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Grant Cole
*University of Georgia School of Law*

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## Cover Page Footnote

J.D. Candidate, 2021, University of Georgia School of Law. I wish to thank Professor Stephen Wolfson for his invaluable advice throughout the process and Mr. and Mrs. McNiff for their help and encouragement. Thank you also to Ashton Williams for helping me through the editing process.

# SECRETS, SOVEREIGNS, AND STATES: ANALYZING STATE GOVERNMENT'S LIABILITY FOR TRADE SECRET MISAPPROPRIATION

*Grant Cole**

* J.D. Candidate, 2021, University of Georgia School of Law. I wish to thank Professor Stephen Wolfson for his invaluable advice throughout the process and Mr. and Mrs. McNiff for their help and encouragement. Thank you also to Ashton Williams for helping me through the editing process.

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## I. INTRODUCTION

"When a secret is revealed, it is the fault of the man who confided it."[1] Though this anachronistic position might be philosophically true, it does not offer any practical solution on how to protect a company's trade secrets.[2] It is often not feasible to keep trade secrets absolutely secret, and even if it was, there would be a lack of utility as businesses sometimes must share their trade secrets with employees or in proposals to acquire work.[3]

This problem of keeping trade secrets "secret" is especially acute when the owner of the trade secret is either a government contractor or a private company hired by the government.[4] Typically, when the government has a project that they want a private company to undertake, they will solicit either a "request for proposal" (RFP) or a "request for quote" (RFQ) from prospective government contractors.[5] Trade secrets are often disclosed in these RFPs or RFQs, though under ostensible confidentiality.[6]

In situations where the government does not respect the confidential nature of the trade secret and discloses it, one would surmise that the contractor would want to bring suit against the government and recover damages. However, the doctrine of sovereign immunity prevents a party from bringing suit against the state unless the state has expressly consented to it.[7] This doctrine exacerbates the damage caused by the inability to sue state governments for trade secret misappropriation as "trade secrecy is more important than ever as an economic

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[1] MAGDALENA KOLASA, TRADE SECRETS AND EMPLOYEE MOBILITY: IN SEARCH OF AN EQUILIBRIUM 7 (2018) (citing JEAN DE LA BRUYÈRE, LES CARACTÈRES, ch. V, para. 81 (1688)).

[2] *Id.*

[3] *Id.*

[4] *E.g.*, Mgmt. Ass'n of Ill. v. Bd. Of Regents of N. Ill. Univ., 618 N.E.2d 694, 699 (1993) (holding that a company hired to train university employees could not recover against the State in district court for trade secret misappropriation because the State had not expressly waived its sovereign immunity in its Trade Secret Act); Smith v. Lutz, 149 S.W.3d 752 (Tex. App. 2004) (holding that a University was immune from breach of contract suit under sovereign immunity despite the University terminating the contract with the appellant and continuing to use his proprietary software although the contract provided that the appellant would remain the owner of the intellectual property created in developing the software and only persons pre-approved by the appellant would be able to access the source code for the software).

[5] § 15.11. *In general, Gov't Cont. Under Fed. Acquisition* Reg. § 15.11 (3d ed.); *see also* 48 C.F.R. § 15.203.

[6] § 15.14. *Disclosure and use of information before award—Restrictions on disclosure, Gov't Cont. Under Fed. Acquisition Reg.* § 15.14 (3d ed.) ("Information provided in response to a particular offeror's request cannot be disclosed if doing so would reveal that offeror's confidential business strategy or the information is otherwise protected under the procurement integrity requirements or exempt from disclosure under the Freedom of Information Act. Additionally, the agency's personnel may not reveal an offeror's technical solution or any information that would compromise his intellectual property to another offeror.").

[7] Sossamon v. Texas, 131 S. Ct. 1651, 1658 (2011).

complement and substitute for other intellectual property protections, particularly patents."[8]

However, depending on the state, there are some limited options to bring suit against the state government notwithstanding the doctrine of sovereign immunity. For example, although many states have enacted a Tort Claims Act or similar laws making them amenable to suit, these acts vary in the degree to which they waive sovereign immunity.[9] The Uniform Trade Secrets Act (UTSA) makes the issue of state governmental liability even more complicated. Despite the UTSA being broadly adopted by forty-eight states,[10] state trade secret statutes vary significantly.[11] This lack of uniformity created by the disjointed implementation of the UTSA has lead trade secret law becoming increasingly complex and less predictable, to the chagrin of businesses and individuals.[12] This wide variation in state trade secret laws goes against the UTSA's purpose of creating more uniform trade secret laws.[13] The UTSA also purports to preempt common law "remedies for misappropriation of a trade secret"[14] which further complicates the inquiry into the state's liability.

Furthermore, concerns regarding the relationship between sovereign immunity and intellectual property are not exclusive to trade secrets.[15] The tension between State sovereign immunity and intellectual property also looms

[8] Gavin C. Reid, Nicola Searle & Saurabh Vishnubhakat, *What's It Worthto Keep A Secret?*, 13 DUKE L. & TECH. REV. 116, 116 (2015).

[9] *See* Miles McCann, *State Sovereign Immunity,* 2 NAGTRI J., no. 4, Nov. 2017, https://www.naag.org/publications/nagtri-journal/volume-2-issue-4/state-sovereign-immunity.php.

[10] Trade Secrets Act, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792 (last visited Oct. 20, 2020).

[11] Beck Reed Riden, *Trade Secrets Acts Compared to the UTSA*, FAIR COMPETITION L., https://www.faircompetitionlaw.com/wp-content/uploads/2018/08/Trade-Secret-50-State-Chart-20180808-UTSA-Comparison-Beck-Reed-Riden-2016-2018.pdf (last visited Oct. 20, 2020).

[12] Patrick Ruelle, The Defend Trade Secrets Act: Why Interpreting the New Law on Its Own Terms Promotes Uniformity, 21 MARQ. INTELL. PROP. L. REV. 249 (2017).

[13] UNIF. TRADE SECRETS ACT commission's prefatory note to 1985 amendments (UNIF. L. COMM'N 1985), https://www.uniformlaws.org (search in search bar for "Trade Secrets Act"; then choose "Trade Secrets Act" hyperlink; then click "Documents" tab; then click "Final Act, with comments" hyperlink) (noting both lack of uniformity and certainty as reasons for the creation of the UTSA).

[14] *Id.* § 7(a).

