

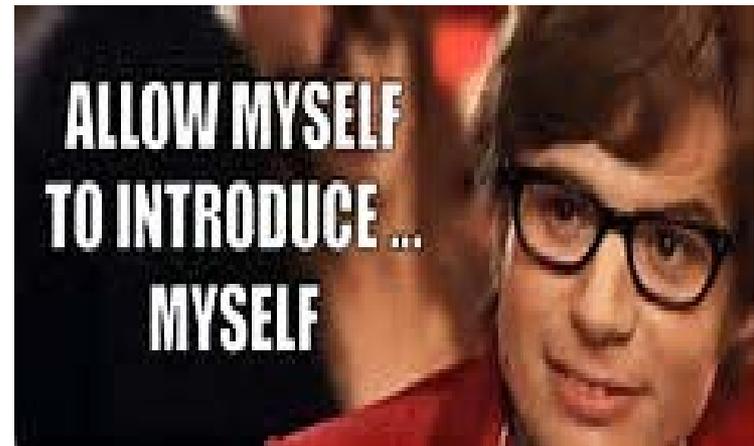
Saving Your Recovery Via Temporary Injunctive Relief

By

David F. Johnson

Introduction

- Author has practiced civil trial and appellate practice for twenty years.
- Author has a blog: <http://www.txfiduciarylitigator.com/>
- Sign up for alerts on fiduciary law



Introduction

- Without immediate injunctive relief, valuable rights can be lost forever and the ability to ever recover on a judgment.
- But a party must follow procedure.
- On the other hand, defendants have their own right to act as they choose and will need to be armed with the law of injunctions to defend against the plaintiff's request for injunctive relief.

Other Potential Pre-Trial Remedies



Other Potential Pre-Trial Remedies

- In addition to temporary injunctive relief, a party should consider other potential pre-trial remedies, such as:
 - Attachment;
 - Sequestration;
 - Garnishment;
 - Receivership; and
 - Repossession.

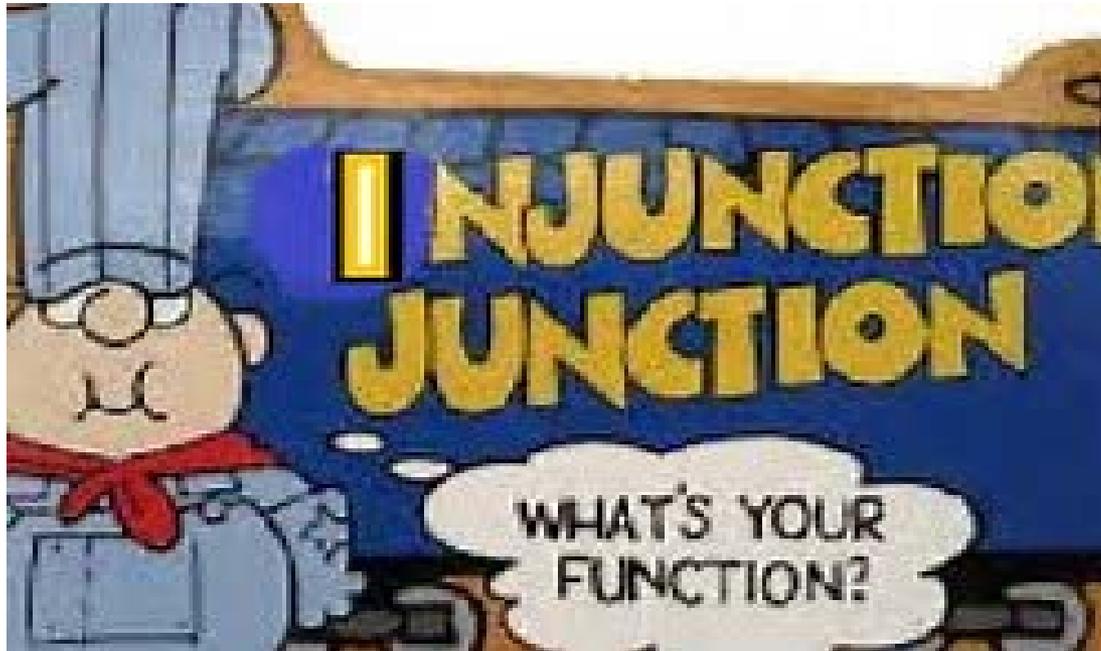
Injunctive Relief To Protect Against Dissipation of Assets

- Injunctive relief can be used by creditors to prevent the dissipation, loss or injury of collateral.
- It potentially can be used to protect against the dissipation of assets owned by the defendant that are not collateral.

