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I. FACTS

Johar, Incorporated is in the business of manufacturing handgrips for use on motorcycles, tools, exercise equipment, and sporting goods. Handgrip manufacturing is a very specialized and competitive business, and the manufacturing equipment utilized by Johar is unique in the industry. Johar has spent many years developing a substantial customer base.

Jerry Allen had been employed by Johar for approximately nine years when his employment was terminated in the spring of 1990. Following his termination, Mr. Allen started his own business, Allen Industries, and began developing handgrip production machinery that would enable him to compete with Johar.


2. 308 Ark. at 49, 823 S.W.2d at 826. There are approximately six companies engaged in handgrip manufacture nationwide. Id.

3. Id. at 47-48, 823 S.W.2d at 825-26. Johar originally entered the handgrip business by purchasing some used machines from a company in California. Id. at 47, 823 S.W.2d at 825. Sometime in the late 1970's Terry Vienna, president and owner of Johar, decided to redesign the machinery to increase its productivity and efficiency. Id. at 47-48, 823 S.W.2d at 825-26. Under the guidance of Dave Archer, a former Johar employee knowledgeable in industrial engineering, the machinery was modified in such a way as to double its production capacity. Id. at 48, 823 S.W.2d at 826. In addition, Archer made extensive refinements to the machinery to improve its operating efficiency. Id.

4. Id. at 49, 823 S.W.2d at 827. Mr. Vienna testified at trial that it has taken Johar almost 20 years to cultivate its current customer base and that its customer files contain detailed and specific information on each customer. Id.

5. Record at 53. Mr. Allen's termination was apparently prompted by rumors that he was preparing to leave Johar. Id. At the time of his termination, Mr. Allen was serving as Johar's sales manager. He had held that position for most of the term of his employment at Johar. 308 Ark. at 46, 823 S.W.2d at 825.

6. 308 Ark. at 46, 823 S.W.2d at 825. Mr. Allen Flowers, another long-time Johar employee, also left Johar and went to work for Jerry Allen at Allen Industries. Record at 54. Mr. Flowers had worked with Dave Archer to modify and service Johar's machinery. 308 Ark. at 48, 823 S.W.2d at 826. It was Mr. Flowers who actually designed and constructed the handgrip
Upon Mr. Allen’s departure, it was discovered that certain customer lists, files, and other confidential information were missing from Johar’s office.7 Terry Vienna, president and owner of Johar, asserted that Allen had wrongfully taken this information and demanded that it be returned.8 Mr. Allen denied taking any of Johar’s property, but acknowledged that he had contacted several of Johar’s customers.9

Johar subsequently filed suit against Allen in St. Francis County Chancery Court seeking injunctive relief and monetary damages.10 In its complaint, Johar alleged that Jerry Allen had misappropriated confidential information in duplicating the design of Johar’s manufacturing equipment.11 Furthermore, Johar asserted that Allen had misused proprietary information in soliciting Johar’s customers.12

During the course of the trial, the chancery court conducted an in-depth comparison of Allen’s and Johar’s manufacturing equipment.13 The chancellor found that, with relatively minor exceptions, Allen’s machinery was virtually identical to the Johar machinery.14 Accordingly, the court concluded that the design of Johar’s machinery was

7. 308 Ark. at 46, 823 S.W.2d at 825. Ms. Eva McCoy, a Johar office employee, testified at trial that following Allen’s departure certain customer files were missing. Record at 83. Ms. McCoy further testified that a customer “call schedule” notebook, inventory list, and customer list were also missing. Id. at 85-87.
8. Record at 53, 56.
9. 308 Ark. at 46, 823 S.W.2d at 825. Mr. Allen admitted that he had contacted up to ten of Johar’s established customers. Id.
10. Record at 2-3. Johar asked that Allen be temporarily and permanently enjoined from using any confidential information acquired while he was employed by Johar. Id. at 2. Johar also requested that Allen Industries be enjoined from using its handgrip manufacturing equipment which was allegedly modeled after Johar’s equipment. Id. at 3. In addition, Johar sought a court order enjoining Allen from contacting any of Johar’s customers whose identity Allen had gained knowledge of while employed at Johar. Id.
11. 308 Ark. at 46, 823 S.W.2d at 825.
12. Id. Johar’s complaint also alleged that, during the course of his employment, Allen had entered into a noncompetition agreement which provided that, upon the termination of his employment with Johar, Allen would not compete with Johar for three years anywhere in the United States. Record at 2. Prior to trial, however, Johar admitted that the noncompetition agreement was overly broad and unreasonable and, therefore, unenforceable. Brief for Appellant at 4, Allen v. Johar, Inc., 308 Ark. 45, 823 S.W.2d 824 (1992) (No. 91-275).
13. 308 Ark. at 47-48, 823 S.W.2d at 825-26. The chancellor not only considered testimony regarding the machinery, he personally inspected the manufacturing equipment of both Johar and Allen. Id.
14. Id. at 48, 823 S.W.2d at 826. Allen’s machines were constructed with a larger motor and included some safety features not on the Johar machines. Id. However, the Allen machinery was identical in design and method of operation to the Johar machinery. Id.
protected by the Arkansas Trade Secrets Act (ATSA)\(^\text{15}\) and enjoined Mr. Allen from any further use of his manufacturing equipment.\(^\text{16}\) Additionally, the chancellor ruled that the list of Johar's customers was protected under the ATSA and enjoined Mr. Allen from contacting any of Johar's current customers for eighteen months.\(^\text{17}\)

Jerry Allen appealed the chancery court's order to the Arkansas Supreme Court.\(^\text{18}\) In affirming the chancery court's decision,\(^\text{19}\) the court found that the evidence in the record clearly established that Johar's machines met the statutory definition of trade secret\(^\text{20}\) and were entitled to protection under the ATSA.\(^\text{21}\) In addition, the court held that Johar's customer list clearly qualified as a trade secret under the ATSA and, therefore, was also entitled to trade secret protection.\(^\text{22}\) Allen v. Johar, Inc., 308 Ark. 45, 823 S.W.2d 824 (1992).

