the abtl REPORT

The Future Looks Bright for San Diego's Future Trial Advocates - ABTL Mock Trial Tournament

By Paul Belva, Buchalter

In the time-honored tradition of community outreach to promote trial advocacy for San Diego's future lawyers, the 2022 9th Annual ABTL Mock Trial Tournament did not disappoint. Beginning on November 4th, six teams from San Diego's three local accredited law schools went head-to-head during a three-day tournament competing for bragging rights and scholarships to their trial advocacy programs. By the end, the University of San Diego School of Law students Noah Brassard, Michelle Dutta, Asia Smith, and Raneen Zubeideh hoisted the Champion's trophy. In a hotly contested competition, runners-up from the California Western School of Law and Thomas Jefferson School of Law took second and third place, respectively.

Out of the twenty-four competing students, Bridget Hulburt from the California Western School of Law was voted Best Trial Attorney by ABTL's participating judiciary and attorney members. Ms. Hulbert was recognized for her poise, calm yet assertive courtroom presence, and skilled use of technology.

This year's legal issue focused on gender discrimination in the workplace. The tournament's hypothetical combined facts from actual civil rights cases filed across the country with a pinch of The Age of Adaline story. The result was a fact pattern chalked full of drama and rabbit holes, forcing students to decern relevant facts from the enticing superfluous.

Simulating real trial practice, students received one week's notice of an order eliminating one-of-two causes of action and a Motion in Limine decision excluding several pieces of key evidence. These orders forced the students to adjust their strategy just days before the tournament started. Participating Judges and scoring attorneys were made aware of these orders, and all teams received high praise for their ability to adapt quickly.

Unlike in previous years, the use of courtroom technology was mandatory for all exhibits. All evidence, including a video, was presented using real-time courtroom display. Every team had 80 minutes to complete opening statements, closing arguments, direct examination of two key witnesses, and cross-examination of two hostile witnesses. Judges from the San Diego Superior Court and Southern District of California presided over each round.

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PRESIDENT'S LETTER:

ABTL, Back to "The Way We Were"

By Hon. Lorna Alksne (Ret.)

One of the biggest news stories of the last several weeks was the Taylor Swift ticket sales debacle, in which websites crashed within minutes, and now there is going to be a congressional investigation. The mention of Taylor Swift in the news got me thinking about her music and one song kept haunting me about ABTL and what we were experiencing with attendance. Honestly, the beginning of my term as president felt a lot like her song, "We Are Never Ever Getting Back Together" as our meeting attendance wasn't as robust as it was pre-pandemic, and I worried this was the new normal for legal organizations. (And please know that I am speaking metaphorically about the song title, and not all of the lyrics!) Thankfully, as the year progressed our chapter proved me wrong. Now I think our chapter is more like a song by Katy Perry, "Never Really Over" or Mariah Carey's song, "We Belong Together." The attendance at this year's Brown Bags, Dinner Programs, Judicial Mixer, Mock Trial just kept getting "Stronger." (Kelly Clarkson) I feel like we have made it through a difficult period in our organizations' history and 2023 under Paul Reyolds' leadership will be a return to "The Way We Were" (Barbara Streisand). Thank you for coming back and supporting ABTL and its excellent programs, networking, and friendships. I have been honored to be your president.

Hon. Lorna Alksne

Hon. Lorna Alksne (Ret.),
President ABTL San Diego Chapter and JAMS Mediator

The Future Looks Bright... | *Continued from cover*

ABTL's Mock Trial Committee would like to give special thanks and acknowledgments to all the volunteers who gave their time to preside over and score the competition. Overall, twenty-seven ABTL members participated and provided valuable feedback to the students – and got a rare first-hand introduction to the cream of the crop graduating class of litigators looking for law firm jobs.

Last but not least, the tournament could not have been possible without the generosity of Chief Judge Dana Sabraw, Hon. Anthony Battaglia, John Morrill, and the US Marshalls for hosting the competition at the District Court, as well as our presiding judges: Hon. Mitchell Dembin, Hon. Roger Benitez, Hon. Jill Burkhardt, Hon. Allison Goddard, Hon. Michael Berg, Hon. Polly Shamoon, Hon. Kenneth Medel, Hon. Lorna Alksne (ret.), and Hon. Marcella McLaughlin.

