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Florida

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

Florida's statute adopting its version of the Uniform Trade Secrets Act ("FUTSA") is Florida's exclusive cause of action for trade secret misappropriation. § 688.008(1), Fla. Stat. (2022). The statute defines a "trade secret" as "[i]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." § 688.002(4), Fla. Stat. (2022).

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

Florida's elements to state a trade secret cause of action are not unique. To prevail on statutory misappropriation claim the Plaintiff must prove by a preponderance of the evidence that (1) it possessed a trade secret, (2) it took reasonable steps to protect the secrecy, (3) the secret was misappropriated, and (4) resulting damages. *See Yellowfin Yachts, Inc. v. Barker Boatworks, LLC*, 898 F.3d 1279, 1297 (11th Cir. 2018) (applying Florida law); *American Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir.1998) (applying Florida law). Yet the simplicity of these elements is superficial.

Misappropriation may occur by acquisition, disclosure, or use of the information or material. § 688.002(2), Fla. Stat. (2022). Misappropriation by acquisition occurs when the person "knows or has reason to know that the trade secret was acquired by improper means." § 688.002(2)(a), Fla. Stat. (2022). Misappropriation by disclosure or use of a trade secret occurs when "without express or implied consent" a person (1) "used improper means to acquire knowledge of the trade secret"; or (2) "at the time of the disclosure or use, knew or had reason to know that her or his knowledge of the trade secret was: (a) derived from or through a person who 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 (3) "Before a material change her or his 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." § 688.002(2)(b), Fla. Stat. (2022).

"Improper means" is defined as "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." An action can be "improper" even if not independently unlawful. *I. duPont deNemours & Co. v. Christopher,* 431 F.2d 1012, 1013 (5th Cir. 1970) (applying Florida law) citing Restatement of Torts § 757, comment f at 10 (1939). Typically, whether something is a trade secret is a question of fact resolved after full presentation of the evidence. *Compulife Software Inc. v. Newman*, 959 F.3d

1288, 1311 (11th Cir. 2020) (applying Florida law).

Finally, the available damages for misappropriation include the actual loss caused by the misappropriation plus the unjust enrichment caused by the misappropriation that was "not taken into account in computing actual loss." § 688.004(1), Fla. Stat. (2022). The "burden of proof as to damages caused by the misappropriation is liberal… and [requires merely] evidence by which the jury can value the rights the defendant obtained." *Premier Lab Supply, Inc. v. Chemplex Industries, Inc.*, 94 So.3d 640, 645 (Fla 4th DCA 2012). Nevertheless, "lost profits must be proven with reasonable certainty…." *XTec, Inc. v. Hembree Consulting Services, Inc.*, 183 F. Supp. 3d 1245, 1250 (S.D. Fla. 2016)(applying Florida law). The "head start doctrine" may be used to limit unjust enrichment damages. *Premier Lab Supply, Inc*., 94 So. 3d at 645. Further, alternatively, a "reasonable royalty" may be imposed as a damage. *Id.* Additionally, if the misappropriation is found to have been "willful and malicious," then the Court "may award exemplary damages" limited to no greater than those awarded pursuant to § 688.004(1). § 688.004(2), Fla. Stat. (2022). However, nominal damages do not appear to be statutorily authorized. *Alphamed Pharm. Corp. v. Arriva Pharm., Inc.*, 432 F. Supp. 2d 1319, 1336-37 (S.D. Fla. 2006) (applying Florida law), *aff'd*, 294 Fed. Appx. 501 (11th Cir. 2008). Prevailing party attorneys' fees may also be awarded in favor of the Defendant if the misappropriation claim is found to have been made "in bad faith." § 688.005, Fla. Stat. (2022).

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.)

"[T]he party asserting trade secret protection must describe the allegedly misappropriated trade secrets with reasonable particularity." *Levenger Co. v. Feldman*, 516 F. Supp.2d 1272, 1287 (S.D. Fla. 2007) (applying Florida law); *see also Poet Theatricals Marine, LLC v. Celebrity Cruises, Inc*., 307 So. 3d 927, 929 (Fla. 3d DCA 2020) (holding that Plaintiff "described the trade secrets with sufficient or reasonably particularity to avoid dismissal."); *Del Monte Fresh Produce Co. v. Dole Food Co. Inc*., 148 F. Supp. 2d 1322, 1324 (S.D. Fla. 2001) ("[i]n order to ascertain whether trade secrets exist, the information at issue must be disclosed.") quoting *Lovell Farms, Inc. v. Levy*, 641 So.2d 103, 105 (Fla. 3d DCA 1994)) (citation omitted). *See also AAR Mfg., Inc. v. Matrix Composites, Inc.*, 98 So. 3d 186, 188 (Fla. 5th DCA 2012) ("plaintiff is required to identify with reasonable particularity the trade secrets at issue before proceeding with discovery.")

