Janaury 25, 1989
1:10 P.M.

The Senate Judiciary Committee held a hearing in room 212 of the l.O.B. on the following:

SB 125 Adopting the Uniform trade secrets act.

Senate Members Present:

Senator E. Podles, Chairman,
Senator C. Bass, V. Chairman
Senator Charbonneau
Senator Preston
Senator Nelson

The Chairman opened the hearing by asking the sponsor of the bill to speak.

Senator McLane
Prime Sponsor
Ditrict 125

I have put bills in the last two sessions because I believe in the general concept, that uniform laws make our law structure of the 50 states work more smoothly. But, I thought it would be helpful today to go into what it is. " It is established to promote uniformity in state law, on all subjects where uniformity is desirable and practical. The National Conference of Commissioners on Uniform Laws is composed of Commissioner on uniform state laws from each state the District of Columbia. The Governors of the state have appointed, lawyers, judges, legislatures and law school professors as commissioners."

Generally the term is three years, but the Commissioners serve far longer than that and all Commissioners are members of te Bar.

See attached A Tradition of Excellence"

I present these two bills to you (125 and SB 173) in an effort to promote commerce and industry in the U.S. by having uniform laws and would ask any substative questions of Michael Ruedig.

Mr. Michael Ruedig:
Attorney -- Uniform Laws Commission.

This has to do with trade secrets. I tried to find out exactly what the Law of N.H. is concerning trade secrets. We have a computerized legal research service in our office and tried to find if there were any cases on trade secrets and THERE ARE NONE. The Law in N.H. is very unclear as to what constitutes a trade secret and what measure of protection is available for those who have invested substantial time and money and developing a trade secret. This establishes a set of fair rules that provides protection who invest their effort in developing software and other high tech things. It provides a fair meansure of protection for employees.

It is simple, it is direct and provides a set of rules that all people can read and understand.

Senator Podles: This bill was IEP in the last session, why is it being introduced now?

Mr. Ruedig: As I understand it, it did pass the Senate last session. I was not involved last session. I think it went to the Commerce committee and in the last minute crunch, simply go overlooked and the commiittee -- nobody followed it through the committee to the executive process to make sure the committee passed favorably on it. I since talked to members of the committee, Rep. Bonnie Packard, Pantzer and they confirmed that there was no opposition to this bill it simply passed because the committee felt they didn't under stand it.

Senator Nelson: Can you give me a concrete example.

Mr. Ruedig: If you have a software company and you are developing a new accounting package that can be sold to retail in the market you have invested time and effort in developing this source code and object code so that the computer can run that. And before you get to the market one of your key employees decides that this is pretty valuable commodity that you are working on and he calls up a competitor and tells him that he has some secrets that he would like to see him. Or he decides that I'm going to take this product and I'm going to go out and start my own company and compete with my former employer knowing that it was confidential. That would be a good example of what constitutes a trade secret.

The bill defines Trade Secret as something that is confidential and something that has value because it is not generally available in the market place. It protects the private efforts in the development of whatever product.

Senator Nelson: In all of your research you couldn't find any cases?

Mr. Ruedig; There are no cases that I could find that the N.H. Supreme court which defined and provide substance to the common law theories of trade secrets.

Senator Nelson: If you can't find anything, in N.H., is it a problem here or is it you want to put this in its place to prevent any situations.

Mr. Ruedig: I would defer to the business memebers who can testify what the impact is on their business practice. There are two decided cases in which employees who had misappropriated confidential information was a question, but those had to do with employement contracts and not computer agreements and don't really deal with the subject at hand here.

Senator Nelson: So If I worked for a company and I had a contract with that company and I signed a paper that says I will not reveal that information, some of these corporations make you do that right, if I did that, when I took the position, and I did in fact give secrets to another company or ideas, have I not broken that contract and am I not covered under the law there.

Mr. Ruedig: You would be covered under the law clearly under those circumstances.

Senator Nelson: So this is a case where there is no contracts, and that is the reason.

Mr. Ruedig: Yes, that is correct.

Senator Bass: Mr. Ruedig: We have been trying to get rid of punitive damages in N.H. and most specifically try to avoid double, triple, damages. Why do you have double damages in here when under Para. one on page 3, -- why do you need double damages. What is the reason for it.

Mr. Ruedig: Senator, I don't honestly know why that was included in the original legislation which was drafted through the National Conference. I'm sure John McCabe can address that point. I personally don't feel strongly on that issue one way or the other.

Senator Bass: Page 4. Why do you need a statute of limitations? We already have 3 years do you need to repeat it?

