

WE HAVE TO STOP THEM! OBTAINING INJUNCTIONS IN BUSINESS LITIGATION

In many business disputes, it is simply not enough for a party to file a Complaint and await a trial, a year or more later, in the hopes of obtaining relief. When faced with an immediate, irreparable harm, a party's only remedy is to seek an injunction from the court immediately upon the filing of a Complaint. A party seeking an injunction can request one by requesting both a Temporary Restraining Order ("TRO") and a Preliminary Injunction. The TRO and the Preliminary Injunction are designed to stop the defendant from continuing with its improper activities, to preserve the status quo and to prevent further damage while the litigation is pending.

A request for a TRO and a Preliminary Injunction are governed in Ohio by Ohio Rule of Civil Procedure 65. The Ohio rule tracks the Federal Rule of Civil Procedure and the analysis is similar. According to the Ohio rule, a party may request a TRO without having notified the other party or its counsel, if it clearly appears that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition. This is a pretty high standard and, in practice, some courts will not grant a TRO absent notification to the other party and an opportunity to be heard.

If a TRO is granted, with or without notice to the adverse party, the TRO will only last for fourteen days. It can be extended for an additional fourteen days, for good cause shown, and can be extended for a longer period of time only if all parties consent to the extension. Here again, some courts are loathe to continue a TRO beyond the initial fourteen (14) days unless all parties agree.

Regardless of the outcome of the request for a TRO, an aggrieved party must also request a Preliminary Injunction to gain relief beyond fourteen to twenty-eight days. Unlike a TRO, a request for a Preliminary Injunction can only be granted after reasonable notice to the adverse party. Upon receiving a request for a Preliminary Injunction, the court will schedule a hearing on the request. This hearing is typically akin to a trial with witness testimony and experts if needed. The Civil Rule allows the court to consolidate the hearing with a trial on the merits if the court so wishes.

Importantly, no TRO or Preliminary Injunction will operate until the party obtaining the relief gives a bond executed by sufficient surety, in an amount fixed by the court. In lieu of a bond, a party may deposit money or an equivalent. Courts have upheld contracts indicating that injunctive relief can be had absent such a bond, but without such a contractual clause, a bond or equivalent is necessary.

In determining whether injunctive relief should be issued under Civil Rule 65, Ohio courts consider the following criteria:

- (1) whether there is a substantial likelihood that a party will prevail on the merits;
- (2) whether a party will suffer irreparable injury if the injunction is not granted;
- (3) whether third parties will be unjustifiably harmed if the injunction is granted; and
- (4) whether the public interest will be served by the injunction.

The court will consider each of the issues individually.

The first element, likelihood of success on the merits, requires a determination of whether a party can succeed in proving at least one of the claims set forth in its Complaint. For instance, if a party alleges breach of contract, the court will analyze whether the party can fulfill the elements of a breach of contract claim, i.e., (1) a contract existed; (2) the complaining party fulfilled its obligations; (3) breach by the opposing party; and (4) resulting damages. At this stage, a party need not prove by a preponderance of the evidence that it will prevail, but it must satisfy the court that it has a likelihood of success on the merits.

While all four of the criteria considered by the court are important, the need to prove irreparable injury is perhaps the most closely scrutinized element. A party must show that monetary damages alone will not fully compensate it for its loss. If the court determines that monetary damages constitute adequate compensation, the request for injunctive relief will be denied.

The issue of unjustifiable harm to third parties frequently centers upon the effect of granting an injunction on free and fair competition. Illegal competition, though, is not protected. If widespread, repeated impropriety is found, the chances for an injunction improve.

When considering the final criteria, the interest of the general public, a party typically must convince the court that an injunction should be granted to deter future unlawful conduct and to preserve a party's legitimate interests. The public is always interested in seeing blatant wrongdoers enjoined from continuing improper activities.

Asking a court for injunctive relief can be arduous, time consuming and expensive and should not be considered lightly. In those instances where a party is truly faced with a continuing wrong which must be immediately stopped, the only remedy is to immediately petition the court for injunctive relief. At the very least, the moving party will focus the court's immediate attention upon its urgent need for relief.