CHAPTER 8

Trade Secrets

**SECTIONS 39‑8‑1 to 39‑8‑9.** Repealed by 1997 Act No. 38, Section 1, eff May 21, 1997.

Editor’s Note

Former Sections 39‑8‑1 to 39‑8‑9 were derived from 1992 Act No. 437, Section 2, eff June 15, 1992.

Former Section 39‑8‑1 was entitled “Definitions”.

Former Section 39‑8‑2 was entitled “Injunction of actual or threatened misappropriation; affirmative acts to protect trade secret may be compelled by court”.

Former Section 39‑8‑3 was entitled “Damages for misappropriation; exemplary damages for wilful and malicious misappropriation”.

Former Section 39‑8‑4 was entitled “Attorney’s fees; when allowable”.

Former Section 39‑8‑5 was entitled “Proceedings shall preserve secrecy of alleged trade secrets”.

Former Section 39‑8‑6 was entitled “Action for misappropriation to be brought within three years of discovery”.

Former Section 39‑8‑7 was entitled “Chapter displaces conflicting tort, restitutionary, and other law; other remedies not affected”.

Former Section 39‑8‑8 was entitled “Construction and application of chapter”.

Former Section 39‑8‑9 was entitled “Short title”.

**SECTION 39‑8‑10.** Short title.

 This chapter may be cited as the “South Carolina Trade Secrets Act”.

HISTORY: 1992 Act No. 437, Section 3, eff June 15, 1992; 1997 Act No. 38, Section 1, eff May 21, 1997.

Effect of Amendment

The 1997 amendment rewrote this section.

RESEARCH REFERENCES

Encyclopedias

91 Am. Jur. Proof of Facts 3d 95, Establishing Liability for Misappropriation of Trade Secrets.

100 Am. Jur. Proof of Facts 3d 195, Abandonment of a Trade Secret.

104 Am. Jur. Proof of Facts 3d 393, Enforceability of Covenant Not to Compete.

134 Am. Jur. Proof of Facts 3d 321, Proof of Facts to Establish Information as Trade Secret Under Restatement of Torts.

136 Am. Jur. Proof of Facts 3d 1, Establishing Liability Under Inevitable Disclosure Doctrine.

139 Am. Jur. Proof of Facts 3d 241, Proof of Facts to Establish Information as Trade Secret Under Uniform Trade Secrets Act.

140 Am. Jur. Proof of Facts 3d 291, Proof of Use of Customer List by Former Employee.

141 Am. Jur. Proof of Facts 3d 1, Proof of Reasonable Precautions Taken to Preserve Secrecy of Trade Secrets.

149 Am. Jur. Proof of Facts 3d 311, Establishing Liability for Misappropriation of Former Employer’s Customer List.

152 Am. Jur. Proof of Facts 3d 1, Proof of Facts to Establish Reasonable Efforts Were Made to Maintain Secrecy Under Uniform Trade Secrets Act.

153 Am. Jur. Proof of Facts 3d 1, Proof of Facts to Establish Information was Not “Readily Ascertainable by Proper Means” Under Uniform Trade Secrets Act.

156 Am. Jur. Proof of Facts 3d 125, Establishing “Plausibility” in Federal Trade Secret Litigation.

157 Am. Jur. Proof of Facts 3d 511, Establishing Liability for “Threatened Misappropriation” of Trade Secrets.

160 Am. Jur. Proof of Facts 3d 183, Proof of Facts to Support Injunctive Relief in Trade Secret Litigation.

161 Am. Jur. Proof of Facts 3d 127, Establishing “Improper Means” Used to Acquire Trade Secrets.

127 Am. Jur. Trials 283, Litigating Misappropriation of Trade Secret.

S.C. Jur. Intellectual Property Section 72, Definition of a Trade Secret.

S.C. Jur. Intellectual Property Section 78, Continuous Use.

S.C. Jur. Intellectual Property Section 80, Sales and Customer Information.

LAW REVIEW AND JOURNAL COMMENTARIES

Employees beware: Employer rights under the South Carolina Trade Secrets Act. 49 S.C. L. Rev. 597 (Spring 1998).

If I told you then I’d have to kill you: The standard for discovery of trade secrets in South Carolina. Renee Saunders, 61 S.C. L. Rev. 717 (Summer 2010).