Injunctive Relief To Protect Against Dissipation of Assets

- In some situations, temporary injunctive relief may be preferable to other pre-trial remedies.
- Particularly helpful if the plaintiff does not know of the type, value/amount, or location of the assets.
- Also prevents general hiding of assets that other remedies may not address.

Purpose of Injunctive Relief



Purpose of Injunctive Relief

- A temporary restraining order serves to provide emergency relief and to preserve the status quo until a hearing may be had on a temporary injunction.
- The purpose of a temporary injunction is to preserve the status quo pending a full trial on the merits.
- The status quo is the last actual peaceable, noncontested status that preceded the controversy.

Elements For Injunctive Relief



Elements For Injunctive Relief

- Equitable elements: cause of action, probable right to recover; probable, imminent, and irreparable harm; and no adequate remedy at law
- Must follow correct procedure – sworn application, correct allegations, bond, specific order, service, etc.

Preliminary Issues For Injunctive Relief

- Burden of proof on applicant whether plaintiff or defendant
- Careful: Election of remedies
- Jurisdiction, venue, and party issues



Temporary Restraining Order



Temporary Restraining Order

- The application must state:
 - Grounds for the injunctive relief,
 - Specific facts that support claims,
 - Request injunctive relief,
 - Need of injunctive relief *ex parte*,
 - Applicant is willing to post bond,
 - Specific relief sought, and
 - Must be verified or otherwise supported by affidavits.

Temporary Restraining Order

- To seek TRO:
 - 1) File application – pay fees;
 - 2) Go to court assigned to case;
 - 3) If court not available, go to one that is available;
 - 4) Have hearing;
 - 5) Court either denies or grants relief;

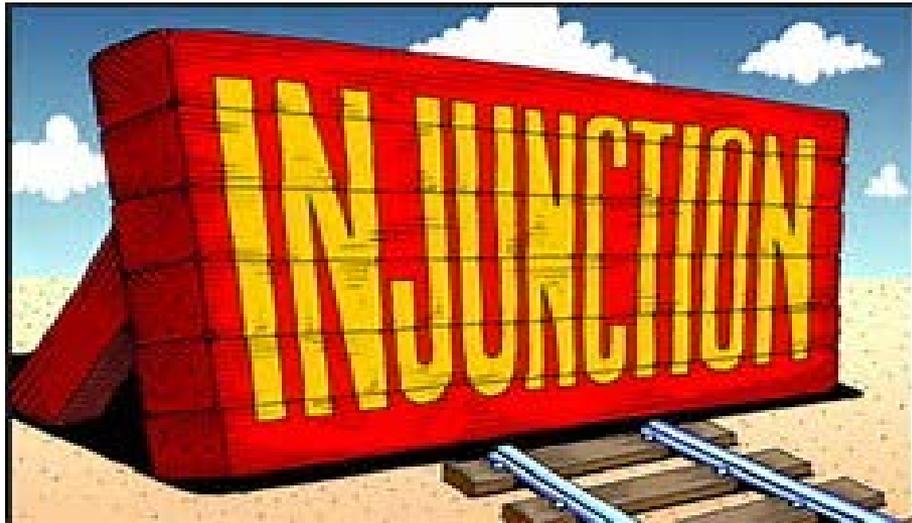
Temporary Restraining Order

- 6) Court signs order with or without changes and enters amount for bond and TI hearing date;
- 7) Execute bond;
- 8) Pay fee for writ;
- 9) Have clerk's office take care of citation, writ, and getting items to sheriff for service.

