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I. INTRODUCTION

Virtually all Americans have heard of the famous formula for Coca-Cola\(^1\) or the eleven herbs and spices used in Kentucky Fried Chicken (KFC).\(^2\) While these legendary formulas lead to great advertising and promotional trade slogans, trade secret law\(^3\) is of great importance to even small businesses in the United States.\(^4\) The misappropriation\(^5\) of trade secrets costs American companies over $100 billion each year.\(^6\)

The main premise behind trade secret law is that it protects processes, ideas, lists, devices, or the like from misappropriation by those who have not put forth the effort to create them on their own.\(^7\) The main problem, however, in the field of trade secret law, despite the large number of judicial decisions, is the uncertainty in what exactly constitutes a trade secret.\(^8\) Even

1. Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co., 107 F.R.D. 288, 289 (D.C. Del. 1985). Even though most of the individual ingredients to the famous formula are in the public domain, the complete formula for the famous soft drink is probably one of the best kept trade secrets in the world. Id. Only two people in the company know the formula for Coca-Cola. Id. The only written copy of the formula is kept in a security vault in Atlanta, Georgia, and the board of directors have to pass a resolution to open the vault. Id.

2. About KFC, Original Recipe Is Still a Secret, at http://www.kfc.com/about/secret.htm (last visited Oct. 7, 2002). For years, the famous secret formula was in the head of Colonel Harland Sanders, and the spice list was in his car. Id. Now that the recipe is worth several million dollars, KFC has it locked away in a safe in Kentucky. Id. There are two companies that mass produce the recipe, and each has only one part of the total mixture. Id.

3. Trade secret law protects against the improper use or taking of secret information that provides a competitive advantage to those who do not know or cannot easily obtain the information. HENRY H. PERRITT, JR., TRADE SECRETS, A PRACTITIONER'S GUIDE 3-4 (1994); see also infra Part III.


5. Misappropriation is the conduct that one must prove in order to seek damages. PERRITT, supra note 3, at 4. Misappropriation occurs when a party improperly obtains a trade secret. Id. at 4–5. Improper conduct includes theft, breach of contract, or breach of a confidential relationship. See id.


7. See infra Part III.A.

with the long progeny of cases involving trade secrets, two restatements, and a uniform act, courts and commentators still have difficulty defining a trade secret. The level of difficulty in trade secret jurisprudence escalates when businesses try to protect combination trade secrets.

This note examines the Arkansas Supreme Court's holding in *Wal-Mart Stores, Inc. v. P.O. Market, Inc.*, where the court broke precedent and held that information must meet all six factors from the first *Restatement of Torts* ("Restatement") as well as the Arkansas Trade Secret Act's (ATSA) definition of trade secret. First, this note discusses the underlying facts that led to Wal-Mart Stores's ("Wal-Mart") appeal of the $50 million jury verdict. Next, the note examines the purpose of trade secret law, looking at the delicate balancing act that courts and commentators undertake between protecting intellectual property rights and limiting restrictions on trade. This note then focuses on the various definitions of "trade secret" that have emerged in the United States, particularly in the area of combination trade secrets. With this foundation in place, the note then shifts directions and examines trade secret jurisprudence in Arkansas, highlighting the movement of the Arkansas Supreme Court from relying solely on the ATSA to relying on both the ATSA and the Restatement factors. Next, this note analyzes the Arkansas Supreme Court's reasoning in *Wal-Mart*, including its decision to heighten the requirements for trade secret protection. This note considers two significant aspects of the *Wal-Mart* holding, both of which may have a profound impact on the future of trade secret law in Arkansas. First, the author examines the Arkansas Supreme Court’s deviation from legislative intent, highlighting that in the two cases following...
Wal-Mart, the court has narrowed the protection for trade secrets in Arkansas. Then, the author discusses the apparent divergence of the Arkansas Supreme Court from the original focus of trade secret law—protecting the owner of the trade secret from unfair trade practices. Finally, this note focuses on how this recent divergence will impact trade secret law in Arkansas, suggesting that courts have made it easier for lazier competitors to gain an advantage by misappropriating trade secrets from those who have actually put forth the effort in developing the idea.

II. FACTS

On February 14, 2002, the Arkansas Supreme Court, in Wal-Mart Stores, Inc. v. P.O. Market, Inc., reversed the jury verdict of $50 million in favor of the plaintiff, P.O. Market, Inc. ("P.O. Market"), by holding that P.O. Market did not possess a protectable trade secret. On February 15, 2002, newspapers across the nation described how the Arkansas Supreme Court tossed out the jury’s decision because of the lack of evidence that a trade secret existed. Sam’s Club, a division of Wal-Mart, is a wholesaling warehouse club. Members of Sam’s Club are able to purchase bulk quantities of goods at lower prices than available at regular discount, department, or grocery stores. Sam’s Club provides goods in bulk for the average consumer and also for large-scale purchasers. In large-scale purchase transactions,

21. See infra Part V.
22. See infra Part V.
23. See infra Part V.
25. Id. at 654, 66 S.W.3d at 621. P.O. Market was a Texas Corporation incorporated on December 4, 1992. Id., 66 S.W.3d at 621. Joe O’Banion incorporated the company with the help of his brother-in-law, Leonard Hoffman. Id. at 654–55, 66 S.W.3d at 621. P.O. Market had three shareholders, O’Banion, Hoffman, and Michael McNew. Id. at 655, 66 S.W.3d at 621. P.O. Market never filed taxes, but did have regular business meetings. Id., 66 S.W.3d at 621.
26. Id. at 654, 66 S.W.3d at 621; see also infra Part IV.
29. See id., 66 S.W.3d at 622.
30. Id., 66 S.W.3d at 622. Large-scale purchasers usually buy in large quantities such as truckloads or large freight containers. Id., 66 S.W.3d at 622. These purchasers are generally companies, schools, or governmental offices. Id., 66 S.W.3d at 622; Abstract and Brief of
Sam's Club stores typically do not handle the individual transactions. Instead, the consumer receives the goods directly from the vendor, manufacturer, or a Sam's Club distribution center.

Prior to 1993 Sam's Club operated its business on a cash-and-carry basis. Because of the cash-and-carry corporate policy, Sam's Club's members could neither use purchase orders to buy goods, nor buy goods on credit through standard commercial financing plans. Wal-Mart knew that, without an appropriate financing plan, it was missing out on an opportunity to serve a large market share of large-scale purchase consumers. Wal-Mart conducted two studies, one in the mid 1980s and another in 1991, to seek out alternative credit plans so that it could offer large-scale purchase financing. Regardless of the alternatives available, there were two main factors that Wal-Mart disliked about the various credit plans: cost and credit risk. Until 1992 Wal-Mart was unable to find a way to extend credit to its large-scale purchase consumers without incurring exorbitant costs as well as the credit risk. In the summer of 1992, Joseph O'Banion believed he had the solution for Sam's Club's large-scale purchase financing problem.

O'Banion first made contact with the management of Sam's Club through Dan DeLaughter, a representative of a company called the Service

32. Id., 66 S.W.3d at 622.
33. Id., 66 S.W.3d at 622. Cash-and-carry basis means that Sam's Club did not have a system for customers to purchase large amounts of goods on credit. Id., 66 S.W.3d at 622. The reason for this cash-and-carry only policy was largely because the founder of Wal-Mart, Sam Walton, had a "philosophical aversion" to offering credit to consumers. Id. at 655 n.2., 66 S.W.3d at 622 n.2. Wal-Mart was slow to implement any credit programs for its customers because of the beliefs of Sam Walton. Id., 66 S.W.3d at 622 n.2.
34. Id. at 655, 66 S.W.3d at 622. The only exception for credit purchases was the Discover credit card. Id., 66 S.W.3d at 622; see also Abstract and Brief of Appellees at iv, Wal-Mart (No. 00-1223) (stating that Wal-Mart had no way to sell items to multi-billion-dollar corporate consumers because Sam's Club did not offer any means to buy goods on credit).
35. Abstract and Brief of Appellees at iv, Wal-Mart (No. 00-1223) (estimating that each Sam's Club Store could reach sales of $1 million a month if it implemented a credit program).
36. Id. "Wal-Mart had no ability to make sales from Sam's Club on credit to the multi-billion corporate and governmental procurement market because Sam's [Club] did not accept purchase orders or offer standard commercial credit terms." Id.
37. Id.
38. Id. "General Electric Capital Corporation ... had offered credit programs to Sam's [Club], but none were accepted." Id.
39. Id. at 84. "P.O. Market informed Wal-Mart that it had developed a unique and innovative program that Wal-Mart could implement to serve a market that Wal-Mart had been unsuccessfully attempting to serve for over ten years." Id.
DeLaughter contacted O'Banion in hopes of gaining financing for a project to sell computers purchased from Sam's Club to the University of Arkansas at Little Rock. Even though this plan did not come into fruition, the negotiations opened the door for O'Banion to submit his financing idea to Mike Hampson, manager of the Sam's Club in Little Rock. Hampson informed O'Banion that large-scale credit purchases were virtually unknown to Sam's Club and its customers, and the potential earnings could be quite large. After this conversation, O'Banion submitted a proposal to Hampson to implement a system that would provide credit to large-scale purchasers for items bought from Sam's Club. Hampson passed the plan on to Sharon Austin, an employee in the Sam’s Club export division.