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 Plaintiff has the burden to prove its efforts to protect the secrecy of the information or material were reasonable under the circumstances. *American Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir.1998) (applying Florida law). *See* also § 688.002, Fla. Stat. (2020). What constitutes reasonableness under the circumstances is usually a fact issue. *Poet Theatricals Marine, LLC v. Celebrity Cruises, Inc*., 307 So. 3d 927, 929 (Fla. 3d DCA 2020). Florida courts have held that an idea is not reasonably maintained in requisite secrecy if disclosed without an accompanying mechanism to maintain secrecy. *Cubic Transp. Sys., Inc. v. Miami–Dade Cnty.*, 899 So.2d 453, 454 (Fla. 3d DCA 2005). For example, courts have found that failure to label information as a trade secret or otherwise specify in writing the information is confidential equated to failure to protect. *Sepro Corp. v. Florida Dept. of Env't Prot.*, 839 So.2d 781, 784 (Fla. 1st DCA 2003). Likewise, courts have found that disclosure of information to others who were under no obligation to protect confidentiality defeats a trade secret claim. *In re Maxxim Med. Grp., Inc.*, 434 B.R. 660, 691 (Bankr.M.D.Fla.2010) (applying Florida law). Further, merely the "expectation that [the idea] would remain confidential" has been deemed insufficient). *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F.Supp.2d 1064, 1077 (S.D.Fla.2003) (applying Florida law).

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

Florida courts have not squarely addressed this preventative doctrine, yet federal courts sitting in Florida have noted that Florida has not adopted this doctrine. *Future Metals LLC v. Ruggiero*, 2021 WL 5853896, *20 (S.D. Fla. Oct. 26, 2021) *recommendation adopted* 2021 WL 5834258 (S.D. Fla. Dec. 8, 2021) *citing Del Monte Fresh Produce Co. v. Dole Food Co., Inc.*, 148 F. Supp. 2d 1326, 1337 (S.D. Fla 2001; *see also Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1236 n. 12 (11th Cir. 2009) (noting doctrine akin to inevitable disclosure is an "uncertain issue of law" under Florida).

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 question of if information is "reasonably ascertainable" a matter of fact. *See Premier Lab Supply, Inc. v. Chemplex Indus., Inc.*, 10 So. 3d 202, 206 (Fla. 4th DCA 2009) (holding the jury could have found that the design of [Plaintiff's] machine derived an economic benefit from not being generally known to or readily ascertainable by others.); *Sun Crete of Fla., Inc. v. Sundeck Prods., Inc.,* 452 So.2d 973 (Fla. 4th DCA 1984) (finding that plaintiffs adequately demonstrated that their complicated process for covering concrete surfaces amounted to a trade secret notwithstanding the availability of some of the raw materials to others in the field).

Florida courts have stated that when information is readily ascertainable to the public, and it is not the "product of any great expense or effort," it "does not qualify as [a] trade secret [ ] entitled to injunctive protection." *Sethscot Collection, Inc. v. Drbul*, 669 So. 2d 1076, 1078 (Fla. 3d DCA 1996); *see also Am. Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir. 1998) (applying Florida law) ("Information that is generally known or readily accessible to third parties cannot qualify for trade secret protection."); *Templeton v. Creative Loafing Tampa, Inc.*, 552 So.2d 288, 289 (Fla. 2d DCA 1989); *Mittenzwei v. Industrial Waste Serv., Inc.*, 618 So.2d 328 (Fla. 3d DCA 1993). Additionally, courts have reasoned that because this "concept is inextricably intertwined with the issue of whether information derives independent value from being a secret," "information that is readily ascertainable by proper means by a person who can obtained economic value from its disclosure or use cannot qualify for trade secret protection." *In re Maxxim Med. Group, Inc*., 434 B.R. 660, 691 (Bankr. M.D. Fla. 2010) (applying Florida law). Simply put, "[o]bvious designs have no value and are readily ascertainable." *Id*.

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

Application of the FUTSA has not been uniform. One area of uncertain is §688.008, Fla. Stat. (2022) displacement common law claims, but of course the legislature has explicitly excluded contractual and criminal remedies through this preemption provision, regardless of whether these claims are based upon misappropriation of a trade secret. However, other claims preempted by the act are not identified. FUTSA merely states that it displaces "conflicting tort, restitutory, and other law of this state providing civil remedies for misappropriation of a trade secret." F.S. §688.008(1). Additionally, the preemption provision does not apply to "[o]ther civil remedies that are not based upon misappropriation of a trade secret." F.S. §688.008(2)(b). Defining the limits of the preemption provision has proven challenging for Florida courts.

Recently, Florida's First District Court of Appeals addressed per curiam the competing interests arising when the Plaintiff claiming misappropriation sought discovery of the Defendant's information which itself was asserted to be trade secret. *Fiberoptics Tech., Inc. v. Sunoptic Techs*., LLC, 2022 WL 2711994, at *1 (Fla. 1st DCA July 13, 2022). In this matter the appellate court held that the trial court "departed from the essential requirements of the law by compelling disclosure" of the asserted trade secret information

without first making a determination as to whether such information was a protected trade secret, and if so, whether the party seeking disclosure of the trade secret had proven a reasonable necessity for such discovery. The court explained reasonable necessity was "a fact-specific analysis that generally requires the court to decide whether the need for production outweighs the interest in maintaining confidentiality." Ultimately, the Court held that an order requiring disclosure of an asserted trade secret "must be supported by findings." *Id.* (quoting *Gulfcoast Spine Inst., LLC v. Walker*, 313 So. 3d 854, 859 (Fla. 2d DCA 2021)).

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

The Florida Uniform Trade Secrets Act ("FUTSA") is similar to the Defend Trade Secrets Act of 2016 ("DTSA") in most respects. However, unlike FUTSA, 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).