TRADE SECRET LAW EVOLUTION
GREENBERG TRAURIG
EPISODE 45
"THE HEAD FOLLOWS THE HEART" – Building a Case from Suspicion to Seven-Figure Jury Verdict

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

This is episode 45 of the Trade Secret Law Evolution Podcast. We're pushing 50 here, which is remarkable to me. And our guest this month is our colleague, my partner, Rich McCrea out of our Tampa office. And, Rich, I'll let you introduce yourself, but just a [00:01:00] quick shout out to the Tampa office and you and David Weinstein who manages it. I really consider your office to be one of the gold standard offices of GT, just super high quality across the board. And luckily, even though I'm in California, I've had the good fortune to work with a lot of you guys over the years and I really enjoy it. So I'm glad you're on. And we've got an interesting case to talk about. Rich, why don't you say a few words [00:01:30] about you and your practice?

Richard McCrea: Well, first Jordan, let me thank you for inviting me today. And I've been with GT since 2007, but I've been in Tampa practicing law for about 40 years now. I moved here in 1982 from the Garden State, New Jersey, and I've been here ever since.

Jordan Grotzinger: Great. And as we were talking about before we hit record, that is where I grew up. So we have some common ground. You're a very accomplished trial lawyer. You've tried a lot [00:02:00] of cases around the country, I understand, including some trade secret matters. And when we met, when I was visiting in Florida a few weeks ago, we talked about one of your cases, one of your trade secret cases that actually went to verdict, and you were telling me about it and how you developed it over the years, because it was not necessarily the standard, okay, client calls. Here's the problem, sue, get your injunction, go [00:02:30] through the motions of litigation in its normal course. Instead, the case really started with some suspicions that you had to dig deep to uncover. So, why don't you tell us about how this arose, I believe in around 2015?

Richard McCrea: Yeah. This case was different than a lot of other trade secret cases. Oftentimes you're lucky because the client has, or after you get involved, you caught someone red handed, downloading information. [00:03:00] In this case, we didn't have any of that. The client, Financial Information Technologies, known as Fintech, was a pioneer and had revolutionized payment processing between retailers and distributors in the alcoholic beverage industry. This client had spent 14 or 15 years developing its technology and was the only player that could do what it did, which was to within 24 hours process electronically [00:03:30] payments between distributors and retailers of alcoholic beverages.

This is important because unlike other things that you can buy, we are usually dealt with on a consignment basis, many states as a result of prohibition require payment upon delivery of alcoholic beverages. So for years and years, a truck would pull up to the back door, drop off cases of beer, and the owner would have to write a check or give cash to the truck driver. [00:04:00] And Fintech was able to develop a system for simultaneous electronic transfers. They called me in sometime in the late summer of 2015. And all they had was suspicion, because suddenly a competitor had emerged. They were unaware of it. And they could not imagine how the competitor had developed its system when it took them 14 or 15 years before they turned to profit, [00:04:30] investing millions of dollars into this technology.

Jordan Grotzinger: So I'm glad you explained the history of this business and how this technology came into play, because when you first mentioned payment processing for alcoholic beverages, I'm thinking to myself, there's plenty of payment processing technology, why can't any business, alcoholic beverages or whatever, use existing technology? So it's interesting how you explained [00:05:00] how specific needs arose from prohibition. And, of course, it's critical in the trade secret context that Fintech, our client, was really the only player, because that, of course, goes to whether other public technology, or I should say available technology exist. But if it's the only player then straight out of the gate, you would think, it's got a pretty strong position [00:05:30] that its technology is actually secret and protectable as trade secrets.

Richard McCrea: And it's far more complex than the way I described it, because they had to develop a common language, all of the distributors had different invoices with different descriptions of their products. And they had to translate this into a common language. And they had to account for things like local taxes, partial cases. And again, they started this process in 89 or 90, [00:06:00] and they did not turn a profit for 14 years. And all they had when we first met was the fact that two of their former employees, one in sales and one who had been in IT was now working for this competitor in Maryland. And they had some evidence that the competitor, I Control, was using its forms, which is hard to prove as a trade secret because you're passing them out to customers and potential customers. [00:06:30] But really it was a macro issue that there was no way that they believed that the competitor could have developed a competing

technology in a short amount of time without an enormous investment of capital.