II. HISTORICAL DEVELOPMENT

Before a meaningful analysis of trade secret law can be undertaken, the elemental principles of this area of the law must be delineated. "The fundamental right created by trade secret law is the owner's entitlement to relief for harm, or potential harm, caused when his trade secret is taken by misappropriation, that is, improper means."\(^\text{23}\) Thus,

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"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(A) 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

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.


16. 308 Ark. at 46, 823 S.W.2d at 825. The chancellor ordered Mr. Allen to dismantle his production machinery. Id.

17. Id. The eighteen month period was to run from the date of the chancellor's order rather than the date of Mr. Allen's termination. Id.

18. Id.

19. Id. at 47, 823 S.W.2d at 825.

20. Id. at 49, 823 S.W.2d at 826. See Ark. Code Ann. § 4-75-601(4) (Michie 1991); see also supra note 15.

21. 308 Ark. at 49, 823 S.W.2d at 826.

22. Id. at 50, 823 S.W.2d at 827.

23. Ramon A. Klitzke, The Uniform Trade Secrets Act, 64 Marq. L. Rev. 277, 277
in order for an item to be afforded legal protection as a trade secret, it must meet two essential requirements: (1) the item must fall within the definition of the term "trade secret;" and (2) the item must have been misappropriated from its owner.\(^{24}\)

Under the common law principles developed prior to the enactment of the Uniform Trade Secrets Act,\(^{25}\) which are still relied upon in jurisdictions that have not adopted the Act, the most comprehensive definition of the term trade secret, and the one most widely used by the courts,\(^{26}\) is contained in a comment to section 757 of the *Restatement of Torts*.\(^{27}\) The comment provides that a trade secret may consist of, among other things, any formula, device, or compilation of information which is used in a person's business and which gives him an advantage over competitors.\(^{28}\)

Although the *Restatement*'s definition appears extremely broad, it contains several important limitations.\(^{29}\) First, in order to be considered a trade secret, an item must be used continuously in the operation of the business.\(^{30}\) Second, the item or information must be of the type not

\(^{24}\) Id. at 278.


\(^{26}\) Klitzke, *supra* note 23, at 278.

\(^{27}\) Klitzke, *supra* note 23, at 278.

\(^{28}\) *Restatement of Torts* § 757 cmt. b (1939). The comment reads, in pertinent part, as follows:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business... in that it is not simply information as to single or ephemeral events in the conduct of the business... A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

*Id.* This section was omitted from the *Restatement (Second) of Torts* (1979) because trade secret law had developed into an independent body of law with decreased reliance on traditional principles of tort law. See *Restatement (Second) of Torts* introductory note to Division Nine at 1-2 (1979).

\(^{29}\) Klitzke, *supra* note 23, at 278.

generally known in the owner's business. Finally, and most importantly, the subject matter of the trade secret must in fact be secret. Absolute secrecy is not required, but a substantial degree of secrecy is necessary for an item to qualify as a trade secret.

The second critical prerequisite to trade secret protection is that the trade secret must have been misappropriated from its owner. Unlike patent and copyright law, which afford broader protection, trade secret law generally protects only those trade secrets which have been taken from their owner by improper or unscrupulous means. Some examples of improper means include acquiring knowledge of the trade secret through conspiracy, fraud, deceit, or theft.

Under the common law and Restatement principles discussed above, countless items have been afforded legal protection as trade

31. Klitzke, supra note 23, at 278.
32. JAGER, supra note 30, § 3.01.
33. RESTATEMENT OF TORTS § 757 cmt. b (1939). With regard to the requirement of secrecy, comment b provides the following:

The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. . . . [The owner of a trade secret] may, without losing his protection, communicate it to employees involved in its use . . . . Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information.

Id. (emphasis added).
34. Id. See also Klitzke, supra note 23, at 279.
35. ALEXANDER, supra note 23, § 3.1.
36. RESTATEMENT OF TORTS § 757 recognizes several situations in which trade secrets will be deemed to have been misappropriated. The section provides that:

One who discloses or uses another's trade secret without a privilege to do so, is liable to the other if:

(a) he discovered the secret by improper means, or
(b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, or
(c) he learned the secret from a third person with notice of the facts [sic] that it was a secret and that the third person discovered it by improper means or that the third person's disclosure of it was otherwise a breach of his duty to the other, or
(d) he learned the secret with notice of the facts [sic] that it was a secret and that its disclosure was made to him by mistake.

RESTATEMENT OF TORTS § 757 (1939). Thus, under § 757, misappropriation occurs when a trade secret is disclosed or taken by improper means, or there is a breach of a confidential relationship. It should be reiterated that the provisions set forth above are still relied upon in many jurisdictions which have not adopted the Uniform Trade Secrets Act. See Myrphy K. Readio, Minnesota Developments, Balancing Employer's Trade Secret Interests in High Technology Products Against Employees' Rights and Public Interests in Minnesota, 69 MINN. L. REV. 984, 987, 990 (1983).
secrets while many others have been held not entitled to protection.38
With regard to protectability, one of the most difficult and extensively litigated issues is the extent to which lists of customers should be afforded protection.39 Customer lists stand at the outer limits of trade secret law.40 Many businesses devote substantial efforts to developing and maintaining customer lists and relationships which they consider to be among their most valuable "trade secrets."41 On the other hand, public policy concerns over unreasonable restraints on legitimate competition weigh against protecting customer lists.42

In the employment context, it is well settled that an employee, unless contractually prohibited, may, upon the termination of his employment, compete with his former employer, provided the competition is conducted fairly and legally.43 However, many courts have prohibited a former employee from soliciting his former employer's customers where the former employee utilized confidential information or customer lists gained in the course of employment to facilitate such solicitation.44 Unfortunately, these courts have failed to establish a predominant theory or general rule as to the circumstances in which such solicitation will be prohibited.45 As a result, the law with regard to customer list protection, as with the entire field of trade secret law, has developed unsystematically and varies significantly between jurisdictions applying common law principles.46

