Jordan Grotzinger (00:05):

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 00:00:21].

Jordan Grotzinger (00:25):

Hi, everybody. Welcome to episode 41. We're going to be discussing two subjects today that really should offer some practical help on dealing with routine, but important issues that arise in trade secret litigation. The first subject is uniform trade secret act preemption or super session, and the risk of what's called shotgun pleadings. And secondly, we're going to discuss the showing required to file trade secret information under seal. So these are principles that are not often addressed in case law like trade secret identification, and so many other subjects that we address a lot, but some practical decisions that can guide you moving forward as you practice in this area, which is what we look for when deciding what cases to discuss.

Jordan Grotzinger (01:24):

So the first subject is preemption and the risk of shotgun pleadings. This case was from September of this year, out of the Southern district of California. And in the case, the plaintiff alleged that the defendants violated the Federal Defend Trade Secrets Act and California Uniform Trade Secrets Act, along with the California Business and Professions Code, Section 170200. I'll get to that in a minute, asserting that the defendants engaged in unfair competition and misappropriated the plaintiff's trade secrets relating to the plaintiff's antiviral nasal spray technology.

Jordan Grotzinger (02:06):

Now the California Business and Professions Code 17-200 is a statute also known as California's Unfair Competition Law or UCL. And it's essentially a law that says, if you engage in conduct that is unlawful, unfair, or fraudulent, there might be a path to recovery based on that conduct. And I'm not going to get into more details since that's a whole separate conversation, but often in business litigation, including trade secret litigation, you will see a 17-200 claim or a UCL claim kind of tagged onto the complaint in addition to trade secret misappropriation and related claims.

Jordan Grotzinger (02:52):

So back to the allegations in the case. The plaintiff alleged that the defendants used confidential, proprietary, and trade secret information obtained by an individual defendant who worked for a private equity fund that had negotiated with the plaintiff about business opportunities to launch a competing antiviral nasal spray product. The plaintiff also asserts its product has the potential to inactivate rhino viruses and novel respiratory pathogens, such as COVID-19, making the product the first of its kind. Thus the plaintiff contends, it will be irreparably harmed by the defendant's exploitation of the allegedly stolen intellectual property.

Jordan Grotzinger (03:39):

The defendants moved to dismiss, but the court found that the plaintiff had alleged enough at the pleading stage to state claims under the Defend Trade Secrets Act and the California Uniform Trade Secrets Act. However, as to the UCL claim, the court found otherwise. Based on the doctrine of

preemption or super session, which we've addressed before. Now, the courts summarize the doctrine as follows, "California law renders common law and statutory unfair competition claims preempted under the California Uniform Trade Secrets Act if the claim asserts the same nucleus of facts as the trade secret misappropriation claim. This is due to the exclusive nature of the California Uniform Trade Secrets Act civil remedy, which supersedes alternative civil remedies if identical facts are used based upon misappropriation of a trade secret."

Jordan Grotzinger (04:39):

The court also noted, "The determination of whether a claim is based on trade secret misappropriation is largely factual, therefore statutory unfair competition claims relying solely on the factual allegations made for a trade secret misappropriation claim are preempted." Here, the defendants argue that plaintiff fails to allege specific facts in support of unfair competition, "apart from facts shared with plaintiff's allegations of trade secret misappropriation." And the court agreed. The interesting thing about this case is why the court agreed and that's because the plaintiff used what's called a shotgun pleading. A shotgun pleading, and a pleading for the non-lawyers is just essentially in this case, it's the lawsuit itself, the complaint. That is your pleading, it's where you state your causes of action and your factual allegations.

Jordan Grotzinger (05:38):

So a shotgun pleading incorporates all proceeding paragraphs of a complaint into a cause of action. For example, the structure of a complaint is usually an introduction, some paragraphs about why the court has jurisdiction. Some introductory about the identity of the parties, and then a bunch of paragraphs with factual allegations. After that, there will be a list of what's called causes of action or claims. And in this case, you'll have a cause of action for trade secret misappropriation. You'll have a cause of action for a UCL claim. And what they did here and what a shotgun pleading is, is that for example, if the UCL claim appears after the trade secret misappropriation claim, the first paragraph of that claim will say something along the lines of plaintiff hereby incorporates paragraphs one through 64 or whatever below as if fully set forth here in. So that's what a shotgun pleading is.

Jordan Grotzinger (06:49):

The court found as to the plaintiff's attempt to assert a UCL claim, in addition to a California Uniform Trade Secrets claim, "It is impermissible if it fails to connect its factual allegations to the elements, compromising plaintiff's claims and denies parties' information on which allegations support each cause of action." And here, "The plaintiff uses a shotgun pleading by way of the phrase 'incorporates all of the above paragraphs as though fully set forth herein' to prelude it's 17-200 cause of action." So the court said, "Through this shotgun pleading strategy, plaintiff limits the contentions it uses for its 17-200 cause of action to paragraphs one through 64." So that's why 64 was in my head. "Plaintiff does not allege distinct facts in its complaint that differentiate its 17-200 claim from its CUTSA claim."

