



The Seizure Provisions of the Defend Trade Secrets Act

Insights

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This week, President Obama signed into law the Defend Trade Secrets Act. Among its many interesting provisions is a detailed procedure for a party to request, ex parte, the seizure of property in order to "prevent the propagation or dissemination" of the trade secret at issue. Such an order would only be available in "extraordinary circumstances." This could be a very powerful tool in a fight against misappropriation of trade secrets as it could impair the defendant's ability to conduct business.

Opponents of the bill pointed out the impact that an ex parte seizure order could have on a business, so the barriers to getting such an order were heightened as the bill wound its way through Congress. Therefore, the procedure laid out in the legislation sets a high bar for granting such an order. To do so, a court must find, among other things, that: (a) other, less drastic measures such as a temporary restraining order would be inadequate; (b) immediate and irreparable injury will occur if such seizure is not ordered; (c) the balance of the harms favors granting the seizure; and (d) the applicant is likely to succeed on the underlying misappropriation claim. Additionally, a court is to take steps to prevent publicity against the seizure and a condition of granting seizure is that the applicant has not sought publicity about it. Presumably this is to avoid tarring a defendant before it has a chance to defend itself. Further, all seized information is to go directly to the court with no copies made and no access to the applicant/plaintiff until the parties have had a chance to be heard in court. That hearing is to be set at the earliest possible time, not later than seven days from the order (not the seizure date). Lastly, there is a possibility for a person who suffers a wrongful or excessive seizure to sue for damages including lost profits, cost of materials, loss of goodwill, and punitive damages in instances where the seizure was sought in bad faith, and, unless the court finds extenuating circumstances, to recover a reasonable attorney's fee.

The upshot is that the seizure provision gives trade secret plaintiffs a major new tool in obtaining immediate, substantial relief for acts of misappropriation. However, with great power comes great responsibility, so there are substantial procedural safeguards and remedies for a defendant that is damaged by an improper ex parte order being entered.

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