other words, was used to infer actual misappropriation, rather than merely to project its likelihood in the future.<sup>209</sup>

Likewise, in *Liebert Corp. v. Mazur*,<sup>210</sup> a court of appeals reversed a trial court dismissal of a trade secret misappropriation claim, finding misappropriation inevitable when an employee (a) left to form a direct competitor, (b) misappropriated by downloading the equivalent of 40 bankers’ boxes of documents, some of which contained trade secrets, and (c) intentionally destroyed evidence that would have revealed whether he burned those documents to a CD.<sup>211</sup> As in *RKI v. Grimes*, the court emphasized the employee’s demonstrated malfeasance, even while relying on the IDD. Indeed, the *Liebert* court concluded that the defendant had

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Instead, Triumph contends that Mr. Ward became privy to Triumph’s trade secrets during the normal course of his employment with Triumph.” (footnote omitted). See generally Schaller, *supra* note 164, at 342 (“At times courts following *PepsiCo* have suggested that at least some degree of dishonesty is necessary in what has been called the ‘inevitability plus’ approach.”).

<sup>202</sup> 177 F. Supp. 2d 859 (N.D. Ill. 2001).

<sup>203</sup> *Id.* at 862.

<sup>204</sup> *Id.* at 863, 868.

<sup>205</sup> *Id.* at 868.

<sup>206</sup> *RKI, Inc. v. Grimes*, 200 F. Supp. 2d 916, 922 (N.D. Ill. 2002) (order denying new trial).

<sup>207</sup> *Id.* at 920.

<sup>208</sup> *RKI*, 177 F. Supp. 2d at 876.

<sup>209</sup> The opinion ordered an injunction, but did not specify the form of injunctive relief. *Id.* at 876–77, 880.

<sup>210</sup> 827 N.E.2d 909 (Ill. App. Ct. 2005).

<sup>211</sup> *Id.* at 919, 928–29.

engaged in “willfull[] misappropriat[ion].”<sup>212</sup> At the same time, it did not mandate an injunction against employment, instead remanding to the district court for entry of appropriate injunctive relief.

In contrast to these opinions, in which employee wrongdoing influenced courts to resolve IDD claims in plaintiffs’ favor on the merits, courts have sometimes allowed IDD claims to proceed to discovery in the absence of clear evidence of bad faith or misappropriation.<sup>213</sup> *Strata Marketing, Inc. v. Murphy*,<sup>214</sup> for example, reversed the dismissal of an IDD-based trade secret misappropriation claim because the former employer had alleged that the employee “could not operate or function” in the new position without relying on the employer’s trade secrets.<sup>215</sup> The court cautioned that it was not passing judgment on the merits, but allowing the plaintiff to develop its case because “we cannot say that Strata could prove no set of facts entitling it to relief.”<sup>216</sup> From the plaintiff’s perspective, this use of the IDD at the pleading stage may generate direct evidence of misappropriation that circumstantial evidence suggests may have occurred. From the defendant’s perspective, however, it can look like an anticompetitive fishing expedition.<sup>217</sup>

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<sup>212</sup> *Id.* at 930.

<sup>213</sup> See e.g., *Gen. Elec. Co. v. Uptake Techs., Inc.*, 394 F. Supp. 3d 815, 832–34 (N.D. Ill. 2019); *PrimeSource Bldg. Prods., Inc. v. Felten*, No. 16-CV-11468, 2017 WL 11500971, at \*6–8, \*10 (N.D. Ill. July 6, 2017) (denying motion to dismiss; five months later, the court refused to grant a preliminary injunction on actual or inevitable misappropriation claims, but granted a more limited injunction on non-solicitation and non-compete claims, *PrimeSource Bldg. Prods., Inc. v. Huttig Bldg. Prods., Inc.*, No. 16-CV-11390, 2017 WL 7795125, at \*28 (N.D. Ill. Dec. 9, 2017)); *Covenant Aviation Sec., LLC v. Berry*, 15 F. Supp. 3d 813, 821 (N.D. Ill. 2014); *Luminate Techs., LP v. Integrated Data Storage, LLC*, No. 13-C-3767, 2013 WL 5974731, at \*6–8 (N.D. Ill. Nov 11, 2013) (denying motion to dismiss based on evidence of both IDD and actual misappropriation); cf. *Cacique, Inc. v. V & V Supremo Foods, Inc.*, No. 03-C-4230, 2004 WL 2222270, at \*16 (N.D. Ill. Sept. 30, 2004) (denying summary judgment based in part on IDD).

<sup>214</sup> 740 N.E.2d 1166 (Ill. App. Ct. 2000).

<sup>215</sup> *Id.* at 1179; cf. *Packaging Corp. of Am., Inc. v. Croner*, 419 F. Supp. 3d 1059, 1070 (N.D. Ill. 2020) (citing *Strata* for the IDD standard under Illinois law, and concluding that plaintiff’s allegations fell short of the standard); *Mario Tricoci Hair Salons & Day Spas v. Sloat*, No. 20-C-7196, 2021 WL 4711507, at \*7 (N.D. Ill. Oct. 8, 2021).

<sup>216</sup> *Strata*, 740 N.E.2d at 1179.

<sup>217</sup> See *Mach 1 Air Servs., Inc. v. Garcia*, No. CV-08-0911, 2008 WL 3200777, at \*2 (D. Ariz. Aug. 6, 2008) (rejecting argument that disclosure was inevitable when employee “took an almost identical position with a direct competitor” because, “under plaintiff’s reasoning, the mere existence of a confidential information agreement would permit a fishing expedition into the conduct of a competing former employee”).

In *Molon Motor v. Nidec Motor*, for example, the court initially denied a motion to dismiss a trade secret claim based in part on the IDD.<sup>218</sup> Applying Illinois' three-factor test, the court concluded:

All told, Molon's allegations on the direct competition between the parties, as well as the allegations on the employment breadth and similarity of Desai's quality control work at the two companies, are enough to trigger the circumstantial inference that the trade secrets inevitably would be disclosed by Desai to Nidec. To be sure, going forward, Molon ultimately will bear the burden of *proving*—not just alleging—enough facts such that disclosure is not premised on a mere unsubstantiated fear. For now, Molon has pled enough for the trade secrets claims to avoid the Rule 12(b)(6) chopping block.<sup>219</sup>

After a couple of years of discovery failed to generate *any* evidence of misappropriation or harm to the plaintiff, however, the court ultimately dismissed the complaint and, indeed, took the unusual step of imposing sanctions against the plaintiff for the bad-faith pursuit of its trade secrets claim.<sup>220</sup> The *Molon* case demonstrates the substantial costs—in terms of time, uncertainty, and litigation expense—that defendants can suffer when courts allow IDD claims to proceed in the absence of any evidence of misappropriation.

Yet another context in which Illinois courts invoke the IDD is to justify an injunction against *disclosure and use* of trade secrets, rather than blocking their employment.<sup>221</sup> Such injunctions reaffirm former employees' existing obligations and do not impair their ability to take a new job. As discussed in Section III.B.4 below, this use of the IDD generates confusion by validating “the IDD” in the state but neglecting to clarify whether (and if so, when) it can justify employment-limiting injunctions.

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<sup>218</sup> *Molon Motor & Coil Corp. v. Nidec Motor Corp.*, No. 16 C 03545, 2017 WL 1954531, at \*7 (N.D. Ill. May 11, 2017).

<sup>219</sup> *Id.* (citing *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1268–69 (7th Cir. 1995); see *Saban v. Caremark Rx, L.L.C.*, 780 F. Supp. 2d 700, 734 (N.D. Ill. 2011); *Teradyne, Inc. v. Clear Commc'ns Corp.*, 707 F. Supp. 353, 357 (N.D. Ill. 1989)).

<sup>220</sup> *Molon Motor & Coil Corp. v. Nidec Motor Corp.*, No. 16-CV-03545, 2020 WL 7027577, at \*4 (N.D. Ill. Nov. 30, 2020) (stating “[i]t is one thing to rely on inevitable disclosure at the pleading stage, which Molon successfully did here in fending off a dismissal motion,” but another to continue to pursue a claim after concluding that the party had suffered no harm from the defendant's conduct).

<sup>221</sup> See, e.g., *Westrock Co. v. Dillon*, No. 21-CV-05388, 2021 WL 6064038, at \*15, \*21 (N.D. Ill. Dec. 22, 2021) (enjoining former employee “from disclosing, using or accessing” files after finding evidence of past misappropriation, reasoning that “where evidence exists that the employee copied the employer's confidential information, it leads to the conclusion of inevitable disclosure” (quoting *Saban*, 780 F. Supp. 2d at 734)); cf. *Aon PLC v. Infinite Equity, Inc.*, No. 19 C 7504, 2021 WL 4192072, at \*17–18, \*33 (N.D. Ill. Sept. 15, 2021) (finding actual misappropriation, granting injunction prohibiting active solicitation of former clients and use of former employer's confidential information in connection with such clients, but refusing to enjoin defendants from accepting work from clients that approached it).



Given the multiplicity of functions that the IDD serves in Illinois case law, it's hard to call it a coherent doctrine because doctrines are principles that suggests some consistency in their application.<sup>222</sup> Instead, the IDD offers a uniform label for a collection of disparate circumstances in which trade secret misappropriation appears to be—or at least is alleged to be—inevitable. Most of these cases do not result in *PepsiCo*-like injunctive relief. By contributing to an impression of the IDD as a well-established doctrine, however, these opinions undoubtedly reduce employees' confidence in their ability to change jobs without triggering a lawsuit. The fact that it is rarely applied in connection with injunctions against employment likely offers cold comfort to such employees, given the *PepsiCo* precedent and continuing dictum suggesting the availability of this form of relief.

b. *Ohio*

The situation in Ohio resembles that of Illinois: a federal court used IDD-like reasoning to issue an injunction against employment decades ago, and since then, state and federal judges have struggled over the meaning of inevitability, the legal contexts in which it is relevant, and its implications for employee mobility. The strong-form IDD made its Ohio appearance in *Emery Industries, Inc. v. Cottier*,<sup>223</sup> a 1978 opinion in which a federal district court enjoined a company's former employee from working for a competitor for one year, stating that "there is an inevitable and imminent danger of disclosure of plaintiff's trade secrets."<sup>224</sup> As in *PepsiCo*, the case involved an executive with detailed knowledge of product information, internal strategy, and business plans who sought to work for the firm's direct competitor in a senior executive role. The court acknowledged that an injunction "prohibiting the defendant from working for [the new firm] for any appreciable length of time would

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<sup>222</sup> Black's Law Dictionary defines a doctrine as "[a] principle, esp[ecially] a legal principle, that is widely adhered to." *Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). See generally Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV. 517, 518–21 (2006) (examining the traditional legal views of doctrine); cf. Martin H. Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 COLUM. L. REV. 1378, 1379–84 (1985) (book review).

