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Redefining Trade Secrets in North Carolina

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Redefining Trade Secrets in North Carolina

ABSTRACT

North Carolina has a trade secrets problem, and it resides at the most elementary part of the doctrine: the definition. In the North Carolina Trade Secrets Protection Act, the general assembly established an elemental, two-prong test for identifying a trade secret. Courts adjudicating trade secrets cases, however, have strayed from this definition, instead applying a six-factor balancing test that common law courts used before enactment of statutory trade secret definitions. This bifurcated development has not only created an inconsistent jurisprudence—it has also cultivated fundamental problems in the North Carolina legal system. Namely, North Carolina courts have infringed on the province of the legislative branch, changed the law governing trade secret claims, and prompted practitioner confusion.

This Comment traces the development of trade secret law nationwide and, more specifically, within North Carolina. It identifies where courts went wrong in their trade secret jurisprudence. Through discussion of the problems of the judicially created six-factor test, this Comment advocates for a simple, straightforward solution. That is, the North Carolina Supreme Court should steer lower courts back to the statutory definition.

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INTRODUCTION

Trade secret law protects businesses or individuals who develop proprietary information and confidentially disclose that information to employees or others.¹ The law provides a remedy when those confidants misappropriate the secret by disclosing it or using it to their own advantage.² Developed through the courts and, later, by statute,³ trade secret doctrine protects secret information such as recipes, formulae, business methods, business plans, software source code, and customer lists.⁴ Information must do more than meet a particular classification, though; trade secret law only protects information that meets certain requirements.⁵ This began in the common law, when courts would only protect confidential business information that was sufficiently secret and valuable.⁶ Later, the restrictions on what information was a trade secret became baked into the statutory definitions of trade secrets.⁷

1. See ROGER M. MILGRIM & ERIC E. BENSON, MILGRIM ON TRADE SECRETS § 1.01 (2017).

2. See, e.g., N.C. GEN. STAT. § 66-153 (2017).

3. See *infra* Part I.

4. THE TRADE SECRET HANDBOOK 1–2 (Michael J. Lockerby ed. 2000).

5. See, e.g., N.C. GEN. STAT. § 66-152(3) (defining “trade secret”).

6. See *infra* Section I.A.1.

7. See, e.g., N.C. GEN. STAT. § 66-152(3) (declaring that a “trade secret” is business information such as formulae, methods, and techniques “that (a) [d]erives independent actual or potential commercial value from not being generally known . . . and (b) [i]s the subject of efforts . . . to maintain its secrecy” (emphasis added)). In North Carolina, a trade secret is not simply confidential business information—it must be confidential business information that also meets the requirements of value and secrecy. See *id.*

Because of the bifurcated development through the judiciary and legislature, different definitions have been used to identify trade secrets.⁸ The definitions are similar—the statutory definitions were built on the foundation of a nearly universal common law definition—but vary in slight but significant ways.⁹ North Carolina courts have overlooked the nuance of this development, sometimes conflating the different definitions or even outright ignoring the binding legislative definition.¹⁰ This has created an anomaly in trade secret law that now needs resolution. And, the implications are not trivial; every trade secrets action requires the plaintiff to demonstrate that a trade secret existed,¹¹ and the definition of a trade secret governs that determination.

This Comment explores the discrepancy that has arisen in North Carolina trade secret law. Part I discusses the origin and development of trade secret law nationwide. Part I then turns its focus to North Carolina and specifically examines the Trade Secrets Protection Act and how courts have conflated statutory and common law principles in regards to the definition of a trade secret. Part II analyzes three problems this conflation causes: (1) a separation of powers problem, (2) a substantive problem, and (3) a practical problem. Part III proposes a solution for these problems.

I. DEVELOPMENT OF TRADE SECRET LAW: NATIONWIDE AND NORTH CAROLINA

Trade secret law originated in England before coursing through the common law of American states and into statute books across the country. This Part traces that development and examines how the definition of a trade secret morphed as the doctrine spread. This Part then turns its focus to North Carolina, which rarely adjudicated trade secrets until the North Carolina General Assembly commandeered the doctrine from the courts in the early 1980s.

8. Compare RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. LAW INST. 1939) (establishing the six factors used in identifying trade secrets), with N.C. GEN. STAT. § 66-152(3) (providing a statutory definition used to identify trade secrets).

9. See *infra* Section I.B.2.

10. See *infra* Part III.

11. Joseph E. Root III & Guy M. Blynn, *Abandonment of Common-Law Principles: The North Carolina Trade Secrets Protection Act*, 18 WAKE FOREST L. REV. 823, 836 (1982) (“[The trade secret] definition assumes significance primarily because courts generally treat the existence *vel non* of a trade secret as a threshold question to whether an action for misappropriation exists.”).

A. *National Development of Trade Secret Law*

To understand the import of the constituent parts of the trade secrets definition, it is important to understand how trade secret doctrine contracted and expanded before settling on the type of information it protects.

1. *Origin of Trade Secret Protection: A Common Law Doctrine*

The concept of protecting the proprietary information of businesses extends deep into the nation's legal history.¹² Specifically, state courts began providing trade secret protection nearly 150 years ago,¹³ when the Supreme Court of Massachusetts adopted English trade secret law and held that an employee can be liable for disclosure of secrets learned during the course of employment.¹⁴ The policy underlying this new protection was the encouragement of commercial enterprise.¹⁵ Just as entrepreneurs can obtain protection for patents and trademarks, the court decided that the government should protect processes, too.¹⁶ Thus, the following doctrine became the origin of trade secret law in the United States:

If he invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for a patent or not, he has not indeed an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it; but he has a property in it, which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons. The jurisdiction in equity to interfere by injunction to prevent such a breach of trust, when the injury would be irreparable and the remedy at law inadequate, is well established by authority.¹⁷

With that affirmative declaration, Massachusetts provided the nation's first definition of a trade secret—one that included elements of manufacturing process, confidence, exclusivity, and value.

Subsequent definitions tendered by state courts built on this foundation. In 1886, the Court of Chancery of New Jersey adopted the

12. See, e.g., *Kendall v. Winsor*, 62 U.S. 322, 329 (1859) (“[I]nventors . . . are . . . entitled to protection against frauds or wrongs practiced to pirate from them the results of thought and labor, in which nearly a lifetime may have been exhausted . . .”).

13. *Kewanee v. Bicron*, 416 U.S. 470, 492–93, 493 n.23 (1974) (citing *Peabody v. Norfolk*, 98 Mass. 452 (1868)).

14. *Peabody*, 98 Mass. at 459–60.

15. *Id.* at 457.

16. *Id.* at 457–58.

17. *Id.* at 458.

Massachusetts law nearly verbatim and declared that “peculiar methods and processes” could receive trade secret protection.¹⁸ In 1889, the New York Court of Appeals recognized that secret formulae could constitute trade secrets but also noted a contraction of the doctrine: protection extended only to the moment at which the public discovered the secret information in good faith.¹⁹ Thus, New York built on the Massachusetts law by increasing the types of information that could constitute a trade secret while also imposing disqualifiers on those types of information.

