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Colorado

1. What is the statutory authority for trade secret protection in your state?

Colorado has adopted a version of the Uniform Trade Secrets Act ("CUTSA"), codified at C.R.S. § 7-74-101, *et seq*. "Trade secret" means the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is (a) secret and of value; and (b) to be a "trade secret" the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes. C.R.S. § 7-74-102(4).

Because the CUTSA was modeled after the Uniform Trade Secrets Act of the National Conference of Commissioners on Uniform State Laws, *see* Unif. Trade Secrets Act (amended 1985), 14 U.L.A. 529-30 (2005); Ch. 63, sec. 1, 1986 Colo. Sess. Laws 460-62, the official comments of the National Conference provide some background for virtually identical provisions of the Colorado Act and have been relied upon by Colorado courts interpreting the CUTSA. *Gognat v. Ellsworth*, 259 P.3d 497, 500 (Colo. 2011).

2. What are the elements of a trade secret claim in your state, and are any unique?

Colorado's elements to state a trade secret cause of action are not unique. To succeed on a misappropriation of trade secrets claim under CUTSA, a plaintiff must show by a preponderance of the evidence: (1) the existence of a trade secret; and (2) acquisition or use of a trade secret by a person who acquired the information under circumstances giving rise to a duty to maintain its secrecy or limit its use. *See generally, Sonoco Prods. Co. v. Johnson*, 23 P.3d 1287 (Colo. App. 2001); C.R.S. § 7-74-102.

What constitutes a trade secret is a question of fact for the trial court. *Saturn Sys. v. Militare*, 252 P.3d 516, 521 (Colo. App. 2011) (citing *Network Telecomms., Inc. v. Boor-Crepeau*, 790 P.2d 901, 902 (Colo. App. 1990)). Colorado courts may consider several factors to make the factual determination of whether a trade secret exists under this statutory definition, including: (1) the extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, such as the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information. *Id.*

Misappropriation is statutorily defined and means:

> (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
> (b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
>> (I) Used improper means to acquire knowledge of the trade secret; or
>> (II) At the time of disclosure or use, knew or had reason to know that such person's knowledge of the trade secret was:
>>> (A) Derived from or through a person who had utilized improper means to acquire it;
>>> (B) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
>>> (C) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
>> (III) Before a material change of such person's position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

C.R.S. § 7-74-102(2). "'Improper means' includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." *Id*. at § 7-74-102(1), *Saturn Sys. v. Militare*, 252 P.3d 516, 525 (Colo. App. 2011) There is no requirement in the CUTSA that there be actual use or commercial implementation of the misappropriated trade secret for damages to accrue. Misappropriation consists only of the improper disclosure or acquisition of the trade secret. *Id.* (quoting *Sonoco Prods.*, 23 P.3d at 1290).

The statute of limitations expressly included in the CUTSA requires an action for misappropriation to be brought within three years after it is, or by the exercise of reasonable diligence should have been, discovered. C.R.S. § 7-74-107. Significantly, the statute also specifies that for purposes of this limitations period, a "continuing misappropriation" constitutes a single claim. *Gognat*, 259 P.3d at 501. Were it not sufficiently clear from the statutory language itself, the official comment of the National Conference emphasizes that the Conference intended to reject a continuing wrong approach, in which a new limitation period could begin at the time each separate act of misappropriation occurred, and the Colorado General Assembly adopted this limitations provision without further amendment. *Id.* (citing Unif. Trade Secrets Act § 6 cmt. (amended 1985), 14 U.L.A. 649-50 (2005)). The legislative decision to measure the limitations period for continuing misappropriations from the initial discovery of a single act of misappropriation has the clear effect of precluding an injured party from delaying until the misuse of his trade secret has become sufficiently profitable to make his resort to legal action economically worthwhile. *Id.* (citing *Intermedics, Inc. v. Ventritex, Inc.*, 822 F. Supp. 634, 652 (N.D. Cal. 1993) (statute of limitations may be triggered even if misappropriation is "relatively inconsequential" and would not, by itself, justify the cost of suit)). Despite this clear statutory design, however, the question remains, with regard to the facts and circumstances of each individual claim, whether any specific act of misappropriation constitutes a continuing misappropriation of the same trade secret or the separate

and distinct misappropriation of a different trade secret. *Id.*

"The [CUTSA] permits plaintiff to recover for both compensatory damages and the defendant's profits from the misappropriation." *Sonoco Products Co.*, 23 P.3d at 1289. Temporary and final injunctions, including affirmative acts, may be granted on such equitable terms as the court deems reasonable to prevent or restrain actual or threatened misappropriation of a trade secret. C.R.S. § 7-74-107. If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney fees to the prevailing party. C.R.S. § 7-74-105.

3. How specific do your courts require the plaintiff to be in defining its "trade secrets?" (This could include discussing discovery case law requiring particularity.)