[15] Allen v. Cooper, 140 S. Ct. 994 (2020) (concerning copyright infringement and state sovereign immunity); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 635 (1999) (concerning patent infringement and state sovereign immunity).

large in both patent[16] and copyright law.[17] This tension was evident in *Allen v. Cooper*, a copyright infringement case that was decided by the Supreme Court during their October 2019-2020 term.[18] In *Allen v. Cooper*, the Supreme Court held Congress could not abrogate states' Eleventh Amendment sovereign immunity from copyright infringement suit.[19] However it is worth noting that, during oral arguments, "the justices plundered North Carolina's argument that it enjoyed sovereign immunity from suit for damages for copyright infringement."[20] Moreover, the Court in *Allen* gave Congress an open invitation to pass a valid copyright law that could abrogate State sovereign immunity while noting that "kind of tailored statute can effectively stop States from behaving as copyright pirates."[21] *Allen* helps highlight how important protecting intellectual property rights are, even when that protection is from the government itself. Furthermore, trade secrets, unlike patents or copyrights, need stronger protections from the government because once they are misappropriated, third parties can freely use the information. This is because once public, a trade secret loses its protection.[22]

This Note argues that the best approach to protect businesses and individuals is to allow them to sue state governments for trade secret misappropriation. This Note also argues that this is best accomplished by amending the UTSA to include an express waiver of sovereign immunity. This Note recognizes although this would be the best solution, the disjointed implementation of the UTSA by states raises concerns about whether states will adopt a new version of the UTSA.[23]

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[16] *See* Regents of the Univ. of Minn. v. LSI Corp., 926 F.3d 1327 (Fed. Cir. 2019) (holding that state sovereign immunity did not bar inter partes review (IPR) of state-owned patents in AIA proceeding).

[17] *Allen*, 140 S. Ct. at 994.

[18] *Id.*

[19] *Id.*

[20] Howard M. Wasserman, *Argument Analysis: Justices Pillage State Arguments for Sovereign Immunity for Copyright Infringement*, SCOTUSBLOG (Nov. 6, 2019, 11:20 AM), https://www.scotusblog.com/2019/11/argument-recap-justices- pillage-state-arguments-for-sovereign-immunity-for-copyright- infringement/.

[21] *Allen*, 140 S. Ct. at 1007 (noting that their ruling "need not prevent Congress from passing a valid copyright abrogation law in the future").

[22] *See* UNIF. TRADE SECRETS ACT § 1 cmt. ("Because the trade secret can be destroyed through public knowledge, the unauthorized disclosure of a trade secret is also a misappropriation").

[23] Sid Leach, *Anything but Uniform: A State-By-State Comparison of Differences in the Uniform Trade Secrets Act*, SNELL & WILMER 48 (Nov.6, 2015), https://www.swlaw.com/assets/pdf/news/2015/11/06/How%20Uniform%20Is%20the%20Uniform%20Trade%20Secrets%20Act%20-%20by%20Sid%20Leach.pdf ("Instead of achieving a more uniform law governing trade secrets as a result of the recommended uniform act in 1979, . . . [t]he net effect of the different language enacted by many state legislatures, and the splits that have arisen among the various state courts interpreting and applying the

This Note will also analyze a well-reasoned alternative approach to allow states to be sued for trade secret misappropriation under a tort theory set out by the GeorgiaCourt of Appeals in Board of Regents of the *University System of Georgia v. One Sixty Over Ninety, L.L.C.*[24] That case held that a government contractor can sue the state for trade secret misappropriation because misappropriation is a tort, and the state waived its sovereign immunity for certain torts committed by the state when it passed the Georgia Tort Claims Act.[25] It should be noted that Georgia's version of the UTSA is also silent on the issue of sovereign immunity.[26] The outcome in *One Sixty Over Ninety* makes sense because states which have adopted the UTSA should not then have greater immunity than they had before the act was passed.[27]

This Note also recognizes that using the *One Sixty Over Ninety* approach adds an additional complication to the analysis not present if states adopt an amended version of the UTSA. This is because if the state waived its sovereign immunity expressly in its trade secret statute, an aggrieved party could bring suit and not have to rely on a tort claims act for waiver of sovereign immunity.[28] Thus, if the state does not waive its sovereign immunity expressly in its trade secret statute, this creates complications for bringing suit because every state does not have a tort claims act or a functional equivalent source of law that waives sovereign immunity for torts such as misappropriation.[29] Even though it would be ideal if states did have similar tort claims acts, this Note recognizes that the *One Sixty Over Ninety* approach is limited to those states that are amenable to tort suits like misappropriation.

Finally, this Note will address the challenges to both approaches, as well as the issues arising from advocating for federal intervention under the Defend

statutes enacted in each state, has been to provide us with a framework of law governing trade secrets that may actually be *less* uniform now than it was in 1979").

[24] 830 S.E.2d 503 (Ga. Ct. App. 2019).

[25] *Id.* at 511.

[26] *Id.*

[27] Catherine Y. Lui, *Are State Governments Immune From Suit for Misappropriation of Trade Secrets?*, ORRICK BLOGS (July 19, 2019), https://blogs.orrick.com/trade-secrets-watch/2019/07/19/are-state-governments-immune-from-suit-for-misappropriation-of-trade-secrets/.

[28] Eidogen-Sertanty, Inc. v. Univ. of N.C.,No. 18 CVS 546, 2018 WL 6579514, at *4 (N.C. Super. Dec. 11,2018) (holding that the "TSPA does not clearly or unmistakablywaive sovereign immunity for claims of trade-secret misappropriation" but the implication from this holding is that if the North Carolina Trade Secret Act *did* contain an express waiver, the sovereign immunity would be waived).

[29] *State Sovereign Immunity and Tort Liability in All 50 States*, MATTHIESEN, WICKERT & LEHRER S.C., https://www.mwl- law.com/wp-content/uploads/2018/02/STATE-SOVEREIGN-IMMUNITY-AND- TORT-LIABILITY-CHART.pdf (last updated Apr. 25, 2019).

Trade Secrets Act of 2016.[30] The policy arguments for waiving state sovereign immunity for trade secret misappropriation will also be addressed, regardless of which approach is chosen.