Jordan Grotzinger (07:57):

That's the acronym for California Uniform Trade Secrets Act. "In its opposition, plaintiff continues to use the same nucleus of facts to propose its alleged alternative legal theories." So, "Although plaintiff may proport a difference between the theories, the nucleus of facts each theory relies upon remains the same." Also the court said, "Each sentence claims either unlawful, fraudulent, or unfair actions, but does not enumerate which facts in paragraphs one through 64 support these conclusions." And plaintiff's opposition to defendant's motion to dismiss "does not provide adequate clarification on this matter."

Jordan Grotzinger (08:47):

Thus, "From the framing of the plaintiff's unfair competition claim, plaintiff has not alleged any factual allegations different from its CUTSA claim. The court finds it beneficial to provide a chance to clarify it's unfair competition claim and provide facts materially different from the facts asserted in the trade secret misappropriation claims to avoid preemption." That is the court dismissed the UCL claim, but without prejudice, meaning it gave the plaintiff a chance to amend its complaint, to try to specify what different facts might support a UCL claim, meaning facts different from the ones that support the trade secret misappropriation claim.

Jordan Grotzinger (09:34):

Okay. As always, we'll get to our takeaways at the end, but first the second case, and this case is somewhat routine and short and it's a court order on a trade secret plaintiff's motion to publicly file their amended complaint with redactions and to file under seal and unredacted copy. What that means in English is the plaintiff wanted to file a copy of its complaint, its lawsuit, with the trade secret information redacted out, but so that the court knew what the trade secret information was. It proposed to simultaneously file an unredacted copy, but under seal. So the public could not get it, which of course would destroy the trade secret status.

Jordan Grotzinger (10:22):

So it sounds like kind of a boring case, but it's important because there's always a sensitivity about how much to disclose in a pleading if you're a trade secret plaintiff and there's also the balance between publicly disclosing a trade secret in a court record, which you obviously don't want to do because it destroys trade secret status, with the particularity requirements in trade secret pleadings that we've discussed for the last two years.

Jordan Grotzinger (10:50):

In other words, you don't want to be too specific because if you put your trade secret information in a court record, it's gone. It's not a trade secret anymore because it's not a secret. On the other hand, as the listeners all know, if you're too vague in pleading the identification of your trade secret, your claim will be dismissed. So the court in this case had previously emphasized that sealing requests, "must explain with specificity why each proposed redaction meets the standard for ceiling." "The factors relevant to a determination of whether the strong presumption of access is overcome include the public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets."

Jordan Grotzinger (11:54):

Thus, "Courts often seal business information that might harm a litigant's competitive standing. In general compelling reasons sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such court files might have become a vehicle for improper purposes, such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets."

Jordan Grotzinger (12:28):

However, the burden is on the plaintiffs to demonstrate that "each proposed redaction covers material that is in fact a trade secret or as at least business information that might harm a litigant's competitive

standing. The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not without more compelled the court to seal its records." Here, the court found, "Plaintiff's explanations are vague and conclusory. Plaintiffs frequently state without explanation that disclosure of the information that is subject to the sealing request would cause 'competitive harm,' that the information is 'confidential, non-public, or secret,' or that allowing others to obtain the information would allow them to exploit it." But the court said, "These conclusory statements do not aid the court and understanding why or how certain information could cause competitive harm.

Jordan Grotzinger (13:33):

And the majority of the proposed redactions do not appear sensitive on their face. As illustrative examples. It is unclear how the information that has been redacted from paragraphs 19 and 54 could be considered a trade secret or why the public disclosure of that information could result in tangible harm. Although there are generic references to customers, pricing information and the like, no actual customer's pricing terms or other specifics are revealed."

Jordan Grotzinger (14:05):

Moreover, "The mere fact that the information is currently nonpublic or that one or both parties would prefer to keep the information secret or consider it confidential does not establish grounds for sealing." Thus, the court denied that motion without prejudice sending the plaintiff's back to the drawing board, if they want to file a renewed motion to seal.

Jordan Grotzinger (14:32):

So now for our takeaways. First, if you're trying to assert a UCL claim or other claims besides trade secret misappropriation in a trade secret case, a shotgun pleading of that claim generally is bad practice. To avoid preemption or super session, you should try to enumerate, itemize which facts support which causes of action. So you can demonstrate that it's not the same facts that underlie the trade secret cause of action, which will result in super session. Second, in a motion to seal trade secret information, the burden is on the plaintiff to demonstrate that, "Each proposed redaction covers material that is, in fact, a trade secret or is at least business information that might harm a litigant's competitive standing. The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not without more compel the court to seal its records." All right, that's it for this episode, we will see you next month. Thanks everybody.

Jordan Grotzinger (15:45):

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 Podcast, Stitcher, Spotify, and other platforms. Thanks everybody. Until next time.

Speaker 2 (16:17):

Greenberg Traurig has more than 2,000 attorneys and 39 offices in the United States, Latin America, Europe, Asia, and the Middle East. GT has been recognized for its philanthropic, giving, diversity, and

innovation, and is constantly among the largest firms in the US on the [inaudible 00:16:33] 360 400 and among the top 20 on the AmLaw Global 100

Speaker 3 (16:37):

Content is for informational purposes only and does not contain legal or other advice and/or opinions. For more information, please visit the IT.LY/GT law disclosures. This podcast is eligible for California self study CLE credit. Certificates of attendance will not be issued. California attorneys are responsible for self-reporting the amount of time they listened. For all other jurisdictions, please contact your state's MCLE board or committee for guidance on their rules and regulations as it relates to the self study credit.