An 1891 opinion from the Supreme Court of South Dakota added new wrinkles to this emerging law.²⁰ The court held that a company had exclusive rights in a retail catalogue it developed because “[i]t was the product of the skill and labors” of the company.²¹ While determining that the catalogue was clearly a trade secret, the court noted that it was “prepared at great expense” by the company and “was of great value” when kept secret.²² This decision expressly analyzed concepts of financial investment and market capitalization that were only tangential to the Massachusetts, New Jersey, and New York doctrines, thus broadening the scope of what trade secret laws could protect.²³

Trade secret law expanded and contracted throughout the next several decades. A 1917 Massachusetts opinion distinguished “instances where employés leave one employer and use their own faculties, skill and experience in the establishment of an independent business” from “instances where they use confidential information secured solely through their employment to the harm of their previous employer.”²⁴ This distinction limited trade secret protection to information unique to the business. A New York trial court further concluded that trade secret law

18. *Salomon v. Hertz*, 2 A. 379, 380 (N.J. Ch. 1886).

19. *Tabor v. Hoffman*, 23 N.E. 12, 12–13 (N.Y. 1889).

20. *See Simmons Hardware Co. v. Waibel*, 47 N.W. 814 (S.D. 1891).

21. *Id.* at 816.

22. *Id.*

23. *See supra* notes 13–22 and accompanying text. The notion of long-term economic value loomed in the backdrop of those cases, of course. After all, the purpose of protecting a manufacturing process or secret formulae was so that the business could profit off its own development. However, those cases focused first on the classification of the information at hand by determining if it was akin to a patentable invention or product. The *Simmons Hardware* case flipped the perspective of the inquiry by looking beyond the mere classification of the information and instead primarily analyzing the value assigned to it by the business. Such an approach broadens the definition of trade secret. Whereas the original approach seemed concentrated on critical components of business operations like formulae and inventions, the South Dakota approach extended protection to any product that a business developed and sought to use in furtherance of its business.

24. *Aronson v. Orlov*, 116 N.E. 951, 953 (Mass. 1917).

was “not confined to secret processes of manufacture or methods of doing business” and held that a customer list fell within the field of trade secrets.²⁵ Courts began shaping new definitions of trade secrets that conformed to these changing contours.²⁶ Soon, trade secret law became prevalent enough to warrant uniform commentary.

More than seventy years of common law development resulted in the authoritative treatment of trade secrets in the Restatement (First) of Torts. Restatement section 757 provided the elements for the tort of Disclosure or Use of Another’s Trade Secret.²⁷ Comment (b) of that section established the basic definition of a trade secret: “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.”²⁸ The meat of the

25. *Witkop & Holmes Co. v. Boyce*, 112 N.Y.S. 874, 878 (N.Y. Sup. Ct. 1908). The court went on to say:

The names of the customers of a business concern whose trade and patronage have been secured by years of business effort and advertising, and the expenditure of time and money, constituting a part of the good will of a business which enterprise and foresight have built up, should be deemed just as sacred and entitled to the same protection as a secret of compounding some article of manufacture and commerce.

Id. This decision was quoted at length and with approval by the Supreme Court of California five years later. *Empire Steam Laundry v. Lozier*, 130 P. 1180, 1183 (Cal. 1913).

26. *See, e.g., Victor Chem. Works v. Iiff*, 132 N.E. 806, 811 (Ill. 1921) (“A trade secret is a plan or process, tool, mechanism or compound known only to its owner and those of his employees to whom it is necessary to confide it. . . . A process commonly known in the trade is not a trade secret and will not be protected by injunction, but the mere fact that there are secret processes of a different kind accomplishing the same result will not prevent the granting of an injunction.”).

27. RESTATEMENT (FIRST) OF TORTS § 757 (AM. LAW INST. 1939).

28. *Id.* § 757 cmt. b. The comment to section 757 continues by qualifying this general definition and providing illustrative guidelines:

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 (see § 759) in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. 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.

Restatement definition, though, came later in comment (b), when the drafters provided a factor-based analysis for identifying trade secrets:

An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.²⁹

This definition became the "one uniformly-recognized trade secret definition" shortly after the Restatement was published.³⁰ Every United States jurisdiction has used this definition to some extent.³¹

2. Turn to Statutory Law

Despite the Restatement's sweeping influence, the National Conference of Commissioners on Uniform State Laws decided in 1968 to mobilize a committee to draft statutes that would bring trade secret law—traditionally a common law innovation³²—into the purview of state legislatures.³³ In August 1979, the Uniform Trade Secrets Act (UTSA) was published and recommended for enactment.³⁴ One of the benefits of the UTSA was standardization of the definition of a trade secret.³⁵ The drafting committee declared that "[t]he contribution of the Uniform Act is *substitution* of unitary definitions of trade secret and trade secret misappropriation."³⁶ While the definition clearly built off the principles of the Restatement definition and factors, it was also plainly different:

Id.

29. *Id.*

30. MILGRIM & BENSON, *supra* note 1.

31. *Id.*

32. See Root & Blynn, *supra* note 11, at 823.

33. *Id.* at 828. The authors identified three reasons for uniform codification: (1) inconsistencies had arisen between the courts of different jurisdictions, (2) holes remained in the doctrine after publication of the Restatement, and (3) the body of law had outgrown its position as a subsection of tort law. *Id.* at 828–29. There was also a strong academic call for uniformity in the growing trade secrets doctrine. See, e.g., Comment, *Theft of Trade Secrets: The Need for a Statutory Solution*, 120 U. PA. L. REV. 378, 380–81 (1971).

34. Root & Blynn, *supra* note 11, at 828.

35. *Id.* at 829.

36. UNIF. TRADE SECRETS ACT prefatory note (UNIF. LAW COMM'N 1985) (emphasis added).

”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.³⁷

The Commissioners’ Comment to the UTSA notes that the definition of trade secret “contains a reasonable departure from the Restatement of Torts (First) definition.”³⁸ The UTSA was purposefully broader than the Restatement definition.³⁹ Considering the purpose of the UTSA—to codify, standardize, and substitute for common law principles—and the variations from the Restatement, it is clear that the UTSA was intended to supplant the Restatement in the jurisdictions that eventually adopted it.

B. *Trade Secrets in North Carolina*

Trade secret law in North Carolina—like in the rest of the country—originated in the judiciary before receiving legislative treatment. The common law development, however, was scant; the doctrine only received serious consideration by North Carolina courts after adoption of a trade secret statute. This history is important not because North Carolina experienced its own expansion and contraction of trade secret doctrine, but rather because this lack of pre-statute history demonstrates how North Carolina courts that revert to common law tests do so without any compelling precedent.

1. *Common Law Development in North Carolina*

North Carolina courts scarcely entertained trade secrets cases before the turn to statutory law.⁴⁰ A North Carolina appellate court first meaningfully discussed trade secrets in 1961, when a dissenting justice noted, “A trade secret is a new process, mechanism, or compound known only to its owner and those employees to whom it has necessarily been confided.”⁴¹ In 1975, the North Carolina Court of Appeals could not define a trade secret under its own law and instead had to cite Washington law,

37. *Id.* § 1(4). The Uniform Act was published in 1979 and amended in 1985, but this definition did not change between the two versions.

38. *Id.* § 1 comm’rs cmt.