Temporary Restraining Order

- Order must have required elements
- TRO may be extended one 14-day period by court – in writing
- TRO may be further extended by agreement of parties
- Agreement will not waive objection to personal jurisdiction

Temporary Injunction



Pleadings To Support Temporary Injunction

- Temporary injunction maintains status quo until the time of trial.
- Pleading requirements for a TI are the same as for a TRO except there does not need to be an *ex parte* provision.
- Rule 682 states: “No writ of injunction shall be granted unless the applicant therefore shall present his petition to the judge verified by his affidavit and *containing a plain and intelligible statement of grounds for such relief.*”

Pleadings To Support Temporary Injunction

- Must have an underlying cause of action.
- Some courts have not been hyper-technical in determining whether a party has fair notice of the relief requested in a TI proceeding.
- However, some courts have held that, “[an] applicant must specify the precise relief sought and that a court is without jurisdiction to grant relief beyond and in addition to that particularly specified.”

Pleadings To Support Temporary Injunction

- To be safe, a plaintiff should request broad injunctive relief in its petition, the court can always narrow the request and award less than that requested.
- In *Sharma v. Vinmar International Ltd.*, the court affirmed a trial court's temporary injunction that awarded narrower relief than that requested in the application.
- Should an attorney verify the petition?

Equitable Elements For Injunctive Relief



Probable Right of Recovery

- To show a probable right of recovery, an applicant need not establish that it will finally prevail in the litigation, rather, it must only present some evidence that, under the applicable rules of law, tends to support its cause of action.
- It need only show that a bona fide issue exists as to its right to ultimate relief.
- If the evidence fails to furnish any reasonable basis for concluding that the applicant has a probable right of recovery, the granting of the temporary injunction is an abuse of discretion.

Probable, Imminent, and Irreparable Injury In The Interim

- The applicant must plead a cause of action and show a probable right to recover on that cause of action and a probable, imminent, and irreparable injury in the interim.
- “Imminent” means that the injury is relatively certain to occur rather than being remote and speculative.
- Possibility of injury is not enough.

Probable, Imminent, and Irreparable Injury In The Interim

- There is no adequate remedy at law if the damages cannot be calculated or the damages cannot be measured by a certain pecuniary standard.
- Evidence that the defendant does not have sufficient assets to cover the amount of damages that the plaintiff will incur will support a finding that an applicant has no adequate remedy at law.

Probable, Imminent, and Irreparable Injury In The Interim

- If there is evidence that the defendant will secret away funds and attempt to avoid payment, a trial court has discretion to award injunctive relief.
- Courts have held that provisions for injunctive relief in agreements are evidence that there is no adequate remedy at law, and that they will support a trial court's temporary injunction.
- It is important to review the plaintiff's causes of action and the substantive law for same to determine if there are any exceptions to the normal requirement of no adequate remedy at law.

Probable, Imminent, and Irreparable Injury In The Interim

- Some courts focus on the irreparable injury requirement and hold that temporary injunctions preventing the dissipation of assets are erroneous where there is no evidence that the defendant cannot pay a judgment for damages.
- Courts have held that an applicant for a temporary injunction does not have an adequate remedy at law if the defendant is insolvent.
- Irreparable harm may potentially be shown where the assets are not fungible and may not be recovered if transferred.

Orders To Deposit Money Into Court's Registry

- A party may seek to have the trial court order a defendant to deposit disputed funds into the registry of the court.
- When the ownership of specific funds is in dispute, and the funds are at risk of “being lost or depleted,” the trial court may order the funds deposited into the registry of the court until the ownership issue is resolved.
- When there is insufficient evidence presented that “funds are in danger of being ‘lost or depleted,’” however, the trial court abuses its discretion by ordering funds deposited in the registry of the court and mandamus relief from such an order is appropriate.
- There is some debate about whether this type of order is an injunction or some other type of order.

Orders To Secure Assets Unrelated To Suit

- Texas courts have generally prohibited the use of an injunction to secure the legal remedy of damages by freezing assets unrelated to the subject matter of the suit.
- There are exceptions, however, to the general rule.
- It is permissible to freeze these type of assets when the defendant is insolvent or likely to be insolvent at the time a judgment is rendered.

