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Delaware Uniform Trade Secrets Act

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

Delaware has adopted its own version of the Uniform Trade Secrets Act, codified at 6 *Del. C.* § 2001 *et seq.* ("DUTSA").

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

"A claim for misappropriation of trade secrets under DUTSA requires allegations sufficient to show: (1) the existence of a trade secret (i.e., information with commercial utility arising from its secrecy and reasonable steps to maintain this secrecy); (2) which the plaintiff communicated to the defendant; (3) under an express or implied understanding that the defendant would respect the secrecy of the matter; and that (4) the defendant used or disclosed the secret information in breach of that understanding to the injury of the plaintiff." *AlixPartners, LLP v. Benichou*, 250 A.3d 775, 782 (Del. Ch. 2019).

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.)

"To show the existence of a trade secret, a plaintiff must allege that the information '[d]erives 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 that the information is 'the subject of efforts that are reasonable under the circumstances to maintain its secrecy.'" *Id.* (citing 6 *Del. C.* § 2001(4). "Trade secrets should be given an expansive meaning and interpretation." *Id.*

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.)

Various means are available to demonstrate that a plaintiff has taken reasonable measures to protect its trade secret, including use of passwords, restricting rights and access to those employees with a need to know, and including confidentiality provisions in their employment agreements. *Id.* at 783; *see also, GWO Litig. Tr. v. Sprint Sols., Inc., 2018 WL 5309477, at *10 (Del. Super. Oct. 25, 2018)* (holding that the "reasonable efforts" prong "is not a high bar" and that "confidentiality provisions or policies intended to prevent unauthorized disclosure are sufficient").

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

Delaware courts do recognize the inevitable disclosure doctrine. "A court may limit a defendant from working in a particular field if his doing so poses a substantial risk of the inevitable disclosure of trade secrets." *W.L. Gore & Associates, Inc. v. Wu*, 2006 WL 2692584, at *17 (Del. Ch. Sept. 15, 2006), *aff'd,* 918 A.2d 1171 (Del. 2007). In the *Wu* case, the court noted, "Wu's general knowledge of TFE-containing polymers is substantially derived from his former employment at Gore. The evidence also demonstrates that Wu misappropriated valuable trade secrets and may still have unauthorized access to some confidential Gore Technology. Because much of the stolen trade secrets and confidential information involves TFE-containing polymers, it would be very difficult, even assuming good faith, for him to not reveal Gore trade secrets if he were allowed to work with such polymers. . . . [Because of] Wu's lack of trustworthiness and the likelihood of inevitable disclosure of Gore trade secrets, the court finds that a 5-year injunction prohibiting Wu from working with TFE-containing polymers is appropriate under the circumstances here."

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?

The term "readily ascertainable" appears in the definition of a trade secret under the DUTSA. 6 *Del. C.* § 2001(4). "[I]f a method, technique or process in question can be found in the public domain or public literature, it is considered to be generally known and readily ascertainable and thus, cannot qualify as a trade secret. Processes alleged to be generally known or readily ascertainable must be known or ascertainable by proper means. Such proper means include: (1) discovery by independent invention; (2) discovery by reverse engineering; (3) discovery pursuant to a license from the owner of the trade secret; (4) observation of the item in public use or on public display; and (5) obtaining the alleged trade secret from the published literature." *Nucar Consulting, Inc. v. Doyle*, 2005 WL 820706, at *6 (Del.Ch., Apr. 05, 2005) (citations omitted), *aff'd,* 916 A.2d 539 (Del. 2006).

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

In *250ok, Inc. v. Message Sys., Inc.,* 2021 WL 225874, *1 (Del. Ch. Jan. 22, 2021), the Court of Chancery found that the DUTSA expressly preempts common law claims based on the misappropriation of trade secrets. Plaintiff asserted both a claim under the DUTSA and a claim for unjust enrichment, where both claims arose from the same alleged misconduct. The Court of Chancery concluded that a trade secret claim under the DUTSA "occupies the field" and preempts a claim for common law unjust enrichment. Applying Delaware precedent on the issue, the Court explained that preemption applies not just to tort-based claims, but to any "alternative common law claims."

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

The DUTSA and DTSA provide similar relief. Both provide civil causes of action for the owner of a trade secret that is misappropriated. 6 *Del. C.* § 2001 et seq.; 18 U.S.C. § 1836. Claims under the DUTSA and DTSA must be brought within three years after the misappropriation "is discovered or by the exercise of reasonable diligence should have been discovered." 6 *Del. C.* § 2006; 18 U.S.C. § 1836(d). Under both the DUTSA and DTSA, a continuing violation constitutes a single claim of misappropriation. 6 *Del C.* § 2006; 18 U.S.C. § 1836(d).