## II. BACKGROUND

### A. TRADE SECRETS GENERALLY

Trade secrets are a form of intellectual property[31] that derive their value from not being generally known.[32] As noted above, forty-eight states have adopted some form of the UTSA.[33] For the two states thathave not adopted the UTSA, or for cases that predate the UTSA, the definition of a trade secret comes from the comment to section 757 of the Restatement (First) of Torts.[34] A fundamental difference between the UTSA and the Restatement definition of a trade secret is that the Restatement requires continuous use in business and puts less emphasis on secrecy than the UTSA.[35] The UTSA rejected the Restatement's continuous use rule because of the "requirement that the secret have independent economic value from not being generally known."[36] This helps encourage innovation. For example, if a company develops a newer trade secret protected manufacturing process, they still would want to protect the old one from being discovered, as it would still be valuable to the company's competitors.[37] Thus, if a government contractor submitted a response to an RFP that contained a trade secret involving a manufacturing process, and then later developed a better manufacturing process, the government would not have to disclose the older method just because it is no longer being used.

### B. TRADE SECRETS VERSUS OTHER FORMS OF INTELLECTUAL PROPERTY

The most salient difference between trade secrets and other forms of intellectual property relates to public disclosure.[38] Unlike patent and copyright owners, "the trade secret owner is rewarded for keeping information that is

30 Defend Trade Secrets Act of2016, 18 U.S.C. § 1836 (2020).

31 Michael Risch, *Why Do We Have Trade Secrets?*, 11 MARQ. INTELL. PROP. L. REV. 1(2007).

32 *Id.* at 6.

33 *See* Trade Secrets Act, *supra* note 10 (showing that New York and North Carolina have not adopted a version of the UTSA).

34 Risch, *supra* note 31, at 7 (citing RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. L. INST. 1939)).

35 *Id.* at 8.

36 *Id.* at 48.

37 *Id.*

38 *Id.* at 11.

neither new nororiginal away from the public for an unlimited duration."[39] Thus, the economic value the information derives from being kept secret helps justify trade secret protections.[40]

Trade secrets[41] are also becoming an increasingly important alternative to other forms of intellectual property, especially patents.[42] A primary reason for this trend is recent patent law developments.[43] Specifically, the passage of the Leahy-Smith America Invents Act (AIA)[44] has made trade secret protection more desirable in certain situations because of restrictions onpatent owners.[45] Patents are also more expensive to acquire and protect than trade secrets because trade secrets have no formal filing requirements.[46] Patent litigation is also generally more expensive than trade secret litigation.[47] As trade secrets gain traction as a preferred method of protecting businesses and individuals' proprietary information, stronger trade secret protections are needed. These protections should extend to government contractors, who should not have to accept the possibility of the government disclosing their trade secrets asa cost of doing business.

### C. TRADE SECRET MISAPPROPRIATION

To be liable for misappropriating a trade secret, a party must either acquire or disclose a trade secret through improper means.[48] The UTSA defines improper means via a non-exhaustive list which includes "theft, bribery, misrepresentation, breach orinducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means."[49] This Note focuses

[39] *Id.*

[40] *Id.* at 26.

[41] *E.g.*, Michael Elkon, *Famous Examples of Trade Secrets*, FISHER PHILLIPS (May 9, 2016), https://www.fisherphillips.com/Non-Compete-and-Trade-Secrets/famous-examples-of-trade-secrets (listing famous trade secrets such as "the Coke formula, Google's search algorithm, Irn-Bru's formula, the criteria for the New York Times Bestseller List, [and] the formula for WD-40").

[42] Reid et al., *supra* note 9.

[43] David S. Almeling, *Seven Reasons Why Trade Secrets Are Increasingly Important*, 27 BERKELEY TECH. L.J. 1091, 1112(2012).

[44] *Id.* at 1113 (citing Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified as amended in scattered sections of title 35 of the United States Code)).

[45] *Id.* at 1114 ("The AIA thus cuts both ways, but in the end, it does more to restrict the power of patent owners and plaintiffs, potentially causing more companies to prefer trade secret protection for certain inventions.").

[46] *Id.* at 1116.

[47] *Id.* ("Trade secret litigation has long cost less; in 2001, patent litigation ran $3 million compared with $1 million for trade secret litigation.").

[48] UNIF. TRADE SECRETS ACT §1(2) (UNIF. L. COMM'N 1985).

[49] UNIF. TRADE SECRETS ACT §1(1) (UNIF. L. COMM'N 1985).

on the liability for the disclosure of trade secrets when the information was acquired through proper means but disclosed anyway withoutregard to a duty of secrecy.[50]

This parochial focus on disclosure is because the government often acquires trade secrets through proper means when it solicits government contractors through requests for proposals (RFPs).[51] If the government can then turn around and disclose these trade secrets without recourse, then they have a have little incentive to keep the proprietary information secret. When the state government actors are not held accountable, it invites abuse even if the individuals are good people.[52] This is especially problematic because trade secrets derive their value from *being secret*.[53]

D. ECONOMIC IMPORTANCE OF TRADE SECRETS

Trade secrets are becoming an increasingly important area of intellectual property law in the United States.[54] Congress recognized this and passed the DTSA,[55] which create private civil causes of action, and the Economic Espionage Act (EEA)[56] which criminalizes trade secret misappropriation.[57] The widespread adoption of the UTSA by 48 states further illustrates the increased importance of trade secrets because the widespread adoption "has increased awareness of trade secret law—among lawyers, companies, judges, and others—

[50] *Id.* (defining disclosure without regard to secrecy as an "improper means" of disclosure).

[51] § 15.14. *Disclosure and use of information before award—Restrictions on disclosure, Gov't Cont. Under Fed. Acquisition Reg.* § 15.14 (3d ed.)

[52] *See* Fazal R. Khan, *Ensuring Government Accountability During Public Health Emergencies*, 4 HARV. L. & POL'Y REV. 319, 338 n.59 (2010) (citing PLATO, THE REPUBLIC 39 (Benjamin Jowett trans., Project Gutenberg rev. ed. 2017) (c. 375 B.C.E.), https://www.gutenberg.org/files/55201/55201-h/55201-h.htm ("In Plato's Republic, the philosopher recounts the parable of the magic ring of Gyges that could make its wearer invisible. The effect of this invisibility is that 'the actions of the just would be as the actions of the unjust.'")).

[53] UNIF. TRADE SECRETS ACT § 1(4)(i) (UNIF. L. COMM'N 1985) (defining a trade secret as one 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").

[54] ALMELING, *supra* note 43, at 1091.

[55] David S. Bloch, *Can the Government Be Sued Under the Defend Trade Secrets Act?*, 45 AIPLA Q.J. 407, 408 (2017) (noting that the DTSA received an unusually high amount of bipartisan support and was supported by a variety of industries).

[56] *Id.* at 418 (titling a heading, "The Economic Espionage Act & Trade Secrets Act Do Not Create a Misappropriation Cause of Action Against the Government").