39. *Id.*

40. See Root & Blynn, *supra* note 11, at 829.

41. *Welcome Wagon Int’l, Inc. v. Pender*, 120 S.E.2d 739, 746 (N.C. 1961) (Bobbitt, J., dissenting) (quoting 43 C.J.S. *Injunctions* § 148).

writing that “a trade secret has been defined as ‘a secret formula or process, not patented, known only to certain individuals who use it in compounding or manufacturing some article of trade having a commercial value.’”⁴²

The most significant judicial development of North Carolina trade secret law occurred in two federal district courts—one of which did not sit in the state.⁴³ Even in those two cases, discussion of trade secrets was slight. For instance, in *Funchion v. Somerset Knitting Co.*, the Middle District of North Carolina casually mentioned trade secrets within an application of agency law, carelessly identifying trade secrets as “the experiments and work of [an agent’s] principal and the information acquired in his efforts to promote his principal’s interests.”⁴⁴ The court in *Funchion* cited the Restatement but only during the discussion of damages and without any substantial reliance on its principles.⁴⁵

Perhaps the most significant discussion of North Carolina’s common law of trade secrets came from a distant forum: the Southern District of Texas.⁴⁶ The court heard a case that required application of North Carolina law.⁴⁷ Noting a severe lack of development in this area, the court relied on general common law principles to form the definition of a trade secret.⁴⁸ Despite neglecting to establish a clear elemental test for the identification of a trade secret, the court found that the plaintiff possessed a trade secret because it had “a formulation, discovered with difficulty and not generally known nor readily discernible, which had potential commercial value, which was only partially revealed to defendant and then in the context of a confidential relationship, and which was otherwise protected in every reasonable manner.”⁴⁹ The careful reader will note that this analysis largely proceeds on the grounds of the six Restatement factors.⁵⁰

Thus, by the late 1970s, North Carolina had a significantly underdeveloped trade secret jurisprudence. The only binding state law on

42. *Harrington Mfg. Co. v. Powell Mfg. Co.*, 216 S.E.2d 379, 381 (N.C. Ct. App. 1975) (emphasis omitted) (quoting W.R. Frothingham, Annotation, *Discovery or Inspection of Trade Secret, Formula, or the Like*, 17 A.L.R. 2d 383 (1951)). In this case, the court of appeals refused to confer trade secret status on a customer list. *Id.*

43. See *Root & Blynn*, *supra* note 11, at 829.

44. *Funchion v. Somerset Knitting Co.*, 158 F. Supp. 57, 62 (M.D.N.C. 1958).

45. See *id.* at 63.

46. *Tex. Urethane, Inc. v. Seacrest Marine Corp.*, 403 F. Supp. 612, 614–16 (S.D. Tex. 1975), *aff’d*, 608 F.2d 136 (5th Cir. 1979). On appeal, the Fifth Circuit wrote that “little North Carolina law on trade secrets exists; accordingly, we must look to common law principles.” *Tex. Urethane, Inc.*, 608 F.2d at 138.

47. *Tex. Urethane, Inc.*, 403 F. Supp. at 614.

48. *Id.* at 614–15.

49. *Id.* at 616.

50. See RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. LAW INST. 1939).

the topic defined a trade secret as (1) a secret formula or process (2) that is not patented (3) that is used in commerce and (4) has commercial value.⁵¹ A district court within the state only noted two requirements of a trade secret: (1) experiments and work (2) used in commerce.⁵² And, a district court sitting in Texas loosely applied the Restatement factors when finding a trade secret under North Carolina law.⁵³ Although the Restatement definition had acquired esteem by this point,⁵⁴ there was no real North Carolina common law on the definition of a trade secret.

2. *North Carolina Trade Secrets Protection Act: The Current Law Governing Secrets in the State*

North Carolina quickly joined the states that started governing trade secrets legislatively after publication of the UTSA. The General Assembly enacted the North Carolina Trade Secrets Protection Act (NCTSPA) in 1981.⁵⁵ It was “based, to a large degree, upon the Uniform Trade Secrets Act.”⁵⁶ The NCTSPA begins with a definition section, which includes a definition for trade secret:

”Trade secret” means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:

- (a) Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by 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.⁵⁷

This differs in no material way from the UTSA definition.⁵⁸ If the only differences between the two definitions are inconsequential, then the theory

51. See *Harrington Mfg. Co. v. Powell Mfg. Co.*, 216 S.E.2d 379, 381 (N.C. Ct. App. 1975).

52. See *Funchion v. Somerset Knitting Co.*, 158 F. Supp. 57, 62 (M.D.N.C. 1958).

53. See *Tex. Urethane, Inc.*, 403 F. Supp. at 616.

54. See MILGRIM & BENSON, *supra* note 1.

55. Act of July 9, 1981, 1981 N.C. Sess. Laws 1326–28 (codified at N.C. GEN. STAT. §§ 66-152 to -157 (2017)).

56. Root & Blynn, *supra* note 11, at 831.

57. N.C. GEN. STAT. § 66-152(3) (2017).

58. Cf. UNIF. TRADE SECRETS ACT § 1(4) (UNIF. LAW COMM’N 1985). North Carolina considered adopting the UTSA in full but instead opted to draft its own act with simpler language. Root & Blynn, *supra* note 11, at 831. The differences between North Carolina’s act and the UTSA are “primarily cosmetic.” *Id.* Specific to the definition of trade secret, “The North Carolina definition of ‘trade secret’ tracks the Uniform Act’s definition with

and commentary of the UTSA definition⁵⁹ should generally be imputed to the North Carolina statutory definition. Thus, consistent with the policy that the UTSA substitute for the common law, this legislative definition should supersede any previous judicial constructions.

The language of the definition seems to set out an elemental test. The statute says a trade secret “means” information “that” has value because of its exclusivity “and is” the subject of efforts to maintain its secrecy.⁶⁰ This is not the soft language that would accompany a factor test. Instead, the statute suggests that information must actually check off all the boxes of the definition to become a trade secret.⁶¹ Unfortunately, the North Carolina General Assembly did not publish any comments or legislative history that articulates its position on the type of test the definition provides.⁶² But, the most straightforward reading of the text indicates an elemental test. Thus, the general assembly has commanded courts to find a trade secret only when the subject information, in short, is business or technical information that meets two requirements: (1) it derives independent actual or potential commercial value from not being generally known or readily ascertainable by people who can obtain economic value from its disclosure or use and (2) it is the subject of reasonable efforts to maintain its secrecy.⁶³ Courts should disregard any other criteria.

minor variations that should improve the operation of the North Carolina Act.” *Id.* at 836 (footnotes omitted). The only quasi-substantive difference is that the UTSA will find a trade secret so long as the information is not readily ascertainable “by proper means,” while the North Carolina definition substitutes “independent development” and “reverse engineering” in place of those words. David P. Hathaway, Comment, *Is the North Carolina Trade Secrets Protection Act Itself a Secret, and Is the Act Worth Protecting?*, 77 N.C. L. REV. 2149, 2158 (1999). Additionally, the North Carolina definition could be read to be broader because it includes the phrase “not limited to” when listing the types of information that can constitute a trade secret at the beginning of the definition. *Id.*

59. See *supra* Section I.A.2. This includes the portion of the commentary suggesting that the UTSA definitions should substitute for common law or Restatement definitions. See UNIF. TRADE SECRETS ACT prefatory note.

