

INJUNCTIVE RELIEF: A PRIMER

Introduction

Injunctive relief is considered an extraordinary remedy in both State and Federal court. While most lawsuits seek monetary damages, injunctive relief is an equitable remedy that is only available when there is no adequate remedy at law. Injunctive relief is provided for in both State and Federal law and procedure. Injunctive relief is available in a broad range of disputes: intellectual property, labor & employment, civil rights, contract and commercial. It is appropriate for every litigator, no matter your area of law, to have at least a basic understanding of injunctive relief and when it may apply in a particular case.

Types of Injunctive Relief

Injunctive relief is usually categorized as temporary or permanent in duration and mandatory or prohibitory in effect. Prohibitory injunctive relief restrains or enjoins the commission or continuance of an act and prevents a threatened injury to the applicant or moving party. Mandatory injunctive relief goes beyond mere restraint and requires the enjoined party to perform specific affirmative acts. For this reason, mandatory injunctions “are looked upon with disfavor, and the courts are even more reluctant to issue them than prohibitory ones.” Grant v. GHG014, LLC, 65 So.3d 1066, 1067 (Fla. 4th DCA 2010).

The three types of injunctive relief are: 1) temporary or preliminary injunctions; 2) temporary restraining orders (TROs); and 3) permanent injunctions. Preliminary injunctions are entered during the pendency of an action; to preserve the status quo until final disposition of the case or until a hearing can be held. Temporary restraining orders are similar in effect to preliminary injunctions. However, as explained below, TROs usually differ from preliminary injunctions in duration, procedure and application. Generally, preliminary injunctions do not have a pre-determined duration and are in effect until further order from the court. Permanent injunctions are entered following trial or after final judgment/disposition of the case on the merits and do not have specified durations. See Amoco Production Co. v. Gambell, 480 U.S. 531, 542 (1987)(quoted in Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 32 (2008)(“The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success”)).

Legal Standards for Injunctive Relief

The *sine qua non*¹ of injunctive relief is a showing of irreparable injury and the inadequacy of legal remedies. See Sampson v. Murray, 415 U.S. 61, 88 (1974). Generally, the party requesting injunctive relief must establish the likelihood of irreparable harm if the injunction is not entered and that other remedies at law are inadequate.

State Law Requirements for Injunctive Relief

Preliminary or Temporary Injunctions

¹ An indispensable condition or thing; something on which something else necessarily depends. BLACK’S LAW DICTIONARY 1418 (8th ed. 2007).

In addition to a showing of irreparable injury and inadequate remedies at law, additional factors may be considered by the court before injunctive relief can be granted including: (1) the movant's likelihood of success on the merits of the action; (2) notice to the opposing party; (3) posting of security or bond by the movant; and (4) a balancing of the equities. Generally, the legal requirements for obtaining a preliminary or temporary injunction are similar to those required in the author's home jurisdiction of Florida:

A party seeking an injunction under general Florida case law must demonstrate: 1) irreparable harm; 2) a clear legal right; 3) an inadequate remedy at law; 4) consideration of the public interest.

Gomez v. Fradin, 41 So.3d 1068, 1071 (Fla. 4th DCA 2010).

There are numerous combinations and variations of the above requirements for preliminary or temporary injunctive relief among the different states:

To be entitled to the equitable relief of a temporary injunction, the moving party must show that: (1) it is likely to prevail on the merits of its claim after trial; (2) it faces immediate and irreparable harm absent an injunction; and, (3) the harm it faces without the injunction is greater than the harm an injunction would do to the defendants.

