Trade Secret Plaintiffs Beware: Suspicion May Start the Clock

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Introduction

The scenario is a familiar one for owners of trade secrets: a key employee departs for a competitor, and shortly thereafter, that competitor introduces a product strikingly similar to the former employer's technology.

Naturally, the former employer begins an investigation, often operating under the assumption that it can—and perhaps should—wait to file a lawsuit until it has definitive proof of misappropriation. However, a recent decision by the U.S. Court of Appeals for the Federal Circuit, Insulet Corp. v. EOFlow, Co., 176 F.4th 1347 (Fed. Cir. May 28, 2026), highlights the danger of taking a wait-and-see approach.

In Insulet, the Federal Circuit underscored that the 3-year statute of limitations under the Defend Trade Secrets Act (DTSA) may trigger as soon as a plaintiff knows, or reasonably should know, enough facts to plead "access and similarity."

A plaintiff need not have in its possession detailed, specific knowledge of the misappropriation that it might prefer to have before filing suit. Because Insulet was on notice of the alleged misappropriation prior to the critical accrual date, the Federal Circuit held that the plaintiff's DTSA claim was time-barred and it reversed a substantial multi-million-dollar district court judgment.

Two features of the opinion make it especially noteworthy. First, the court tied the DTSA accrual to the "access-plus-similarity" framework traditionally used to plead and prove misappropriation. Second, it established that multiple related trade secrets, when allegedly disclosed through the same relationship, during the same period, and for the same purpose, may constitute a single continuing claim governed by a single accrual date.

For trade secret owners and their counsel, the decision serves as a pointed reminder that the statute of limitations clock starts ticking long before a complete evidentiary record is assembled.

The Access-Plus-Similarity Standard

The DTSA, 18 U.S.C. §1836 et seq., provides a federal cause of action for the misappropriation of trade secrets related to products or services used in, or intended for use in, interstate or foreign commerce. Because direct proof of trade secret misappropriation is rarely available, courts permit plaintiffs to plead and prove their claims circumstantially through the "access-plus-similarity" framework.

Under this framework, copying can be established by demonstrating that the defendant had access to the alleged trade secrets and that there is substantial similarity between the defendant's alleged copy and the original product embodying the trade secrets.

For example, in Broker Genius, Inc. v. Zalta, 280 F. Supp. 3d 495 (S.D.N.Y. 2017), the court recognized that because misuse is difficult to prove directly, circumstantial evidence of access and substantial similarity is sufficient. Access can be established in numerous ways; in Tilebar v. Glazzio Tiles, 723 F. Supp. 3d 164 (E.D.N.Y. 2024), the court inferred access at the pleading stage where a former employee transferred hundreds of confidential files to a personal drive and a competing product was launched shortly after her departure.

Conversely, Grynberg v. BP, PLC, 2011 U.S. Dist. LEXIS 34286 (S.D.N.Y. 2011), illustrates the limits of an access-plus-similarity theory: the court declined to infer “use” where the defendant’s actions did not bear the “unique marks” of the plaintiff’s alleged confidential information and were not suspiciously similar to the plaintiff’s proposed project.

Claim Accrual Under the Insulet Decision

In Insulet, the plaintiff, a Massachusetts-based developer of a wearable insulin patch, sued EOFlow, a South Korean competitor. In 2018, former Insulet employees, including its former Director of Mechanical Engineering, began working for EOFlow, which subsequently developed a similar insulin patch.

Insulet first learned of EOFlow’s competing patch technology at an industry conference in 2018, and by March 2019, it knew EOFlow had hired former Insulet employees. Nevertheless, Insulet waited until August 2023 to file suit for trade secret misappropriation and patent infringement.

The case’s procedural history is complex. After Insulet secured a preliminary injunction in the district court, the Federal Circuit reversed it. The case proceeded to trial, where a jury awarded Insulet $452 million for trade secret misappropriation, which the district court later reduced to $59.4 million. The district court also granted Insulet’s motion to dismiss its patent claims without prejudice.

On appeal, the Federal Circuit reversed the hefty judgment, holding that Insulet’s DTSA claim was time-barred under the three-year statute of limitations.

The court noted a circuit split regarding whether the DTSA accrual is governed by an “inquiry notice” or a “discovery” standard, but found it unnecessary to resolve the split because Insulet’s claims failed even under the more forgiving discovery standard. The court determined that Insulet knew or should have known enough facts to plead the alleged misappropriation before the critical date of Aug. 3, 2020 (three years prior to the Aug. 3, 2023 complaint filing).

