

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

Jordan Grotzinger:

Everybody. Welcome to episode 27. It is Tuesday morning, August 27th. I hope everyone is well. Uh, I'm tired of this, this whole situation, but, uh, hanging in there and I hope you are too. Uh, it's been a little longer since our last episode, and that is only because as we've said before, the purpose of this podcast is to give you somewhat new or interesting information or wrinkles on these cases. There are plenty of cases that just discuss the same issues. We've talked about many times, and I don't want to be a broken record. This podcast is about growth and learning and hence the title trade secret law evolution podcast. So here we go today, we're going to discuss two cases involving attorney fee awards and trade secret cases. The sealing of documents in trade secret cases, which is, uh, something that needs to be done often.

Jordan Grotzinger:

And the challenges in obtaining a temporary restraining order. So the first case deals with attorney's fees in these cases, and this was a case out of the Eastern district of Louisiana in August, 2020, a party can get attorney's fees in trade secret cases. And this was a motion for attorney's fees by the prevailing defendants. It was a classic case of a former employee of the plaintiff's allegedly stealing trade secrets for his new company, the defendant and the plaintiff's alleged claims under the defend trade secrets act, which is the federal act and the Louisiana uniform trade secrets act, both of which are substantially similar. And they re they asserted related claims as well. The case was litigated for three years and involved a lot of motions, including over whether the plaintiff sufficiently identified their trade secrets, a subject, as you know, that is probably the most common issue in these cases, the court quote, recounted the ever evolving nature of plaintiff's trade secret claims and the pains taken by the court and all defendants to nail down the exact trade secrets plaintiffs were alleging to have been misappropriated close quote.

Jordan Grotzinger:

So the defendants won their motion for summary judgment and move for fees as the prevailing parties under the defend trade secrets act and Louisiana act. And the plaintiffs argued that the claims were brought in bad faith quote, pointing to the ever evolving nature of plaintiff's trade secret claims and the extensive discovery and motion practice required to eventually dismiss them. The defendants argue that plaintiffs continued to prosecute such claims after it should have become clear that the claims were without merit and specious. The defendants further argue that the defense of all of plaintiff's claims was inextricably interwoven with their defense of the trade secret claims and thus all of the attorney's fees incurred in defending the claims are recoverable close quote. The plaintiffs argued that the claims were in good faith and that the defendants actually were not cooperative in discovery, which hampered their investigation and the individual, uh, defendant allegedly took some confidential information, further evidencing.

Jordan Grotzinger:

The plaintiffs argued the good faith nature of their claims. So the court said the following quote under the defense trade secrets act and the Louisiana uniform trade secrets act a court may award reasonable attorney's fees to the prevailing party, excuse the background noise 2020. If the trade secret misappropriation claim is in bad faith, close quote, quote, a party that receives a judgment in its favor on the merits is the prevailing party close quote and quote. Although it is uncontested that the defendants were the prevailing party on plaintiff's defend trade secrets act and Louisiana uniform trade secrets act claims a plain reading of either statute indicates that the decision to award attorney's fees still requires a finding of bad faith and even then lies within the court's discretion close quote. So the court explained that bad faith is not defined by either the defend trade secrets act or the Louisiana uniform act, but quote, the standards for bad faith are necessarily stringent, close quote, because quote fee shifting is punitive.

Jordan Grotzinger:

Thus quote, a party should not be penalized for maintaining an aggressive litigation posture, but advocacy simply for the sake of burdening and opponent with unnecessary expenditures of time and effort, clearly warrants recompense for the extra outlays attributable they're too close quote. So quote courts have used the two-part test to analyze whether trade secret claims have been brought in such bad faith as to warrant attorney's fees, asking first whether the claims were entirely or objectively specious, and second, whether the claims were made or pursued in subjective bad faith or for an improper purpose close quote, turning to the decision. The court said, quote, while plaintiff's claims did have a ready fire aim quality to them. It was a quality arising out of their concerns, understandably engendered by the misstep of the plaintiff's former employee and unauthorized lead downloading hundreds of documents from his company issued computer after he left the company and then setting up shop with the plaintiff's competitor, the defendants right across the street close quote, and while quote, the court has previously recounted its disappointment with plaintiffs, every evolving conceptualization of their claims and articulation of their trade secrets.

