

HAS THE CUTSA FURTHERED OR FRUSTRATED UNDERLYING THEORIES OF TRADE SECRETS LAW?*

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I. INTRODUCTION

Since the development of trade secrets law from the common law in the 1800s, scholars have debated the purposes and theories underlying trade secrets law.¹ The most often cited theories include trade secrets as property rights, as an enforcement mechanism for relational duties between employers and employees, and, most recently, as protection of commercial information to promote efficiency in the marketplace.² As trade secrets law evolved, each state developed its own body of common law varying from state to state.³ While the Uniform Trade Secrets Act (UTSA) and its 1985 revisions are the most recent attempts to normalize standards and reaffirm trade secrets law, some aspects of the current system, particularly in California, may have further supported some underlying theories, while frustrating others. This paper examines how California's current trade secrets system differs from the historical system, uses case studies to determine the practical effects of those differences, and analyzes how those effects shape the property rights, relational duty, and efficiency theories underlying trade secrets law.

II. BRIEF HISTORY OF TRADE SECRETS LAW

Trade secrets law in the United States can be traced back to mid-nineteenth century common law.⁴ As it evolved in the 1900s, trade secrets law

¹ Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241, 251–53 (1998) (describing the emergence of trade secrets law in the 1800's). For the proposition that scholars have debated the purposes and theories underlying trade secrets law, *see generally id.*

² Regarding the relational duty theory, *see* Bone, *supra* note 1, at 243 (stating that trade secrets law focuses on “relationally specific duties”); the property theory, *see generally* Charles T. Graves, *Trade Secrets as Property: Theory and Consequences*, 15 J. INTELL. PROP. L. 39 (2007); and the marketplace efficiency theory, *see* Vincent Chiappetta, *Myth, Chameleon or Intellectual Property Olympian? A Normative Framework Supporting Trade Secret Law*, 8 GEO. MASON L. REV. 69, 86–87 (1999) (referring to “encouragement to invention” as a cornerstone of trade secrets law policy, including underlying economic justifications and efficient use of information).

³ Bone, *supra* note 1, at 257 (noting that trade secret law developed from common law varies from state to state); *see also* MELVIN JAGER, *TRADE SECRETS LAW*, Part B (2009) (listing trade secret laws of selected states, each including common-law definitions and noting subtle differences).

⁴ *See* Peabody v. Norfolk, 98 Mass. 452, 458 (1868) (referring to the “earliest reported” trade secret case, decided in 1817).

developed differently in different jurisdictions—each jurisdiction imposing its own requirements and standards—creating an often conflicting, “confusing body of precedent.”⁵ In 1939, the Restatement (First) of Torts assembled the “most widely accepted” principles of common law trade secrets doctrines.⁶ Often these trade secret doctrines have encouraged a standard of commercial ethics by enforcing a duty of confidence when a trade secret has been misappropriated through wrongful acts.⁷ This duty of confidence, whether express or implied through circumstances, continued even after employment ended.⁸ States differed regarding what defined a trade secret and wrongful means, and whether to recognize a duty of confidentiality.⁹ Despite the Restatement’s guidance, states continued to interpret trade secrets principles in different ways.¹⁰ Additionally, the Restatement left unanswered questions, including the applicability of injunctive relief, the statute of limitations, and the determination of damages.¹¹

In an attempt to create uniformity in the definitions and applications of trade secrets law, scholars developed a uniform code in the 1970s, which in 1979 was approved by the National Conference of Commissioners on Uniform State Laws.¹² This code, the UTSA, was revised in 1985.¹³ Currently, forty-six states have enacted some version of the UTSA; California enacted the California Uniform Trade Secrets Act (CUTSA) on January 1, 1985.¹⁴

⁵ Bone, *supra* note 1, at 247.

⁶ See Prefatory Note, UNIF. TRADE SECRETS ACT (amended 1985), 14 U.L.A. 529, 531 (2005) (noting that these principles were contained in the Restatement of Torts § 757).

⁷ JAGER, *supra* note 3, § 1.3 (“The encouragement of increasingly higher standards of fairness and commercial morality continues to be the touchstone of trade secret law in the courts.”). Jager then cites list of cases from various states that support this concept. *Id.*

⁸ Futurecraft Corp. v. Clary Corp., 23 Cal. Rptr. 198, 209, 285–86 (Cal. Dist. Ct. App. 1962) (noting that when an employer discloses a pre-existing trade secret to an employee, the employee has an implied duty of confidence not to disclose the trade secret which continues even “beyond the ties of his employment relationship”).

⁹ See JAGER, *supra* note 3, at Part B (2009) (listing trade secret laws of selected states, each including common-law definitions and noting subtle differences).

¹⁰ See Ramon A. Klitzke, *The Uniform Trade Secrets Act*, 64 MARQ. L. REV. 277, 282 (1980) (discussing how the Restatement failed to provide uniformity in the law).

¹¹ JAGER, *supra* note 3, § 3.34.

¹² JAGER, *supra* note 3, § 3.28.

¹³ *Id.* § 3.29.

¹⁴ *Id.*

III. DEVELOPMENTAL THEORIES UNDERLYING TRADE SECRETS LAW

A. Property Rights Theory

Trade secret rights have been referred to as property, quasi-property, and intellectual property.¹⁵ Upon examination, however, early and modern trade secrets cases reveal aspects of property rights not fully captured by any one of these categories.

In an early American trade secret case, *Peabody v. Norfolk*,¹⁶ the court stated that the inventor or discoverer of a process of manufacture that was kept secret “has a property in it, which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons.”¹⁷ While referring to the trade secret as property, the court qualified this designation by noting that this “property” is only protected against breaches of a confidential duty.¹⁸ It is also notable that, at the time, the court of chancery was a court of equity with the power to grant injunctions when irreparable injury had occurred and the remedies at law were inadequate. From its very beginnings, trade secrets law recognized injunctions as a potential remedy for misappropriations of trade secrets. The court stated that “courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment.”¹⁹ This principle had been well established in the 50 years before *Peabody* in an almost unbroken line of cases.²⁰

Courts typically considered both injunctions and money damages in remedying the wrongful appropriation of trade secrets.²¹ While the Restatement disclaimed the property rights theory, trade secret cases both before and after the

¹⁵ See Chiappetta, *supra* note 3, at 70 (“Is trade secret law a chameleon with the ability to appear varyingly as an almost full-fledged property right, a quasi-property right or a duty of confidence depending on its environment?”).

¹⁶ 98 Mass. 452 (1868).

¹⁷ *Id.* at 458.

¹⁸ *Id.* (noting that a trade secret holder’s right is “not indeed an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it”).

¹⁹ *Id.* at 459 (quoting JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 952 (The Lawbook Exchange 2006) (1884)).

²⁰ O. & W. Thum Co. v. Tloczynski, 72 N.W. 140, 142 (Mich. 1897).

²¹ JAGER, *supra* note 3, § 7:1 (noting that “injunctions and money damages” are “typical” in trade secret cases in reference to early, common-law trade secrets cases).

1939 Restatement referred to trade secret protection as a property right.²² More recently, the Supreme Court recognized a trade secret as a protectable property right in at least two cases—*Ruckelshaus v. Monsanto Co.*²³ and *Kewanee Oil Co. v. Bicron Corp.*²⁴ In *Ruckelshaus*, the Court held that disclosure of a trade secret was an unconstitutional taking effected an unconstitutional taking of property without just compensation.²⁵ In *Kewanee Oil Co.*, the Court referred to trade secrets law as a state-established system of protection for intellectual property rights.²⁶ These decisions, however, do not necessarily incorporate property right aspects into the legal theories of trade secret protection.

B. Relational Duty Theory

Once information qualified as a trade secret, previously under the Restatement definition or currently under the CUTSA definition, the law protects the trade secret from misappropriation by wrongful means or through breach of a duty to maintain secrecy.²⁷ One commentator has suggested that focusing on liability—for using wrongful means or breaching a relational duty—enforces a standard of conduct between employers and employees or third parties.²⁸ In 1892, *Merryweather v. Moore*²⁹ was the first “employment-related trade secret case” where the court found an implied contract giving rise to a duty of confidentiality.³⁰ Since then, courts have often recognized implied duties between employers and employees not to disclose confidential or trade secrets informa-

²² See 1 ROGER M. MILGRIM & ERIC E. BENSON, MILGRIM ON TRADE SECRETS § 2.01[1], at 2-12 to -17, 2-17 n.15 (Supp. 2007) (describing trade secrets under modern law as a property right inasmuch as copyright is property right; noting that the Restatement does not describe trade secret protection as a property right; and describing trade secrets as a property right in pre-CUTSA cases, including *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)); see generally JAGER, *supra* note 3, § 2:3 (Supp. 2002) (identifying property terminology used in Massachusetts, Pennsylvania, New York, Michigan, Ohio, and California).

²³ 467 U.S. 986 (1984).

²⁴ 416 U.S. 470 (1974).

²⁵ *Ruckelshaus*, 467 U.S. at 1003–04.

²⁶ *Kewanee*, 416 U.S. at 482 (discussing preemption doctrine regarding patent and trade secrets laws).

