Federal Court in California Rules on DTSA's "Extraordinary" Ex Parte Seizure Remedy

Insights
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When the Defend Trade Secret Act ("DTSA") was enacted last year, there was much debate on the remedy provision permitting the *ex parte* seizure of property. Such an order would not only direct the seizure of information without notice to the defendant, it would involve the assistance of law enforcement who would seize physical property and deliver it to the court. No analogous procedure was available at the state level or under the Uniform Trade Secret Act. Thus, the remedy was seen as a potentially powerful new tool for employers who sought to protect their trade secrets against misappropriation.

The provision was drawn from analogous law found in the Lanham Act (trademark infringement) and Copyright Act (copyright infringement). Critics suggested that such seizure orders were inappropriate in a federal trade secrets statute because of the potential for abuse and disruption to a business. Proponents pointed to the high bar set for granting such an order, and the subsequent limitations and precautions imposed by the statute.

The statute only permits courts to issue a seizure order in "extraordinary circumstances" when "necessary" to prevent the "propagation or dissemination" of trade secrets. The plaintiff must to prove that (a) less drastic relief, such as a temporary restraining order, will be inadequate; (b) immediate and irreparable injury will occur if seizure is not ordered; (c) the balance of the harms favors granting the seizure, (d) plaintiff is likely to succeed on the merits of the misappropriation claim, (e) the defendant is in actual possession of the trade secret and/or property, (f) the plaintiff has identified the property with reasonable particularity, (g) the defendant would destroy the property if put on notice, and (h) the plaintiff has not publicized the requested seizure. To curtail abuse, the DTSA further prohibits any copies of the seized property from being made, and requires that the orders provide specific, narrowly tailored instructions to law enforcement, including the hours when seizure can take place and whether force can be used to access locked areas.

In these nascent days of the DTSA, there has been little case law, let alone case law on these *ex parte* seizure orders. Until now. Just the other day, in *000 Brunswick Rail Management v. Sultanov*, a federal court out of California issued an opinion addressing a request for an *ex parte* seizure order. The case involved two individual defendant employees. The first employee allegedly sent several confidential documents to his personal e-mail, and communicated by phone with a representative of the company's creditor (who he was explicitly prohibited from contacting). The second employee had his former assistant send him confidential materials to his personal account, which he forwarded to

his former assistant send him confidential materials to his personal account, which he forwarded to the creditor's representative and other employee. The company sought a seizure order under the DTSA of the e-mails, its company-issued laptop, and the mobile phone. The court rejected the request. An *ex parte* seizure order was not "necessary" to preserve the information. The non-party custodians were ordered to preserve the e-mails so the seizure of physical copies was not "necessary." Similarly, the plaintiff was sufficiently protected by the courts order to the defendant to deliver his devices to the court at the hearing in two weeks without accessing or modifying them in the interim.

While ultimately the court did not to issue a seizure order, *Sultanov* remains instructive. Plaintiffs face a high burden in obtaining an *ex parte* seizure orders, and courts will not issue such orders is the typical case. In most circumstances, a court order directing the preservation and return of the property will be sufficient and not require the intervention of law enforcement. To get a court to go this extra step, plaintiffs will need truly extraordinary and unique circumstances involving the imminent destruction of trade secrets. Such circumstances we have not seen yet.