

Pay Attention: ITC Exclusion Orders May Block Your Imports If You Don't

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A disruption of imported products or materials can have serious consequences to a business that depends on such imports. Nonetheless, the **United States International Trade Commission (ITC)** is authorized to issue general exclusion orders that direct **U.S. Customs** officials to block imports of certain goods *regardless of the source and regardless of whether an importer has been heard*. A recent ITC opinion makes clear that unless you monitor ITC investigations and seek to intervene early where the outcome may affect your business, you may lose your opportunity to avoid the consequences of a general exclusion order. *In re Certain Ground Fault Circuit Interrupters and Products Containing the Same*, Inv. No. 337-TA-739.

The ITC enforces section 337 of the **Tariff Act of 1930**. That section prohibits unfair practices in connection with the import trade. It expressly declares it illegal to import articles that infringe a valid and enforceable United States patent or are made by a process covered by the claims of a valid and enforceable United States patent. The Act authorizes the ITC to exclude such articles from entry into the United States. Generally the exclusion is limited to the persons found to have violated that section. Such orders are referred to as “limited exclusion orders.” However, the ITC is authorized to issue a “general exclusion order” if it finds it necessary to prevent circumvention of an exclusion order limited to products of named persons or if there is a pattern of violation of § 337 and it is difficult to identify the source of infringing products. 19 U.S.C. § 1337(d)(2). Because the customs officials who carry out the general exclusion order are not patent agents, the implementation of these orders can interfere with the importation of non-infringing products.

In *In re Certain Ground Fault Circuit Interrupters and Products Containing the Same*, Leviton Manufacturing Co., a producer of ground fault circuit interrupters (GFCIs), a common safety feature on home kitchen and bathroom outlets, filed a complaint against various companies alleging patent infringement. The complaint focused mainly on international companies but several domestic companies were also listed. Leviton did not include in the complaint two GFCI producers, Pass & Seymour (P&S), owned by the French company Legrand S.A., or Hubbell. Leviton did not include these two companies in its complaint in part because they did not represent a large proportion of GFCI imports and for other reasons that were not disclosed.

The Administrative Law Judge (ALJ) who heard the evidence made an initial determination to effect a limited exclusion order. However, the ALJ failed to take evidence or make findings on the public

interest in the investigation, so upon review, the Commission issued a public notice soliciting written submissions from the public as to the appropriate remedy and the public interest. Non-party GFCI manufacturer P&S filed written submissions and responses thereto, arguing against a general exclusion order and alternatively asking to be exempt from any general exclusion order; Hubbell did not file any submission but was identified by P&S and one of the respondents as a non-party manufacturer that would be impacted by a general exclusion order.

The ITC issued a general exclusion order and refused to exempt P&S or Hubbell from its scope, finding P&S had not established a “compelling reason” for such an exemption. The ITC was perhaps less sympathetic to P&S because P&S “apparently knew about the present investigation as early as the institution phase, but chose not to intervene. Any burden imposed on P&S by remedial orders could have been avoided if P&S had participated in the present investigation and had presented meritorious defenses.” There is no indication that Hubbell was aware of the proceedings at any stage.

P&S may still use ITC procedures to “obtain a ruling as to whether its products are subject to the general exclusion order,” but this will take time and money. During this time, the business of P&S will be impacted by not being able to receive these imported goods and by the uncertainty as to whether it will be able to resume such imports in the future.

In light of this ruling, businesses are advised to monitor investigations by the ITC, assess the potential impact on their business if a requested general exclusion order is issued, and determine whether the risk of a general exclusion order merits intervening in the case. When assessing the potential harm or disruption resulting from a ban on imports, a business should consider imported products brought to the United States for direct resale as well as any imported goods critical to a supply chain such as intermediates, ingredients, and component parts. Maintaining an up-to-date list of imported goods essential to the business can be a useful aid. Any business using an imported product that is the subject of an ITC investigation is advised to seek legal assistance.

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