



TRO'S / PRELIMINARY INJUNCTIONS WINNING STRATEGIES

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Maximizing Your Likelihood of Success in Obtaining or Opposing Temporary Restraining Orders and Preliminary Injunctions

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I. General Principles

There are two types of injunctive relief:

- i) Prohibitory, which prohibits a party from continuing certain conduct; and
- ii) Mandatory, which requires a party to act affirmatively.

Prohibitory injunctions are much easier to obtain and are the most common type of injunctive relief sought in most cases. Mandatory injunctions are very difficult to obtain from most courts and often require a greater showing of need for preliminary relief. See *Liebhart v. SPX Corp.*, 917 F.3d 952, 963 (explaining consideration of the intrusiveness of the ordered act, as well as the difficulties that may be encountered in supervising the enjoined party's compliance). If you can phrase the type of relief as prohibitory, rather than mandatory, the likelihood of obtaining the relief you seek will increase.

There are three types of injunctions:

- i) Temporary Restraining Order ("TRO");
- ii) Preliminary Injunction ("PI"); and
- iii) Permanent Injunction.

We will discuss each of these in more detail below.

Temporary Restraining Orders

Temporary restraining orders ("TRO's") are usually sought on an expedited basis to preserve the "status quo" of the subject matter litigation and prevent irreparable harm until a hearing can take place on a preliminary injunction. *IPS Steel LLC, v. Hennepin Industrial Development, LLC*, Case No. 17-cv-1451, 2018 WL 3093959, at *2 (Feb. 23, 2018); *Crue v. Aiken*, 137 F.Supp.2d 1076, 1083 (C.D. Ill. 2001). "Status quo" is generally defined as the last actual, peaceable, uncontested status that preceded the controversy. *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958).

Preliminary Injunction Orders

Preliminary injunction orders ("PI") are entered to preserve the status quo pending a final determination on the merits of the case. *Indiana Civ. Liberties Union v. O'Bannon*, 259 F.3d 766, 770 (7th Cir. 2001). They prohibit or require future action until a court can reach a final determination of the merits at trial.

Permanent Injunction Orders

Permanent injunctions are only granted after a final ruling by the trial court on the merits of the case. *Diamond Blade Warehouse, Inc. v. Paramount Diamond Tools, Inc.*, 420 F.Supp.2d 866, 872 (N.D.Ill. 2006). Although it seems obvious, they are permanent in nature, and last forever, unless reversed on appeal. During oral argument on appeal, I was asked by an appellate judge how long a permanent injunction entered by the trial court would last; after a pause, I said I thought forever or until circumstances changed. I was not surprised when the

appellate court shortly thereafter reversed the injunction.

II. TROs and PIs Are Extraordinary Remedies and Require Unique Showings

TROs and PIs are extraordinary and drastic remedies that should only be sought and issued in exceptional circumstances. *Goodman v. Ill. Dep't of Fin. and Prof'l Regulation*, 430 F.3d 432, 437 (7th Cir. 2005). Their purpose is not to determine controverted rights or to decide the merits of the case; rather, they are designed to prevent a threatened wrong or continued injury and preserve the status quo with the least injury to the parties concerned.

Under federal law, one must demonstrate i) a "clear showing" of irreparable injury in the absence of an injunction; ii) no adequate remedy at law; iii) a likelihood of success on the merits; iv) balance of hardships favors the party seeking the injunction; and v) the effect on public interest favors injunctive relief. *Turnell v. Centimark Corp.*, 796 F.3d 656, 661 (7th Cir. 2015); *Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999).

Irreparable Injury

Irreparable injury is imminent harm that is not speculative or merely possible. It is harm that will likely occur before the court or jury rules on the merits of the case. Irreparable injury is usually defined as (i) harm that cannot be prevented or fully rectified by a final judgment following trial; (ii) harm that cannot be undone by award of money damages; or (iii) harm that cannot be accurately measured in money damages. *Roland Machinery Co. v. Dresser Indus., Inc.* 749 F.2d 380, 386 (7th Cir. 1984).

No Adequate Remedy at Law

The requirement of no adequate remedy at law often merges with the irreparable injury factor. *Kreg Therapeutics, Inc. v. VitalGo, Inc.* No. 11-cv-6771, 2011 WL 5325545, at *5 (N.D. Ill. Nov. 3, 2011); *Roland Machine Co.*, 749 F.2d at 386. It means, in essence, a legal remedy would be merely illusory. Unless the status quo is preserved no legal remedy entered later will fully compensate or protect the plaintiff.