<sup>223</sup> No. C-1-78-474, 1978 WL 21419 (S.D. Ohio Aug. 18, 1978).

<sup>224</sup> *Id.* at \*9. The *Emery* court cited an earlier Ohio state court opinion that had granted an injunction in part based on the inevitability of disclosure. *B. F. Goodrich Co. v. Wohlgenuth*, 192 N.E.2d 99, 105 (Ohio Ct. App. 1963). The defendant in *B.F. Goodrich* had openly stated his intention to use his knowledge of his employer's trade secrets in his new job, so the opinion had reason beyond the IDD to find threatened misappropriation. *Id.* at 103–04. In any event, whether *B.F. Goodrich* or *Emery* is the first IDD opinion in Ohio, the point is that the strong-form version of the doctrine dates back decades and has receded in recent years in response to concerns about restraints on mobility.

obviously cause the defendant irreparable injury,” because “the defendant’s employability, as a practical matter, is limited” to the field in which the parties competed.<sup>225</sup> The court also pointed out that the former employer had the opportunity to negotiate an express non-compete agreement with the defendant, but never did so.<sup>226</sup> Nonetheless, the court found that an injunction against employment was necessary to protect the plaintiff’s trade secrets, although it softened the blow somewhat by requiring the plaintiff to pay a monthly fee to its former employee during the term of the injunction.<sup>227</sup>

In the decades since *Emery Industries*, Ohio courts have invoked the IDD in a wide range of situations, but rarely to enjoin employment altogether in the absence of a non-compete. Sometimes they use the doctrine to justify an injunction against misappropriation;<sup>228</sup> sometimes they use it to buttress a claim of actual misappropriation,<sup>229</sup> and most commonly, they invoke it as a reason to enforce a non-compete.<sup>230</sup> Indeed,

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<sup>225</sup> *Emery*, 1978 WL 21419, at \*6.

<sup>226</sup> The court discussed this issue at some length:

The parties to this controversy, some eleven years ago, gave consideration to what sort of agreement should govern their relationship after it terminated. It was their joint decision at that time that their relationship after termination could be covered by a non-disclosure agreement. Both the plaintiff and the defendant have stood on that ever since and only after their relationship was terminated has the plaintiff asserted the necessity of a noncompete agreement. Concededly, a noncompete agreement is more stringent than a nondisclosure agreement. If the circumstances change in such a way as to require noncompetition, it would seem only fair that it be on some basis which would compensate the defendant. It is clear in this case that taking the defendant out of the ozone field practically amounts to removing him from employment.

*Id.* at \*9.

<sup>227</sup> *Id.* at \*11. The monthly fee was \$3,300 per month, which roughly split the difference between his former salary and the amount he would make in his new job. *Id.*

<sup>228</sup> See, e.g., *Polymet Corp. v. Newman*, No. 16-CV-734, 2016 WL 4449641, at \*8–9 (S.D. Ohio Aug. 24, 2016) (denying plaintiff’s request for injunction against employment, even after finding that the IDD applied and misappropriation was likely: “the Court finds that an order entirely prohibiting Element Blue from making hot extruded wire, which would effectively shut down the company, is a bridge too far given the current lack of any direct evidence of misappropriation of trade secrets at this time”); *Dayton Superior Corp. v. Yan*, No. 12-CV-380, 2012 WL 5497804, at \*7, \*9–10 (S.D. Ohio Nov. 13, 2012) (finding disclosure inevitable, then entering injunction prohibiting use or disclosure of trade secrets against defendants bound by non-disclosure agreement and prohibiting employment for defendant bound by a non-compete agreement).

<sup>229</sup> E.g., *Pharmerica Corp. v. McElyea*, No. 14-CV-00774, 2014 WL 1876271, at \*4–5 (N.D. Ohio May 9, 2014).

<sup>230</sup> See, e.g., *id.*; *Litig. Mgmt., Inc. v. Bourgeois*, No. 95730, 2011 WL 2270553, at \*7 (Ohio Ct. App. June 9, 2011); *Procter & Gamble Co. v. Stoneham*, 747 N.E.2d 268, 273 (Ohio Ct. App. 2000); *Handel’s*

in a 2008 case, *Hydrofarm, Inc. v. Orendorff*,<sup>231</sup> an Ohio Court of Appeals suggested that the IDD should apply *only* in cases involving non-compete agreements. Noting that “[n]either this court nor the Supreme Court of Ohio has applied the inevitable-disclosure doctrine in a case that did not involve an enforceable noncompetition agreement,”<sup>232</sup> the court emphasized that even employees exposed to trade secrets have a presumptive right to change jobs unless they have contractually agreed to limits.<sup>233</sup> Absent express language in the trade secret statute authorizing employment-blocking injunctions, the *Hydrofarm* court concluded that the legislature intended trade secret injunctions to target only use or disclosure of trade secrets.<sup>234</sup> Lamentably, the court equivocated on that point later in the opinion, when it distinguished *PepsiCo* on the facts, rather than rejecting it as inconsistent with Ohio law.<sup>235</sup> In other words, even a court that recognized both the normative and doctrinal objections to the strong-form IDD could not quite bring itself to rule it out entirely,

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Enters., Inc. v. Schulenburg, No. 18-CV-00508, 2020 WL 419158, at \*10 (N.D. Ohio Jan. 27, 2020); FirstEnergy Sols. Corp. v. Flerick, No. 12-CV-2948, 2012 WL 6649201, at \*5 (N.D. Ohio Dec. 20, 2012).

<sup>231</sup> 905 N.E.2d 658 (Ohio Ct. App. 2008).

<sup>232</sup> *Id.* at 663; see *Exel Inc. v. Xpedient Mgmt. Grp., LLC*, No. 17-CV-1076, 2018 WL 456315, at \*7 n.4 (S.D. Ohio Jan. 16, 2018) (“In Ohio, whether there is an enforceable noncompetition agreement arguably impacts the availability of the inevitable disclosure doctrine.” (citing *Hydrofarm*, 905 N.E.2d at 663)); *Arthur J. Gallagher & Co. v. Anthony*, No. 16-CV-00284, 2016 WL 4523104, at \*19 (N.D. Ohio Aug. 30, 2016) (citing *Hydrofarm* for the notion that the IDD applies only to cases involving non-compete agreements).

<sup>233</sup> *Hydrofarm*, 905 N.E.2d at 663 (“An employee possessed of his former employer’s trade secrets [has] the right to take employment in a competitive business, and to use his knowledge (other than trade secrets) and experience, for the benefit of the new employer.” (internal quotation marks and citation omitted)); see *A&P Tech., Inc. v. Lariviere*, No. 17-CV-534, 2017 WL 6606961, at \*7 (S.D. Ohio Dec. 27, 2017) (“Essentially, by granting A&P’s request for relief here, the Court would be endorsing the proposition that any employee with specialized knowledge that agreed not to disclose that knowledge can be forbidden from working for a direct competitor indefinitely. Such a proposition would undermine the ‘strong public interest in fair and free competition.’”) (quoting *Bailey v. Chattem, Inc.*, 684 F.2d 386, 391 (6th Cir. 1982)); *Safety Today, Inc. v. Roy*, No. 12-CV-510, 2012 WL 12872691, at \*3 (S.D. Ohio June 29, 2012) (describing injunctions against employment as “an extreme precaution and one that is disfavored in the absence of a non-compete agreement”).

<sup>234</sup> *Hydrofarm*, 905 N.E.2d at 663 (“If the General Assembly had intended to permit injunction of competition or employment under the act, it easily could have so specified. Instead, it left the law substantially intact; that is, employers or employees are free to, and frequently do, enter into noncompetition agreements, while the state has an interest in promoting morality in business affairs and innovation.”).

<sup>235</sup> *Id.* at 665 (citing *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995) (distinguishing “cases in which courts have enforced the inevitable-disclosure doctrine in absence of a noncompetition agreement, the former employee possessed timely, sensitive, strategic, and/or technical information that, if it was proved, posed a serious threat to his former employer’s business or a specific segment thereof”).

leaving the prospect of employment-blocking injunctions lurking in the background of Ohio trade secret law.

Other IDD opinions in Ohio perpetuate the uncertainty over the scope of the doctrine by describing it in broad strokes that focus on the nature of the new position and don't seem to require wrongdoing by the former employee. The statement of the court in *Dayton Superior Corp. v. Yan*<sup>236</sup> is typical: "under the 'inevitable disclosure rule,' a former employee working for a competitor will be enjoined because an individual cannot compartmentalize a competitor's knowledge and disclosure or misappropriation of trade secrets is inevitable."<sup>237</sup> While the court in that case did not grant an injunction based solely on the risk of trade secret misappropriation, nothing in its description of the doctrine precluded that form of relief. By citing *PepsiCo* as authority for the IDD, moreover, the court—along with many others in Ohio—suggests endorsement of employment-blocking injunctions as a remedy for trade secret claims.<sup>238</sup> To make matters worse, courts addressing claims involving both non-disclosure and non-compete agreements sometimes sloppily blend them together, leaving the impression that either claim could provide the basis for an employment-blocking injunction.<sup>239</sup> As in Illinois, then, the IDD casts a shadow over employment mobility in Ohio. By failing to foreclose the possibility of employment-blocking injunctions in trade secret cases, Ohio courts preserve the specter of the IDD as a mobility-restricting doctrine in the state.

