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While focusing in our primary areas, our attorneys maintain expertise in a broad range of specialized practice areas and subspecialties including:

- Business law and transactions
- Securities law
- Commercial litigation
- Environmental law
- Water law
- Real estate
- Estate planning
- Legal ethics

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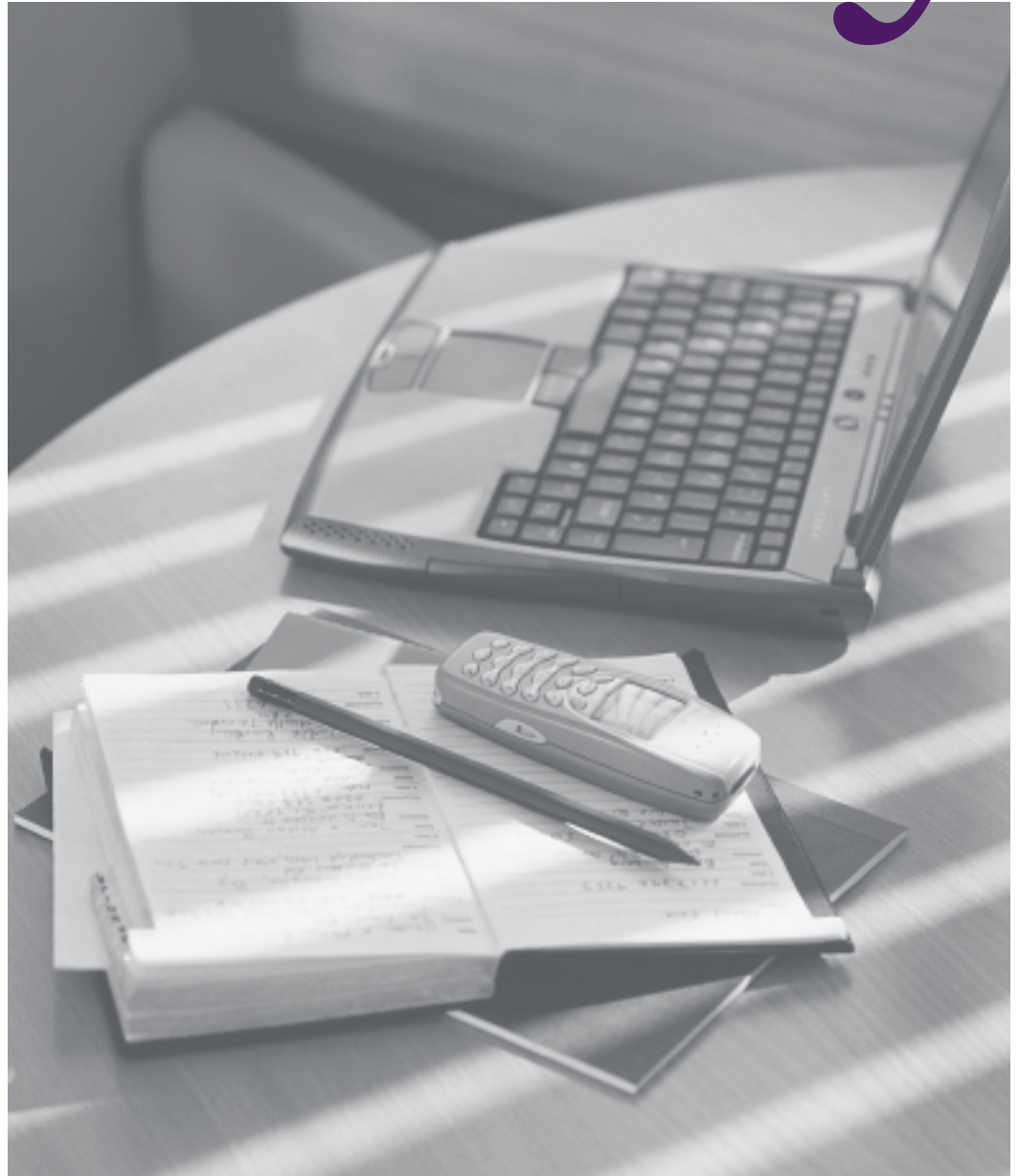
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**Briefly. . . from Burns, Figa & Will, P.C.** is published periodically to provide general information to our clients and friends about legal issues and new developments in the law. Additional articles prepared by our attorneys can be found on our website at [www.bfw-law.com](http://www.bfw-law.com).

