

COLORADO

I. Scope of Comments

The comments below are intended to provide a general overview of Colorado case law applicable to all industries. Statutes applicable to specific industries (including farm equipment, motor vehicles, prescription drugs, alcoholic beverages, gaming equipment, commercial feed and tobacco products) are not considered in this overview.

The considerations summarized below apply equally to agreements with sales representatives and distributors. Colorado has no statute generally applicable to all industries regarding sales representatives, distributors or franchises with one exception. A distributor, jobber or manufacturer who is not a resident of Colorado who enters into a written sales agreement with a wholesale sales representative is "doing business in Colorado" for purposes of personal jurisdiction in a Colorado civil action. If such a party knowingly fails to pay commissions due to a wholesale sales representative, the sales representative may sue for treble damages. The prevailing party in such a suit is entitled to attorney fees and costs.

II. Considerations Upon Initiating an Agreement

Colorado has adopted its version of the Uniform Commercial Code (UCC) which may affect interpretation of provisions of commercial transaction agreements. (CRS §§4-1-101, *et seq.*). Many presumptive terms set out in the UCC may be changed by agreement of the parties. But UCC requirements, such as the "best efforts" requirement of an exclusive distributorship, will only be negated by clear language reflecting the intent of the parties to negate the requirement.

Colorado's antitrust statute was modeled after Wisconsin's statute, which is based on the Sherman Antitrust Act of 1890. Colorado courts are not bound by, but are influenced by federal antitrust decisions.

Covenants not to compete are void unless they meet one of the exceptions set out in CRS §8-2-113. The two exceptions most often asserted as bases for enforcement of non-competes in connection with commercial agreements are (1) an exception for agreements narrowly tailored for the protection of trade secrets, and (2) agreements in connection with the sale of a business. Assuming a non-compete provision is within one of the statutory exceptions, it must also be reasonable. An agreement may be void under Colorado law if it does not set forth a geographic scope -- even if the agreement is tied to competition for business from a specified list of customers or clients.

III. Obligations During the Term of an Agreement

Written agreements include an implied duty of good faith and fair dealing. Colorado claims for breach of this implied duty arise in contract and are not generally subject to tort damages (with exceptions for insurance and certain other specific types of contracts).

A duty will not be implied if it is contrary to specific language in an agreement. For example, if an agreement clearly disclaims any intention to create an exclusive territory, Colorado courts will generally not find an implied duty not to encroach on a representative or distributor's geographic base of operations.

IV. Considerations Upon Termination of an Agreement

Colorado courts are inclined to enforce a provision requiring arbitration of disputes.

Colorado courts are inclined to honor a choice-of-forum provision of an agreement unless the provision is shown to be unreasonable under the circumstances. A 2005 Tenth Circuit decision, applying Colorado law, held that a clause requiring disputes to be determined in the "courts of the State of Colorado" meant the state courts, and did not allow a claim to proceed in the federal court for the District of Colorado.

A choice-of-law provision will generally be honored, unless it would lead to a result contrary to an important public policy of Colorado. For example, a Colorado court will not apply another jurisdiction's law regarding enforcement of covenants not to compete if this would lead to a result contrary to CRS §8-2-113 (dealing with covenants not to compete).

Lost profits, including lost future royalties from products new on the market, may be awarded if the fact of some future damages is established and if the jury (or judge in a trial to the court) is presented with sufficient admissible evidence to enable it assess the amount of damages.

A limited number of recent decisions from the federal courts for the District of Colorado and Tenth Circuit suggest a trial court should apply these factors to determine the validity of a provision purporting to waive the right to a jury trial: (1) the conspicuousness of the provision in the contract; (2) the level of sophistication and experience of the parties entering into the contract; (3) the opportunity to negotiate terms of the contract; (4) the relative bargaining power of each party; and (5) whether the waiving party was represented by counsel.

Colorado has adopted its version of the Uniform Trade Secrets Act. (CRS §§7-74-101, *et seq.*). This Act may provide a basis for an injunction and for a damages claim against a terminated sales representative or distributor using without permission trade secrets of the manufacturer.

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