

Jordan Grotzinger:

Welcome to the trade secret law evolution podcast, where we give you comprehensive summaries and takeaways on the latest developments and trends in trade secret law. We want you to stay current and ahead of the curve when it comes to protecting your company's most valuable assets. I'm your host Jordan Grotzinger hi everybody. How very different the world looks from a little over two weeks ago when we recorded our last Podcast, I'm glad to be back at this. And, uh, of course, for the first time, since we started this last summer, I am recording remotely from home and without my amazing team to make this sound perfect. So I don't think it's going to sound perfect. Bear with me with the, uh, wartime audio quality, if you will, but, um, privileged, uh, that we have the technology to keep doing this, and I hope you keep listening. We've got incredible listeners. And now that we can't go to CLE seminars, you can get those self study credits for California, at least by listening. So, uh, we're very grateful in this episode, we are going to discuss the requirement of reasonable efforts to maintain secrecy. When employees are working from home, something that's very timely for millions of people. Now, we're also going to discuss how one court addressed the issue of so-called high level trade, secret identification, trade, secret identification.

Jordan Grotzinger:

Of course, as an issue, we've addressed a lot in this podcast. And in that same case, the court addresses misappropriate misappropriation, and specifically what acquisition through improper means consists of. So jumping into reasonable efforts to maintain secrecy when you've got a remote workforce, all of a sudden in this current crisis, including the stay at home orders and several states, including my own here in California, uh, millions of employees are working from home and in this situation, companies should be extra vigilant and proactive with those employees that have access to trade secrets. As we've discussed reasonable efforts or measures to maintain secrecy generally falls into four buckets. One contracts like confidentiality agreements to company policies, three, and very importantly technology. And for physical barriers for this crisis, companies might want to focus on buckets two and three, that is company policies and technology and employee working from home may be more prone than usual to, for example, use her or his email or store sensitive documents locally on his or her computer.

Jordan Grotzinger:

If your company has technological protections like VPNs or firewalls, as it should be sure those employees are working on company systems and email, which are generally, and, and better be more secure than your home system. If your workforce is suddenly remote, have your it personnel test those protections and patch any holes. And even if you have policies about trade secret protection and, and they're essential to meet the reasonable efforts requirement, it's worth sending a reminder to your employees now because we're in a unique circumstance, everyone's scared and distracted, and they might not be focusing as much as you want them to on being as careful as they should with your trade secret information. And also, even though most of us are confined to home, uh, we are still allowed outside. And to the extent anybody is trying to use a public wifi, those are generally not as secure as a company.

Jordan Grotzinger:

Wifi is going to be. So those should be avoided. If you are dealing with trade secrets at all, remember your protections don't have to be perfect under the law. They have to be reasonable. And in an unprecedented situation like this, you may have some leeway with the judge if this actually becomes an issue, but as always, and as we've discussed, the more protections you have, the better chance, you'll be

able to prove that your efforts to maintain secrecy were reasonable, which is a requirement for trade secret status. Now turning to the recent case, I mentioned, uh, this one was out of the Northern district of California this month, March, 2020. And this was a dispute between a seafood importer and a former employee with access to confidential data. The employee allegedly started a competing company and misappropriated the plaintiff's trade secrets, including customer lists, and the plaintiff moved for a preliminary injunction.

Jordan Grotzinger:

The plaintiff's claims were violations of the defend trade secrets act and California uniform trade secrets act, which essentially have the same requirements and that the court focused on the key issue of trade secret identification reciting the familiar standard that a plaintiff quote need not spell out the details of the trade secret, but must describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special persons who are skilled in the trade and to permit the defendant to ascertain at least the boundaries within which the secret lies close quote here, quote, plaintiff alleges that its trade secrets included detailed customer lists, customer purchasing data, customer sales figures, and other related customer purchasing analysis and trends close quote. Also the plaintiff quote attempts to slightly narrow this definition, which was pretty broad in its opposition by claiming the confidential customer identification is for a niche clientele of end run buyers closed quote.

Jordan Grotzinger:

And the plaintiff continued to assert that these trade secrets include quote an assortment of confidential and publicly unknown customer information such as customer purchasing data, customer sales, figures, analysis, and trends, and other information as further identified close quote in a, in a corresponding motion filed with, along with the PR the motion for preliminary injunction. Now that was a mouthful and kind of sounded like a bunch of platitudes and the court agreed and found those broad definitions to be insufficient. It held quote the description of these purported trade secrets is indistinguishable from matters of general knowledge within the parties industry. I E the seafood distribution business. These are broad categories of information that would be applicable to any business accordingly. These allegations are too high level to give the court, or defendant's notice of the boundaries of the alleged trade secret close quote. The court also gave other examples of alleged trade secrets, uh, identified at too high, a level to ascertain those necessary boundaries.

