

In Colorado Revised Statutes, add section 6-4-123 as follows:

§ 6-4-123—Definitions—tacit agreement—illegal restraint of trade or commerce—per se violation—standards of pleading and proof—presumption of illegal behavior—motion to dismiss or motion for summary judgment prohibited—affirmative defense—exemptions

(1)

- (a) “Consciously parallel pricing coordination” under this section means a tacit agreement among two or more persons to raise, lower, change, maintain, or manipulate pricing, including for the purchase or sale of reasonably interchangeable commodities or services.
- (b) “Commodity” under this section has the same meaning under subsection (1) of section 6-4-103.
- (c) “Motion for summary judgment” under this section means a motion by a court pursuant to the provisions of Rule 56 of the Colorado Rules of Civil Procedure.
- (d) “Motion to dismiss” under this section means a motion by a court pursuant to the provisions of Rule 41 of the Colorado Rules of Civil Procedure.
- (e) “Pricing” under this section means monies required for the payment of a commodity or service or monies required for the payment of a human being for their labor.
- (f) “Person” under this section has the same meaning under subsection (3) of section 6-4-103.
- (g) “Service” under this section has the same meaning under subsection (4) of section 6-4-103.

(2)

- (a) A tacit agreement constitutes a form of “a contract; a combination in the form of trust or other combination; or a conspiracy” under subsection (6) of section 6-4-104.
- (b) A tacit agreement to engage in consciously parallel pricing coordination in violation of section 6-4-104 alleged and proved pursuant to the provisions of subsections (3) and (4) of this section constitutes a *per se* violation of this article 4 with respect to the provisions of subsection (2) of section 6-4-112 or subsection (1) of 6-4-115.

(3) In any action commenced pursuant to sections 6-4-112, 6-4-113, 6-4-114, or 6-4-115:

(a) A complaint:

(I) Plausibly pleads “a contract; a combination in the form of trust or other combination; or a conspiracy” under section 6-4-104 if the complaint contains factual allegations, which may consist of allegations of consciously parallel conduct, demonstrating that the existence of the alleged contract, combination in the form of trust or other combination, or conspiracy is among the realm of plausible possibilities; and

**(II) Need not allege facts tending to exclude the possibility of independent action to plausibly plead the existence of “a contract, combination in the form of trust or other combination, or a conspiracy” under section 6-4-104.**

**(b) A plaintiff:**

**(I) Demonstrates a genuine dispute of material fact that a defendant entered into or engaged in “a contract; a combination in the form of trust or other combination; or a conspiracy” under section 6-4-104 by offering evidence, which may be direct or circumstantial, that is sufficient to allow a trier of fact to reasonably conclude that a defendant entered a contract, a combination in the form of trust or other combination, or a conspiracy; and**

**(II) Need not offer evidence tending to exclude the possibility of independent action to demonstrate a genuine dispute of material fact that a defendant entered into or engaged in “a contract; a combination in the form of trust or other combination; or a conspiracy” under section 6-4-104, although, at trial, the trier of fact may consider the existence or absence of evidence tending to exclude the possibility of independent action when determining whether a defendant entered a contract, a combination in the form of trust or other combination, or a conspiracy.**

**(4) In any action commenced pursuant to sections 6-4-112, 6-4-113, 6-4-114, or 6-4-115:**

**(a) A plaintiff establishes a *prima facie* case of consciously parallel pricing coordination by demonstrating that two or more persons:**

**(I) Engaged in substantially similar action, within a substantially similar time period, with respect to pricing, including for reasonably interchangeable commodities or services; and**

**(II) Had a substantially similar motivation to coordinate their efforts to raise, lower, change, maintain, or manipulate pricing, including for the purchase or sale of reasonably interchangeable commodities or services.**

**(b) A court shall presume that a defendant entered into or engaged in “a contract; a combination in the form of trust or other combination; or a conspiracy” under section 6-4-104, when for the market in which the alleged contract, combination in the form of trust or other combination, or conspiracy occurred:**

