Preliminary Injunctions

Live or Die on Powerful Evidence of Wrongdoing

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Before filing a motion for a temporary restraining order (TRO) or a preliminary injunction, the most critical thing to consider is the quality of the supporting evidence. If you lack credible witness testimony and admissible documents to support interim injunctive relief, you should not file the motion. Too often, lawyers rush to court with a well-pleaded claim, but they move for immediate relief with incomplete or inadequate facts and without sufficient consideration of whether the evidence establishes the required elements for an injunction. Clients sometimes push lawyers to seek injunctive relief, not realizing the risks, procedure, burdens, costs, and ramifications. In many cases, it might be better to wait until credible and admissible facts are discovered, instead of rushing into court on an inadequate factual record. It is not unusual for injunctive relief cases to improve over time if patience is exercised in waiting for evidence of suspected nefarious conduct to bubble up in multiple places.

For example, sometimes an employer might learn that a former employee has gone to work for a competitor and might suspect that the former employee is soliciting the employer's customers in breach of a noncompetition or non-solicitation covenant (or both). Indeed, the employer might have an incriminating email or two evidencing the former employee's solicitation. Instead of rushing into court with the first scrap of evidence of a potential breach, it is often better for the employer to wait until numerous instances of prohibited conduct appear. As time goes by, many more customers might bring prohibited solicitations to the attention of the company. If there has been only sporadic or limited conduct without any real economic harm, some courts are reluctant to enjoin limited prohibited conduct, finding no real threat of irreparable harm. Some litigants' own customers also are reluctant to get involved in litigation if pushed. A patient client and counsel, on the other hand, who wait for the bad conduct to emerge, often obtain more helpful documents and emails than if they simply rushed to court at the first hint of a breach.

Preliminary injunctions are a provisional equitable remedy that should be used only in extraordinary circumstances. If granted, a preliminary injunction directs a party to refrain from an action or, in rare cases, to perform an action. Preliminary injunctions are more likely to be granted to preserve the status quo pending an adjudication of a case on the merits. Injunctions are less likely to be granted if they are mandatory and order a party to take affirmative action. Courts require the moving party to establish the existence of an emergency and to do so with credible, admissible evidence.

Temporary restraining orders and preliminary injunctions are often sought in noncompetition, non-solicitation, and theft of trade secret cases, as well as in cases involving the dissipation or destruction of assets or in trademark and patent litigation.

Strategic Considerations

Many strategic considerations must be evaluated before seeking injunctive relief. For example, should a company seek a temporary restraining order and, if so, seek an ex parte restraining order? Many courts are reluctant to consider and grant ex parte motions for a temporary restraining order, except under the most

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extreme and exigent circumstances. Often, when presented with an ex parte motion for a TRO, a court nevertheless will require that notice in fact be given to the opposing party, unless secrecy and speed are critical to maintaining the status quo or preventing real harm. Such exigent circumstances might exist, for example, if a party is in the process of destroying documents or electronic evidence, or dissipating assets out of the country. TROs also have a limited duration (for example, 14 days in federal court), and courts typically are required to hold a preliminary injunction hearing before the expiration of the TRO. You should never file a motion for a TRO without anticipating the evidentiary hearing at the preliminary injunction stage to be conducted shortly thereafter. When moving for a TRO, think at least one step ahead.

You thus need to evaluate whether a TRO involves a true emergency. Should you instead wait and file a motion for a preliminary injunction after sufficient facts are developed? Indeed, if a rock-solid and persuasive case can be presented at the preliminary injunction hearing, a plaintiff might consider requesting not only a preliminary injunction but also a consolidation of the preliminary injunction hearing with trial on the merits. On the other hand, preliminary injunctions are called "preliminary" for a reason. If a party waits too long before filing a motion for a preliminary injunction, a court might conclude that there are no exigent circumstances to justify injunctive relief or that the status quo need not be preserved.

TROs are best suited to emergencies where preservation of the status quo is essential to prevent an irreparable harm that cannot be compensated with money damages. A TRO is most appropriate when there are exigent circumstances that require expedited relief. For example, when a company's trade secrets have been stolen in a computer theft by a former employee and the company wishes to recover the trade secrets from the hacker. Or when a former employee has stolen assets and is in the process of transferring the stolen assets out of the country.

Before they will grant a TRO, most courts require that the moving party establish by credible, admissible evidence that the plaintiff has a right that requires protection, the plaintiff has a likelihood of success on the merits, the plaintiff will suffer irreparable harm if the application for a TRO is denied, and the plaintiff has no adequate remedy at law. In practice, courts are most persuaded by egregious conduct, the quality of the evidence in support of the TRO, and whether the plaintiff likely will prevail at trial. Courts are less likely to grant a TRO if money damages are an adequate remedy for the defendant's conduct.