²⁷ *Id.* at 475–76 (noting that trade secret protection promotes commercial ethics applying Restatement definitions); *Drill Parts & Serv. Co., Inc. v. Joy Mfg. Co.*, 439 So. 2d 43, 49 (Ala. 1983) (post-UTSA case noting trade secret law protects against reprehensible acts).

²⁸ See Bone, *supra* note 1, at 244–45.

²⁹ (1892) 2 Ch. 518 (U.K.).

³⁰ Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property*, 52 HASTINGS L.J. 441, 498 (2001).

tion.³¹ Employee non-disclosure contracts expressly forbidding disclosure of confidential information have become commonplace and are routinely enforced by the courts.³² However, as one commentator points out, the relational duty theory has historically been portrayed from the viewpoint of the employer and fails to take into account the importance of employee mobility and the right of the public to rely on information in the public domain.³³ California, much more so than other jurisdictions, has taken into consideration the issue of employee mobility by barring non-competition agreements.³⁴ California trade secrets law, however, has found non-disclosure agreements enforceable to the extent that they prevent the disclosure of confidential information or trade secrets.³⁵

³¹ See *Christopher M's Hand Poured Fudge, Inc. v. Hennon*, 699 A.2d 1272, 1276 (Pa. Super. Ct. 1997) (observing that an employee's duty not to disclose or use his employer's trade secrets can be express or implied from the nature of the confidential relationship that exists between them); *Westervelt v. Nat'l Paper & Supply Co.*, 57 N.E. 552, 553–54 (Ind. 1900) (finding a confidential relationship between employer and employee not to disclose trade secrets, even absent an explicit agreement); *Olschewski v. Hudson*, 262 P. 43, 44 (Cal. Ct. App. 1927) (finding a former employee of had an implied duty of confidentiality to his former employer regarding a laundry route).

³² See *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262–63 (1979) (upholding a non-disclosure agreement even after the secret has been disclosed); *Alta Analytics, Inc. v. Muuss*, 75 F. Supp. 2d 773, 785–86 (S.D. Ohio 1999) (noting that enforcement of a non-disclosure unlimited in duration was consistent with Ohio trade secrets law); *Warner-Lambert Pharm. Co. v. John J. Reynolds, Inc.*, 178 F. Supp. 655, 665 (S.D.N.Y. 1959) (noting that since trade secrets may remain secret indefinitely, there is no reason why courts should not be able to enforce a non-disclosure agreement indefinitely); JAMES POOLEY, *TRADE SECRETS* §§ 8.02[1] n30, 8.02[4][b] (2009) (noting that non-disclosure agreements are at “the core of trade secret practice” and that contract provisions entitling a trade secret owner to an injunction are “common”). See also *RESTATEMENT (THIRD) OF UNFAIR COMPETITION* § 41, cmt. d (1995) (“[L]icensing agreements that require the continuation of royalty payments for the use of a trade secret even after the secret becomes generally known are ordinarily enforceable.”).

³³ See Charles T. Graves, *Trade Secrets As Property: Theory and Consequences*, 15 J. INTELL. PROP. L. 39, 42 (2007) (“[T]rade secret law emphasizes not the boundaries of the information at issue but the asserted disloyalty of the employee, who is alleged to have owed a one-way duty of fidelity to the employer.”).

³⁴ CAL. BUS. & PROF. CODE § 16600 (West 2008).

³⁵ *JDS Uniphase Corp. v. Jennings*, 473 F. Supp.2d 697, 702–04 (E.D. Va. 2007) (applying California law in upholding a non-disclosure agreement regarding employee who took confidential documents); *Loral Corp. v. Moyes* 219 Cal. Rptr. 836, 841 (Cal. Ct. App. 1985) (holding that California Business and Professions Code Section 16600 does not invalidate an agreement not to disclose a former employer's trade secrets or other confidential information); *Rigging Int'l Maint. Co. v. Gwin*, 180 Cal. Rptr. 451, 462–63 (Cal. Dist. Ct. App. 1982) (noting that a confidentiality agreements are enforceable, but only if the misappropriated information is confidential or a trade secret).

The idea that the relational duty creates a standard of commercial ethics is evident in the case of *E.I. duPont de Nemours & Co. v. Christopher*.³⁶ Although the defendants in this case had no express or implied pre-existing duty to maintain secrecy, the court held that the defendants misappropriated trade secrets by acts that were considered “wrongful,” even if not criminal.³⁷ Some courts have focused their analysis so strongly on the violation of relational duties that they have found misappropriation even when the information was not found to be a secret.³⁸

C. Marketplace Efficiency

More recently, one justification for trade secrets law is that it promotes technological innovations that might not merit protection under the patent system.³⁹ Both the Restatement (Third) of Unfair Competition and the CUTSA require that potential trade secret information derive actual or potential economic value from its secrecy.⁴⁰ Neither the Restatement nor the UTSA, however, require absolute secrecy.⁴¹ This enables industries to utilize trade secrets by confiding the information in employees or third parties through licensing agreements.⁴²

³⁶ See 431 F.2d 1012, 1016 (5th Cir. 1970).

³⁷ See Brandon B. Cate, *Saforo & Associates, Inc. v. Porocel Corp.: The Failure of the Uniform Trade Secrets Act to Clarify the Doubtful and Confused Status of Common Law Trade Secret Principles*, 53 ARK. L. REV. 687, 712–13 (2000) (“The Fifth Circuit held that a misappropriation of the trade secret process had occurred, despite the lack of a confidential relationship, because the defendant acted with ‘improper means.’”).

³⁸ See *Imax Corp. v. Cinema Techs., Inc.*, 152 F.3d 1161, 1169 (9th Cir. 1998) (“Under California law a plaintiff can maintain a common law unfair competition claim regardless of whether it demonstrates a legally protectable trade secret.”); *Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 467 (9th Cir. 1990) (omitting actual secrecy from the elements of misappropriation).

³⁹ Chiappetta, *supra* note 2, at 87.

⁴⁰ CAL. CIV. CODE § 3426.1(d) (West 1997); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995).

⁴¹ See MILGRIM & BENSON, *supra* note 22, § 1.07[2] (2009) (citing pre-CUTSA and post-CUTSA cases both noting that absolute secrecy is not required); 1 MELVIN JAGER, TRADE SECRETS LAW § 2.3 (2009) (“*Peabody* finally discussed the concept of secrecy, and established the general rule that the secrecy does not have to be absolute” (referring to *Peabody v. Norfolk*, 98 Mass. 452 (1868), a case applying the common law)); see also CAL. CIVIL CODE § 3426.1(d)(1) (2009) (defining a trade secret as “not being generally known to the public”).

⁴² *Peabody*, 98 Mass. at 461 (discussing the importance of disclosing a trade secret to certain employees, stating that “a secret of trade or manufacture does not lose its character by being

The Restatement provides a list of factors to determine whether information is sufficiently secret to qualify as a trade secret,⁴³ while the CUTSA only requires “efforts that are reasonable under the circumstances to maintain its secrecy.”⁴⁴ Both seem to offer some flexibility in their definition, which may reassure companies that their trade secrets are protected from unlawful misappropriation, thus encouraging further research and development.

IV. CALIFORNIA TRADE SECRETS LAW UNDER THE CUTSA

A. *Purpose of the CUTSA*

Given the fractured development of trade secrets law, it is not surprising that courts often come to conflicting holdings depending on a particular court’s jurisdiction. In 1979, the National Conference of Commissioners on Uniform State Laws drafted the UTSA to “promote even development of trade secret law” and to “relieve the uncertainty surrounding trade secret protection.”⁴⁵ Although intended to preempt case law, the UTSA built upon principles established in trade secrets case law.⁴⁶ One of the CUTSA’s express goals was to “codif[y] the results of the better reasoned cases concerning the remedies for trade secret misappropriation.”⁴⁷ It is logical, therefore, that courts have looked to pre-CUTSA law when discrepancies exist under the statute.⁴⁸

B. *Changes Under the CUTSA*

Although California adopted the UTSA with the 1985 revisions without significant alteration, California did omit certain language when it enacted the

confidentially disclosed to agents or servants, without whose assistance it could not be made of any value”).

⁴³ RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

⁴⁴ CAL. CIVIL CODE § 3426.1(d)(2) (West 1997).

⁴⁵ Julie Piper, Comment, *I Have a Secret?: Applying the Uniform Trade Secrets Act to Confidential Information that does not Rise to the Level of Trade Secret Status*, 12 MARQ. INTELL. PROP. L. REV. 359, 360 (2008).

⁴⁶ *Am. Credit Indem. Co. v. Sacks*, 262 Cal. Rptr. 92, 96 (Cal. Ct. App. 1989) (quoting Prefatory Note, UNIF. TRADE SECRETS ACT (amended 1985)).

⁴⁷ *Id.*

⁴⁸ See *Burbank Grease Servs., LLC v. Sokolowski*, 717 N.W.2d 781, 792–93 (Wis. 1972) (noting that other states’ decision were helpful in interpreting Wisconsin’s version of the UTSA since their law was also based on the UTSA). Note that dependence on pre-CUTSA law is ground for overturning decisions.