60. N.C. GEN. STAT. § 66-152(3).

61. For more discussion about how the statutory definition contains a set of elements while the common law definition contains a set of factors, compare Fenwick & West LLP, *Trade Secrets Protection* 2-3 (2001), <https://perma.cc/G6FG-7YQJ> (describing the “four elements” within California’s version of the UTSA), with Gregory S. Bombard, *Three Key Distinctions Between the Uniform Trade Secrets Act and the Common Law*, 17 A.B.A. SEC. COM. & BUS. LITIG. 23, 23-24 (2016) (describing how New York and Massachusetts—two states that have not adopted the UTSA—use the Restatement’s six-factor balancing test, which is different from the UTSA definition).

62. See N.C. GEN. STAT. § 66-152.

63. The precise formulation of the elements can, of course, vary by interpreter. For instance, some commentators have approached the terms of the statute more generally and defined trade secrets as “information that: (1) is business or technical information, (2) has

Early cases interpreting the NCTSPA reflect this understanding. The first court to apply the new statute found that the business information at issue was a trade secret because it “satisfied the Statutory definition under the North Carolina Trade Secrets Protection Act.”⁶⁴ The district court never considered any other factors.⁶⁵ In *Bank Travel Bank v. McCoy*, the Eastern District of North Carolina wrote that North Carolina “defines a trade secret as valuable business or technical information that a) is neither ‘generally known nor readily ascertainable through independent development or reverse engineering,’ and b) has been subject to ‘efforts that are reasonable under the circumstances to maintain its secrecy.’”⁶⁶ The court then said that a plaintiff must allege facts that “satisfy these two requirements” to withstand summary judgment.⁶⁷ Because the plaintiff in that case repeatedly disclosed his information, the reasonable efforts prong failed, such that the plaintiff could not maintain an action for trade secret misappropriation.⁶⁸

Other cases throughout the early '90s copied this analysis, looking to the requirements of the definition rather than considering additional factors. The North Carolina Court of Appeals, in the 1991 case *S.E.T.A. UNC-CH, Inc. v. Huffines*, refused to find a trade secret when the information at issue lacked any value and could “hardly be considered as a ‘trade secret’ as

actual or potential economic value stemming from its secrecy, and (3) the owner has made the object of reasonable efforts to keep secret.” Root & Blynn, *supra* note 11. One law firm has interpreted the UTSA statute to have four elements: (1) information, (2) that derives economic value from the fact it is secret, (3) that is not generally known, and (4) is the subject of reasonable efforts to maintain its secrecy. Fenwick & West LLP, *supra* note 61.

64. *Moore v. Am. Barmag Corp.*, 710 F. Supp. 1050, 1060 (W.D.N.C. 1989). The Federal Circuit eventually affirmed the district court’s decision in an unpublished opinion because “[t]he North Carolina Trade Secrets Protection Act limits a trade secret to ‘business or technical information’ which ‘[i]s subject of efforts that are reasonable under the circumstances to maintain its secrecy.’” *Moore v. Am. Barmag Corp.*, No. 89-1524, 1990 WL 52409, at *1 (Fed. Cir. Apr. 27, 1990) (citing N.C. GEN. STAT. § 66-152(3) (1981)).

65. *See Moore*, 710 F. Supp. at 1060.

66. *Bank Travel Bank v. McCoy*, 802 F. Supp. 1358, 1360 (E.D.N.C. 1992).

67. *Id.* (emphasis added) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

68. *Id.* The court cited the Restatement comment when making its decision, even though it never supplied the factors or set out to apply them. *See id.* It is worth noting that the court did not conduct the analysis completely correctly; even though it properly treated the trade secrets definition as containing elements, it misstated the first element by removing the consideration of value. *See id.* at 1358–60. When the court stated that North Carolina defines trade secrets as “valuable business or technical information,” it improperly gave short shrift to one of the most substantive parts of the definition. *See id.* at 1360.

defined above.”⁶⁹ In *North Carolina Electric Membership Corp. v. North Carolina Department of Economic and Community Development*, the North Carolina Court of Appeals provided only the statutory definition—as opposed to the Restatement factors—and determined that a plaintiff could establish a trade secret because the information would be valuable to its competitors.⁷⁰ Again, in 1993, the court of appeals had the opportunity to consider a trade secrets case.⁷¹ The court quoted the definition of section 66-152(3) and then—for the purposes of finding whether a trade secret existed—analyzed three issues: (1) whether the information was generally known, (2) the reasonableness of the efforts to maintain secrecy, and (3) whether the information was readily ascertainable.⁷² These issues all sprung from the express language of the statutory definition.⁷³ While they also spoke to Restatement factors,⁷⁴ the court of appeals limited its analysis to those facts that alone could preclude the finding of a trade secret if insufficient under the statutory language.⁷⁵

C. North Carolina’s Reversion to the Common Law

In the immediate wake of the NCTSPA, courts directly applied the definition statute and the simple test found therein. However, in 1997, the North Carolina Court of Appeals issued a decision that soon became seminal: *Wilmington Star-News*.⁷⁶

1. Wilmington Star-News: The Impetus of Trade Secret Confusion

In *Wilmington Star-News, Inc. v. New Hanover Regional Medical Center, Inc.*, a newspaper was seeking disclosure of the price lists contained in a contract between a public hospital and a private insurer.⁷⁷

69. S.E.T.A. UNC-CH, Inc. v. Huffines, 399 S.E.2d 340, 343 (N.C. Ct. App. 1991) (emphasis added) (referencing the court’s earlier quotation of section 66-152(3)).

70. N.C. Elec. Membership Corp. v. N.C. Dep’t of Econ. & Cmty. Dev., 425 S.E.2d 440, 444 (N.C. Ct. App. 1993).

71. See *Barr-Mullin, Inc. v. Browning*, 424 S.E.2d 226 (N.C. Ct. App. 1993).

72. See *id.* at 229–30.

73. See N.C. GEN. STAT. § 66-152(3) (2017).

74. See RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. LAW INST. 1939).

75. Several other trade secrets cases were decided exclusively by reference to the definition of section 66-152(3), with the courts foregoing any analysis of the Restatement factors. See, e.g., *Glaxo Inc. v. Novopharm Ltd.*, 931 F. Supp. 1280 (E.D.N.C. 1996); *Merck & Co. v. Lyon*, 941 F. Supp. 1443 (M.D.N.C. 1996); *FMC Corp. v. Cyprus Foote Mineral Co.*, 899 F. Supp. 1477 (W.D.N.C. 1995).

76. *Wilmington Star-News, Inc. v. New Hanover Reg’l Med. Ctr., Inc.*, 480 S.E.2d 53 (N.C. Ct. App. 1997).

77. *Id.* at 54.

The hospital and insurer sought to avoid disclosure under the trade-secret exemption within the Public Records Act.⁷⁸ Thus, for the first time the court had to determine whether price lists constituted a trade secret.⁷⁹

The court started on the right track, providing the full trade secret definition as found in the NCTSPA.⁸⁰ It provided a straightforward, statute-based test for finding a trade secret: “According to the *plain language* of . . . 66-152(3), trade secrets may concern business information that is formulated or compiled and that *meets two requirements*: (1) [t]he information must have commercial value from not being known or readily ascertainable; and (2) reasonable efforts must be made to keep the information secret.”⁸¹ Affirming the rule of *Bank Travel Bank*, the court wrote that the plaintiff must “meet these two requirements of a trade secret” to survive summary judgment.⁸² Then, the court took a questionable turn.