In September 1992 O'Banion and Austin made plans to meet in Bentonville, Arkansas, to discuss O'Banion’s idea. During this conversation, Austin orally agreed to keep the conversation confidential. On October 7, 1992, O'Banion sent a letter to Austin confirming the meeting and renewing the request for confidentiality. This letter outlined the components of the O'Banion concept. The letter explained that customers would submit a purchase order to Sam’s Club and that P.O. Market would then buy the goods from Sam’s Club at a reduced rate. P.O. Market would then take title to the goods, mark up the price, and ultimately sell the goods to the consumer on credit. The letter also explained that P.O. Market would obtain a sales force and a marketing program to advertise the large-scale credit purchasing system to Fortune 500 companies. P.O. Market also requested a nonexclusive license to use the logos and trademarks of Sam’s Club.

41. Id. at 655–56, 66 S.W.3d at 622.
42. Id. at 656, 66 S.W.3d at 622.
43. Id., 66 S.W.3d at 622. O'Banion testified that Hampson stated, "bulk credit purchases were a huge untapped market for Sam’s Club." Id., 66 S.W.3d at 622.
44. Id., 66 S.W.3d at 622.
45. Id., 66 S.W.3d at 622.
46. Wal-Mart, 347 Ark. at 656, 66 S.W.3d at 622.
47. Id., 66 S.W.3d at 622–23.
48. Id., 66 S.W.3d at 623.
49. Id., 66 S.W.3d at 623.
50. Id., 66 S.W.3d at 623.
51. Id., 66 S.W.3d at 623.
52. Wal-Mart, 347 Ark. at 656, 66 S.W.3d at 623.
53. Id., 66 S.W.3d at 623. The license was extremely important to O'Banion. Id. at 656 n.3, 66 S.W.3d at 623 n.3. O'Banion needed the license to gain financing for his proposal and hoped the license would boost customer confidence in the new operation. Id. at 656, 66 S.W.3d at 623.
P.O. Market’s financing institute would approve the credit of the companies prior to any purchases and would keep track of the customer accounts.\(^5\)

O’Banion stated that his plan offered many favorable aspects to Sam’s Club: (1) the consumers could make purchases for all of their needs with one large purchase; (2) P.O. Market would assume all of the credit risk;\(^5\) (3) Sam’s Club would receive the payment on the same day that the customer placed the order; and (4) Sam’s Club would increase its market share\(^6\) by reaching the larger consumer wishing to purchase goods on credit.\(^5\)

In early October 1992, O’Banion, Leonard Hoffman, and Michael Hill met with two employees of Wal-Mart’s export division, Austin and Ralph Bane, to discuss the O’Banion concept.\(^5\) Austin informed O’Banion that she would pass the O’Banion concept on to the legal department and explained that Sam’s Club was not currently seeking any other credit suppliers for large-scale purchase transactions.\(^5\)

During November and December of 1992, the parties met twice to discuss the O’Banion concept.\(^6\) During the December meeting, O’Banion explained the importance of having the sales agreement signed—without it O’Banion would not be able to gain financing to begin operations.\(^6\) Austin informed O’Banion that the legal department was reviewing the license and sales agreement.\(^6\) Furthermore, Austin explained to O’Banion the concerns the legal department had with the license and exclusivity aspects of the sales agreement.\(^6\) Even with these glitches, O’Banion believed the parties would

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54. Id. at 657, 66 S.W.3d at 623. The financial lender would manage the credit risk and perform the payment transaction to Sam’s Club. Id., 66 S.W.3d at 623.

55. Id., 66 S.W.3d at 623. Although P.O. Market bore the credit risk, O’Banion was not concerned about the potential risk because the companies he intended to seek out were large and had substantial amounts of capital. See id., 66 S.W.3d at 623.

56. Abstract and Brief of Appellees at iv, Wal-Mart (No. 00-1223). Sales estimates were $1 million a month for each Sam’s Club store. Id.

57. Id. Sam’s Club would guarantee the product just as if the sale had occurred in one of its stores. Wal-Mart, 347 Ark. at 657, 66 S.W.3d at 623.


59. Id. at 657–58, 66 S.W.3d at 624. Later, Austin stated that she only remembered giving the proposal to her immediate supervisor, Scott Burford. Id. at 658, 66 S.W.3d at 624. During this initial meeting, Hoffman stated the importance of keeping the O’Banion concept confidential and submitted a confidentiality agreement to Austin. Id., 66 S.W.3d at 624. The parties, however, never signed the agreement. Id., 66 S.W.3d at 624. According to O’Banion’s testimony at trial, Austin stated that the confidentiality agreement was not necessary and gave her word that the information would be confidential. Id., 66 S.W.3d at 624.

60. See id., 66 S.W.3d at 624.

61. Id., 66 S.W.3d at 624–25.

62. Id. at 658–59, 66 S.W.3d at 624.

63. Id. at 659, 66 S.W.3d at 624. Sam’s Club did not grant P.O. Market a license to use the Sam’s Club logos and trademarks. Id., 66 S.W.3d at 624. The problem with the exclusiv-
sign it "any day." After the meeting, O'Banion changed the terms of the sales agreement by eliminating the license agreements. The parties never signed this agreement.

A fourth meeting occurred on January 7, 1993, and, according to O'Banion, Austin assured him that Wal-Mart would sign the sales agreement soon. During this meeting, Austin also mentioned a possible new aspect of the plan, a credit plan for large-scale customers in Mexico. Austin proposed that P.O. Market set up a financing system for the Mexican large-scale purchasers. O'Banion informed Austin he was willing to take the higher credit risk of these customers if it would result in Sam's Club signing the sales agreement. As a result of these meetings, Hoffman drafted a proposal for adding the Mexican consumers to the original plan.

During this time, O'Banion regularly called Austin to check on the status of the proposal. In January 1993, however, Austin quit returning O'Banion's phone calls. Hoffman, concerned the agreement was not going to happen, sent four additional drafts of the sales agreement along with a letter stating that P.O. Market could not move forward until it was signed.

Throughout November and December 1992 and even up to January 1993, O'Banion sought out eight possible lenders for his concept. 

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64. *Wal-Mart*, 347 Ark. at 659, 66 S.W.3d at 624.
65. *Id.*, 66 S.W.3d at 625. This third version of the agreement was included with a letter dated December 15, 1992. *Id.*, 66 S.W.3d at 625. O'Banion followed up on the letter with a phone call to Austin. *Id.*, 66 S.W.3d at 625. O'Banion stated that Austin claimed that she had sent the new agreement to the legal department. *Id.*, 66 S.W.3d at 625. At trial Austin denied forwarding the sales agreement to the legal department. *Id.*, 66 S.W.3d at 625.
66. *Id.*, 66 S.W.3d at 625.
67. *Id.*, 66 S.W.3d at 625.
68. *Id.*, 66 S.W.3d at 625. Customers of Sam's Club were purchasing items in bulk in the United States and then marking up the price and selling the items in Mexico. *Id.*, 66 S.W.3d at 625. The Sam's Club stores along the border were accepting letters of credit for these purchases. *Id.*, 66 S.W.3d at 625.
69. *Id.*, 66 S.W.3d at 625. The individual stores along the border offered the letters of credit to its customers, not Sam's Club. *Id.*, 66 S.W.3d at 625. These consumers were a high credit risk, and the individual stores were losing money. *Id.*, 66 S.W.3d at 625.
70. *Wal-Mart*, 347 Ark. at 660, 66 S.W.3d at 625.
71. *Id.*, 66 S.W.3d at 625. Hoffman also hoped that this would prompt Wal-Mart to sign the sales agreement. *Id.*, 66 S.W.3d at 625.
72. *Id.*, 66 S.W.3d at 625.
73. *Id.*, 66 S.W.3d at 625.
74. *Id.*, 66 S.W.3d at 625.
75. *Id.*, 66 S.W.3d at 625. Several lenders rejected O'Banion's proposal. *Id.*, 66 S.W.3d at 625. When communicating with each of the lenders, O'Banion presented a copy of his proposal and a confidentiality agreement. *Id.*, 66 S.W.3d at 625.
O'Banion finally decided on NationsBank. 76 O'Banion sent a letter to Austin in March stressing that the bank wanted to meet with all the parties, including Sam's Club's financial officers and that a meeting had been tentatively scheduled for March 22, 1993. 77 The meeting never occurred, and in March 1993, O'Banion, realizing that the proposal was not going to become a reality, went back to work at Southwest Factors. 78 During the next several months, O'Banion had no contact with Austin or anyone else from Sam's Club. 79