SAVE THE DATE:

The ABTL 10th Annual Mock Trial Tournament will be November 3, 4, and 6, 2023.

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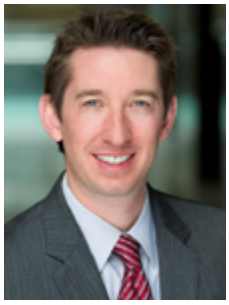
Marisa Janine-Page, Chair



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Transunion v. Ramirez, and Van Buren v. United States

By Christian Andreu-von Euw, Tech.Law

Last year, the Supreme Court decided two cases that were expected to significantly affect data security litigation: ***Transunion v. Ramirez***, and ***Van Buren v. United States.*** ***Transunion*** narrowed the rules for standing for intangible injuries such as "informational injuries" and injuries that create a risk of future harm. ***Van Buren*** narrowed the reach of the Computer Fraud and Abuse Act. Now, over a year later, we can begin to see their effect on the lower courts.

TransUnion v. Ramirez

TransUnion concerned 8,185 class members who TransUnion falsely labelled as "potential matches" to a Treasury Department list of "terrorists, narcotics traffickers" and others with whom it is "unlawful to transact business." There was no dispute that credit records for the entire class contained the false allegation, but TransUnion keeps few records when it disseminates credit reports and only 1,853 class members could show that TransUnion disseminated reports containing the false allegation.[1] The trial court granted all 8,185 people statutory and punitive damages under the Fair Credit Reporting Act (FCRA).

The Supreme Court affirmed as to the 1,853 people who could prove dissemination but reversed as to the rest. Relying on its recent decision in ***Spokeo v Robbins***, the Court held that standing requires an "injury in fact" that is "concrete and particularized" and is "actual or imminent."[2] It determined that the risk of future harm asserted by that class was not sufficiently concrete and denied standing, despite an undisputed statutory violation and statutory damages. The Court held that Congress cannot manufacture standing without harm and that standing for intangible injuries can be established by showing that an injury has "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American court."[3]

Some saw the criticism of intangible informational injuries and the risk of future harm as a significant barrier to data security cases, where plaintiffs can typically show that information was stolen but can rarely show how it was used. But ***TransUnion*** has not led to a sea change. Standing in data security cases was difficult but not always impossible before ***TransUnion*** and that remains the case. It also remains the case that decisions vary widely and depend on the precise nature of the allegations, the jurisdiction, and the venue.

For example, the data breach victims in ***Kim v. McDonald's USA, LLC*** failed to establish standing under ***TransUnion***.[4] Their alleged harms included credit monitoring costs and emotional distress. The court found no standing, largely because no plaintiff "fell victim to a phishing scam or otherwise had their identities stolen."[5] It dismissed emotional distress as a "quintessential abstract harm[ ]" and mitigation expenses as "manufacture[d] standing . . . based on [ ] fears of hypothetical future harm."[6] But other post-***TransUnion*** courts have found that emotional distress and monitoring costs can establish standing. For example, the Third Circuit has held that, where "plaintiff's knowledge of the substantial risk of identity theft causes him to presently experience emotional distress or spend money on mitigation measures like credit monitoring services, the plaintiff has alleged a concrete injury."[7]

Disagreements about standing are not limited to damages for emotional distress or monitoring costs. Courts have also differed on whether evidence of data misuse is necessary,[8] whether statutory or common law privacy claims are enough establish standing,[9] and other issues. Outcomes remain dependent on the precise facts of the case, the venue, and other factors.