### c. Delaware

Although Delaware courts have rarely applied the IDD to block employment in recent years, the doctrine nominally remains good law in the state.<sup>240</sup> The Delaware Chancery Court adopted the IDD in *E.I. duPont*

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<sup>236</sup> No. 12-CV-380, 2012 WL 5497804 (S.D. Ohio Nov. 13, 2012).

<sup>237</sup> *Id.* at \*7; see also *Hydrofarm*, 905 N.E.2d at 665.

<sup>238</sup> See, e.g., *Polymet Corp. v. Newman*, No. 16-CV-734, 2016 WL 4449641, at \*5 (S.D. Ohio Aug. 24, 2016); *Hydrofarm*, 905 N.E.2d at 665; *Procter & Gamble Co. v. Stoneham*, 747 N.E. 2d 268, 279 & n.20 (Ohio Ct. App. 2000).

<sup>239</sup> E.g., *Seaman Corp. v. Flaherty*, No. 20-CV-443, 2020 WL 4597323, at \*6 (N.D. Ohio Mar. 3, 2020) (enjoining defendant from competing with his former employer after finding that "[p]laintiff is . . . likely to succeed on its claim of breach of contract and/or misappropriation" (emphasis added)).

<sup>240</sup> See generally *Cotiviti, Inc. v. McDonald*, No. 19-CV-6559, 2021 WL 2784529, at \*6 (S.D.N.Y. July 2, 2021) (applying Delaware law) ("Further, Delaware courts have enjoined Defendants from working at a competitor where there is an inevitable and imminent danger of disclosure of . . . trade secrets to [competitor] and use of these trade secrets by [competitor]." (internal quotations omitted)); *id.* ("Because Plaintiffs have demonstrated that Defendants had access to Cotiviti's trade secrets during

*de Nemours & Co. v. American Potash & Chemical Corp.*,<sup>241</sup> which has been cited as one of the first judicial decisions to use the phrase “inevitability of disclosure.”<sup>242</sup> In that case, a duPont employee not bound by a non-compete who worked on a team focused on a secret chemical process was recruited by a rival company seeking to develop expertise in the same process. The court noted that duPont’s development of corporate expertise around the chemical process had been expensive and slow, and that the company had gone out of its way to protect its IP by securing patents and obliging employees to enter into confidentiality agreements.<sup>243</sup> The court had previously granted a temporary restraining order (“TRO”) barring the employment, which remained in effect; the opinion addressed the defendant’s subsequent motion for summary judgment, which the court denied, concluding that “the threat of unlawful disclosure [was] implicit in the situation itself.”<sup>244</sup>

Because of the posture of the case, the court’s decision addressed the merits of the trade secret claim, rather than the propriety of either preliminary or permanent injunctive relief. Indeed, in a footnote, the court deferred judgment on the “difficult and significant issue” of whether to grant a permanent injunction against employment in the absence of a non-compete.<sup>245</sup> Even so, by finding the plaintiff’s allegations of inevitable disclosure sufficient for purposes of summary judgment, and by allowing the TRO to remain in place, the court effectively endorsed the IDD, at least in connection with interim injunction relief.

While some subsequent courts have followed the lead of *duPont*,<sup>246</sup> the doctrine has been applied sparingly in Delaware, particularly in recent years. In a rare post-*PepsiCo* Delaware case purporting to apply the IDD, *W.L. Gore & Associates, Inc. v. Wu*,<sup>247</sup> the defendant employee, a high-level scientist who had entered into both confidentiality and non-compete agreements with the plaintiff company, displayed almost comically high levels of bad faith.<sup>248</sup> While the *Gore* court imposed an employment-

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their employment and that they have *substantially similar responsibilities* in their new roles, they have sufficiently alleged misappropriation of trade secrets as to all Defendants.” (emphasis added).

<sup>241</sup> 200 A.2d 428 (Del. Ch. 1964).

<sup>242</sup> *Id.* at 432; Eleanore R. Godfrey, Note, *Inevitable Disclosure of Trade Secrets: Employee Mobility v. Employer’s Rights*, 3 J. HIGH TECH. L. 161, 168–69 (2004).

<sup>243</sup> *E.I. duPont*, 200 A.2d. at 432.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 436 n.4.

<sup>246</sup> *E.g.*, *Am. Totalisator Sys., Inc. v. Automatic Totalisators (U.S.A.) Ltd.*, No. 5562, 1978 WL 4479, at \*3 (Del. Ch. Apr. 20, 1978); *Newell Rubbermaid Inc. v. Storm*, No. 9398, 2014 WL 1266827, at \*10 & n.61 (Del. Ch. Mar. 27, 2014).

<sup>247</sup> No. 263-N, 2006 WL 2692584 (Del. Ch. Sept. 15, 2006).

<sup>248</sup> In the words of the court:

related injunction extending beyond the term of the non-compete, it has to be treated as an outlier given the unusual circumstances of the case. The smattering of other recent Delaware IDD cases offer little insight into the nature and scope of the doctrine, including the conditions (if any) that might justify an injunction against employment.<sup>249</sup> Nonetheless, the Delaware courts have neither rejected nor expressly limited the holding in *duPont*, so employment-blocking injunctions remain theoretically available under Delaware law.<sup>250</sup>

d. *Pennsylvania*

While other jurisdictions have retreated from using the IDD to enjoin employment in recent decades, the strong form of the doctrine remains alive and well in Pennsylvania, at least according to a 2010 opinion from the federal Court of Appeals for the Third Circuit. *Bimbo Bakeries USA, Inc. v. Botticella*<sup>251</sup> involved a suit filed by the manufacturer of Thomas' English Muffins against one of its senior executives who had accepted a job with Hostess, a competing national baking company. The facts of the case closely resembled *PepsiCo*: the executive had high-level knowledge of the plaintiff's business and sales strategy, and he was one of only eight employees who were privy to the secret "nooks 'n crannies" English muffin

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Throughout this litigation, Wu has proven that he has no moral compass and cannot police himself or take responsibility for his actions. He has hidden evidence, destroyed evidence, manufactured evidence, testified evasively or unbelievably, and repeatedly failed to comply with this Court's Orders. Furthermore, Wu consistently has resisted legitimate discovery.

*Id.* at \*8.

<sup>249</sup> As in Ohio, Delaware courts sometimes consider inevitable disclosure as a reason to enforce express non-compete agreements. *See, e.g., Gen. Mills, Inc. v. Champion Petfoods USA, Inc.*, No. 20-CV-181, 2020 WL 915824, at \*10 (S.D.N.Y. Feb. 26, 2020) ("[W]hen addressing violations of non-compete agreements, courts—including in Delaware—commonly consider the harm arising from the likely, even if inadvertent, misuse of confidential information or customer relationships.").

<sup>250</sup> In *Cotiviti, Inc. v. McDonald*, a New York court applied Delaware law to reject a motion to dismiss a trade secret claim based on the IDD. *Cotiviti, Inc. v. McDonald*, No. 19-CV-6559, 2021 WL 2784529, at \*6–7 (S.D.N.Y. July 2, 2021). *In dictum*, the court read Delaware law to allow IDD-based injunctions against employment. *Id.* ("Further, Delaware courts have enjoined Defendants *from working at a competitor* where there is an inevitable and imminent danger of disclosure of . . . trade secrets to [competitor] and use of these trade secrets by [competitor]." (emphasis added) (internal quotation marks omitted) (quoting *Gore*, 2006 WL 2692584, at \*17)). It also suggested an expansive standard for evaluating inevitability. *See id.* ("Because Plaintiffs have demonstrated that Defendants had access to Cotiviti's trade secrets during their employment and that they have *substantially similar responsibilities* in their new roles, they have sufficiently alleged misappropriation of trade secrets as to all Defendants." (emphasis added)).

<sup>251</sup> 613 F.3d 102 (3d Cir. 2010).

recipe. The record showed evidence that the defendant had hidden his plans from his employer for months after accepting the new offer, and had downloaded at least some sensitive documents to his personal computer on his last day at the firm. He never testified on his own behalf in court, which the court used as a basis for a negative inference against him regarding his past behavior as well as his plans for the new job. Collectively, the district court viewed this evidence as demonstrating an affirmative intention to use his former employer's trade secrets in his new job, and entered a preliminary injunction blocking his employment pending an expedited trial.<sup>252</sup> The Third Circuit affirmed.<sup>253</sup>

*Bimbo* is notable not only for its rare invocation of the IDD to block employment, but also for the undemanding legal standard that it applied in reaching that conclusion. Rather than limiting the IDD to cases in which an employee could not perform her new job without relying on her former employer's secrets,<sup>254</sup> the district court held that a plaintiff need demonstrate only a "substantial threat of disclosure."<sup>255</sup> In reaching this conclusion, the district court adopted a questionable interpretation of state court precedent<sup>256</sup> and contradicted a recent Third Circuit opinion

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<sup>252</sup> *Id.* at 105–08, 112.

<sup>253</sup> *Id.* at 119.

<sup>254</sup> See, e.g., *Strata Mktg. Inc. v. Murphy*, 740 N.E.2d 1166, 1179 (Ill. App. Ct. 2000) (limiting injunctions against employment to situations in which employee "could not operate or function" in a new position without relying on the trade secrets); cf. *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1269 (7th Cir. 1995) ("[A] plaintiff may prove a claim of trade secret misappropriation by demonstrating that defendant's new employment will *inevitably* lead him to rely on the plaintiff's trade secrets." (emphasis added)).

<sup>255</sup> *Bimbo Bakeries USA, Inc. v. Botticella*, No. 10-0194, 2010 WL 571774, at \*12 (E.D. Pa. Feb. 9, 2010), *aff'd*, 613 F.3d 102 (3d Cir. 2010).

