

## Trade Secrets Law Evolution: Episode 42: Year In Review

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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. Here we are for the Year In Review Podcast. I think this is the third year we're doing this, and this is episode 42. We are welcoming today a co-host, which is great, because since the pandemic, that's only happened about half of the podcast episode. Introducing my colleague, Charles Feigelstock, who is a new [00:01:00] attorney at GT and a first year who very recently passed the bar, right?

**Charles Feigelstock:** That's correct. And thank you so much for having me, Jordan. Very excited to be co-hosting you with this podcast.

**Jordan Grotzinger:** Yeah, it'll be fun. What's it been two weeks, three... No, it was right before Thanksgiving, right? That you passed the bar?

**Charles Feigelstock:** Yeah. I'm an attorney for about a month.

**Jordan Grotzinger:** There you go. All right. Why don't you take this episode? I'll just bow out.

**Charles Feigelstock:** Yeah. I mean, I have it handled. After a few weeks, you basically [00:01:30] know everything.

**Jordan Grotzinger:** There you go. I'm glad you're interested in trade secret law. And as we've done in the past for the Year In Review episode, we reviewed the cases that we discussed over the past year and pick the ones that we think are the most interesting. We had a lot to choose from. Here we go. The subjects that we'll be discussing in this episode are the concept of [00:02:00] sabotage as misappropriation, avoided costs as damages for misappropriation, the statutory definition of the term use within the Defend Trade Secrets Act, which, of course, is an important principle, proving damages even after you get a preliminary injunction, which is a pretty typical occurrence in trade secret cases, and finally, statute of limitations and specifically the concept [00:02:30] of continuing misappropriation.

Our first case involves the concept of sabotage as misappropriation, and this was a case out of the District of Colorado in April of this year. In that case, the plaintiff made commercial oil and gas plungers and hired a machine shop to produce drawings of plungers based on the plaintiff's specifications. The plaintiff

met with the defendant about the defendant manufacturing the plungers, [00:03:00] and the plaintiff required an NDA governing the drawings. And the defendant prepared initial drawings that the plaintiff found to be not up to par. The plaintiff then had the defendant create revised plunger drawings, which becomes important. Both of these sets of drawings included language that the drawings were confidential.

The relationship soured. The plaintiff terminated [00:03:30] the defendant's services and began manufacturing its own plungers, and also the plaintiff alleges at the defendant began modifying the plunger design drawings it had generated for the plaintiff to create its own plunger designs.

Charles Feigelstock: Later the plaintiff received a cease and desist letter from a competitor, a third party, claiming that competitor had received two mailings containing the drawings [00:04:00] of plaintiff's plungers and that the designs infringed on the competitor's patents. The drawings were defendant's drawings and a handwritten note on one of them stated that the plaintiff had been copying the competitor's patents and selling them for the plaintiff's biggest customer. But according to the plaintiff, the drawings were modified drawings that the defendant had created as its own designs.

These designs were based on the drawings it had prepared for the plaintiff, and it was these changes [00:04:30] that resulted in the apparent infringement of plaintiff's competitor's patents. The competitor then told the plaintiff's biggest customer that the plaintiff had infringed its patents. And therefore, plaintiff did not succeed in its seven figure bid to that customer and it lost other bids. And as a result, plaintiff sued the defendant for trade secret misappropriation and related claims.

Jordan Grotzinger: The defendant moved for summary judgment [00:05:00] and the court denied it. The plaintiff argued that the damages from lost contracts and lost sales wouldn't have happened but for the modifications, because the modifications are what led its competitor to assume that plaintiff was infringing on the competitor's patent. The court found, "This is enough for a reasonable jury to link misappropriation to damages, though plaintiff will need to prove [00:05:30] actual damages and the link at trial."

