

LITIGATION REVIEW

UP-TO-DATE ANALYSIS FOR CLIENTS AND FRIENDS OF THE FIRM

Obtaining TROs and Preliminary Injunctions

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Businesses sometimes have emergencies. When such situations arise, they and their counsel must quickly determine whether it is appropriate to seek immediate relief from the courts. Temporary restraining orders and preliminary injunctions are two types of orders a court may issue on an expedited basis without first going through the time-consuming rigors associated with a trial. Their function is to prevent a serious injury from either taking place or getting worse before a trial can be held. This article discusses both forms of relief and issues that can arise when a plaintiff seeks them.

WHEN IS A TRO APPROPRIATE?

A temporary restraining order, commonly referred to as a "TRO," is appropriate when a plaintiff faces the prospect of serious, immediate harm that money alone cannot cure. Courts view a TRO as a drastic, emergency remedy which may issue only in exceptional circumstances. *Abdulhafedh v. Secy. of State*, 161 Ill. App. 3d 413, 416 (2nd Dist. 1987). The existence of an emergency is usually critical to convincing a judge to grant relief. Moreover, the absence of an emergency is a common ground for denying a TRO.

The purpose of a TRO is to preserve the *status quo* in the short term until a later hearing on a preliminary injunction is held. *Passon v. TCR, Inc.*, 242 Ill. App. 3d 259, 264 (2nd Dist. 1993). In other words, TROs are intended to last for a short period of time until the court can examine the matter

more closely at a preliminary injunction hearing. At that later hearing, the court will consider testimony and other evidence that cannot be presented at the TRO hearing.

The *status quo* is not the situation that exists at the time the motion for a TRO is brought. Rather, it is the "last, actual, peaceable, uncontested status which preceded the controversy." *In re Marriage of Weber*, 182 Ill. App. 3d 212, 218 (1st Dist. 1989). Thus, the mere fact that a defendant already has started to take wrongful action does not prevent a business from seeking a TRO to stop the defendant's wrongful behavior.

WHAT PLEADINGS SHOULD BE FILED?

Obtaining a TRO requires the filing of a complaint, a TRO motion and a supporting memorandum of law. Of course, these materials should complement one another. In drafting a complaint, one of the first decisions that a plaintiff must make is whether to have a representative verify that the complaint is accurate by reviewing it and swearing to its truth.

Though not required, the verification of the complaint will naturally lend credibility to both it and the TRO motion. Moreover, at least one appellate court has stated that where the defendant has not filed an answer, it is proper for a trial court to grant a TRO based on "the uncontroverted facts of the verified complaint." *Stanton v. Chicago*, 177 Ill. App. 3d 519, 524 (1st Dist. 1988). Hence, it may be wise to file a verified complaint in order to take advantage of this holding and other potential benefits.¹

SHOULD NOTICE OF THE TRO MOTION BE GIVEN?

Because TROs are sought in emergency situations, plaintiffs often wonder whether they are obligated to give defendants notice of the TRO hearing. In all but the most unusual cases, it is advisable to give defendants such notice. The Illinois

¹By statute, a TRO without notice to the opposing party cannot be granted in the absence of either a verified complaint or an affidavit. 735 ILCS 5/11-101; see *Hough v. Weber*, 202 Ill. App. 3d 674, 688 (2nd Dist. 1990) (verified pleading not required where there is notice).

Code of Civil Procedure provides:

No temporary restraining order shall be granted *without notice* to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon.

735 ILCS 5/11-101 (emphasis added). Stated another way, a TRO without notice is considered a drastic remedy that should be granted only in the most extreme circumstances. *Hill v. Pawnee*, 16 Ill. App. 3d 208, 209 (4th Dist. 1973).

Plaintiffs have been faulted where the record in a case fails to indicate why a minimum degree of notice, such as a telephone call, could not have been provided. *Hirschauer v. Chicago Sun-Times*, 192 Ill. App. 3d 193, 201 (1st Dist. 1989). Additionally, there may be advantages for a plaintiff to have the defendant in court at the hearing. For example, it may avoid a later dispute about whether or when the defendant was notified that the court ordered it to stop taking certain actions.

WHAT STANDARD OF PROOF MUST BE MET TO OBTAIN A TRO?