A new age of discovery: Your trade secrets are safe in South Carolina. 49 S.C. L. Rev. 615 (Spring 1998).

South Carolina’s inevitable adoption of the inevitable disclosure doctrine: Balancing protection of trade secrets with freedom of employment. 52 S.C. L. Rev. 895 (Summer 2001).

**SECTION 39‑8‑11.** Repealed by 1997 Act No. 38, Section 1, eff May 21, 1997.

Editor’s Note

Former Section 39‑8‑11 was entitled “Retroactive application of chapter” and was derived from 1992 Act No. 437, Section 4, eff June 15, 1992.

**SECTION 39‑8‑20.** Definitions.

 As used in this chapter, unless the context requires otherwise:

 (1) “Improper means” include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, duties imposed by the common law, statute, contract, license, protective order, or other court or administrative order, or espionage through electronic or other means.

 (2) “Misappropriation” means:

 (a) acquisition of a trade secret of another by a person by improper means;

 (b) 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

 (c) 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 his knowledge of the trade secret was:

 (A) derived from or through a person who had utilized improper means to acquire it;

 (B) acquired by mistake or 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 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.

 (3) “Owner” means the person or entity in whom or in which rightful legal or equitable title to the trade secret is reposed.

 (4) “Person” means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

 (5) “Trade secret” means:

 (a) information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that:

 (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and

 (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

 (b) A trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy. The collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.

HISTORY: 1997 Act No. 38, Section 1, eff May 21, 1997.

LIBRARY REFERENCES

86 C.J.S., Torts Section 48.

87 C.J.S., Trade‑Marks, Trade‑Names, and Unfair Competition Sections 13, 122, 205.

RESEARCH REFERENCES

ALR Library

59 ALR 4th 641 , What is “Trade Secret” So as to Render Actionable Under State Law Its Use or Disclosure by Former Employee.

Encyclopedias

S.C. Jur. Intellectual Property Section 72, Definition of a Trade Secret.

S.C. Jur. Intellectual Property Section 73, Secrecy: Whether the Requisite Secrecy Exists is a Factual Determination.

S.C. Jur. Intellectual Property Section 74, Public Information Cannot be a Trade Secret.

S.C. Jur. Intellectual Property Section 77, Types of Information Included.

S.C. Jur. Master and Servant Section 61, Trade Secrets.

S.C. Jur. Private Business Franchises and Business Opportunities Section 90, Confidentiality Agreements.

LAW REVIEW AND JOURNAL COMMENTARIES

If I told you then I’d have to kill you: The standard for discovery of trade secrets in South Carolina. Renee Saunders, 61 S.C. L. Rev. 717 (Summer 2010).

Notes of Decisions

Secrecy 1

Unjust enrichment 2

1. Secrecy

Purported creator of marketing scheme for national gospel choir competition did not take reasonable efforts to maintain secrecy of scheme, thereby precluding creator’s claim against advertising agency alleging violation of South Carolina Trade Secrets Act (TSA) when agency created similar scheme with one of its clients; creator transmitted scheme to agency and presented plan to client in presence of multiple third‑parties, including members of other advertising agencies, without benefit of any type of nondisclosure agreement, and had previously shared scheme with different third‑party, a restaurant chain, with whom creator had no confidentiality or other agreement. Hill Holliday Connors Cosmopulos, Inc. v. Greenfield (C.A.4 (S.C.) 2011) 433 Fed.Appx. 207, 2011 WL 2160642, Unreported. Antitrust and Trade Regulation 419

2. Unjust enrichment

Creator of marketing scheme for national gospel singing contest did not confer benefit upon advertising agency or its client that would be inequitable for them to keep without paying its value, thereby precluding creator’s unjust enrichment claim under South Carolina law, as scheme did not constitute trade secret under South Carolina Trade Secrets Act (TSA). Hill Holliday Connors Cosmopulos, Inc. v. Greenfield (C.A.4 (S.C.) 2011) 433 Fed.Appx. 207, 2011 WL 2160642, Unreported. Implied and Constructive Contracts 3

**SECTION 39‑8‑30.** Trade secrets; employees’ obligation to refrain from disclosing; civil actions and remedies.

 (A) A trade secret endures and is protectable and enforceable until it is disclosed or discovered by proper means.