CUTSA and has interpreted certain sections of the CUTSA in agreement with pre-CUTSA policy arguments, as will be further discussed in the following sections. The main areas that the UTSA covered were injunctions⁴⁹ as a remedy, establishing a three-year statute of limitations from when the misappropriation was or should have been discovered,⁵⁰ and establishing a standard determination of damages.⁵¹

Surprisingly, in researching case law under the CUTSA, courts often cite case law from other jurisdictions as determinative on various issues.⁵² This is less surprising, however, in light of language within the CUTSA requiring the statute to be “applied and construed to . . . make uniform the law with respect to [trade secrets] among states enacting [the UTSA].”⁵³ Thus, case law applying the UTSA from other states is more than simply secondary persuasive precedent. The CUTSA implicitly authorizes courts to apply the statute in accordance with other states’ rulings to achieve uniformity between the states.⁵⁴ It should be noted, however, that courts assume that subtle differences between each state’s version of the UTSA are driven by policy concerns within each state;⁵⁵ despite the goal of uniformity, these changes and policy arguments will likely continue to influence how courts apply their version of the statute.

C. CUTSA Preemption

The CUTSA contains a preemption clause expressed in negative terms; this clause states that the CUTSA does not preempt statutes regulating trade secrets, nor does it affect any contractual remedies, criminal remedies, or civil actions not based on trade secret misappropriation.⁵⁶ In contrast, most other states have a similar preemption clause expressed positively to preempt all

⁴⁹ UNIF. TRADE SECRETS ACT § 2 (amended 1985), 14 U.L.A. 529, 619 (2005).

⁵⁰ *Id.* § 6, 14 U.L.A. at 649.

⁵¹ *Id.* § 3, 14 U.L.A. at 633.

⁵² *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.*, 90 Cal. Rptr. 3d 247, 251–59 (Cal. Ct. App. 2009) (citing cases from other states and noting that other states’ holdings may be relevant in applying the CUTSA).

⁵³ CAL. CIV. CODE § 3426.8 (West 1997).

⁵⁴ *Id.*

⁵⁵ *Hughes Elecs. Corp. v. Citibank Del.*, 15 Cal. Rptr. 3d 244, 257 (Cal. Ct. App. 2004) (“Typically, when a Legislature models a statute after a uniform act, but does not adopt the particular language of that act, courts conclude the deviation was deliberate and that the policy of the uniform act was rejected.”).

⁵⁶ CAL. CIV. CODE § 3426.7(b).

common law torts based on misappropriation of trade secrets.⁵⁷ In light of the CUTSA's intent to harmonize the law in states enacting the UTSA, however, California courts have interpreted the CUTSA to preempt all common law torts based on misappropriation of trade secrets.⁵⁸ Although there is some debate as to whether the CUTSA preempts claims under section 17200 of the California Business & Professions Code, most California courts have held that if the underlying facts of a claim support trade secret misappropriation, then the claims are preempted by the CUTSA.⁵⁹

V. CASE STUDIES: BEFORE AND AFTER THE CUTSA

This section seeks to highlight the effects of CUTSA by analyzing pre-CUTSA cases that embody the property rights and relational duty theories. The outcomes of these cases will then be analyzed under CUTSA to determine how the outcome might have been different. These changes will then be discussed in terms of whether they further or frustrate the underlying developmental theories of trade secrets law.

A. *Property Viewpoint: Pre-CUTSA Case Analyzed Under the CUTSA*

1. *Reid v. Mass Co. Under Pre-CUTSA Law*

One California case under pre-CUTSA law that viewed trade secrets primarily as the property of the employer was *Reid v. Mass Co.*⁶⁰ Reid's company published a booklet that advertised various businesses to new residents and that was paid for by those businesses' subscriptions.⁶¹ The defendant, Snetsinger, had previously worked with Reid's company, but then left its employment

⁵⁷ See *Ernest Paper Prods. Inc. v. Mobil Chem. Co. Inc.*, No. CV95-7918 LGB(AJWX), 1997 WL 33483520, at *8-9 (C.D. Cal. Dec. 2, 1997) (noting that California worded its preemption clause negatively, whereas other UTSA states worded their preemption clause positively).

⁵⁸ See Andres Quintana, *Preemption Under California's Uniform Trade Secrets Act*, 33 NEW MATTER 28, 29 (2008) (noting that the CUTSA "supersedes common law and statutory causes of action"), available at <http://www.qlglaw.com/site/publications/preemption-under-californias-uniform-trade-secret-act.htm> (last visited Mar. 5, 2010).

⁵⁹ *Id.*

⁶⁰ 318 P.2d 54 (Cal. Dist. Ct. App. 1957).

⁶¹ *Id.* at 57 (discussing the rights of employers to be secure in their trade secrets).

and began publishing a competing advertising booklet.⁶² The court determined Snetsinger had misappropriated information he obtained from customer information lists during the course of his employment with Reid's company.⁶³ Snetsinger had solicited advertisements from businesses that were current clients of Reid.⁶⁴ Another defendant, Holland, who worked as one of Snetsinger's salesmen, admitted to using Reid's booklet to target businesses for advertising.⁶⁵ The defendants claimed this information was not a secret since the booklet was publicly available to both businesses and residents.⁶⁶ Snetsinger gained knowledge of when the businesses' subscriptions expired, however, during the course of his employment.⁶⁷ The plaintiffs claimed that Snetsinger's actions led to a sales loss of \$7,700, when compared to the previous year's sales.⁶⁸ The plaintiffs urged the court to adhere to a series of cases known as "route cases"—referring to retail delivery routes—holding that former employees that improperly acquired and used confidential customer lists could be enjoined from soliciting customers on the lists.⁶⁹ The defendants, however, urged the court to follow

⁶² *Id.* at 58.

⁶³ *See id.* at 60 (noting the presence of all the elements of unfair competition).

⁶⁴ *Id.* at 58.

⁶⁵ *Id.* at 59.

⁶⁶ *See Reid v. Mass Co.*, 318 P.2d 54, 61 (Cal. Dist. Ct. App. 1957) ("Defendants argue that the identity of plaintiffs' subscribers was no secret, that it was known by each member of the public who had a [booklet] . . .").

⁶⁷ *Id.* at 58.

⁶⁸ *Id.* at 59.

⁶⁹ *See id.* at 63 ("A list of customers is a trade secret if there is confidential information as to such customers. To act upon it is an improper use of confidential information and amounts to unfair competition. . . . This rule applies generally to trade route cases as well as others involving a knowledge of the [customers'] . . . buying habits." (quoting *Alex Foods, Inc. v. Metcalf*, 290 P.2d 646, 654 (Cal. Dist. Ct. App. 1955))).

"Route cases" derive their name from cases involving businesses whose employees engaged in business by following particular routes to solicit business from a regular group of customers. For instance, in *Empire Steam Laundry*, plaintiff ran a laundry business which was

conducted through its agents and the drivers of its wagons, who canvass from house to house soliciting orders for laundry work, collect and return the clothes. Each of these agents and drivers has a particular route. On this he is required to call for the clothes upon regular recurring days of each week. Thus the whole week is consumed by each driver in covering his route. The names and addresses of plaintiff's customers, together with the day of the week their clothes are to be called for, are kept in special prepared lists by plaintiff and are used for plaintiff's business purposes by its drivers and agents. These lists have been compiled and are maintained at the expenditure

another line of cases holding that use of publicly available employee contact information did not misappropriate trade secret information and should not be enjoined.⁷⁰

The court proceeded to cite case law noting that confidential customer lists should be regarded as property and their use by a former employee should be enjoined.⁷¹ The court cited section 2860 of the California Labor Code, stating that “everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment.”⁷² The court further stated that laws of equity protect an employer’s property rights in trade secrets.⁷³ Although the court stressed the importance of property rights in trade secret law, the court also stated that equity should have some regard for the rights of all people by condemning negative covenants which might restrict a person’s right to choose an occupation.⁷⁴ The court also recognized a person’s right to compete with their former employer as long as they do so “fairly and legally.”⁷⁵

The *Reid* court looked to five elements of case law to establish trade secret misappropriation within the context of unfair competition.⁷⁶ These pre-CUTSA elements, which were established by the case law of the “route cases,”⁷⁷ required:

- (1) The information was confidential and not readily accessible to competitors;

of a large sum of money and they enable the plaintiff to keep a check upon its business and to increase and extend it where possible. They constitute a trade secret of great value to plaintiff.

Empire Steam Laundry v. Lozier, 130 P. 1180, 1181 (Cal. 1913).

⁷⁰ *Reid*, 318 P.2d at 59.

⁷¹ *See id.*

⁷² *Reid v. Mass Co.*, 318 P.2d 54, 59 (Cal. Dist. Ct. App. 1957) (quoting *Alex Foods*, 290 P.2d at 652).

⁷³ *Id.* at 60.

⁷⁴ *Id.*

⁷⁵ *Id.* at 59–60.

⁷⁶ *Id.* at 60.

⁷⁷ *See Alex Foods, Inc. v. Metcalf*, 290 P.2d 646, 652–53 (Cal. Dist. Ct. App. 1955); *George v. Burdusis*, 130 P.2d 399, 402–03 (Cal. 1942); *Empire Steam Laundry v. Lozier*, 130 P. 1180, 1182 (Cal. 1913) (listing several of the “route cases”); *Aetna Bldg. Maint. Co. v. West*, 246 P.2d 11, 13–14 (Cal. 1952).