Although the granting or denial of a TRO is within a trial court's discretion, there are certain guidelines which the court should follow. *Diamond Sav. & Loan Co. v. Royal Glen Condo. Assn.*, 173 Ill. App. 3d 431, 434 (2nd Dist. 1988). A TRO should be issued by the court upon a summary showing of the necessity of an order to prevent immediate and irreparable harm. *Peoples Gas Light & Coke Co. v. Chicago*, 117 Ill. App. 3d 353, 355 (1st Dist. 1983); *see also Passon*, 242 Ill. App. 3d at 263. If no answer to the complaint has been filed, this means the court should consider only the verified complaint and arguments of counsel in reaching its ruling. *Stanton*, 177 Ill. App. 3d at 524. Further, appellate courts have stated that even if the defendant files a verified answer, the trial court still should hear only the arguments of counsel. *Passon*, 242 Ill. App. 3d at 263; *Paddington Corp. v. Foremost Sales, Promotions, Inc.*, 13 Ill. App. 3d 170, 175 (1st Dist. 1973); *but see*

G&W Electric Co. v. Joslyn Mfg. & Supply Co., 127 Ill. App. 3d 44, 48 (1st Dist. 1984). In short, a TRO hearing focuses on the allegations of the complaint and the arguments of counsel. It is not an opportunity for either party to present evidence.

WHAT SHOULD A TRO MOTION CONTAIN?

A plaintiff seeking a TRO is not required to prove that it ultimately will win the case. *Buzz Barton & Assoc., Inc. v. Giannone*, 108 Ill. 2d 373, 382 (1985). A plaintiff must establish only: (1) a protectible right; (2) irreparable harm in the absence of the TRO; (3) a lack of an adequate remedy at law; and (4) a likelihood of success on the merits. *AFSCME, Council 31 v. Ryan*, 332 Ill. App. 3d 965, 966-67 (1st Dist. 2002).

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Moreover, courts have held that a party needs to raise only a “fair question” that it has the right at issue. *Buzz Barton*, 108 Ill. 2d at 382. Hence, a proper motion should adequately address each of these four points by identifying the complaint allegations that support them and explaining the import of each.

A PROTECTIBLE RIGHT

In order to show a protectible right, a plaintiff must first raise a fair question as to a substantive interest recognized by statute or common law. *See Delta Med. Sys., Inc. v. Mid-America Med. Sys., Inc.*, 331 Ill. App. 3d 777, 789-90 (1st Dist. 2002). Stated another way, a plaintiff must identify an interest it possesses for which the law will afford protection. Although this requires a fact specific determination, case law provides many examples of substantive interests that are deemed sufficient to be protected by an injunction.

For instance, the Illinois Appellate Court has upheld a TRO that prevented the City of Chicago from forcing a police officer to retire. *Stanton*, 177 Ill. App. 3d at 532. It has also stated that an employer has a valid interest in protecting its long-

standing client relationships against the sabotage of former employees. *A-Tech Computer Servs., Inc. v. Soo Hoo*, 254 Ill. App. 3d 392, 399 (1st Dist. 1993). In a marital dispute, the court ruled that a family business was a legitimate, threatened business interest which may receive injunctive protection. *In re Marriage of Weber*, 182 Ill. App. 3d at 219. In short, there are a great many business and property interests that the courts will protect.

IRREPARABLE HARM

Second, a plaintiff must show it will suffer irreparable injury unless a TRO is granted. An irreparable injury is an injury that cannot be adequately compensated with money alone. This may be because the loss itself cannot be measured with a reasonable degree of certainty or because it involves interests that have a significant non-monetary component, such as a valuable business opportunity, a long-standing business relationship, the plaintiff's reputation, or some other significant intangible or qualitative interest. See *In re Marriage of Weber*, 182 Ill. App. 3d at 219.

At the TRO stage, showing irreparable harm is often the focal point of the court's analysis. Many courts must be convinced that a truly permanent injury is imminent. Still, Illinois appellate courts have ruled that once a protectible interest is established, it is *presumed* that irreparable injury follows if that interest is not protected. *A-Tech Computer Servs., Inc.*, 254 Ill. App. 3d at 400; *A.B. Dick Co. v. American Pro-Tech*, 159 Ill. App. 3d 786, 794 (1st Dist. 1987). Consequently, as a matter of law, the irreparable harm element is sometimes deemed satisfied when the plaintiff can show that it has a protectible interest that is being threatened by the defendants' wrongful conduct.