# Recognizing Investment Scams

By Herrick K. Lidstone, Jr. and Colleen R. Belak

**A**s an investor, how do you distinguish a great investment opportunity from a scam? Are those claims of fantastic returns for real? What if it is a scam?

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Most investment scams are a variation of the **Ponzi pyramid scheme** or the pump-and-dump scheme.

The Ponzi scheme is a pyramid scheme in which sellers attempt to make money solely by recruiting new investors into the program. The hallmark of these schemes is the promise of sky-high returns in a short period of time for doing nothing other than making the investment. The promoters generally use the money coming in from new investors to pay early stage investors, or they will simply pocket the money for their own use. **Eventually the scheme collapses because there are insufficient funds to pay investors their promised returns.**

A **pump-and-dump scheme** occurs when a person publishes overly optimistic information regarding a particular company, product or segment of industry, the market reacts to such information by driving up the price of the stock and then the persons publishing the information sell their shares at a large profit. Remaining investors, especially **those who purchased stock during the hype, take a loss in market value when the hype dies down** and the stock price falls back to more normal levels, frequently zero.

These scams pull in experienced and inexperienced investors alike. Each of the following vignettes is based on a real-world experience. Judge them for yourself. **Would you fall for these come-ons? Many people have, and unfortunately more will.**

## Scam Number 1: Secret Securities and Affinity Fraud

The promoter has an investment program that trades in European intra-bank markets in accordance with Christian and humanitarian investment principles. You are promised very high returns within a couple of months of making the investment. The principal amount of the investment is guaranteed because the promoter invests in instruments representing obligations of major world banks. These investments are extremely lucrative. The market is so secret that those with access to the market might deny its existence and the investor's own well-experienced brokers or bankers likely have not heard of it. In fact, the promoter's response to the question of how the promoter found out about or got involved in **the investment program is itself a secret.**

**Religion is an important part of the promoter's program.** The promoter claims to be devout and humanitarian and is offering this exclusive business opportunity only to like-minded investors. The meetings at which the opportunity is presented are motivational and inspirational events, often including prayer and hymn singing.

The investment will be used to advance charitable causes. Former clients of the promoter include nationally well known, prominent families. To show his integrity and good faith, the promoter will personally **guarantee your investment with his own personal assets**, which are substantial (**but unsubstantiated**).

### **Herrick K. Lidstone Jr. Publishes New Book**

*Securities Law Deskbook: For Business Lawyers, Public Accountants, and Corporate Management* is a practical reference guide to securities law, in one convenient volume! With 17 chapters and hundreds of citations to securities rules, statutes, and cases, it is an essential tool for researching securities regulation, litigation, compliance issues, and much more.

Author: Herrick K. Lidstone, Jr., shareholder at Burns, Figa & Will, P.C.

Price: \$195. (Available mid-May 2006 from Bradford Publishing Company. To order, please call the customer service department at (303) 292-2590

## Scam Number 2: The Government Is Involved

You have the opportunity to invest funds in an **overseas trading program**. The program will earn a 10% return per week (which is more than 1,400% per year after compounding) on a risk free-basis. The program is run by an administrator from the **Federal Reserve and the investments are held by this administrator**.

## Scam Number 3: The Wrong Number

"Hi Jennifer, this is Peggy. Remember Mark, that guy I was dating last year? Well, he was a stock broker and we are still friends. He called me up a couple of months ago and gave me a tip to buy ABC security and I did. Wow, a 75% increase in the stock price in three weeks when I sold. Well, he called me again and suggested XYZ. If you want to invest, give me a call and I will give you his number."

Of course, you are not Jennifer. And perhaps **the solicitation comes by fax or e-mail**. Clearly **you need to invest immediately** before others catch on to what a good deal the stock is and the price goes up.

## Scam Number 4: Bird Flu

The 2006 **threat of bird flu fueled stock scams touting large gains** from companies that claim to be poised to capitalize on helping the world avoid a global pandemic. **You receive a fax** claiming the company "has the solution for tracking and containing the Bird Flu virus in turn preventing it from spreading." Citing the enormous cost of fighting avian flu, the fax stated the stock was "positioned to gain 250% or more." **The fax urges you not to miss out on a stock that was "clearly missed by Wall Street" but** has the support of the National Institute of Health, the Centers for Disease Control, or even the United Nations. The communication also points to other companies in the industry segment that have seen exponential growth and notes there are very few companies positioned to provide the products or services that are needed.