- (2) The former employee solicited the customers of his former employer with intent to injure him;
- (3) The former employee sought out certain preferred customers whose trade is particularly profitable and whose identities are not generally known to the trade;
- (4) The business is such that a customer will ordinarily patronize only one concern;
- (5) The established business relationship between the customer and the former employer would normally continue unless interfered with.⁷⁸

The court stated that although the identities of the plaintiff's customers were public and readily ascertainable, "the list becomes a trade secret when there is other confidential information as to the customers on the list."⁷⁹ In this case, the confidential information was the expiration date of the customers' existing contracts with the plaintiff.⁸⁰ Although there was no express contract forbidding Snetsinger's use of the trade secret, the court noted that the laws of equity enjoin a former employee's disclosure of such information "learned in the course of his employment," and for the former employee to act on such information "amounts to unfair competition."⁸¹ The court was unpersuaded by Snetsinger's defense that Reid came to court with "unclean hands" by using the temporary injunction as a tool to solicit business from Snetsinger's customers.⁸²

Having found trade secret misappropriation, the court upheld the damages awarded against the defendants.⁸³ Snetsinger argued that, by rule, evidence as to profits and damages was not allowed if uncertain or speculative; however, the court reasoned that the rule applied only to evidence regarding whether the defendant's wrongful acts caused such damages, not to evidence pertaining to the amount of damages.⁸⁴ The evidence showed that Snetsinger's accounts in-

⁷⁸ Reid v. Mass Co., 318 P.2d 54, 60 (Cal. Dist. Ct. App. 1957) (quoting *Aetna*, 246 P.2d at 15 (citing *Cal. Intelligence Bureau v. Cunningham*, 188 P.2d 303, 306 (Cal. Dist. Ct. App. 1948))); *Alex Foods*, 290 P.2d at 653.

⁷⁹ *Reid*, 318 P.2d at 61.

⁸⁰ *Id.* at 61.

⁸¹ *Id.* at 62–63.

⁸² *Id.* at 63–64.

⁸³ *Id.* at 64.

⁸⁴ Reid v. Mass Co., 318 P.2d 54, 64 (Cal. Dist. Ct. App. 1957) (noting there was "abundant evidence" to conclude "that the sharp decline in plaintiffs' profits was directly caused by defendants' wrongful acts").

cluded fifty-eight of Reid's former customers, whose depositions indicated they would have stayed with Reid had Snetsinger not solicited their business.⁸⁵ The court also upheld the trial court's injunction preventing Snetsinger from soliciting business from any of Reid's customers he had become acquainted with during the course of his employment at Reid's company.

2. *Reid v. Mass Co. Under the CUTSA*

Had *Reid* been decided after the CUTSA's enactment, the courts would likely have analyzed several aspects of the case differently. Aspects of the new standards in the CUTSA relevant to the case include the trade secret definition, the sufficiency of secrecy, possible defenses, and the analysis of damages.

First, the trade secret would be analyzed under the CUTSA definition rather than solely on the "route cases" factors.⁸⁶ The CUTSA defines a trade secret as information that: "(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."⁸⁷ This is notably broader than the five-factor definition applied by the *Reid* court. The CUTSA standard, however, does not appear to be incompatible with the standards in the "route cases," and California courts have continued to look to the "route cases" even when applying the CUTSA definition of a trade secret.⁸⁸

Moreover, the general rule described in *Reid* provided that courts recognize an otherwise unprotectable customer information list as a protectable trade secret if it contained confidential information concerning the listed customers.⁸⁹ Under the CUTSA, this rule no longer applies.⁹⁰ The CUTSA defini-

⁸⁵ *Id.*

⁸⁶ Some states have continued to rely on the Restatement definition, even after adoption of a version of the UTSA. *See, e.g.,* *Basic Am., Inc. v. Shatila*, 992 P.2d 175, 184 (Idaho 1999) (applying the Restatement factors in their application of the UTSA); *Stampede Tool Warehouse, Inc. v. May*, 651 N.E.2d 209, 214 (Ill. App. Ct. 1995) (applying the Restatement factors); *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 918 (Ind. 1993) (applying the Restatement factors); *Engineered Mech. Servs., Inc. v. Langlois*, 464 So. 2d 329, 333 (La. Ct. App. 1984) (applying the Restatement definition of "trade secret").

⁸⁷ CAL. CIV. CODE § 3426.1(d) (West 1997).

⁸⁸ *Thompson v. Impaxx, Inc.*, 7 Cal. Rptr. 3d 427, 429-30 (Cal. Ct. App. 2003) (noting the holdings of several "route cases" then applying the CUTSA trade secret definition); *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 27 Cal. Rptr. 2d 573, 579 (Cal. Ct. App. 1994) (applying both the "route cases" and the CUTSA definitions).

⁸⁹ *Reid v. Mass Co.*, 318 P.2d 54, 61 (Cal. Dist. Ct. App. 1957).

tion requires that a customer list must derive actual or potential economic benefit from its secrecy.⁹¹ On the facts in *Reid*, the court would have had to inquire further as to the secrecy of Reid’s list and whether he made “reasonable efforts” under the circumstances to maintain its secrecy.⁹² Despite these differences, the CUTSA does not appear to significantly change trade secret laws as applied to customer lists because such lists are still commonly held to be trade secrets.⁹³ The underlying theory the new definition seems to affect is the efficiency theory, since a “reasonable efforts” standard allows courts more flexibility in considering efforts to maintain secrecy, especially in rapidly changing high-tech industries.

Second, the CUTSA relaxes the requirements of trade secret status by omitting the UTSA’s requirement that the trade secret not be “readily ascertainable by proper means.”⁹⁴ It seems that the UTSA has broadened the definition of trade secrets by providing one definition to encompass all types of information, whether it be customer information lists, delivery routes, or computer software.⁹⁵ The CUTSA’s omission of the requirement that it not be “readily ascertainable” broadens it even further. In California, the possibility of discovering a specific trade secret from publicly available information is not enough to obliterate trade secret protection; someone must actually ascertain the supposed secret information.⁹⁶ Theoretically, under the UTSA, a defendant could prevail by showing that the trade secret could have been readily ascertained through proper means (e.g., reverse engineering or obtaining from the public domain), even if that defendant actually used improper means.⁹⁷ The information in *Reid* could have been readily ascertainable by proper means, since Snet-singer could have simply called each business and asked them when their sub-

⁹⁰ See CAL. CIV. CODE § 3426.1(d) (omitting from the definition of “trade secret” language regarding customer lists having confidential information about the listed customers).

⁹¹ *Id.*

⁹² See *id.* (requiring “reasonable efforts” to maintain secrecy for trade secret status).

⁹³ *ReadyLink Healthcare v. Cotton*, 24 Cal. Rptr. 3d 720, 730 (Cal. Ct. App. 2005); *Morlife, Inc. v. Perry*, 66 Cal. Rptr. 2d 731, 735, 740 (Cal. Ct. App. 1997); *Metro*, 27 Cal. Rptr. 2d at 579.

⁹⁴ UNIF. TRADE SECRETS ACT § 1(4)(i) (amended 1985), 14 U.L.A. 529, 538 (2005).

⁹⁵ See *id.* (defining trade secrets to encompass information in the form of “a formula, pattern, compilation, program, device, method, technique, or process”).

⁹⁶ Compare CAL. CIV. CODE § 3426.1(d)(1) (West 1997) (“[N]ot being generally known . . .”), with UNIF. TRADE SECRETS ACT § 1(4)(i) (“[N]ot being readily ascertainable . . .”).

⁹⁷ See UNIF. TRADE SECRETS ACT § 1(4)(i) (requiring trade secrets to “not be[] readily ascertainable by proper means”).

scriptions expired. Under the CUTSA, however, this would not defeat trade secret status.⁹⁸

The CUTSA's omission of the "not being readily ascertainable" requirement seems to further support the relational theory in that it ensures misappropriating conduct is punishable even if the information could have been readily ascertained by proper means. One could also argue, however, that this omission is less about the relational theory and more about focusing on what type of information or property is to be protected, since it seems reasonable to require that the information actually be ascertained before withdrawing trade secret protection. It seems equally likely that this change reinforces the underlying efficiency theory of trade secrets, since the "readily ascertainable" language appears vague and ill defined, resulting in a standard that could be unevenly applied. Its omission could potentially increase the predictability of both trade secret protection and litigation, further encouraging businesses to rely on trade secret protection.

Third, although not determinative in the *Reid* case, the transition of trade secret misappropriation from various unfair competition torts to a statutory cause of action may eliminate certain defenses. Common law tort defenses, such as private or public necessity, laches, or unclean hands, are not mentioned in the CUTSA.⁹⁹ As discussed previously, the common law torts have been completely preempted;¹⁰⁰ therefore, it seems appropriate that these defenses would no longer exist in trade secrets law. If Reid had unfairly used the injunction as a tool to solicit business from Snetsinger's customers, unclean hands would seem an appropriate defense. This transition to the statutory scheme seems to weaken the relational theory that often encompasses duties in tort action, since it basically ignores the relational aspects between Reid and Snetsinger and focuses on the misappropriation of Reid's property.

