

A principal scientist recently left her job at a biotechnology corporation that manufactures and commercializes biopharmaceuticals for various medical conditions. The scientist began working for a competitor in order to lead the development of an experimental drug that would address the same medical condition as a drug she had been developing at the corporation. When the competitor issued a press release that it was in the final stages of testing the experimental drug, the corporation presented evidence to a prosecutor that the experimental drug contained the corporation's trade secrets and that the scientist first learned of the trade secrets while working at the corporation. The corporation also provided the prosecutor with a copy of its employment contract with the scientist, under which the scientist had agreed that the trade secrets belonged to the corporation and would remain with the corporation even after her employment ceased.

In a common-law jurisdiction, which of the following property crimes is the prosecutor most likely to charge the scientist with?

- A. No crime, because trade secrets are intangible property.
- B. Embezzlement, because the scientist lawfully acquired possession of the trade secrets.
- C. False pretenses, because the scientist obtained title to the corporation's trade secrets.
- D. Larceny, because the scientist permanently deprived the corporation of its trade secrets.

Explanation:

Legislative changes to theft crimes

Common law	Larceny, embezzlement, false pretenses & receipt of stolen goods are separate offenses Property limited to tangible personal property
MPC & state criminal codes	Theft is a single statutory crime that encompasses larceny, embezzlement, false pretenses & receiving stolen goods Property broadened to include anything of value—including intangibles, services, documents

MPC = Model Penal Code.

At common law, liability for property crimes is limited to the trespassory or otherwise unlawful taking of **tangible property**.^{*} Trade secrets are **intangible property**, so it is unlikely that the prosecutor will charge the scientist with a property crime in this common-law jurisdiction.

^{*}The Model Penal Code and modern theft statutes expand criminal liability for property crimes to include intangible property (eg, trade secrets).

(Choice B) Embezzlement is the fraudulent conversion of another's property by someone in lawful possession of that property. The scientist may have acquired lawful possession of the trade secrets through her employment with the corporation. But in a common-law jurisdiction, the embezzled property must be tangible property or, in some states, real property—not intangible property (as seen here).

(Choice C) False pretenses is obtaining title to another's property by knowingly making a false representation of a past or present material fact with the specific intent to defraud. Here, there is no indication that a false representation was made, and title to the trade secrets never passed from the corporation to the scientist. Additionally, only tangible property is subject to a charge of false pretenses at common law.

(Choice D) Larceny is the unlawful taking and carrying away of another's personal property with the specific intent to permanently deprive the owner of that property. At common law, the property taken must be tangible personal property; intangible property will not suffice.**

^{**}However, documents that represent a right to intangible property are treated as personal property.

Educational objective:

Common-law property crimes limit criminal liability to the trespassory or otherwise unlawful taking of *tangible* property.

References

Charles E. Torcia, 3 Wharton's Criminal Law § 371 (15th ed. 2020) (discussing that at common law only tangible personal property can be the subject of larceny).

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