Pop Radio, LP v. News America Marketing In-Store, Inc., 898 A.2d 863, 867 (Conn. Super. Ct. 2005). See also Lifeguard Benefit Services, Inc. v. Direct Medical Network Solutions, Inc., 308 S.W.3d 102, 111 (Tex. App. 2010) (“To obtain a temporary injunction, an applicant must plead and prove: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim”); Stop Rail Now v. DeCosta, 203 P.3d 658, 663 (Haw. Ct. App. 2008) (“Generally, the standard for a preliminary injunction is: (1) whether the moving party has shown that it is likely to succeed on the merits; (2) whether the balance of irreparable harms favors the issuance of an injunction; and (3) whether the public interest supports granting such an injunction”).

In order to obtain injunctive relief under South Carolina law, “the plaintiff must establish that: (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law.” Scratch Golf Co. v. Dunes West Residential Golf Props., 603 A.E.2d 905, 907-08 (S.C. 2004). South Carolina does not require the applicant for injunctive relief to consider the public interest or to prove that the balancing of equities tips in his or her favor. In Minnesota, the court must consider the relationship between the parties, prior to the dispute, in order to determine whether injunctive relief is proper:

The factors to be considered to determine whether to grant preliminary injunctive relief are: (1) the nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief; (2) the harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial; (3) the likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief; (4) the aspects of the fact situation, if any, that permit or require consideration of public policy

expressed in the statutes, state and federal; (5) the administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314, 321-22 (Minn. 1965).

Temporary Restraining Orders (TROs)

As stated above, the effect of a preliminary or temporary injunction is similar to that of a TRO. It follows then that the legal requirements for obtaining a TRO are similar to those required to obtain a preliminary injunction. In some states, like Hawaii, California, D.C., Illinois and Kansas, the legal requirements for obtaining a preliminary injunction are the same or very similar to the legal requirements necessary to obtain a TRO². The same is true in Delaware; however the factors are weighted differently when seeking a TRO:

A TRO is an injunction, and the factors relevant to determining whether to issue a TRO are similar to those relevant when determining whether to grant a preliminary injunction. But these factors are ordinarily given different weight in the TRO context. This stems from the fact that when this court determines whether to grant a TRO, it usually has little time to digest the merits. It therefore rightly concentrates on whether the absence of a TRO will permit imminent, irreparable injury to occur to the applicant and whether that possibility outweighs the injury that the TRO itself might inflict on the defendants. In a case where this balance tilts in favor of the applicant and where a responsible consideration on the merits cannot be had, this court will issue a TRO even though the applicant has only raised claims that are “colorable, litigable, or . . . raise questions that deserve attention.”

ACE LTD v. Capital Re Corp., 747 A.2d 95, 102 (Del. Ch. 1999).

Despite their similarities, there are some distinct differences in the application and procedure for obtaining a TRO versus a preliminary or temporary injunction. Primarily, TROs can be issued without notice to the opposing party or ex parte³:

There is a well-recognized distinction between a temporary restraining order and a temporary or preliminary injunction which may be stated as

² Hawaii: See Life of the Land v. Ariyoshi, 577 P.2d 1116, 1118 (1978); California: See Church of Christ in Hollywood v. Superior Court, 99 Cal. App.4th 1244, 1251 (Cal. Ct. App. 2002); D.C.: See Ifill v. District of Columbia, 665 A.2d 185, 187 (D.C. 1995); Illinois: See AFSCME, Council 31 v. Ryan, 773 N.E.2d 1196, 1198 (Ill. App. Ct. 2002) ; Kansas: See General Bldg. Contrs., L.L.C. v. Bd. of Shawnee County Comm’rs, 66 P.3d 873, 884 (Kan. 2003).

³ Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other, usu. for temporary or emergency relief. BLACK’S LAW DICTIONARY 616 (8th ed. 2007).

follows: A temporary restraining order is generally granted without notice to the opposite parties and is intended only as a restraint on the defendant until the propriety of granting a temporary injunction can be determined and it goes no further than to preserve the status quo until that determination. It is limited in its operation and continues only for such a reasonable time as may be necessary to have a hearing on an order to show cause why a temporary injunction should not issue. On the other hand a temporary or preliminary injunction is rarely granted without notice, but when granted it is effective until the trial of the cause in which it is issued.