Jordan Grotzinger: So we spend approximately 14 years, and I think I heard you say millions of dollars developing this technology, which didn't exist, we really were the only player. And then all of a sudden you're telling me this competitor [00:07:00] seemingly pops out of nowhere and is able to do what we do. And two former employees of our client are working at the competitor.

Richard McCrea: Yes. And just to give you a little history, this competitor iControl in Maryland had gotten started in the business in 2012. And by April, of 2013, they had a pilot program with some grocery stores in the Midwest. So if you can compare that to the 14 years of development, you can see [00:07:30] unless they had an army of processors and analyst, and enormous infusion of cash, it was complete disproportionate in terms of how much time it took them to get into the market. But I told them, you really have no hard evidence of misappropriation.

And so I counseled them to take a slower shore path, which is to bring suit against the two former employees, both of whom, by the way, were beyond the term of a [00:08:00] one year non-compete, but to sue them on account of the forms and on account of some disparaging statements they had made to customers about our client. And to really use those two lawsuits as a way of developing evidence, if any existed, of misappropriation by their new employer. It was parallel to the way they developed the technology. Fintech was willing to invest in the process, take the long road to develop evidence, which [00:08:30] at that time we were unsure whether it would ever emerge of misappropriation, but in fact, it did.

Jordan Grotzinger: So you had actionable evidence against these employees for things like disparagement on which you could comfortably bring a claim, but you didn't quite have a misappropriation case yet, I think that's what I'm hearing.

Richard McCrea: Right. And I suspected that if we brought a misappropriation case, because we would be in federal court against a Maryland company, [00:09:00] we probably, we ran the risk of having our case thrown out on summary judgment before we had an opportunity to get the evidence we needed. And so it turned out to be the approach that worked, even though it took a long time.

Jordan Grotzinger: So, you're referring generally to the stricter evidentiary standards in federal court. And so part of your strategy, it sounds, was, not only were you not ready and ultimately [00:09:30] your suspicions were correct as, spoiler alert, but no surprise. But part of the strategy was to make sure you were in the right forum, so that as you develop this evidence, which you suspected you would find, and ultimately did, you wouldn't get premature cutoff on summary judgment under the harsher federal standards, let's say, than the often more liberal standards in state court?

Richard McCrea: Exactly right. Summary judgment standard, [00:10:00] at least at that time, was far more lenient in state court.

Jordan Grotzinger: So you sued the two employees. Was it Maryland state court?

Richard McCrea: No, we were here in Florida because they both worked, they had worked for Fintech in Florida. And we had some venue provisions in confidentiality agreements that we relied upon and choice of law provisions. And so we started down the road and basically took a number of depositions. And everyone [00:10:30] maintained that these two individuals had no role whatsoever in the development of iControl's technology. And then in Washington, we took the deposition of one of the former founders of iControl and its former COO who left and apparently was less than pleased with how he left. And he told us that one of these two former employees, Mark Lopez, had actually been working for over [00:11:00] a year over 18 months as an independent contractor for iControl from his home in California, while iControl was in the process of developing its technology.

Fintech didn't know this before, up until that time iControl was maintaining that Mr. Lopez had no involvement in the development of this technology, and Mr. Harris, this was the former founder, also testified that Mr. Lopez was directly involved [00:11:30] in writing software to develop iControl's capabilities in this market. That was really a big moment for us. Ironically, the same day in Washington, I took the deposition of iControl's chief technology officer who testified unequivocally that Mark Lopez had absolutely no involvement in the development of iControl's software, or database capabilities.

Jordan Grotzinger: So you've got a founder who [00:12:00] testified that Lopez, the bad actor at that point, had worked as an independent contractor for iControl for almost two years before formal employment. Was that founder the disgruntled one? I guess so.

Richard McCrea: Yes. Yes. I don't want to say he was forced out, but he left and I guess because he was on the outside, he was more willing to be candid and honest in his deposition. [00:12:30] Like I said, everyone else we had deposed prior to that date was adamantly denying that Mr. Lopez had any involvement in iControl's development of its processes.

Jordan Grotzinger: So the founder gives you some helpful evidence, helpful in that it seems to be approaching proof of possible misappropriation, but on the same day, the CTO testifies to the opposite and [crosstalk 00:12:56].