However, unbeknownst to O'Banion, during November and December 1992, Wal-Mart was meeting with General Electric Capital Corporation (GECC) about developing a bulk purchasing credit plan. 80 GECC had been working with Wal-Mart for some time seeking to create such a plan. 81 In late 1992 and early 1993, Wal-Mart finally agreed to a five-year exclusive agreement with GECC to implement a bulk purchase financing system. 82 The GECC program, called Sam's Club Direct, would allow Sam's Club customers to buy goods from Sam's Club on a credit card issued by GECC, and then GECC would purchase the accounts receivable from Sam's Club for the full price. 83 Under this plan GECC never took title of the goods, unlike the O'Banion concept. 84 In February 1993 Wal-Mart and GECC signed confidentiality and exclusive trade agreements, and the program became operational in November 1993. 85

77. Id., 66 S.W.3d at 625.
78. Id., 66 S.W.3d at 625–26. Before the existence of P.O. Market, O'Banion and McNew were principals in Southwest Factors. Id. at 655, 66 S.W.3d at 622. Southwest Factors offered credit to subcontractors by purchasing their accounts receivable. Id., 66 S.W.3d at 622.
79. Id. at 661, 66 S.W.3d at 626.
80. Id., 66 S.W.3d at 626.
81. Id., 66 S.W.3d at 626.
82. Wal-Mart, 347 Ark. at 661, 66 S.W.3d at 626.
83. Id. at 662, 66 S.W.3d at 626. A Wal-Mart interoffice memo dated February 10, 1993, stated in part:
   I appreciate everyone’s input and time spent reviewing the information on the proposed credit program for Sam’s [Club]. We will be pulling together the team to continue the review/examination process and communicating that immediately. In addition, please remember that this is a new product in this industry, and therefore, confidentiality is a must if we are to maintain our competitive advantage.
   Abstract and Brief of Appellees at 83, Wal-Mart (No. 00-1223).
84. Wal-Mart, 347 Ark. at 662, 66 S.W.3d at 626–27 (providing that instead of GECC taking title of the goods, the title passed directly from Sam’s Club to the consumer).
85. Id., 66 S.W.3d at 627. The appellants contended that this program was not new in the industry but was already in use by other business. Supplemental Abstract and Substituted Brief of Appellant at 286, Wal-Mart Stores, Inc. v. P.O. Market, Inc., 347 Ark. 651, 665
In November 1993 O'Banion learned of an article in the *Wall Street Journal* detailing Sam's Club's new plan to offer bulk purchase financing. After reading the article, O'Banion tried to contact Austin, but was unable to reach her. O'Banion did speak with Austin about what had occurred later in November and in April 1994. In these taped conversations, Austin revealed that O'Banion had "made it easy for them" to use his plan and that she felt that Wal-Mart had "stepped on" him. Austin also informed O'Banion that she was not sure whom at Wal-Mart actually saw the O'Banion concept.

After talking with Austin, P.O. Market filed suit against Wal-Mart in Pulaski County Circuit Court for trade secret misappropriation. P.O. Market later nonsuited that cause of action, and on April 9, 1999, P.O. Market filed suit in Miller County. P.O. Market stated six causes of action, including misappropriation of a trade secret. Wal-Mart answered and filed a motion for summary judgment claiming that the O'Banion concept was not a trade secret. The trial judge rejected the motion, and in March of 2000, the case went to trial. After a ten-day trial, the jury returned a verdict for P.O. Market and awarded $6,736,761 in lost profits and $25 million for unjust enrichment. The trial court also awarded P.O. Market $5 million in attorneys' fees and $1125 in costs. With interest added, the total judgment was approximately $50 million. Wal-Mart appealed the judgment to the Arkansas Supreme Court, stating in part that the O'Banion concept was not a trade secret.

S.W.3d 620 (2002) (No. 00-1223). A plan similar to Sam's Club Direct had already been in use at Home Depot and Payless Cashways prior to 1992, but the trial court excluded this evidence from the jury. *Id.*

86. *Wal-Mart*, 347 Ark. at 661, 66 S.W.3d at 626.
87. *Id.*, 66 S.W.3d at 626.
88. *Id.*, 66 S.W.3d at 626.
89. *Id.*, 66 S.W.3d at 626. O'Banion admitted that he taped the conversations without Austin's knowledge in anticipation of the lawsuit that he had already decided to file against Wal-Mart. *Id.*, 66 S.W.3d at 626.
90. *Id.*, 66 S.W.3d at 626.
91. *Id.*, 66 S.W.3d at 626.
93. *Id.*, 66 S.W.3d at 627.
94. *Id.*, 66 S.W.3d at 627. The six causes of actions were: "breach of implied contract, breach of a confidential agreement, breach of confidential relations, misappropriation of a trade secret, unjust enrichment, and negligence." *Id.*, 66 S.W.3d at 627.
95. *Id.*, 66 S.W.3d at 627.
96. *Id.* at 664, 66 S.W.3d at 627.
97. *Id.* at 654, 664, 66 S.W.3d at 621, 628.
100. *Wal-Mart*, 347 Ark. at 654, 66 S.W.3d at 621. Wal-Mart had four points for appeal: "(1) a trade secret was not involved; (2) there was no competent evidence of misappropriation;"
III. BACKGROUND

For over a thousand years people wishing to seek a competitive advantage from their competitors have used improper means, such as theft, espionage, or abuse of a confidential relationship, to obtain secret processes, ideas, or devices. Modern trade secret jurisprudence, however, has evolved into an in-depth analysis on whether the thing in question is a trade secret. The issue of whether or not the thing is a trade secret becomes even more difficult today because businesses are trying to protect computer programs, business plans, and marketing plans. The problem with gaining protection for these combination trade secrets is that each of them may be composed of components that are generally known or easily ascertainable in the industry, thus failing one of the key tests for trade secrets in modern jurisprudence.

This section begins by studying the purpose underlying trade secret law. Next, this section examines the various definitions of a trade secret, examining both the Restatement definition and the Uniform Trade Secrets Act (UTSA) definition, followed by a discussion on the area of combination trade secrets. Then, this section will shift directions and focus on trade secret jurisprudence in Arkansas.

A. The Purpose of Trade Secret Law

Trade secret jurisprudence in the United States began around the middle of the nineteenth century. Historically, patent and copyright law pro-
ected the bulk of intellectual property, while trade secret law protected inventions and innovations that were not worthy of such protection.\textsuperscript{107} While the United States has a federal law protecting trademark, copyrights, and patents, there is no federal law governing trade secrets.\textsuperscript{108} Instead, the common law has developed the standards, definitions, and requirements for trade secret protection.\textsuperscript{109}

The protection under trade secret law extends beyond the realm of patent law by giving the holder of the trade secret perpetual protection, so long as the information remains a secret.\textsuperscript{110} Moreover, trade secrets do not have to meet the stringent requirements of novelty, usefulness, and nonobviousness to qualify for protection, unlike patents.\textsuperscript{111} The writers of the Restatement made it explicitly clear in the comments that trade secret law was not the same as patent protection.\textsuperscript{112} Trade secret law does not protect or reward the invention or discovery of secret processes or devices.\textsuperscript{113} The commentators of the Restatement appeared more concerned with preventing others who were gaining a competitive advantage from misappropriating trade secrets through improper means, rather than protecting the actual trade secret.\textsuperscript{114} More recently, the writers of the UTSA stated that the general policy behind trade secret law is to maintain a standard of ethics in the commercial

\begin{itemize}
\item \textsuperscript{107} Van Arnam, supra note 102, at 100–01.
\item \textsuperscript{108} Hilton, supra note 8, at 287.
\item \textsuperscript{112} RESTATEMENT, supra note 12, § 757 cmt. b (“A trade secret may be a device or process which is patentable: but it need not be that. It may be [an idea], which is clearly anticipated in the prior art or . . . merely a mechanical improvement that a good mechanic can make. Novelty and invention are not requisite for a trade secret as they are for patentability.”); see Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 472–75 (1974) (holding that patent law did not preemp state trade secret law).
\item \textsuperscript{113} RESTATEMENT, supra note 12, § 757 cmt. b. Rather, the protection of trade secrets is against people using reprehensible means, such as theft or breach of a confidential relationship, to gain knowledge and use of the trade secret. \textit{Id}.
\item \textsuperscript{114} \textit{Id.} § 757 cmt. a (“The theory that has prevailed is that the protection is afforded only by a general duty of good faith and that liability rests upon breach of this duty; that is, breach of contract, abuse of confidence or impropriety in the method of ascertaining the secret.”).
\end{itemize}
world. As one commentator noted, the purpose of trade secret law is to maintain fair and clean competition in business.