At common law, prior to the adoption of the ATSA,47 Arkansas

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38. For a thorough listing of items that may or may not qualify as trade secrets see ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS, 12 BUSINESS ORGANIZATIONS § 2.09 (1992).
39. Id. § 2.09[7].
41. MILGRIM, supra note 38, § 2.09[7].
42. Competitive Torts, supra note 40, at 955-56. This is especially true when the one making use of the customer lists is the former employee of the one seeking trade secret protection. Id. at 956. As one New York court has pointed out, "there are powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood . . . ." Purchasing Associates, Inc. v. Weitz, 196 N.E.2d 245, 247 (N.Y. 1963).
44. 2 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 29:2 (2d ed. 1984). See also RESTATEMENT (SECOND) OF AGENCY § 396(b) (1958).
46. See generally Larsen, Customer Lists, supra note 43 (encyclopedic treatment of various levels of protection afforded customer lists in different jurisdictions).
courts defined a trade secret as a "secret formula, method, or device that gives one an advantage over competitors." Obviously, this definition was far more narrow than that provided by the Restatement. Despite its restrictiveness, Arkansas courts continued to apply this definition and implicitly rejected the Restatement's more expansive formulation.

The Arkansas Supreme Court first addressed the issue of whether a customer list qualified as a trade secret in *El Dorado Laundry Co. v. Ford.* In that case, the laundry company sought an injunction prohibiting Ford, a former employee, from soliciting the customers whom Ford had served while working for the laundry company. The court held that the names of the customers on Ford's laundry route were not a trade secret and, therefore, the laundry company was not entitled to relief. The court reasoned that, under the facts of the case, an injunction against Ford would have been an unreasonable restraint on freedom of employment.

In *Witmer v. Arkansas Dailies, Inc.* the corporation sought an injunction against Witmer, a former director and officer of the corporation, prohibiting him from soliciting the corporation's customers. The

49. See supra notes 23-29 and accompanying text.
50. See Milgrim, supra note 38, § 2.01. Prior to the decision in Miller v. Fairfield Bay, two federal courts, purportedly applying Arkansas law, cited the Restatement's definition of trade secret with approval. See Tlapek v. Chevron Oil Co., 407 F.2d 1129, 1135 (8th Cir. 1969); Harris Manufacturing Co. v. Williams, 157 F. Supp. 779, 786 (W.D. Ark. 1957). The court in Miller, however, articulated a more narrow definition of the term, and subsequent Arkansas courts were not inclined to expand it. See, e.g., Rector-Phillips-Morse, Inc. v. Vroman, 250 Ark. 750, 751, 489 S.W.2d 1, 3 (1973).
51. 174 Ark. 104, 294 S.W. 393 (1927).
52. Id. at 105, 294 S.W. at 394.
53. Id. at 106-07, 294 S.W. at 394. The court apparently drew a distinction between the use of a printed customer list and the use of memorized information. Id. The uncontradicted evidence at the trial showed that, although he had access to a printed customer list, Ford had only solicited customers with whom he had become familiar during his employment at the laundry company. Id. at 106, 294 S.W. at 394.
54. Id. at 106, 294 S.W. at 394. The court noted that any restraint on freedom of employment, without some reasonable limitations, was similar to a contract in restraint of trade in that they were both "contrary to public policy, and unenforceable." Id.
55. 202 Ark. 470, 151 S.W.2d 971 (1941).
56. Id. at 473-75, 151 S.W.2d at 972-74. Arkansas Dailies was engaged in the business of soliciting advertising from manufacturers for placement in newspapers on a contract basis. Id. at 472, 151 S.W.2d at 972. Witmer had organized a company that would directly compete with
Arkansas Supreme Court held that the corporation was not entitled to the relief it sought because it was not engaged in a business which involved any trade secrets.\(^5\) The court stated that there was no proof that Witmer, in pursuing his new business, had used any confidential information, trade secrets, or anything else that he had acquired from the corporation.\(^6\)

In 1975 the Arkansas Supreme Court decided *Orkin Extermination Co. v. Weaver*,\(^5\) a case which involved a covenant not to compete.\(^6\) Although it did not directly address the issue, the court clearly indicated that it did not believe customer lists qualified as trade secrets.\(^6\) The only trade secret at issue in the case concerned Orkin's technical manuals regarding pesticides.\(^6\) The court's discussion of Orkin's list of customers was totally separate.\(^8\) The court concluded

Arkansas Dailies. *Id.* at 474, 151 S.W.2d at 973. However, he did not solicit business from Arkansas Dailies' patrons until their contracts with Arkansas Dailies had expired. *Id.* at 477, 151 S.W.2d at 974. Prior to soliciting any business from Arkansas Dailies' customers, Witmer had resigned as both officer and director of the corporation. *Id.* at 473, 151 S.W.2d at 972. Thus, a fiduciary relationship between Witmer and Arkansas Dailies no longer existed at the time of the solicitations. *Id.*

\(^5\) *Id.* at 475, 151 S.W.2d at 973. The court apparently based this holding on the fact that Arkansas Dailies was nothing more than a "service corporation." *See id.*

\(^6\) *Id.* at 477, 151 S.W.2d at 974. The court quoted an earlier Iowa case for the proposition that "[a]n employee, on leaving his employer's service is guilty of no legal wrong in profiting by the experience and knowledge gained in the service." *Id.* (quoting H. W. Gossard Co. v. Crosby, 109 N.W. 483 (Iowa 1906)). The court also appeared to be influenced by the fact there was not a provision in Witmer's employment contract which prohibited him from competing with the corporation in the event he should leave its employment. *Id.* at 473, 151 S.W.2d at 972.

\(^9\) 257 Ark. 926, 521 S.W.2d 69 (1975).

\(^10\) *Id.* at 927, 521 S.W.2d at 70. Weaver's employment contract contained a provision in which he agreed not to engage in the pest control business within a certain area for a period of two years after the termination of his employment with Orkin. *Id.* For a thorough discussion of Arkansas law regarding the enforceability of covenants not to compete see John R. Pagan, *Arkansas Courts and Covenants Not to Compete*, 12 U. ARK. LITTLE ROCK L. J. 57 (1989-90).