Richard McCrea: Correct.

Jordan Grotzinger: ... that Lopez had nothing with the development of this technology. [00:13:00] So, here you are, you've got, the evidence is getting hotter, so to speak, what do you do?

Richard McCrea: So at that point, we decide that we have enough information to go ahead and sue iControl in federal court for misappropriation of trade secrets. The testimony also allowed us to get a second shot at deposing, Mr. Lopez. It turns out that he had a series of independent contractor agreements with iControl. It took us a while, [00:13:30] but we finally got a copy of one of them. And it was as close to a smoke gun as we would find in the case.

Jordan Grotzinger: How's that?

Richard McCrea: There was a scope of services attached to it. And it said that he was being paid as an independent contractor. And the words were very interesting, because it said he was to deliver, not assist, not perform, but to deliver specific technologies to iControl in support of its alcohol payment processes, which we, of course, argued [00:14:00] in closing argument that words have meaning, that deliver meant just what it said, that he was to bring to iControl what he had learned when he had been at one point the head of IT at Fintech and was intimately aware of all it's technology.

Jordan Grotzinger: I was going to ask you what his role was at Fintech, because that language in the independent contractor agreement sure does sound like smoking gun type language. It says I'm [00:14:30] going to deliver the technology that I was familiar with at my old company for my new company. And so my question was going to be, but you answered since he was the head of IT, he was intimately familiar with that tech when he was with our client.

Richard McCrea: Right. And he had been there for a long time, his last role, he was over the technology department, but earlier he was actually an analyst, he was developing the software code. [00:15:00] And so he knew intimately how Fintech, how its processes worked from a computer standpoint.

Jordan Grotzinger: So he was developing software code among other things. But I understand that you and the client had some hesitation rightfully so about comparing software code. Can you talk about that a little bit? And if that's the case, what did you do to prove, [00:15:30] on top of that bad language, which is very suggestive of misappropriation, you had more, but you were concerned about going down the software code comparison route. So what did you do?

Richard McCrea: I was not reluctant to go down that route, but my client was extremely reluctant because as I said before, the [inaudible 00:15:49] and dollars it had invested in this process, it did not trust that even under a court confidentiality order, that that information wouldn't leak [00:16:00] out. And so it told us that we were not going to disclose that, which made it more difficult to prosecute our case, would've been a lot easier to compare our software to iControl's, but so essentially we had to nibble around the edges and rely upon some emails, very few emails were produced by iControl, even though there was deposition testimony that during the 20 months Mr. Lopez [00:16:30] was writing software,

he was living in California and he was emailing the software to iControl in Maryland.

iControl maintained that it didn't have any emails. And which seemed to be an obvious gap. And we did manage to get a few emails. And contrary to the chief technology officer's deposition testimony, there were emails by him asking Mr. Lopez [00:17:00] to explain "how Fintech did it," or with respect to certain software features that iControl was developing and would release subsequently. So we did get some additional evidence, but frankly, when we tried the case, we tried the case heavily based upon what I told the jury were acts of deception, including in the lawsuit.

Jordan Grotzinger: Yeah. And I want to hear more about your [00:17:30] trial theme and how that resonated with the jury, but it's interesting to me just looking at trade secret litigation as a whole, you frequently run in if your case goes long enough in litigation, you frequently, particularly if you're the plaintiff, run into this awkward situation where you're not quite sure where to draw the line in terms of disclosing your technology, [00:18:00] even if it's under a protective order or under seal, which is an option, all of which are designed to protect the trade secrets, but understandably, look, the judicial system is at the end of the day, it's run by a bunch of human beings and nothing's perfect. And if you spend years and millions of dollars investing in technology, you could have the most iron clad protective order, or ceiling order possible and still [00:18:30] be concerned.

And so it's interesting, but not surprising, that our client had that concern and more interesting how you found a way, you called it nibbling around the edges, but found an alternative path to proof that focused on the how. And I also see that in a lot of trade secret cases and in terms of how to [00:19:00] prove trade secrets, no pun intended using how to prove, but the, how is often so important to show that a lot of elements of what is a trade secret, was the trade secret owner the only one who really knew the technology? Why is it unique and independently, or why does it have independent economic value? And the proof of how often goes to all of those elements? So it's [00:19:30] interesting to me how you decided to prove that up. So we get to trial, and you mentioned that your focus in large part was on the deception scene.

