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Sorry—No Finality, No Injunction, No Appellate Jurisdiction

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The US Court of Appeals for the Third Circuit dismissed an appeal from the denial of a motion under the Defend Trade Secrets Act (DTSA) for an *ex parte* seizure order, explaining that such orders are not final, not effectively injunctive and that the DTSA does not independently provide appellate jurisdiction to review such orders. *Janssen Prod., L.P. v. eVenus Pharms. Lab'ys Inc.*, Case No. 22-2426 (3d Cir. Oct. 17, 2023) (Porter, **Freeman**, Fisher, JJ.)

In 2015, the US Food & Drug Administration (FDA) approved Janssen's drug Yondelis—a stable, injectable version of the cancer drug trabectedin—for use in certain cancer patients. Janssen asserts that its data, specifications and methods for manufacturing Yondelis are trade secrets. After Janssen received FDA approval for Yondelis, eVenus sought FDA approval for a generic version of Yondelis. Janssen filed a lawsuit against eVenus (under the Hatch-Waxman Act) for patent infringement. During discovery, Janssen obtained documents that allegedly demonstrated that eVenus misappropriated Janssen's trade secrets. Janssen then filed the current lawsuit against eVenus seeking relief for eVenus's alleged trade secret misappropriation under the DTSA.

During discovery, Janssen found that eVenus spoliated evidence. In response, Janssen filed a motion for an *ex parte* seizure under the

DTSA, requesting that the district court order the seizure of eVenus' network servers and stored data, and the laptops and cell phones of certain eVenus employees and ex-employees. The district court denied Janssen's *ex parte* seizure motion. Janssen appealed.

The Third Circuit dismissed the appeal, concluding that it lacked jurisdiction over Janssen's appeal for two reasons.

First, the Third Circuit found that it lacked appellate jurisdiction because the district court's denial of Janssen's *ex parte* seizure motion was not a final judgment and did not meet any of the limited exceptions to the final judgment rule.

One limited exception to appellate jurisdiction under the final judgment rule is review of a lower court's refusal to order injunctive relief. However, as the Third Circuit explained, an *ex parte* seizure order under the DTSA is not effectively injunctive and therefore does not fall under the injunction exception. The Court explained that refusal to grant an *ex parte* seizure order does not satisfy the first two prongs of the Court's three-part functional injunction test, which require that an order be "directed to a party" and may be enforced by contempt. Regarding the first prong, the Court noted that DTSA seizure orders are not "directed to a party" because the DTSA requires law enforcement officials—and not a party—to execute any *ex parte* seizure order. Regarding the second prong, no party can be held in contempt for failing to comply with an order that does not direct it to do anything. Therefore, the district court's order did not effectively deny an injunction.

Second, the Third Circuit analogized DTSA seizure orders with seizure orders under the Lanham Act in terms of statutory construction. As the Court explained, in the Lanham Act, *ex parte* seizure provisions are part of its "injunctive relief" section. In contradistinction, Congress did not provide any link between the DTSA's civil seizure provisions and injunction provisions. The Court further noted that the DTSA includes

provisions that suggest Congress intended *ex parte* seizure orders under the DTSA to be distinct from injunctions. Finally, the Court noted that the DTSA was enacted in 2016 as an amendment to the Economic Espionage Act (EEA). As the Court observed, Congress's express grant of appellate jurisdiction over certain interlocutory appeals in the EEA stands in contrast to the lack of such express jurisdictional authority over DTSA *ex parte* seizure rulings.

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