Colorado appellate courts have not specifically adopted a requirement that the party asserting trade secret protection must describe the allegedly misappropriated trade secrets with "reasonable particularity." But at least one Colorado state district court and the U.S. District Court for the District of Colorado have required the party asserting trade secret protection to describe the trade secret with reasonable particularity. *See Architectural Eng'g Assocs. v. G2 Consulting Eng'rs*, 2017 Colo. Dist. LEXIS 870, *6-7 (requiring claimant to describe claimed trade secrets with reasonable particularity); *Animal Care Systems v. Hydropac/Lab*, 2015 WL 1469513, at *5 (D. Colo. Mar. 26, 2015) (holding that the claimant "must explain, with sufficient particularity, the information allegedly misappropriated that constitutes a cognizable trade secret; otherwise, [the defendant] cannot adequately prepare its defense."); *L-3 Comm. Corp. v. Jaxon Engineering*, 2011 WL 10858409, *1 (D. Colo. Oct. 12, 2011) (recognizing that "a plaintiff will normally be required to first identify with reasonable particularity the matter which it claims constitutes a trade secret …"). Given these holdings and the language of the CUTSA, it is likely that Colorado courts would require that claimed trade secrets be described with reasonable particularity.

4. What is required in your state for a plaintiff to show it has taken reasonable measures to protect its trade secrets? (Preferably answer with practical, factual requirements from decisions.)

The CUTSA provides that "[t]o be a 'trade secret' the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes." C.R.S. § 7-74-102(4). Thus, "the alleged secret must be the subject of efforts that are reasonable under the circumstances to maintain its secrecy," but "[e]xtreme and unduly expensive procedures need not be taken." *Saturn Sys.*, 252 P.3d at 521 (quoting *Colo. Supply Co. v. Stewart*, 797 P.2d 1303, 1306 (Colo. App. 1990)). Reasonable efforts have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on a "need to know" basis, and controlling plant access. *Id*.

5. Does your state apply the inevitable disclosure doctrine? If so, how is it applied?

Colorado has not adopted the inevitable disclosure doctrine.

6. How have courts in your state addressed the defense that an alleged trade secret is "reasonably ascertainable?" What needs to be shown to prevail on that theory?

Colorado courts have not squarely addressed the defense that an alleged trade secret is "reasonably ascertainable." Colorado courts do consider, under a multi-factorial analysis, whether sufficient reasonable efforts have been taken to protect the claimed trade secret, as discussed in response to question number four, above. Within this framework, it is possible that the "reasonably ascertainable" defense could be asserted — in other words, that the trade secret claimant did not take reasonable measures to protect the trade secret, meaning it was reasonably ascertainable to the defendant.

7. What are the most recent "hot button" issues addressed by courts in your state regarding trade secret claims?

There are few recent appellate decisions from Colorado courts concerning trade secret claims.

Preemption of certain claims. Where a trade secret misappropriation claim is brought with other related claims such as civil theft, conversion, unfair competition claims, interference with contract claims, interference with prospective business relations claims, and unjust enrichment claims; Colorado law provides that some of those claims may be preempted. Specifically, Colorado courts have determined that claims dependent on the information in question qualifying as a trade secret are preempted by the CUTSA; however, claims that do not require the information qualifying as a trade secret are not preempted.

Thus, claims such as interference with prospective business relations where the defendant can have interfered with the plaintiff's business relations independent of any trade secret existing will not be preempted while a conversion claim, which requires the existence of a trade secret as a property interest, will be preempted. Importantly, where state law claims are preempted, it is an affirmative defense and, accordingly, must be plead in the defendant's answer. *See* C.R.S. § 7-74-108; *Hawg Tools, LLC v. Newsco International Energy Services, Inc.*, 2016 COA 176 (Colo. App. 2016); *Powell Products, Inc. v. Marks*, 948 F.Supp. 1469 (D. Colo. 1996).

Statute of limitations. As discussed above, under C.R.S. § 7-74-107, trade secret misappropriation claims "must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered." Notably, a continuing misappropriation constitutes a single claim such that a claim will begin to accrue when the misappropriation was discovered or should have been discovered, and not each time the trade secret is used. That is, the first discovered or discoverable misappropriation of the trade secret commences the running of the limitations period. *See Gognat v. Ellsworth*, 224 P.3d 1039 (Colo. App. 2009). Colorado courts have made clear that a plaintiff cannot wait until a lawsuit is economically viable to file a claim; suit must be filed within three year of the discovery date.

8. How does your state's Trade Secret law differ from the DTSA, as the latter is applied in your Circuit?

The CUTSA is similar to the federal Defend Trade Secrets Act of 2016 ("DTSA") in most respects. However, unlike CUTSA, the DTSA includes a civil seizure remedy. Under the DTSA, upon *ex parte* application by the trade secret owner, a court can "issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action." 18 U.S.C. § 1836(b)(1). The DTSA's civil seizure mechanism provides victims of trade secret theft a tool to immediately stop dissemination of stolen proprietary information. 18 U.S.C. § 1836(b)(2)(C).