B. What Is a Trade Secret?

The early common law protected an inventor or discoverer from a third person’s theft or misappropriation of a secret process or device. The common law definition of a trade secret is “(1) information that is used in business, (2) that is secret, and (3) that gives a competitive advantage to the person with knowledge of it.” No trade secret protection exists when one discovers the trade secret by independent discovery, reverse engineering, or use pursuant to a license or contract. Thus, trade secret law focuses on two main points. First, there must be a secret to protect, and second, the protection only applies to the improper taking or use of the trade secret. From this early recognition of a trade secret, the law has developed into a large body of jurisprudence.

1. The Restatement of Tort’s Definition of Trade Secret

In 1939 the Restatement attempted to compile all of the common law from across the nation and form a general guideline for trade secrets protection. Under the Restatement, a trade secret may consist of a “formula, pattern, device or compilation of information” or “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.” The alleged trade secret, however, had to provide the owner “an opportunity to obtain an advantage over competitors who do not know or use it” and had to be in continuous use in the business.

118. PERRITT, supra note 3, at 3–4.
119. Id. at 6.
120. See Lars S. Smith, Trade Secret in Commercial Transactions and Bankruptcy, 40 IDEA 549, 552 (2000). Courts scrutinize the relationship between the parties when analyzing trade secret cases. See id. When a party improperly obtains secret information, then trade secret law steps in and protects the owner of the trade secret, but if the party gains the information through proper means, then he faces no liability. Id. Therefore, reverse engineering and independent discovery are not improper means under trade secret law. Id.
121. See supra note 8 and accompanying text.
122. See Cavico, supra note 104, at 6.
123. RESTATEMENT, supra note 12, § 757 cmt. b.
124. Id.
The commentators realized that an exact definition of a trade secret was impossible, so they provided six factors for guidance in determining whether the information constituted a trade secret. The six Restatement factors include:

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 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.

Commentators believe that the Restatement factors should "serve as the backbone for judicial analysis of trade secret claims." The main problem with the Restatement factors is that courts interpret each of the factors differently, sometimes giving varying levels of importance to each one. Regardless of the inconsistent application of the Restatement factors, the factors still play an active role in determining whether the information is a trade secret.

2. Uniform Trade Secrets Act's Definition of Trade Secret

Prior to the existence of the UTSA, the common law protection of trade secrets was at best uncertain. Even with the Restatement as a guide, the common law of trade secret protection was uneven and uncertainty existed concerning what constituted a trade secret.

125. Id.
126. Id.
128. See Cavico, supra note 104, at 7–8.
129. See infra note 145 and accompanying text.
131. UNIF. TRADE SECRETS ACT, prefatory note, 14 U.L.A. 434 (1990). "Notwithstanding the commercial importance of trade secret law to interstate business, the law has not developed satisfactorily." Id.
132. Id. Despite the need for clarity and uniformity in the area of trade secret protection, the Restatement (Second) of Torts did not include a revision to section 757. Id. at 435. Instead, the American Law Institute decided to include an updated version of trade secret law in the Restatement (Third) of Unfair Competition. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995).
In 1979 the National Conference of Commissioners on Uniform State Laws approved the UTSA in hopes of clarified and updating the law of trade secrets. The UTSA attempted to compile all of the common law principles into a single body of law, while at the same time elucidating the various interpretations of judicial decisions. The definition of a trade secret under the UTSA, however, is a "reasonable departure from the [Restatement] . . . definition." The writers of the UTSA expanded the definition of a trade secret beyond the boundaries that the common law had provided by extending the definition to a plaintiff who has not used the proposed trade secret in business. The UTSA also broadened trade secret protection by including in the definition not only information that provides a competitive advantage from its use, but also information that shows that an idea, process, or device will not work.

Section one of the UTSA provides the basis for trade secret law. The UTSA defines a trade secret as:

information including a formula, pattern, compilation, program, device, method, technique, or process, that 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 is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The writers of the UTSA also intended to clarify the "generally known and easily ascertainable requirement" by stating that this requirement does not apply to the public at large; it only applies to those who can obtain a competitive or economic advantage from knowing the information. If those who can gain some economic benefit already know the information, then there is no trade secret to protect. The UTSA also stated that information is readily ascertainable if it is available in published trade journals, books, pamphlets, or brochures.

134. See supra note 128 and accompanying text; see also Samuels & Johnson, supra note 110, at 53.
136. Id.
137. Id.; see also Samuels & Johnson, supra note 110, at 55, 63.
139. Id.
140. Id. § 1 cmt.
141. Id.
142. Id.
The adoption of the UTSA definition by individual states was slow, but once the American Bar Association approved it in 1979 as a model for trade secret analysis, more states began adopting the UTSA.\(^{143}\) To date more than forty-three states have adopted all or part of the UTSA.\(^{144}\) There is some controversy in UTSA states as to whether the Restatement should still play a role in analyzing trade secret cases.\(^{145}\)

3. *Combination Trade Secrets*

Combination trade secrets are protectable under both the UTSA and the Restatement.\(^{146}\) Courts across the country have come to the conclusion that trade secret protection exists for patterns, processes, or devices that consist of generally known components, so long as the end product is not generally known.\(^{147}\)

In cases involving combination trade secrets, the courts commonly focus on two issues in particular, what exactly is the information that the plaintiff is trying to protect and whether the otherwise commonly known components are brought together in a unique way to thrust the combination into trade secret protection.\(^{148}\) In these cases, there are competing policy arguments. Primarily, the law of trade secrets seeks to prevent the confidential disclosures of valuable information, but there is no protection against independent discovery.\(^{149}\) Hence, the problem in combination trade secrets

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\(^{143}\) Hilton, *supra* note 8, at 288.


\(^{145}\) See *Amoco Prod. Co.* v. Laird, 622 N.E.2d 912, 918 (Ind. 1993) (quoting *Optic Graphics, Inc.* v. Agee, 591 A.2d 578, 585 (Md. Ct. Spec. App. 1991)) (“Although all of the Restatement’s factors no longer are required to find a trade secret, those factors still provide helpful guidance to determine whether the information in a given case constitutes ‘trade secrets’ within the definition of the statute.”); cf. *Dionne v. Southeast Foam Converting & Packing, Inc.*, 397 S.E.2d 110, 114 (Va. 1990) (commenting that once states adopt the UTSA, their reliance on common law principles was misplaced). “Once the legislature has acted, the role of the judiciary ‘is the narrow one of determining what [the legislature] meant by the words it used in the statute.’” *Dionne*, 397 S.E.2d at 114 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980)).

\(^{146}\) See *Restatement*, *supra* note 12, § 757 cmt. b (using the term “compilation” as part of the information that the Restatement protects); *Unif. Trade Secrets Act* § 1 (amended 1995), 14 U.L.A. 437–38 (1990) (using the term “compilation” as part of the information that the UTSA protects).

\(^{147}\) See, e.g., *Saforo & Assocs., Inc.* v. *Porocel Corp.*, 337 Ark. 553, 560, 991 S.W.2d 117, 121 (1999) (“It is a combination of components, each of which by itself is in the public domain, but the unified process has afforded a competitive advantage.”); *Weston v. Buckley*, 677 N.E.2d 1089, 1092 (Ind. App. 1997) (stating combination of known elements must be unique and not known in the market).