A Likelihood of Success

In proving a likelihood of success on the merits, the plaintiff does not have to prove it will ultimately prevail on the merits, but must show only a "better than negligible" chance of succeeding on the merits. *Meridian Mutual Ins. Co. v. Meridian Insurance Group, Inc.*, 128 F.3d 1111, 1114 (7th Cir. 1997). However, the greater likelihood of

success that can be shown, the greater the likelihood that the court will enter the TRO or PI. *Turnell*, 796 F.3d at 662; *Roland*, 749 F.2d at 387-388. Some courts have even said that as the likelihood of success increases, less irreparable harm is required. *Id.*

Balancing Hardships

Balance of hardships means plaintiff's injury, if no TRO/PI is granted, outweighs defendant's injury if the TRO/PI is granted. *Turnell*, 796 F.3d at 662.

Public Policy Considerations

The TRO/PI must not adversely affect public policy or the public's interest. *Id.*

III. TROs and PI Orders Must be Specific And Are Generally Immediately Appealable

All injunction (TRO, PI or Permanent) orders must (i) state reasons why it was issued; (ii) state its terms specifically; and (iii) describe in reasonable detail the act or acts restrained or required (cannot simply refer to complaint or other document). This is required for several reasons. If an immediate appeal is sought, the appellate court will have the trial court's reasons and rationale. In addition, parties need specific direction for what they can and cannot do while the injunction is in place.

Federal Rule of Civil Procedure 65 governs injunctions in Federal Court. This rule allows for TROs to be issued without written or oral notice, if specific facts in an affidavit or verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition, and the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required. Fed. R. Civ. P. 65(b). These are very rare.

Temporary Restraining Orders must:

- (i) state the date and hour issued; Fed. R. Civ. P. 65(b)(2)
- (ii) describe the injury; *Id.*
- (iii) state why it is irreparable; *Id.*
- (iv) state why the order was issued without notice; *Id.*
- (v) state the date the order expires (under federal law, TROs expire after 14 days – the court can extend an order for another 14 days for good cause or the adverse party can agree to extend it longer); *Id.*
- (vi) state the date of the PI hearing (if the TRO hearing was granted ex parte, the PI hearing must be set for hearing at the earliest possible time); Fed. R. Civ. P. 65(b)(3)

- (vii) fix the amount of the TRO bond; Fed. R. Civ. P. 65(c), and
- (viii) be promptly filed with the clerk's office and entered in the record Fed. R. Civ. P. 65(b)(2).

Preliminary Injunctions Require Notice and the Opportunity for a Hearing

Notice is required for preliminary injunctions and if requested, an evidentiary hearing, usually referred to as a PI hearing. Fed.R.Civ.P. 65(a)(1). Evidence presented at a PI hearing becomes part of the record for trial purposes. Fed.R.Civ.P. 65(a)(2).

The court can advance the trial on the merits and consolidate it with the PI hearing. *Id.*

Bond

A party seeking a TRO or PI is required to post a bond. Fed. R. Civ. P. 65(c). Under Rule 65(c), a TRO or PI can only be issued if movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. *BankDirect Capital Finance, LLC v. Capital Premium Financing, Inc.*, 912 F.3d 1054, 1057 (7th Cir. 2019). It is reversible error if the order is silent as to the bond. *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999).

The court needs to consider the bond issue even if it decides to waive the bond. The amount of the bond, however, is within the court's discretion. The court can set a nominal bond, or no bond, if the bond would effectively deny judicial review or if defendant is unlikely to be harmed. *BankDirect*, 912 F.3d at 1059. The court can also deny bond if plaintiff will likely succeed based on the strength of the case or if the bond would place the plaintiff at financial risk. *Arkansas Best Corp., v. Carolina Freight Corp.*, 60 F.Supp.2d 517, 521 (W.D.N.C. 1999) (ordering only a nominal bond where plaintiff showed a strong likelihood of success on the merits); *Collick v. Weeks Marine, Inc.*, 680 F.Supp.2d 642, (D.N.J. 2009) (imposing on a nominal bond because plaintiff was struggling to pay past due bills.)