Laundry, Dry Cleaning, Dye House Workers Union, Local 3008, AFL-CIO v. Laundry Workers Int'l Union, 91 N.W.2d 320, 326 (Wis. 1958). In addition, TROs generally must be accompanied by a sworn pleading or affidavit from the party seeking the TRO or that party's attorney, explaining why notice is impossible; why prior notice to the opposing party would make further prosecution of the action futile; or what specific efforts were made to provide notice to the opposing party. See Zabinski v. Bright Acres Assocs., 553 S.E.2d 110, 120 (S.C. 2001)("[A] trial judge can issue a temporary restraining order without providing notice where 'it clearly appears from specific facts shown by affidavit or by verified complaint that immediate or irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon'"). See also Or. R. Civ. P. 79 B.

A TRO is appropriate in cases where prior notice to the adverse party may make further prosecution of the action futile. See In re Vuitton et Fils S.A., 606 F.2d 1,5 (2d Cir. 1979)(Trademark infringer would dispose of good before the hearing, therefore issuing TRO without prior notice to infringer was appropriate). See also International Schools Services, Inc. v. AAUG Ins. Co., Ltd and Gregor Gregory, No. 0:10-cv-62115-CMA (S.D. Fla. Oct. 17, 2012)(Entry of TRO was appropriate to prevent defendants from dissipating and/or hiding assets to avoid the collection of a judgment). A TRO is also appropriate where it is impossible to provide prior notice because the identity of the adverse party and their attorney is unknown.

Further, although the effect and the legal requirements for a preliminary injunction are similar to that of a TRO some states do not provide for TROs in their local procedures. In those jurisdictions, a specific request for an injunction must be pled. See Attorney T. v. Office of Disciplinary Counsel of PA., 547 A.2d 350, 350 n.2 (PA. 1988)("Temporary Restraining orders' are provided for in the Federal Rules of Civil Procedure, Fed. R. Civ. P. 65(b), but are not cognizable under our Pennsylvania Rules of Civil Procedure. The proper request under our rules would be a prayer for an injunction, Pa. R. C.P. 1531"). Florida has done away with the legal terminology of a "temporary restraining order" in its local rules of court. See Fla. R. Civ. P. 1.610, committee Notes, 1984 Amendment. Under Florida law, a temporary injunction can be issued with or without notice. See Fla. R. Civ. P. 1.610. In addition, TROs may have a pre-determined duration, especially when they are issued ex parte. See Fed. R. Civ. P. 65(b)(2).

Given the above, it is essential to know the facts of your case and compare them with the applicable law in your particular jurisdiction to determine whether you can meet the requirements necessary to obtain injunctive relief.

Requirements for Injunctive Relief Under Federal Law

The requirements for obtaining injunctive relief in the different federal jurisdictions are more uniform and not as varied as the requirements in different state court jurisdictions.

The U.S. Supreme Court reiterated the legal standard for injunctive relief in the eBay Inc. v. MercExchange, L.L.C. case:

A plaintiff seeking a permanent injunction must demonstrate that: (1) it suffered an irreparable injury; (2) remedies at law, such as monetary damages, are inadequate to compensate for the injury; (3) considering the balance of the hardships between plaintiff and defendants, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). These criteria are similar if not identical to the legal standards for injunctive relief in the Federal Circuit:

[A] plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)(quoted in American Signature, Inc. v. U.S., 598 F.3d 816, 823 (Fed. Cir. 2010)). See also Titan Tire Corp. v. Case New Holland, Inc., 566 F.3d 1372, 1375-76 (Fed. Cir. 2009). The legal standard for injunctive relief in the U.S. Circuit Courts of Appeal are also consistent with the eBay Inc. opinion:

A district court may grant injunctive relief only if the movant establishes the following: (1) it has a substantial likelihood of success on the merits of the underlying case; (2) the movant will suffer irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction issued, and; and (4) an injunction would not disserve the public interest.