<sup>256</sup> The district court interpreted two Pennsylvania Superior Court opinions as adopting the "substantial threat" standard for employment injunctions, but neither opinion did so. In the first opinion, *Air Products & Chemicals, Inc. v. Johnson*, 442 A.2d 1114 (Pa. Super. Ct. 1982), the court affirmed an employment-restricting injunction based on a trial court's conclusion that the employee's duties in his new job "would make it impossible for [him] not to disclose trade secrets." *Id.* at 1124–25. The impossibility standard had come from an earlier opinion, *Emery Industries, Inc. v. Cottier*, by a federal district court in Ohio; the *Air Products* court embraced that standard and found it properly applied by the trial court below. *Id.* ("This was precisely the reasoning of the court in *Emery*, supra, which we find *persuasive*. Both courts held it would be impossible for the employee to perform his duties at the new employer without disclosing trade secrets." (emphasis added) (citing *Emery Indus., Inc. v. Cottier*, No. C-1-78-474, 1978 WL 21419 (S.D. Ohio Aug. 18, 1978))). Both the trial court and appellate opinions in *Bimbo* looked to different language in the *Air Products* opinion that could be read to support a different standard, but that language was ambiguous, unlike the above-quoted language that squarely adopted the "impossibility" approach.

The second opinion relied upon by the *Bimbo* courts involved a dispute between parties to a proposed corporate acquisition, in which the target firm had disclosed trade secrets to the potential acquirer in reliance upon its assurances that it was not simultaneously negotiating with the target's

that had (albeit in dictum) explicitly rejected an expansive notion of the IDD.<sup>257</sup> On appeal, the *Bimbo* panel decided to disregard the dictum and agreed with the district court's interpretation of the Pennsylvania precedents.<sup>258</sup> The upshot is that, at least nominally, Pennsylvania law offers the prospect of injunctive relief any time a new employee's job presents a "substantial threat" of disclosure. As a result, the prospect of an employment-blocking injunction looms large for Pennsylvania executives and others with detailed knowledge of their employer's affairs, even in the absence of a non-compete. Notably, neither the trial court nor the court of appeals in *Bimbo* considered whether the employer's failure to obtain a non-compete agreement should count against it in the trade secret claim. Instead, they gave the employer—at least temporarily—the equivalent of non-compete enforcement, without the support of a written contract, consideration, or a meeting of the minds.

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As a practical matter, courts very rarely invoke the IDD to prevent an employee from taking a new job when the employee (a) is not bound by a non-compete agreement, and (b) has neither actually misappropriated nor committed acts that demonstrate an intention to do so. As a result, even executives with substantial firm-specific knowledge arguably face little risk that a court will enjoin them from assuming a job with a competitor, as long as they behave in good faith and work with their new employer to avoid inadvertent use of their former employer's secrets.<sup>259</sup>

Even so, the fact that a handful of states have occasionally invoked the IDD to block employment means that employees in those states face a non-negligible risk of a lawsuit if they accept a directly competing job.

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direct competitor. *Den-Tal-Ez, Inc. v. Siemens Cap. Corp.*, 566 A.2d 1214, 1230–31 (Pa. Super. Ct. 1989). After the acquirer abandoned the deal and agreed to purchase said competitor, the target sued for trade secret misappropriation as well as claims of misrepresentation. *Id.* In granting an injunction blocking the acquisition for three years, the court cited the inevitable disclosure doctrine; it took pains to emphasize that "this is not an ordinary trade secrets case," but a case also involving procurement of a rival's information by improper means. *Id.* at 1230. Given the unusual circumstances of *Den-Tal-Ez*, it offers little guidance for cases involving former employees leaving for a comparable job.

<sup>257</sup> *Victaulic Co. v. Tieman*, 499 F.3d 227, 234 (3d Cir. 2007) ("Under Pennsylvania law, a broader injunction only lies when it is 'virtually impossible . . . [for the employee] to perform his . . . duties for [his new employer] without in effect giving [it] the benefit of [his] confidential information.'" (alteration in original) (quoting *Air Prods.*, 442 A.2d at 1123)).

<sup>258</sup> *Bimbo Bakeries*, 613 F.3d at 114.

<sup>259</sup> *Cf. Aetna, Inc. v. Fluegel*, No. CV074033345S, 2008 WL 544504, at \*7 (Conn. Super. Ct. Feb. 7, 2008) ("When balancing [an employer's] need to protect its trade secrets with a former employee's right to change jobs, it is unfair to create a noncompete agreement after the fact by enjoining [the employee] from performing his responsibilities at [the new employer] when he has credibly stated, in no uncertain terms, that he will uphold the confidentiality of [the] trade secrets.").



That risk is exacerbated by the broad language that courts use to describe the IDD, even while (usually) applying it narrowly. As discussed below, moreover, the fact that the IDD *sometimes* allows an employment-blocking injunction, at least in some states, creates ambiguity about its scope in other jurisdictions, including those that have so far applied the doctrine more narrowly.

### 3. The Use of the IDD to Enjoin Employment After Actual Misappropriation

While courts rarely enjoin employment based solely on the perceived “impossibility” that the employee can perform her new job without misappropriating, it is more common for courts to enter employment-related injunctions as a remedy for *actual* misappropriation, and when they do so, they often cite the IDD. Indeed, as discussed above, many of the strong-form IDD states have largely followed this path in recent years, entering injunctions only against employees who have proven themselves unwilling to meet their non-disclosure obligations. Courts in Arkansas,<sup>260</sup>

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<sup>260</sup> Cardinal Freight Carriers, Inc. v. J.B. Hunt Transp. Servs., Inc., 987 S.W.2d 642, 647 (Ark. 1999).

Indiana,<sup>261</sup> Iowa,<sup>262</sup> New York,<sup>263</sup> South Carolina,<sup>264</sup> Utah,<sup>265</sup> and Minnesota<sup>266</sup> have also used IDD-like language in this context, reasoning that someone who has intentionally misappropriated in the past will inevitably repeat the offense in the future. Typically, these courts invoke inevitability in the context of evaluating “irreparable harm” for purposes of crafting injunctive relief.<sup>267</sup> Some of these courts have enjoined employment

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<sup>261</sup> See *Ackerman v. Kimball Int'l, Inc.*, 652 N.E.2d 507, 510–11 (Ind. 1995) (upholding an injunction that imposed a greater restriction on the employee than the terms of the employee’s covenant not to compete after observing that the former employee’s “pre-departure harvesting” of his former employer’s confidential information elevated the “threat of disclosure”). Subsequent Indiana courts have interpreted *Ackerman* narrowly, applying only in situations involving demonstrated malfeasance by the departing employee. See *AL-KO Axis, Inc. v. Revelino*, No. 13-CV-1002, 2013 WL 12309288, at \*16 (N.D. Ind. Oct. 25, 2013) (“Though the Indiana Supreme Court has held that an employee can be enjoined from accepting or continuing subsequent employment in order to eliminate the threat of misappropriation, it did so only on the basis of facts indicating the departing employee’s bad faith and intent to use or disclose the trade secrets.” (citing *Ackerman*, 652 N.E.2d at 510–11)); see also *Metals & Additives Corp. v. Hornedo*, No. 49A02-1011-PL-1213, 2011 WL 3211119, at \*6 (Ind. Ct. App. July 28, 2011); *Dearborn v. Everett J. Prescott, Inc.*, 486 F. Supp. 2d 802, 820 (S.D. Ind. 2007) (“Indiana courts may entertain attempts to use the inevitable disclosure theory, but . . . the theory should remain limited to a rare and narrow set of circumstances in which the departing employee has acted in bad faith in taking or threatening to take valuable confidential information from the employer.”).

<sup>262</sup> See *Barilla Am., Inc. v. Wright*, No. 4-02-CV-90267, 2002 WL 31165069, at \*12–13 (S.D. Iowa July 5, 2002) (finding evidence that employee took documents, computer files, and other information from his former employer, concluding that “a threat of disclosure does exist” and enjoining employee “from taking any position in the pasta industry, so as to prevent any incentive, financial or otherwise, to disclose trade secret information”). A 1990 federal district court opinion granted a temporary restraining order barring an employee from taking a new job based solely on the risk of disclosure, but the opinion included little substantive discussion, and the TRO expired after nine days. See *Norand Corp. v. Parkin*, 785 F. Supp. 1353, 1355–56 (N.D. Iowa 1990). More recently, neither federal nor state courts in Iowa have granted employment-blocking injunctions based on inevitable disclosure in the absence of actual misappropriation or a non-compete agreement. *Interbake Foods, L.L.C. v. Tomasiello*, 461 F. Supp. 2d 943, 957 (N.D. Iowa 2006) (observing that “the Iowa Supreme Court has not affirmatively ruled on the viability of [the inevitable disclosure] doctrine”).

<sup>263</sup> *DoubleClick, Inc. v. Henderson*, No. 116914/97, 1997 WL 731413, at \*4, \*8 (N.Y. Sup. Ct. Nov. 7, 1997).

<sup>264</sup> *Nucor Corp. v. Bell*, No. 06-CV-02972, 2008 WL 9894350, at \*20, \*25 (D.S.C. Mar. 14, 2008).

<sup>265</sup> *Novell Inc. v. Timpanogos Rsch. Grp. Inc.*, No. 970400339, 1998 WL 177721, at \*27, \*29 (D. Utah Jan. 30, 1998).

<sup>266</sup> *Wyeth v. Nat. Biologics, Inc.*, No. 98-2469, 2003 WL 22282371, at \*26 (D. Minn. Oct. 2, 2003) (“Because Natural Biologics would inevitably use information gained from misappropriating the Brandon Process in any research or development related to processes for extracting estrogens from urine, the Court concludes that the scope of the injunction requested by Wyeth is appropriate.”), *aff’d*, 395 F.3d 897 (8th Cir. 2005).

<sup>267</sup> See, e.g., *Janus et Cie v. Kahnke*, No. 12 Civ. 7201, 2013 WL 5405543, at \*2 (S.D.N.Y. Aug. 29, 2013) (“[T]he doctrine has been used to support the required showing of irreparable harm where there is a substantial risk that a defendant will disclose trade secrets to a competing employer. But . . . only

altogether, while others have restricted the conditions of employment by, for example, limiting the employee's ability to work on certain technologies or to solicit groups of clients.