 (B) Every employee who is informed of or should reasonably have known from the circumstances of the existence of any employer’s trade secret has a duty to refrain from using or disclosing the trade secret without the employer’s permission independently of and in addition to any written contract of employment, secrecy agreement, noncompete agreement, nondisclosure agreement, or other agreement between the employer and the employee.

 (C) A person aggrieved by a misappropriation, wrongful disclosure, or wrongful use of his trade secrets may bring a civil action to recover damages incurred as a result of the wrongful acts and to enjoin its appropriation, disclosure, use, or wrongful acts pertaining to the trade secrets.

 (D) A contractual duty not to disclose or divulge a trade secret, to maintain the secrecy of a trade secret, or to limit the use of a trade secret must not be considered void or unenforceable or against public policy for lack of a durational or geographical limitation.

 (E) This chapter applies to any and all civil remedies which are based upon misappropriation of a trade secret or upon protection of a trade secret except as provided in Section 39‑8‑110(B) and (C).

HISTORY: 1997 Act No. 38, Section 1, eff May 21, 1997.

LIBRARY REFERENCES

25 C.J.S., Damages Section 82.

86 C.J.S., Torts Section 48.

87 C.J.S., Trade‑Marks, Trade‑Names, and Unfair Competition Sections 205, 206.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Intellectual Property Section 78, Continuous Use.

LAW REVIEW AND JOURNAL COMMENTARIES

The expansion of trade secrecy protection and the mobility of management employees: A new problem for the law, 47 S.C. L. Rev. 659 (Summer 1996).

NOTES OF DECISIONS

In general 1

Injunctions 2

Waiver 3

1. In general

Issue of whether former employer’s claims, under South Carolina law, against former employees and/or their new employer for breach of duty of loyalty, tortious interference with relations, unfair trade practices, conspiracy, conversion, unjust enrichment, and constructive trust were preempted by South Carolina Trade Secrets Act could not be resolved at motion to dismiss phase, because of factual dispute as to whether those claims involved trade secrets. Nucor Corp. v. Bell, 2007, 482 F.Supp.2d 714. Federal Civil Procedure 1831

Nondisclosure provisions in employment agreement were, in effect, noncompete provisions without a reasonable time restriction and, thus, were invalid and unenforceable as contrary to South Carolina public policy; although provisions allowed employee to use “general skills and knowledge” he acquired while working for employer, they prevented him from ever holding a position with a competitor that was similar to his position with employer, statute extinguishing reasonable time requirement for nondisclosure of trade secret provisions did not apply because provisions were so broad they effectively became noncompete provisions, and one‑year restriction found in other sections of agreement could not replace the provisions’ express time limit of “at all times.” Fay v. Total Quality Logistics, LLC (S.C.App. 2017) 419 S.C. 622, 799 S.E.2d 318, rehearing denied. Contracts 118

Information regarding vacation home renters and homeowners, which was available from sources other than operator of vacation rental business, was not protected as a trade secret under South Carolina Trade Secrets Act; a list of all the homeowners in community and their contact information was a matter of public record available at town hall, and homeowners sometimes knew their renters or kept a guestbook where renters provided personal contact information. Atwood Agency v. Black (S.C. 2007) 374 S.C. 68, 646 S.E.2d 882, rehearing denied. Antitrust And Trade Regulation 420

Former corporate officer’s intentional defiance of temporary restraining order (TRO), which required him to turn over computer to corporate president for purpose of discovery of information related to corporation’s claim that officer planned to compete with corporation in violation of Trade Secrets Act, and willful destruction of evidence justified sanction of striking of officer’s pleadings and entry of judgment for corporation, where officer failed to turn over computer for seven days after TRO issued, and computer hard drive was reformatted prior to delivery to president, which destroyed any information on the drive. QZO, Inc. v. Moyer (S.C.App. 2004) 358 S.C. 246, 594 S.E.2d 541, rehearing denied, certiorari denied. Pretrial Procedure 434; Pretrial Procedure 435

Question had to be certified to South Carolina Supreme Court as to whether South Carolina recognized evidentiary privilege for trade secrets, since issue was both unresolved by any definitive state law and sufficiently debatable. Hartsock v. Goodyear Dunlop Tires North America Ltd (C.A.4 (S.C.) 2016) 672 Fed.Appx. 223, 2016 WL 6958446. Federal Courts 3107