Fourth, under the CUTSA's damages provision, damages may be awarded for any actual loss and any additional unjust enrichment not accounted for in the actual loss calculation.¹⁰¹ Under the CUTSA, parties may no longer file separate claims for damages arising from unfair competition and unjust

⁹⁸ See CAL. CIV. CODE § 3426.1(d) (lacking the "not readily ascertainable by proper means" requirement (quoting UNIF. TRADE SECRETS ACT § 1(4)(i))). *But see* CAL. CIV. CODE § 3426.1(a) ("Reverse engineering or independent derivation alone shall not be considered improper means.").

⁹⁹ See generally CAL. CIV. CODE §§ 3426.1–.11 (West 1997 & Supp. 2009).

¹⁰⁰ See CAL. CIV. CODE § 3426.7 (omitting common law torts from the list of remedies not preempted by the statute).

¹⁰¹ CAL. CIV. CODE § 3426.3(a).

enrichment.¹⁰² Before, claimants could recover under both theories as long as such recovery was not duplicative.¹⁰³ The CUTSA simply codified these aspects by allowing claimants to recover under both theories within one action.¹⁰⁴ While the facts of *Reid* do not support recovery under unjust enrichment, one could easily imagine facts that would necessitate recovery. For instance, if Snetsinger had also sold the confidential information to a third party in exchange for money, Reid may have been able to recover that amount as unjust enrichment under the CUTSA.

Additionally, under the CUTSA, if damages and unjust enrichment are not “provable,” a reasonable royalty may be recovered “for no longer than the period of time the use could have been prohibited.”¹⁰⁵ This is another area where the CUTSA differs from the UTSA and other states’ versions of the Act. California requires that damages or unjust enrichment be unprovable before a court may award a reasonable royalty, whereas other states and the UTSA do not.¹⁰⁶ A reasonable royalty also seems to reinforce the property view analogous to just compensation in a takings context. Also, the CUTSA allows for an award of attorney fees in cases of “bad faith” or “willful and malicious misappropriation,”¹⁰⁷ whereas prior to the CUTSA, California did not award attorneys

¹⁰² See *R.K. Enter., L.L.C. v. Pro-Comp Mgmt., Inc.*, 158 S.W.3d 685, 687–88 (Ark. 2004) (Arkansas’ version of the UTSA precluded tort claims of conversion and conspiracy); *Lucini Italia Co. v. Grappolini*, No. 01 C 6405, 2003 WL 1989605, at *22 (N.D. Ill. April 28, 2003) (Illinois Trade Secret Act now precludes claims for breach of fiduciary duty, fraud, and promissory estoppel as they are based on misuse of trade secrets); *On-Line Techs. v. Perkin Elmer Corp.*, 141 F. Supp. 2d 246, 260–61 (D. Conn. 2001) (Trade Secrets Act precludes claims of unjust enrichment that occurred as a result of misuse of trade secrets); *Glasstech, Inc. v. TGL Tempering Sys., Inc.*, 50 F. Supp. 2d 722, 730–31 (N.D. Ohio 1999) (Trade Secrets Act precluded common law claims where claims were based only on the misappropriation of trade secrets); *Hutchison v. KFC Corp.*, 809 F. Supp. 68, 71–72 (D. Nev. 1992) (Trade Secrets Act precluded plaintiff’s unjust enrichment and unfair competition claims as they were based solely on trade secret misappropriation).

¹⁰³ *Hutchinson*, 809 F. Supp. at 71–72.

¹⁰⁴ CAL. CIV. CODE § 3426.3(a) (West 1997).

¹⁰⁵ *Id.* at § 3426.3(b).

¹⁰⁶ *Cacique, Inc. v. Robert Reiser & Co.*, 169 F.3d 619, 623 (9th Cir. 1999). Compare CAL. CIV. CODE § 3426.3(b) (“If neither damages nor unjust enrichment . . . are provable, the court may order payment of a reasonable royalty . . .”), with UNIF. TRADE SECRETS ACT § 3 (amended 1985), 14 U.L.A. 529, 633 (2005) (“Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss.”).

¹⁰⁷ CAL. CIV. CODE § 3426.4.

fees for common law actions.¹⁰⁸ This change regarding attorney fees seems to promote the efficiency theory in the context of trade secret litigation. Commentators have noted that trade secret litigation is often used as a weapon,¹⁰⁹ and this provision would encourage proper use of trade secret protection and increase efficiency in litigation as well.

The injunction in *Reid* might not fare as well. Once a trade secret is no longer secret, the CUTSA requires that an injunction may only “be continued for an additional period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.”¹¹⁰ If the information Snetsinger misappropriated was no longer secret, the injunction against his solicitation of former customers could not be indefinite.¹¹¹ An injunction to eliminate commercial advantage is frequently referred to as a “head-start” period.¹¹² However, if the court was convinced that only Snetsinger and his salesmen knew of the information and the information was still not generally known to the public, then a permanent injunction against use of the trade secret would have still been appropriate under the CUTSA.¹¹³ This difference in injunction duration does not seem to affect the relational theory or the efficiency theory; rather, it seems more closely tied to a balancing of a property right with the right of the public to rely on and use information in the public domain.

B. Relational Duty: Pre-CUTSA Case Analyzed Under the CUTSA

1. *Plant Industries, Inc. v. Coleman* Under Pre-CUTSA Law

Another pre-CUTSA California case, *Plant Industries, Inc. v. Coleman*,¹¹⁴ stressed the importance of the employer-employee relationship by rein-

¹⁰⁸ Cf. CAL. BUS. & PROF. CODE § 17082 (West 2008) (mandating an award of attorney fees when a “judgment is entered against the defendant,” but extending this mandate only to actions under California’s unfair competition code).

¹⁰⁹ Charles T. Graves & James A. DiBoise, *Do Strict Trade Secret and Non-Competition Laws Obstruct Innovation?*, 1 ENTREPREN. BUS. L.J. 323, 342–43 (2007).

¹¹⁰ CAL. CIV. CODE § 3426.2(a) (West 1997).

¹¹¹ *See id.* (limiting the duration of an injunction when the subject trade secret is compromised).

¹¹² *Celeritas Techs., Ltd. v. Rockwell Int’l Corp.*, 150 F.3d 1354, 1359–60 (Fed. Cir. 1998) (stating an injunction under the CUTSA is limited to the “head start” period).

¹¹³ *See* CAL. CIV. CODE § 3426.2(a) (requiring an injunction’s termination only when the trade secret is compromised). But if the list was still not generally known to the public, then it may still be a trade secret protectable by an injunction. *See id.* § 3426.1(d).

¹¹⁴ 287 F. Supp. 636 (C.D. Cal. 1968).

forcing the duty of confidence.¹¹⁵ In *Plant*, the plaintiff, Cal Citrus, had previously employed the defendant, William Coleman, in its factory, which manufactured and sold citrus products.¹¹⁶ During the course of his employment at Cal Citrus, Coleman learned various processes and techniques for producing citrus peel.¹¹⁷ One issue discussed at length was Coleman's claimed construction of a slicer device with a water attachment for his new employer, Belk Fruit Packers.¹¹⁸ Coleman argued that there was no contractual non-disclosure agreement and all the allegedly misappropriated information was know-how he learned while employed at Cal Citrus.¹¹⁹ The plaintiffs argued that there was an implied duty to keep the information in confidence, but under California case law, an implied duty of confidentiality did not apply if the employee had developed the trade secret.¹²⁰ This principle was derived from the Restatement of Torts, which stated that a duty of confidence arises when a trade secret is *disclosed to an employee*.¹²¹ The court also noted that many of the details of Cal Citrus's secret processes, such as the thickness of the citrus peels, could have been discovered by analyzing the finished products and through inquiries of people knowledgeable about the slicer device.¹²² After applying California trade secrets case law and the Restatement, the court determined that Coleman had not, in fact, developed these processes himself and only learned of them through his employment at Cal Citrus.¹²³ The court noted that when an employee receives confidential information, the mere circumstances of employment might be enough to impose

¹¹⁵ See *id.* at 644 (noting that an express or implied agreement can impose a duty of secrecy on an employee even if the employee never received a "communication[] in confidence" from his or her employer).

¹¹⁶ *Id.* at 638.

¹¹⁷ *Id.* at 637–39.

¹¹⁸ *Id.* at 643–44.

¹¹⁹ See *id.* at 639–41 (discussing whether Coleman's knowledge of the trade secrets was "know how" or "a result of knowledge and skill acquired as an employee" and the absence of an express non-disclosure agreement).

¹²⁰ See *Plant Indus., Inc. v. Coleman*, 287 F. Supp. 636, 641 (C.D. Cal. 1968) ("This leaves the question of whether there was an implied confidential relationship between Coleman and plaintiff . . ."); *Futurecraft Corp. v. Clary Corp.*, 23 Cal. Rptr. 198, 210 (Cal. Dist. Ct. App. 1962) (opining that a court could not "compel a man . . . to wipe clean the slate of his memory" and deprive him "the use of knowledge and skill which he gained which did not originate with [the employer]").

