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Jordan Grotzing...: 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 [00:00:30] your company's most valuable assets. I'm your host, Jordan Grotzinger.

Hi everybody. Welcome to episode 46 of the podcast. Let's jump right in. The subjects this month are the intersection of trade secret laws and public records acts, trade secret identification, one of our favorite issues, and pleadings and the supersession doctrine, which we haven't dealt with in a while.

The first case about the intersection of trade secret [00:01:00] law and public records acts was a case out of the Supreme Court of Nevada in March of this year. And, the opinion began with a nice concise conclusion, which is, quote, "Nevada's public records law shines a light on government conduct. It permits Nevadans insight into whether the officials they elect are holding true to their promises. But, this law's illumination ends where the statutory confidentiality [00:01:30] provisions begin." Closed quote. In this case, the Nevada Supreme Court considered, quote, "Whether the federal Defend Trade Secret Act prohibits disclosure under the Nevada public records act." We're going to abbreviate that NPRA. "Of documents from pharmaceutical companies and pharmacy benefit managers collected under Senate Bill 539."

A newspaper petitioned the district court [00:02:00] to order the Department of Health and Human Services to release such documents, arguing that the documents constituted public records that must be made available to it. The district court determined that the information in these documents comprised trade secrets protected under the DTSA, Defend Trade Secrets Act, and that the documents thus were not subject to disclosure under the NPRA. Closed quote. So, the newspaper appealed. [00:02:30] A year after the 2016 enactment of the Defend Trade Secrets Act, the Nevada governor signed Senate Bill 539 into law, which requires pharmaceutical manufacturers and so-called pharmacy benefit managers or PBMs to submit to DHHS documentation regarding the cost structure of insulin medication in Nevada. It also requires DHHS to compile lists of essential [00:03:00] diabetes medications, manufacturers to report the pricing information and justify any price increases, and PBMs to disclose the rebates they negotiate.

Senate Bill 539 also amended the Nevada Uniform Trade Secrets Act to exclude from trade secret protection information that a PBM is required to report under Senate Bill 539. But, after litigation over [00:03:30] that exclusion, the DHHS promulgated regulations to try to harmonize the Senate bill, the Nevada public

records act and the Defend Trade Secrets Act. And, we're going to refer to those as, quote, the regulations. Stick with me here. Later, the newspaper sought the names of pharmaceutical manufacturers and PBMs that submitted annual reports pursuant to Senate Bill 539 and the annual reports themselves.

[00:04:00] In response, DHHS provided the names of manufacturers and PBMs and some general information about the diabetes drugs, but did not disclose other parts of the reports, including costs, administrative expense and profit margin information. The DHHS explained that it believed disclosing this information would constitute trade secret misappropriation under the Defend Trade Secrets Act and under the regulations.

[00:04:30] As a result, the newspaper filed an action in the district court to compel disclosure under the NPRA, the Nevada Public Records Act, and to challenge the validity of the regulations. A pharmaceutical company that submitted records pursuant to Senate Bill 539 intervened and presented an affidavit from a vice president attesting to the steps the company took to safeguard its trade secrets and the potential economic hardship it would suffer [00:05:00] from the trade secrets' disclosure. Among other things, the affidavit said that pricing inputs and rationale are restricted internally within the company and are shared on a need to know basis only, subject to non-disclosure agreements. Also, the public disclosure of this information could be used by competitors and customers in price negotiations with insurers, to the company's financial detriment.

The district court denied the newspaper's [00:05:30] petition, holding that, quote, "The DTSA's definition for trade secrets places these reports squarely under confidentiality protections since DHHS demonstrated that the reports are subject to reasonable efforts to maintain their secrecy and that the reports derive independent economic value from such secrecy." Closed quote. And, the district court found that the regulations are valid regulations because [00:06:00] the DHHS has broad discretion to develop regulations that, quote, "foster efficient enforcement of codified legislation." Closed quote. In this case, Senate Bill 539. And, DHHS reasonably interpreted the governing statute in adopting the regulations.

The district court opined that these regulations, quote, "ensured that NPRA, the Nevada Public Records Act, requests for information [00:06:30] had gathered due to Senate Bill 539 did not run afoul of the Defend Trade Secrets Act because while the regulations' confidentiality protections are not automatic, they ensured that the affected entity had the opportunity to contest the release of what it believes to be confidential information in court." Closed quote.

