



Ariz. Deepens States' Rift On UTSA Preemption

*By Bill Donahue
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The Uniform Trade Secrets Act is more than three decades old, but a ruling in Arizona this week highlights the fact that the various states that have adopted it are still split over a sticky question: whether the act preempts all other claims of information theft.

Because the UTSA was designed to harmonize the state-by-state mishmash of common-law torts that were being used to protect proprietary information, its drafters included a preemption provision that generally displaces any “conflicting torts” involving the misappropriation of a trade secret in favor of the new statutory remedy.

Figuring out just what exactly that provision preempts, however, hasn't quite led to harmony.

Over the past decade, numerous courts around the country have turned in conflicting opinions on the fundamental question of whether that provision also bars common-law claims for theft of information that doesn't meet the UTSA's definition of a “trade secret.”

Put another way: If a company believes an employee has left with “confidential information,” but the information doesn't rise to the level to allow for a UTSA claim, does the firm still have a claim, under common law, that it can bring? Some courts have answered yes; many others have said no.

“It’s really a state-by-state issue,” said Eric Ostroff, a partner at [Meland Russin & Budwick](#) and editor of the blog Protecting Trade Secrets.

“Attorneys bringing and defending misappropriation claims need to think very carefully about the applicable law. That decision can wind up being critical to the case’s outcome, since it may define the causes of action that are actually litigated.”

In one camp is the majority: Most of the courts to consider the issue have said that UTSA statutes must be read broadly to bar any claim related to the theft or unauthorized use of information. Otherwise, those courts have said, it would effectively render meaningless the UTSA's objective to replace vague and varying common-law tort with clearly defined statutory law.

In this view, adopted by courts in California, Indiana, Hawaii, Utah and many other states, business information is either a trade secret that's protected and enforceable under the UTSA, or it's in the public domain.

But a few other courts, like the Wisconsin Supreme Court, have said otherwise. In this narrower view of preemption, common-law claims based on information that doesn't meet the statutory definition of “trade secret” cannot be displaced by a trade secrets statute. Courts adopting this view note that the UTSA explicitly mentions only “trade secrets,” and they’ll allow suits to go forward on claims based on the theft of something south of a trade secret.

Enter Arizona.

Over the past few years, it had been looking like courts were coalescing around that majority view, trending toward a broad take on the preemption provision. But on Wednesday, Arizona's Supreme Court issued a ruling that fell squarely in the minority camp.

“Assuming the viability of a common-law claim for misappropriation of confidential information that falls outside [the Arizona] UTSA’s definition of ‘trade secret,’ we hold that AUTSA does not, as a matter of law, displace” such a claim, the high court wrote, allowing an unfair competition claim based on the theft of confidential information.

“If such broad displacement was intended, the legislature was required to express that intent clearly,” the court added.

From the employer side, there are a lot of things to like about rulings that buck the trend toward broader preemption. After all, not all information can meet the requirements for trade secrets, but companies still often want to defend it against bad actors.

"Certainly, it is much easier to establish that a company has confidential information, as opposed to a trade secret," Ostroff said. "Essentially, if you can bring an independent claim for misappropriating confidential information, you are greatly increasing your likelihood of success."

But critics see a lot of problems in decisions like the one issued in Arizona.

Charles Tait Graves, a partner at Wilson Sonsini Goodrich & Rosati PC who's written in favor of broader preemption, noted that the UTSA created a careful balance between plaintiff and defendant interests and also clearly defined the scope of protection that it provides.

Allowing common-law claims over commercial information that's defined only as “proprietary” or “confidential” would let trade secret plaintiffs skirt those protections, he said, possibly for abusive purposes.

“The risk here is that an angry former employer can show up in court and call something protectable IP without boundaries and without rules in a way that wasn't predicable to the departing employee,” Graves said. “That's a terrible rule to have because it inhibits people who want to follow the rules and do the right thing.”