¹²¹ See RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939) ("Although given information is not a trade secret, one who receives the information in a confidential relation or discovers it by improper means may be under some duty not to disclose or use that information.").

¹²² *Plant*, 287 F. Supp. at 643.

¹²³ *Id.* at 642.

an implied duty of confidentiality, regardless of whether an express non-disclosure agreement existed.¹²⁴ In discussing trade secret status, the court also determined that Cal Citrus's minimal efforts of posting several signs denying admittance, along with their competitors' lack of awareness of the processes, were sufficient to show secrecy.¹²⁵

The court in *Plant* awarded damages and granted an injunction against Coleman and Belk.¹²⁶ The court had little difficulty in extending the misappropriation to Coleman's new employer since the plaintiffs sent a letter notifying Belk of Coleman's knowledge of confidential information, and also because Belk later admitted employing Coleman because of this knowledge.¹²⁷ The damages were awarded for the actual money damages suffered "as a result of defendants' use of its trade secrets."¹²⁸ The injunction barred the defendants from using any of the plaintiff's trade secrets or confidential information for a period of eighteen months, presumably the time it would have taken the defendant to discover the information through proper means.¹²⁹

2. *Plant Industries, Inc. v. Coleman* Under the CUTSA

Had *Plant* been decided after the CUTSA's enactment, the courts would likely have analyzed several aspects of the case differently, potentially resulting in a different outcome. These aspects include the liability of the new employer, the required level of secrecy of Cal Citrus's processes, the distinction between confidential information and trade secret information, the preservation of trade secrecy during litigation, and the concern of employee mobility.

First, the CUTSA establishes a slightly different standard for finding new employers liable for trade secrets misappropriated by their employees. To hold the new employer accountable for misappropriation, the CUTSA requires that the new employer had actual or constructive knowledge that the trade secret's acquisition occurred "under circumstances giving rise to a duty" or from "a person who owed a duty . . . to maintain its secrecy."¹³⁰ For the most part,

¹²⁴ *See id.* ("The defendant Coleman, although not bound by written agreement not to disclose trade secrets, knew that the information as to the details of the method and know-how of processing citrus peel . . . was confidential and there was an implied obligation on his part not to disclose this confidential information received by him in trust.").

¹²⁵ *Id.* at 642-43.

¹²⁶ *Plant Indus., Inc. v. Coleman*, 287 F. Supp. 636, 645 (C.D. Cal. 1968).

¹²⁷ *Id.* at 639, 643.

¹²⁸ *Id.* at 645.

¹²⁹ *Id.*

¹³⁰ CAL. CIV. CODE § 3426.1(b)(2)(B) (West 1997).

this is consistent with pre-CUTSA case law, primarily because the courts followed the Restatement.¹³¹ Regarding innocent third parties that received a misappropriated trade secret, however, the CUTSA appears to codify an equitable grounds exception to liability from section 758(b) of the Restatement (First) of Torts; this section contains an exception that protects a misappropriating party from liability if the party had “in good faith paid value for the secret or has so changed [their] position that to subject [them] to liability would be inequitable.”¹³² This concept was incorporated into the CUTSA’s definition of misappropriation.¹³³ Under the Restatement, however, subsequent notice may expose previously innocent parties to misappropriation liability if they continue to use the trade secret, whereas the UTSA provision does not.¹³⁴

Had this exception applied to *Plant*, Belk could have argued that they were exempt from liability if they reasonably believed that Coleman had developed and could legally use the slicer process. It was not until after Belk spent over \$2,000 and hired Coleman that Cal Citrus notified Belk of the alleged misappropriation.¹³⁵ If this exception had applied, Cal Citrus would only have had a cause of action against Coleman, unless it could have been shown that Belk knew or reasonably should have known of Coleman’s misappropriation.¹³⁶

¹³¹ See *Ferrolene Corp. v. Gen. Aniline & Film Corp.*, 207 F.2d 912, 923 (7th Cir. 1953) (noting that one who receives information is not liable, so long as they were without notice of the plaintiff’s rights); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40 cmt. d (1995) (noting one with notice of plaintiff’s rights may be liable); RESTATEMENT (FIRST) OF TORTS § 758 (1939) (noting one who received information in good faith paid or materially changed their position on a mistaken belief of no misappropriation is shielded from liability); see also *Rohm & Haas Co. v. Adco Chem. Co.*, 689 F.2d 424, 431 (3d Cir. 1982) (charging defendant employer with constructive notice since they should have known plaintiff had tried very hard to keep the information secret).

¹³² RESTATEMENT (FIRST) OF TORTS § 758(b).

¹³³ See CAL. CIV. CODE § 3426.1(b)(2)(C) (excepting from misappropriating use or disclosures occurring after “a material change of [the misappropriating party’s] position”).

¹³⁴ Compare RESTATEMENT (FIRST) OF TORTS § 758(b) (1939) (“One who learns another’s trade secret . . . is liable to the other for a disclosure or use of the secret after the receipt of [subsequent] notice . . .”), with UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 529 (omitting subsequent notice language). See *Vantage Point, Inc. v. Parker Bros., Inc.*, 529 F. Supp. 1204, 1215 (E.D.N.Y. 1981); HENRY H. PERRITT, JR., TRADE SECRETS: A PRACTITIONER’S GUIDE § 7:9:5 (2d ed. 2007) (discussing *Vantage Point v. Parker Bros.* and noting that a court of equity may not find liability even after notice if there was a change in position before notice).

¹³⁵ *Plant Indus., Inc. v. Coleman*, 287 F. Supp. 636, 638–39 (C.D. Cal. 1968).

¹³⁶ See CAL. CIV. CODE § 3426.1(b)(2)(B) (West 1997) (applying misappropriation to persons who “[knew] or had reason to know” that the information had been given to them by a person who had a duty to refrain from disclosing it).

Since a previously innocent party who subsequently received notice of their misappropriation could still escape liability, the equitable grounds exception to liability could be seen as frustrating the relational duty theory by ignoring bad conduct. Alternately, the equitable grounds exception appears to further both the property rights and efficiency theories. The exception seems consistent with a property rights theory because it is analogous to a bona-fide good faith purchaser of property having voidable title. The likely policy reason for this principle in both personal property and trade secrets is the same—to facilitate the efficient transfer of goods or, in this case, information in a market economy.

Second, regarding the required level of secrecy, although their efforts to maintain the secrecy of its processes were minimal, even under the CUTSA, Cal Citrus's efforts likely would have been sufficient. The CUTSA does not appear to raise the bar concerning what are considered sufficient efforts to maintain secrecy.¹³⁷ It would seem that the CUTSA offers even more flexibility than the Restatement of Torts for finding a trade secret,¹³⁸ which may explain why many courts have continued, even after enactment of the UTSA, to look toward the Restatement for guidance.¹³⁹ Although by modern standards Cal Citrus's failure to require a confidentiality agreement may not appear "reasonable under the circumstances" to maintain secrecy, in 1968 such agreements were probably less prevalent. Today, a good faith argument could be made that the lack of such agreements show an unreasonable lack of secrecy measures, especially considering the foreseeability of employees leaving with "know-how" learned on the job. Employees in 1968, however, likely changed jobs less frequently. On the other hand, other courts have held that confidentiality agreements alone are not sufficient to maintain the secrecy requirement of a trade secret.¹⁴⁰ Moreover, it

¹³⁷ The CUTSA only requires that the trade secret be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." CAL. CIV. CODE § 3426.1(d)(2).

¹³⁸ See RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939) (factoring "(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others").

¹³⁹ *Thompson v. Impaxx, Inc.*, 7 Cal. Rptr. 3d 427, 429–30 (Cal. Ct. App. 2003) (noting the holdings of several "route cases" then applying the CUTSA trade secret definition); *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 27 Cal. Rptr. 2d 573, 579 (Cal. Ct. App. 1994) (applying both the "route cases" and the CUTSA definitions).

¹⁴⁰ See *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 901–02 (Minn. 1983) (holding the defendant "did not meet its burden of proving that it used reasonable efforts to

is uncertain today whether simply posting “No Entry” signs would be sufficient efforts “under the circumstances,” particularly since such signs may be mandated by public safety requirements. By offering flexibility as to what property is deemed secret, and hence protectable, while allowing courts to have a flexible standard for secrecy that adjusts to growing industries, the CUTSA’s secrecy requirements seem to have affected only the property rights and efficiency theories.

Third, the *Plant* court made no distinction between confidential information and trade secret information,¹⁴¹ as was often the case in much of pre-CUTSA law.¹⁴² Since the enactment of the CUTSA, California courts have interpreted the statute as preempting all common law torts arising from the misappropriation of not only trade secrets, but also non-public, commercial information.¹⁴³ The *Plant* court seemingly focused on Coleman’s actions and his breach of an implied duty rather than on whether all the confidential information satisfied the requirements for trade secret protection.¹⁴⁴ A court applying the CUTSA should have carefully examined the allegedly misappropriated information and find liability only as to the information rising to the level of a trade secret. As far as the misuse of confidential information not rising to the level of a trade secret, Cal Citrus might still have a cause of action under an implied contract between Cal Citrus and Coleman. As discussed previously, the CUTSA does not preempt criminal actions or actions based on contract law.¹⁴⁵ Since breaches of express and implied duties may also be prosecuted under contract and criminal law, this seems to suggest that the CUTSA may only be a supplemental tool to enforce a relational duty between employer and employee. A cause of action for a breach of a relational duty could potentially be brought under the CUTSA, contract, and in criminal law. On the other hand, the CUTSA provides an additional cause of action to prosecute breaches of duty,

maintain secrecy” even though it took the “minimal precautions . . . by requiring some of its employees to sign a confidentiality agreement”).