What's unique about this case is that the court effectively found that using the plaintiff's trade secrets for purposes of sabotage, that is by sending a modified version of them to a competitor to make it look like the plaintiff infringed the competitor's patent, as distinguished from the normal situation where a defendant would use the plaintiff's trade secret to help develop its own product, here [00:06:00] a plunger was found to be misappropriation. Charles, you want to talk about the next case which addresses avoided costs as damages?

Charles Feigelstock: Absolutely. A case out of the Southern District of New York in April of this past year talks about avoided costs as damages. After a six day jury trial, the jury found in favor of the plaintiff's claims for trade secret misappropriation under the Defend Trade Secrets Act and New York law [00:06:30] and a copyright infringement claim. The jury awarded \$284,855,192 in compensatory damages and \$569 million in punitive damages. Those are pretty high damages.

Jordan Grotzinger: Not low.

Charles Feigelstock: Defendants moved for judgment as a matter of law or alternatively for a new trial.

Jordan Grotzinger: A judgment as a matter of law motion is essentially a motion that says [00:07:00] to the judge, "The jury got it wrong. No reasonable jury could have found this result." That was the post-trial motion. By way of background, the plaintiff developed software for health insurance companies. One software product manages and automates processes for such companies, including claims processing, which I'll call the product. The plaintiff also created software tools to facilitate and improve the product's installation, [00:07:30] customization, and upgrade processes. As part of its business, the plaintiff also provides customization and implementation consulting services about the product.

The defendant provides IT services. In 2010, the parties entered into a master services agreement, abbreviated MSA, under which the defendant agreed to provide software development and consulting services to the plaintiff's customers with the product. In 2012, the parties amended the [00:08:00] MSA and deleted a provision that barred the defendant from competing with the plaintiff. And in 2014, the plaintiff was acquired by I'll call it plaintiff number two, a competitor of the defendant, and the plaintiff and defendant terminated the MSA and their relationship.

Charles Feigelstock: As for the jury trial and damages award, the jury "awarded 284 million in compensatory damages total and punitive damages of 569 [00:08:30] million, double the amount of compensatory damages." The defendant moved for judgment as a matter of law or alternatively a new trial. The court denied the motion and we address what we believe is the notable part of the analysis. At trial, plaintiff argued that defendant was unjustly enriched by the amount of the compensatory award because defendant "avoided expending this amount in development costs by stealing and using plaintiff's trade secrets [00:09:00] instead of incurring the cost of developing the trade secrets on its own."

The jury accepted this argument, but defendant argues that avoided cost damages are an impermissible measure of damages as matter of law. The court rejected the argument. The court reasoned, "The DTSA expressly permits, unjust enrichment as damages. The DTSA permits a plaintiff to seek damages for [00:09:30] actual loss caused by the misappropriation and damages for any unjust enrichment caused by the misappropriation that is not addressed in

computing damages for actual loss or in lieu of damages measured by those methods, the damages measured by imposition of liability for a reasonable royalty for the misappropriators unauthorized disclosure or use of the trade secret."

Jordan Grotzinger: And the court said, " [00:10:00] Unjust enrichment damages include what the parties call avoided costs, IE, the development costs that the defendant avoided incurring when it misappropriated the plaintiff's trade secrets. These avoided costs are recoverable as damages for unjust enrichment under the DTSA and its state law counterparts derived from the Uniform Trade Secrets Act." The defendant argued that a claimant is not entitled to recover the total value of a trade secret when [00:10:30] the trade secret still has value to the claimant. But the court said this misconstrues the damages award here.

"The DTSA expressly permits recovery of the loss to a claimant and/or the unjust enrichment to a wrongdoer as long as there is no double counting. Damages characterized as the total value of the trade secret belong in the former category, lost to the claimant, and logically could not be awarded if the value in fact [00:11:00] is not lost. However, avoided cost damages are in the latter category of unjust enrichment and represent the wrongful gain to the party that misappropriated the trade secret.

There is no legal or conceptual limitation on these damages based on the continuing value of the trade secret to the claimant, unjust enrichment damages derived from a policy of preventing wrongdoers from keeping ill-gotten gains, and therefore do not require [00:11:30] a corresponding loss to the plaintiff."