Mr. Ruedig: I think it was considered important in the uniform law that it would be the same from state to state to protect those companies who might have trade secretsproblems in multiple states. It was necessary to have a uniform statute of limitiations so that if what we are trying to protect is a secret that is could become an item of commerce, that the law of Mass. for example, might be the same as the law of N.H., Vt., etc. So the employee who desires to misappropriate his employers secrets, cannot form shop for short of a statute of limitations. That was theory.

Senator Bass: Let the record show that the Statute of Limitations is 3 years.....

Senator Nelson: What this pc. of legislation is going to do (both of them), would it also apply to a situation where a computer when you have the information on a computer and yo you can access the information and take it. Does that cover in this. NO.

Mr. Ruedig: I can only go to the statutory definition of what constitutes a trade secret. It includes a formula, pattern program...technique or process."

SB 125

Senator Podles: The bill allows the court to aware attorney's fees under certain circumstances and it does tell us on page 3. Explain that part. What do they mean by certain circumstances.

Mr. Ruedig: It seems to be dealing with a situation where there as been a claim of misappropriation that has been made in bad faith in paragraph I. I think that is a simple codification of the Law of N.H. as it exists right now. Bad faith in bringing a claim warrants the court in awarding attorney fees.

Normal rule in common law in N.H. is: a party pays their own attorney's fees but where we have established a uniform law here, that provides some pretty substantial penalties, I think the theory behind that provision was that if you bring a claim of misappropriation relying on this statute in bad faith, that ought to be a subject of sanction through imposition of attorney's fees.

Mr. John M McCabe Uniform Law Commissioners Chicago Ill. Legislative Director

There clearly is a common law of trade secrets in N.H. if there were appropriate cases would probably be decided under specific rules. The Common law rule is under the restatement of laws of Tort in its restatment of 757. And actually what the uniform trade secrets act is an effort to codify the common law and 757, is really the basis from what we see here in the uniform trade secrets act.

See attached for reasons why states should adopt Uniform trade secrets act.

You can look at this act towards economic conditions in light of what is happening in N.H.

In the common law the U.S. has always accorded some protection to trade secrets, we have a common law of trade secrets in the U.S.

Senator Podles: Explain double damages Page 3.

Mr. McCabe: We are dealing with behavior which exceeds

Tape turned

Again the issue is a cap. And what this is a cap. You can't get more than twice. That is what is saids. So no matter, it is not a situation where you can claim a dollars worth of damages and a million dollars worth of punitive. That is what we are trying to get away from in this language. If you have $10,000 worth of damages and it is a willful situation the most you can get is a $20,000. That is the point of this provision.

Attached also shows the number of states that have this law.

Senator Preston: We are not preventing anyone from litigation in this are we.

Mr. McCabe: No.

Senator Preston: Tell me again what they can do that they can't do now

Mr. McCabe: You can do it, there is so many questions that are not answer. I do not know what level of relief I can expect from the courts . I can ask for kinds of injunctive relief, damages. I can't know ahead of time that a court is going to for instances if I have a reasonable royalty situation, I can't know that I'm going to have a sure kind of damage to ask for. Although I have common law standards to work from, I do not have a definite set of common law standards as I would have for derterming what is a misappropriation as I would have if you have this act in place. This act would make the process a crime to develop a trade secret case if there was an appropriate trade secret case to be developed. It is a whole lot simpler and easier.

If I am a N.H. lawyer, and I never handled an action like this, and I start casting around, I'm going to find right away, that I'm in an area where I'm going to need some help. So if I don't refer it to a specialist, I'm going to find a specialist to consult with to do this action, particularly if there is a lot of money involved. If I have this act, I don't need to worry about that. Any body can work with this act. Any body who handles law suits in the state of N.H. can work with this act.

If you do do this it will be good for N.H. business.

Senator Podles: Wouldn't this be better to put this in the RSA's 350 trade and commerce.

Mr. Ruedig: I think it probably would Senator.

Senator Nelson: Does R.I. Have this.

Mr. McCabe: Yes.

Senator Nelson: Really what you want to do is to codify the common law. So you want to take. So this would then become a tool for the law community. Correct.

Mr.McCabe: To the business community to get what it wants done. But the lawyers would have a better set of rules to do what they want to do.

Senator Nelson: This is a technique for the law profession to simply just recodify the laws, Right?

Mr. McCabe: You would codify the law, we would be the ones bringing the law suits under the////////

Senator Podles: So it is an advantage to the attorneys.

MR. McCabe: That is arguable.

Senator Podles: No one is in opposition so that is a good sign.

Mr. McCabe: Does it mean that it is going to create a whole lot of new law suits. NO it is not.

Senator Nelson: That is not what I meant. That is why I used the word technique. I wanted to say, tool , device, technique aid.