[57] ALMELING, *supra* note 43, at 1097.

and has provided greater consistency in the application of trade secret law and in the laws themselves."[58]

The increasing monetary value of trade secrets also warrants their increased protection. There has been a dramatic increase in the value of intellectual property owned by firms in the S&P 500.[59] It is estimated that almost two-thirds of this intellectual property held by these firms are trade secret protected.[60]

E. SOVEREIGN IMMUNITY

Waivers of sovereign immunity in the modern American legal system are strictly construed in favor of the government and require the sovereign to expressly waive their sovereign immunity.[61] Sovereign immunity is a vestige of European monarchies and their view that *l'état, c'est moi* or "I am the State," which stands for the proposition that the government cannot be sued without its consent.[62] The UTSA does not contain an explicit waiver of sovereign immunity, but some commentators argue that the UTSA contains an implicit waiver of sovereign immunity.[63] This is because the UTSA defines "person" as including the "government, governmental subdivision or agency."[64] Courts that have addressed the issue, however, rejected this reasoning.[65] These courts reasoned that because waivers of sovereign immunity must be strictly construed, the term "person" in statutes based on the UTSA does not constitute an implicit waiver of sovereign immunity.[66]

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58 *Id.* at 1106. *But see* Leach, *supra* note 23 (arguing that the UTSA has not accomplished its goals of more certainty and consistency in trade secret litigation).

59 *Id.* at 1104 (citing research that showed in "1975, 17 percent of the total value of the S&P 500 consisted of intangible assets, which encompasses trade secrets and other forms of IP; by 2009, the value had grown to 81 percent").

60 *Id.* (citing research by Forrester Research that "estimates that trade secrets account for two-thirds of the value of most firms' information portfolios").

61 Bloch, *supra* note 55, at 412.

62 *Id.*

63 *Id.* at 417 (arguing that the UTSA contains an explicit waiver of sovereign immunity because UTSA defines "person" to include "government, governmental subdivision or agency").

64 UNIF. TRADE SECRETS ACT §1(3) (UNIF. L. COMM'N 1985).

65 *See, e.g.*, Bd. of Regents of the Univ. Sys. of Ga. v. One Sixty Over Ninety, L.L.C., 830 S.E.2d 503, 513 (Ga. Ct. App. 2019) (holding that Georgia's version of the UTSA, the Trade Secrets Act, does not waive the State's sovereign immunity despite plaintiff's contention that the "person" language in statute constituted an implicit waiver); Mgmt. Ass'n of Ill. v. Bd. of Regents of N. Ill. Univ., 618 N.E.2d 694, 707 (1993) (rejecting plaintiffs argument that the "Trade Secrets Act encompasses a governmental entity of the State just as it encompasses any other entity" despite the "Act's definition of "person" which includes "government, governmental subdivision or agency."").

66 *See, e.g., One Sixty Over Ninety*, 830 S.E.2d at 513; Mgmt. Ass'n of Ill., 618 N.E.2d at 707.

F. WAIVERS OF SOVEREIGN IMMUNITY IN VERSIONS OF THE UTSA

States that have adopted the UTSA have not been uniform regarding its stance on sovereign immunity. Some states, like Georgia, have remained consistent with the UTSA and stayed silent on the issue of sovereign immunity.[67] Other states that have adopted the UTSA have expressly addressed the issue of sovereign immunity in their respective versions of the statute.[68] These states have a great degree of variation in the way they have addressed this issue, which is a microcosm of just how much variation state trade secret statues have. This is ironic since almost all these statutes are based on the *Uniform* Trade Secret Act.[69] For example, Maryland's version has expressly stated in its version of the UTSA that the statute does not waive the state's sovereign immunity, but is otherwise identical to the UTSA's "effect on other laws" provision.[70] Maine's version of the UTSA states that their version did not affect the Maine Torts Claim Act.[71] New Jersey's law states that the New Jersey Tort Claims Act supersedes any conflicting provisions with its trade secret act.[72] Oregon has a more nuanced way of insulating the state from liability for trade secret misappropriation. It does so by stating that agents of the government will not be liable for trade secret misappropriation if they disclose the information in good faith reliance on a public record request or on the advice of an attorney authorized to advise that government entity[73] Massachusetts adds further variation into the mix, with their trade secret statute stating that it does not affect "remedies based on submissions to governmental units."[74] The great

[67] *One Sixty Over Ninety*, 830 S.E.2d at 507 (affirming "the judgment of the trial court that the [Georgia] Trade Secrets Act neither expressly nor impliedly waived the state's sovereign immunity").

[68] MD. CODE ANN., COM. LAW § 11-1207(b)(2) (West 2018).

[69] *See* Trade Secrets Act, *supra* note 10 (showing every state, but New York and North Carolina, has enacted a version of the UTSA).

[70] *One Sixty Over Ninety*, 830 S.E.2d at 511 n.14 (citing MD. CODE ANN., COM. LAW § 11-1207(b)(2) (West 2018) ("Nothing contained in this act may be applied or construed to waive or limit any common law or statutory defense or immunity possessed by State personnel . . . .")).

[71] *Id.* (citing ME. REV. STAT. ANN. tit. 10, § 1548(1)(E) (2018) (Trade Secrets Act "does not affect . . . [t]he provisions of the Maine Tort Claims Act")).

[72] *Id.* (citing N.J. STAT. ANN. § 56:15-9(c) (West 2018) ("In any action for misappropriation of a trade secret brought against a public entity or public employee, the provisions of the 'New Jersey Tort Claims Act' . . . shall supersede any conflicting provisions of this act.")).

[73] *Id.* (citing OR. REV. STAT. § 646.473(3) (2018) ("Notwithstanding any other provision in ORS 646.461 to 646.475, public bodies and their officers, employees and agents are immune from anyclaim or action for misappropriation of a trade secret that is based on the disclosure or release of information in obedience to or in good faith reliance on any order of disclosure issued pursuant to ORS 192.311 to 192.431 or on the advice of an attorney authorized to advise the public body, its officers, employees or agents.")).

[74] MASS. GEN. L. ANN. ch. 93, § 42F(West 2018).

amount of variation in state versions of the UTSA just regarding the issue of sovereign immunity shows how states are diverging from the UTSA's core goal of more Uniform Trade Secret Protections. By amending the UTSA to include an express waiver of sovereign immunity, the UTSA's goal of more uniform trade secret protections can be furthered.