Charles Feigelstock: Defendant also argued that avoided costs should not be awarded because plaintiff's actual loss profits and defendant's unjust enrichment in the form of increased revenue were measurable. The court rejected that argument too. Revenue and avoided costs "both are a form of unjust enrichment, but avoided cost may be a more appropriate measure of damages when the wrongdoer made only a [00:12:00] modest profit, as defendant did here, or no profit from the use of the trade secrets. The wrongdoer, not the aggrieved party, should bear the business risk that the wrongdoer's use of purloin trade secrets will not be profitable."

Jordan Grotzinger: The next case was from June and out of the Third Circuit and concerned the definition of use under the federal Defend Trade Secrets Act. So in this case, the plaintiff was a pharmaceutical [00:12:30] company that initiated litigation against the former vice president of product development and a competitor pharmaceutical company that hired that former vice president alleging claims of misappropriation, breach of contract, and tortious interference. The complaint alleged that shortly after the defendant former vice president joined the defendant competitor, the competitor began developing " [00:13:00] microsphere technology" products that the defendant competitor previously had not been developing and/or had experience with.

Now, microsphere technology is an injection technology for medication that eliminates the rapid delivery of high concentrations of drugs to the application site, and instead allows for a slower release of potentially irritating drugs.

Charles Feigelstock: The defendant [00:13:30] competitor had announced with the product development that it had invested \$6 million into the technology. But the plaintiff alleged that this rapid development of the technology could not possibly have occurred without the misappropriation of plaintiff's trade secret. The plaintiff also alleged that it invested over \$130 million and 20 to 40 full-time employees to develop this technology. And as a result, the defendant could not have developed the product within the rapid timeline announced without the assistance of the defendant former [00:14:00] employee and use of the plaintiff's trade secrets.

Jordan Grotzinger: The district court held that while the plaintiff had identified trade secrets, it had failed to adequately allege how defendants "used those trade secrets." Specifically, the opinion stated that the complaint was speculative because it failed to explain why the plaintiff was the only potential source of information related to microsphere technology or the development of the competitive product. [00:14:30] The Third Circuit disagreed, reversing the district court's dismissal. The Court of Appeals explained that its reversal centered on the district court's definition of use or used. The district court defined the concept of use or used as "replicating."

Charles Feigelstock: The DTSA 18 USC code section 1839 5B defines misappropriation [00:15:00] in part as disclosure or use of a trade secret of another without express or implied consent. Reviewing the statutory language of the DTSA, the Third Circuit found that the term "use," while undefined, should be more broadly defined to include "any exploitation of the trade secret that is likely to result in injury." Thus, marketing goods that embody the trade secret or employing the trade secret in manufacturing [00:15:30] or to accelerate research or development constitutes use under the Defend Trade Secrets Act.

Jordan Grotzinger: So by rejecting the district court's narrow definition of use, the Third Circuit found that the plaintiff had adequately alleged that defendant's used plaintiff's trade secrets because the court was supposed to construe all reasonable inferences in favor of the plaintiff, including the two decade investment and \$130 million it took to develop microsphere technology compared [00:16:00] to the defendant's compressed timeline with a minimal investment. The next case involves so-called head start damages after a preliminary injunction, and also, more broadly, addresses the viability of a damages claim when the trade secret plaintiff has obtained a preliminary injunction, which is an interesting issue.

Because in a lot of these cases, the [00:16:30] plaintiff will get a preliminary injunction. And then the defendant may argue, well, you got your injunction stopping the misappropriation at the beginning of the case, so where are your damages? And this case addresses that issue in part. This was out of the Eastern

District of Texas in August. The plaintiff alleges that the defendants gave third parties access to the plaintiff's property management software platform, aiding in the development of a competing software. [00:17:00] Customers are only able to access the platform, I'll call it, after signing a master subscription agreement or MSA that imposes use restrictions and confidentiality obligations on the customer.