TransUnion did not provide a clear-cut rule, but that does not mean that establishing standing is a crap-shoot. Courts disagree on the importance of specific factors, but they all look for indicia of harm. Where direct evidence of harm is absent, evidence of specific data misuse (such as identity theft) can help, particularly where the misuse can be clearly attributed to the breach. Barring that, indirect evidence of misuse (such as unexplained credit inquires or increased phishing attempts) may help establish standing. Similarly, allegations that hackers specifically targeted a plaintiff's data are stronger than allegations that data acquisition was a byproduct of another goal (such as ransomware extortion). And highly sensitive data (such as medical and banking information) may support a finding that a harm is "actual or imminent" where less sensitive information (like email addresses) may not.

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TRANSUNION AND VAN BUREN | Continued from page 8

After ***TransUnion***, some data breach plaintiffs may have a harder time establishing standing, particularly if case is based on a risk of future harm. But there is often still a path to court. Plaintiffs should plead and prove harm thoughtfully, thoroughly, and as specifically as possible, and be very aware of pre- and post-***TransUnion*** standing caselaw in their jurisdiction.

Van Buren v. United States

Van Buren concerned the phrase "exceeds authorized access" in the Computer Fraud and Abuse Act (CFAA), a broad anti-hacking law that imposes criminal and civil liability for "access[ing] a computer without authorization or exceed[ing] authorized access."[10] Van Buren was a police officer who was found guilty under the CFAA for selling information he obtained from police databases. The Eleventh Circuit affirmed his conviction because, under its jurisprudence, the phrase "exceeds authorized access" included the use of computers for an "inappropriate reason."[11]

Resolving a circuit split, the Supreme Court reversed. Noting that a usage-based interpretation could criminalize common scenarios, such as violations of employee handbooks or website terms of service, the Supreme Court adopted a narrower access-based interpretation. It endorsed a "gates-up-or-down inquiry" and held that "an individual 'exceeds authorized access' when he accesses . . . information located in particular areas of the computer—such as files, folders, or databases—that are off limits to him."[12]

The Justice Department responded to the ***Van Buren*** decision by clarifying its charging policy for "cyber-based crimes."[13] It will now "not charge defendants for accessing 'without authorization' . . . unless . . . the defendant was not authorized . . . under any circumstances" and will not charge "exceeding authorized access" unless the prohibitions to access are "established in a computational sense, that is, through computer code or configuration, rather than through contracts, terms of service agreements, or employee policies."[14]

Unsurprisingly, courts in circuits that previously allowed CFAA claims[15] based on information misuse are now following ***Van Buren's*** "gates-up-or-down" approach. For example, in ***Gemstone Foods, LLC v. AAA Foods Enterprises, Inc.***, an Alabama district court held that a former employee does not violate the CFAA by copying documents before leaving a company but may violate the CFAA by continuing to access company email after his departure.[16] This is consistent with Ninth Circuit law (before and after ***Van Buren***), which allows CFAA claims when employee access is revoked, but does not allow them when access is misused.[17]

Courts have continued to allow CFAA claims outside the context of traditional hacking**.** For example, courts have upheld CFAA claims where defendants used login credentials improperly obtained from others.[18] More interestingly, the court in ***Bowen v. Porsche Cars, N.A., Inc.***, allowed a complaint alleging that Porsche violated the CFAA by accessing the computers in customers' cars to install defective infotainment software via an automated software update.[19]

Post-***Van Buren***, courts have often interpreted ***Van Buren*** to preclude civil claims where defendants copied (or "scraped") information from public websites, often in violation of terms of service.[20] Courts have, however, often allowed alternate theories of liability (such as contractual claims based on the terms of service) in those cases.[21]

Finally, it is important to remember that ***Van Buren's*** narrowing of the reach of the CFAA does not necessarily leave victims of information misuse without recourse. As the Ninth Circuit noted in ***hiQ Labs, Inc. v. LinkedIn Corp.***, "even if the CFAA does not apply: state law trespass to chattels claims may still be available. And other causes of action, such as copyright infringement, misappropriation, unjust enrichment, conversion, breach of contract, or breach of privacy, may also lie."[22]

Christian Andreu-von Euw founded Tech.Law after twelve years of high-stakes technology litigation at Morrison & Foerster, a premier international law firm. He has experience with bench trials, jury trials, and arbitration. He also teaches Data Security and Privacy at the University of San Diego.