## Conclusion

Each of the foregoing vignettes is a **scam that has been perpetrated on people who should have known better**. There are common themes through most of these scams.

- The investor must invest quickly or the opportunity will disappear;
- They offer high returns at low or no risk; and
- There is no opportunity to perform due diligence.

It is also fairly common for scam artists to represent that the investments they are hawking are somehow sanctioned by the federal government. However, the Federal Reserve System and other U.S. government agencies never get involved in the operation of any private investment opportunity.

It seems the more farfetched the promises, the more investors fall for the scam. The old adage remains sage advice today: **"If it sounds too good to be true, it probably is too good to be true."**



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many aspects of their businesses, including assisting clients in forming their businesses; the purchase or sale of a business and negotiating and drafting contracts of all types.

# Protecting a Company's Trade Secrets

By Michael J. Norton and  
Jennifer M. Osgood

**P**rotection of “trade secrets” is often important to the economic success of a Colorado company. Companies often choose not to protect “trade secrets” with patents simply to keep the process a secret. The formula for Coca-Cola is probably the most famous example of an unpatented, trade secret. In Colorado, companies may seek to protect trade secrets, (ranging from specialized, technical processes to customer lists) from disclosure or use by others by, among other measures, injunctive relief barring disclosure or use of a trade secret. Successful use of Colorado’s Uniform Trade Secrets Act (“Act”) can stop the improper disclosure of trade secrets.

**The Act defines “trade secret” as any scientific or technical information, design, process, procedure, formula or improvement.** Factors a court looks at in determining whether the matter is a trade secret are:

- a. The extent to which the information is known outside the business.
- b. The extent to which the information is known to those inside the business.
- c. The precautions taken by the holder of the trade secret to guard the secrecy of the information.
- d. The savings effected and the value to the holder in having the information as against competitors.
- e. The amount of effort or money expended in obtaining and developing the information.
- f. The amount of time and expense it would take for others to acquire and duplicate the information.

Courts hold that the company claiming something to be a trade secret should have: advised employees of the existence of the trade secret; limited access to the trade secret to a need-to-know basis; and controlled access to locations where the information about the claimed trade secret may be learned. In addition, these measures must be more than normal business procedures.

**A trade secret can include** a system where the elements are in the public domain, *i.e.*, is not “secret,” but an effective, successful, and valuable integration of the public domain elements and claimed trade secret result in a competitive advantage to the company that is protected from misappropriation as a trade secret. A company need not have actually used or commercially implemented or sold a misappropriated trade secret for a claim for injunctive relief or damages to accrue. Misappropriation consists only of the improper disclosure or acquisition of a trade secret.

As with any injunction, the key to success in obtaining injunctive relief is whether the company can show irreparable injury. This means that the company must show a substantial threat of harm to the company that cannot be compensated for by money.

More importantly, however, **a company should have solid employment agreements in place with key employees**, particularly those who have access to a company’s trade secrets or other confidential information. These employment agreements should contain enforceable non-competition agreements and prohibitions against disclosure of a company’s trade secrets or other confidential information.

Attorneys at Burns, Figa & Will can assist you and your company in a broad range of corporate services, including a determination of whether to have non-competition agreements and confidentiality agreements in place. In addition, we can assist you in trade secret litigation as well.



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**H**igh Plains A&M LLC filed two almost identical applications for changes of water rights in late 2002 and early 2003. The Water Court consolidated the two cases. In its Applications, **High Plains claimed to own or control of about 30% of the shares in one of the largest irrigation systems in Colorado.** High Plains asked the Water Court to approve changes to its water rights from irrigation and other decreed uses in the lower Arkansas River Valley to any beneficial use, including over fifty identified potential uses, in any location within twenty-eight Colorado counties. High Plains' applications did not identify any end users of the water besides the farmers who currently use the water. In *High Plains A&M, LLC v. Southeastern Colorado Water Conservancy District*, 120 P.3d 710 (Colo. 2005), Burns, Figa & Will, on behalf of our client, the Southeastern Colorado Water Conservancy District, successfully argued that High Plains' application for a change of water right was properly dismissed because the application did not state with specificity the use or location of use of the changed water rights, thus violating Colorado's anti-speculation doctrine.