2. Injunctions

Evidence was sufficient to support trial court’s finding that former corporate officer violated temporary restraining order (TRO) that required him to turn over computer to corporate president for purpose of discovery of any information related to corporation’s claim that former officer planned to compete with corporation in violation of Trade Secrets Act, where officer failed to turn over computer until seven days after TRO issued, and it was clear that computer hard drive had been reformatted day before computer was turned over, which effectively erased any information on the drive. QZO, Inc. v. Moyer (S.C.App. 2004) 358 S.C. 246, 594 S.E.2d 541, rehearing denied, certiorari denied. Pretrial Procedure 434

3. Waiver

Non‑resident former corporate officer waived for appellate review issue of whether state’s “door closing statute” prevented non‑resident corporation from bringing state action against non‑resident citizen, where officer raised issue for first time on appeal, in action alleging officer planned to operate competing business in violation of Trade Secrets Act. QZO, Inc. v. Moyer (S.C.App. 2004) 358 S.C. 246, 594 S.E.2d 541, rehearing denied, certiorari denied. Appeal And Error 173(1)

Non‑resident former corporate officer waived for appellate review issues relating to temporary restraining order (TRO) against him issued in trial court, in action by corporation alleging officer planned to operate competing business in violation of Trade Secrets Act, where officer raised issues for first time on appeal. QZO, Inc. v. Moyer (S.C.App. 2004) 358 S.C. 246, 594 S.E.2d 541, rehearing denied, certiorari denied. Appeal And Error 173(1)

**SECTION 39‑8‑40.** Recovery of actual damages; exemplary damages.

 (A) A complainant is entitled to recover actual damages for misappropriation of trade secrets. A material and prejudicial change of position before acquiring knowledge or reason to know of misappropriation may render full monetary recovery inequitable and may form the basis for reducing monetary recovery.

 (B) Damages may include both the actual loss caused by misappropriation or the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator’s unauthorized disclosure or use of a trade secret.

 (C) Upon a finding of wilful, wanton, or reckless disregard of the plaintiff’s rights, the court may award separate exemplary damages in an amount not exceeding twice any award made under subsection (A).

HISTORY: 1997 Act No. 38, Section 1, eff May 21, 1997.

LIBRARY REFERENCES

25 C.J.S., Damages Section 82.

RESEARCH REFERENCES

ALR Library

28 ALR 7th 6 , Proper Measure and Elements of Damages for Misappropriation of Trade Secret‑Royalties.

Encyclopedias

127 Am. Jur. Trials 283, Litigating Misappropriation of Trade Secret.

S.C. Jur. Intellectual Property Section 78, Continuous Use.

Notes of Decisions

In general 1

1. In general

Exemplary or punitive damages for defendant’s willful misappropriation of trade secrets, pursuant to South Carolina trade secrets statute, would not be awarded by court to successful plaintiff following jury trial where issue of such damages had been properly submitted to jury and jury had not awarded any damages on the claim; plaintiff had agreed to use of verdict form which clearly instructed jury to award punitive damages should they find them appropriate, and plaintiff did not object to court’s instruction to the jury regarding exemplary or punitive damages. Uhlig, LLC v. Shirley, 2012, 895 F.Supp.2d 707, appeal dismissed. Antitrust and Trade Regulation 437

**SECTION 39‑8‑50.** Injunctions against actual or threatened misappropriations.

 (A) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation. Such reasonable period of time shall take into account the average rate of business growth that would have been gained from nonmisappropriated use of the misappropriated trade secret.

 (B) In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position before acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

 (C) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

HISTORY: 1997 Act No. 38, Section 1, eff May 21, 1997.

LIBRARY REFERENCES

43A C.J.S., Injunctions Sections 42, 151‑156.

**SECTION 39‑8‑60.** Preservation of secrecy during discovery proceedings of civil actions; substantial need defined.

 (A) In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding hearings in‑camera, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

 (B) In any civil action where discovery is sought of information designated by its holder as a trade secret, before ordering discovery a court shall first determine whether there is a substantial need by the party seeking discovery for the information.