So, the newspaper appealed. First, the Supreme Court held [00:07:00] that the regulations, which attempted to harmonize Senate Bill 539, the Nevada Public Records Act and the Defend Trade Secrets Act, are valid. The regulations, quote, "permit a manufacturer or PBM to submit a request for confidentiality to DHHS

to prevent public disclosure of any information it reasonably believes could lead to the misappropriation of a trade secret under the DTSA. [00:07:30] The requesting manufacturer or PBM must describe the information it seeks to protect with particularity and explain why public disclosure would lead to misappropriation of a trade secret under the DTSA." Closed quote.

Administrative agency regulations, the court reasoned, are presumed valid. They just can't contradict unambiguous language of the statute at issue. Here, the court said the regulations do, quote, "not [00:08:00] act as unilateral bar on disclosure of documents otherwise entitled to be part of the public record. They merely create a process by which DHHS can determine whether the requested records fall within the DTSA's protection of trade secrets. Should DHHS determine that the DTSA does not afford the records such protection, the regulations place the burden on the pharmaceutical company or PBM to challenge [00:08:30] the DHHS' determination in court." Closed quote.

Second, the Supreme Court held that the requested information constituted trade secrets. It recited that the DTSA classifies as trade secrets information, quote, "A, that the owner has taken reasonable measures to keep secret and B, from which the owner derives independent economic value that is not readily ascertainable through proper means by an entity [00:09:00] that can obtain economic benefit from the information's disclosure." Closed quote.

And again, as we've discussed a lot on this podcast, in plain English that means a trade secret is basically any information that is actually secret, valuable to the owner and to the competitors of the owner because of its secrecy, and subject to reasonable measures to maintain that secrecy. The government bears the burden of demonstrating [00:09:30] by a preponderance of the evidence that the public records at issue are confidential. Here, the DHHS places significant limitations on who has access to the requested records and privatizes the information that is shared, and the manufacturers and PBMs have submitted requests for confidentiality to prevent the release of their trade secrets.

Also, the declaration from the pharmaceutical company supports [00:10:00] that the company restricts access to pricing information and rationale and the requested records which identified, quote, "drug cost structure, marketing and advertising costs, rebate strategies and profit information comprise trade secrets under the DTSA because the manufacturers and PBMs derive independent economic value from this information not being generally known." [00:10:30] Closed quote.

Thus, quote, "the NPRA, the Nevada Public Records Act, permits the disclosure of government documents that are not declared by law to be confidential. In this opinion, we hold that the requested documents are confidential under the DTSA and are thus exempted from disclosure under the NPRA, Nevada Public Records Act." Closed quote. And, as with every episode, we'll get to the [00:11:00] takeaways from that opinion.

The second case we'll discuss involves trade secret identification in pleadings and the supersession doctrine. This was a case out of the Eastern District of California from this month, April 2022. In that case, the plaintiff provides software to milk processors and dairy cooperatives, including a payroll application that allows users to comply with minimum milk prices that need [00:11:30] to be paid to dairy producers, among other things. This case concerned a plaintiff customer that used the payroll application and the defendant's, which provide cloud-based software to the dairy industry. The plaintiff alleges that defendants and the customer engaged in discussions resulting in the customer entering into a software and services agreement with defendants.

Later, the customer gave notice to plaintiff that it was terminating [00:12:00] all subscriptions with the plaintiff. Plaintiff also alleges that the customer and defendants had a call in which they discussed, quote, "confidential and trade secret information regarding plaintiff's payroll application and reporting capabilities." Closed quote. And, after the call, customer employees allegedly shared with defendants reports generated from plaintiff's software and plaintiff claims the user agreement it had with customer, with [00:12:30] the customer, restricted the customer from sharing those reports.

So, the plaintiff sued the defendants for misappropriation under the Defend Trade Secrets Act and the California Uniform Trade Secrets Act, which are substantively close to identical, and also sued for interference with contractual relations. The court stated the test for identifying trade secrets at pleadings, which is that plaintiff was required to, quote, "describe the subject [00:13:00] matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons skilled in the trade." Closed quote.

Here, the complaint includes a section titled, quote, "Description of Dairy's Trade Secret." Closed quote. In which the plaintiff outlines the federal regulations that its software attempts to comply with through its payroll application. Then, the plaintiff lists [00:13:30] the features of the payroll application that help clients comply with the regulations and decide whether to, quote, "pool their milk purchases." Next, the plaintiff states that the alleged trade secret is within the payroll application. Closed quote.