# Colorado Supreme Court Victory: Water Courts Cannot Consider Speculative Water Transfers

By Stephen H. Leonhardt,  
Scott A. Clark and Alix L. Joseph

After conducting limited discovery confirming that High Plains lacked any specific plan for use of the water, Southeastern and other objectors filed a motion for summary judgment asking the Water Court to dismiss High Plains' applications. The Water Court granted Southeastern's motion and dismissed High Plains' applications because "Applicants' plan was so expansive and nebulous that it was impossible for other holders of water rights to determine whether they will be injured," and because the applications were speculative. On appeal, the **Colorado Supreme Court upheld the dismissal, holding that:**

the anti-speculation doctrine is rooted in the requirement that an **appropriation of the public's water resource must be for an actual beneficial use.** To implement this requirement, adjudication of water right and change of water right applications includes identification of the structures through which the appropriated water will be diverted and delivered for identified beneficial uses at identified locations.

*High Plains*, 120 P.3d at 716.

The Court based its decision on statutory definitions of "change of water right," "water right," "appropriation" and "beneficial use," the relationships linking those terms, and a review of how Court precedent on water rights and changes of water rights relates to the statutory definitions. These definitions work together to assure protection of the public's resource by application of a specified amount of water to an actual beneficial use at a specified location. The essential elements of a water right are priority, location of diversion and amount of water applied to actual beneficial use. "Actual beneficial use is the basis, measure, and limit of an appropriation." Water rights owners can change these essential elements of their decreed rights while preserving the original priority of the right. However, this right to change water rights is within, and subject to, the **"Colorado Doctrine,"** which specifies that **water is a public resource dedicated to beneficial use by appropriators as prescribed by law.**

**The Court** concluded that the primary function of a change of water rights proceeding is **to assure that a valid appropriation continues in effect after the change.** Thus, "the appropriator's interest in the appropriation for an actual beneficial use is a prerequisite for maintaining the application and obtaining a decree." The definition of "appropriation" found in C.R.S. § 37-92-103(3)(a), which implements the "appropriation and beneficial use requirements of Article XVI, sections 5 and 6 of the Colorado Constitution," imposes on an applicant the obligation to demonstrate **(1)** an interest or reasonable expectation of procuring an interest in the lands or facilities to be served by the appropriation, and **(2)** a specific plan and intent to divert a specific quantity of water for specific beneficial uses. An application for change of a water right reopens the absolute decree to demonstrate terms of operation under changed conditions. Such changed conditions still must constitute an "appropriation."

The Court found that High Plains failed to identify any specific parcel of land or consumer to be served by the changed water rights. In contrast, other change applications approved by the Court contemplated a plan for actual use by the applicant. (For this point, the Court cited *Strickler v. Colorado Springs*, 26 P. 313 (Colo. 1891); *Farmers Highline Canal & Reservoir Co. v. Southworth*, 21 P. 1028 (Colo. 1889); and *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).) The Court concluded that:

A guess that a transferred priority might eventually be put to beneficial use is not what the Colorado Constitution or the General Assembly envisioned as the triggering predicate for continuing an appropriation under a change of water right decree. The change application process is intended to prevent injury to other water rights.

(continued)

*High Plains*, 120 P.3d at 721.

High Plains' applications were not sufficiently detailed to trigger a right to a continuing appropriation under a change of water right decree, and did not justify commanding the attention of the Water Court or the opposing parties.

Given the demand for Colorado's limited supplies of water, the anti-speculation doctrine will be an increasingly important issue in changes of water rights. Without the protection of the anti-speculation doctrine, wealthy investors could potentially purchase agricultural water rights, obtain a broad change decree, holding changed rights until municipalities or other industries are so desperate for water that they will pay extraordinary prices. Colorado's water rights system is rooted in continued beneficial use of water. Had the Court determined that the anti-speculation doctrine did not apply to changes of water rights, Colorado's prior appropriation system would become an incomprehensible and unreliable jumble of ill-defined and unmanageable decrees authorizing ever-changing uses.

If you need assistance with a change or transfer of water rights, or have questions as to whether or how the anti-speculation doctrine may apply to a particular situation, please call any member of the firm's water group, and we will be happy to assist you.