Jordan Grotzinger:

And these were from other cases, they were things like quote data on the environment in the stratosphere close quote, quote data on the propagation of radio signals from stratospheric balloon based transceivers, close quote, quote, design, review templates, close quote, quote, fluidics, design files, and source code files. More general broad, almost platitude like descriptions that do not really give the court or the defendant, the boundaries with which to discern what the alleged trade secret is. As the court said, quote, the customer list did not sufficiently describe a trade secret. Given that client information constitutes a trade secret. When that information is assembled over many years and allows the company to tailor its service contracts and pricing to the unique needs of its customers. Close quote. In other words, a customer list has to be unique enough that it can't be compiled from general knowledge in the field of public information.

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And for that reason, the court held or found that the plaintiff did not sufficiently identify its trade secrets for purposes of its motion for injunctive relief and separately, the court addressed the requirement of misappropriation and found that showing to be insufficient as well. The plaintiff alleged that the former employee collaborated with another defendant, a muscle supplier muscles, as in shellfish to misappropriate the plaintiff's trade secrets. The plaintiff's theory was one of what's called indirect misappropriation. In other words, that the plaintiff asserted that the other defendant obtained the plaintiff's trade secrets improperly from the individual defendant, but to adequately plead this kind of indirect misappropriation, the plaintiff must alleged facts to show that the defendant knew or had reason to know before the user disclosure, that the information was a trade secret and knew, or had reason to know that the disclosing party had acquired it through improper means or was breaching a duty of confidentiality by disclosing it.

Jordan Grotzinger:

What that means in plain English is if you're that, I'll call it a second tier defendant, a defendant who receives the trade secrets from the misappropriate or defendant. What that mouthful means essentially is that that second tier defendant has to have some culpability to that. Defendant had to have acted wrongly. In other words, known that it was acquired through improper means or known that it was somebody else's trade secret. They can't be innocent in receiving those transactions. That's all that means it's common sense, but here, quote, the plaintiff does not allege any factual basis to support the conclusion that those defendants knew that the information that the individual defendant provided, for example, customer lists or identities was actually plaintiffs knew that it was protectable or knew that the defendant acquired it through improper means nor did the first amended complaint plead how those defendants could have known as much and conclusory allegations that those defendants contacted and continuously communicated with the individual defendant while that defendant was employed by the plaintiff alone are insufficient to plead that those other second tier defendants knew that any information that individual defendant communicated to them contained trade secrets.

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In other words, the plaintiff didn't plead enough facts showing that those second tier defendants knew that they were doing something wrong, knew that they were receiving trade secrets that belong to somebody else or confidential data that was acquired through improper means there wasn't a sufficient showing of culpability on the part of those second tier defendants. So what a plaintiff do in an indirect misappropriation case like this, the court said as follows quote, plaintiff must allege facts that are not merely consistent with both a theory of innocent market entry. And the theory that defendants use plaintiff's confidential customer lists, but rather tend to exclude an innocent explanation, close quote. And so for that additional reason, injunctive relief was denied. So what are the takeaways? Well, if your employees with trade secret access are now working at home, make sure they stick to your company network, which should have protections like passwords, firewalls, et cetera, and remind those employees about your policies in this regard.

Jordan Grotzinger:

Um, as I said, everybody is distracted. Uh, there are a million things to worry about and your employees might not be as focused as you want them to be about this critical issue. So a reminder is worth it takeaway too, is that trade secret identification, can't be too high level. You need to plead improve that the alleged trade secret is unique enough that it's distinguishable from common knowledge in the field or public information facts like the time and money you invested or how a competitor's getting its hands

on the trade secret could hurt your company help. As we've discussed, those kinds of facts tend to bolster trade secret identification because it shows, Hey, these really are uniquely valuable and not just something that is a public or a matter of common knowledge in the particular field. So in other words, the fact pled can't show, um, that there might have been misappropriation, but the transaction might've been innocent as well.

Jordan Grotzinger:

The showing us to be a little stronger, such that the facts suggest, uh, that an innocent explanation would not make sense. Well, that's it for now? Um, this is strange. Uh, I, I miss my cohost. I Ms. Ashley and my other co-hosts. We will figure out a way soon, uh, to get our co-hosts back. I know that, um, we can do this remotely, but, uh, it was a priority for me to get our next episode out sooner rather than later, because, uh, I think continuity is, is so important, uh, for this podcast and for so many other things right now. So once again, we're very grateful for you listening. We hope you're well, you know how to contact us

Jordan Grotzinger:

And, um, we're going to get back to our regular schedule. Thanks everybody. Bye. Okay. That's a wrap. Thanks for joining us on this episode of the trade secret law evolution podcast as the law evolves. So this podcast, so we value your feedback, let us know how we can be more helpful to you. Send us your questions and comments. You can reach me by email@gratsingerjayatgtlaw.com or on LinkedIn. And if you like, what you hear, please spread the word and feel free to review us. Also, please subscribe. We're on apple podcasts, Stitcher, Spotify, and other platforms. Thanks everybody. Until next time,

Speaker 3:

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