

# When Time is Critical, Seek an Injunction

by John P. Lacey

In many cases, an aggrieved party will determine that, even if it were to file a complaint seeking only damages, a monetary award would provide inadequate compensation for its potential losses. In those cases where damages are incalculable, or are inadequate to compensate the plaintiff for the harm it has suffered, or will suffer, at the hands of the defendants, the plaintiff may wish to pursue injunctive relief.

**T**he availability of temporary, preliminary and, ultimately, permanent injunctive relief is an especially important remedy to businesses of all sizes when they are in need of immediate court intervention. For example, the departure of one or more key employees can wreak havoc on a firm's business, creating uncertainty not only among the firm's employees, but also among its customers. Often, such departures can leave an enormous hole in the company's operations. The problem is magnified substantially when those employees leave to start up a competing business, or to join a competitor. If the employer does not act quickly and decisively, it could find itself out of business within a matter of weeks.

To avoid complete devastation of its operations, an employer that has suffered mass defections, or the loss of certain key employees, will turn to the courts for immediate help. What they may find, unfortunately, is that the courts will not be sympathetic to their plight unless the employer has a substantial basis for obtaining immediate relief. If at-will employees in a competitive marketplace merely leave their employment to work for a competitor, courts normally will not interfere with the employee's right to earn a living. To obtain an injunction, the aggrieved employer must show something more.

In contrast, where an employer can show its departing employees have breached a fiduciary duty, or have converted certain of the employer's property, and they are now capitalizing on those transgressions to harm their former employer, the courts will be far more willing to grant the employer immediate injunctive relief.

## **Situations Where Injunctive Relief May be Obtained**

While the threshold to obtain injunctive relief is high, courts are willing to issue injunctions in a variety of contexts, especially where an injunction is essential to protect a valuable property right, or to enforce the plain terms of a contract. Thus, for example, in appropriate cases, courts will enjoin individuals from working in violation of a valid non-compete agreement, or from misappropriating or misusing a former employer's trade secrets. Similarly, courts have acted quickly to prevent the infringement of a copyright or trademark.

There are three types of injunctive relief available: a temporary restraining order; a preliminary injunction; and a permanent injunction. The temporary restraining order is sought at the outset of a case. The request for temporary restraints usually will be part of an application for an order to show cause requiring the defendant to present evidence demonstrating why a preliminary or permanent injunction in the plaintiff's

favor should not be issued.<sup>1</sup> The order to show cause with temporary restraints, if issued, will ensure the plaintiff will not suffer further harm until a full hearing can be held. A preliminary injunction will be available after the parties have had an opportunity to submit affidavits, documents and other evidence to the court in support of their respective positions. If issued, the preliminary injunction normally will remain in place until the conclusion of the matter. Finally, the permanent injunction is the remedy available to the plaintiff if it ultimately succeeds at trial on the merits of its equitable claims.

The purpose in seeking a temporary or preliminary injunction at the outset of litigation is to maintain or re-establish the *status quo*, *i.e.*, to prevent the defendant from causing any further harm to the plaintiff pending trial. Thus, if a departing key employee is working for a competitor in clear violation of a valid non-compete agreement, a court may temporarily and preliminarily enjoin that employee from working for the competitor until the trial is completed. The standard for obtaining this *extraordinary* and emergent interim relief is necessarily a high one; it is not to be lightly granted.

Although stated in many ways, there are essentially four factors a court will consider in determining whether it should issue a temporary, preliminary or permanent injunction:

1. Is the issuance of the injunction necessary to prevent *irreparable harm* to the plaintiff?;
2. Are the facts and legal theories underlying the plaintiff's claim well-settled, *i.e.*, has the plaintiff shown a *reasonable probability* of success on the merits when the case is ultimately tried?;
3. Does the plaintiff's need for an injunction outweigh the hardship the defendant will suffer if such an

injunction is issued?; and

4. Is there a public interest that is implicated?<sup>2</sup>

### **Irreparable Harm**

A court will not issue any injunction unless it is necessary to prevent irreparable harm to the plaintiff, or to another interested party. In cases where an aggrieved plaintiff can simply sue the defendant for damages, an injunction will not issue. However, if harm to the plaintiff cannot be redressed adequately by monetary damages, an equity court will consider the harm to be *irreparable*, thus meeting the first of the four criteria set forth by the New Jersey Supreme Court.

A clear illustration of irreparable harm often is seen in the employment context where departing employees steal intellectual property of their employer in order to start up a competing business. Such property may include proprietary client information, trade secrets or works protected by patents or copyrights. In these types of cases, the employer's business could be devastated within a matter of weeks if its former employees utilize the information to steal customers from their former employer. By the same token, it would be extremely difficult, if not impossible, to prove the exact amount of damages attributable to the former employees' theft, as opposed to the harm that might be attributable to normal market conditions or to the departure of the former employees. As a result, monetary damages are incalculable. Almost by definition, therefore, the irreparable harm requirement would be met.

Interestingly, the courts of New Jersey also have demonstrated a willingness to relax the irreparable harm standard in certain circumstances, even where damages may be available. In *Crowe v. DiGioia*, for example, the court recognized that "severe personal incon-

venience" may constitute "irreparable injury justifying the imposition of an injunction."