The plaintiff alleges that after signing the MSA, defendant one provided to defendant two three non-transferrable user IDs and passwords to the platform for the purpose of defendant two producing [00:17:30] a competing software. After a nine day jury trial, the jury awarded \$9.4 million in unjust enrichment damages arising from defendant one's misappropriation of trade secrets, \$11.4 million in unjust enrichment damages from defendant two's misappropriation of trade secrets, \$40 million in exemplary damages or punitive damages arising from [00:18:00] defendant one's misappropriation of trade secrets, and \$50 million in punitive damages arising out of defendant two's misappropriation of trade secrets.

And as we saw in a prior case we discussed today, and not surprisingly given those massive numbers, the defendants moved for judgment as a matter of law.

Charles Feigelstock: As to damages, the jury was instructed, "If you find that defendants misappropriated any of plaintiff's trade secret, you must [00:18:30] then determine the damages, if any, caused by defendant's misappropriation of that trade secret. Plaintiff seeks damages measured by defendants' unjust enrichment, if any, caused by misappropriation." As to unjust enrichment, the jury was instructed, "The law does not allow to profit by wrongdoing at the expense of another. Unjust enrichment is an equitable principle holding that one who receives benefits unjustly should make restitution for those [00:19:00] benefits."

Jordan Grotzinger: At the beginning of the case, the court entered a preliminary injunction against the defendants prohibiting further internal or commercial use of the defendant's competing product. Thus, the court said, "This case presents an unusual question, does the existence of a preliminary injunction sever the causal link between harm and damages in trade secret misappropriation cases?" [00:19:30] The court answered that it "is ultimately persuaded that the answer to the question is no." The court explained. "Although defendants are correct that in every previous case where the Fifth Circuit has upheld an unjust enrichment award based on avoidance of development cost, the defendant was able to achieve a "head start."

Defendants have not provided the court with any Fifth Circuit cases rejecting [00:20:00] the proposition that development costs may be avoided even in the presence of a preliminary injunction." Here, the plaintiff "primarily sought damages based on avoided development costs," which we discussed earlier. While the court's preliminary injunction may have halted the dissemination and

use of the competing platform, the injunction did not prohibit the development of the software.

" [00:20:30] Because defendants were free to continue developing the competing platform and because defendants had already completed a significant portion of the platform by the date the injunction was entered, the court finds the injunction did not sever the causal link between the plaintiff's harm and its damages. Judicial intervention may have prevented further harm from accruing due to defendant one's inability to commercially use the competing platform. However, [00:21:00] it did nothing to remedy the harm already suffered" by the plaintiff.

Charles Feigelstock: "Further, if the court adopts defendant's reasoning that the injunction prohibited damages from accruing, the same could be said for all trade secret cases where an injunction is entered. Such result is absurd and ignores both the benefits conferred on defendants before the injunction was entered and benefits existing outside commercial use of the trade secret." Thus, the court did not overturn [00:21:30] the damages award.

Jordan Grotzinger: For our last case, we're going to discuss the statute of limitations and the concept of continuing misappropriation, which is another common issue in these cases and worth addressing again. Worthy, we thought, of the Year In Review episode. This case was out of the Sixth Circuit in August. And in this [00:22:00] case, the plaintiff builds industrial equipment. In 2012, it began to hear from its customers that its former president and his new company might possess trade secret drawings belonging to the plaintiff. It filed a complaint with the FBI in July 2015, but the FBI declined to investigate.

Then in February 2018, the plaintiff learned that the new company had [00:22:30] been awarded a contract from the Navy to refurbish a large mixer originally designed and built by the plaintiff's predecessor, and that defendants were using the plaintiff's drawings to fulfill that contract. In May 2018, the plaintiff sued for misappropriation of trade secrets under the Defend Trade Secrets Act and the Michigan Uniform Trade Secrets Act. But the district court granted summary judgment dismissing the claims [00:23:00] as outside the three year statute of limitations. Both the Michigan Uniform Trade Secrets Act and the Defend Trade Secrets Act were modeled on the Uniform Trade Secrets Act.