**(I) Either the defendant raised, lowered, changed, maintained, or manipulated pricing, including for its commodities or services no more than 200 days before or after another defendant raised the price of its product or it is more likely than not that an agreement exists with the defendant to raise, lower, change, maintain, or manipulate pricing, including for its commodities or services; and**

(II) Either the defendant invited another defendant to raise, lower, change, maintain, or manipulate pricing, including for its commodities or services or the defendant engaged in communications with another defendant that may result in anticompetitive harm, as defined by the federal Department of Justice or Federal Trade Commission; and

(III) Either the defendant engaged in actions that would be against its own interests in the absence of “a contract; a combination in the form of trust or other combination; or a conspiracy” under section 6-4-104 or the pricing, including for the purchase of commodities or services, in the market in which the alleged contract, combination in the form of trust or other combination, or conspiracy occurred is above or below that which would be predicted in absence of a contract, combination in the form of trust or other combination, or conspiracy.

(c) A defendant may rebut this presumption with evidence that it did not engage in the actions described in subsections (4)(b)(I), (4)(b)(II), or (4)(b)(III) of this section.

(d) A plaintiff asserting a claim of consciously parallel pricing coordination in violation of section 6-4-104 bears the burden of proving the *prima facie* case described in subsection (4)(a) of this section by a preponderance of evidence, at which point the burden of production shifts to the defendant as set forth in subsection (4)(c).

(e) A defendant bears the burden of rebutting a *prima facie* case of consciously parallel pricing coordination by producing evidence, sufficient to raise a genuine dispute of material fact, that the defendant’s action described in subsection (4)(a)(I) of this section was motivated by business judgment that is economically rational in the absence of any consciously parallel pricing coordination. Evidence of this nature may include, but is not limited to, evidence that the defendant acted rationally in response to or in anticipation of changing conditions affecting the market for or the marketability of the commodities or services concerned.

(f) If the defendant rebuts the *prima facie* case, the burden shifts back to the plaintiff to prove, by a preponderance of the evidence, that the defendant entered into or engaged in a tacit agreement among two or more persons to raise, lower, change, maintain, or manipulate pricing, including for the purchase or sale of reasonably interchangeable commodities or services. The plaintiff may do so by means that include, but are not limited to, proving that:

(I) The business judgment described in subsection (4)(d) was not economically rational in the absence of consciously parallel pricing coordination or was not the the predominant motivating factor for the defendant’s action described in subsection (4)(a)(I); or

(II) The defending party, knowing that coordinated action to raise, lower, change, maintain, or manipulate pricing, including for the purchase or sale of reasonably

interchangeable commodities or services was contemplated and invited by a competitor, adhered to the scheme and participated in it; or

(III) Based on circumstantial evidence implying a naked contract, combination in the form of trust other combination, or conspiracy, it is more likely than not that the defendant entered into or engaged in an agreement among two or more persons to raise, lower, change, maintain, or manipulate pricing, including for the purchase or sale of reasonably interchanges commodities or services.

(g) It is an affirmative defense to a claim of consciously parallel pricing coordination, on which the defending party bears the burden of proof by a preponderance of evidence, that any affirmative defense to price fixing applies.

(5) In any action alleging a violation of section ~~6-4-104~~ of this article ~~4~~, a court shall not dismiss the suit on a motion to dismiss or motion for summary judgment solely because the conduct alleged is consistent with “tacit collusion”, “oligopolistic price coordination”, or “conscious parallelism” where the plaintiff plausibly alleges the actions described in subsection ~~(4)~~(a).

(6)

(a) Nothing in subsection ~~(4)~~(b) or ~~(4)~~(c) of this section shall be construed to affect the remedies provided for a violation of section ~~6-4-104~~ provided under subsection ~~(4)~~(a) of this section.

(b) Nothing in this section ~~6-4-123~~ shall be construed to affect the provisions of section ~~6-4-109~~.

(c) Nothing in subsection ~~(4)~~ of section ~~6-4-109~~ shall be construed to affect the provisions of this section ~~6-4-123~~.