NO ADEQUATE REMEDY AT LAW

Third, a plaintiff seeking a TRO must show that it has no adequate monetary remedy. This means a plaintiff must demonstrate that an award of money cannot make it whole. One court has stated that to be adequate a monetary remedy must be as clear, complete, practical and efficient as the equitable remedy. *Diamond Sav. & Loan Co.*, 173 Ill. App. 3d at 435.

Nevertheless, as a practical matter, a plaintiff must show far more than that it will be inconvenienced by the court's failure to enter a TRO. To give but one example, courts have recognized that a loss of competitive position is intangible and incapable of being measured. *A-Tech Computer Servs., Inc.*, 254 Ill. App. 3d at 401. Thus, this element has been found to be satisfied when an employee unlawfully solicits his former employer's customers. *Id.*

LIKELIHOOD OF SUCCESS ON THE MERITS

Fourth, a plaintiff must show a reasonable likelihood that it will prevail on the merits at trial. *Lo v. Provena Medical Ctr*, 342 Ill. App. 3d 975, 987 (4th Dist. 2003). This requirement is not as stringent as it seems. In reality, a plaintiff seeking a TRO must show only that there is sufficient reason for the court to protect its rights until a more fulsome hearing on the merits can be held. Case law clearly states that the court should not decline to enter a TRO merely because the court may not be absolutely certain the plaintiff has the rights that it claims. *Stocker Hinge Mfg. Co. v. Darnel Indus., Inc.*, 94 Ill. 2d 535, 541-42 (1983). There is no clear bright line for what it will take to convince the court to grant relief. But if the plaintiff can make a reasonable showing that it has a valid interest that needs the court's protection, and there are no affirmative defenses or other

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considerations that clearly trump the plaintiff's rights, this element probably will be deemed satisfied.

HOW LONG WILL A TRO LAST?

A plaintiff who establishes the four elements, and thereby obtains a TRO, will naturally wonder how long the TRO can last. As its name indicates, a TRO is a *temporary* form of relief. Indeed, by statute, a TRO which is issued *without notice* to the opposing party initially can last no longer than 10 days. 735 ILCS 5/11-101; *Abdulhafedh*, 161 Ill. App. 3d at 416. Although a TRO *with notice* can last longer than 10 days, a hearing must be set within a short time after such a TRO is granted. *Greenspan v. Mesirov*, 132 Ill. App. 3d 508, 511 (1st Dist. 1985).

SHOULD EXPEDITED DISCOVERY BE EXPECTED?

At the end of a TRO hearing, regardless of who prevailed, it is common for one or both parties to seek expedited discovery to prepare for the preliminary injunction hearing. Therefore, even before the TRO hearing has begun, counsel should consider what preliminary injunction discovery will be necessary and how long it will take to complete. Although such discovery can be used at any future trial, the scope of such discovery may be limited to matters that are directly relevant to the preliminary injunction hearing.

Once a request for a preliminary injunction has been made, trial judges normally expect parties to answer interrogatories, exchange documents, take depositions and begin presenting

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evidence at a hearing all within a few weeks. It is not unusual for a party to anticipate this and bring a proposed preliminary injunction scheduling order to the TRO hearing. To help meet the expedited discovery schedule, the relevant documents should be gathered and witnesses should be identified at the earliest possible time.

WHAT SHOULD A PRELIMINARY INJUNCTION MOTION CONTAIN?

The elements entitling a party to a preliminary injunction are essentially the same as those which entitle a party to a TRO. A plaintiff must allege in its motion and establish at a hearing: (a) a clearly ascertainable right in need of protection; (b) irreparable harm in the absence of an injunction; (c) no adequate remedy at law; and (d) a likelihood of success on the merits. *Save the Prairie Soc’y v. Greene Dev. Group*, 323 Ill. App. 3d 862, 867 (1st Dist. 2001). As a result, plaintiffs often include their preliminary injunction arguments and request for a relief in their TRO motions.

Prior to ruling on a motion for a preliminary injunction, but not a TRO, some courts consider an additional factor.

They compare the effects of granting the injunction versus denying it and try to determine who would be hurt more if the injunction is or is not granted. *Keefe-Shea Joint Venture v. City of Evanston*, 332 Ill. App. 3d 163, 169 (1st Dist. 2002). This fact-intensive consideration is often called “balancing the equities,” and it can be critical to the result. Ultimately, as is the case with a TRO, the granting or denial of a preliminary injunction is within a trial court’s discretion. *Id.* at 167.