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ENDNOTES

[1] *TransUnion LLC v. Ramirez,* 141 S.Ct. 2190 (2021).

[2] *Id.* at 2212.

[3] *Id.* at 2211-12.

[4] No. 21-CV-05287, 2022 WL 4482826, at *1 (N.D. Ill. Sept. 27, 2022).

[5] *Id.* at *5.

[6] *Id.* at *6.

[7] *Clemens v. ExecuPharm Inc.,* 48 F.4th 146, 156 (3d Cir. 2022).

[8] *Compare In re Am. Med. Collection Agency, Inc. Customer Data Sec. Breach Litig.,* No. CV 19-MD-2904, 2021 WL 5937742, at *9 (D.N.J. Dec. 16, 2021) ("A plaintiff who suffers a wrongful disclosure need not additionally demonstrate misuse resulting in economic harm") to *Aponte v. Ne. Radiology, P.C.,* No. 21 CV 5883 (VB), 2022 WL 1556043, at *4 (S.D.N.Y. May 16, 2022) (no harm where "plaintiffs do not allege any misuse or attempted misuse").

[9] *Compare Griffey v. Magellan Health Inc.,* 562 F. Supp. 3d 34, 43 (D. Ariz. 2021) ("disclosure of private information is one of many various intangible harms that satisfy Article III standing") to *Aponte v. Ne. Radiology, P.C.,* No. 21 CV 5883 (VB), 2022 WL 1556043, at *5 (S.D.N.Y. May 16, 2022) (no standing based on intrusion upon seclusion because "it is not defendants who improperly accessed plaintiffs' data, but instead other, unauthorized third parties.")

[10] *See* 18 U.S.C. § 1030(a).

[11] *Van Buren v. United States,* 141 S. Ct. 1648, 1653–54 (2021).

[12] *Id.* at 1659.

[13] https://www.justice.gov/opa/press-release/file/1507126/download.

[14] *Id.*

[15] The Ninth Circuit already followed a standard that is similar to the *Van Buren* standard.

[16] No. 5:15-CV-01179-MHH, 2022 WL 586767, at *5 (N.D. Ala. Feb. 26, 2022)

[17] *See, e.g., United States v. Nosal,* 844 F.3d 1024, 1038 (9th Cir. 2016) (Use of computing systems by former employee after "revocation of access" violates the CFAA).

[18] *See, e.g. United States v. Thompson,* No. CR19-159RSL, 2022 WL 834026, at *5 (W.D. Wash. Mar. 21, 2022) ("allegations that defendant obtained and used security credentials that did not belong to her, and that she was not authorized by the victims to use, adequately state an offense under the CFAA")

[19] 561 F. Supp. 3d 1362, 1370 (N.D. Ga. 2021)

[20] *See, e.g., hiQ Labs, Inc. v. LinkedIn Corp.,* 31 F.4th 1180, 1201 (9th Cir. 2022) ("when a computer network generally permits public access to its data, a user's accessing that publicly available data will not constitute access without authorization under the CFAA").

[21] *See, e.g., Southwest. Airlines Co. v. Kiwi.com, Inc.,* No. 3:21-CV-00098-E, 2021 WL 4476799, at *3 (N.D. Tex. Sept. 30, 2021) (granting preliminary injunction in case alleging that data scraping violated terms of service);*see also hiQ Labs v. LinkedIn,* no. 3:17cv-03301 N.D. Cal. Oct. 27, 2022) (finding breach of contract).

[22] 31 F.4th 1180, 1201 (9th Cir. 2022)

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Law Firms are Navigating a New Normal Following COVID

By Daniel Gunning, Wilson Turner Kosmo LLP

We are hopefully getting out of the pandemic day by day, prompting law firms to face difficult questions about their office footprint, return to work, and firm culture in the so-called "new normal." Firms are facing difficult choices about whether to mandate employees back to work, how much office space to lease, how to maintain firm culture in this flexible environment, and how to mentor and foster our young attorneys throughout it all. I had the pleasure of moderating a panel discussion at this year's Annual Seminar addressing this very topic. My panel included the managing partner of a large LA office within an international firm, a managing partner of a multi-state mid-size firm, and myself, a partner at a local San Diego firm.

