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Getting Relief Now: Restraining Orders and Injunctions

Litigation is a long process that can often take many years to conclude. Sometimes, a client will suffer irreparable harm due to the passage of time and can't wait a year or more to get a ruling from a court. When time is of the essence, the solution is injunctive relief.

Through the use of injunctions, clients can be assured that their interest in the litigation will not be prejudiced with the passage of time. This article examines the process for obtaining injunctive relief and the standard by which courts judge whether to grant injunctive relief.

Injunctive relief takes two forms in both federal and Tennessee state actions. Both the Federal and Tennessee Rules of Civil Procedure provide a mechanism for obtaining immediate, temporally limited relief – the temporary restraining order. See Fed. R. Civ. P. 65(b); Tenn. R. Civ. P. 65.03. And, both the Federal and Tennessee Rules of Civil Procedure provide a mechanism for obtaining relief pending the court's resolution of the merits of the case – the preliminary injunction in federal courts and the temporary injunction in Tennessee state courts. See Fed. R. Civ. P. 65(a); Tenn. R. Civ. P. 65.04.

I. The Standard

While injunctive relief pending a trial on the merits is an attractive option that many clients desire, the burden a moving party must carry to justify the issuance of injunctive relief is a significant one. The factors to be weighed in considering whether to grant a temporary restraining order and a preliminary injunction are the same. See *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008).

In considering whether to grant pre-trial injunctive relief, both federal and Tennessee state courts weigh the following four factors:

(1) whether the movant has demonstrated a likelihood of success on the merits;

- (2) whether the movant will suffer irreparable harm if the injunction is not issued;
- (3) whether the injunction will cause substantial harm to others if it is issued; and
- (4) whether granting the injunction will serve the public interest.

See *Tenn. Scrap Recyclers Ass'n. v. Bredesen*, 556 F.3d 442, 447 (6th Cir. 2009); see also *Denver Area Meat Cutters and Employers Pension Plan ex rel. Clayton Homes, Inc. v. Clayton*, 120 S.W.3d 841, 857 (Tenn. Ct. App. 2003).

In considering an application for injunctive relief, courts look at each factor and weigh the strength of the moving party's position on each one. A discussion of each factor follows.

Likelihood of Success on the Merits

In the Sixth Circuit, "although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000); See e.g. *Galyon v. First Tenn. Bank Nat. Ass'n*, 1991 WL 259473, at *1 (Tenn. Ct. App. 1991). While there is some disagreement as to the degree of likelihood of success on the merits a moving party must demonstrate (some courts requiring a "strong" or "substantial" likelihood and some courts only requiring "some" likelihood), it is universally agreed that, when weighing the factors, a court must find that there does exist a likelihood that the moving party will prevail in its claims.

Irreparable Harm to the Moving Party

In addition to a likelihood of success on the merits, a moving party must demonstrate that it will suffer irreparable harm in the absence of an injunction. Specifically, "a plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002); See also *Murfreesboro Medical Clinic, P.A. v. Udom*, 2004 WL 193049, at *2 (Tenn. Ct. App. 2004) (reversed on other grounds) (internal citations omitted). Furthermore, the Sixth Circuit explains that "[a]n injury is not fully compensable by money damages if the nature of the plaintiff's loss would make the damages difficult to calculate." *Basicomputer Corp.*

v. Scott, 973 F.2d 507, 511 (6th Cir. 1992). As a result, determinable, monetary damages alone will not suffice to support the grant of an injunction.

When considering whether to grant injunctions, however, courts have identified several harms that qualify as irreparable that do relate to loss of money:

- (1) going out of business, see *Sisay v. Smith*, 2009 WL 361414 at *17 (6th Cir. 2009);
- (2) financial ruin, see *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1995);
- (3) competitive losses (non-compete agreements), see *Basicomputer Corp.*, 973 F.2d at 511–12; and
- (4) interference with customer relationships (loss of goodwill), see *id.*

In addition to those harms listed above, there are numerous others that courts will examine on a case by case basis. The important concept to keep in mind is that money alone will not serve as a basis for irreparable harm absent some additional factor.

Substantial Harm to Others

In addition to weighing the irreparable harm that will result to the moving party in the absence of an injunction, a court must weigh any harm that will result to the adverse party or any third parties if the injunction is granted.

The irreparable harm to the moving party and the substantial harm to others are often collapsed into one factor called the “balance of the harms.” This is because neither one of the two is independently sufficient in deciding whether to grant an injunction. Even if the moving party clearly demonstrates irreparable harm, a court must still balance that against the harm that the adverse party or any third parties may suffer if the injunction is granted.

It is important to note that the harm to others need not be irreparable, but only substantial. And, the harm need not necessarily be to the party adverse to the moving party, but rather, can be to unrelated, third parties. Much like the public interest factor discussed below, harm to third parties is often more prevalent in

government or public interest litigation and less so in business litigation.

The Public Interest

The final factor a court weighs in deciding whether to grant an injunction is whether granting it will serve the public interest. The case law that discusses the public interest is usually related to litigation against a governmental entity. Typically, in a business litigation setting, this factor becomes less important.