Orders To Secure Assets Unrelated To Suit

- “Insolvent” means: “(A) having generally ceased to pay debts in the ordinary course of business other than as a result of a bona fide dispute; (B) being unable to pay debts as they become due; or (C) being insolvent within the meaning of the federal bankruptcy law.” Tex. Bus. & Com. Code Ann. § 1.201(b)(23).
- Under federal bankruptcy law, insolvent means: “financial condition such that the sum of such entity’s debts is greater than all of such entity’s property, at a fair valuation, exclusive of--(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity’s creditors; and (ii) property that may be exempted from property of the estate under section 522 of this title [11 USCS § 522].” 11 U.S.C.A. § 101(32)(A).

Orders To Secure Assets Unrelated To Suit

- At a temporary injunction stage, the strict rules of insolvency are applied liberally, as a court can grant injunctive relief if a “defendant [is] potentially insolvent or judgment proof.”
- Further, it may be permissible to freeze assets unrelated to the subject matter of the suit when the assets would be subject to a pleaded equitable remedy.

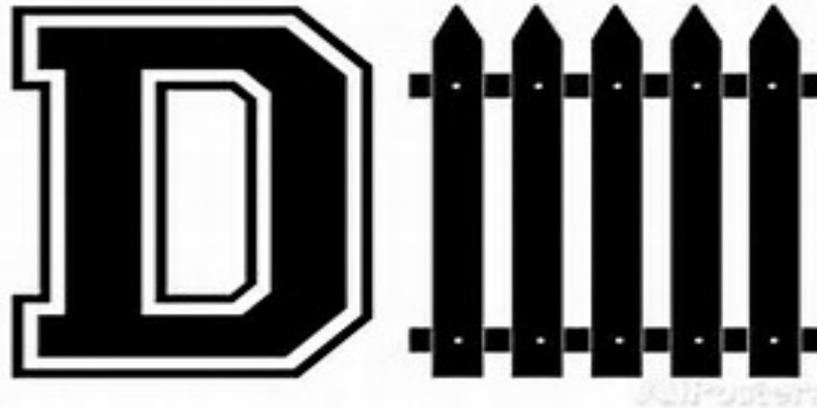
Fraudulent Transfers

- The Texas Uniform Fraudulent Transfer Act may provide a remedy via temporary injunctive relief to counteract a defendant dissipating its assets to become judgment-proof. Tex. Bus. & Com. Code Ann. § 24.001, et seq.
- TUFTA delineates what types of transfers and obligations are fraudulent, enumerates the remedies available to a creditor, prescribes the measure of liability of a transferee, and lists the defenses and protections afforded a transferee.

Fraudulent Transfers

- “Remedies of Creditors,” states that a creditor may obtain, “subject to applicable principles of equity and in accordance with applicable rules of civil procedure . . . an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property . . . [or] any other relief the circumstances may require.” Tex. Bus. & Com. Code Ann. § 24.008.
- Attachments and preliminary injunctions are allowed for fraudulent transfers.

Equitable Defenses To Injunctive Relief



Equitable Defenses To Injunctive Relief

- Laches—Since an injunction is an equitable remedy, the complaining party must have acted promptly to enforce its right.
- Unclean Hands—(a) The litigation must arise out of, or be connected to, the improper conduct on which the defense is based; and (b) the defendant must be injured by a wrong that is done to him personally rather than to some third party.
- Estoppel is also available.

Equitable Defenses To Injunctive Relief

- Courts require a party seeking relief in equity to offer or plead willingness to do equity.
- Mootness—if the act sought to be enjoined has occurred prior to the granting of a temporary injunction, the issue has become moot and a court should deny the request.

Discovery In Anticipation of TI Hearing



Discovery In Anticipation of TI Hearing

- Motion to expedite discovery
- Request for production, request for disclosure, and interrogatories
- Depositions after written discovery
- Obtain computer and personal electronic devices for search by expert
- Obtain order from court on the above

Temporary Injunction Hearing



Temporary Injunction Hearing

- Defendant must be given notice
- Texas Rule of Civil Procedure 680 requires evidence on irreparable injury and probable recovery
- Even if the defendant does not appear, there must still be a hearing and evidence is required
- Can court admit affidavit evidence?
- Trial court can impose reasonable limits on the parties' presentation of evidence in the hearing but cannot deny a party a right to be heard.
- Contempt and Spoliation evidence.

Temporary Injunction Hearing

- Warning: There is authority that a plaintiff has one bite at an apple and should not be allowed to present successive applications for temporary injunction based on the same grounds absent a change in circumstances.
- So, a plaintiff should bring its best case at the hearing.