\(^11\) See 257 Ark. at 927, 521 S.W.2d at 70. The court stated that the issues involved in the case were whether Weaver had access to *trade secrets*, special training, confidential information, or customer lists belonging to Orkin. 257 Ark. 927, 521 S.W.2d 70 (citing Orkin Extermination Co. v. Murrell, 212 Ark. 449, 206 S.W.2d 185 (1947)). By referring to trade secrets and customer lists in the disjunctive, the court made it clear that, although a customer list might be a protectable property interest in appropriate circumstances, it did not believe that a customer list qualified as a trade secret.

\(^12\) See 257 Ark. at 928, 521 S.W.2d at 70. The court concluded that the information contained in Orkin's technical manual was readily available to the public and not protectable as a trade secret. *Id.*

\(^13\) *Id.* at 929, 521 S.W.2d at 71. Orkin never asserted that its customer list constituted a trade secret. *See id.* at 930, 521 S.W.2d at 71. It merely sought to enforce the restrictive covenant contained in Weaver's employment contract. *Id.* at 927, 521 S.W.2d at 70.
that the restrictive covenant in Weaver's employment contract was unreasonable and, therefore, invalid.64

As the preceding discussion partially illustrates, prior to the enactment of the Uniform Trade Secrets Act,65 the common law of trade secrets "languishe[d] in a deepening maze of conflict and confusion."66 This is true despite the fact that trade secret law is obviously of paramount importance in preserving the confidentiality of commercially valuable information, inventions, and ideas and should receive a uniform application as an independent body of law.67 Although the adoption of the Restatement of Torts in 1939 greatly contributed to the gradual evolution of the common law of trade secrets,68 it lacked the comprehensiveness and uniformity necessary for the development of a coherent, systematic, and exhaustive body of law.69 Furthermore, the Restatement did not adequately address certain essential areas of trade secret law.70 The uncertainty and confusion surrounding the common law of trade secrets was exacerbated by the deletion of all sections relating to trade secret law from the second edition of the Restatement of Torts.71 The reporters of the American Law Institute suggested that trade secrets law was no longer based primarily on tort principles and, therefore, its inclusion in the Restatement (Second) of Torts would be inappropriate.72

64. Id. at 930-31, 521 S.W.2d at 71-72. The court stated that the covenant not to compete in the Orkin employment contract was "directed not against unfair competition but against competition of any kind on the part of its former employees." Id. at 929, 521 S.W.2d at 71. "Needless to say, the law does not provide any such protection from ordinary competition." Id. at 930, 521 S.W.2d at 71. See also Pagan, supra note 60, at 61-63.
68. See supra notes 26-38 and accompanying text.
70. ALEXANDER, supra note 23, § 3.1. The Restatement did not address the issue of an appropriate statute of limitations. Id. It also failed to provide adequate guidance on the issue of damages. Id.
72. RESTATEMENT (SECOND) OF TORTS introductory note to Division Nine at 1-2 (1979). The introductory note stated that:

[T]he influence of Tort law [on trade secret law] has continued to decrease . . . and the law of Unfair Competition and Trade Regulation is no more dependent upon Tort law than it is on many other general fields of the law and upon broad statutory developments, particularly at the federal level. The Council formally reached the decision that these chapters no longer belong in the Restatement of Torts, and they are omitted from this Second Restatement.
The common law of trade secrets stood in this unsettled state when the National Conference of Commissioners on Uniform State Laws adopted the Uniform Trade Secrets Act in 1979. The Uniform Act codifies the generally accepted principles of common law trade secret protection with some modifications based on the better reasoned cases concerning remedies for trade secret misappropriation. The Uniform Act contains general concepts intended to promote uniformity and predictability in the litigation of trade secret issues.

Arguably, the most important section of the Uniform Trade Secrets Act is the definitions section which "delineates the substantive rights created by the Act." This section defines the terms "trade secret," "misappropriation," "improper means," and "person" as

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Id. The omission of § 757 from the second edition of the Restatement has forced states which have not adopted the Uniform Trade Secrets Act to rely on principles established before 1939. See Readio, supra note 36, at 990.


75. Id.


77. Klitzke, supra note 23, at 284.

78. UNIF. TRADE SECRETS ACT § 1(4) reads as follows:

"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.


79. UNIF. TRADE SECRETS ACT § 1(2) defines "misappropriation" as:

(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(ii) disclosure or use of a trade secret of another without express or implied consent by a person who

(A) used improper means to acquire knowledge of the trade secret; or

(B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was

(I) derived from or through a person who had utilized improper means to acquire it;

(II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(III) derived from or through a person who owed a duty to the person

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used in the Act. The remaining sections of the Act deal with, among other things, appropriate remedies for misappropriation of a trade secret, a statute of limitations, and the effect the Act has on conflicting law.

As of 1991, the Uniform Trade Secrets Act had been adopted, in various forms, in thirty-six states and the District of Columbia. Arkansas adopted the ATSA in 1981 with only minor departures from

seeking relief to maintain its secrecy or limit its use; or

(C) before a material change of his [or her] position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.


80. UNIF. TRADE SECRETS ACT § 1(1) states that "improper means" include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Id., 14 U.L.A. at 437 (1990 & Supp. 1992).

81. UNIF. TRADE SECRETS ACT § 1(3) defines the term "person" as "a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity." Id., 14 U.L.A. at 438 (1990 & Supp. 1992).


83. UNIF. TRADE SECRETS ACT § 6. Under this section, an action for misappropriation of a trade secret must be commenced within three years after the misappropriation is discovered or reasonably should have been discovered. Id., 14 U.L.A. at 462 (1990 & Supp. 1992).