Despite the great amount of variation in state trade secret laws, most state trade secret laws comport with the UTSA and do not mention sovereign immunity.[75] This lack of an explicit waiver of sovereign immunity is not confined to states that have trade secret statutes that do not mention sovereign immunity.[76] Federal government contractors thus face a similar problem as their state counterparts. The Defend Trade Secrets Act of 2016 (DTSA) did not fix this problem. DTSA is structurally like the UTSA, with a few slightly different remedies available, though peculiarly it does not contain the "person" definition contained in the UTSA.[77] And just like the UTSA, the DTSA does not have an explicitwaiver of sovereign immunity.[78] This makes it extremely difficult to bring suit when the federal government apparently misappropriates the trade secret."[79]

Interestingly, this lack of an express waiver of sovereign immunity leads to an analysis similar to the one conducted by the Georgia Court of Appeals in *One Sixty Over Ninety*.[80] Like many states, Congress has also enacted a federal Torts Claims Act that allows the Federal Government to be sued for certain tortious acts.[81] The Federal Torts Claim Act (FTCA), however, does *not* waive the Federal Government's sovereign immunity for torts created under federal law.[82] This means that violating the federal DTSA is nota basis to bring a claim under the FTCA.[83] Furthermore, the DTSA cannot be used to bring suit against a state in federal court.[84] Thus, the *One Sixty Over Ninety* approach would not be an effective solution to the DTSA's lack of a waiver of sovereign immunity. An express waiver in the DTSA itself, however, would be an effective solution.

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75 *See, e.g.*, Riden, *supra* note 11 (comparing state and federal trade secret laws with the UTSA).

76 UNIF. TRADE SECRETS ACT §7 (UNIF. L. COMM'N 1985).

77 Bloch, *supra* note 55, at 417 (noting that the "DTSA's own 'Definitions' section does not include 'person' at all").

78 *Id.* at 418 ("The previous section of this Article confirms that the DTSA does not contain a waiver of sovereign immunity.").

79 *Id.* at 411-12.

80 *See* discussion *infra* Part III.A. (detailing the *One Sixty Over Ninety* approach which allows a violation of the state's version of the UTSA to be brought under the state's Tort Claims Act).

81 Bloch, *supra* note 55, at 424.

82 *Id.* at 425 (citing Glob. Mail Ltd. v. U.S. Postal Serv., 142 F.3d 208, 211 (4th Cir. 1998)).

83 *Id.*

84 Fast Enters., L.L.C. v. Pollack, No. 16-CV-12149-ADB, 2018 WL 4539685, at *4 (D. Mass. Sept. 21, 2018).

G. UTSA VARIATIONS AMONG STATES

As discussed above, the UTSA has been adopted by forty-eight states.[85] However, there is a great amount of variation in each state's version of the UTSA.[86] A commentator even went as far as to say that trade secret law is less uniform today than before the UTSA was passed.[87] This lack of uniformity is a result of multiple factors. The first is that "state legislatures [have enacted] different versions of the [UTSA]."[88] This is because there are two versions of the UTSA. The UTSA was drafted in 1979 and then amended in 1985.[89] Some of the states that adopted the 1979 version never adopted the 1985 version.[90] Some states even have used language from both the 1979 and 1985 versions.[91] States have also made substantive modifications to their versions of the UTSA, even changing the definition of a trade secret.[92] States have also diverged from the UTSA by expressly addressing the issue of sovereign immunity in their version of the statute; the UTSA is silent on that issue.[93] Further variations in the UTSA among the states come from portions of the UTSA being rejected or new language being added.[94] Moreover, state courts have been split on whether certain common law doctrines are preempted by the UTSA.[95] Finally, many states have not enacted section eight of the UTSA,[96] which asserts the UTSA "shall be applied and construed to effectuate its purpose to make uniform the law."[97]

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85 Leach, *supra* note 23, at 1.

86 *Id.* at 2.

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.* at 8 (noting that Washington, Alaska, Arkansas, Connecticut, Indiana, and Louisiana passed the 1979 version of the UTSA and not the 1985 amendments).

91 *Id.* at 9 (noting that both Michigan and Illinois used the 1979 language for injunctions and the 1985 language for damages).

92 *Id.* at 13 (noting that Alabama, Arizona, and California all define trade secrets differently than the UTSA); *see* ALA. CODE § 8-27-2 (1975); ARIZ. REV. STAT. ANN. § 44-401 (1990); CAL. CIV. CODE § 3426.1 (West 2012).

93 *See* discussion *supra* Part II.F.

94 Leach, *supra* note 23, at 16 (showing that the "California legislature deleted the 'not readily ascertainable' requirement from the definition of a 'trade secret'").

95 *Id.* at 41 (noting that courts are split on "whether the common law *respondeat superior* doctrine is displaced by the [UTSA]").

96 *Id.* at 26 (noting that "Arizona, Georgia, Hawaii, Idaho, Illinois, Iowa, Minnesota, North Dakota, Maine, New Mexico, Nebraska, Nevada, New Jersey, Alabama, and North Carolina did not enact section 8 of the [UTSA]").

97 UNIF. TRADE SECRETS ACT § 8 (UNIF. L. COMM'N 1985).

H. STATE AGENT LIABILITY

Like state trade secrets acts, there is great variation among the various states on tort liability.[98] Generally, sovereign immunity is waived by the state either through statute or by case law in that jurisdiction.[99] Since only the states and federal government are considered sovereigns, municipalities and counties are not protected by the doctrine of sovereign immunity and must be immunized from liability by separate state legislation.[100] This distinction was created because, in 1793, cities were seen more like a private corporation than a state.[101] However, public universities, as state entities, generally are afforded sovereign immunity protection unless it has been waived.[102] The fact that public universities are afforded sovereignimmunity protection is important because these universities are often the entities soliciting RFPs that contain trade secret protected information.[103]

## III. ANALYSIS

A. CURRENT LANDSCAPE

Relatively few courts have addressed the issue of whether a state is immune from suit for trade secret misappropriation. Many of the courts that have ruled on the issue have, unfortunately, held that the state was immune from suit for trade secret misappropriation.[104] The courts in *Eidogen-Sertanty* and *Management*

98 *State Sovereign Immunity and Tort Liability in All 50 States*, *supra* note 29.

99 *Id.*; *see e.g.*, Lincoln Cty. v. Luning, 10 S. Ct. 363(1890).

100 *Luning*, 10 S. Ct. at 363. *But cf.*, Pennhurst State Sch. & Hosp. v. Halderman, 104 S. Ct. 900, 920 (1984) (holding that though county officials do not have sovereign immunity, any relief sought against the officials that had a significant impact on the state treasury would be considered a suit against the state and barred by the state's sovereign immunity).