In *Cardinal Freight Carriers, Inc. v. J.B. Hunt Transport Services, Inc.*,<sup>268</sup> for example, the Arkansas Supreme Court enjoined several former employees of J.B. Hunt Transport Services ("Hunt"), a trucking company, from doing business with four of Hunt's key customers for a year in their new roles at Cardinal Freight Carriers ("Cardinal"), a Hunt competitor, after finding that the employees had revealed an intent to use their knowledge about Hunt's pricing models, future plans, and software capabilities to court those customers.<sup>269</sup> The record showed that Cardinal's president, after hiring the former Hunt employees, had encouraged them to use their former employer's secrets, including by "comparing Hunt's future plans and operational capabilities [to Cardinal's]," and that Cardinal employees had plans to use the former employees' knowledge of Hunt's proprietary software program "to exploit the holes" in that program.<sup>270</sup> Invoking the IDD to find that such misappropriation would inevitably continue, the court affirmed the one-year injunction applied by the lower court.<sup>271</sup>

Courts in other states have occasionally applied the IDD to block employment after finding actual misappropriation. In *DoubleClick, Inc. v. Henderson*,<sup>272</sup> a New York state court relied in part on the IDD to issue a six-month injunction against employment in the absence of a non-compete covenant, but only after finding "evidence of actual misappropriation" of trade secrets.<sup>273</sup> In *Nucor Corp. v. Bell*,<sup>274</sup> a federal district court sitting in South Carolina concluded that the state would

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in instances where there is evidence of the actual misappropriation of trade secrets, or where the plaintiff asserts a claim for breach of a non-compete agreement.").

<sup>268</sup> 987 S.W.2d 642 (Ark. 1999).

<sup>269</sup> *Id.* at 643, 647.

<sup>270</sup> *Id.* at 647.

<sup>271</sup> *Id.*; see *NanoMech, Inc. v. Suresh*, No. 13-CV-05094, 2013 WL 4805692, at \*6 (W.D. Ark. Sept. 9, 2013) (noting that *Cardinal Freight* did not grant an injunction based on the mere risk of disclosure, but on evidence that "the employees and their new employer *actually threatened* to use or disclose the former employer's trade secrets").

<sup>272</sup> No. 116914/97, 1997 WL 731413 (N.Y. Sup. Ct. Nov. 7, 1997).

<sup>273</sup> *Id.* at \*2-8; see also *Marietta Corp. v. Fairhurst*, 754 N.Y.S.2d 62, 65 (App. Div. 2003) (quoting *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999)). New York courts also invoke the IDD as a basis for enforcing the terms of express non-compete agreements. See, e.g., *Payment All. Int'l, Inc. v. Ferreira*, 530 F. Supp. 2d 477, 481 (S.D.N.Y. 2007) (noting while "proof of inevitable disclosure would not provide a basis for injunctive relief independent of an express restrictive covenant," the doctrine may be used "as a basis to support enforcement of an express restrictive covenant").

<sup>274</sup> No. 06-CV-02972, 2008 WL 9894350 (D.S.C. Mar. 14, 2008).

adopt the IDD despite its general policy against restraints on trade.<sup>275</sup> The court found that the former employee in the case, John Bell, had misappropriated trade secrets from his former employer, Nucor, a steel plant, and then acted in bad faith by attempting to hide this misappropriation.<sup>276</sup> The court applied the IDD to preliminarily enjoin Bell from working on certain steel manufacturing processes with a competing steel manufacturer, reasoning that Bell would inevitably disclose more of Nucor's trade secrets if permitted to work in this area.<sup>277</sup> The court refused, however, to enjoin him altogether from working in the new job, concluding that the balance of equities weighed in favor of a narrower injunction.<sup>278</sup> The court did not explicitly limit the IDD to situations involving actual misappropriation, but subsequent federal courts applying South Carolina law have restricted it in this way.<sup>279</sup>

In Utah, the court in *Novell Inc. v. Timpanogos Research Group Inc.*<sup>280</sup> relied on findings of both actual misappropriation and inevitable continued misappropriation to award a lengthy preliminary injunction that restricted three former employees from using their former employer's technology at a new company that they had formed.<sup>281</sup> The former employees of Novell had been intimately involved in developing a complex software product and had signed agreements identifying the software as "top secret" and promising not to use or disclose it outside the firm.<sup>282</sup> The court found that they violated that promise both by disclosing details of the software to third parties and by using its core architecture in

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<sup>275</sup> *Id.* at \*16.

<sup>276</sup> Before leaving his job at Nucor, Bell downloaded confidential documents onto a thumb drive, which he then viewed on a laptop belonging to his new employer, SeverCorr, a competing steel mill. *Id.* at \*6. He then attempted to hide this downloading and later viewing from the court by throwing out the thumb drive. *Id.* at \*6, \*20.

<sup>277</sup> *Id.* at \*19, \*24. In balancing the harms for purposes of evaluating the injunction, the court emphasized that the defendants had described this work as a small part of Bell's new job, so that the injunction would not substantially harm either him or his new employer. *Id.* at \*24.

<sup>278</sup> *Id.* at \*22-24 ("Assuming the worst-case scenario for plaintiff, it may lose a portion of its business; Bell would lose his livelihood and SeverCorr would lose an important resource.").

<sup>279</sup> *E.g.*, *Milliken & Co. v. Smith*, No. 10-CV-00301, 2011 WL 939211, at \*3 (D.S.C. Mar. 16, 2011) (noting that the *Nucor* opinion "was in the context of allegations of actual misappropriations"); *Belimed, Inc. v. Bleecker*, No. 22-CV-00891, 2022 WL 939819, at \*12 (D.S.C. Mar. 29, 2022) (agreeing with other federal courts interpreting South Carolina law, concluding that "application of the doctrine should only occur if [threatened misappropriations] are accompanied in the context of allegations of actual misappropriations," and finding such evidence lacking in the case before the court (internal quotation marks omitted) (quoting *Milliken*, 2011 WL 939211, at \*3)).

<sup>280</sup> No. 970400339, 1998 WL 177721 (D. Utah Jan. 30, 1998).

<sup>281</sup> *Id.* at \*28-30.

<sup>282</sup> *Id.* at \*1-2.

developing a competing product in their new firm.<sup>283</sup> Indeed, the defendants not only “took and intended to use Novell’s technology for [their] own use,” but one of them “even bragged to the press and to other Novell employees that he had under-documented the technology so that Novell would not know what he had, and that if Novell sued him, it would not even know what to sue for.”<sup>284</sup> Based on this evidence, the court found that the defendants had “misappropriated trade secrets, violated their contractual obligations of confidentiality, and breached their fiduciary duties to their former employer.”<sup>285</sup> It went on to discuss the IDD, concluding that the doctrine justified “an inference” that, based on the facts, future misappropriation was “inevitable” and warranted an injunction preventing the defendants from developing the same type of software product for an additional nine months.<sup>286</sup>

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Although these cases limit employment mobility in the absence of a non-compete and thus raise some of the same concerns as *PepsiCo*,<sup>287</sup> they do not present the same risk of chill as the *PepsiCo* standard, which largely presumes misappropriation based on similarities between two jobs.<sup>288</sup> By requiring proof of actual misappropriation, jurisdictions can assure employees not bound by non-compete agreements that if they honor their non-disclosure obligations, they can change jobs without risking an injunction.<sup>289</sup> Employees and their new employers can insulate themselves more completely by using firewalls or other devices to avoid unintentional disclosure; but such efforts are unnecessary if the standard requires actual misappropriation.<sup>290</sup>

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<sup>283</sup> *Id.* at \*20.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at \*26.

<sup>286</sup> *Novell*, 1998 WL 177721, at \*29. Upon the filing of the lawsuit, the court had granted a temporary restraining order, which had been in place for nine months when the court entered its preliminary injunction, making the overall bar eighteen months long. *Id.* at \*30.

<sup>287</sup> See *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1268 (7th Cir. 1995); see also *supra* text accompanying notes 169–170. In particular, they impose employment restrictions that were not explicitly contemplated by any contract between the parties.

<sup>288</sup> See *PepsiCo*, 54 F.3d at 1270–71. Although *PepsiCo* involved some behavior by the defendant and his new employer that the court found problematic, none of the behavior related directly to any attempt to take or use the former employer’s trade secrets.

<sup>289</sup> See *Janus et Cie v. Kahnke*, No. 12 Civ. 7201, 2013 WL 5405543, at \*3 (S.D.N.Y. Aug. 29, 2013).

<sup>290</sup> Cf. *Great Lakes Home Health Servs. Inc. v. Crissman*, No. 15-CV-11053, 2015 WL 6667772, at \*4 (E.D. Mich. Nov. 2, 2015) (“Crissman rebutted Great Lakes’s presumption that she had or would use and disclose any confidential information by submitting a signed statement that she worked with CHI to create a firewall that preclude[d] [her] from disclosing any confidential [ ] information to CHI.” (alteration in original) (internal quotation marks omitted)).

Yet even in actual-misappropriation jurisdictions, courts have sometimes created confusion by refusing to foreclose the possibility of the strong-form IDD in “the rarest of cases.”<sup>291</sup> Jilted employers, of course, always view their case as the exceptional one; by leaving the door open, however slightly, to non-misappropriation-based IDD claims, such language gives fodder for threats, cease and desist letters, and meritless lawsuits.<sup>292</sup>

#### 4. The Use of Inevitability in Other Doctrinal Contexts

In the majority of U.S. states, courts either have not resolved the IDD’s status or have put it to such disparate uses that it loses coherence as a distinct “doctrine.”<sup>293</sup> Many courts refer to the “doctrine” any time that inevitability appears factually relevant to a dispute involving trade secrets or non-competes. The high risk that an employee would use her knowledge of corporate strategy in the same job with a direct competitor, for example, might play a role in evaluating the reasonableness of an express non-compete agreement—a finding that fits squarely within existing employment law doctrine rather than creating a new form of relief.<sup>294</sup> While individual outcomes in these cases do not stretch the limits of trade secret law as *PepsiCo* did, the use of the IDD label, paired with courts’ tendency to cite *PepsiCo* as authority, leads to confusion about which version of the doctrine prevails in the state. A few states have

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<sup>291</sup> *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999). In describing these rare cases, moreover, the court focused on the nature of the jobs and not evidence of the defendant’s bad behavior. *Id.* (“Factors to consider in weighing the appropriateness of granting injunctive relief are whether: (1) the employers in question are direct competitors providing the same or very similar products or services; (2) the employee’s new position is nearly identical to his old one, such that he could not reasonably be expected to fulfill his new job responsibilities without utilizing the trade secrets of his former employer; and (3) the trade secrets at issue are highly valuable to both employers. Other case-specific factors such as the nature of the industry and trade secrets should be considered as well.”).