87. See supra note 15.
the text of the Uniform Trade Secrets Act in effect at the time.\textsuperscript{88} Those jurisdictions which have not adopted the Act continue to rely on the \textit{Restatement of Torts} and the common law principles previously discussed.\textsuperscript{89}

One of the express purposes of the Uniform Trade Secrets Act is to promote uniformity in the litigation of trade secret issues among the states enacting it.\textsuperscript{90} Nevertheless, even among states which have adopted the Act, a few areas of trade secret law remain uncertain.\textsuperscript{91} One of these areas of uncertainty is the extent to which customer lists should be afforded trade secret protection.\textsuperscript{92} Courts in several jurisdictions which have adopted the Act have extended trade secret protection to customer lists,\textsuperscript{93} while courts in other jurisdictions adopting the Act have refused to do so.\textsuperscript{94} A review of the cases indicates, however, that the inconsistent treatment afforded customer lists is a function of the unique facts of each case rather than of unsound interpretation of the Act's definition of trade secret.\textsuperscript{95}

For instance, two recent California cases aptly illustrate that not all customer lists will qualify for trade secret protection.\textsuperscript{96} In \textit{American Paper \& Packaging Products v. Kirgan},\textsuperscript{97} the plaintiff, a shipping material supply company, brought suit against two former employees seek-
ing to enjoin them from soliciting its customers or disclosing its customer lists to competitors. As grounds for the injunction, American Paper asserted that its customer list qualified as a trade secret. The court first determined that customer lists could qualify as trade secrets under the California version of the Uniform Trade Secrets Act in certain circumstances. In this case, however, the court held that American Paper's customer list was not protectable as a trade secret because it was readily ascertainable by proper means and, therefore, did not fit within the Act's definition of trade secret.

In *American Credit Indemnity Co. v. Sacks* the plaintiff, American Credit Indemnity (ACI), was a national underwriter of credit insurance. The potential customers for credit insurance were companies with annual revenues in excess of two million dollars and large accounts receivable. However, only about six and one-half percent of these potential customers actually purchased credit insurance. Sacks, who had been an ACI agent for over nine years, resigned from ACI to form an independent insurance agency and solicited several of ACI's clients. ACI subsequently filed suit against Sacks seeking injunctive relief and damages. The court held that ACI's list of policyholders

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98. Id. A dispute arose between American Paper and the former employees over commission payments. Id. at 714. The former employees left American Paper and went to work for one of its competitors. Id.

99. Id. at 715.

100. Id. at 716. The court pointed out that any prior California case law to the contrary was superseded by the adoption of the Act. Id.

101. Id. at 717. The court stated that:

While the information sought to be protected here, that is lists of customers . . . may not be generally known to the public, they certainly would be known or readily ascertainable to other persons in the shipping business. The compilation process in this case is neither sophisticated nor difficult nor particularly time consuming.

.Id. The former employees had developed their list of customers by making "cold calls" to companies that might be in need of shipping services. Id. at 714.

102. Id. at 717. See supra note 78.

103. 262 Cal. Rptr. 92 (Ct. App. 1989).

104. Id. at 93. Credit insurance is sold to manufacturers, wholesalers, and service organizations that sell on credit terms and is designed to protect the insured from excessive bad debt losses. Id. Only three firms offered this type of insurance, and American Credit was the leader in the field. Id.

105. Id.

106. Id. ACI had compiled a list of potential customers who had exhibited an interest in purchasing credit insurance. Id. at 97.

107. Id. at 94. Upon departure from ACI, Sacks sent a letter to the ACI customers for whom she had provided services while at ACI announcing the formation of her new agency and inviting them to contact her. Id.

108. Id. In its complaint, ACI alleged that Sacks had misappropriated certain ACI trade
constituted a trade secret under the California version of the Uniform Trade Secrets Act\textsuperscript{109} and that Sacks had misappropriated that trade secret.\textsuperscript{110} Accordingly, the court concluded that ACI was entitled to injunctive relief.\textsuperscript{111}

Prior to the decision in \textit{Allen}, no Arkansas court had ever been called upon to interpret the ATSA. However, two federal courts, applying Arkansas law, did have occasion to consider the Act’s definition of “trade secret.”\textsuperscript{112}

In \textit{Hi-Line Electric Co. v. Moore}\textsuperscript{113} the Eighth Circuit Court of Appeals was called upon to determine whether the electric company’s list of customers met the definition of a trade secret.\textsuperscript{114} Moore had worked for the electric company as a salesman for approximately six years when he resigned\textsuperscript{115} and began selling a similar product in direct competition with Hi-Line.\textsuperscript{116} The electric company filed suit against Moore alleging that its customer information was a trade secret which Moore had misappropriated.\textsuperscript{117} The court affirmed the judgment of the
district court which had held that Hi-Line's customer information was readily ascertainable\(^{118}\) and, therefore, not within the definition of trade secret as provided by the ATSA.\(^{119}\)

In *United Centrifugal Pumps v. Cusimano*\(^{120}\) the plaintiff, United Centrifugal Pumps (U.C.P.), filed suit against two former employees seeking a preliminary injunction prohibiting them from marketing automated welding services to U.C.P. customers or potential customers.\(^{121}\) U.C.P. claimed that both its welding system and customer list were trade secrets.\(^{122}\) The court held that U.C.P. had not carried its burden of proving that its customer list was not readily ascertainable by proper means\(^ {123}\) as required by the ATSA.\(^{124}\)

Although the courts in *Hi-Line Electric* and *United Centrifugal Pumps* refused to protect the customer lists before them, neither court implied that customer lists were not appropriate subject matter for trade secret protection under the ATSA.\(^ {125}\) These cases simply illustrate that whether a particular customer list is entitled to trade secret protection is a question of fact that will depend on the unique circumstances of each case.\(^ {126}\)

### III. Reasoning of the Court in Allen

In January 1992 the Arkansas Supreme Court was called upon for the first time to interpret the Arkansas Trade Secrets Act in *Allen v.*

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118. *Id.* The district court found that Moore had developed up to 80% of the customers he had serviced while at Hi-Line and that he had not misappropriated any information. *Id.* According to the court, the reason for Moore's success in his new position was customer loyalty not unfair competition. *Id.*

119. *Id.* See *supra* note 15.