101 William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1100 (1983).

102 Steinbuch v. Univ. of Arkansas, S.W.3d 350, 362 (2019) (holding that the University of Arkansas has sovereign immunity protection and it was not waived); *see also* Univ. Interscholastic League v. Sw. Offs. Ass'n, Inc., 319 S.W.3d 952, 957 (Tex. App. 2010) (noting "it is well settled that state universities are governmental entities subject to sovereign immunity").

103 Shaul Kuper, *Entering a Tech Procurement Process? Here Are 5 Things You Need to Know About RFPs*, EVOLLLUTION, (Sept. 12, 2014), https://evolllution.com/opinions/entering-tech-procurement-process-5-rfps/.

104 *See, e.g.,* Eidogen-Sertanty, Inc. v. Univ. of N.C.,No. 18 CVS 546, 2018 WL 6579514, at *4 (N.C. Super. Dec. 11,2018) (holding that the "TSPA does not clearly or unmistakablywaive sovereign immunity for claims of trade-secret misappropriation"); Mgmt. Ass'n of Ill. v. Bd. of Regents of N. Ill. Univ., 618 N.E.2d 694, 707-08 (1993) (holding that the Illinois Trade Secret Statute did not expressly waive the state's sovereign immunity); Smith v. Lutz, 149

*Association of Illinois* both base their holdings on the lack of an express waiver of sovereign immunity within the trade secret statute itself.[105] This is one of the reasons why having an express waiver of sovereign immunity within the trade secret statute itself would be the most effective way to allow the state to be sued for trade secret misappropriation. Despite these rulings barring misappropriation claims against their respective state governments, the harshness of these decisions has not gone unnoticed.[106] The recognition that denying relief to these contractors is harsh could help influence state legislatures to amend their version of the UTSA to include an express waiver of sovereign immunity.

There are a few state cases, however, where courts have allowed suits against States for trade secret misappropriation, the paradigmatic example being the *One Sixty Over Ninety* case from the Georgia Court of Appeals discussed above.[107] In that case, a creative services agency submitted a response to a request for proposal to the University of Georgia (the "University").[108] The information submitted to the University was designated as confidential.[109] After denying the agency's proposal, the University gave the information contained in the agency's proposal to one of its competitors.[110] Due to this improper disclosure by the University, the creative services agency sued the University under the Tort Claims Act for a violation of the Trade Secrets Act.[111] The University then moved to dismiss the claim, saying that it was barred by sovereign immunity.[112] The trial court denied the University's motion, "finding that a litigant may bring an action for a violation of the Trade Secrets Act under the Tort Claims Act, through which the state waived its sovereign immunity."[113] The University appealed, and one of the main issues before the Georgia Court of Appeals was whether the suit was barred by sovereign immunity.[114]

The court first rejected the creative service agency's argument that the government was a "person" under the Trade Secret Act, as the state had simply

S.W.3d 752 (Tex. App. 2004) (held suit for breach of contract and trade secret misappropriation dismissed for lack of jurisdiction because of the doctrine of sovereign immunity).

105 *Mgmt. Ass'n of Ill.*, 618 N.E.2d at 707-08; *Eidogen-Sertanty*, 2018 WL 6579514, at *2.

106 *Eidogen-Sertanty*, 2018 WL 6579514, at *4 (noting that "[t]o be sure, this is a harsh result—one that may seem distasteful" when describing their ruling immunizing the stare from trade secret misappropriation liability).

107 Bd. of Regents of the Univ. Sys. of Ga. v. One Sixty Over Ninety, LLC, 830 S.E.2d 503 (Ga. Ct. App. 2019).

108 *Id.* at 506.

109 *Id.*

110 *See id.* (noting that the University picked a competitor over the plaintiff and disclosed plaintiff's proposal information to a competitor).

111 *Id.*

112 *Id.*

113 *Id.* at 507

114 *Id.*

taken the UTSA definition of "person" without revision.[115] The court said that the General Assembly could have defined the "state" as a person when it passed the Trade Secret Act, and the fact that it did not "is significant."[116] Up to this point, the analysis is similar to the North Carolina and Illinois opinions that addressed this same issue.[117] The North Carolina, Illinois, and Georgia appellate courts all determined that there was no express or implied waiver of sovereign immunity in their states' respective trade secret statues.[118] However, unlike the other courts, Georgia Court of Appeals did not end their analysis there. The Georgia Court of Appeals then looked to the definition of a tort in Georgia.[119] The court noted that before the Trade Secret Act was passed in Georgia in1990, trade secret misappropriation was a tort.[120] The court further stated the Trade Secret Act "supersede[s] conflicting tort" remedies for trade secret misappropriation.[121] The court resolved this tension by reasoning that even though the Trade Secret Act superseded common law tort claims, the underlying conduct was still a tort and cited other common law torts that had been codified as evidence.[122] Thus, the Court of Appeals held that violation of the Trade Secrets Act constitutes a tort under Georgia law, allowing the plaintiff to sue the University under the Torts Claim Act, which does expressly waive sovereign immunity.[123]

### B. ARGUMENTS FOR WAIVER OF SOVEREIGN IMMUNITY IN THE UTSA

States should amend their versions of the UTSA and add a provision expressly waiving their sovereign immunity. This is the most direct and efficient way to solve the problem of allowing state governments to misappropriate trade secrets without recourse. Even courts barring trade secret misappropriation suits against the government note how harsh the result is.[124] One of the primary benefits of waiving sovereign immunity in the UTSA is that it

115 *Id* at 507, 509 n.9*; see* discussion *supra* Part II.C.

116 *One Sixty Over Ninety*, 830 S.E.2d at 509.

117 Eidogen-Sertanty, Inc. v. Univ. of N.C., No. 18 CVS 546, 2018 WL 6579514, at *4 (N.C. Super. Dec. 11, 2018); Mgmt. Ass'n of Ill., Inc. v. Bd. of Regents of N. Ill. Univ., 618 N.E.2d 694, 707-08 (1993).

118 *Eidogen-Sertanty*, 2018 WL 6579514, at *4; *Mgmt. Ass'n of Ill.*, 618 N.E.2d at 707-08; *One Sixty Over Ninety*, 830 S.E.2d at 509.

119 *One Sixty Over Ninety*, 830 S.E.2d at 510 (citing O.C.G.A. § 51-1-1 (2018)).

120 *Id.*

121 *Id.* (alteration in original)(quoting O.C.G.A. § 10-1-767(a)).