 “Substantial need” as used in this section means:

 (1) the allegations in the initial pleading setting forth the factual predicate for or against liability have been plead with particularity;

 (2) the information sought is directly relevant to the allegations plead with particularity in the initial pleading;

 (3) the information is such that the proponent of the discovery will be substantially prejudiced if not permitted access to the information; and

 (4) a good faith basis exists for the belief that testimony based on or evidence deriving from the trade secret information will be admissible at trial.

 (C) Direct access to computer databases containing trade secret information, so‑called “real time” discovery, shall not be ordered by the court unless the court finds that the proponent of the discovery cannot obtain this information by any other means and provided that the information sought is not subject to any privilege.

 (D) Upon motion of the holder of the trade secret information, a court may condition the production of trade secret information on the posting of an appropriate bond.

 (E) Information produced pursuant to this section must be governed by an appropriate written protective order of the court.

 (F) Information produced pursuant to this section may only be disclosed to persons identified in the written protective order of the court and may be used or disclosed only in the action in which it is produced. Litigation‑sharing orders pertaining to trade secret information must not be entered by the court.

 (G) A person receiving trade secret information pursuant to this section is subject to the jurisdiction of the courts of this State.

 (H) When information produced pursuant to this section is discussed or otherwise disclosed at a trial or hearing, the owner of the produced trade secret information is allowed to obtain individually signed confidentiality agreements from all parties that are present in the courtroom or are party to any procedures where trade secret information is discussed, presented, or otherwise made known to any party not already under a confidentiality agreement with the trade secret owner.

 (I) All trade secret information and any copies, duplicates, or other writings which reflect or contain the trade secret information, or excerpts therefrom, must be returned to the holder of the trade secrets at the conclusion of the litigation.

 (J) This section applies to any civil action brought within or without this State where discovery is sought of trade secret information present in this State.

HISTORY: 1997 Act No. 38, Section 1, eff May 21, 1997.

LIBRARY REFERENCES

27 C.J.S., Discovery Sections 18, 51, 54, 79.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. South Carolina Rules of Civil Procedure Section 26.2, Discussion.

Treatises and Practice Aids

American Law of Products Liability 3d Section 53:77, Trade Secrets.

NOTES OF DECISIONS

In general 1

Balancing test 3

Construction with court rules 2

Necessity 5

Relevance 4

Specificity 6

1. In general

South Carolina Trade Secrets Act did not apply to discovery request in products liability action; Act did not apply to any action that was not based on misappropriation of a trade secret or protection against such a misappropriation. Griego v. Ford Motor Co., 1998, 19 F.Supp.2d 531. Privileged Communications And Confidentiality 402

2. Construction with court rules

Application of Trade Secrets Act to any civil action where trade secrets are sought during discovery does not supplant, but rather complements, rule of civil procedure relating to discovery of trade secrets. Laffitte v. Bridgestone Corp. (S.C. 2009) 381 S.C. 460, 674 S.E.2d 154. Privileged Communications And Confidentiality 402

3. Balancing test

Balancing test involving relevance and necessity governed the discovery, in products liability action against tire manufacturer arising from rollover accident, of manufacturer’s trade‑secret steel belt skim stock formula. Laffitte v. Bridgestone Corp. (S.C. 2009) 381 S.C. 460, 674 S.E.2d 154. Privileged Communications And Confidentiality 402

4. Relevance

Trade‑secret information of which discovery is sought in civil action must be relevant not only to the general subject matter of the litigation, but also relevant specifically to the issues involved in the litigation. Laffitte v. Bridgestone Corp. (S.C. 2009) 381 S.C. 460, 674 S.E.2d 154. Privileged Communications And Confidentiality 402

5. Necessity

Reasonable alternatives existed, in products liability against tire manufacturer arising from fatal rollover accident, to discovery of trade‑secret formula for steel belt skim stock, such that discovery of that information was not necessary; report issued by the National Highway Traffic Safety Administration (NHTSA) found defect in similar tires based on physical testing that did not focus on skim stock formula, and discovery already available to plaintiff included information about development, design review, and testing of tires manufactured with same specifications as tire at issue. Laffitte v. Bridgestone Corp. (S.C. 2009) 381 S.C. 460, 674 S.E.2d 154. Privileged Communications And Confidentiality 402