121. *Id.* at 1041. It is important to note that this case came before the court on U.C.P.'s motion for a preliminary injunction, pending the outcome of the case on the merits. *Id.* As the court pointed out, a preliminary injunction is an extraordinary remedy, and the movant must bear a significant burden of persuasion to prevail. *Id.* at 1042.

122. *Id.* at 1043. The former employees asserted that they did not use U.C.P.'s trade secrets in developing their welding system and that the identities of U.C.P.'s customers were readily ascertainable by proper means. *Id.* at 1041-43.

123. *Id.* at 1043. The court also stated that, on the record before it, it could not determine if U.C.P.'s welding system constituted a trade secret. *Id.* The court pointed out that in denying the preliminary injunction, it was not in any way ruling on the merits of the case. *Id.* at 1044.

124. See *supra* note 15.

125. As a matter of fact, both courts implicitly recognized that a customer list might be entitled to protection as a trade secret in the appropriate circumstances. See *Hi-Line Elec.*, 755 F.2d at 997; *United Centrifugal Pumps*, 708 F.Supp. at 1043.

Johar, Inc. The court began its analysis by reviewing the definitions of "trade secret" and "misappropriation" as provided by the ATSA. The court pointed out that actual or threatened misappropriation of a trade secret may be enjoined under the Act.

The court then addressed the chancery court's ruling that Johar's manufacturing equipment was protected under the ATSA. At trial, Jerry Allen argued that Johar had not developed the dual capacity production machinery which it sought to protect as a trade secret. To support this argument, Allen introduced testimony that another company involved in handgrip manufacturing, Halstead Industrial Products, also utilized dual capacity machinery. Johar's witness, on the other hand, testified that he had inspected the Halstead machines, and they were not similar to the ones used by Johar.

The court emphasized that the chancellor had made detailed findings of fact and personally viewed both companies' machines. The chancellor had found that Allen's machinery was virtually identical to the machinery designed and used by Johar and that Allen's machinery had been built by a former Johar employee. Furthermore, the
chancellor found that Johar had taken reasonable precautions to maintain the secrecy of its dual production machinery as required by the ATSA. In affirming the chancery court's holding, the court concluded that "the evidence in the record clearly establishes that Johar's machines fit under the definition of trade secret in Ark. Code Ann. § 4-75-601(4)."

The court then turned to the issue of whether Johar's customer list constituted a trade secret under the ATSA. The court first dispensed with prior Arkansas case law which held that customer lists were not entitled to trade secret protection by stressing that those cases were decided prior to the enactment of the ATSA. The court next took notice of cases in other jurisdictions which have afforded trade secret protection to customer lists.

The court's first consideration regarding Johar's customer list was whether the information contained therein was readily ascertainable by proper means. Johar maintained detailed information on its customers, and Terry Vienna testified that it would take several years of work for a competitor to compile similar information. The court found that the potential users of Johar's product would not be easily ascertainable.

The court distinguished Hi-Line Electric by pointing out

ployee, asserted that he had not learned of the dual capacity technology while working for Johar. 128. Johar introduced evidence contradicting Mr. Flower's testimony. 129. Having considered the conflicting testimony, the chancellor ruled that all of Mr. Flower's knowledge regarding dual capacity machinery came from his familiarity with the Johar machinery. Record at 58.

130. 308 Ark. at 49, 823 S.W.2d at 826. The chancellor apparently based this ruling on the fact that Terry Vienna, President of Johar, did not allow tours of the Johar plant. 131. Id.

132. Id. Reasonable efforts to maintain the secrecy of a trade secret are a prerequisite to legal protection under Ark. Code Ann. § 4-75-601(4)(B) (Michie 1991). See supra note 15.

133. 308 Ark. at 48-49, 823 S.W.2d at 826.

134. Id. at 49, 823 S.W.2d at 826.

135. Id. See supra notes 51-64 and accompanying text.

136. 308 Ark. at 49, 823 S.W.2d at 826. Ark. Code Ann. § 4-75-602 (Michie 1991) states that the ATSA displaces any conflicting Arkansas law regarding civil liability for misappropriation of a trade secret.

137. 308 Ark. at 49-50, 823 S.W.2d at 826-27. In order to meet the definition of trade secret, the "information" must not be readily ascertainable by proper means by one who could obtain economic value from its use. Ark. Code Ann. § 4-75-601(4)(A) (Michie 1991). See supra note 15.

138. 308 Ark. at 49, 823 S.W.2d at 827. See also supra note 4 and accompanying text.

139. 308 Ark. at 50, 823 S.W.2d at 827. Vienna testified that Johar's substantial customer base had been accumulated through years of attending trade shows and subscribing to trade magazines.
that the former employee in that case had developed most of Hi-Line's
customers himself, while here there was no showing that Allen had de-
veloped any of Johar's customers.\footnote{148} The court concluded that the
identities of Johar's customers were not readily ascertainable by conven-
tional means as required by the ATSA.\footnote{150}

The court's analysis then shifted to whether Johar had taken rea-
sonable precautions to preserve the secrecy of its customer list as re-
quired by the ATSA.\footnote{151} The chancery court had found that Johar's
customer list was imparted to employees in confidence, was not to leave
the business premises, and that outdated customer printouts were de-
stroyed as a matter of company policy.\footnote{152} The Arkansas Supreme
Court concluded, largely on the basis of the chancellor's findings, that
Johar's efforts to maintain the secrecy of its customers' identities were
reasonable under the circumstances.\footnote{153} Thus, the court declared that
the evidence "clearly supports the chancellor's holding that Johar's cus-
tomer lists meet the requirements of protection as a trade secret."\footnote{154}

Finally, the court addressed Allen's argument that even if Johar's
written customer list was protectable as a trade secret, the customer list
he retained in his memory should not be protected.\footnote{155} The court sum-
marily dismissed this argument by stating that "whether the customer
information used was written down or memorized is immaterial, and
the proper issue is whether the information is protectable as a trade
secret."\footnote{156} The court concluded that, under the circumstances of the
case, Johar's customer list was a protectable trade secret regardless of its form.157