\(^{149}\) *Id.* ¶ 5.09.
is that the components are generally known but the whole of the thing is not, and thus it is hard to prove that the person did not obtain the trade secret from independent discovery rather than improper disclosure.\textsuperscript{150}

Regardless of whether the court is using a form of the UTSA or the Restatement factors for analyzing the existence of a trade secret, the following requirements are needed to obtain protection for combination trade secrets: (a) definiteness of the secret; (b) novelty;\textsuperscript{151} and (c) security.\textsuperscript{152}

\textbf{a. Definiteness of the trade secret}

Failing to define a trade secret clearly and specifically can result in the court's refusal to protect the information regardless of how improperly the person obtained the information.\textsuperscript{153} The owner of the alleged trade secret must state in definite terms what exactly he or she is seeking to protect.\textsuperscript{154}

\textbf{b. Novelty}

Novelty for trade secret protection is not the same as the novelty needed for a patent.\textsuperscript{155} However, some element of novelty or uniqueness is

\begin{footnotes}
\footnote{150. Id.}
\footnote{151. See infra Part III.B.3.b. Novelty includes the elements of (i) generally known and (ii) easily ascertainable.}
\footnote{152. See infra Part III.B.3.c.}
\footnote{153. Julie A. Henderson, Comment, The Specifically Defined Trade Secret: An Approach to Protection, 27 SANTA CLARA L. REV. 537, 557 (1987). Failure to properly define the trade secret can result in disclosure because employees may not know what information the employer wants to keep secret. Id. at 556. Without a properly defined trade secret, the court may not be able to employ a proper injunction to forbid some uses of the trade secret. Id. The most dangerous situation is when the court determines that by failing to define the trade secret, the owner did not take reasonable steps to guard its secrecy; thus no trade secret protection exists. Id.}
\footnote{154. Weins v. Sporleder, 569 N.W.2d 16, 18 (S.D. 1997). In Weins, the court failed to find a trade secret existed because the plaintiff never precisely identified what information constituted or comprised the alleged trade secret. Id. at 20. The plaintiff called the alleged trade secret "feed product, and its use and application," "selling and developing of the feed product," "idea," "invention," "tub feed product containing a combination of ingredients to be fed free choice," "selling and developing the feed product," and "feeding system." Id.; see also Coenco, Inc. v. Coenco Sales, Inc. 940 F.2d 1176, 1179 (8th Cir. 1991) (determining that the machine used to control the climate in chicken houses was not a trade secret because the Eighth Circuit was not sure what specific trade secret was at issue in the case); Electro-Craft Corp. v. Controlled Motion, Inc., 332 N.W.2d 890, 898 (Minn. 1983) (holding that dimensions of a brushless motor lacked specificity and therefore were not a trade secret). See generally Henderson, supra note 153, at 537–57 (discussing how to specifically define a trade secret).}
\footnote{155. Electro-Craft, 332 N.W.2d at 899.}
\end{footnotes}
required, otherwise, the information is generally known or easily ascertainable.\footnote{156}{Id.}

\textit{i. Generally known element}

Most trade secret cases fail because the court determines that the information was generally known.\footnote{157}{See infra notes 160–64 and accompanying text.} However, courts vary as to what "generally known" means.\footnote{158}{See infra notes 276–79 and accompanying text.} Courts typically rely on the obviousness of the secret.\footnote{159}{See infra note 160 and accompanying text.} Using the obviousness test, courts reason that trade secret protection does not exist if the new process, advancement, or device would be obvious to anyone in that field.\footnote{160}{Computer Care v. Serv. Sys. Enters., 982 F.2d 1063, 1074 (7th Cir. 1992).} The United States Court of Appeals for the Seventh Circuit, in \textit{Computer Care v. Service Systems Enterprises},\footnote{161}{982 F.2d at 1063.} denied protection for a computer program that utilized twelve triggers to generate a list for reminder letters.\footnote{162}{Id. at 1073.} Other businesses were only using two triggers, vehicle identification numbers and driver's license numbers.\footnote{163}{Id.} The court reasoned that this was an obvious solution to those in the business of sending reminder letters and that because the system of using more than one or two triggers was obvious, it was generally known.\footnote{164}{Id.}

\textit{ii. Easily ascertainable requirement}

To determine if information is readily ascertainable, some courts look at the time, effort, and cost required to duplicate the alleged trade secret by proper means.\footnote{165}{Weston v. Buckley, 677 N.E.2d 1089, 1092 (Ind. App. 1997) (finding that the information was not easily ascertainable because the plaintiff had spent a great deal of time, expense, and effort to develop the process).} If information is easily accessible to competitors, then a presumption arises that the plaintiff claiming the trade secret did not spend a great deal of time or effort in developing the alleged trade secret.\footnote{166}{Vigoro Indus., Inc. v. Cleveland Chem. Co., 866 F. Supp. 1150, 1162 (E.D. Ark. 1994) (reasoning that because there was little effort in developing the information, then no
have taken the position that if a competitor can easily see or observe a feature of a product, then it is not a trade secret because it was easily ascertainable. Courts have also determined that information is easily ascertainable if it is available from a published source.


c. Security requirement

Courts often view the secrecy requirement as the most important factor in deciding whether a trade secret exists. Courts look to see if the owner employed adequate measures to protect the alleged trade secret. In Cardinal Freight Carriers, Inc. v. J.B. Hunt Transport Services, Inc., the Arkansas Supreme Court determined that the security measures used by J.B. Hunt were reasonable steps to maintain the secrecy of the combination trade secret. The court concluded that the information was not generally known or easily ascertainable because J.B. Hunt used a number of steps to guard the secrecy of the information, such as employee confidentiality agreements, passwords and pass codes, and a policy called "loose-lips." Conversely, in ConAgra, Inc. v. Tyson Foods, Inc., the Arkansas Supreme Court found that the profit margins and marketing strategies were not trade secrets because Tyson had failed to maintain secrecy of the trade secrets. The court reasoned that "failure of a business to protect against the disclosure of information it considers to be secret following employment is injury could result if someone else used the same information—because they too could have easily discovered it).

169. See infra note 176 and accompanying text.
170. Compare Surgidev Corp. v. Eye Tech., Inc., 648 F. Supp. 661, 693–94 (D. Minn. 1986) (holding that securing documents in locked files and only distributing them on a need-to-know basis was sufficient), aff'd, 828 F.2d 452 (8th Cir. 1987), and Johns-Manville Corp. v. Guardian Indus. Corp., 586 F. Supp. 1034, 1071 (E.D. Mich. 1983) (finding adequate secrecy because the owner used physical barriers, visitor control systems, secrecy agreements, and restricted access to the plant), and Bertotti v. C.E. Shepherd Co., 752 S.W.2d 648, 651 (Tex. Ct. App. 1988) (determining secrecy was adequate because the owner used employment agreements, visitor confidentiality agreements, and had shredded documents before discarding them), with Gordon Employment, Inc. v. Jewell, 356 N.W.2d 738, 741 (Minn. Ct. App. 1984) (holding no trade secret existed because the files were not locked and there was not a confidentiality policy).
172. Id. at 151, 987 S.W.2d at 646. The information was pricing models, profit margins, market strategies, and future plans of the company. Id., 987 S.W.2d at 646.
173. Id., 987 S.W.2d at 646. The "loose-lips" policy only allowed two appointed employees to speak to the media. Id., 987 S.W.2d at 646.
175. Id. at 679, 30 S.W.3d at 730.
critical to our analysis and the ultimate decision regarding whether the information is in fact a trade secret."176

The owner of the trade secret does not need to provide absolute secrecy, but some element of secrecy has to exist to create a confidential relationship.177 Courts typically hold that companies that have few guards, unlocked doors, unlocked files, and that do not require passes to enter confidential areas have inadequately guarded the trade secret.178 In early trade secret cases, secrecy was often the determining factor in deciding if the information was a trade secret.179 In the area of trade secret law today, however, courts are focusing more on the generally known and easily ascertainable aspects of trade secret law.180

C. Trade Secret Jurisprudence in Arkansas

This section of the note will examine the history of trade secret law in Arkansas by discussing the evolution of trade secret jurisprudence from reliance on the common law through adoption of the UTSA. In addition, this part examines the recent decisions from the Arkansas Supreme Court where the court has reversed precedent and relied upon the Restatement factors in analyzing trade secret cases.