To satisfy necessity requirement for discovery of trade‑secret information, party seeking the information cannot merely assert unfairness but must demonstrate with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat; implicit in this requirement is the notion that suitable substitutes must be completely lacking. Laffitte v. Bridgestone Corp. (S.C. 2009) 381 S.C. 460, 674 S.E.2d 154. Privileged Communications And Confidentiality 402

6. Specificity

Testimony of plaintiff’s experts, in products liability action against tire manufacturer arising from rollover accident, did not establish that experts would necessarily be able to opine on a defect if they were provided manufacturer’s trade‑secret formula for steel belt skim stock used in tire, and therefore did not rise to the level of specificity required for discovery of a trade secret. Laffitte v. Bridgestone Corp. (S.C. 2009) 381 S.C. 460, 674 S.E.2d 154. Privileged Communications And Confidentiality 402

**SECTION 39‑8‑70.** Time limit for bringing action.

 An action for misappropriation must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

HISTORY: 1997 Act No. 38, Section 1, eff May 21, 1997.

Notes of Decisions

In general 1

1. In general

Causes of action for misappropriation of trade secrets, fraud, breach of fiduciary duty, and unfair trade practices accrued, and three‑year statutes of limitations under South Carolina law began to run, under discovery rule, when employer knew or should have known, by exercise of reasonable diligence, that its former employee used its confidential documents while working for competitor, deleted files from employer’s computer, and received monthly payments from competitor while he worked for employer. Abrasives‑South, Inc. v. Korte, 2016, 226 F.Supp.3d 584. Limitation Of Actions 95(1)

**SECTION 39‑8‑80.** Bad faith; award of attorney’s fees.

 If (1) a claim of misappropriation is made in bad faith, (2) a motion to terminate an injunction is made or resisted in bad faith, or (3) wilful misappropriation exists, the court may award reasonable attorney’s fees to the prevailing party.

HISTORY: 1997 Act No. 38, Section 1, eff May 21, 1997.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Intellectual Property Section 78, Continuous Use.

Notes of Decisions

In general 1

Duplicative recovery 2

1. In general

Plaintiff was entitled to recover reasonable attorney fees, pursuant to South Carolina trade secrets statute, given that it was prevailing party following jury trial on claims for breach of employment agreement, tortious interference with employment agreements, breach of fiduciary duty, and tortious interference with prospective contractual relations, and defendant’s actions, as a departing employee using confidential business information to start his own competing business, had been willful. Uhlig, LLC v. Shirley, 2012, 895 F.Supp.2d 707, appeal dismissed. Antitrust and Trade Regulation 438

2. Duplicative recovery

Under South Carolina law, prevailing plaintiff following jury trial on claims for breach of employment agreement, tortious interference with employment agreements, breach of fiduciary duty, and tortious interference with prospective contractual relations could not simultaneously recover attorney fees under both an employment contract and South Carolina’s trade secrets statute, since to do so would result in a double recovery; plaintiff had elected not to recover under its claim for breach of contract. Uhlig, LLC v. Shirley, 2012, 895 F.Supp.2d 707, appeal dismissed. Election of Remedies 14

**SECTION 39‑8‑90.** Persons guilty of stealing trade secrets; criminal penalties.

 (A) A person, with intent to or reason to believe that it will injure an owner and benefit a person other than the owner, shall be fined not more than $100,000 or imprisoned not more than ten years, or both, if he:

 (1) steals, wrongfully appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains trade secrets;

 (2) wrongfully copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys trade secrets;

 (3) receives, buys, or possesses trade secrets, knowing the trade secrets have been obtained by any means described in items (1) or (2);

 (4) attempts to commit any offense described in items (1) through (3);

 (5) wrongfully solicits another to commit any offense described in items (1) through (3); or

 (6) conspires with one or more other persons to commit any offense described in items (1) through (3), and where one of the conspirators performs an act to further the conspiracy.

 (B) In a prosecution for any violation of subsection (A) of this section the court must, pursuant to Section 39‑8‑100, preserve the secrecy of an alleged trade secret.

HISTORY: 1997 Act No. 38, Section 1, eff May 21, 1997.