In his dissent, Justice Newbern, joined by Justices Brown and Dudley, contended that the majority had erred with respect to Johar's memorized customer list.158 The dissent first pointed out that, even after the adoption of the ATSA, the Arkansas Court of Appeals "continued to consider protection of a customer list separately from protection of a trade secret."159 Justice Newbern then turned to the language of the ATSA and concluded that Johar's written list of customers undoubtedly fit within the Act's definition of trade secret.160 The dissent did not believe, however, that the list of Johar's customers retained in Allen's mind was entitled to trade secret protection.161 The dissenting justices were not convinced that Johar had taken reasonable efforts to protect the secrecy of the memorized list as required by the ATSA.162

ployee. Other courts hold that it is immaterial whether the information is written or memorized, as the issue is whether the information is legally protectable property of the employer. The latter view appears more reasonable. The mere fact that an ex-employee has a good memory and needs no tangible records seems to be a slender reed upon which to hang a finding of nonliability. If the information used is protectable, it should make little difference whether the employee had to write it down or not. It cannot be absolutely stated that an ex-employee can use any customer information so long as he does not write it down.


157. 308 Ark. at 50, 823 S.W.2d at 827.
158. Id. at 52, 823 S.W.2d at 828 (Newbern, J., dissenting).
159. Id. at 51, 823 S.W.2d at 828 (Newbern, J., dissenting). In Girard v. Rebsamen Ins. Co., 14 Ark. App. 154, 685 S.W.2d 526 (1985), a case involving a covenant not to compete, the Court of Appeals held that the insurance company's customer list was not a trade secret, but that "its customer list and related information were protected interests." Id. at 137, 685 S.W.2d at 527-28. Note, however, that the Court of Appeals did not even refer to the ATSA in so holding. Allen, 308 Ark. at 51, 823 S.W.2d at 828 (Newbern, J., dissenting). Following the Girard decision, the Court of Appeals has continued to treat trade secrets and customer lists as separate subjects. Id. See Federated Mut. Ins. Co. v. Bennett, 36 Ark. App. 99, 818 S.W.2d 596 (1991); Duffner v. Alberty, 19 Ark. App. 137, 718 S.W.2d 111 (1986). It should be emphasized that the decisions in both Federated Mutual and Duffner also turned on the enforceability of covenants not to compete, and that the ATSA was not at issue in either case.

160. 308 Ark. at 52, 823 S.W.2d at 828 (Newbern, J., dissenting). Prior to reaching this conclusion, Justice Newbern pondered whether the ATSA has "elevated to the status of 'trade secret' the customer list previously protected only by the common law of unfair competition?" Id. Recall that in Arkansas, however, the common law provided precious little protection for customer lists. See supra notes 51-64 and accompanying text.

161. 308 Ark. at 52, 823 S.W.2d at 828 (Newbern, J., dissenting).
162. Id. The dissent argued that the only reasonable effort an employer can make to protect a list of customers not in writing, but retained in an employee's memory, is to enter a reasonable noncompetition agreement with the employee. Id. The dissent then accused the chancery court of
Justice Newbern was also concerned that protecting memorized customer lists as trade secrets would “lead to problems which could be avoided if the holding were limited to lists in writing.” Finally, the dissenters questioned how, if Johar’s customer list qualified as a trade secret, it could cease to so qualify at the end of eighteen months. The dissent concluded by reiterating its position that only written customer lists should be protected as trade secrets under the ATSA, and that the only way an employer can reasonably maintain the secrecy of a memorized list of its customers is to enter a reasonable noncompetition agreement with its employees.

IV. ANALYSIS AND SIGNIFICANCE

The Arkansas Supreme Court’s holding in Allen is obviously of great significance. For the first time, an Arkansas court has afforded trade secret protection to a confidential customer list in the absence of a covenant not to compete. The decision appears to be a drastic departure from the precedent established by such cases as El Dorado Laundry. However, as the court correctly pointed out, those cases were decided prior to the enactment of the ATSA and are no longer controlling.

The court in Allen was presented with trade secret litigation between an employer and its former employee. Inherent in any such litigation is a tension between the employer’s interest in preserving the secrecy of its trade secret, whether it is a process, formula, or customer list, and the employee’s interest in economic mobility and freedom of employment. A further consideration in such litigation is the public policy interests of promoting legitimate competition and free trade and encouraging entrepreneurial and technological advances. A court simply creating a noncompetition agreement between Johar and Allen, stating that “[such an] agreement in these circumstances is a standard device; however . . . it should be written by the parties and not by the Chancellor.” Id. However, Justice Newbern did not clearly articulate what these “problems” might be. See id.

163. Id. However, Justice Newbern did not clearly articulate what these “problems” might be. See id.
164. Id. Recall that the chancery court had enjoined Allen from contacting any of Johar’s then-current customers for 18 months. Id. at 46, 823 S.W.2d at 825.
165. Id. at 53, 823 S.W.2d at 828-29 (Newbern, J., dissenting).
166. See id. at 50, 823 S.W.2d at 827. See also supra notes 51-64 and accompanying text.
167. 174 Ark. 104, 294 S.W. 393 (1927). See supra notes 51-54 and accompanying text.
168. 308 Ark. at 49, 823 S.W.2d at 826. See supra note 143 and accompanying text.
169. 308 Ark. at 46, 823 S.W.2d at 825.
faced with these competing interests must balance them carefully in order to reach an equitable result.

In *Allen*, the court properly considered the expense and initiative undertaken by Johar in developing its unique machinery and accumulating a substantial customer base. The court also evaluated Johar's efforts to maintain the secrecy of its machinery and customer information and concluded that they were reasonable under the circumstances. Against these factors, the court assessed Mr. Allen's relatively minor contributions to the success of Johar and concluded that it was not proper for Allen to appropriate for his own use information and technology that had been developed over many years and at great expense by Johar.