122 *Id.* n.13 (noting that "the Board's argument that a Trade Secrets Act violation is a statutory remedy rather than a tort is belied by other common law torts that have been codified" like O.C.G.A. § 51-7-20 (false imprisonment) and O.C.G.A. § 51-7-85 (abusive litigation)).

123 *Id.*

124 *Eidogen-Sertanty*, 2018 WL 6579514, at *4.

avoids the dismissal of trade secret claims against the government based solely on a lack of an express waiver. The lack of an express waiver of sovereign immunity within the trade secret statute itself has been cited by courts who have addressed the issue as the rationale for their decisions to bar the claim.[125] An express waiver would remove the primary bar to such claims.

Another reason to have an express waiver of sovereign immunity within the UTSA is that a government contractor would not have to rely on another statute like a tort claims act to bring suit.[126] Many tort claims acts are not as permissive as Georgia's, making the "misappropriation as a tort" theory not viable in every jurisdiction.[127] Thus, the court's hands would be tied if the state's tort claims act did not allow suits for misappropriation or the state did not have the functional equivalent of a tort claims act at all.

Furthermore, waiving sovereign immunity within the trade secret itself would make suing the state far easier,[128] and would allow government contractors to seek the same remedies that would be available when suing a private company. This is relevant because some states have tort claims acts that allow suits against them but restrict the available remedies.[129] Other states vest the subject matter jurisdiction to hear the case in aclaims court that only offers restricted remedies.[130] Government contractors should have the same remedies available to them against the government, and expressly waiving sovereign immunity will expand the types of relief contractors would be able to pursue.

### C. ARGUMENTS FOR THE *ONE SIXTY OVER NINETY* APPROACH

Although expressly waiving sovereign immunity in the UTSA is the preferred method, the *One Sixty Over Ninety* approach still achieves many of the same goals. As discussed above, this approach does have drawbacks that are not present if the UTSA is directly amended.[131] Still, allowing government contractors to sue for trade secret misappropriation under a tort theory gives them a remedy against

125 *See* discussion, *supra* Part III.A.

126 *Id.*

127 *See State Sovereign Immunity and Tort Liability in All 50 States*, *supra* note 29, at 12 (breaking down Georgia's tort claims act and comparing to other states' in a table).

128 *One Sixty Over Ninety*, 830 S.E.2d at 511 n.15 (noting that "the Georgia whistleblower statute provided acause of action separate from the Tort Claims Act" because it contained an express waiver of sovereign immunity).

129 *See State Sovereign Immunity and Tort Liability in All 50 States*, *supra* note 29, at 3 (noting that 33 states have damage caps for suits against the state).

130 Mgmt. Ass'n of Ill. v. Bd. of Regents of N. Ill. Univ., 618 N.E.2d 694 (1993) (vesting subject matter jurisdiction for suits against the state in a court of claims).

131 *See supra* notes 126-127 and accompanying text (explaining the drawbacks of having to rely on a separate statute for relief other than the version of the UTSA itself).

the government, which is the ultimate goal.[132] Moreover, allowing government contractors to sue the state for tradesecret misappropriation under a tort theory is logically sound as "the Restatements, UTSA, and most state courts rely on the tort theory as the justification for trade secret rights."[133] Other states have also held that misappropriating trade secrets is a statutory tort, further reinforcing the *One Sixty Over Ninety* approach.[134]

Finally, this approach is still a viable alternative because it comports with the current UTSA and its silence on the issue of sovereign immunity.[135] The states that have adopted similar "effect on law" provisions as the UTSA in their respective trade secret statutes should follow the same *One Sixty Over Ninety* approach if the UTSA is not amended to include an express waiver of sovereign immunity that is subsequently adopted by states that have codified a version of the UTSA and have a tort claims act like the one in Georgia.[136] Adhering to the current UTSA in this way would still help bring uniformity to the still disjointed area of trade secret law.[137]

### D. POLICY ARGUMENTS FOR WAIVER OF SOVEREIGN IMMUNITY

No matter which approach is taken, the same policy rationales apply to reinforce the idea that government contractors should be able to sue state governments for trade secret misappropriation.

The first reason is that it allows government contractors to protect one of their most valuable assets: their trade secrets.[138] Not only would this approach give contractors a legal remedy, but it would also have a substantial deterrent effect. State actors would be more careful about making sure trade secrets remain confidential if their departments were liable for damages.

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132 *See supra* notes 115-123 and accompanying text (explaining the reasoning behind *One Sixty Over Ninety* "misappropriation as a tort" approach ).

133 Zoe Argento, *Killing the Golden Goose: The Dangers of Strengthening Domestic Trade Secret Rights in Response to Cyber-Misappropriation*, 16 YALE J.L. & TECH. 172, 182 (2014).

134 *See* U.S. Marine, Inc. v. United States, No. 08-2571, 2010 WL 1403958, at *4 (E.D. La. Apr. 1, 2010) ("Misappropriation of a trade secret is a statutory tort in Virginia under its version of the Uniform Trade Secrets Act . . ."); *see also* Env't Health Testing, L.L.C. v. Lake City Sch. Bd., No. 5:11-CV-121-OC-10TBS, 2011 WL 13295825, at *9 (M.D. Fla. Sept. 28, 2011) (denying schools board's motion to dismiss for "the state law misappropriation of trade secrets claim on the ground that it is entitled to sovereign immunity").

135 Bd. of Regents of the Univ. Sys. of Ga. v. One Sixty Over Ninety, L.L.C., 830 S.E.2d 503, 511 n.14 (Ga. Ct. App. 2019).

136 *Id.* at 507 (affirming "the judgment of the trial court that the [Georgia] Trade Secrets Act neither expressly nor impliedly waived the state's sovereign immunity" which is consistent with the UTSA on being silent on the issue of State sovereign immunity).

137 Leach, *supra* note 23.

138 *See* discussion *supra* Part II.B. (discussing the increasing value and number of trade secrets).