Richard McCrea: We tried the case for six days. The jury came back just before COVID hit. So this was very early part of March of 2020.

Jordan Grotzinger: Oh, wow.

Richard McCrea: I said before, I think it was a week later that COVID hit. But as I said before, I had first met with the client about this issue in [00:20:00] August or September, of 2015. So this was a long slog, but basically some of the things that we focused on, we started our case by playing the video deposition of the chief technology officer in deposition saying under oath, unequivocally that Mr. Lopez had no

involvement whatsoever in iControl's development of its software processes. We, of course, refuted that with Mr. Harris's testimony, [00:20:30] not only that his own emails asking how Fintech did it, we pointed out that there was a strange courtesy notification that Fintech received from iControl announcing that it was formally hiring Mr. Lopez. And this was sometime, I would say in March, of 2015. And we pointed out that it seemed rather odd that it formally announced that to Fintech for no current reason, but concealed [00:21:00] the fact that he had been working for it as an independent contractor for 20 months previously.

Jordan Grotzinger: Right. Why do that in other words.

Richard McCrea: Exactly. It was just very odd.

Jordan Grotzinger: Yeah.

Richard McCrea: IControl had never given its computer expert in California information that Mr. Lopez had worked for it for 20 months as an independent contractor, had never given its expert, the independent contractor agreement with the scope of services attached it, had never given its computer [00:21:30] expert any of the emails that we were able to find. Had never explained to its computer expert, the deposition testimony of Mr. Harris. And I argued that this was a deception and everyone knows there's no reason to be deceptive if you have nothing to hide. And so we had very strong evidence of deception, and again, argued [00:22:00] that iControl would not need to hide anything if it hadn't done anything wrong. The jury came back with a $5.7 million verdict, $2.7 million in compensatory damages and $3 million in exemplary or punitive damages.

The case went up on appeal. Recently, we got an order from the Eleventh Circuit affirming the jury's verdict that there had been misappropriation of trade secrets, affirming the $3 million [00:22:30] in punitive or exemplary damages, sending back to the judge the 2.7 million for some modification saying that there had to be some modification of that to cover, or account for variable cost, which are estimated between three and 10% of that number. So somewhere between 81,000 and 270,000 should have been discounted according to the appellate court to account for a variable cost. So, all in all, it was a long [00:23:00] process. Like I said, very unusual in that we had no hard evidence and it was a long uphill battle to get the evidence that we took to trial.

Jordan Grotzinger: How long was the jury out?

Richard McCrea: Jury was only out for about three hours.

Jordan Grotzinger: Oh, really? Wow.

Richard McCrea: Yeah. Yeah.

Jordan Grotzinger: Were you surprised by that?

Richard McCrea: No, really not. I long since stopped speculating what it means when they stay out long time or when they come back. I know they [00:23:30] don't stay out as long for civil cases as they do for criminal cases. But I felt pretty good, because we had some people on the jury, I actually was trying a morality play. And so I wanted people on the jury who were, I thought were moralistic. So I wanted people who seemed either deeply religious. Also, we had one preschool teacher. I wanted people who were very sensitive [00:24:00] to the difference between right and wrong. And so in asking for punitive damages, we asked that they send a message that this is not how American companies should be behaving. Normally I defend cases, or more often than not. So it was a rare moment for me to be closing with a, send the message type of closing argument.

Jordan Grotzinger: Did you use a jury consultant, or did you use your own judgment in trying to picture jurors that, as [00:24:30] you said, were particularly sensitive to right and wrong?

Richard McCrea: Well, we used a jury consultant and it was probably a year or more before trial. And we did that, not so much to find out, but we were worried about certain flaws in our case. And we wanted to find out how much people would rely upon them. There were certain behaviors and statements made by different people on our side of the case that might bleed in, in front of the jury. [00:25:00] And we wanted to see whether or not that would affect the jury's thinking. And what we learned was, as you often find out, the juries focused primarily on the evidence and not on extrinsic information about people's behavior.