1. Arkansas Common Law of Trade Secret Protection Prior to the Uniform Trade Secrets Act

The early Arkansas decisions involving trade secrets mainly discussed the policy concerns in restricting trade.181 The court reasoned that legitimate competition should be encouraged and that any restrictions placed on free competition are not highly favored.182 The court did recognize that in some instances the use of trade secrets in a competing business would be subject to an injunction if the employee obtained the trade secrets while working there and then used that information to compete in the same business.183 Even though the Restatement was available to the court in these early cases to determine if a trade secret existed, the court simply stated that trade se-

176. Id. at 680, 30 S.W.3d at 731.
177. Electro-Craft Corp. v. Controlled Motion, Inc., 332 N.W.2d 890, 901 (Minn. 1983).
178. See, e.g., Capsonic Group Inc. v. Plas-Met Corp., 361 N.E.2d 41, 44 (Ill. App. Ct. 1977) (finding no guards present, unlocked doors, and no passes required to enter the plant).
179. See supra Part III.B.3.c.
180. See supra Part III.B.3.b.
182. Witmer, 202 Ark. at 476, 151 S.W.2d at 974.
183. Id., 151 S.W.2d at 974.
crets were not involved, without any analysis, and chose instead to focus on the covenants not to compete. 184

Later, in *Miller v. Fairfield Bay, Inc.*, 185 the court noted that trade secrets were not involved in the case, and rather than relying on the *Restatement*, the court, in a footnote, took the definition of trade secret from a dictionary. 186 Four years later, in *Rector-Phillips Morse, Inc. v. Vroman*, 187 the court quoted the footnote definition provided in the *Miller* decision. 188 The Arkansas Supreme Court would not rely on the *Restatement* for guidance in trade secret cases until 1999.189

2. Adoption of the Uniform Trade Secrets Act

Arkansas adopted the majority of the text from the UTSA, 190 and on March 12, 1981, the Arkansas Trade Secrets Act (ATSA) became effective. 191 The ATSA includes the same definition for trade secret as the UTSA. 192

Eleven years after the General Assembly enacted the ATSA, the Arkansas Supreme Court interpreted the meaning of it in *Allen v. Johar, Inc.* 193 In *Allen*, once again, the court did not call upon the *Restatement* factors to help determine whether a trade secret existed, but only interpreted and applied the ATSA. 194 Allen filed suit against a former employee seeking to

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184. Compare Miller, 247 Ark. at 571, 446 S.W.2d at 663 (stating, "[c]ertainly, there were no trade secrets involved . . . "), with Orkin Exterminating Co. v. Murrell, 212 Ark. 449, 457, 206 S.W.2d 185, 189 (1947) (stating trade secrets were involved but not using the *Restatement* definition or the *Restatement* factors).

185. 247 Ark. at 565, 446 S.W.2d at 660.

186. Id. at 570 n.4, 446 S.W.2d at 663 n.4 ("According to the American Heritage Dictionary of the English Language (1969), a 'trade secret' is: 'A secret formula, method, or device that gives one an advantage over competitors.")


188. Id. at 751, 489 S.W.2d at 3.

189. See Saforo & Assocs., Inc. v. Porocel Corp., 337 Ark. 553, 559, 991 S.W.2d 117, 120 (1999); see also infra Part III.C.3.


192. Ark. Code Ann. § 4-75-601(4)(A)–(B); see supra Part III.B.2 (detailing the UTSA's definition).


194. Id. at 47, 823 S.W.2d at 825.
enjoin his use of an alleged confidential customer list and grinding machine. Allen's grinding machine was the combination of two regular grinding machines intermingled in a way that allowed Allen to produce two handgrips simultaneously. This dual capacity machine was a huge competitive advantage because other machines in the market were only able to produce one grip at a time; therefore, Allen doubled his capacity. The court concluded that the machine was a trade secret because the evidence supported the requirements needed under the ATSA; in particular, the court noted the secrecy factor, relying on the fact that Allen did not allow tours of the plant. The court made this conclusion without analyzing any of the other factors under the ATSA.

The court then turned to the issue of Allen's customer list and found that the list was a trade secret under the statute. The court concluded that Allen had taken a substantial amount of time to develop the list. Again, the court looked at the secrecy involved in protecting the list. Allen kept the list confidential by not allowing it to leave the plant. The court, therefore, held that trade secret protection existed for the customer list.

Several years later, the Arkansas Supreme Court, in Cardinal Freight Carriers, Inc. v. J.B. Hunt Transport Services, Inc., quoted and applied the ATSA, and once again chose not to utilize the Restatement factors. The court held that the price modeling, profit margins, future plans, and market strategies were trade secrets under the ATSA. The court concluded that the information was not generally known or readily ascertainable and that the confidential agreement and "loose-lips" policy provided adequate secrecy to insure protection of the trade secret. During all of this time, the Arkansas Supreme Court did not look to the Restatement for guidance in trade secret cases. However, the Arkansas Supreme Court diverged from this path in 1999.

195. Id. at 46, 823 S.W.2d at 825.
196. Id. at 47–48, 823 S.W.2d at 825–26.
197. Id. at 48, 823 S.W.2d at 826.
198. Id. at 49, 823 S.W.2d at 826.
199. See Allen, 308 Ark. at 47–49, 823 S.W.2d at 825–26.
200. Id. at 50, 823 S.W.2d at 827.
201. Id. at 49–50, 823 S.W.2d at 826–27.
202. Id. at 50, 823 S.W.2d at 827.
203. Id., 823 S.W.2d at 827.
204. Id., 823 S.W.2d at 827.
205. 336 Ark 143, 987 S.W.2d 642 (1999).
206. See id. at 147–48, 987 S.W.2d at 644.
207. Id. at 151, 987 S.W.2d at 646.
208. Id., 987 S.W.2d at 646; see supra notes 171–73 and accompanying text.
209. See infra notes 210–12 and accompanying text.
3. **Arkansas Supreme Court Adopts the Restatement Factors as Guidance for Determination of Whether a Trade Secret Exists**

Only four months after deciding *Cardinal Freight Carriers*, the Arkansas Supreme Court, in *Saforo & Associates, Inc. v. Porocel Corp.*, took a different approach in analyzing trade secret cases in Arkansas by adopting the "Vigoro factors as the controlling analysis for determining whether any particular information constitutes a trade secret." The court made a passing quote of the ATSA and then went directly into analyzing each of the six Restatement factors against the facts of the case. In *Saforo*, Porocel sought to enjoin Saforo from using a wash water system that it had developed. Porocel alleged that it had developed a special system to wash Bayer Scale, an alumina residue, which Saforo used in its business. Saforo later terminated the contract that it had with Porocel and helped a competitor build a wash water system similar to Porocel's. After hearing evidence from experts in the field that the system was unique and the evidence presented from Porocel concerning their secrecy of the wash water system, the court concluded that the wash water system met all six Restatement factors and was a protectable trade secret.

One year later, in *ConAgra, Inc. v Tyson Foods, Inc.*, the Arkansas Supreme Court concluded that the six Restatement factors were essentially the same as the ATSA requirements. The court listed the six Restatement factors and quoted the ATSA, but noted that secrecy was the "ultimate decision regarding whether the information is in fact a trade secret." The court found that ConAgra had not taken reasonable steps to maintain the secrecy of its pricing programs, profit margins, and marketing strategy and, therefore, denied trade secret protection. The court reasoned that if the owner of the alleged trade secret did not take reasonable steps to protect the

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211. *Id.* at 559, 991 S.W.2d at 120. The "Vigoro factors" were allegedly the Restatement factors that were used in that case. See Brandon B. Cate, Note, *Saforo & Associates, Inc. v. Porocel Corp.: The Failure of the Uniform Trade Secrets Act To Clarify the Doubtful and Confused Status of Common Law Trade Secret Principles*, 53 Ark. L. Rev. 687, 691 (2000). The Vigoro case, however, does not mention or apply the Restatement factors. Vigoro Indus., Inc. v. Cleveland Chem. Co., 866 F. Supp. 1150, 1160–63 (E.D. Ark. 1994).
212. *Saforo*, 337 Ark. at 559–62, 991 S.W.2d at 120–22.
213. *Id.* at 557, 991 S.W.2d at 119.
214. *Id.*, 991 S.W.2d at 119.
215. *Id.*, 991 S.W.2d at 119.
216. *Id.* at 559–62, 991 S.W.2d at 120–21.
217. 342 Ark. 672, 30 S.W.3d 725 (2000).
218. *Id.* at 676–78, 30 S.W.3d at 728.
219. *Id.* at 676–78, 680, 30 S.W.3d at 731.
220. *Id.* at 679–80, 30 S.W.3d at 730.
secrecy, then the information becomes easily ascertainable or generally known and, thus, is not protectable under trade secret law.\textsuperscript{221}