North American Medical Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1217 (11th Circuit 2008); Siegel v. Lepore, 234 F.3d 1163, 1176 (11th Cir. 2000).

Under Federal law, the procedure for obtaining injunctive relief is governed by Federal Rule of Civil Procedure 65. Federal Rule of Civil Procedure 65(a) addresses preliminary injunctions and Federal Rule of Civil Procedure 65(b) addresses TROs. See Fed. R. Civ. P. 65(a)-(b). Under Fed. R. Civ. P. 65, a preliminary injunction may only issue on notice to the adverse party. See Fed. R. Civ. P. 65(a). Also pursuant to Fed. R. Civ. P. 65, a TRO may issue without written or oral notice to the adverse party or their attorney. See Fed. R. Civ. P. 65(b). In addition, TROs expire 14 days after entry, unless before that time it is extended by the court. See Fed. R. Civ. P. 65(b)(2). Fed. R. Civ. P. 65 also requires that security or bond be posted by the movant before the court can issue a preliminary injunction or a TRO. State courts also require security or bond to be posted by the movant prior to the entry of a preliminary injunction or TRO. See Fla. R. Civ. P. 1.610.

There are remedies available to the enjoined party if they wish to challenge the injunction or TRO. Generally, a party claiming to be wrongfully enjoined can request an expedited hearing. See Fed. R. Civ. P. 65(b)(4) (“On 2 days’ notice to the party that obtained the order without

notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires”). See also Fla. R. Civ. P. 1.610(d) (“A party against whom a temporary injunction has been granted may move to dissolve or modify it at any time. If a party moves to dissolve or modify, the motion shall be heard within 5 days after the movant applies for a hearing on the motion”). The amount of the bond posted by the movant is generally the limit on the amount of damages recoverable by the adverse party for entry of a wrongful injunction or TRO. Damages for a wrongful injunction are usually limited to the amount of damages resulting from the injunction. Attorneys’ fees and costs may be recoverable by the party wrongfully enjoined if the injunction, at its inception, was wrongfully issued. Any attorneys’ fees recovered by the enjoined party as damages must directly relate to the dissolution of the injunction or TRO. The court has some discretion regarding the bond requirement. Courts can dispense with the bond requirements for U.S. government agencies, state agencies and municipalities. A court can also dispense with the bond requirement if the plaintiff can show a strong likelihood of success at trial and is sufficiently solvent to pay the defendant’s costs. See Specialty Chemicals & Services, Inc. v. Chandler, 1988 WL 618583 (N.D. Ga. 1988). No bond is required for injunctions to prevent physical harm, such as domestic violence injunctions.

Presumptions: Irreparable Harm

As stated above, a showing of irreparable harm is essential to obtaining injunctive relief. In addition to a showing that there are no adequate remedies at law, the requirement to show a likelihood of irreparable harm is not easy and usually serves as a bar to those seeking injunctive relief. However, certain causes of action, in both state and federal law, contemplate injunctive relief and provide for a presumption of irreparable harm.

In the employment law context, certain jurisdictions support a presumption of irreparable harm in discrimination and retaliation cases. See Baker v. Buckeye Cellulose Corp., 856 F.2d 167 (11th Cir. 1988). However, other circuit courts require irreparable harm to be proven by the employee in discrimination and retaliation cases before injunctive relief can be granted. See DeNovellis v. Shalala, 135 F.3d 58 (1st Cir. 1998); Stewart v. U.S. Immigration & Naturalization Serv., 762 F.2d 193 (2d Cir. 1985); Marxe v. Jackson, 833 F.2d 1121 (3d Cir. 1987); EEOC v. Anchor Hocking Corp., 666 F.2d 1037 (6th Cir. 1998).