But no matter the size of the firm, one overarching theme prevailed: flexible scheduling and remote work is here to stay. Research has indicated time and again that attorneys, especially younger attorneys, enjoy the flexibility of working from home. This helps reduce commute time, ensures more time with family, and allows greater flexibility with childcare. We all agreed that firms better beware if they insist on mandating 5-days back in the office. A great resignation may await.

Yet with flexibility and the ability to work remotely comes several challenges for law firms. An on-going challenge many of us are facing is how to strike the right balance between providing flexibility and remote working opportunities while still maintaining the culture the firm seeks to promote. Camaraderie is certainly lost by not having water-cooler talks or short conversations on the way to the office, up the elevator, or in the halls.

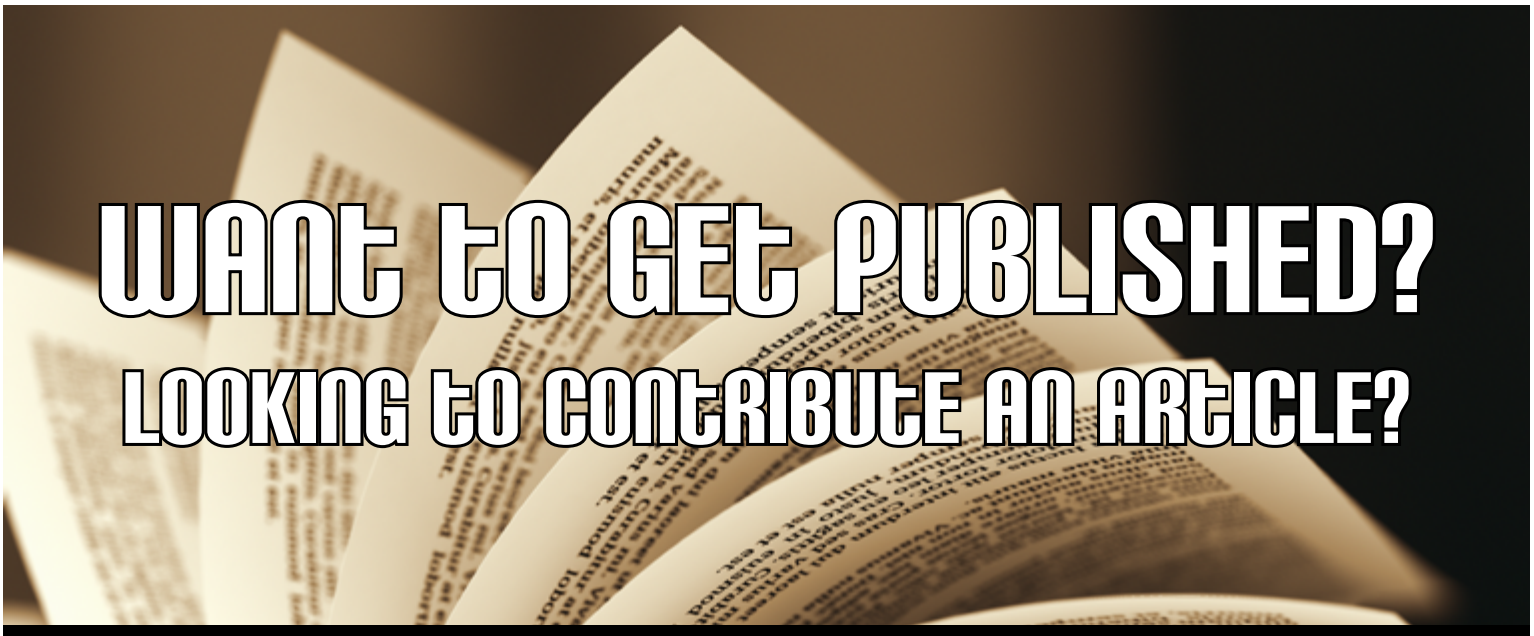
The solution, at least we thought, was to provide those in-person opportunities to socialize both inside and outside the office. A monthly social event, happy hour, trivia night, game night, or any host of ideas can help bring the firm together and bond. Our firm also hosts what we call "in-office Wednesdays," where the firm buys lunch and encourages (but does not require) attorneys and staff to come into the office. The idea is that if you are planning a team meeting, try scheduling it in-person on Wednesday to greater encourage that camaraderie the firm is trying to build.