Primarily because it was tasked with analyzing a new type of business information, the court decided that section 66-152(3) “seems to require a deeper inquiry.”⁸³ It stated that “[o]ther jurisdictions in interpreting similar trade secret statutes have determined the following factors should be considered,” thereafter listing the six Restatement factors verbatim.⁸⁴ The court then listed eleven facts it deemed relevant to the discussion and held that a reasonable juror could find that a trade secret existed.⁸⁵ The court probably arrived at the right conclusion—there were sufficient facts to meet the two requirements.⁸⁶ However, the court unnecessarily complicated the analysis by resurrecting the Restatement factors and

78. *Id.* at 55; see also N.C. GEN. STAT. § 132-1.2 (2017) (providing that a public agency need not disclose information that is (1) a trade secret as defined by section 66-152(3), (2) is private property, (3) is disclosed by the public agency in connection with the owner’s performance of a public contract, and (4) is designated as confidential or a trade secret at the time of initial disclosure).

79. *Wilmington Star-News, Inc.*, 480 S.E.2d at 54–55 (noting that this was an issue of first impression in North Carolina).

80. *Id.* at 55–56.

81. *Id.* at 56 (emphasis added).

82. *Id.*

83. *Id.*

84. *Id.*; cf. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. LAW INST. 1939).

85. *Wilmington Star-News, Inc.*, 480 S.E.2d at 57.

86. Regarding the information having commercial value from not being known or readily ascertainable, the court found that disclosure of the financial terms would have significantly benefitted the insurer’s competitors and that disclosure would have been detrimental to competition in the industry. *Id.* Regarding reasonable efforts to maintain secrecy, the court found that the parties treated the information as confidential, entered into a confidentiality agreement, and that the hospital restricted access to the price lists. *Id.*

considering irrelevant facts.⁸⁷ Worse, the court set into motion a new line of cases that created the trade secret problems that exist today.⁸⁸

2. *Subsequent Cases Follow Wilmington Star-News and Revive Common Law*

The next time the North Carolina Court of Appeals considered a significant trade secrets case after *Wilmington-Star News*,⁸⁹ it again employed the Restatement factors—this time with more gusto.⁹⁰ Similar to *Wilmington-Star News*, the case arose in the context of a public disclosure action.⁹¹ The public agencies seeking to enjoin the required disclosure argued that the information contained in reports and questionnaires constituted a trade secret.⁹² The court set out the statutory definition of a trade secret and then wrote, “When determining whether information is a trade secret, the following factors *are proper* to consider.”⁹³ The court listed the six Restatement factors and renamed them the “*Wilmington Star-News* factors.”⁹⁴ Oddly, the court said it reviewed the factors, but its holding spoke only to the statutory requirements.⁹⁵ However, the court clearly reaffirmed the use of the factors in trade secret analysis, as indicated by its commanding language of “are proper,”⁹⁶ as opposed to *Wilmington*

87. The court examined the following facts that speak to no real requirement of a trade secret: the insurer’s subjective consideration of the price list as confidential; the market in which the hospital and insurer operate; the difficulty that the insurer’s competitors would experience when trying to replicate the list; and whether there was any testimony expounding on the price or difficulty of generating the list. *Id.* Although these facts bear on the Restatement factors, section 66-152(3) provides no place for their consideration. See N.C. GEN. STAT. § 66-152(3) (2017).

88. See *infra* Part II.

89. The North Carolina Court of Appeals decided one trade secrets case between *Wilmington Star-News* and *Utilities Commission*. See *Cox v. Dine-A-Mate, Inc.*, 501 S.E.2d 353 (N.C. Ct. App. 1998). However, the court gave fairly little attention to the trade secrets issue after more thoroughly discussing the enforceability of employment contracts. See *id.* at 354–57.

90. *State ex. rel. Utils. Comm’n v. MCI Telecomm. Corp.*, 514 S.E.2d 276, 282 (N.C. Ct. App. 1999).

91. *Id.* at 279.

92. *Id.* at 282.

93. *Id.* (emphasis added).

94. *Id.*

95. See *id.* (“Our review of the *Wilmington Star-News* factors in the context of section 66-152(3) reveals that the information . . . has ‘actual or potential commercial value from not being generally known’ and is ‘the subject of efforts that are reasonable under the circumstances to maintain its secrecy.’ The information thus constitutes ‘trade secret[s]’ within the meaning of [the Public Records Act].”).

96. *Id.*

Star-News's softer language of “other jurisdictions . . . have determined the following factors *should be* considered.”⁹⁷

The Restatement factors became affixed in trade secrets cases. In *Byrd's Lawn & Landscaping, Inc. v. Smith*, the North Carolina Court of Appeals repeated that the factors are “properly considered.”⁹⁸ Using these factors, the court concluded that (1) the information was not known outside the business,⁹⁹ (2) employees within the business did not know the information,¹⁰⁰ (3) the owner took measures to guard the secrecy of the information,¹⁰¹ (4) the information was valuable to both the business and its competitors,¹⁰² and (5) the owner expended money and effort in developing the information.¹⁰³ The court also considered the sixth factor—regarding the ease with which the information could be acquired or duplicated—but seemingly ignored the “evidence offered by defendant that similar information may have been ascertainable by anyone in the lawn maintenance and landscape business.”¹⁰⁴ Thus, although there was evidence in the record that the information could not meet one of the statutory requirements, the court still found that a trade secret existed because all of the other factors weighed toward the plaintiff.¹⁰⁵

Similarly, the trial and appellate courts in *Sunbelt Rentals, Inc. v. Head & Engquist Equipment, L.L.C.* showed no hesitation to apply the Restatement factors.¹⁰⁶

97. *Wilmington Star-News, Inc. v. New Hanover Reg'l Med. Ctr., Inc.*, 480 S.E.2d 53, 56 (N.C. Ct. App. 1997) (emphasis added).

98. *Byrd's Lawn & Landscaping, Inc. v. Smith*, 542 S.E.2d 689, 692 (N.C. Ct. App. 2001).

99. *Id.* (“The information was treated as confidential by Mr. Byrd . . .”).

100. *Id.* (“Therefore, Mr. Byrd did not even share the information with plaintiff's employees.”).

101. *Id.* (“The information was kept by Mr. Byrd, first in a notebook and then on computer.”).

102. *Id.* (“Mr. Byrd . . . used the information to prepare bids for the various properties upon which plaintiff performed services. Many of the accounts had to be rebid each year. Mr. Byrd testified that someone with access to these records could use the information to underbid plaintiff on any of its contracts.”).

103. *Id.* (“Plaintiff offered evidence . . . that it had maintained detailed cost records as to the materials, labor and equipment required for each of its contracts over a period of seventeen years.”).

104. *Id.*

105. See *infra* notes 119–25 and accompanying text for a more thorough discussion of this problem.

106. *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 620 S.E.2d 222, 226–29 (N.C. Ct. App. 2005).