Temporary Injunction Order

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DATE FILED September 11, 2012

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
*****X

CHRISTOPHER BEHRE, DANIEL SILBERG,
JENNIFER BOLEN, NADIA CHENNEY, ALEXA
O'BRIEN, ED SAI OF HANG, YAI MARGALLA,
MOM. SAIGITA DOMADOTTIR M.F.,
DianaLEFA,
-0-
MIAMI ORAMA, individually and as
representative of the UNITED STATES OF
AMERICA; LEON VASHTAL, individually
and in his capacity as the Assistant
and representative of the DEPARTMENT
OF DEFENSE; JOHN MCCAIN, JOHN BUCKNER,
GARY ERIC, NANCY PELONI, MITCH
MCOSMELL, ERIC CARTER as
representatives of the UNITED STATES
OF AMERICA,
Defendants.

*****X

KATHERINE B. FORREST, District Judge

On May 14, 2012, this Court preliminarily enjoined enforcement of § 10112 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-188, 126 Stat. 1290 (Dec. 31, 2012) ("the NDAA"). See *Holder v. Homan*, No. 12 Civ. 784, 2012 WL 170124 (S.D.N.Y. May 14, 2012) (order granting preliminary injunction) (the "May 14 Opinion"). On June 4, 2012, in response to a footnote contained in the Government's

* "The Government" as used herein refers to those defendants in this action that are properly before the Court. See *Holder*, 2012 WL 170124, at *12.

Temporary Injunction Order

- A temporary injunction must:
 - (1) State the reasons for the injunction's issuance by defining the injury and describing why it is irreparable;
 - (2) Define the acts sought to be enjoined in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him; and
 - (3) Set the cause for trial on the merits and fix the amount of the bond.
- Be careful that order is not overly broad.
- Be careful that order is not conclusory.
- Waiver of form errors?

Motion to Dissolve



Motion to Dissolve

- The purpose of a motion to dissolve an injunction is “to provide a means to show changed circumstances or changes in the law that require modification or dissolution of the injunction; the purpose is not to give an unsuccessful party an opportunity to relitigate the propriety of the original grant.”
- A trial court generally has no duty to dissolve an injunction unless fundamental error has occurred or conditions have changed.
- A “change in circumstances” refers to a change in conditions occurring since the granting of the temporary injunction.

Appellate Review



Appellate Review

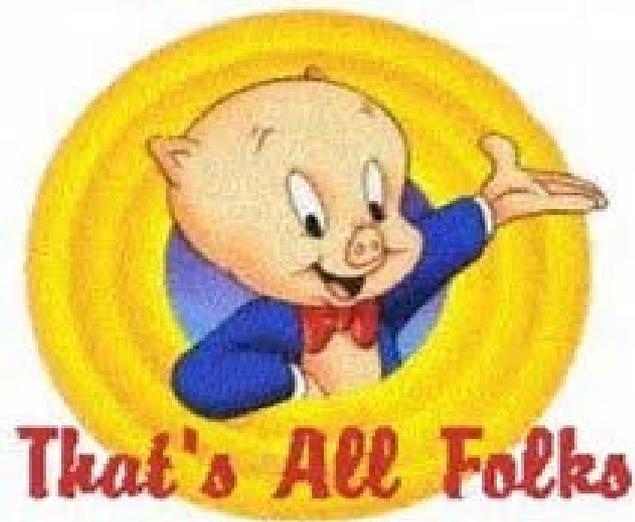
- No appeal of TRO
- Right to interlocutory appeal of temporary injunction, but not permanent injunction
- Texas Supreme Court's jurisdiction
- Mandamus is possible for either TRO or temporary injunction
- Request findings of fact and conclusions of law

Impact Of Appeal

- If affirmed, injunction becomes court of appeals' injunction as well.
- Law of the case?
- Res judicata or collateral estoppel?
- Risk vs. Reward



Conclusion



Conclusion

- When an attorney has a client walk in the door that seeks to either prosecute or defend against injunctive relief, there is not much time to research and think about the various issues that come up.
- The author hopes that the paper and presentation is an assistance in that busy time.