<sup>292</sup> See *Janus*, 2013 WL 5405543, at \*4 (dismissing plaintiff’s complaint, which relied on the language from *Earthweb* to assert an IDD claim without any evidence of misappropriation).

<sup>293</sup> Occasionally, courts recognize this tension. See, e.g., *IDT Corp. v. Unlimited Recharge, Inc.*, No. 11-4992, 2012 WL 4050298, at \*15 (D.N.J. Sept. 13, 2012) (“The Court is unable to find a case which acknowledges inevitable disclosure as a viable cause of action in New Jersey. The case law cited by Plaintiff refers to inevitable disclosure as a doctrine that may be applied in the context of independent causes of action to award injunctive relief. These cases do not establish inevitable disclosure as an independent cause of action.” (citations omitted)).

<sup>294</sup> Cf. *Janus*, 2013 WL 5405543, at \*2 (rejecting “the extraordinary request that this Court be the first [in New York] to recognize the inevitable disclosure of trade secrets as a stand-alone claim in a complaint bereft of any allegations that [defendant] misappropriated trade secrets or breached a non-compete agreement” (emphasis added)).

spoken clearly, limiting the IDD to defined situations such as disputes involving written non-competes.<sup>295</sup> In other states, however, courts sometimes speak in broad terms about the doctrine, even while applying it to a narrow set of facts or granting limited relief. Other courts speculate about whether the state would adopt the IDD, but find it unnecessary to resolve the question because the plaintiff's allegations would fall short in any event.<sup>296</sup> As a result, lawyers, scholars, and even judges struggle to understand the doctrine's status in many of these states, including whether it can be used to block employees from changing jobs.<sup>297</sup>

a. *Non-Competes*

Courts commonly invoke the IDD in cases involving express non-compete agreements. Inevitability can play three related but distinct roles in these cases: in evaluating the reasonableness of the agreement,<sup>298</sup> in assessing whether the defendant's proposed employment threatens the legitimate interests underlying the contract,<sup>299</sup> and in weighing the equities for purposes of injunctive relief.<sup>300</sup> If courts explicitly limited the

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<sup>295</sup> *E.g.*, *Payment All. Int'l, Inc. v. Ferreira*, 530 F. Supp. 2d 477, 481 (S.D.N.Y. 2007) (noting that under New York law, "proof of inevitable disclosure would not provide a basis for injunctive relief independent of an express restrictive covenant" or actual misappropriation).

<sup>296</sup> *E.g.*, *Drayton Enters., L.L.C. v. Dunker*, No. A3-00-159, 2001 WL 629617, at \*3 (D.N.D. Jan. 9, 2001).

<sup>297</sup> *E.g.*, *Corp. Techs., Inc. v. Harnett*, 731 F.3d 6, 14 (1st Cir. 2013) (describing the status of the inevitable disclosure doctrine in Massachusetts as a "thicket").

<sup>298</sup> *E.g.*, *Branson Ultrasonics Corp. v. Stratman*, 921 F. Supp. 909, 913 (D. Conn. 1996) (finding non-compete agreement reasonable, in part, because "it is likely, if not inevitable, that such use and disclosure will occur" and it "would be nearly impossible" for the employer "to detect any such use or disclosure"); *Ikon Off. Sols., Inc. v. Usherwood Off Tech., Inc.*, No. 9202-08, 2008 WL 5206291, at \*11 (N.Y. Sup. Ct. Dec. 12, 2008) ("[P]roof of inevitable disclosure may also form the basis of a legitimate employer interest in enforcing a mutually agreed upon covenant against post-employment competition.").

<sup>299</sup> *E.g.*, *Pitts v. Fire Extinguisher Sales & Servs. of Ark. LLC*, No. 21-CV-00075, 2021 WL 4860812, at \*10 (E.D. Ark. June 11, 2021) ("While not strictly necessary for the preliminary injunction in this case, the Court also finds that Mr. Pitts working in the fire suppression industry during the time frame and within the geographical area defined by the Noncompetition Agreement would more likely than not result in an inevitable disclosure of FESSAR's trade secrets."); *MeadWestvaco Corp. v. Bates*, 91 Va. Cir. 509, 525 (2013) ("In light of the foregoing, the court finds that, under the present circumstances, in which the parties previously entered a non-compete agreement and that thus there is no concern about an after-the-fact creation of such a restriction, Virginia would likely apply the doctrine of inevitable disclosure to determine whether threatened misappropriation exists, assuming the non-compete is enforceable."); *cf.* *Gov't Tech. Servs., Inc. v. IntelliSys Tech. Corp.*, 51 Va. Cir. 55, 56 (1999) ("Virginia does not recognize the inevitable disclosure doctrine.").

<sup>300</sup> *See, e.g.*, *Panera, LLC v. Nettles*, No. 16-CV-1181, 2016 WL 4124114, at \*4-5 (E.D. Mo. Aug. 3, 2016).

use of inevitability to these contexts, they would not only clear up the muddle surrounding the IDD, but also ameliorate the resulting chill. In other words, if courts considered “inevitability” only in the context of non-compete agreements, employees who have not signed such agreements could rest easy in the knowledge that they could change jobs without facing an injunction.

b. *Injunctions Against Disclosure or Conditions of Employment.*

In some states, courts have invoked the IDD to find a compelling risk of disclosure that justifies injunctive relief, but have fashioned that relief narrowly, to avoid an injunction on employment. Sometimes these courts enjoin use or disclosure; other times, they limit the employee’s functions in the new job, to avoid situations in which the confidential information would inevitably affect her decisions.<sup>301</sup> Typically, these courts require evidence of actual misappropriation or behavior that manifests an intent to use the former employer’s trade secrets in the new job.<sup>302</sup> Of course, if carried to an extreme, this type of injunction could effectively constitute a bar on employment, so the distinction between these cases and *PepsiCo* is one of degree rather than kind; to address this concern, courts crafting this type of relief give careful attention to the nature of the job and the injunction’s impact on the employee’s ability to function in the role.<sup>303</sup> But least in some cases, limited injunctive relief can offer a middle ground when the court believes that certain aspects of the new job will make it hard to avoid trade secret use or disclosure.

c. *Dictum*

Finally, the IDD makes frequent appearance in dictum, with courts musing about its place in their state’s law but declining to settle the issue because the case before them is distinguishable on its facts. In North Carolina, for example, a 1996 federal district court predicted that the state would adopt the employment-blocking version of the IDD, even while

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<sup>301</sup> See, e.g., *Nucor Corp. v. Bell*, No. 06-CV-02972, 2008 WL 9894350, at \*19, \*24 (D.S.C. Mar. 14, 2008) (applying the IDD to enjoin employee from working on particular technologies).

<sup>302</sup> See generally *H & R Block E. Tax Servs., Inc. v. Enchura*, 122 F. Supp. 2d 1067, 1075 (W.D. Mo. 2000) (“This suggests that demonstrated inevitability alone is insufficient to justify injunctive relief; rather, demonstrated inevitability *in combination with* a finding that there is unwillingness to preserve confidentiality is required.” (emphasis in original)).

<sup>303</sup> See *Nat’l Starch & Chem. Corp. v. Parker Chem. Corp.*, 530 A.2d 31, 33 (N.J. Super. Ct. App. Div. 1987) (affirming injunction that affected only five to ten percent of employee’s job responsibilities, according to the employee’s own testimony).



finding it inapplicable to the case before it.<sup>304</sup> By 2018, however, a state trial court pointed out that no North Carolina court had yet applied the doctrine to block employment.<sup>305</sup> Without definitively rejecting the doctrine on principle, the court “decline[d] at this time to adopt and apply” it.<sup>306</sup> This pattern repeats itself in state after state: courts entertain the doctrine, sometimes skeptically and sometimes with approval, but ultimately decline to resolve its status in their state.<sup>307</sup> The result is continued uncertainty over the doctrine’s power to block employee movement, which undoubtedly explains why executive mobility suffers in response to a state’s embrace of any version of the IDD.<sup>308</sup>

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<sup>304</sup> *Merck & Co. Inc. v. Lyon*, 941 F. Supp. 1443, 1460 (M.D.N.C. 1996) (concluding the present facts warranted only an injunction against use or disclosure despite “appear[ance] that North Carolina would enjoin threatened misappropriation based upon an inevitable disclosure theory”); see *Analog Devices, Inc. v. Michalski*, 579 S.E.2d 449, 455 n.4 (N.C. Ct. App. 2003) (“While North Carolina case law does allow for an injunction preventing an employee from working for a former employer’s competitor where there is a showing of bad faith, underhanded dealing, or inferred misappropriation (justified by circumstances tending to show the new employer plainly lacks comparable technology), no showing has been made that misappropriation is imminent or occurring.”).

<sup>305</sup> *Se. Anesthesiology Consultants, PLLC v. Charlotte-Mecklenburg Hosp. Auth.*, No. 18 CVS 5899, 2018 WL 3304441, at \*19 (N.C. Super. Ct. June 22, 2018) (“Notwithstanding the federal district court’s prediction, which after nearly twenty-two years has still not come to fruition, the Court declines at this time to adopt and apply the inevitable disclosure doctrine.”).