¹⁴¹ See generally *Plant Indus., Inc. v. Coleman*, 287 F. Supp. 636 (C.D. Cal. 1968).

¹⁴² *Bancroft-Whitney Co. v. Glen*, 411 P.2d 921, 938–39 (Cal. 1966) (noting the Restatement protects against disclosure of trade secrets and confidential information and making no distinction between the two); *Continental Car-Na-Var Corp. v. Moseley*, 148 P.2d 9, 13–14 (Cal. 1944) (discussing an injunction to protect trade secrets or confidential information making no distinction between the two).

¹⁴³ See *Digital Envoy, Inc. v. Google, Inc.*, 370 F. Supp. 2d 1025, 1034 (N.D. Cal. 2005); *Accuimage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 954 (N.D. Cal. 2003) (holding that UTSA preempted common law claims of misappropriation).

¹⁴⁴ *Plant*, 287 F. Supp. at 641.

¹⁴⁵ CAL. CIV. CODE § 3426.7(b) (West 1997).

which would seem to further support the relational duty theory. It also removes non-public confidential information from the property rights theory, and in doing so may strengthen and further define the boundaries of what property is protectable as a trade secret. This would also likely increase efficiency in the marketplace by allowing employees to change jobs and freely use “know-how” that does not rise to the level of a trade secret.

Fourth, current trade secrets law attempts to preserve the secrecy of a trade secret, even during litigation.¹⁴⁶ In its decision, the *Plant* court gave a detailed description of the step-by-step processes of the claimed trade secrets.¹⁴⁷ Although the court omitted precise details, such as processing times, it did state the exact order of the steps, even noting the elevated temperatures and pressures within the process.¹⁴⁸ Since publishing these steps in the decision destroyed the trade secret status of many of Cal Citrus’s processes, an indefinite injunction against Belk would no longer have been plausible under the CUTSA.¹⁴⁹ However, a temporary injunction to eliminate the unfair advantage of misappropriation would have still been appropriate.¹⁵⁰

One benefit of the CUTSA is its requirement that courts preserve the secrecy of the trade secret information.¹⁵¹ It requires that courts take “reasonable means” to maintain secrecy of the information, including issuing protective orders in discovery proceedings, conducting in-camera hearings, sealing court records and issuing court orders forbidding disclosure by any person involved in the litigation.¹⁵² Although Cal Citrus could have requested these methods, it is uncertain whether the court would have granted them because before CUTSA courts were not required to maintain the secrecy of a trade secret.¹⁵³ If the *Plant* case had been heard post-CUTSA, the court may have been less apt to publish the extensive details of the trade secret processes and confidential information at issue.

The CUTSA strikes a delicate balance in allowing for full litigation of the trade secret conflict while still imposing a responsibility on the court to

¹⁴⁶ See CAL. CIV. CODE § 3426.5 (requiring a court to use reasonable means to preserve secrecy).

¹⁴⁷ *Plant Indus., Inc. v. Coleman*, 287 F. Supp. 636, 637–38 (C.D. Cal. 1968).

¹⁴⁸ *Id.*

¹⁴⁹ See § 3426.2(a) (limiting the duration of an injunction once the trade secret has been compromised).

¹⁵⁰ CAL. CIV. CODE § 3426.2(a) (West 1997).

¹⁵¹ CAL. CIV. CODE § 3426.5.

¹⁵² *Id.*

¹⁵³ As shown by the disclosure of the processes in *Plant*. See *Plant Indus., Inc. v. Coleman*, 287 F. Supp. 636, 637–38 (C.D. Cal. 1968).

maintain secrecy.¹⁵⁴ Although not applicable to the relational duty theory, this provision seems vaguely to further property rights by at least recognizing the importance of secrecy in trade secret status. Without sufficient secrecy, the trade secret would lose its property status and become part of the public domain. More significantly, this provision seems to support the efficiency theory because it allows trade secrets law to more effectively protect trade secrets without destroying the underlying trade secret status. Companies might be more likely to depend on trade secrets if they could assert liability for their misappropriation with less uncertainty about the secret's eventual disclosure.

Fifth, pre-CUTSA law allowed employees that developed trade secrets to continue that use, absent an express agreement to the contrary. The courts in *Futurecraft Corp. v. Clary Corp.*¹⁵⁵ and *Wexler v. Greenberg*,¹⁵⁶ both cited in *Plant*,¹⁵⁷ refer to the Restatement,¹⁵⁸ which declares: “One who discloses or uses another’s trade secret, without a privilege to do so, is liable to the other if . . . his disclosure or use constitutes a breach of confidence reposed in him *by the other in disclosing the secret to him.*”¹⁵⁹ The issue in *Futurecraft* and *Wexler* exposes another difference between pre-CUTSA case law and the current statutory scheme. The CUTSA’s standard for liability is silent regarding misappropriation by the employee who developed the trade secret; instead, it simply states that there are “circumstances giving rise to a duty to maintain its secrecy or limit its use.”¹⁶⁰ It seems reasonable, however, that without an explicit agreement giving ownership of the development to the employer, an employee should not be presumed to have an implied duty of confidentiality to not disclose a trade secret that was developed by the employee. At least one case applying California law under the CUTSA came to this conclusion.¹⁶¹ This liability standard seems analogous to a shop-right¹⁶² in patent law and seems to reinforce both the

¹⁵⁴ CAL. CIV. CODE § 3426.5.

¹⁵⁵ 23 Cal. Rptr. 198 (Cal. Dist. Ct. App. 1962).

¹⁵⁶ 160 A.2d 430 (Pa. 1960).

¹⁵⁷ *Plant Indus., Inc. v. Coleman*, 287 F. Supp. 636, 640–42 (C.D. Cal. 1968).

¹⁵⁸ *Futurecraft*, 23 Cal. Rptr. at 207–12; *Wexler*, 160 A.2d at 433 n.2, 434 n.4, 436 n.9, 437 n.11.

¹⁵⁹ RESTATEMENT (FIRST) OF TORTS § 757 (1939) (emphasis added).

¹⁶⁰ CAL. CIV. CODE § 3426.1(b)(2)(B)(ii) (West 1997).

¹⁶¹ See *Callaway Golf Co. v. Dunlop Slazenger Group Ams., Inc.*, 318 F. Supp. 2d 205, 211 (D. Del. 2004) (stating that for the plaintiff employers to receive trade secret protection, the trade secret itself must have originated with the plaintiffs, not the employee (citing *Bowser, Inc. v. Filters, Inc.*, 398 F.2d 7, 10 (9th Cir. 1968))).

¹⁶² 8-22 DONALD S. CHISUM, CHISUM ON PATENTS § 22.03[3] (2009) (stating “[t]he classic ‘shop right’ doctrine provides that an employee who uses his employer’s resources to conceive an

relational theory and the property rights theory. It fails, however, to recognize an implied relational duty of confidentiality of the employee that developed the trade secret, but it clarifies the identity of the property right owner. This would also seem to have a mixed effect on the efficiency theory, since it would allow employees to retain their trade secrets while preventing their employers from obtaining full ownership. This conflict is likely why many employers require express agreements assigning all developments to the employer.

VI. MARKETPLACE EFFICIENCY

A. Trade Secret Protection

The efficiency theory seems intertwined with both the property rights theory and the relational duty theory. In keeping with marketplace efficiency, commentators have cited “encouragement to invention” and reduction of costs as policy reasons for keeping research and development secret.¹⁶³ Just as in the patent and copyright context, an efficient system requires clear boundaries over what subject matter is protectable under the system. While the CUTSA does not resolve all uncertainties, it does help further the goal of determining what information can be considered protectable property under trade secrets law.¹⁶⁴ This is particularly noticeable by California interpreting the UTSA provisions to preempt common law torts regarding misappropriation of non-public, confidential information not rising to the level of a trade secret.¹⁶⁵ Preemption of common law torts involving misappropriation could potentially increase the efficiency of trade secrets law by more clearly defining the legal boundaries of protection. Additionally, clarifying the statute of limitations and outlining damages may also further that goal. To the extent it has helped normalize and unify trade secrets law across different jurisdictions, the CUTSA has likely increased the efficiency of trade secret law and increased industry reliance on such protection.

invention or to reduce it to practice must afford to his employer a nonexclusive, royalty-free, nontransferable license to make use of the invention” even though patent protections prevent unauthorized use by other parties).

¹⁶³ See Chiappetta, *supra* note 2, at 74 (identifying the objectives for providing a better framework for analyzing misappropriation).

¹⁶⁴ See CAL. CIV. CODE § 3426.1(d) (West 1997) (covering information in the form of “a formula, pattern, compilation, program, device, method, technique, or process”).

¹⁶⁵ CAL. CIV. CODE § 3426.7.

