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ALERTS

Chance Favors The Prepared: 100-Day Proceedings In Section 337 ITC Investigations

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Highlights

Section 337 IP/trade investigations generally move at a rapid, unforgiving pace over several months

When the ITC places an issue into a 100-day proceeding, this pace is even faster, though more focused

Companies considering bringing or defending against claims in these investigations should be prepared if the ITC places an issue into a 100-day proceeding, particularly if no party asked for one

This adage applies especially in International Trade Commission (ITC) Section 337 investigations where deadlines come much sooner than in district court litigation. The 30 days between the filing of an ITC complaint and the start of an investigation – the storm before the storm – is critical for any company sued in these intense, fast-paced investigations.

But it may also be a critical time for a complainant that likely has been preparing for months. That is, the ITC may decide, without any party requesting it, to start the investigation and put it into a 100-day proceeding. This happened recently when the ITC started the

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investigation concerning alleged trade secret misappropriation in *Certain Selective Thyroid Hormone Receptor-Beta Agonists, Processes For Manufacturing or Relating to Same and Products Containing Same*, Inv. No. 337-TA-1352.

With no request by any party, the ITC directed the administrative law judge (ALJ) to "hold an early evidentiary hearing, find facts, and issue an early decision, within 100 days of institution except for good cause shown, as to whether complainant can show that the threat or effect of the alleged unfair acts is to (i) destroy or substantially injure an industry in the United States, or (ii) to prevent the establishment of such an industry." Instead of the usual course where all issues are addressed over several months, all proceedings related to this issue (including a decision by the ALJ) were to be concluded within 100 days.

For whatever reason, the respondents produced approximately 44,000 pages of materials 12 days after the deadline set the by ALJ and two days before the bench trial/evidentiary hearing was to occur. The ALJ offered the respondents two options: "(1) stipulate to the injury requirement and cancel the evidentiary hearing, which would end any further investigation into [sanctions for discovery violations] or (2) proceed with the evidentiary hearing, which would allow an orderly investigation into possible sanctions for the admitted discovery violation." The respondents chose the second option.

After the brief bench trial/hearing, the ALJ found that "witnesses' answers showed that the emails untimely produced by [respondents] contained information relevant to [complainant's] alleged industry in the United States and alleged injury to that industry, topics for which the hearing had been convened." As the ALJ observed, "[t]he stated purpose of an expedited 100-day proceeding is to allow for the early resolution of a potentially case-dispositive issue, which in turn could potentially avoid the costs and burdens of litigating all issues in an investigation. But due to [respondents'] actions, any savings contemplated by the 100-day proceeding in this investigation have been frustrated."

Thus, the ALJ found good cause to continue the investigation beyond the 100-day proceeding without issuing an early decision on injury.

For more information, please contact the Barnes & Thornburg attorney with whom you work, or Chad Stover at 302-300-3474 or chad.stover@btlaw.com, Megan New at 312-214-8339 or megan.new@btlaw.com, or Steve Adkins at 202-371-6359 or steve.adkins@btlaw.com.

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