<sup>306</sup> *Id.*

<sup>307</sup> *Compare, e.g., Phoseon Tech., Inc. v. Heathcote*, No. 19-CV-2081, 2019 WL 7282497, at \*11 (D. Or. Dec. 27, 2019) (Oregon’s “willingness by legislation to reduce the scope and application of noncompetition agreements . . . does not yield confidence that the doctrine will be adopted in Oregon anytime soon.”), and *AFGD, Inc. v. Tri-Star Glass, Inc.*, No. 05-CV-300, 2005 WL 8175945, at \*4 (N.D. Okla. June 7, 2005) (“In light of the evidence presented, the Court finds that Plaintiff is unlikely to succeed at this point on the merits of its trade secret claim. Plaintiff has made some showing that its pricing structures are confidential, but made no showing that Defendants are misappropriating any of Plaintiff’s confidential information. The Court declines to adopt the inevitable disclosure doctrine at this time, given Oklahoma’s public policy as articulated in *Central Plastics*, allowing former employees to compete with their former employers.” (internal quotation marks omitted)), and *Sunbelt Rentals, Inc. v. McAndrews*, 552 F. Supp. 3d 319, 332 (D. Conn. 2021) (noting “the disfavored nature of the inevitable disclosure doctrine,” but concluding that “even if the inevitable disclosure doctrine were to apply to Plaintiff’s trade secrets claims, Plaintiff has not shown that it would be likely to succeed on the merits on those claims”), with *Drayton Enters., L.L.C. v. Dunker*, No. A3-00-159, 2001 WL 629617, at \*3 (D.N.D. Jan. 9, 2001) (citing *PepsiCo* with apparent approval but denying injunction because it is “unclear the extent to which disclosure is inevitable”). See generally *NanoMech, Inc. v. Suresh*, No. 13-CV-05094, 2013 WL 4805692, at \*6 (W.D. Ark. Sept. 9, 2013) (“[E]ven though the Arkansas Supreme Court has expressed approval of the inevitable-disclosure doctrine in Trade Secrets Act cases, and has stated that the doctrine may justify the issuance of preliminary injunctions under certain circumstances, it has not yet affirmed the issuance of an injunction based on the application of the doctrine.”), *aff’d*, 777 F.3d 1020 (8th Cir. 2015).

<sup>308</sup> See *Klasa et al.*, *supra* note 45; *Flammer & Kacperczyk*, *supra* note 49.

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As this discussion has demonstrated, the IDD has no consistent meaning across—and often within—jurisdictions. Courts almost never apply it to block employment in the absence of a non-compete. At the same time, however, courts across multiple jurisdictions cite *PepsiCo* as the source of their state’s version of the IDD, and fail to repudiate the most expansive reading of the Seventh Circuit’s opinion. As a result, the shadow of *PepsiCo* extends over a sizable portion of U.S. states.

### III. The Economic Effects of the IDD

The cloud of uncertainty surrounding the IDD has not only created confusion in the case law,<sup>309</sup> but has discouraged executives from changing jobs. Recent empirical studies have shown that the specter of the IDD has a negative impact on employment mobility within a state, particularly among executives and others who typically have knowledge of trade secrets. A state need not formally adopt the doctrine; a court’s nod to the IDD (in whatever form) as consistent with state trade secret principles is sufficient. In contrast, when a court either rejects the IDD or signals its incompatibility with a state’s trade secret principles, executive mobility rebounds.<sup>310</sup> Because the most vibrant and innovative regional economies are also the most fluid and dynamic,<sup>311</sup> these shifts in mobility undoubtedly affect the broader economy.

To understand this empirical evidence requires some background on the IDD’s treatment within the economics and finance literature. Studies of the doctrine’s economic impact are complicated by its incoherence and variability in meaning across (and sometimes within) states. In particular, scholars have struggled to fix the dates of adoption or rejection in particular states because of ambiguity about what, exactly, courts are doing when they discuss the IDD. As a formal legal matter, a court does not adopt a doctrine when it discusses it favorably but declines to apply it or to resolve its status in the state. As discussed above, moreover, courts

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<sup>309</sup> The doctrine’s multiplicity of meanings has confused legal scholars as well; the law review literature reflects a range of views about what the IDD is and when it applies. Compare David Lincicum, *Inevitable Conflict?: California’s Policy of Worker Mobility and the Doctrine of “Inevitable Disclosure,”* 75 S. CAL. L. REV. 1257, 1269 (2002), and Thomas A. Muccifori & Benjamin D. Morgan, *Exploring the Nooks and Crannies of the Inevitable Disclosure Doctrine*, 287 N.J. LAW. 59, 59 (2014), and Flowers, *supra* note 1, at 2211 (defining the IDD as applying in the absence of a non-compete agreement), with Rowe, *supra* note 1, at 186, and Phillips, *supra* note 1, at 395 (defining the IDD as capable of applying both in the presence and absence of a non-compete agreement).

<sup>310</sup> Klasa et al., *supra* note 45.

<sup>311</sup> See *supra* note 20 and accompanying text.

often purport to adopt the IDD but use it to evaluate non-competes or to set remedies for actual misappropriation<sup>312</sup>—scenarios far removed from those in which inevitability alone justifies an employment-blocking injunction.

Rather than wrestling with these nuances and distinguishing between the different shades of the IDD, however, scholars often set dates of adoption and rejection based on their reading of the tea leaves in opinions discussing the doctrine. Dates of adoption, for example, may include opinions that discuss the IDD favorably while distinguishing it on the facts. If the studies acknowledged this move, it would not undermine their findings; to the contrary, it would demonstrate that markets respond not only to definitive doctrinal rulings, but also to signals about the direction that a state's law might take. But when they fail to acknowledge the move, their analysis is inaccurate and misleading from a legal perspective, because it mischaracterizes the doctrine's status and leads to a mistaken impression that many states have adopted its strong form.

In a commonly cited 2018 article in the *Journal of Financial Economics*, for example, Sandy Klasa and coauthors attempt to examine the relationship between a firm's relative risk of losing its trade secrets, on the one hand, and the nature of the firm's capital structure decisions, on the other.<sup>313</sup> They hypothesize that firms facing a greater risk of losing trade secrets to competitors would adopt more conservative capital structures than less vulnerable firms. To measure that effect, they turn to the IDD, reasoning that a state's adoption of the IDD reduces the risk of loss of trade secrets for firms in that state, and should therefore lead to more aggressive capital strategies.<sup>314</sup> Their results show that after a state adopts the IDD, it sees a relative decline in the mobility of workers in "managerial and related occupations" to rival firms.<sup>315</sup> The authors focus on these employees based on the assumption that they are most likely to have knowledge of firm trade secrets.<sup>316</sup>

Apart from the contestable assumption that the IDD's principal impact is to make trade secrets more secure rather than to inhibit the flow of employees' experience, skills and knowledge,<sup>317</sup> the Klasa study reflects the same definitional muddle as the case law. In the introduction that sets

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<sup>312</sup> See *supra* Section 11.B.3.

<sup>313</sup> Klasa et al., *supra* note 45.

<sup>314</sup> *Id.* at 267.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> The authors simply assume that the principal effect of the IDD is to limit the loss of trade secrets; as discussed below, however, it seems equally plausible that firms' capital strategies are responding to the risk of loss of talented executives and the vision and ambition with which they lead.

up the study, the article defines the IDD in its the strong, mobility-restricting iteration:

The IDD is a legal doctrine that states that a firm's former employee can be prevented from working for a rival firm if this would "inevitably" lead the employee to divulge the firm's trade secrets to the rival. *It is applicable even if the employee did not sign a noncompete or nondisclosure agreement with the firm, if there is no evidence of bad faith or actual wrongdoing, or if the rival is located in another state.*<sup>318</sup>

Despite this definition, however, the dates of adoption used in the study include several opinions that applied a narrower version of the IDD— or that failed to adopt it at all. For Connecticut, for example, the study cites the 1996 *Branson Ultrasonics Corp. v. Stratman*<sup>319</sup> opinion, which involved a non-compete agreement and found the agreement reasonable, in part, based on a theory of inevitable disclosure.<sup>320</sup> It did not involve the strong-form IDD as defined by the study. Nor did the cited opinion for Missouri, which discussed inevitable disclosure but found it inapplicable on the facts.<sup>321</sup> The decision identified by the study as adopting the IDD in Kansas described the doctrine as unresolved in the state, concluding that it did "not need to determine if Kansas courts would adopt this doctrine because even if this doctrine were the law in Kansas, Plaintiff's claim, insofar as it relies on this theory, would be barred by the statute of limitations."<sup>322</sup>

We have no reason to doubt the robustness of Klasa's conclusion that, by entertaining the IDD and not rejecting it, courts support an impression of the doctrine as viable in a state, which in turn shapes both employee and firm behavior. Indeed, given the muddled state of the doctrine, it should come as no surprise that markets respond to any hint about whether a state's law might allow non-contractual, inevitability-based injunctions against employment. Yet by bundling so many different treatments of the doctrine into crude categories of adopt or reject, the study over-simplifies and leaves an inaccurate impression of the doctrine's penetration across states. We encourage scholars who study the IDD to take care with how they characterize the doctrine, to avoid exacerbating the existing chaos.

Other recent studies have relied upon variants of the Klasa dates to find a statistically significant relationship between the IDD and employment mobility within a state. In a 2022 article, for example, Deqiu Chen and coauthors conclude that a state's adoption or rejection of the

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<sup>318</sup> Klasa et al., *supra* note 45, at 267 (emphasis added).

<sup>319</sup> 921 F. Supp. 909 (D. Conn. 1996).

<sup>320</sup> *Id.* at 913.

<sup>321</sup> H & R Block E. Tax Servs. Inc. v. Enchura, 122 F. Supp. 2d 1067, 1075–76 (W.D. Mo. 2000).

<sup>322</sup> Bradbury Co., Inc. v. Teissier-duCros, 413 F. Supp. 2d 1203, 1209 (D. Kan. 2006).