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A plaintiff has the best shot at obtaining a TRO where the defendant's conduct truly offends the court and where the admissible evidence in support of the TRO is credible and overwhelming. Courts, however, are reluctant to grant TROs when there are disputed facts that cannot be resolved on the papers. Courts also will not grant TROs based on affidavits that are based on hearsay, speculation, or "information and belief." To succeed on a motion for injunctive relief, the evidence needs to tell a powerful story of wrongdoing and be credible, admissible, and substantial.

In evaluating motions for injunctive relief, courts also consider such things as whether the contract at issue expressly provides for injunctive relief, whether a statute authorizes injunctive relief, and whether the requested relief is narrowly tailored. For example, if a proposed TRO is overly broad or does not strictly comply with the applicable statutory requirements, courts can deny the TRO even if other factors are present to support injunctive relief. Plaintiffs' counsel should be cautious in drafting a proposed TRO and should carefully limit the impact of the TRO to the offending conduct. Seek to avoid unintended collateral consequences that might result in a denial of the injunction.

In defending against a TRO, consider whether the defendant should stipulate to the TRO. Where a moving party lacks sufficient evidence, defense counsel should vigorously point out the evidentiary infirmities. But in cases in which the evidence is overwhelming, it might be advantageous to agree to refrain from the offending conduct to evidence good faith and establish credibility with the judge in voluntarily assisting to maintain the status quo. For example, if a defendant's conduct was inadvertent or done in reliance on bad advice, stipulating to a TRO might help the defendant to minimize the consequences of the action in the litigation. A court is more likely to go easy on a defendant who owns up to bad acts and works to prevent such conduct in the future. Clients who persist in fighting a TRO in the face of overwhelming evidence of bad acts may face the wrath of an offended judge with power to stop a party in its tracks. After a TRO is granted, defendants might consider stipulating to a continuance of the TRO to permit settlement discussions and to avoid the cost, expense, and risk of a preliminary injunction hearing if there are negative facts.

Preliminary Injunction Hearing

A preliminary injunction hearing is most often like a full-blown trial on the merits. It comes with direct and cross-examination and with opening and closing statements. As a result, the process of filing a TRO and a preliminary injunction is expensive and should be used only where the economics or rights at issue merit extraordinary expense. In some cases, a client might be better off simply filing a complaint and then litigating the case without injunctive relief if the defendant's continued conduct is unlikely to result in substantial damage to the plaintiff or damage that is recoverable in money. The filing of a lawsuit alone can in some cases deter further wrongful conduct.

Carefully plan for the preliminary injunction hearing before filing a motion for a TRO. For example, while TROs often are granted or denied based on affidavits or declarations, preliminary injunction hearings typically require live witness testimony or deposition testimony. If key witnesses are beyond the subpoena power of the court or unable to travel to court for the preliminary injunction hearing, a lawyer might find it impossible to meet the burden of proof. The lawyer must be able to get all facts, documents and testimony into evidence at the preliminary injunction hearing. The evidentiary nature of the preliminary injunction hearing might, for example, require counsel to conduct expedited discovery in the limited amount of time between the TRO and the preliminary injunction hearing. It is not uncommon for extensive depositions to be taken after a TRO is granted in the 10– or 14-day window before the preliminary injunction hearing.

This is particularly true where witnesses cannot be compelled to appear live in court or where third-party witnesses are reluctant to become involved in the dispute.

You should not file a motion for a TRO without thoughtful consideration of all facts, documents, and testimony that will be needed for the evidentiary hearing at the preliminary injunction stage. Obtaining a TRO on written affidavits is a much different process than winning a preliminary injunction with live witness testimony and cross-examination. If a case depends on having third-party documents admitted at the evidentiary hearing, you need to consider what testimony is required to get the documents into evidence. Injunctions can be denied in meritorious cases due to a failure to plan how to get key documents and testimony admitted at the evidentiary hearing.

For example, when an employee steals trade secrets, the evidence of the theft is often contained in various computer logs, emails, and complicated technical computer data. Counsel should be prepared with witnesses who can authenticate such evidence. You also need competent witnesses who can completely explain what the complex evidence is to a judge who might be inexperienced with the intricacies of computer forensics.

Another risk that counsel should consider prior to filing a motion for a TRO is that some states (Utah, for example) allow fee shifting in preliminary injunction proceedings. If the defense succeeds at the preliminary injunction stage in setting aside a TRO, some states will award attorney fees to the party who was wrongfully enjoined. Counsel needs to discuss this attorney fees risk with the client prior to filing a TRO and motion for a preliminary injunction. Defense counsel often file motions to dissolve TROs and preliminary injunctions on the grounds, for example,

that the TRO was wrongfully issued, that circumstances supporting the TRO have changed, or that the TRO caused substantial damage to the enjoined party.