Another key issue that comes with remote work is ensuring the same level of mentoring and training is provided to newer attorneys, especially those attorneys that may be unable to come into the office as often as their peers. Not only is this simply a challenge to foster the growth of newer attorneys, but it could also impact the firm's DE&I efforts (think young mothers who may not be able to come in as often due to child care). We all agreed that ensuring partners who supervise these attorneys still provide feedback, guidance, and mentoring is especially important. Our panel discussed having a more strategic effort at providing feedback than before, including having mid-year or additional check-ins beyond the ordinary annual performance review. With remote appearances, depositions, and mediations also comes easier opportunities to observe, even if the newer attorney is not the one arguing or only observes for part of the session. Partners should strive to give opportunities to newer attorneys to observe and participate in these events.

Then comes the issue of office space. With more attorneys working remotely, there comes a great opportunity to downsize or think more creatively on leasing options, which could result in significant savings for the firm. Instead of still assigning offices to attorneys that desire to work remotely, the concept of hoteling is becoming more popular. This allows attorneys to sign out an office on a given day, reducing the number of offices needed as a whole. And by not having so many empty offices, it creates more energy and buzz around the office, providing the synergy we are hoping to generate with in-person discussions.

These are just a few of the issues firms will be facing as workers continue to insist upon remote work. Firm leadership should start strategically thinking and discussing these issues, because they are important to the firm's future.

Daniel C. Gunning is a partner in WTK's Employment Law Group. Dan concentrates his practice on defending employers in discrimination, harassment, and retaliation litigation, and he also defends employers in wage and hour class actions.



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Readily Ascertainable: How California Provides More Certain Trade Secret Protection

By Adam Powell and Stephen Larson

Trade secret laws in most jurisdictions are based on the model Uniform Act, which requires a showing that a trade secret is not "generally known" ***or*** "readily ascertainable by proper means."[1] California deliberately omitted the "readily ascertainable" requirement.[2] Thus, "under California law, information can be a trade secret even though it is readily ascertainable, so long as it has not yet been ascertained by others in the industry."[3]

This change "has the effect of providing broader protection" to trade secret plaintiffs.[4] One commentator provided a helpful example:

> Suppose an employee absconds with a customer list that is otherwise secret. Further, assume that one could easily look in the yellow pages (or use an Internet search engine) to find out the same names of potential customers who would be interested in the product. In most states, the employee would not be liable because the list would not be a trade secret – the information is "readily ascertainable." In California, however, the employee would be liable because he or she did not actually perform the independent research, but instead misappropriated the list.[5]

The California legislature deliberately removed the "readily ascertainable" requirement because it was "ambiguous in the definition of a trade secret."[6] The legislature was concerned that a "readily ascertainable" requirement may allow a defendant to escape liability for ***actually*** stealing confidential information by arguing it ***could*** have discovered the information "through reverse engineering or a literature search."[7] Thus, rather than focusing on where the defendant actually obtained the information, a "readily ascertainable" requirement would "invite[ ] the various parties to speculate on the time needed to discover a trade secret." ***Id.***

This rule makes sense because "California law emphasizes punishing the wrongful acquisition of information, even if it could have been obtained legally."[8] Thus, the California rule "enhances the incentive for competitors to research where it is inexpensive to do so instead of expending resources on appropriation activities that are otherwise disfavored."[9] It also "bypasses extensive discovery, trial time, expert costs, and other administrative costs associated with the plaintiff proving a negative, namely that the information is not readily ascertainable."[10]