Furthermore, if the government was immune from trade secret misappropriation claims, the inherent unfairness is great. In situations like the in One *Sixty Over Ninety*, notions of fairness and equity militate against allowing the government to prevail on its immunity argument.[139] The State should not be able to willfully infringe on trade secrets with impunity. The entire system for bidding on government contracts, where the government chooses the lower-priced bid, would be undermined if the government could simply reject a proposal and give the trade secrets within that proposal to the lower bidding competitor without the threat of recourse. Allowing this to happen seems antithetical to any conception of fairness, but this was the fact pattern in *One Sixty Over Ninety*.[140] Luckily, the court allowed the government to be sued for misappropriating the creative agency's trade secret, avoiding such a harsh result.[141]

Another reason that government contractors should be able to sue the state for trade secret misappropriation is because of the unique damage misappropriating a trade secret causes its owner. This unique damage stems from the fact that once a trade secret is misappropriated, there is the risk that the trade secret is no longer sufficiently secret enough to be afforded protection. This risk is especially acute if third parties learn about the trade secret through no fault of their own since the trade secretowner would not be able to sue them for trade secret misappropriation. This damage is not feared by the owners of patents and copyrights, who can seek injunctions against people using their intellectual property, even if they are third parties. Thus, if thegovernment misappropriates a trade secret and the trade secret becomes "generally known," the owner cannot recover from either the government because of sovereign immunity or any third party since they did not misappropriate the trade secret. Moreover, if a "trade secret enters the public domain, whether legitimately or through misappropriation, it cannot be reclaimed."[142] This makes protecting trade secrets *ex ante* even more important and allowing the government to be liable for trade secret misappropriation can provide that deterrent effect.

### E. ARGUMENTS AGAINST ALLOWING THE GOVERNMENT TO BE SUED FOR TRADE SECRET MISAPPROPRIATION

The main argument for sovereign immunity in general, and barring suits against the states for trade secret misappropriation in particular, is that sovereign

139 *One Sixty Over Ninety*, 830 S.E.2d at 511.
140 *Id.* at 506.
141 *Id.* at 511.
142 Argento, *supra* note 132, at 172.

immunity is a device whose primary purpose is saving the state money.[143] It is argued that exposing the state, and therefore the taxpayers, to additional liability would be unduly burdensome to states.[144] It seems patently unfair, however, to have government contractors shoulder the burden of that state's wrongful act of misappropriating a trade secret.[145] It makes more sense to have the cost of an illegal government action be spread through the population instead of being born by the party who was wronged.[146] This is because government accountability should be more important than simply shielding the government from paying judgments.[147] Finally, another reason people would reject an approach that expands trade secret liability to the government is the feat that expanding trade secret laws will be detrimental to the American economy by stifling innovation and making the market less competitive.[148] One reason they argue innovation will be stifled and markets will be less competitive is that increasing trade secret protections can create an monopoly on trade secret information, preventing other companies from using that information to create better products.[149] Even accepting this argument, making the government liable does not expand existing trade secrets protections by making it easier to prove the elements of trade secret misappropriation, it simply allows the government to be liable for its wrongful acts. People are also wary of expanding trade secret laws due to the potential of encouraging "trade secret trolls," who similar to patent trolls, would simply try and use aggressive tactics to get companies to settle suits instead of legitimately trying to protect their intellectual property.[150] Since, however, both approaches offered in this Note only make the government amenable to trade secret

143 *One Sixty Over Ninety*, 830 S.E.2d at 507 ("[T]he primary purpose of sovereign immunity is to protect state coffers." (citing In the Interest of A. V. B., 482 S.E.2d 275 (Ga. 1997)); *see also* Alden v. Maine, 527 U.S. 706, 749 (1999 ( "Not only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf.").

144 Erwin Chemerinksky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1217 (2001). (noting that "[s]overeign immunity assumes that providing the government immunity, so as to safeguard government treasuries, is more important than ensuring government accountability.").

145 *Id.*

146 *Id.*

147 *Id.*

148 Argento, *supra* note 132, at 174.

149 *Id.* at 175.

150 David S. Levine & Sharon K. Sandeen, *Here Come the Trade Secret Trolls*, 71 WASH. & LEE L. REV. ONLINE 230, 231 n.1 (2015), https://scholarlycommons.law.wlu.edu/wlulr-online/vol71/iss4/3 ("The potential trolling here is the hyper-aggressive use of alleged trade secret status to intimidate, vex, and exact settlements, . . . [i]n that way, trade secret trolls may exhibit the same tactical behavior as patent trolls even as their alleged rights acquisition may differ.").

misappropriation suits, and do not change other aspects of trade secret law, trade secret trolling is also not an issue. The concern about trade secret trolling stems from federal trade secret statutes like the DTSA creating uncertainty in the law as the statutes scope is worked out in the federal courts.[151] However, simply amending state trade secret statutes or tort claims acts to allow the plaintiffs to bring suit against the government raises none of these uncertainty concerns, as the government would just be subject to suit the same as a private citizen in that state and courts in those states would be able to rely on the same body of trade secret law. Even those worried about trade secret trolls do so because of federal trade secret statutes like the DTSA, not because of the UTSA.[152] Thus, as trade secret trolling is not an issue under the UTSA, it is highly unlikely that allowing the government to be liable for trade secret misappropriation by amending the UTSA to include a waiver of sovereign immunity will have any impact on the amount of trade secret trolling.[153]

## IV. CONCLUSION

Trade secrets are an increasingly important part of the United States economy. This increasing importance warrants evaluating our current trade secret laws to gauge if they are affordingadequate protection. An evaluation of current trade secret laws reveals that the UTSA does not provide adequate protection against state governments themselves. The protection is inadequate because one of the primary purposes of trade secret law is to protect economically valuable trade secrets from being misappropriated. The UTSA does not help prevent the government, who encounters a great number of trade secrets through the RFP process, from misappropriating those trade secrets. This is because the doctrine of sovereign immunity shields the government from liability.

The government's misappropriation is especially pernicious since once a trade secret is not "secret" it loses its protection. Expressly waiving the state's sovereign immunity in the UTSA would be the best way to avoid this harsh result. The approach taken by the Georgia appellate court in *One Sixty Over Ninety* is a viable alternative to protect trade secrets from state government misappropriation if the UTSA is not amended to include an express waiver of sovereign immunity.

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151 *Id.* at 247 (noting that "while federal jurisprudence is developing to apply the new law [DTSA], we should expect aggressive trolling to emerge while courts sort out what the Acts actually do and do not do and how to respond to their notable weaknesses.").

152 *Id.* at 248 (preferring a the widely adopted uniform law, the UTSA, over the federal DTSA).

153 *Id.* at 263 (noting that "[t]rade secret trolls have been unable to emerge thus far because of the strengths of uniform state law and the checks against abuse found in established trade secret principles and corollary state law involving noncompete covenants and invention ownership.").

There are also compelling polices rationales for allowing government contractors to sue the government for trade secret misappropriation. Government contractors should not have to bear the burden when the state commits an illegal act. Allowing state governments to be liable for trade secret misappropriation will help promote fairness, justice, and aid in making trade secret law more uniform.