And before the Uniform Trade Secrets Act was drafted, the court noted, "Jurisdictions were split on whether the limitations period ran only from the initial misappropriation or whether it was triggered anew with [00:23:30] each act of misappropriation." The court explained, "The former approach rested on a view of misappropriation of trade secrets as a breach of the relationship between the parties, which has not breached anew with each further use or disclosure, while the latter envisioned misappropriation of trade secrets as

damaged to property, which may be further damaged or destroyed by each additional use."

[00:24:00] In declaring that a "continuing misappropriation institutes a single claim," the Uniform Trade Secrets Act expressly adopted the former relationship-based approach and rejected the latter.

Charles Feigelstock: In the Sixth Circuit, the court said, "We too have endorsed the confidential relationship approach to the various iterations of the Uniform Trade Secrets Act. It is the relationship [00:24:30] between the parties at the time the secret is disclosed that is protected and the fabric of that relationship once rent is not torn anew with each added use or disclosure. Although the damage suffered may thereby be aggravated, thus, the first discovered or discoverable misappropriation of a trade secret commences the limitation period, placing the focus on the breach of the relationship between the parties at the time [00:25:00] the secret is disclosed.

Stated differently, although the initial wrongful acquisition of the trade secret and each subsequent misuse are separate acts of misappropriation, a claim for misappropriation arises only once at the time of the initial misappropriation subject to the discovery rule. Each new misuse or wrongful disclosure is then viewed as augmenting a single claim of continuing misappropriation [00:25:30] rather than as giving rise to a separate claim." And here's why. "The goal of this rule is not to pressure the owner of a trade secret to file suit prematurely, but rather to ensure such an owner conducts a timely and reasonable investigation after learning of possible misappropriation.

That obligation is wholly consistent with the nature of trade secrets, because trade secrets are not subject to filing system. [00:26:00] Owner's diligence in taking affirmative steps to protect them is crucial."

Jordan Grotzinger: The district court held that the plaintiff's claim accrued no later than 2012 and was therefore time barred when it filed suit in 2018. The court relied on the plaintiff's statements in the 2015 FBI complaint that it became "aware" of possible trade secret misappropriation when "the information began appearing in 2012" [00:26:30] and that it believed the former president possessed "the entire electronic files of plaintiff's technical drawing."

While the plaintiff argued that the defendants never had the electronic files and that it only discovered the misappropriation in 2018 when it became aware of the former president's possession of certain drawings, the court said the use of the drawings was merely a "continuing misappropriation" and plaintiff's argument [00:27:00] to the contrary was an attempt to "revert back to pre Uniform Trade Secrets Act property-based theory of trade secret misappropriation. The Court of Appeals reasoned that "the continuing misappropriation rule provides that the repeated misappropriation of a given



trade secret forms a single claim, not multiple claims, because a confidential relationship once rent [00:27:30] cannot be torn anew.

Thus, it is the first discoverable misappropriation of a trade secret that commences the limitation period for a claim based on misappropriation of that trade secret." I'm going to repeat that because this is really the key to the rule. "Thus, it is the first discoverable misappropriation of a trade secret that commences the limitation period for a claim based on misappropriation of that [00:28:00] trade secret. But nothing in the Michigan Uniform Trade Secrets Act, Defend Trade Secrets Act, or relevant case loss suggests that a misappropriation of one trade secret can trigger the limitations period for a claim based on the misappropriation of a different trade secret."