The Arkansas Supreme Court also construed the ATSA for the first time in *Allen*. The court conducted a well-reasoned analysis of the statutory definition of the term "trade secret" and reached what was, with little doubt, the correct conclusion in holding that Johar's customer list met the definition. The court made it clear, however, that not all customer lists or other confidential information will qualify as a trade secret. The court's opinion appropriately emphasized that in order to be protectable as a trade secret, the information sought to be protected must not be readily ascertainable by proper means and must be the subject of efforts reasonable under the circumstances to maintain its secrecy.

Possibly the most significant aspect of the *Allen* decision is the Arkansas Supreme Court's ruling with regard to memorized customer

171. 308 Ark. at 48-50, 823 S.W.2d at 825-27.
172. id. at 49-50, 823 S.W.2d at 827.
173. id. at 48-50, 823 S.W.2d at 827. There was no evidence that Allen had cultivated any new business for Johar, and the evidence established that he was not involved in developing the dual capacity technology. id.
174. id. at 49-50, 823 S.W.2d at 827. The chancellor found that Johar spent an enormous amount of money to redesign its production machinery. Record at 51.
175. 308 Ark. at 50, 823 S.W.2d at 827. The court was clearly correct in holding that Johar's handgrip production equipment fit within the ATSA's definition of trade secret. This contention is supported by the fact that the dissent did not dispute that holding. See id. at 51-53, 823 S.W.2d at 827-29 (Newbern, J., dissenting).
176. Id. at 49-50, 823 S.W.2d at 826-27.
177. Id. at 47, 49-50, 823 S.W.2d at 825-27. The comment to the definitions section of the Uniform Trade Secrets Act states that proper means include: independent discovery; discovery by reverse engineering; public observation of the trade secret; discovery under a license from the owner of the trade secret; or obtaining trade secrets from published literature. UNIF. TRADE SECRETS ACT § 1 cmt., 14 U.L.A. 433, 438 (1990).
178. 308 Ark. at 49-50, 823 S.W.2d at 827.
lists. In holding that the distinction between written and memorized customer lists is irrelevant to the issue of trade secret protection, the court seems to have adopted the more logical view of the issue. The policy of protecting a written list of customers which has been misappropriated from its owner, but refusing to protect that same list simply because it was committed to memory rather than written down is difficult to justify. "The distinction places a premium upon good memory and a penalty upon forgetfulness, and it cannot be justified either from a logical or pragmatic point of view." The issue in a case such as Allen should be whether a particular list of customers is protectable as a trade secret, not whether the person who misappropriated that list has a good memory.

As previously discussed, the dissenting justices believed that only written customer lists should be afforded trade secret protection under the ATSA. The basis of the dissent's argument was that the only reasonable effort an employer can make to protect its customer list from misappropriation by employees is to require the employees to execute noncompetition agreements. Admittedly, the most prudent means by which an employer can protect its confidential customer information from misappropriation is by requiring its employees to execute a reasonable noncompetition agreement. However, it cannot be absolutely stated that it is always possible for an employer to secure such an agreement. Furthermore, the possibility that a court will declare a noncompetition agreement unenforceable is always present.

179. *Id.* at 50, 823 S.W.2d at 827. "[T]he distinction between written and memorized information should not be encouraged. The form of the information . . . [is] unimportant; the nature of the relationship and the employee's conduct should be the determinative factors." 2 CALLMANN, supra note 155, § 14.31, at 109-10 (footnote omitted). *See also Competitive Torts, supra* note 40, at 956 ("This memory rule in most cases seems to have little merit other than as an arbitrary rule of thumb"). 2 McCARTHY, supra note 156, § 29.5.

180. 2 CALLMANN, supra note 155, § 14.31, at 110 (footnote omitted).

181. 308 Ark. at 52, 823 S.W.2d at 828 (Newbern, J., dissenting).

182. *Id.* at 52-53, 823 S.W.2d at 828-29 (Newbern, J., dissenting). The undesirable result which such an ironclad rule might yield must be pointed out: In the absence of a noncompetition agreement a customer list will not be entitled to trade secret protection, because it does not meet the definition of a trade secret; however, where a noncompetition agreement is present, the customer list will not need trade secret protection. Thus, a customer list might be denied trade secret protection in the very circumstances in which such protection is most critical.

183. The noncompetition agreement also serves to put "the employee on notice that certain information is considered confidential and should not be disclosed." Silberberg & Lardiere, supra note 92, at 502.

184. This possibility is vividly illustrated by the facts in Allen. As previously discussed, Johar had required Jerry Allen to sign a noncompetition agreement, but it was later stipulated
Thus, the court’s holding in *Allen* that memorized customer lists may be afforded trade secret protection in appropriate circumstances, even in the absence of a noncompetition agreement, seems to be the more equitable approach. It should be emphasized, however, that employers should not forego securing a noncompetition agreement when possible because, as previously discussed, not all information that an employer considers confidential will necessarily constitute a trade secret.

The dissent also questioned how Johar’s customer list could cease to qualify as a trade secret at the end of eighteen months. It is clear that such reasoning was not the basis for the court’s holding that Johar’s list of customers should only receive trade secret protection for a limited duration. Instead, the court implicitly recognized that protecting a customer list in perpetuity is not appropriate except in extraordinary circumstances. The commentary to the Uniform Trade Secrets Act clearly indicates that the National Conference of Commissioners on Uniform State Laws believed that injunctive relief should last no longer than is necessary. The court’s holding in *Allen* that Johar’s customer list should only be protected for eighteen months appears to be in accord with this position.

The Arkansas Supreme Court’s interpretation of the ATSA is con-
sistent with the purposes underlying the enactment of the Uniform Trade Secrets Act: to promote certainty regarding the parameters of trade secret protection and to provide appropriate remedies for trade secret misappropriation.\footnote{UNIF. TRADE SECRETS ACT, 14 U.L.A. 433, 434 prefatory note (1990).} The court's decision in \textit{Allen} should facilitate the protection of customer lists in appropriate circumstances and allow employers to entrust a wide range of customer and other confidential information to an employee without fear of later misappropriation by that employee. This should encourage technological advances, improve efficiency, and increase productivity.

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