The trial court determined such information was (1) not generally known outside BPS; (2) only discreetly disclosed within BPS; (3) guarded as secret (e.g. information removed from view when outsiders visited BPS' premises, pricing kept in special books, passwords used to protect computer access, file removal rules, and salary information kept under lock and key); (4) competitively valuable; (5) developed at significant cost to BPS; and (6) difficult to duplicate or acquire.¹⁰⁷

The court of appeals, after restating the trial court's factual conclusions in a way that made it seem as if it was applying a totality-of-the-circumstances test, affirmed the trial court's finding of a trade secret.¹⁰⁸ More than a decade later, analysis like the trial court's in *Sunbelt Rentals* is now commonplace.¹⁰⁹ Some trial courts, such as that in *360 Mortgage Group*, have gone so far as providing a full paragraph of analysis for each factor before making the ultimate conclusion of whether a trade secret exists based on a balancing of those factors.¹¹⁰

In sum, despite North Carolina's turn to a statutory definition of trade secrets in 1981, courts in the state have resurrected common law considerations when determining whether a trade secret exists. The result is a dueling body of law: a statutory definition versus a judicially created definition, with courts that inconsistently choose which to apply and how to apply it.

II. NORTH CAROLINA'S TRADE SECRET PROBLEMS

The bifurcated development of the trade secret definition has thrown trade secret jurisprudence into disarray. The introduction of the Restatement factors is an interesting quandary in many ways. For instance, it is unclear how or why the factors arrived in North Carolina law. The Restatement factors developed as a codification of common law throughout the country, but North Carolina essentially had no common law in this area.¹¹¹ The courts did not use the factors until roughly fifteen years after a statutory definition was enacted.¹¹² Thus, the courts resurrected a judicially

107. *Id.* at 227–28.

108. *Id.* at 228.

109. *See, e.g., 360 Mortg. Grp., LLC v. Stonegate Mortg. Corp.*, No. 5:14-CV-00310-F, 2016 WL 4943933, at *5–*6 (E.D.N.C. Sept. 14, 2016); *Combs & Assocs., Inc. v. Kennedy*, 555 S.E.2d 634, 640 (N.C. Ct. App. 2001) (“From this statutory definition, our courts have fashioned six factors which are to be considered when determining whether information is a trade secret . . .”); *Comput. Design & Integration, LLC v. Brown*, No. 16 CVS 11847, 2017 NCBC 8, at *8 (N.C. Super. Ct. Jan. 27, 2017).

110. *360 Mortg. Grp., LLC*, 2016 WL 4943933, at *5–*6.

111. *See supra* Section I.B.

112. *See supra* Section I.C.1.

created test that they had never before used, and they did so in spite of preexisting legislative guidance. The North Carolina judiciary has never questioned this oddity, though. In fact, the court of appeals seems to ignore this legal fiction altogether. In *Sunbelt Rentals*, the court wrote that it had previously found trade secrets in various types of information while “[a]pplying these factors.”¹¹³ There was one slight problem, though: one of the cases cited by the *Sunbelt Rentals* court predated *Wilmington Star-News* and never once mentioned the word “factor.”¹¹⁴ In short, the court of appeals used the factors test even though one of the decisions it cited employed the statutory elemental test.

In addition to the foible of grasping the factors test from thin air, there are fundamental problems associated with modern trade secret precedent. Whereas a statute provides a cause of action and a test for what constitutes a valid suit, a judicially created test often controls the outcome of the case. This Comment discusses three of those problems: the theoretical problem of the judiciary ignoring a legislative directive, the substantive problem of changing the law, and the practical problem of confusing practitioners who litigate trade secrets cases.

A. *Theoretical Problem: The Judicial Branch Ignoring a Legislative Mandate*

Though the first problem has no tangible effect on trade secret application, it rests uneasy on legal idealists. In this instance, the North Carolina legislature has established a clear definition of a trade secret, yet the courts have fashioned their own definition and test. This contravenes basic separation of powers tenets.¹¹⁵

The United States Supreme Court has long held that the “sole function” of a court is to enforce a statute by its terms.¹¹⁶ As the Third Circuit has written, “The words of a statute are not to be lightly jettisoned by courts looking to impose their own logic on a statutory scheme.”¹¹⁷ The Third Circuit has further expounded upon this concept:

113. *Sunbelt Rentals, Inc.*, 620 S.E.2d at 226.

114. *See id.* at 226 (citing *Drouillard v. Keister Williams Newspaper Servs.*, 423 S.E.2d 324, 327 (N.C. Ct. App. 1992)).

115. *See* N.C. CONST. art. I, § 6 (“The legislative, executive, and supreme judicial powers shall be forever separate and distinct from each other.”).

116. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

117. *In re Visteon Corp.*, 612 F.3d 210, 219 (3d Cir. 2010) (citing *United States v. Terlingo*, 327 F.3d 216, 221 (3d Cir. 2003)).

“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” It is for Congress, not the courts, to enact legislation. When courts disregard the language Congress has used in an unambiguous statute, they amend or repeal that which Congress enacted into law. Such a failure to defer to the clearly expressed statutory language of Congress runs contrary to the bedrock principles of our democratic society.¹¹⁸

North Carolina has incorporated this longstanding constitutional doctrine into its own jurisprudence. In *Orange County ex rel. Byrd v. Byrd*, the court of appeals wrote that it was “not free to either ignore or amend legislative enactments because when the language of a statute is clear and unambiguous, the courts must give it its plain meaning.”¹¹⁹

No court has ever contended that section 66-152(3) is ambiguous, unconstitutional, or otherwise objectionable. The judiciary is supposed to show restraint to honor the legislature’s command and enforce the statute as written. Instead, the courts have abandoned the statutory definition in lieu of a definition and test it created itself. The judiciary has exceeded its province by commandeering trade secret doctrine from the North Carolina General Assembly.

B. Substantive Problem: Employment of the Restatement Approach Changes the Test

The most significant of the three problems discussed herein is the substantive problem. That is, the judiciary has changed the law by applying its factor test instead of the statutory test when identifying trade secrets.

The discussion in Section I.B.2 of this Comment highlights the chief distinction between the common law and statutory definitions of trade secret: the Restatement instructs the court to use factors to find a trade secret, while the North Carolina statute appears to be more rigid.

Byrd’s Lawn & Landscaping is illustrative of this problem. There, the court compiled a long list of facts, all of which helped satisfy one or more of the first five Restatement factors.¹²⁰ There were, however, no facts that satisfied the sixth Restatement factor,¹²¹ which is “the ease or difficulty with which the information could be properly acquired or duplicated by

118. *Id.* at 220 (citation omitted) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

119. *Orange Cty. ex rel. Byrd v. Byrd*, 501 S.E.2d 109, 112 (N.C. Ct. App. 1998).

120. *See Byrd’s Lawn & Landscaping, Inc. v. Smith*, 542 S.E.2d 689, 692 (N.C. Ct. App. 2001).

121. *Id.*

others.”¹²² In fact, the court wrote that the defendant offered evidence that “similar information may have been ascertainable by anyone in the lawn maintenance and landscape business.”¹²³ Looking back to section 66-152(3) of the NCTSPA, part of the subsection (a) requirement is that the information is not “generally known or readily ascertainable through independent development or reverse engineering.”¹²⁴ Had the court applied the straightforward, elemental test of the NCTSPA, it would have been compelled to find that there was no trade secret because the information was readily ascertainable. However, the court of appeals, electing to apply the factors test instead of the statutory test, overlooked the failure of that element. Instead, it held that “[n]otwithstanding” the evidence of ascertainability,

plaintiff’s evidence, when considered in the light most favorable to it, is sufficient to sustain a finding by the jury that plaintiff’s cost history records were “a compilation of information, method, technique, or process” which was treated by plaintiff as confidential, was neither known outside plaintiff’s business nor shared with its employees, which had value to plaintiff and potential value to plaintiff’s competitors, and which could not be easily acquired by others who had not performed similar services on the same properties from which plaintiff’s cost history information was acquired.¹²⁵

Despite the apparent statutory shortcoming of the plaintiff’s case, the court found that a trade secret existed.¹²⁶ Through the use of loose factors and standards, courts are able to arbitrarily decide which indicia of a trade secret are sufficient to support a claim. This is not the strict test that the statutory definition provides.