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# Buying Contaminated Property: New Rules – New Twists

by J. Kemper Will

**N**ew rules related to buying contaminated property are now final. Both EPA and the American Society of Testing and Materials ("ASTM") published due diligence rules in November, revising standards for **conducting environmental site assessments prior to purchasing a contaminated property, steps that are necessary to avoid environmental liability.**

Previous articles in *Briefly* by Scott Clark (Fall, 2003) and J. Kemper Will (Spring, 2004) have tracked the development of these standards. The publication of these revised standards introduces new twists by both EPA and ASTM.

The context of these standards is the due diligence a person must conduct when acquiring potentially contaminated property to minimize liability for any environmental issues encountered. At its root, the standards address liability under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), enacted in 1980. As interpretation of CERCLA evolved through court decisions, it became clear that **persons acquiring contaminated property could assume significant environmental liability if they did not make "all appropriate inquiries" into the environmental conditions of the property prior to purchase.** Since the early 1980's, there has been an evolution of law and science related to environmental liability. On the science side, buyers have learned methods to manage environmental risk through thoughtful Phase I and Phase II site assessments, through addressing environmental concerns in the regulatory context by risk-based remediations, and by continuing diligence with the property after purchase.

There has also been an evolution of legal environmental risk-management through property acquisition, contractual provisions and using available federal, state and local regulatory tools. One of the most useful new tools has been the “bona fide prospective purchaser” exemption to CERCLA liability, enacted in January, 2002 by the Brownfield Amendments to CERCLA. **A person can qualify as a bona fide prospective purchaser if they satisfy each of the statutory criteria:**

- The property is acquired after January 11, 2002.
- Prior to purchase, the purchaser has conducted a Phase I site assessment fully compliant with the new EPA and ASTM standards.
- After closing, the purchaser takes “reasonable steps” to exercise appropriate care with regard to the environmental conditions.
- The person cooperates with regulatory agencies.

If the buyer complies with each of the steps summarized above, the buyer will not have environmental liability pursuant to CERCLA. However, if the federal government spends money to investigate or clean up the property, those costs can be recovered by means of a lien on the property if the buyer, as a result of the federal action, receives a “windfall” in value.

I would like to focus on the “reasonable steps” aspect of the new standards, because **EPA’s explanation of their “all appropriate inquiry” standard suggested some new twists.** CERCLA, in the context of a bona fide prospective purchaser’s obligations states:

. . . the person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to –

- (i) stop any continuing release;
- (ii) prevent any threatened future release; and
- (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.

The “appropriate care” and “reasonable steps” language has been an ambiguity. Most buyers easily understand what is required by performance of a Phase I site assessment as a criterion for bona fide prospective purchaser status. However, the obligation to continue “appropriate care” and to take “reasonable steps” after buying the property has been ambiguous.

One of the questions was whether it might be necessary to conduct soil or groundwater sampling as part of a Phase I site assessment. In its preamble, EPA almost definitively states that “[the] rule does not require sampling and analysis as part of the [Phase I] inquiry”. However, equally almost definitively, EPA, again in its preamble, states that post acquisition sampling and even control mechanisms may be necessary as part of the continuing obligations of “appropriate care” or “reasonable steps”. Here is a quotation from the EPA preamble, which does not seem to clear up the ambiguity:

It may be necessary to conduct sampling and analysis, either pre- or post-acquisition, to fully understand the conditions at a property, and fully comply with [the reasonable steps] requirement.

Certainly, this EPA preamble discussion is a **wake-up call for those wishing to comply with the bona fide prospective purchaser liability exemption of CERCLA.** EPA emphasizes that not only must a fully compliant Phase I site assessment be performed, but that a bona fide prospective purchaser must continue to be diligent about environmental conditions after the property is acquired.

Burns, Figa & Will environmental attorneys work with many high quality environmental consulting firms to assist clients to minimize environmental liability during and after property acquisition. The revised site assessment standards suggest that close interaction between environmental consultants and lawyers will be appropriate to assure buyers receive the full benefit of environmental liability protections.



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the U.S. Environmental Protection Agency in Washington D.C. and Denver. In addition to being one of the most experienced “Superfund” lawyers in the United States, he has represented hundreds of parties regarding contaminated properties:

- Sales, purchases and other contaminated property transactions;
- Mergers and acquisitions;
- Redevelopment, voluntary clean-up, brownfields;
- Permitting and regulatory compliance;
- Managing environmental litigation.