Under Florida law, “use of specific trade secrets, customer lists, or direct solicitation of existing customers shall be presumed to be an irreparable injury and may be specifically enjoined.” Florida Antitrust Act of 1980 §542.33(2)(a), Fla. Stat. (2012). The following jurisdictions also presume irreparable harm from actual or threatened misappropriation of trade secrets: 1) New York-Lumex v. Highsmith, 919 F.Supp. 625 (E.D.N.Y. 1996); 2) Connecticut (limited presumption)-Genworth Financial Wealth Management Inc. v. McMullan, 721 F.Supp.2d 122 (D. Conn. 2010); 3) North Carolina-Merck & Co., Inc. v. Lyon, 941 F. Supp. 1443 (M.D.N.C. 1996); 4) Ohio- Columbus Steel Castings Co. v. Alliance Castings, Co. LLC, 2011 WL 6931518 (Ct. App. 2011); 5) Massachusetts- EchoMail, Inc. v. American Exp. Co., 378 F.Supp.2d 1 (D. Mass. 2005); 6) Illinois- JanoJustice Sys. Inc. v. Burton, 636 F.Supp.2d 763 (C.D. Ill. 2009); 7) Pennsylvania-Verizon Communications, Inc. v. Pizzirani, 462 F.Supp.2d 648 (E.D. Penn. 2006); 8) Oklahoma- SkyCam LLC v. Bennett, 2012 WL 4483610 (N.D. Okla. September 2012); 9) Texas- Hill v. McLane Co., Inc., 2011 WL 56061 (Ct. App. Tex. 2011).

Further, some jurisdictions have refused to recognize a presumption of irreparable harm for actual or threatened misappropriation of trade secrets: 1) Second Circuit-Faireley Transport Malmö AB v. Wabtec Corp., 559 F.3d 110, 118-19 (2d. Cir. 2009); 2) Third Circuit-Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 89, 92 (3d Cir. 1992). In addition, some states, like Florida, provide for a presumption of irreparable harm in cases involving a violation of restrictive covenant or a noncompete agreement.

In the eBay Inc. opinion, the U.S. Supreme Court reversed the Federal Circuit and held that there is no presumption of irreparable harm upon proof of patent infringement. See eBay, Inc., 547 U.S. at 393-94. Following the eBay Inc. opinion, the U.S. Court of Appeals for the 11th Circuit has held that there is no presumption of irreparable harm for claims of trademark infringement and unfair competition. See North American Medical Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1228 (11th Cir. 2008). See also Chanel, Inc. v. Mesadieu, No. 6:08-cv-1557-Orl-31KRS, 2009 WL 2496586 *7-8 (M.D. Fla. Aug. 12, 2009); Osmose, Inc. v. Viance, LLC, 612 F.3d 1298, 1320 (11th Cir. 2010).

Conclusion

The foregoing is just a brief outline of the basic requirements necessary to obtain injunctive relief. The requirement to show a likelihood of irreparable harm and the inadequacy of other remedies at law are generally always necessary before injunctive relief is granted. In addition, there is usually a requirement to post a bond, provide notice to the adverse party, show a likelihood of success on the merits and to show that the balance of equities tips in the movant's favor before injunctive relief will be granted. The requirements for the entry of a preliminary or temporary injunction or a TRO varies greatly from state to state. In Federal court, the criteria for seeking injunctive relief are more consistent and the procedure is governed by Fed. R. Civ. P. 65. As explained above, there are presumptions of irreparable harm in certain situations. However, recent case law, such as the eBay Inc. opinion, is challenging the validity of presumptions of irreparable harm in trademark, copyright, and patent infringement cases. Being able to require an adverse party to perform an affirmative act or to prevent them from taking an action can be a powerful advantage in any litigation. However, in order to be successful, it is imperative to become familiar with the local rules and procedure regarding injunctive relief in your particular jurisdiction including any presumptions of irreparable harm that may apply to your claims.