Charles Feigelstock: However, neither the Defend Trade Secrets Act nor Michigan Uniform Trade Secrets Act provides explicit guidance [00:28:30] on when to classify particular pieces of information as "different trade secrets." And as the Colorado Supreme Court noted, "avoiding arbitrariness in differentiating one from another." Therefore, it requires a "controlling principle consistent with the purposes of the statutory accrual rule." The focus of the Uniform Trade Secrets Act discovery rule is on "the [00:29:00] relationship between the parties at the time the secret is disclosed."

We might ask whether the same relationship has been ruptured in the same way, looking, for example, at who made the disclosure, to whom the disclosure was made, and the nature and timing and reasons for the disclosure, and "the subject matter of the different pieces of information may also be relevant depending on the circumstances."

Jordan Grotzinger: Here, the defendants [00:29:30] did not actually possess the plaintiff's entire electronic files. But because of the district court's denial of the plaintiff's request for discovery to assess the scope of the misappropriation and an order limiting discovery to the subject matter in the drawing, it was "unclear what documents or drawings defendants did have, when they had them, and how they got them." The Court of Appeals held that, " [00:30:00] Drawing inferences in the plaintiff's favor, as we must, a reasonable jury could conclude that the acquisition and use of the drawings in 2017 or 2018 was a new misappropriation because the drawings could not have been misappropriated by the former president before he obtained them.

And at least on this record, the earlier alleged misappropriations represented a breach [00:30:30] of only the president's relationship with the plaintiff. But the 2017 or 2018 acquisition derived from a former plaintiff salesperson's initial acquisition of the drawings by improper means, that is the breach of his confidential relationship with the plaintiff, that a different relationship was damaged supports the conclusion [00:31:00] that under the relationship based approach of the Uniform Trade Secrets Act, the later acquisition and use gave rise to a new claim of misappropriation."

Charles Feigelstock: Defendants argue that the limitations period begins to run when a plaintiff becomes aware of facts sufficient to encourage further investigation into a potential misappropriation, even if there is evidence suggesting that the misappropriation had not actually [00:31:30] occurred at that time. The Sixth Circuit found that argument untenable. "It is well established that the limitations period for a given claim of misappropriation begins to run when it is discovered or reasonably discoverable. This necessarily requires an underlying alleged misappropriation because no amount of reasonable diligence would enable a plaintiff to discover an injury that has not yet occurred.

In addition, there is evidence to support [00:32:00] the conclusion that plaintiff conducted a reasonable investigation. Among other things, "from 2012 to early 2015, multiple vendors on multiple occasions told plaintiff that the former president had provided them with drawings that were identical or very similar to plaintiff's drawings." During this time, the plaintiff asked its vendors if they had received drawings or if they were "doing anything for" the former president. But the vendors provided no [00:32:30] information that would point to misappropriation." Having reached a dead end, plaintiff decided to ask the FBI to investigate, but the FBI declined to prosecute."

Jordan Grotzinger: The Sixth Circuit held, "From this evidence, a jury could find that plaintiff satisfied its obligation of conducting a reasonable investigation. It attempted to unearth evidence of misappropriation, but was stymied by a lack of documentation and its vendor's responses [00:33:00] and thereafter turned to the FBI for assistance. Without drawings or further leads, the plaintiff was not in the position to file a lawsuit against defendants in good faith, as defendants contend it should have."

And the court found, "There are multiple issues of fact relating to defendant's alleged misappropriation of the drawings, including whether the president's receipt of the drawings from the former salesman in 2017 [00:33:30] or 2018 gave rise to a claim of misappropriations separate from his earlier acquisitions of the plaintiff's drawings. And if it did not, whether plaintiff conducted a reasonable but unsuccessful investigation that would toll the statute of limitations until it learned about the project and the drawings in 2018. Thus, "the district court's grant of summary judgment was premature and further factual development [00:34:00] is required." And now we are nearing the end and here are our 2021 takeaways.