On page 3 of the bill. I just want to have an understanding of this. Line 3 Exceptional circumstances include but are not limited to...

Mr. McCabe: An example: There is a case. This is the reasonably royalty concept. When I said injunctive relief that means stop. If I asked for an injunctive relief (representing Adjax and someone stole the formula) what I'm saying is that Adjax is asking the court to stop xyz from using the trade secret. Stop period. NO More. There are situations which we may not want to say stop. There may be exceptional circumstances in which we may not be able to stop. Now they may not realize that they had a trade secret when they started and realized that we had one from the mis-appropriation. We are now involved in a contract that is material lets say to the national defense, if we quit producing this we would materially effect national defense so we can't stop it.

Senator Nelson: What is an exceptional circumstances in the state of N.H. What does this mean, is this an opportunity so that if we haven't written it in the law, you could define exceptional circumstances. Its a catch all.

Mr.McCabe: No it is not a catch all. It pertains to a situation where the courts feel for reason of public policy or reasons of relationships between the two parties tha they ought not to flagg the misappropriation.

Senator Nelson: If you can't tell them to stop you want to be able to go in -- sometimes it is better for you to get a royalty then it is for you to stop im.

Mr. McCabe; It may be better for the situation, it may not be better for this guy, but it is a remedy.

Mr. McCabe: Material again, this fellow who is producing the weapons for the government was in contracts that were very valuable, there was the national defense, they had a production line going, it would have been a prejudical change to their interests if in fact it had been injunct.

What we have in this language is an exception to the rule of stop.

Mr. John Cook
Board of Directors Member
and Chairman of the Legislative AFfairs
Committee N.H. High Tech Council

SEE TESTIMONY ATTACHED

Mr. Joseph Donnelly
NSS Corp.
Bedford, N.H.

Develop Computer software for the banking industry.. Six years ago we had 4 people working out of our founders bedroom. Today we employ 65 people. Projective revenues this coming august will be 21 million. We invest $350,000 to research and development. We need to protect ourselves as best we can. He has a product that he is in the process of developing./ The timing involved to bring this product to market is about 1 year to 18 months and they are only 1/2 way through it. If one of the employees left and took the formula with them they would be in the kind of situation that was talked about. The company would have to try and stop that employee. They don't want to spend any more money on lawyers and legal fees in pursuing something that is a clear violation of corporately developed trade secret. But they would have to. They feel they need this type of legislation.

Ms. Deborah Watrous
SNap Software Inc.
Manchester. N.H.

They sell software products used by sales and marketing organizations throughout the nation. Some sites are in Canada and Europe. They develop, sell and support the software all based in N.H. This is an industry of sales and marketing software with the newest automation tools. They have about 500 competitors roughly more all the time. They feel the bill would be helpful to them to insure that the product is safe in its development stages.

Senator Preston: The purpose of the bill as you see it isn't to stiffle compeititon.

Mr. Watrous: No.

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Senator Preston: Mr. Donolley makes a very lucritive offer to a head hunter organization to look for a person who has expertise, that company is attracted by Mr. Donolley. Th ere is nothing to keep them from leaving you as long as they don't take the information, but some of their skills....

Would there be anything in the law that would keep this person from doing that.

Shaking of head in room were NO.

Senator Charbonneau: How long do you have in your contract before someone can work for another person in the field.

Ms. Watrous: One year but only in our specific area.

Tape changed.....

Mr. Green Adair
Guo Key Electronics, Inc.

5 year old company with 8 employees and manufactures printing controlers which are little boxes which are little computers which the company write programs to allow big computers to use printers that were not designed to be used with the computers.

If a company of my size should have a problem the cost of litigation would be prohibitive and would be a big major decision to whether or not bring litigation.

As a business man, what you think should be correct should be written down. When things aren't written down there is always room for difference of opinion.

Senator Charbonneau: When you established your company were you working for someone else in this particular field.

Mr. Adair: Yes I was and when I decided to start my compnay I informed my employer as to what I wanted to do. I was offered by my supervisor not to resign but to take a leave of absence. I did resign and did notify the employer that I was considering producing aproduct that uses Digital equiptment. I made sure there was not development work done while I was employed.

Mr Dave Mackey
Amherst Int'l Corp.
President.

Our company is a member of the low tech community. WE manufacture ////// dust covers as well as some other products for the electronic industry. Many of the considerations in the provisions of the law apply to my company. The law specifically makes reference to patterns.

When we first began these patterns took up quite a bit of space. We took the information that was in them, we put them in to a file box. Today they are on computer disk, which could be copied many times. This bill would help to protect us also.

Hearing closed 2:20 P.M.