Jordan Grotzinger: Right. Right. It's funny because you talk about the trial theme of deception and picking jurors who are sensitive to right and wrong. And in a way that sounds, well, you think to yourself, well, of course you would want that. But [00:25:30] I find that interesting. And also, this has been a unique discussion for this podcast, because usually we talk about developments and trends in case law and rulings on motions to dismiss, rulings on injunctive relief. And as you know, statistically speaking these cases don't get tried that much, because [00:26:00] among other things you see motions for injunctive relief frequently in this space. And often whether such motions, which are generally brought at the beginning of the litigation are granted or denied, that tends to spur a settlement.

So it was really great to hear how over a period of five years, you and your team and the client, as you said, not only [00:26:30] invested time and money in the technology itself, but slowly and methodically invested time and money on building a case that five years later, from clouds of suspicion, came this much more black and white proof of deception and right and wrong. So black and white, in fact that your jury [00:27:00] came back in three hours. Now, maybe

that's because they were worried about, we got to get the heck out of the courthouse because of COVID, but probably more because of your proof.

Richard McCrea: No, and I think it's difficult I think in these cases, even when you try them to a jury to get the jury to care, because you're talking about a corporation against another corporation. So, in the jury's mind, this is just money between two large entities. But I believe, and I'm sure you do that the [00:27:30] heart follows the head, rather the head follows the heart. And so once I think we covered some of the deception, I won't say lies because I didn't use that word in the courtroom. I think we got them caring about the case and I'd like to think that's why it didn't take them that long to figure out what they were going to do with it.

Jordan Grotzinger: So the format of this podcast usually is we talk about the cases and the developments and trends. And then we go with, [00:28:00] we list out a short bullet point list of hard takeaways. And I think a great, hard takeaway before we introduce our new segment, which I'll do in a second here, but I think the takeaway today is that the head follows the heart. And regardless of what you're proving, particularly in business litigation, whereas you said, these are jurors who have jobs, their minds are elsewhere. And they're going to sit there [00:28:30] and take time out of their busy lives to listen to a fight that in their minds might just be, it's about money. Of course, it's about more than that. It's about technology that was invested in for years, but to them who have never heard anything about this case, you've worked it for five years. They're sitting there, they're out of their element because they're not going to work or whatever they do during the day, and it's hard to get them to care.

And so I think a great takeaway, trade secret practice, [00:29:00] any litigation practice, is find a way to get your trier of fact to care. So the takeaway folks is, the head follows the heart. Don't forget that. And finally, and Rich, you will be the inaugural guest for this episode. And this is per the suggestion of our firm's CEO, Brian Duffy, who mentioned to me when we last talked about the podcast, he said, why don't you ask your guests at the end of the episode [00:29:30] to tell the audience something interesting about them. And Rich, I've known you for a few years now. And you've got a lot of interesting stories. So I'm going to defer to you on something interesting about you. It can have nothing to do with, in fact, I prefer it to have nothing to do with litigation, or trade secret law.

Richard McCrea: Well, I think I was formed a lot before I went to law school by three years I spent as a state trooper in New Jersey. And just [00:30:00] to get that role, I had to go through probably the most Darwinian experience of my life. We started with 220 people and after 20 weeks of bootcamp, only 66 survived. And most people quit. They were not kicked out, they quit. But essentially I spent three years, I worked on a New Jersey turnpike where guns and drugs went north into New York and then came back out in less than an hour with heroin and guns. And our job was to intercept [00:30:30] that flow. And so I really had to learn a lot of things that they don't teach in law school, which is interviewing and talking to all different types of people and relating to all different types of people. And I think

that gave me a big leg up when I managed to get through law school and start doing what we do.

Jordan Grotzinger: So that's going to be a hard one to top for future guests when I ask, tell me something interesting. I know if I were on the other side of this conversation, I would fall [00:31:00] far short of something that interesting. So thank you for that. That's quite a story. Rich, thanks so much for coming on and talking about this case and the strategy and how you built this from suspicions into a multimillion dollar affirmed verdict almost six years later. That was really, really interesting. Arguably my favorite episode really in 45 tries here. So thank you so much. That was great.

Richard McCrea: [00:31:30] Thank you. And once again, I really appreciate you asking me to appear today.

Jordan Grotzinger: 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 and 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 [00:32:00] Apple Podcast, Stitcher, Spotify, and other platforms. Thanks everybody. Until next time.

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