IDD has a significant impact on voluntary CEO turnover in the state.<sup>323</sup> As dates of adoption and rejection, the authors rely upon a combination of the Klasa dates and a list of rejection dates from a 2019 article by Caroline Flammer and Aleksandra Kacperczyk.<sup>324</sup> Like the Klasa list, the Flammer and Kacperczyk version has some questionable entries, including at least two opinions that explicitly decline to resolve the IDD's status under the relevant state law.<sup>325</sup> The Chen results, therefore, bundle definitive doctrinal adoptions and rejections together with opinions that only hint at the IDD's status in a state, and reinforce the notion that employment markets respond to these hints, just as they do to changes in the law.<sup>326</sup>

Together, the Klasa, Chen, and related studies demonstrate empirically what we have warned throughout this Article: that the ambiguity surrounding the IDD has real costs for employees in states that have not renounced it. By equivocating about the IDD's status and thus perpetuating the perception that a court might enjoin an executive from assuming a job with a competitor, courts distort the employment marketplace. Only by clearly rejecting the employment-blocking version of the IDD can states correct that distortion, protect employees' right to exploit their skills and experience, and preserve restrictive-covenant law as the exclusive domain for employment restraints.

This evidence of the mobility-restricting impact of the IDD takes on added significance when considered in light of the relationship between

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<sup>323</sup> Wen Chen, Sumi Jung, Xiaoxia Peng & Ivy Xiyang Zhang, *Outside Opportunities, Managerial Risk Taking, and CEO Compensation*, 97 ACCT. REV. 135, 136 (2022) (finding an increase in CEO mobility in response to states' rejection of the IDD, and a decrease in mobility in response to adoption of the doctrine); see also I.P.L. Png & Sampsa Samila, *Trade Secrets Law & Mobility: Evidence from "Inevitable Disclosure"* (unpublished manuscript) (finding that a state's adoption of the IDD has an adverse effect on the mobility of professionals, with particularly strong effects on employees in sales-related and management roles); Deqiu Chen, Huasheng Gao & Yujing Ma, *Human Capital-Driven Acquisition: Evidence from the Inevitable Disclosure Doctrine*, 67 MGMT. SCI. 4643, 4661 (2021) (finding (1) that merger-and-acquisition activity increases when a state adopts the IDD, presumably because the IDD makes it more difficult to hire employees without an acquisition, and (2) that the IDD increases the retention of employees in the post-acquisition period).

<sup>324</sup> Flammer & Kacperczyk, *supra* note 49.

<sup>325</sup> For Wisconsin, for example, Flammer and Kacperczyk list *Clorox Co. v. S.C. Johnson & Son Inc.*, 627 F. Supp. 2d 954 (E.D. Wis. 2009), as an opinion that rejected the IDD. The court in that case, however, applied California rather than Wisconsin law, in part because of the uncertainty surrounding the IDD's status in Wisconsin. See *id.* at 967 (noting that "[t]he parties have yet to cite a Wisconsin court that has addressed whether the inevitable disclosure doctrine is viable under Wisconsin's trade secret laws"). The case listed as rejecting the doctrine in New Hampshire likewise applied California law. *Allot Commc'ns, Ltd. v. Cullen*, No. 10-E-0016, 2010 WL 6620308 (N.H. Super. Ct. Feb. 7, 2010).

<sup>326</sup> See also Ke Na, *supra* note 49 (using the Klasa and Flammer/Kacperczyk dates to find that a state's rejection of the IDD results in greater use of performance-based CEO compensation within the state, thus suggesting that high performers are able to benefit from increased outside employment opportunities in the wake of IDD rejection).

mobility restrictions and economic dynamism in a state.<sup>327</sup> As Michigan's experience demonstrates, states that inhibit employee movement risk losing their most dynamic and creative innovators to states with less restrictive laws, which can in turn stifle the state's innovation economy. The Klasa and Chen studies suggest that the IDD may have this same dampening effect, even in states that have not adopted the most aggressive form of the doctrine.<sup>328</sup>

#### IV. Limiting the IDD's Fallout

The inevitable disclosure doctrine needs reform.

The most extreme version of the doctrine not only limits employee mobility through *ex post*, non-contractual intervention, but it also displaces the legislature's role as the principal architect of state employment law. This concern has special salience in this moment of increased scrutiny of non-compete agreements and other mobility restraints. Indeed, as states add rigor and precision to their laws governing non-compete agreements, they strengthen the case for rejecting the IDD. If the legislature has decided to make non-competes inapplicable to certain groups of employees, surely it doesn't intend to give employers a back-door way to limit those same employees' prospects. On the other hand, if the law *does* allow senior executives and other enumerated employees to be constrained by non-competes, their employers' failure to obtain such an agreement indicates either neglect or an inability to obtain the employee's consent to the restrictive term. Either way, applying the IDD would undermine the existence and limits of the specialized rules governing non-compete agreements.

For these and other reasons, very few courts have applied the IDD in its most aggressive form; given its limited value and considerable costs, state legislatures would do well to reject it explicitly.<sup>329</sup> The federal Defend Trade Secrets Act provides a model, authorizing courts to grant injunctive relief to prevent misappropriation "on such terms as the court deems reasonable, provided the order does not . . . prevent a person from entering into an employment relationship, and that conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on the information the person

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<sup>327</sup> See *supra* note 20 and accompanying text.

<sup>328</sup> See Klasa et al., *supra* note 45, at 275-76 Chen et al., *supra* note 323, at 20-23, 33.

<sup>329</sup> In at least one state—Massachusetts—the legislature's failure to address the IDD in recent legislation addressing trade secrets and non-compete agreements has created a debate over its viability. See *generally* Beck et al., *supra* note 4.

knows.”<sup>330</sup> By incorporating similar language into their trade secret statutes, states could serve three related goals. First, they would protect the legitimacy of state non-compete law, by eliminating the IDD loophole and forcing employers to use contract law to achieve any limits on employees’ ability to assume a new job. Second, by requiring evidence of wrongdoing or concrete plans to misappropriate as a prerequisite for injunctions regarding *other* conditions on employment—such as restrictions on working on particular technologies, or soliciting particular sets of clients—states would enable employees (and their new employers) to avoid abusive lawsuits by preemptively demonstrating their intention to honor non-disclosure obligations. At the same time, courts would retain the equitable power to impose stricter limits on individuals who have shown themselves either incapable or unwilling to honor their duties to their former employer. Third, this discrete legislative fix would remove the fog of uncertainty about the potency of the IDD and thus reduce the drag on employee mobility caused by the doctrine’s shadow.

Even without legislative action, courts could go a long way toward minimizing the IDD’s adverse impact by expressly rejecting the employment-blocking version of the doctrine, as courts in California and Maryland have done. The vast majority of states that purport to follow the IDD have never used it to enjoin employment in the absence of a non-compete, undoubtedly out of a combination of deference to non-compete law and normative concerns about non-negotiated limits on employee mobility. Yet courts’ failure to say that explicitly creates uncertainty and confusion over whether the doctrine could *ever* be used to block mobility in a state. Courts do not need legislative action to reject this version of the IDD. In states that enforce non-compete agreements that meet certain substantive requirements, courts could conclude by negative implication that *only* contracts meeting those requirements justify an injunction against employment. In other states, courts could follow California’s lead to conclude that non-contractual restraints on mobility would offend the principles that led the state to prohibit non-competes.

Ruling out the most radical form of the IDD would go a long way toward reducing the chill associated with the doctrine. Employees could have confidence that, so long as they did not sign a non-compete agreement, their employer could not entirely prevent them from changing jobs. It would not, however, resolve the more general ambiguity about the doctrine’s applicability, meaning, and scope. The broader doctrinal morass

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<sup>330</sup> 18 U.S.C. § 1836(b)(3)(A)(i). As discussed above, some courts appear confused about this language and its relationship to the IDD, at least in part because they have conflated state and federal law. While we trust that the courts will, in time, properly interpret the statute, increased uniformity across state and federal law would help to avoid that kind of confusion and enable consensus over the relationship between trade secret law and employment mobility.

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surrounding “inevitability” and its role in trade secret and non-compete analysis requires separate attention. We suggest three straightforward reforms.

First, we urge courts to abandon the use of the label “inevitable disclosure *doctrine*” to describe anything other than a claim that an employee’s new position—*alone*—raises the risk of use or misappropriation of trade secrets. Settling on a singular, consistent definition will force more precise and disciplined analysis and will (as discussed above) likely lead to a rejection of the doctrine in most states. It will also sharpen the doctrine’s blurry lines and reduce the risk that other references to inevitability will be interpreted as an adoption of the IDD. In cases involving the reasonableness of non-compete agreements, for example, courts could consider the risk (or inevitability) of trade secret disclosure without purporting to invoke a doctrine.

Second, to the extent that state law allows employment-related injunctions as a remedy for actual misappropriation and related misdeeds, we encourage courts to apply that remedy sparingly, and only against parties whose wrongdoing relates directly to the trade secrets themselves. Employees who download reams of confidential documents on their way out the door, for example, signal an intent to misuse information; employees who are less than forthcoming about the fact that they’re considering a new job, on the other hand, do not. Courts should insist on compelling evidence to rebut the ordinary presumption that employees can and will honor their non-disclosure obligations in their new jobs. They should not invoke this extraordinary form of relief absent concrete evidence of active wrongdoing with respect to trade secrets.

Third, given our evolving understanding of the relationship between employee mobility and a healthy economy, courts should recognize the limitations of their expertise and should defer to the legislature to set the rules for employment restraints. Executives and other employees change jobs all the time. Sometimes, their knowledge of their former employer’s strategy and business plans will infect their judgment when they leave to work for a competing firm. In some states, policymakers may view that as a reason to enforce contracts that restrict them from taking those jobs. In other states, the legislature may view that as the price of operating in a vibrant, innovative, spark-filled economy. The law is not designed to optimize short-term outcomes for individual firms; it aims to achieve the best outcomes for society. Particularly as economists demonstrate the positive economic impact of employee movement, courts need to step back and resist their impulse to protect spurned employers from short-term harms, in favor of a longer-term and bigger-picture perspective.



**Conclusion**

At a moment when state and federal governments are reckoning over the economic and human consequences of limitations on employment mobility, the time is ripe to revisit the IDD. This Article has revealed the confusion and inconsistency that characterizes the doctrine, as well as the cost of that confusion for employees and the economy. The time has come to lay the IDD to rest.