In the past few years, the Arkansas Supreme Court has come into line with other jurisdictions across the country by relying on the Restatement for guidance in trade secret law.\textsuperscript{222} Even though Arkansas is now consistent with the majority of jurisdictions, many scholars feel that if an individual state has enacted some form of the UTSA then reliance on the Restatement factors is no longer needed.\textsuperscript{223} The uncertainty in how courts rely on each of the six factors and the inconsistent holdings in cases involving analysis under the Restatement factors has left scholars, judges, and businesspeople in a state of confusion as to what requirements are necessary to gain trade secret protection.\textsuperscript{224}

IV. REASONING

In \textit{Wal-Mart Stores, Inc. v. P.O. Market, Inc.},\textsuperscript{225} the Arkansas Supreme Court broke from precedent and held that trade secrets must meet all the requirements of the ATSA as well as the six Restatement factors to qualify for trade secret protection.\textsuperscript{226} Even after stating the Restatement factors were part of the analysis, the Arkansas Supreme Court only relied on the ATSA in finding that the bulk purchase financing plan proposed by P.O. Market was not a trade secret because it was generally known in the industry and easily ascertainable by proper means.\textsuperscript{227}

A. Information Requirement

The first consideration the court made was whether the bulk purchase financing plan that O'Banion proposed was "information" under the statute.\textsuperscript{228} The court noted the general principle that if the alleged trade secret is

\textsuperscript{221} See \textit{id.} at 680, 30 S.W.3d at 731.
\textsuperscript{222} See \textit{supra} Part III.C.3.
\textsuperscript{223} See \textit{supra} note 145 and accompanying text; see also infra note 263 and accompanying text.
\textsuperscript{224} See \textit{supra} note 145 and accompanying text; see also infra note 263 and accompanying text.
\textsuperscript{225} 347 Ark. 651, 66 S.W.3d 620 (2002).
\textsuperscript{226} \textit{id.} at 667, 66 S.W.3d at 630.
\textsuperscript{227} \textit{id.} at 673, 66 S.W.3d at 635.
\textsuperscript{228} \textit{id.} at 667, 66 S.W.3d at 630. The Arkansas Supreme Court noted that other jurisdictions agree with the conclusion that it is a legal question whether or not certain information is a protectable trade secret. \textit{id.}, 66 S.W.3d at 630. The Arkansas Supreme Court noted that it had examined this element before in three prior cases and that it had either "directly or by inference" decided whether certain information qualified under the statute. \textit{id.}, 66 S.W.3d at 630; see Cardinal Freight Carriers, Inc. v. J.B. Hunt Transp., 336 Ark. 143, 151, 987 S.W.2d 642, 646 (1999) (holding that profit margins, pricing models, software, and future marketing
not specifically stated or defined, then no trade secret protection can exist.\textsuperscript{229} The court cited several cases in which failure to specifically define the proposed trade secret was fatal to the cause of action.\textsuperscript{230} The court expressed concerns about whether the O'Banion concept was specifically defined.\textsuperscript{231} The court found that the O'Banion concept evolved and was in constant flux from the time of its conception up until the last contact between O'Banion and Austin.\textsuperscript{232} The court, on two occasions, noted that it had concerns about the definiteness of the O'Banion concept, but chose not to decide the case on this basis.\textsuperscript{233} Instead, the court focused on and ultimately decided the case on the generally known and easily ascertainable factors of the ATSA.\textsuperscript{234}

B. Generally Known and Easily Ascertainable

The Arkansas Supreme Court primarily focused on whether there was substantial evidence that the O'Banion concept had economic benefit from not being generally known or readily ascertainable by proper means.\textsuperscript{235} The analysis at this point developed into the theory of whether the financing plan, as a whole, was a trade secret even though the plan consisted of economic elements known in the industry.\textsuperscript{236} P.O. Market alleged that the O'Banion concept took those known elements and combined them in a unique pattern that subjected the whole concept to trade secret protection.\textsuperscript{237} The court noted that combination trade secrets could fall under the protective veil of trade secret law, even though those in the industry may know of the components, so long as the whole of the thing is new or unique.\textsuperscript{238} Relying on its earlier decision in \textit{Saforo}, as well as other jurisdictions, the court noted that combination components can become protectable trade secrets.\textsuperscript{239}

\begin{itemize}
\item[229.] \textit{Wal-Mart}, 347 Ark. at 669, 66 S.W.3d at 631.
\item[230.] \textit{Id.}, 66 S.W.3d at 631 (citing Coenco, Inc. v. Coenco Sales, Inc., 940 F.2d 1176 (8th Cir. 1991); Electro-Craft Corp. v. Controlled Motion, Inc., 332 N.W.2d 890 (Minn. 1983)).
\item[231.] \textit{Id.}, 66 S.W.3d at 632.
\item[232.] \textit{Id.}, 66 S.W.3d at 632. O'Banion changed the trademark and license aspects of the agreement. \textit{Id.}, 66 S.W.3d at 632. The geographical area the plan was to service also changed. \textit{Id.}, 66 S.W.3d at 632.
\item[233.] \textit{Id.} at 669, 673, 66 S.W.3d at 632, 634.
\item[234.] \textit{Id.}, 66 S.W.3d at 632.
\item[235.] \textit{Wal-Mart}, 347 Ark. at 669, 66 S.W.3d at 632.
\item[236.] \textit{Id.} at 670, 66 S.W.3d at 632.
\item[237.] \textit{Id.} at 669–70, 66 S.W.3d at 632.
\item[238.] \textit{Id.} at 670, 66 S.W.3d at 632.
\item[239.] \textit{Id.}, 66 S.W.3d at 632 (citing Integrated Cash Mgmt. Serv., Inc. v. Digital Transactions, Inc., 920 F.2d 171, 174 (2d Cir. 1990); Lee v. Cercoa, Inc., 433 So. 2d 1, 2 (Fla. Dist. Cour. 1983)).
\end{itemize}
The Arkansas Supreme Court stated that being the first to use certain processes did not in and of itself warrant trade secret protection when those in the field already knew of the individual components.\(^{240}\)

O'Banion himself testified that the components of his system were known economic principles.\(^{241}\) He testified that "there was nothing secret about [the individual parts of the plan]."\(^{242}\) O'Banion contended that he turned the parts into a problem solving solution and that it was a trade secret at that point.\(^{243}\) The ultimate issue before the court was whether the O'Banion concept was unique rather than merely a variation of other known economic principles.\(^{244}\)

The Arkansas Supreme Court stated that it was obvious that "any person reasonably well versed in the economics of wholesaling and credit purchasing could have put together the O'Banion concept."\(^{245}\) The court determined that at its most basic level the O'Banion concept was essentially just wholesaling, buying goods at favorable prices and selling them to customers at a slightly higher price.\(^{246}\) The court did point out that the test was not whether each of the individual components in the overall plan were generally known, but whether the plan as a whole was generally known or easily ascertainable by proper means.\(^{247}\) Even looking at the whole financing plan, the court concluded that the O'Banion concept was not unique.\(^{248}\) The court held that there was nothing in the O'Banion plan that was not already generally known or easily ascertainable in the industry.\(^{249}\) To further support this conclusion, the court recited the testimony of O'Banion in which he stated that the idea of the O'Banion concept came from Dan DeLaughter, admittedly in a smaller form, but generally the same plan.\(^{250}\) The Arkansas Supreme Court concluded from this testimony that the O'Banion concept was in use in certain business circles, and therefore, it was generally known or easily ascertainable.\(^{251}\)

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\(^{240}\) Wal-Mart, 347 Ark. at 670, 66 S.W.3d at 632.
\(^{241}\) Id., 66 S.W.3d at 632.
\(^{242}\) Id., 66 S.W.3d at 632–33.
\(^{243}\) Id. at 671, 66 S.W.3d at 633.
\(^{244}\) Id. at 672, 66 S.W.3d at 634.
\(^{245}\) Id., 66 S.W.3d at 634.
\(^{246}\) Wal-Mart, 347 Ark. at 670, 66 S.W.3d at 632.
\(^{247}\) Id., 66 S.W.3d at 632.
\(^{248}\) Id., 66 S.W.3d at 632–33.
\(^{249}\) Id. at 671, 66 S.W.3d at 633.
\(^{250}\) Id. at 672, 66 S.W.3d at 634.
\(^{251}\) Id. at 672–73, 66 S.W.3d at 634.
O'Banion attempted to distinguish his idea as novel through witness testimony. Bill McBrine stated that the components of the O'Banion concept were generally known in the industry, but Sam's Club had not implemented any financing systems prior to the meetings with O'Banion. McBrine testified that O'Banion's concept was "exciting, novel, a unique product, and worth a lot of money." Furthermore, O'Banion and Hoffman both testified about the uniqueness of the plan. However, the court gave "little credence" to this testimony. The court held "that the testimony of these three men does not rise to the level of evidence of such sufficient force and character to compel a conclusion on this point with reasonable certainty."