### **Likelihood of Success on the Merits**

In order to prevail on an application for an injunction, the plaintiff also must make a preliminary showing that there is a *reasonable probability* it will succeed on the merits. To meet this requirement, the plaintiff will have to demonstrate that the legal principles underlying its claims are well-settled. Similarly, the plaintiff must show that all, or a significant portion, of the material facts in the case are not in dispute. This latter requirement, however, is mitigated somewhat by the principle that "mere doubt as to the validity of [the plaintiff's] claim is not an adequate basis for refusing to maintain the *status quo*" on a temporary basis.<sup>4</sup>

In practical terms, the plaintiff will demonstrate a likelihood of success on the merits, and thus its entitlement to temporary or preliminary injunctive relief, by submitting a comprehensive verified complaint, setting forth the specific and undisputed facts relevant to the case. These details should include the background of the case, the relationship between the parties and the specific and ongoing acts of wrongdoing by the defendants. Ultimately, the complaint should show beyond doubt why the defendant must be enjoined from engaging in any further wrongful acts, and that the plaintiff will be irreparably harmed if an injunction does not issue. The verified complaint should be accompanied by lengthy affidavits from persons having personal knowledge of all of the relevant facts. (Affidavits containing hearsay will be given less weight by the court.) To the extent possible, documents supporting the affidavits, including relevant contracts and correspondence between the parties, also should be submitted so the reviewing court may see firsthand why the plain-

tiff is likely to succeed when the case is heard at trial.

Lastly, the plaintiff must submit a comprehensive brief, setting forth the law applicable to the case, as well as the arguments showing why the legal principles applicable to the complaint are well-settled. For the court's convenience, the legal argument section of the brief should be separated into categories that correspond to the requirements necessary to obtain temporary, preliminary and permanent injunction relief. Thus, Section A of the legal argument will contain the plaintiff's argument regarding why it will suffer irreparable harm if an injunction is not immediately issued; Section B will address the plaintiff's likelihood of success on the merits, and so on.

In the end, the brief, verified complaint and supporting affidavits and exhibits must be tailored to provide the reviewing court with a strong comfort level, demonstrating that an immediate injunction is essential and that the plaintiff is likely to succeed when its legal and equitable claims ultimately are tried.

### **Balancing the Parties' Hardships or Equities**

In its original formulation of the test to determine whether a temporary or preliminary injunction should issue, the New Jersey Supreme Court directed that the relative hardships to the parties be considered in granting or denying injunctive relief.<sup>5</sup> In cases where the plaintiff will suffer minimal harm if an injunction does not issue, the court typically will deny an injunction application. Conversely, where an injunction will have little or no effect upon the defendant, the court will have no problem imposing a temporary or preliminary injunction, assuming the plaintiff has satisfied the other requirements.

Returning to the original example,

where it is alleged that departing employees have stolen their former employer's proprietary information to start a competing enterprise, the court will weigh the effect of an order granting or denying the injunction on the respective parties. Similarly, the court will balance those equities to determine the scope of any injunction. If, in the example, the plaintiff has proven it is likely to succeed on the merits, the equities would dictate that the former employees should be enjoined from utilizing any of their ill-gotten information to further their start-up business. This is true even though the former employees may claim they will not be able to start their business without the information in question. On the other hand, the court is not likely to entirely prohibit the departing employees from working.

By the same token, if the other factors in the case, including the likelihood of success on the merits and the irreparable harm to be suffered by the plaintiff, lean only marginally in favor of the plaintiff, the court may deny injunctive relief simply because the issuance of an injunction would have a significant detrimental effect upon the defendant. Accordingly, it is imperative the plaintiff make a strong showing that it will be devastated if an injunction is not issued, while simultaneously demonstrating that the harm to the defendant if an injunction is issued will be minimal, or that the harm to the defendant is the necessary and justified result of the defendant's wrongful conduct.

### **The Public's Interest**

In recent years, New Jersey courts, following federal standards applicable to injunction applications, have looked beyond the interests of the parties to consider the public's interest in determining whether an injunction should issue in a particular case.<sup>6</sup> By way of illustration, where enforcement of an overbroad non-compete agreement

involving physicians is at issue, the courts likely would be more willing to enjoin enforcement of the non-competition agreement to ensure that the public can obtain the medical treatment when and where it is needed. Similarly, despite competing free speech rights under the First Amendment of the United States Constitution, the New Jersey Supreme Court has enjoined anti-abortion protesters from picketing directly in front of physicians' residences, and also has limited nearby pickets in both time and scope, finding that the public's interest in preserving the peace warrants limited, content-neutral restraints on the defendants' free speech.<sup>7</sup>

### **Conclusion**

The remedy of injunctive relief can be an especially potent weapon in every litigator's arsenal. When used properly, it may not only devastate the defense case from the very start of the litigation, it also can ensure the proponent will be protected from further harm while the underlying litigation proceeds to a final judgment. ☪

### **Endnotes**

1. See *R.* 4:52-1(a).
2. See *Crowe v. DeGioia*, 90 N.J. 126 (1982); see also, *Ispahani v. Allied Domecq Retailing USA*, 320 N.J. Super. 494, 498 (App. Div. 1999).
3. 90 N.J. at 133.
4. *Id.* at 133-34 (citations omitted).
5. *Id.* at 134.
6. *Ispahani*, 320 N.J. Super. at 498.
7. *Murray v. Lawson*, 138 N.J. 206, 225 (1994); see also, *Horizon Health Ctr. v. Felicissimo*, 135 N.J. 126, 143-44 (1994).

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