II. Immediate Relief: The Temporary Restraining Order

In federal courts, temporary restraining orders are governed by Rule 65(b) of the Federal Rules of Civil Procedure and are limited in duration to 10 days. They can be extended an additional 10 days upon application by the moving party or even longer by consent of the adverse party. As explained by the Sixth Circuit, “the purpose of a temporary restraining order is to preserve an existing situation in status quo until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction.” *Hudson v. Barr*, 3 F.3d 970, 975 (6th Cir. 1993).

With respect to notice, Rule 65(b) allows a party to seek a temporary injunction without notice to the adverse party or its attorney if: a) the application for injunctive relief demonstrates that immediate and irreparable injury will result to the moving party before the adverse party can be heard in opposition; and b) the moving party’s attorney certifies in writing any efforts made to give notice to the adverse party and the reasons why it should not be required.

In Tennessee state courts, temporary restraining orders are governed by Rule 65.03 of the Tennessee Rules of Civil Procedure. Much like its federal counterpart, Rule 65.03 allows for the issuance of a temporary restraining order without notice to the adverse party or its attorney. Unlike its federal counterpart, however, a moving party seeking a temporary restraining order without notice to the adverse party is neither required to demonstrate irreparable injury that will result before the adverse party can be heard, nor that the

moving party's attorney made any efforts to give notice to the adverse party.

In Tennessee state courts, temporary restraining orders are limited in duration to 15 days. The duration can be extended an additional 15 days upon application of the moving party or even longer by consent of the adverse party.

Because the considering court often only looks to the pleadings filed by the moving party in deciding whether to grant a temporary restraining order, obtaining one often requires little more than pleading sufficient facts to satisfy the standard set forth above. Because courts will often only consider pleadings, attached affidavits take on a heightened importance as evidence of the facts supporting the grant of an injunction.

III. Relief Pending Resolution on the Merits: The Preliminary Injunction and Temporary Injunction

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007).

Unlike temporary restraining orders, preliminary and temporary injunctions cannot be granted without notice to the adverse party. While neither the Federal nor Tennessee Rules of Civil Procedure require a hearing to grant a preliminary or temporary injunction, it is common practice for courts to hold such a hearing. In addition, pursuant to both the Federal and Tennessee Rules of Civil Procedure, a court may consolidate a trial on the merits with a preliminary or temporary injunction hearing. See Fed. R. Civ. P. 65(a)(2); Tenn. R. Civ. P. 65.04(7).

Because courts generally hold a hearing for preliminary and temporary injunctions, and both parties are entitled to put forth arguments and evidence in support of their positions, these hearings often assume a very important role in shaping the entire case. A court's order granting or denying an injunction can often

serve as an indicator of the strength of the parties respective positions and a roadmap for the litigants to use in putting together their case to address the court's concerns. These hearings can often amount to a sneak peak at the end result after a trial on the merits. That said, both federal and Tennessee courts have held that findings of fact and law in relation to an application for an injunction are not binding upon the court in future proceedings in that case. As a result, a party can recover from an injunction defeat.

It is important to keep in mind that preliminary injunction hearings are often full evidentiary hearings, with multiple witness and often days of testimony. These hearings are often mini-trials and can require a significant amount of preparation.

IV. Miscellaneous Provisions to Keep in Mind

While injunctive relief may often seem like an inviting way to get a quick ruling from a court indicating the strength of a parties positions, there is also an inherent danger in seeking and obtaining an injunction. Both federal and state courts require the issuance of a bond to support an injunction that serves to protect and reimburse the enjoined party against wrongfully granted injunction. See Fed. R. Civ. P. 65(c); Tenn. R. Civ. P. 65.05. As a result, a party may find that an injunction may cost them quite a bit at the conclusion of a case. With this in mind, parties should carefully weigh whether to seek an injunction and the veracity of the evidence upon which they rely in obtaining an injunction.

In addition, parties should keep in mind that injunctions are only enforceable against those parties who receive actual notice of it by personal service or otherwise. As a result, parties who obtain an injunction should serve that injunction liberally, upon any party they may think may act in concert or adverse to the party being enjoined. These related parties include banks, customers, government entities, etc.

Also, when asked to draft the injunction order, parties should be careful to include the necessary components. Injunctions must contain the date and time the injunction was granted, the reasons the injunction was issued (addressing the factors listed above), the

terms of the injunction specifically, the act or acts restrained (without reference to the complaint), clearly defined impermissible/permissible actions, and the persons bound by the injunction.

Finally, parties should be aware that the grant or denial of an injunction is appealable as an interlocutory appeal. See 28 U.S.C.A. § 1292(a); Tenn. R. App. P. 9. On appeal, the findings of fact of the trial court are only disturbed if clearly erroneous, whereas legal conclusions based on those facts are reviewed de novo. See *H.D.V. Greektown, LLC v. City of Detroit*, 568 F.3d 609, 619–20 (6th Cir. 2009).

V. Conclusion

Injunctions serve an important purpose both as preliminary relief and as litigation strategy. With the right planning and representation, clients can obtain meaningful relief without waiting months or years for the resolution of an entire case.

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