**SECTION 39‑8‑100.** Criminal proceedings; finding of disclosure of trade secrets; issuance of protective order.

 (A) If the court finds that a trade secret may be disclosed during a criminal proceeding, the court must issue a protective order limiting the use and dissemination of the trade secret including, but not limited to, articles disclosing that secret, provided that the issuance of a protective order would not conceal fraud or work an injustice. The protective order may, in the court’s discretion, include the following provisions:

 (1) that the information produced pursuant to this section may be disclosed only to persons identified in the written protective order of the court and may be used or disclosed only in the action in which it is produced;

 (2) that the defendant may view the secret only in the presence of his counsel or at counsel’s office;

 (3) that a party seeking to show the trade secret, or articles containing the trade secret, to a person not designated by the protective order must first obtain court approval to do so.

 (a) The court must require that the person receiving the trade secret do so only in the presence of counsel for the party requesting protection.

 (b) The court must require the person receiving the trade secret to sign a copy of the protective order and a confidentiality agreement with the trade secret owner and to agree to be bound by its terms. The order may include a provision recognizing the owner of the trade secret to be a third‑party beneficiary of that agreement.

 (c) The court shall require a party seeking disclosure to an expert to provide that expert’s name, employment history, and any other relevant information to the court for examination. The court must evaluate the expert and determine whether the expert poses a significant risk of compromise.

 (4) that no articles disclosing the trade secret may be filed or otherwise made a part of the court record available to the public without approval of the court and prior notice to the owner of the secret. The owner of the secret may give permission to accept the notice on the owner’s behalf;

 (5) other orders as the court considers necessary to protect the integrity of the trade secret.

 (B) During proceedings where trade secrets may be disclosed, the court may, in its discretion, take other appropriate measures to protect against disclosure of trade secrets.

HISTORY: 1997 Act No. 38, Section 1, eff May 21, 1997.

LIBRARY REFERENCES

88 C.J.S., Trial Section 39.

**SECTION 39‑8‑110.** Chapter’s effect on conflicting tort, restitutionary and other laws; effect on other remedies.

 (A) Except as provided in subsections (B) and (C), this chapter displaces conflicting tort, restitutionary, and other law of this State providing civil remedies for misappropriation of a trade secret.

 (B) This chapter does not affect:

 (1) contractual remedies, whether or not based upon misappropriation of a trade secret or protection of a trade secret;

 (2) the provisions of the South Carolina Tort Claims Act.

 (C) Any and all other civil remedies that are not based upon misappropriation of a trade secret or upon protection against misappropriation of a trade secret are governed by the rules of procedure, rules of evidence, regulations, and the common law applicable to the administrative law tribunal or court where the action is filed.

HISTORY: 1997 Act No. 38, Section 1, eff May 21, 1997.

NOTES OF DECISIONS

In general 1

1. In general

Issue of whether former employer’s claims, under South Carolina law, against former employees and/or their new employer for breach of duty of loyalty, tortious interference with relations, unfair trade practices, conspiracy, conversion, unjust enrichment, and constructive trust were preempted by South Carolina Trade Secrets Act could not be resolved at motion to dismiss phase, because of factual dispute as to whether those claims involved trade secrets. Nucor Corp. v. Bell, 2007, 482 F.Supp.2d 714. Federal Civil Procedure 1831

To determine whether a particular cause of action involves rights equivalent to those protected by the South Carolina Trade Secrets Act, so that the Act preempts the cause of action, the elements of the particular cause of action and of a cause of action under the Act should be compared, not the facts pled to prove them. Nucor Corp. v. Bell, 2007, 482 F.Supp.2d 714. Antitrust And Trade Regulation 416

**SECTION 39‑8‑120.** Severability.

 If any provision of this chapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of the chapter are severable.

HISTORY: 1997 Act No. 38, Section 1, eff May 21, 1997.

**SECTION 39‑8‑130.** Retroactive application of chapter.

 This chapter does not apply to a misappropriation occurring before July 1, 1997, or a continuing misappropriation that began before July 1, 1997.

HISTORY: 1997 Act No. 38, Section 1, eff May 21, 1997.

RESEARCH REFERENCES

Encyclopedias

140 Am. Jur. Proof of Facts 3d 291, Proof of Use of Customer List by Former Employee.

141 Am. Jur. Proof of Facts 3d 1, Proof of Reasonable Precautions Taken to Preserve Secrecy of Trade Secrets.

127 Am. Jur. Trials 283, Litigating Misappropriation of Trade Secret.

S.C. Jur. Intellectual Property Section 72, Definition of a Trade Secret.