The Restatement test also changes the law because it changes the facts courts are supposed to consider.¹²⁷ Most notably, factor (5) is completely absent from the statutory definition; the North Carolina General Assembly does not to care how much money or effort the business spent developing

122. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. LAW INST. 1939).

123. *Byrd’s Lawn & Landscaping, Inc.*, 542 S.E.2d at 692.

124. N.C. GEN. STAT. § 66-152(3)(a) (2017); *see also* Bank Travel Bank v. McCoy, 802 F. Supp. 1358, 1360 (E.D.N.C. 1992) (stating expressly that it is a “requirement” of a trade secret that it not be known or generally ascertainable).

125. *Byrd’s Lawn & Landscaping, Inc.*, 542 S.E.2d at 692.

126. *See id.*

127. The six Restatement factors are: (1) the extent to which the information is known outside of the business, (2) the extent to which the information is known by those inside the business, (3) the extent of measures taken to guard the secrecy of the information, (4) the value of the information to the business, (5) the amount of effort or money spent in developing the information, and (6) the ease with which the information could be duplicated by others. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. LAW INST. 1939).

the information, so long as the information meets the requirements of not being generally known and subject to reasonable efforts to preserve secrecy.¹²⁸ Additionally, factor (2) has no real place inside the statutory definition. Section 66-152(3) requires that information be sufficiently secret to warrant protection.¹²⁹ However, the statute seems to be external-facing—it speaks to whether information is “generally known” and whether competitors could reverse-engineer the same information.¹³⁰ This interpretation is supported by the commentary to the UTSA, which mentions the “general public” and the “industry” when discussing whether information is generally known.¹³¹ The statute does not contemplate internal discussions about the information.

While the other four factors are tied to language in the statute, the framing of those criteria is distinct between the two approaches. The Restatement uses amorphous language such as “extent to which” and “value of.”¹³² The statute, on the other hand, contains more definite terms. Section 66-152(3) asks whether the information *has* value, not *how much* value it has.¹³³ It requires the owner of the information take “reasonable” efforts to maintain secrecy, as opposed to weighing the “extent” of those measures.¹³⁴ It provides a standard that information is “*not . . .* generally known or readily ascertainable” instead of analyzing the “extent” to which it is known.¹³⁵ These distinctions, while seemingly slight, open the door for capricious adjudication. They reinforce the uncertainty that already accompanies a factor-balancing test. Instead of engaging in the binary inquiry of each individual requirement, a court applying loose factors like these would be influenced to examine the intensity with which factors tip toward a party.

As an example, it would be a natural tendency for a court to excuse how readily ascertainable information is when the owner went to the most extreme measures to guard its secrecy and it held immense commercial

128. *Cf.* N.C. GEN. STAT. § 66-152(3).

129. *Id.*

130. *See id.*

131. UNIF. TRADE SECRETS ACT § 1 cmt. (UNIF. LAW COMM’N 1985). The comment more explicitly states that “[i]f the principal persons who can obtain economic benefit from information are aware of [the information], there is no trade secret.” *Id.* It is a business’s competitors who can obtain a benefit from knowing information, not those who are working with the information inside the business. Thus, the statute appears to largely disregard any consideration of whether the information is known *inside* the business.

132. *See* RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. LAW INST. 1939).

133. *See* N.C. GEN. STAT. § 66-152(3).

134. *Id.*; *cf.* RESTATEMENT (FIRST) OF TORTS § 757 cmt. b.

135. N.C. GEN. STAT. § 66-152(3) (emphasis added); *cf.* RESTATEMENT (FIRST) OF TORTS § 757 cmt. b.

value. A sympathetic court would find a trade secret, even though the general assembly would not. On the other side of the spectrum, consider a case where the owner took barely reasonable efforts to maintain secrecy of information, the information was slightly known throughout the industry, and the information was fairly valuable to the owner. Under the statutory definition, each of the requirements is met, and the owner has an enforceable trade secret. Under the factor-balancing test with its “extent to” language, a court could find that, on the whole, the information is unworthy of trade secret protection. This is the uncertainty that occasions a split legal doctrine. The judiciary should seek to avoid inconsistent results.

It is important to note that the North Carolina definition still largely encompasses the principles that developed through the common law and composed the Restatement treatment.¹³⁶ This understanding informs the court about what the language of the statute means and how to apply the tests found in the statutory definition.¹³⁷ However, the judiciary is incorrect to think that this backdrop permits it to ignore a legislative directive, particularly when such a tangent fundamentally affects the rights of litigants.

C. *Practical Problem: Practitioner Confusion*

The third problem is that the law’s development undoubtedly frustrates practitioners. It is one thing to have two laws that could govern a case. It is another for the courts to not always know which to apply.

For instance, in the first trade secrets case the court of appeals decided after *Wilmington Star-News*, the court proceeded exclusively on statutory grounds.¹³⁸ The court quoted section 66-152(3) in full before making the conclusory statement that “the record shows that the information defendants claim as trade secrets is ‘readily ascertainable through independent development.’”¹³⁹ With that, the court affirmed the trial court’s conclusion that there was no trade secret.¹⁴⁰ This seemed to indicate that the court would follow the statutory guidance and refuse to identify a trade secret when any portion of the definition was insufficient.

136. Root & Blynn, *supra* note 11, at 837.

137. For instance, the North Carolina Court of Appeals applied section 66-152(3) when analyzing a trade secrets case but still resorted to common law precedent regarding how secret information must be to still be not “generally known” and how difficult reverse-engineering must be to make it not “readily ascertainable.” *Barr-Mullin, Inc. v. Browning*, 424 S.E.2d 226, 229–30 (N.C. Ct. App. 1993).

138. *See Cox v. Dine-A-Mate, Inc.*, 501 S.E.2d 353, 357 (N.C. Ct. App. 1998).

139. *Id.*

140. *Id.*

Then, in the next trade secrets case before the court of appeals, the court doubled down on the *Wilmington Star-News* factors and set out to apply each of them.¹⁴¹

This pattern has persisted more recently. In the 2001 case of *Combs & Associates, Inc. v. Kennedy*, the court of appeals affirmatively stated that courts have “fashioned six factors” from section 66-152(3) that courts should use when determining whether a trade secret exists.¹⁴² In the 2013 case of *GE Betz, Inc. v. Conrad*, the same court applied only section 66-152(3) of the NCTSPA and found that a trade secret existed because it fit within the statutory definition.¹⁴³

Even when courts decide to apply the Restatement definition, they do so inconsistently. Some courts employ a classic factor-balancing test, examining each and every factor and then making a determination at the end of who has the best case.¹⁴⁴ On the other hand, a trial court recently wrote that “[t]he factors overlap, and courts considering these factors do not always examine them separately and individually.”¹⁴⁵

A fairly recent case from the North Carolina Business Court demonstrates the confusion that arises from an inconsistent body of law. There, the plaintiff asked the court to consider each of the six factors before determining whether a trade secret existed.¹⁴⁶ The defendant, on the other hand, asked the court to summarily reject the trade secrets claim once it became clear that the information was previously made publicly available.¹⁴⁷ The court struggled with application of the law.¹⁴⁸ It noted that the North Carolina Court of Appeals has relied on the six-factor test, even writing that disclosure alone would not necessitate the rejection of a trade secret claim based on this balancing test.¹⁴⁹ But, the court then relied on a series of cases applying the UTSA when it eventually held that generally available information cannot obtain trade secret status.¹⁵⁰

141. See *supra* notes 89–97 and accompanying text.

142. *Combs & Assocs., Inc. v. Kennedy*, 555 S.E.2d 634, 640 (N.C. Ct. App. 2001).