Defendants argue that the alleged trade secret, quote, "lacks boundaries because the first amended complaint states the trade secret information is including but not limited to the pooling methodology and the pooling [00:14:00] methodology is amongst plaintiff's trade secrets." Closed quote. However, the court said, that language is distinguishable from other cases where the complaint included, quote, "a non-exhaustive list of trade secrets" and alleged that the defendant had misappropriated, quote, "any number" closed quote of unidentified trade secrets.

You may recall if you've been listening to a while it's a little risky for purposes of trade secret identification to [00:14:30] include that sort of catch-all including but not limited to language because it invites an argument that you're not sufficiently identifying all the trade secrets at issue precisely because you included that language. And, you know, which the proponent would beg... Say begs the question, well, what are the other trade secrets?

Here, the court said the complaint specifically identifies the pooling methodology as a trade secret and does not include [00:15:00] a, quote, "non-exhaustive list." Closed quote. Further, the court noted at the pleading stage, quote, "It is not fatal," closed quote, that plaintiffs', quote, "hedging language left open the possibility of expanding its identifications later." Closed quote. Thus, the court concluded that the complaint sufficiently identifies the trade secret with particularity without spelling out, quote, "the details of the trade secret, as doing so [00:15:30] would mean that the complainant would have to destroy the very thing for which it seeks protection." Closed quote. That is the technology's secrecy. So, quote, "Defendants can ascertain that the trade secret is the pooling methodology used in the payroll application within plaintiff's software." Closed quote.

Now, as to the interference with contract claim, the court noted that the elements of that claim are, quote, "one, a valid contract [00:16:00] between plaintiff and a third party, two, defendants' knowledge of this contract, three, defendants' intentional acts designed to induce a breach or disruption of the contractual relationship, four, actual breach or disruption of the contractual relationship and five, resulting damage." Closed quote.

While the complaint alleged those elements, the issue was whether the California Uniform Trade Secrets Act [00:16:30] supersedes the claim. The court noted, quote, "The California Uniform Trade Secrets Act provides the exclusive civil remedy for trade secret misappropriation under California law. Other civil remedies that are not based upon misappropriation of a trade secret and contractual or criminal remedies are not superseded. The California Uniform Trade Secrets Act supersedes claims that are based on the same, [00:17:00] quote, nucleus of facts as trade secret misappropriation." Closed quote.

Here, the court found the interference claim alleges defendants, quote, "induced the customer to breach its confidentiality obligations and terminate its agreement with plaintiff by requesting that the customer provide confidential non-trade secret information about the structure, [00:17:30] functionality and operation of plaintiff's software." Closed quote. Thus, the court said the plaintiff's intentional interference claim focuses on, quote, "non-trade secret information which is different than the trade secret upon which plaintiff's California Uniform Trade Secret Act claim relies." Closed quote. Therefore, the interference claim was allowed to survive at pleadings.

[00:18:00] But, it is unclear whether that ruling was correct, as other recent case law interpreting the California Uniform Trade Secrets Act has held that it, quote, "serves to preempt all claims premised on the wrongful taking and use of confidential business and proprietary information, even if that information does not meet the statutory definition [00:18:30] of a trade secret." Closed quote.

So, that's what the opinion said. I'm not quite buying it yet because it doesn't really reconcile those other cases which are good law and rightfully recognize that the California Uniform Trade Secrets Act is designed to, as it says in the title, uniformly set the legal treatment of confidential information.

So, to the takeaways. [00:19:00] One, in Nevada and presumably other jurisdictions, public records acts are not an exception to trade secret protection so long as a showing is made as to the elements of a trade secret. That is, secret valuable because of its secrecy and subject to reasonable measures to maintain the secrecy. Two, to meet the pleading test that a plaintiff is required to, quote, "describe the subject matter of the trade [00:19:30] secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons skilled in the trade," closed quote, try to identify the features of the trade secret without giving away the actual secret like when the plaintiff in the Eastern District of California case listed the features of the payroll application that helped clients comply with regulations and decide whether to pool their milk purchases. [00:20:00] If you do this, then hedging language like including but not limited to should not be fatal.

And, finally, the third and last takeaway is that the California Uniform Trade Secrets Act supersedes claims that are based on the same nucleus of facts as trade secret misappropriation. And, although our recent case held that inducing a party to disclose confidential non-trade secret information isn't superseded, other [00:20:30] perhaps better reasoned cases hold otherwise, treating all confidential information as encompassed by the Uniform Trade Secrets Act and the supersession doctrine.

Hope that helps everybody. Talk to you next month. Bye.

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