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The defendants did not have completely clean hands themselves. And while it was a teeth pulling exercise to get plaintiffs, to identify their trade secrets and while defendants those slowly at first eventually produced reams of documents and discovery. The ultimate evaluation of the allegations of misappropriation or misuse was hindered by the defendants tardy production of certain drawings of a competing transport container quote and quote that it took a battle of experts to assist the court in resolving the issues raised by these drawings belies the defendant's contention. Now that the entirety of plaintiff's position and all of their trade secret claims were objectives specious. Even if the court in the end determined that they did not have sufficient merit to survive summary judgment, close quote, also quote, equally questionable is the defendant's contention. Now that plaintiffs asserted and pursued all of their trade secret claims and subjective bad faith, or for an improper purpose close quote, there was no direct evidence of bad faith, only circumstantial evidence of the plaintiff's quote, ever shifting litigation position on the existence of trade secrets and on the ultimate dismissal of plaintiff's trade secret claims, close quote.

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However, the court said some of the plaintiff's trade secret claims were baseless, just not the whole of their position, thus quote, the court finds that an equitable way to fashion an award is to estimate a percentage of the litigation devoted to the identification of trade secrets and to those few claims that

had absolutely no merit on their face, as opposed to the percentage of the litigation devoted to the resolution of the core trade secret claims, or even the more marginal, but unsuccessful trade secret claims for which plaintiffs presented a modicum of proof close quote and quote, based on the court's own experience in commercial disputes and its supervision of this particular litigation. The court finds that 25% is a fair and just the approximation of the time devoted to the former category and thus a sound basis for a fee award close quote. So that's how the court apportioned an attorney fee award in that case, turning to the second case that dealt with in part sealing of records in trade secret cases, this was a case out of the central district of California, uh, just a few days ago, and this was another classic trade secret case in which the plaintiff's alleged certain employees took confidential information for use with a competitor, the businesses that issue involved geospatial imaging that can be used for insurers, contractors and governments.

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The plaintiffs moved for a TRO and filed certain documents containing alleged trade secrets under seal. But the court noted that quote, a particular rise showing of good cause is required. And while protection of trade secrets may constitute good cause for sealing records, the plaintiffs quote, however, are required to show that there is good cause to seal each document. That is the subject of their application close quote. And here the judge said the plaintiffs have quote failed to articulate with any particularity why the redacted portions of its application and declarations merit protection under seal, nor have they articulated. Why each of the 33 exhibits they designated to file under seal merits protection from public disclosure in their entirety close quote, the motion to seal was denied. And why is that important? Because parties frequently filed trade secret information or alleged trade secret information under seal in court.

Jordan Grotzinger:

It's good to know what kind of showing you need to make. If you need to do that. In one of these cases here, turning to the merits, the TRO was denied as well. The defendants made a showing that the parties had actually entered into an NDA to discuss a potential business opportunity and any confidential information was disclosed in accordance with that NDA. But here are the plaintiffs. Didn't mention the NDA in their papers. Let alone try to explain why it didn't apply here. Thus, the court said the plaintiffs could not show a likelihood of success on the merits. So what are the takeaways first as to attorney's fees courts use a two-part test to analyze whether trade secret claims have been brought in such bad faith as to warrant attorney's fees. And those two parts are one, whether the claims were entirely baseless or objectively specious and two, whether the claims were made or pursued in subjective bad faith or for an improper purpose.

Jordan Grotzinger:

Also, the court has discretion to a portion of fee award based on what parts of a trade secret case had merit and what did not, and a moving or opposing party should, should address this apportionment as appropriate. Uh, like the judge did in the first case we discussed third when moving to seal trade secrets or alleged trade secrets, it's a good idea to make a particular rise that is redaction by redaction or document by document showing. And lastly, when moving for provisional relief, like a temporary restraining order, don't omit material facts, like an NDA that goes to the merits of whether any disclosure was authorized. That's an elephant in the room. And if you don't address it, it's going to be a problem to prove your case at that stage. That's it. Everybody hope everyone is well safe and look forward to the next episode. Talk to you.

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Jordan Grotzinger:

Okay. Okay. That's a wrap. Thanks for joining us on this episode of the trade secret law evolution podcast as the law evolves. So will 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 at GROTZINGERJ@gtlaw.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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