143. *GE Betz, Inc. v. Conrad*, 752 S.E.2d 634, 649–50 (N.C. Ct. App. 2013).

144. See, e.g., *360 Mortg. Grp., LLC v. Stonegate Mortg. Corp.*, No. 5:14-CV-00310-F, 2016 WL 4943933, at *5–*6 (E.D.N.C. Sept. 14, 2016)

145. *Comput. Design & Integration, LLC v. Brown*, No. 16 CVS 11847, 2017 WL 442691, at *8 (N.C. Super. Ct. Jan. 27, 2017) (citing *SCR-Tech LLC v. Evonik Energy Servs. LLC*, No. 08 CVS 16632, 2011 NCBC 26 (N.C. Super. Ct. July 22, 2011)).

146. *Evonik Energy Servs. LLC*, 2011 NCBC at 40.

147. *Id.*

148. See *id.* at 41.

149. *Id.*

150. *Id.* at 44 & nn.106–09.

The court's ultimate resolution of the issue is beside the point. This litigation involved three of the most sophisticated law firms in the North Carolina legal market. Yet, they could not even agree on which law applied and how the court should apply that law.

III. THE NORTH CAROLINA SUPREME COURT SHOULD STRIKE DOWN THE FACTOR TEST

In light of such pressing problems, North Carolina needs to resolve the tension between the statutory trade secrets definition and the common law trade secrets definition. North Carolina is not alone in adjudicating trade secrets in this way; the vast majority of states continues to use the Restatement factors, despite a uniform trade secrets definition that has been nearly universally adopted.¹⁵¹ However, North Carolina has been willing to lead legal reform in the past,¹⁵² and it should do so again in this context.

The solution is quite simple: North Carolina courts should drop the use of factors and instead apply section 66-152(3) when analyzing whether a trade secret exists. Courts should look exclusively to the statutory definition of a trade secret and the elemental test that is built into it. The inquiry is straightforward: if the information is of the kind enumerated at the top of the statute and meets the requirements found in the subsections, then a trade secret exists. If the plaintiff insufficiently proves satisfaction of one of the requirements, then there is no trade secret. There is no need for complex examination of all the facts of the case; all that is required of the courts is to decide whether all the boxes are checked.

Taking this approach would cure the separation of powers problem that arose when the court decided to make its own law, contravening the legislature's intention. This would also provide one, uniform law devoid of substantive inconsistencies and practitioner confusion. Businesses would know exactly what they need to do to protect their valuable, confidential information, and the judicial system protecting their interests would adjudicate cases more consistently and efficiently.

North Carolina has examples of the proper way to consider trade secrets cases. For instance, the North Carolina Court of Appeals heard a trade secrets claim in 2007 that concerned a steel truck part.¹⁵³ The court

151. See MILGRIM & BENSON, *supra* note 1.

152. Johnny C. Chriscoe, *A Plea to North Carolina: Bring Fairness to the Assessment of Civil Battery Liability for Defendants with Cognitive Disabilities*, 39 CAMPBELL L. REV. 241, 268 (2017) (discussing North Carolina's institution of the business court to handle complex business litigation).

153. Griffith v. Glen Wood Co., 646 S.E.2d 550, 553–54 (N.C. Ct. App. 2007).

set out the definition found in section 66-152(3).¹⁵⁴ Then, the court highlighted the plaintiff's admission that his part was "readily ascertainable through reverse engineering."¹⁵⁵ That was all it took; the court treated that admission as the failure of a critical element of a trade secret claim, therefore holding that the part could not be a trade secret as a matter of law.¹⁵⁶ The court did not engage in any further analysis of the extent to which the part was ascertainable, how valuable the part was, the ease with which the part could have been reverse-engineered, or how many people inside the plaintiff's business knew about the part.¹⁵⁷ It treated the statutory requirements as binary and made the simple conclusion when one of the requirements failed.¹⁵⁸

The successful analysis in that case highlights a main feature of the statutory definition: it is workable. Courts using the elements within the statutory definition had no problem adjudicating trade secrets cases before *Wilmington Star-News*. No court that retreated to the common law factors noted any difficulties or ambiguities within the statute—in fact, they never gave much of a reason to use the factors at all. The statutory definition was carefully drafted by a commission of experts, and it was enacted by the substantial majority of the states.¹⁵⁹ This adoption would not have occurred if the statute lacked clarity. The drafters of the UTSA—and by extension the NCTSPA—incorporated a century of trade secret expansion and contraction into a settled, workable definition. Simply put, this is not an area of law that needed judicial salvation.

The North Carolina Supreme Court has never before decided a trade secrets case or interpreted section 66-152(3). The good news about this solution is that the high court has a prime opportunity to set the record straight. Under North Carolina's Business Court Modernization Act, any party in litigation may designate a case as a mandatory complex business case if a material issue in the case relates to trade secrets.¹⁶⁰ Appeals from such mandatory complex business cases bypass the court of appeals and proceed directly to the supreme court.¹⁶¹ Thus, the North Carolina Supreme Court can address this legal discrepancy *carte blanche*; it is not controlled by the preexisting court of appeals law. When that opportunity

154. *Id.* at 558.

155. *Id.*

156. *Id.*

157. *See id.*

158. *See id.*

159. *See* MILGRIM & BENSON, *supra* note 1.

160. N.C. GEN. STAT. § 7A-45.4(a)(8) (2017).

161. *Id.* § 7A-27(a)(2).

arrives, the court should resolve these issues and preclude future use of the knotty Restatement definition.

CONCLUSION

Trade secret doctrine developed rapidly and thoroughly through the common law. At the time, the Restatement provided a great service by codifying a universal treatment of the topic; however, that common law lost relevance when legislatures throughout the country opted to protect trade secrets legislatively. Courts have had a difficult time accepting this new reality. This is particularly true in North Carolina, where trial courts and the court of appeals have resurrected the Restatement factors when determining whether a trade secret exists. Such a resurrection does a disservice to the state. The judiciary has not only created a separation of powers issue with the general assembly but also birthed a body of law that is unnecessarily complex.

The North Carolina Supreme Court should step in and correct the lower courts' errors. It is the legislature's role to create law, and that is what it has chosen to do by passing the NCTSPA. The supreme court should not permit the lower courts to modify that law by considering additional factors and fundamentally changing how the test for a trade secret functions. Given the structure of the North Carolina business courts, the North Carolina Supreme Court should soon hear a case that bears on trade secrets. When it does, it should resolve the problems in trade secrets litigation by prohibiting future use of the factors analysis. The state already has a trade secret definition—it doesn't need two.

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