Parties Bound by a TRO/PI

Provided the enjoined party receives actual notice of the order by personal service or some other method, are bound by a TRO or PI. Fed.R.Civ.P. (d) (2). In addition, the parties' officers, agents, servants, employees and attorneys and other persons who are in active concert or participation with the above are bound by a TRO or PI. *Id.*

IV. Things You Must Do to Maximize your Success in Seeking or Defending Against TROs and PIs

A. Seeking A TRO or PI

1. Prepare a Verified Complaint. The verified complaint should request compensatory and equitable relief and temporary, preliminary and permanent injunctive relief. In addition, a Motion for Temporary Restraining Order and Preliminary Injunction and Memorandum of Law in Support of Motion should be filed with the Verified Complaint, as well as Declarations or Affidavits Supporting the Motion if not include in the Verified Complaint.
2. Draft and Submit a Proposed Order. Include in the Order the exact relief you seek and who is subject to the requested TRO or PI as required by Rule 65 of the Federal Rules of Civil Procedure.
3. Prepare a Motion for Expedited Discovery. Attach draft discovery, including production requests, interrogatories, deposition notices and possible third-party subpoenas.
4. Be Prepared to Post a Bond. Arrange for a bond in an amount you think the court will order. Also, be prepared to argue why a bond is not required or the amount sought by the defendant is excessive.
5. Make sure you have witnesses available and prepare them well in advance of the PI hearing.
6. Remember when you launch a TRO/PI, you have the advantage of the first strike, but your opposition will quickly catch up and will likely be demanding pre-hearing depositions and document productions.
7. Arrange your personal and professional affairs to account for the fact for the next several weeks or months you will be consumed with seeking the TRO and PI relief you request, and defending against any possible interim appeals.
8. Most importantly make sure you have a litigation team that is experienced in seeking and defending against TROs and PIs.

B. Opposing TROs or PI Motions

1. When opposing motions for TRO and PI, at a minimum, prior to the hearing, prepare and file a Verified Answer.
2. Prepare a written opposition brief and opposition affidavits, if possible. Request a short period of additional time to do so if you have only a few hours' notice.
3. Ask for an evidentiary hearing and expedited discovery and be prepared to articulate what discovery you need and why. If you limit your discovery requests to only what is absolutely needed, you have a better chance that court will allow expedited discovery.

4. Consider and articulate why a significant bond is required given the harm any TRO or PI will cause your client.

5. Recognize that while you are opposing the TRO/PI you will have to set aside your regular schedule and personal affairs in order to successfully oppose the relief sought.

6. Consider having your client agree to stop the conduct sought to be enjoined pending a full opportunity to prepare adequately for the PI evidentiary hearing. Courts will generally appreciate this courtesy because

it gives everyone, including the court, the opportunity to consider the facts, study the law and make an informed decision. Remember TROs are designed to preserve the status quo—the last peaceable act before the conduct sought to be enjoined. Courts will often enter TROs to do so, while the parties have time to more fully inform the court of their respective positions.

7. As when seeking TROs and PIs, you want an experienced team that has been through this drill many times.



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David Gustman is Head of the Firm's Litigation Practice Group, Co-head of the Firm's Antitrust Practice Group and a member and former Chairman of the Firm's Executive Committee.

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- Board of Advisors of the BNA Antitrust and Trade Regulation Report in Washington, D.C. (a group of nationally recognized antitrust law practitioners, which meets quarterly in Washington, D.C.)
- The Trial Law Institute
- Chairman of the Illinois Finance Authority (2004-2007)

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- Leading Lawyers - Antitrust Law, Commercial Litigation, and Corporation Law
- Chambers-USA Guide to America's Leading Lawyers for Business - General Litigation Recognized Practitioner - 2019 (cited in multiple years)
- The Best Lawyers in America® - Antitrust - 2017 (cited in multiple years)
- The Legal 500 - Leading Individual - Antitrust – Midwest for his work with Mergers, Acquisitions and Buyouts
- Who's Who Legal International, the Official Research Partner of the International Bar Association - One of the top 12 Illinois lawyers practicing Antitrust and Competition Law
- Martindale-Hubbell legal ability/ethical standards rating ("A-V") - Highest possible rating - 2019 (cited in multiple years)
- Illinois Leading Lawyers - 2019 (cited in multiple years)
- America's Top 100 High Stakes Litigators®

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