First, using or disclosing someone else's trade secret for sabotage, like in the case where the defendant sent a modified version to the plaintiff's competitor to make the plaintiff look like a patent infringement or infringer, can be misappropriation. The [00:34:30] defendant doesn't have to use it for its own purposes, such as developing its own product, although the defendant in that case presumably had self-serving purposes when it allegedly tried to sabotage the plaintiff, presumably to eliminate the competition if it brought its, in that case, plunger to market.

- Charles Feigelstock: Second, unjust enrichment damages include so-called avoided cost damages. That is the development cost that defendant avoided incurring when it misappropriated [00:35:00] plaintiff's trade secrets.
- Jordan Grotzinger: Third, unjust enrichment damages derived from a policy of preventing wrongdoers from keeping ill-gotten gains, and therefore, do not require a corresponding loss to the plaintiff.
- Charles Feigelstock: Four, the defendant's revenue and avoided costs "both are a form of unjust enrichment, but avoided costs may be a more appropriate measure of damages when the wrongdoer made only a modest profit. [00:35:30] The wrongdoer, not the aggrieved party, should bear the business risk that the wrongdoer's use of stolen trade secrets would not be profitable."
- Jordan Grotzinger: Fifth, the term use should be given a broad definition and interpretation by courts when considering what conduct by a defendant constitutes misappropriation.
- Charles Feigelstock: Six, the test in the Third Circuit is that improper use is "any exploitation of the [00:36:00] trade secret that is likely to result in injury." Thus, marketing goods that embody the trade secret or employing the trade secret in manufacturing or to accelerate research or development constitutes use under the Defend Trade Secrets Act. The Third Circuit includes Pennsylvania, New Jersey, Delaware, and the Virgin Islands. The test is logical, so maybe followed by other circuits.
- Jordan Grotzinger: Next, a preliminary injunction in a trade secret [00:36:30] case does not necessarily sever the causal link between harm and damages. For example, if the defendant saved development costs that it would not otherwise have saved, but for the misappropriation, an injunction will not cut off so called head start or unjust enrichment damages.
- Charles Feigelstock: Eight. In the Sixth Circuit, Kentucky, Michigan, Ohio, and Tennessee, "it is the relationship between [00:37:00] the parties at the time the secret is disclosed that is protected. And the fabric of that relationship once rent is not torn new with each added use or disclosure, although the damage suffered may thereby be aggravated."
- Jordan Grotzinger: Thus, "the first discovered or discoverable misappropriation of a trade secret commences the limitation period, placing focus on the breach of the relationship between the parties [00:37:30] at the time the secret is disclosed. In other words, although the initial wrongful acquisition of the trade secret and each subsequent misuse are separate acts of misappropriation, a claim for misappropriation arises only once, at the time of the initial misappropriation subject to the discovery rule and each new misuse or wrongful disclosure [00:38:00] is viewed as augmenting a single claim of continuing misappropriation rather than as giving rise to a separate claim."

Charles Feigelstock: And our last takeaway, the limitations period begins to run not when a plaintiff becomes aware of fact sufficient to encourage further investigation into a potential misappropriation, but rather the limitations period for a given claim of misappropriation begins to run when it is discovered or reasonably discoverable. [00:38:30] This necessarily requires an underlying alleged misappropriation, because "no amount of reasonable diligence would enable plaintiff to discover an injury that has not yet occurred."

Jordan Grotzinger: And that's going to do it for 2021. Wow! That was quick. Well, everybody, thanks for tuning in. Happy holidays. Happy New Year. Charles, you're sweating terribly. You're going to have to [00:39:00] take a shower for the holiday party.

Charles Feigelstock: Thanks, everybody. We'll be back in January.

Jordan Grotzinger: Okay. That's a wrap. Thanks for joining us on this episode of the Trade Secret Law Evolution Podcast. As the law evolve, 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](mailto:grotzingerj.@gtlaw.com) or on LinkedIn. And if you like what you hear, please spread the word and feel [00:39:30] free to review us. Also, please subscribe. We're on Apple Podcast, Stitcher, Spotify, and other platforms. Thanks, everybody. Until next time.

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