In analyzing the DTSA accrual, the court applied the access-plus-similarity framework. The court ruled that if a plaintiff knows that an alleged misappropriator had access to trade secrets through a former employee, and that the competing product is similar to those trade secrets, the plaintiff possesses sufficient facts to state a claim — meaning the statute of limitations begins to run.

Applying this standard, the court found that Insulet had knowledge of EOFlow’s access by March 2019, when it learned the competitor was working with Insulet’s former engineering leader who possessed detailed technical knowledge of their platform.

Regarding similarity, the court looked to Insulet's real-time internal documentation. At 2018 and 2019 industry conferences, Insulet personnel photographed EOFlow's booth and internally described the competing product as "cloned," "almost identical," and "very similar." This real-time knowledge was legally sufficient to establish that Insulet reasonably should have known enough to plead similarity long before the critical date.

Implications: Pleading Tensions and "Continuing Misappropriation"

The Insulet decision is highly notable because it transforms the access-plus-similarity test, traditionally used to evaluate the sufficiency of pleadings and proof, into a strict trigger for statute-of-limitations accrual.

Once a plaintiff has enough facts to plausibly allege access and similarity, the limitations clock may start running, even before the plaintiff uncovers direct or corroborating proof that trade secrets were stolen. Indeed, the more closely a company tracks its competitors, the more difficult it becomes to argue delayed discovery.

This creates immediate tension with federal pleading standards. Under Ashcroft v. Iqbal, 556 U.S. 662 (2009), a plaintiff must plead sufficient factual matter to state a plausible claim. Furthermore, Rule 11, Fed.R.Civ. P. requires counsel to certify that their factual contentions have evidentiary support after a reasonable pre-filing inquiry.

Yet, the Federal Circuit explicitly warned that waiting for technical certainty is dangerous, stating that detailed knowledge of all relevant facts or specific misappropriated documents is not required to trigger the limitations period.

This tension is most acute when the misappropriated trade secret is a hidden, internal process, such as an algorithm, that cannot be visually confirmed by inspecting a competitor's product. In Insulet, the court closed a potential loophole for plaintiffs seeking to protect such hidden secrets.

Relying on the DTSA's instruction that a "continuing misappropriation constitutes a single claim," the court held that four distinct trade secrets shared a single accrual date, even those uncovered later in discovery. Because the alleged disclosures were made by the same person, to the same defendant, during substantially the same period, and for the same purpose—they constituted one unified claim.

Consequently, plaintiffs can no longer easily isolate non-public, highly technical, or later-discovered trade secrets (like Insulet's internal "occlusion-detection algorithm") from earlier, visible theories of misappropriation to save them from a time bar. Once a single related misappropriation is reasonably discoverable, the clock begins running for the entire claim.

As Circuit Judge Prost warned in her dissent, this broad conception of access and similarity forces plaintiffs to "race to the courthouse with undeveloped claims based on mere suspicion" before gathering adequate information. (Trade secret practitioners should note that the window for further appellate review remains open, as the deadline for Insulet to file a petition for rehearing en banc is July 29, 2026.)

Best Practices After Insulet: Early Assessment and Documented Diligence

Insulet serves as a stark warning about the doctrine of constructive knowledge. Plaintiffs do not need a trial-ready evidentiary record for the legal clock to begin counting down. If a company knows enough facts to reasonably allege access and similarity, Insulet arms the alleged misappropriator with precedent to argue that the limitations period started running, even if plaintiff's investigations are ongoing.

Counsel must assess potential accrual much earlier than instinct might dictate. Key triggers include the departure of a critical employee, the discovery of that employee's new role at a competitor, the public appearance of a similar competing product, or the emergence of commercial materials suggesting technological overlap.

Furthermore, related trade secrets must be evaluated holistically, as courts may now bundle them into a single continuing claim with one strict accrual date.

The ultimate takeaway is not that every employee defection warrants an immediate federal lawsuit, but rather that waiting for a high degree of certainty is a perilous litigation strategy. Insulet reminds parties to approach accrual not as a background litigation issue but as an up-front strategic constraint. Following Insulet, prompt legal assessment and early attention to facts supporting misappropriation remain essential to ensuring a DTSA claim is not fatally time-barred.

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