At the preliminary injunction hearing, a court deciding on such relief will not only consider the same four factors used to evaluate a TRO but will also decide whether the balance of hardships between the parties warrants the preliminary injunction. Courts often also consider whether the public interest weighs in favor of granting the injunction. The decision to grant or deny a preliminary injunction rests with the sound discretion of the court, and it will be overturned on appeal only for an abuse of discretion. Oftentimes, the party that wins at the preliminary injunction stage is, in substance, the prevailing party in the case. Litigation often ends after a preliminary injunction is granted or denied, particularly in cases that have no quantifiable monetary damages.

There are many defenses to evaluate before filing a motion for a TRO or a preliminary injunction. For example, the constitutionality of statutes generally is not adjudicated at the preliminary injunction stage. Courts are reluctant to enjoin public officials and hesitant to enjoin alleged criminal conduct absent statutory authorization. Courts also will not enjoin other courts or issue injunctions if there is statutory preemption. There are many equitable affirmative defenses to injunctive relief, such as laches, prematurity, and unclean hands.

In most cases in which injunctions are denied, it is for the moving party's failure to satisfy its burden of proof. Some courts require that the claim be proven by a preponderance of the evidence, while others require clear and convincing evidence to obtain injunctive relief. Courts often require the moving party to post a bond to pay for costs and damages incurred if an enjoined party is determined to have been wrongfully enjoined. Fights over the amount of a bond can be protracted and complex.

Injunctive relief is an expensive, complex, and aggressive form of litigation and should be pursued only with thoughtful planning and consideration.

When deciding whether to file for injunctive relief, you should evaluate venue and jurisdiction. State court injunctions, for example, enjoin conduct within a state but are not effective outside the borders of the state. There are often differences between federal and state courts concerning whether a TRO can be appealed. You should determine whether the court you are in permits the grant or denial of a TRO to be appealed. Consider the options and costs before moving for injunctive relief.

Counsel needs to consider not only whether to move for injunctive relief but also from whom to seek injunctive relief. For example, in a noncompetition and non-solicitation case, should the plaintiff move for injunctive relief not only against the former employee but also against the competitor who hired the former employee? What evidence, for example, exists that the competitor hired the former employee with knowledge of the restrictive covenants and with the intent to interfere in the contract between the former employee and former employer? The decision of whom to sue depends on the very same considerations at issue in suing the former employee. What solid, substantial, and persuasive evidence exists that will convince a judge that the nefarious conduct did, in fact, take place? In the absence of strong, persuasive, and admissible evidence, moving for an injunction against a competitor is unlikely to result in an injunction and may, in fact, harm the case against the former employee.

Defending Against a TRO

If you are defending against a TRO, your first step is to develop a credible and admissible factual record that disputes the facts in the moving papers. Defense counsel also should object to plaintiff's evidence that is not admissible. Challenge each of the factors required to obtain a TRO. Defense counsel should argue that the moving party has not met its burden on one or more of the elements a movant must show to obtain an injunction. Defense counsel also should advocate for a sizable bond. If a TRO is granted, a defendant might want to push for a quick preliminary injunction hearing to minimize the opportunity for the moving party to obtain additional and extensive discovery in support of the injunctive relief. Defense counsel should also plan for expedited depositions of the moving party's witnesses and any third parties whose testimony or documents will be essential for the defense at the preliminary injunction hearing. Like moving counsel, defense counsel needs to immediately focus on what evidence the defense will need to admit at the evidentiary hearing in terms of witnesses and documents.

Often the best defense strategy is to take tactical advantage of the moving party that too quickly files for injunctive relief without a sufficient evidentiary basis, acting on unsubstantiated suspicions, rather than concrete, solid facts. The same due diligence standard that applies to plaintiff's counsel before filing a motion for injunc-

tive relief applies equally well to defense counsel. Defense counsel needs to master the facts and present credible, admissible evidence, if available. Defense counsel also needs to be prepared to point out the absence of proof on the moving party's part.

Many lawsuits seeking injunctive relief involve collateral consequences. For example, if an employer aggressively enforces noncompetition or non-solicitation covenants, will the employer be viewed as a bully by its workforce and have difficulty hiring and retaining employees? Will employees really be deterred from leaving the company to join competitors or form their own companies? Will competitors put an overly aggressive company at a competitive disadvantage in the labor market by using negative information to attract the best talent? Counsel should not only evaluate the merits, strategy, and costs of seeking injunctive relief but also should discuss the potential effects of such conduct on the client's larger business interests. Injunctive relief is an expensive, complex, and aggressive form of litigation and should be pursued only with thoughtful planning and consideration. ■