

Seizure Orders Not Appealable, At Least For Trade Secrets

Janssen Prods. LP v. eVenus Pharm. Labs. Inc., Case No. 22-2426 (3d Cir. Oct. 17, 2023)

By: Joseph Saltiel and Victoria Hanson | November 6, 2023

On October 17, 2023, the Third Circuit held that Janssen Products, L.P. and Pharma Mar, S.A. (“Janssen”) could not immediately appeal the denial of its ex parte seizure application requesting the District Court of New Jersey (“District Court”) to seize various property. In doing so, the Third Circuit found that ex parte seizure orders under the Defend Trade Secrets Act (“DTSA”), which permits companies to ask courts to order law enforcement officials to seize property to stop propagation or dissemination of the trade secret, are not the same as injunctions and cannot be directly appealed.

Janssen, a pharmaceutical company, developed a stable, injectable version of the cancer drug trabectedin called Yondelis. Janssen considered its data, specifications, and methods for manufacturing the drug confidential and trade secrets. In 2017, Janssen discovered that two competitors were selling a generic version of Yondelis and sued them for patent infringement. During discovery, Janssen discovered information that led them to believe that the competitors also misappropriated Janssen’s trade secrets and sought relief under the DTSA and state law. Concerned that the competitors might spoliage evidence that would support its trade secret misappropriation claim, Janssen filed an ex parte seizure application under the DTSA requesting the seizure of the competitors’ servers, stored data, and some employees’ laptops and cell phones. Janssen argued that it met all eight requirements needed for an ex parte seizure order under the DTSA. The District Court denied this ex parte seizure application because Janssen had failed to show five of the eight requirements.



Janssen immediately appealed the denial of the DTSA ex parte seizure application. Janssen argued that the District Court’s order was immediately appealable because the denial of a DTSA ex parte seizure is the denial of a functional injunction. Janssen also argued that a DTSA ex parte seizure denial is appealable for the same reasons that Lanham Act ex parte rulings are immediately appealable. The Third Circuit disagreed on both issues. It found that the ex parte seizure denial failed to satisfy the three part functional test to determine whether the order was effectively injunctive, which considers whether an order (1) is “directed to a party,” (2) may be enforced by contempt, and (3) is “designed to accord or protect some or all of the substantive relief sought by a complaint in more than a [temporary] fashion.” The Third Circuit held that no DTSA seizure order can satisfy the first or second prong because the DTSA requires law enforcement officials to execute an ex parte seizure order, and thus, a DTSA seizure order is not directed at a party to the litigation and may not be enforced by contempt for failing to comply with it. Further, the Third Circuit distinguished ex parte seizure orders under the DTSA from ex parte seizure orders under the Lanham Act because the Lanham Act expressly lists ex parte seizure orders as a type of injunctive relief available whereas the DTSA does not have a section providing for injunctive relief.

Because ex parte seizure orders are not immediately appealable, the district court’s ruling on such orders will be more impactful as that order will not be revisited until the district court proceedings are terminated, something the parties should carefully consider when requesting or defending against such applications.