Because the information was either already generally known in the industry or easily ascertainable by proper means, the Arkansas Supreme Court reversed the jury's decision and held that the O'Banion concept did not qualify as a combination trade secret under the ATSA or the Restatement factors.

V. SIGNIFICANCE

The Arkansas Supreme Court's decision in *Wal-Mart* is important in two aspects, both of which could affect future trade secret cases in Arkansas. First, the Arkansas Supreme Court contravened the intent of the General Assembly and heightened the requirements for future trade secret cases in Arkansas—after *Wal-Mart*, trade secrets must meet both the ATSA definition of trade secret and all of the Restatement factors to qualify for trade secret protection. Second, in changing the requirements for trade secret protection in Arkansas, the court diverged from the main premise behind trade secret law, allowing lazy competitors to gain a competitive advantage by misappropriating trade secrets.

The Arkansas General Assembly sought to clarify the area of trade secret law by deviating from the common law principles and enacting the ATSA. The intent of the ATSA was to provide for broader protection of

252. *Id.* at 673, 66 S.W.3d at 634.
254. *Id.* at 663, 66 S.W.3d at 627.
255. *Id.* at 673, 66 S.W.3d at 634.
256. *Id.*, 66 S.W.3d at 634.
257. *Id.*, 66 S.W.3d at 634 (stating "[t]he fact that they testified similarly at trial was simply self-serving and a restatement of their theory of the case").
258. *Id.* at 654, 673, 66 S.W.3d at 621, 635.
trade secrets while clarifying the confused status of trade secret law.\footnote{260} The Arkansas Supreme Court, by limiting trade secret protection to only trade secrets that meet the ATSA definition and all six Restatement factors, circumvented the intent of the General Assembly and confused the already difficult area of trade secret law in Arkansas.

The Arkansas Supreme Court not only deviated from legislative intent, but also went beyond modern trade secret jurisprudence by requiring that all six Restatement factors must be met to qualify for trade secret protection. While other jurisdictions do rely on the six Restatement factors for guidance, they do not require that a trade secret meet all six of the factors to obtain trade secret protection.\footnote{261} The commentators of the Restatement did not intend for courts to use the six factors as a list of qualifications; the factors should serve as guideposts.\footnote{262} Moreover, some commentators believe that reliance on the Restatement factors is redundant, not to mention outdated, once a state adopts some form of the UTSA, suggesting that the UTSA preempts other causes of action for trade secrets.\footnote{263} Therefore, because Arkansas adopted a form of the UTSA, complete reliance on the Restatement factors may be misplaced.\footnote{264} Arkansas courts should instead only use the Restatement factors as a guide in analyzing trade secret cases, not as a conclusive list of requirements. Not only has the Arkansas Supreme Court deviated from legislative intent by requiring all six Restatement factors in addition to the ATSA requirements, but also now requires courts in Arkansas to use a test that is at best confusing.\footnote{265}

It is clear from the two recent cases that followed Wal-Mart, Weigh Systems South, Inc., v. Mark’s Scales & Equipment, Inc.\footnote{266} and Tyson Foods, Inc. v. ConAgra, Inc.,\footnote{267} that the Arkansas Supreme Court views the six factors as the exclusive checklist to decide whether information is a trade secret.\footnote{268} In both of these cases, the court analyzed the facts of the case...
directly against the six Restatement factors. The court, in each case, did not analyze the ATSA; it only mentioned the ATSA in passing. These recent decisions have to leave the General Assembly wondering whether passing the ATSA had any meaning to the Arkansas Supreme Court.

The second significant point from Wal-Mart is the appearance that Arkansas courts, like courts around the country, are stepping back from the general principle behind trade secret law, which is to prevent the improper taking of an idea. Courts focus instead on whether or not the idea itself was a trade secret, regardless of how improper the taking. The law originally protected items that would be costly or take a long time to develop. Courts also looked at the difficulty the person would have had in developing the trade secret had he not used improper means. Courts now concentrate more on the generally known aspect of trade secret cases. While courts disagree on what exactly this term means, the term “generally known” appears to operate on somewhat of a continuum. Some courts interpret “generally known” to mean the majority of people in the industry already have the knowledge; therefore, it cannot be a trade secret. Other courts find that if the information affords some level of competitive advantage, even over a single competitor, then it is not “generally known” and can be a protected trade secret. If courts take the broad definition of “generally known” they are in reality giving businesses less of an incentive to invent or create new information. The incentive to invent decreases when the information is very costly to develop or will take a tremendous amount of work and effort, just to have it misappropriated by a competitor. If courts take the narrow approach, however, competition could be stifled. Every new idea that a company has would be subject to trade secret protection and would cause restraints on the competitive atmosphere of the market system.

The third and most restrictive meaning of “generally known” is the obviousness test. Courts using this definition of “generally known” deter-

272. Id.
273. Id.
274. See supra note 160 and accompanying text.
275. Unikel, supra note 271, at 845.
276. Id. at 870.
277. Id. at 870, 875 (suggesting that the “not generally known” requirement should include only information “that is known to a minority (i.e., less than half) of persons who could obtain economic or competitive value from its use”).
278. See id. at 875–76.
279. See supra notes 159–64 and accompanying text.
mine that if a person could have developed the idea using proper means, then no trade secret protection exists, regardless of the time and expense they saved by misappropriating the idea.\footnote{See supra notes 159–64 and accompanying text. It appears that courts are taking a patent approach to trade secrets by using the obviousness test. The use of a patent-like test is clearly against the main premise behind trade secret jurisprudence. See supra notes 110–13 and accompanying text.} In Wal-Mart, the court used the most restrictive definition of "generally known" by declaring that it was obvious that anyone could have developed the O'Banion concept.\footnote{Wal-Mart Stores, Inc. v. P.O. Mkt., Inc., 347 Ark. 651, 672, 66 S.W.3d 620, 634 (2002).} One commentator stated that it is irrational to deny protection "simply because [the] actor theoretically could have obtained the knowledge through proper means."\footnote{Unikel, supra note 271, at 876; see also supra note 112.} The whole premise underlying trade secret law is that if the person can acquire the information properly, then he should do so properly.\footnote{Unikel, supra note 271, at 876.} Trade secret law today is placing too much emphasis on the possibility of the actor developing the trade secret on his own, instead of realizing that the actor saved time, money, effort, and man-power by gaining the information from others who already put their blood, sweat, and tears into the development of the information. Furthermore, this idea should apply not only to time intensive projects, but also to those that were easy to develop.\footnote{Id. at 876–77.} One commentator believes that the easier it is to obtain the information, the more forceful courts should be on punishing the improper taking.\footnote{Id.} This implies that the lazier the business is in developing some relatively simple idea, the worse they appear in the world of fair competition.\footnote{Id.} Therefore, if Wal-Mart did obtain the information from the four meetings and various proposals that O'Banion supplied, it truly was a lazy competitor, especially since the individual components of the overall plan were available in the industry.

The holding from Wal-Mart may cause a chilling effect on businesses in Arkansas while at the same time rewarding lazy companies that use unfair tactics in competition. By using the terms "generally known" and "easily ascertainable" as a premise that anyone could have developed the information, the Arkansas Supreme Court has made it difficult for courts in Arkansas to ever find that a combination trade secret exists. There is always the possibility that someone could have developed the information by proper means, especially since the components are all in the public domain. Therefore, businesses in Arkansas are going to be leery of spending the time and money to develop combination trade secrets in light of this new test. It appears that the Supreme Court of Arkansas has stepped away from the

\footnote{See supra notes 159–64 and accompanying text. It appears that courts are taking a patent approach to trade secrets by using the obviousness test. The use of a patent-like test is clearly against the main premise behind trade secret jurisprudence. See supra notes 110–13 and accompanying text.}


\footnote{Unikel, supra note 271, at 876; see also supra note 112.}

\footnote{Unikel, supra note 271, at 876.}

\footnote{Id. at 876–77.}

\footnote{Id.}

\footnote{Id.}
origins of trade secret law and is now helping lazy competitors gain a competitive advantage over the innovator.

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