

December 16, 2014

Arizona Supreme Court Holds the Arizona Uniform Trade Secrets Act Does Not Preempt Tort Claims Based on Misappropriation of Confidential Information

By Kristy Peters and Neil Alexander

On November 19, 2014, the Arizona Supreme Court ruled in *Orca Communications Unlimited, LLC v. Noder* that the Arizona Uniform Trade Secrets Act (AUTSA) does not preempt common law tort claims for misappropriation of confidential information that does not rise to the level of trade secret information.

The AUTSA, enacted by the Arizona legislature in 1990 to adopt most provisions from the Uniform Trade Secrets Act, contains a provision that specifically addresses the AUTSA's displacement of other laws:

- A. Except as provided in subsection B, this chapter displaces conflicting tort, restitutionary and other laws 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 on misappropriation of a trade secret.
 2. Other civil remedies that are not based on misappropriation of a trade secret.
 3. Criminal remedies, whether or not based on misappropriation of a trade secret.

A.R.S. § 44-407.

The Arizona Supreme Court held that the statutory language is clear that the AUTSA only displaces conflicting tort claims based on "misappropriation of a trade secret." Therefore, the court concluded that if the AUTSA preempted claims for misappropriation of confidential information, this would give a broader preemptive sweep than the statute's text supports. Further, the court noted that there is no indication the Arizona legislature intended to displace common law claims not arising from the misappropriation of trade secrets.

What This Means for Employers

Employers can now raise tort claims based on the misappropriation or other improper conduct related to confidential information that does not rise to the level of trade secret information, and these claims will not be preempted by the AUTSA. Notably, the Arizona Supreme Court specifically

did not opine on whether Arizona recognizes a claim for unfair competition based on misappropriation of confidential information. Rather, it merely held that such a claim, if it exists, is not preempted by the AUTSA.

Bringing a tort claim will allow employers the chance to recover punitive damages under common law, which unlike the AUTSA, does not contain any damages cap. However, the standard for punitive damages requires clear and convincing evidence of a defendant's "evil mind," which can be a difficult standard to meet.

If an employer believes that its confidential information has been misappropriated, it will want to consider raising an unfair competition claim. To avoid preemption, the complaint must be clear that the unfair competition claim is solely based on the misappropriation of confidential information that does not rise to the level of trade secret information.

Employers should still raise claims under the AUTSA if the employer's trade secret information has been misappropriated. The AUTSA provides for remedies not available under common law, such as injunctive relief (A.R.S. § 44-402), attorneys' fees (A.R.S. § 44-404), and preservation of secrecy of trade secrets during litigation (A.R.S. § 44-405). Further, the AUTSA provides for exemplary damages of no more than twice the amount of actual damages for "willful and malicious misappropriation." A.R.S. § 44-403. This standard is easier to meet than the "evil mind" standard to obtain punitive damages under common law.

Additionally, employers should consider reevaluating their employment agreements with their employees to ensure they are compliant with this ever-changing body of law. The underlying appellate decision in *Orca* contained significant discussion regarding the language of Orca's confidentiality provision, non-solicitation provision, and non-compete provision of its agreement. (For more on the appellate decision, click [here](#).) Although the Arizona Supreme Court did not address these issues, it did not depublish these paragraphs of the appellate decision and they remain good law. Therefore, employers should ensure their employment agreements are updated regularly and are narrowly tailored to be enforceable under Arizona law.

[Kristy Peters](#) is an Associate and [Neil Alexander](#) is a Shareholder in Littler's Phoenix office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Ms. Peters at kpeters@littler.com or Mr. Alexander at nalexander@littler.com.