B. Trade Secret Litigation

Another way in which the CUTSA has indirectly increased marketplace efficiency is by simplifying trade secrets litigation. Commentators have noted that far too often trade secrets lawsuits have been used as a weapon against competitors and former employees.¹⁶⁶ Most employees would be ill-equipped to defend themselves against a burdensome and costly lawsuit, and the filing of the lawsuit itself could squelch competition and inhibit employee mobility.¹⁶⁷ Although this continues to be a problem, the effect of the CUTSA may have reduced some of the inefficiency and uncertainties involved with litigating trade secrets.

In one case applying pre-CUTSA law, *Balboa Insurance Co. v. Trans Global Equities*,¹⁶⁸ the plaintiffs simply pled “unfair competition” in their complaint.¹⁶⁹ Since complaints are construed liberally, the court spent much of the decision trying to determine which common law torts were implicated under any and all applicable common law unfair competition theories.¹⁷⁰ Aside from actions for breach of contract, torts for unfair competition included “breach of confidential relationship, breach of fiduciary duty, interference with prospective economic advantage, advantageous business relationships [sic], and interference with contractual relations,” each tort having its own distinct set of issues that the court must wade through.¹⁷¹ Needless to say, this not only appears to have unnecessarily complicated the lawsuit, but it may have also made it more difficult for the defendants to mount a defense since it was unclear which common law torts applied. Although there is still some uncertainty and debate, the CUTSA has largely resolved this confusion through its preemption doctrine. For the most part, California courts have held the CUTSA to preempt all common law torts and unfair competition statutes when the complaint alleges facts that support misappropriation of trade secrets or confidential information.¹⁷² Theoretically, this change may increase efficiency by simplifying trade secrets

¹⁶⁶ Graves & DiBoise, *supra* note 109, at 343.

¹⁶⁷ *See id.*

¹⁶⁸ 267 Cal. Rptr. 787 (Cal. Ct. App. 1990).

¹⁶⁹ *Id.* at 794 n.17.

¹⁷⁰ *See id.* at 797 (reading by court into the pleadings four unfair competition claims and no breach of contract claims).

¹⁷¹ *Id.* at 795 (quoting ALLAN BROWNE, ATTORNEY’S GUIDE TO THE LAW OF COMPETITIVE BUSINESS PRACTICES 63 (1981)).

¹⁷² *See Digital Envoy, Inc. v. Google, Inc.*, 370 F. Supp. 2d 1025, 1034 (N.D. Cal. 2005); *Accuimage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 954 (N.D. Cal. 2003) (holding that UTSA preempted common law claims of misappropriation).

lawsuits, allowing defendants to more accurately assess risks, and making damages awards more predictable.

VII. CONCLUSION

In summary, the CUTSA has resulted in a variety of changes to the body of California trade secret law, often driven by policy concerns and prior case law in California. Although scholars disagree as to which underlying theory predominates, to some degree elements of property rights, relational duties, and efficiency are present in all theories. In examining pre-CUTSA cases and predicting the effect that the CUTSA might have had on their outcomes, it appears that many of the changes enacted by the CUTSA have strengthened both the property rights and efficiency theories, while having a mixed effect on the relational theory of trade secrets.

Although the CUTSA's definition of trade secret has not dramatically altered trade secret determinations, it does offer a broader, more flexible approach by creating one definition for various types of trade secrets.¹⁷³ Also, the "reasonable under the circumstances" language, as applied to efforts to maintain secrecy, furthers the efficiency theory by allowing courts a more flexible approach in analyzing trade secrecy.¹⁷⁴ The CUTSA's omission of the requirement that a trade secret not be readily ascertainable could be argued to further the relational aspect by punishing bad acts, or it may have been included simply as a continuation of pre-UTSA law. Likewise, the absence of this requirement may offer more clarification as to what is protectable under the property rights theory while substantiating the marketplace efficiency theory by creating a more flexible standard that adjusts to changes in industry.

The most significant way in which California's enactment of the CUTSA has limited the relational theory has been the transition of trade secret misappropriation from a common law tort to a statutory scheme that preempts various common law causes of action. Many common law torts developed to impose relational duties, finding liability for the breach of those duties.¹⁷⁵ The

¹⁷³ See CAL. CIV. CODE § 3426.1(d) (West 1997) (applying the same standards to a non-exclusive list of information types).

¹⁷⁴ See § 3426.1(d)(2) (requiring trade secrets be "subject of efforts that are reasonable under the circumstances to maintain its secrecy").

¹⁷⁵ See *Westervelt v. Nat'l Paper & Supply Co.*, 57 N.E. 552, 554 (Ind. 1900) (finding a confidential relationship between employer and employee not to disclose trade secrets, even absent an explicit agreement); *Olschewski v. Hudson*, 262 P. 43, 45 (Cal. Ct. App. 1927) (finding a former employee had an implied duty of confidentiality to his former employer regarding a laundry route).

CUTSA's preemption of common law actions has possibly eliminated common law defenses in the process. Preemption of common law torts has also weakened the relational duty theory since pre-CUTSA torts for unfair competition periodically found liability for breach of a duty involving non-secret confidential information.¹⁷⁶ While these actions may still sound in contract as a breach of an express or implied contract, the majority of California cases addressing the issue have found the CUTSA to foreclose such causes of action under common law torts.¹⁷⁷

Another instance of the CUTSA limiting the relational duty theory, and not previously mentioned in this paper, is one provision that gives the court the discretion to "award exemplary damages" against "willful and malicious misappropriation," but limits these damages to twice the sum of money damages and reasonable royalties awarded.¹⁷⁸ Prior to this CUTSA provision, there were apparently no limits on exemplary damages, which could have led to unpredictable and excessive damages against corporate defendants. The CUTSA may lead to a more reasoned result by limiting the damages award, which would seem to support the efficiency theory by creating a more predictable system of trade secret protection.

The CUTSA's provision of a reasonable royalty also may be considered to further the efficiency theory by allowing further misappropriation if circumstances require, while still recognizing the property rights of the original trade secret holder by awarding the royalty. This may also be viewed as limiting the relational duty theory since the misappropriator may be allowed to continue misappropriating under certain circumstances.

The provision of the CUTSA which allows innocent parties that have already made a "material change" in position to escape liability seems to be analogous to a bona-fide purchaser acquiring good title from a voidable title.¹⁷⁹

¹⁷⁶ See *Pioneer Hi-Bred Int'l v. Holden Found. Seeds*, 35 F.3d 1226, 1237 (8th Cir. 1994) (failing to inquire into secrecy and noting only the bad acts of the defendant); *Franke v. Wilt-schek*, 209 F.2d 493, 495 (2d Cir. 1953) ("It matters not that defendants could have gained their knowledge from a study of . . . plaintiff's publicly marketed product. The fact is they did not.").

¹⁷⁷ See *Digital Envoy, Inc. v. Google, Inc.*, 370 F. Supp. 2d 1025, 1034 (N.D. Cal. 2005); *Accuimage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 954 (N.D. Cal. 2003) (holding that UTSA preempted common law claims of misappropriation).

¹⁷⁸ CAL. CIV. CODE § 3426.3(c) (West 1997).

¹⁷⁹ For an illustration of voidable title, see 2-13 GEORGE W. THOMPSON, THOMPSON ON REAL PROPERTY, THOMAS EDITIONS § 13.04 (David A. Thomas ed., Matthew Bender & Co. 2009). For example, if one gains possession of property through misconduct, the possessor's title is voidable by the true owner; however, if one with voidable title transfers possession to an innocent purchaser, that purchaser obtains title superior to that of the true owner.

This would further support the property rights theory of trade secrets. It also would seem to support the efficiency theory in that accounting for the material change in position would likely prevent economic waste. If interpreted to foreclose future liability against an innocent party's misappropriation after receiving notice, this would seem to substantially limit the relational theory as compared to previous case law.

Overall, it appears that the CUTSA's effect on California trade secrets law has been to strengthen the property rights and efficient marketplace theories behind trade secrets while having a more varied effect on the relational duty theory. There is no evidence from the commentary of the UTSA that the intent of the legislation was to reinforce or establish any one of these three theories underlying trade secrets law.¹⁸⁰ Neither the 1979 UTSA nor the 1985 revised UTSA has explicitly stated an intent to establish or reinforce trade secret law as primarily a property based regime or a relational regime.¹⁸¹ At least one commentator maintains that a property rights theory would be the most effective manner in which to revise trade secrets law in light of California public policy.¹⁸² The property regime may inherently be the most effective manner in which to revise trade secret law or it may partly be that California courts have read California's better reasoned cases into their interpretation of the CUTSA, driven by policy concerns such as efficiency, innovation, employee mobility and the right of the public to rely on information in the public domain.

¹⁸⁰ See generally UNIF. TRADE SECRETS ACT (amended 1985), 14 U.L.A. 529, 530–32 (2005).

¹⁸¹ See Prefatory Note, UNIF. TRADE SECRETS ACT (amended 1985), 14 U.L.A. at 530; MILGRIM & BENSON, *supra* note 22, § 1.01[2][a]–[b].

¹⁸² See Graves, *supra* note 33, at 89 (concluding that “a property conception of trade secret law provides more protection to mobile employees than does . . . a relational conception”).