WHAT WILL OCCUR AT THE PRELIMINARY INJUNCTION HEARING?

Unlike a TRO hearing, which is a summary proceeding, a preliminary injunction hearing is an evidentiary hearing. In effect, it is a trial before the judge. *Peoples Gas Light & Coke Co.*, 117 Ill. App. 3d at 355. Typically, counsel for both parties will make opening statements, present witnesses, submit documentation and other evidence, and make closing arguments. Oftentimes, parties will stipulate to the admissibility of affidavits, deposition testimony and documents. However, the rules do not require the parties to do so. In the end, the court will consider the evidence and arguments and decide whether the plaintiff has established its case by a preponderance of the evidence. *See In re Marriage of Weber*, 182 Ill. App. 3d at 219.²

HOW LONG WILL A PRELIMINARY INJUNCTION LAST?

Unlike a TRO, a preliminary injunction is not intended to be of brief duration. *Bullard v. Bullard*, 66 Ill. App. 3d 132, 135 (5th Dist. 1978). A preliminary injunction is meant to stay in effect until a full trial on the merits can be held. *Id.* In most cases, this means a preliminary injunction will protect a plaintiff for months or even years. Indeed, because of the thorough nature of a preliminary injunction hearing, the parties must evaluate whether a trial is likely to lead to a different outcome and, thus, whether a trial is worth the time and expense associated with it. For this reason, cases often settle after a preliminary injunction is either granted or denied.

²When only questions of law are present, a trial court “is not precluded from issuing a preliminary injunction upon the . . . undisputed facts alleged in a verified complaint.” *Seagram Distillers Co. v. Foremost Sales Promotions, Inc.*, 13 Ill. App. 3d 166, 169 (1st Dist. 1973).

ARE THERE RISKS TO SEEKING A TRO AND PRELIMINARY INJUNCTION?

A plaintiff seeking a TRO or preliminary injunction assumes some risk if its motion is granted. The Illinois Code of Civil Procedure provides:

The court in its discretion, may before entering a restraining order or a preliminary injunction, require the applicant to give bond in such sum, upon such condition and with such security as may be deemed proper by the court, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

735 ILCS 5/11-103. Because many courts exercise this discretion, a plaintiff seeking such relief should be prepared to post a bond.

The Code further provides that, prior to the final disposition of a case, a defendant may ask the court to award it damages caused by a TRO or preliminary injunction. 735 ILCS 5/11-110. To be entitled to such damages, the defendant must show that it was “wrongfully enjoined or restrained.” 735 ILCS 5/11-103. A party seeking a TRO or preliminary injunction should be aware that courts have been known to award such damages.

In *Hirschauer*, 192 Ill. App. 3d at 202, a court found that a TRO was entered without proper notice and the plaintiff’s complaint allegations were deficient. Hence, the case was remanded for a determination of damages. *Id.* at 198-202. In *Knapp v. Palos Cmty. Hosp.*, 176 Ill. App. 3d 1012, 1025-26 (1st Dist. 1988), a court found that an injunction was wrongfully issued for two independent reasons. First, it determined that the trial court lacked jurisdiction over the case. And, second, it found that the plaintiff had failed to establish a likelihood of success on the merits. Consequently, that court affirmed the trial court’s award of over \$50,000 in damages payable to the defendant. *Id.* at 1027.

These cases warn that a business that seeks a TRO or preliminary injunction has responsibilities and that it must take care not to overreach. Moreover, even the errors of the court could come back to haunt that business at a later date. It is

therefore important for counsel to assist clients in evaluating when injunctive relief is appropriate and the scope of relief that should be requested. If proper discretion is not used, success at the TRO or preliminary injunction stage just might come with a high price tag that will not be known until later.

SUMMARY

The judicial process allows a plaintiff, through a TRO or preliminary injunction, to obtain prompt or even immediate relief when faced with the imminent threat of irreparable harm. A TRO often will last until a preliminary injunction hearing can be concluded. Then, if a plaintiff meets with continued success, a preliminary injunction can protect the plaintiff until a trial is held and final judgment is entered.

There are expenses and risks associated with obtaining TROs and preliminary injunctions. Because of the large amount of work that is usually involved, legal fees can be considerable. Further, if the plaintiff is successful, there is the cost of posting a bond and the risk of potential liability to the defendant if the injunction is found to have been wrongfully issued. Despite the expense and risk, however, these forms of injunctive relief can be an indispensable means of protection in emergency situations.

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