"Readily ascertainable" remains "a defense to a claim of misappropriation."[11] However, the defense is "based upon an absence of misappropriation, rather than the absence of a trade secret."[12] Because the defendant negates the element of misappropriation, the defendant must show the information was "easily identifiable" ***and*** "the defendants' knowledge of [the information] resulted from that identification process and not from the plaintiff's records."[13]

The second requirement is important because defendants in trade secret cases often argue that the information could have been obtained from publications even though the defendant actually took it from the plaintiff. For example, the Federal Circuit recently addressed a case where the defendants argued information was "readily ascertainable" from industry publications even though they did not actually obtain the information from a readily ascertainable source.[14] The Federal Circuit affirmed the district court's decision rejecting that argument, explaining "ready ascertainability is a defense to a claim of misappropriation of trade secrets, but the defense is available only if the defendant can establish that the alleged trade secret was obtained from sources that made the information ascertainable."[15]

In another case, the Ninth Circuit criticized a lower court for failing to "endeavor to determine whether CTI actually relied only on the 'public domain sources in creating its own projector."[16] District courts have similarly excluded evidence that information was "readily ascertainable" where the defendant alleged only that it "could" have obtained the technology elsewhere—"not that it actually did so."[17]

As a result, California law provides more certain trade secret protection than most other jurisdictions. This protection allows trade secret plaintiffs to counter the common defense argument that the defendant could have learned the information even though they chose to misappropriate it.

Adam Powell is a litigation partner at Knobbe Martens in San Diego.

Stephen Larson is a litigation partner at Knobbe Martens in Orange County.

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ENDNOTES

[1] Uniform Trade Secrets Act § 1(4).

[2] ***Compare*** Uniform Trade Secrets Act § 1(4) (requiring a showing that trade secrets "derive[] 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") ***with*** Cal. Civ. Code § 3426.1(d) (requiring a showing that trade secrets "derive[] 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").

[3] ***Abba Rubber Co. v. Seaquist***, 235 Cal. App. 3d 1, 21 (1991); ***see also Imax Corp. v. Cinema Techs., Inc.***, 152 F.3d 1161, 1168 n.10 (9th Cir. 1998) ("'readily ascertainable' is not part of the definition of a trade secret in California").

[4] Ronald J. Gilson, ***The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete***, 74 N.Y.U. L. Rev. 575, 597 n.73 (1999) (California's omission of the "readily ascertainable" requirement "has the effect of providing broader protection" than the Uniform Act).

[5] Risch, ***Why Do We Have Trade Secrets?***, 11 Marq. Intell. Prop. L. Rev. 1, 54 (2007) (citing ***Abba,*** 235 Cal. App. 3d at 21 n.9).

[6] West's Ann. Cal. Civ. Code § 3426.1 (1984 Legislative Committee Comments).

[7] Senate Comm. On Judiciary, Cal. A.B. 501, 1983-84 Ref. Sess. 5-6, Selected Bill Analyses (1984).

[8] Imi-Tech, 691 F. Supp. at 231.

[9] Risch, 11 Marq. Intell. Prop. L. Rev. at 54-55.

[10] ***Id.*** at 55.

[11] ***See*** West's Ann. Cal. Civ. Code § 3426.1 (1984 Legislative Committee Comments).

[12] ***Abba Rubber***, 235 Cal. App. 3d at 21 n.9; ***see also Imax***, 152 F.3d at 1168, n.10 (quoting ***Abba***).

[13] ***Abba***, 235 Cal. App .3d at 21 n.9 (emphasis added).

[14] ***Masimo Corp. v. True Wearables, Inc.***, No. 2021-2146, 2022 WL 205485, at *3 (Fed. Cir. Jan. 24, 2022).

[15] ***Id.***

[16] ***Id.***

[17] ***Medtronic MiniMed***, 2009 WL 10672947, at *2.

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The Association of Business Trial Lawyers
8030 La Mesa Blvd., #127
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