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## VIEW FROM THE BENCH

### PRELIMINARY INJUNCTIONS AND TEMPORARY RESTRAINING ORDERS How to Get Them Effectively and Efficiently



By Honorable C. Timothy Corcoran, III

Attorneys are seeking temporary restraining orders and preliminary injunctions in numbers greater than ever these days it seems. Now may be a good time, therefore, to review some of the procedural basics of this aspect of bankruptcy practice.

Injunctions may only be sought in the bankruptcy court in the context of an adversary proceeding. F.R.B.P. 7001(7). The adversary complaint must contain some claim for relief that would entitle the plaintiff to an injunction.

Once the adversary proceeding is filed, Bankruptcy Rule 7065 applies. It makes applicable F.R.Civ.P. 65 with one minor — but important — exception. That exception eliminates Rule 65's requirement that security (or a bond) be posted as a condition of obtaining temporary or preliminary injunctive relief if the party seeking the relief is a debtor, trustee, or debtor in possession.

#### *What Are They?*

A preliminary injunction is an injunction that applies pending the determination of the adversary proceeding on its merits. In its stereotypical application, a preliminary injunction freezes the status quo until the court can rule on the merits of the underlying dispute framed in the adversary proceeding's pleadings. Often it is used to preserve the dispute for determination in circumstances in which a defendant's action would moot the dispute and render the court unable to act. For example, the court may consider preliminarily enjoining a defendant's disposition of property in circumstances in which the property is claimed by the trustee to be property of the bankruptcy estate and the defendant's transfer of the property to a buyer in a foreign country is imminent. The preliminary injunction would

preserve the status quo and keep the property within the jurisdiction of the bankruptcy court so the court can determine whether it is property of the estate. If it is ultimately determined to be estate property, it will still be around so the trustee can administer the property.

Under Rule 65, no preliminary injunction may be issued without notice to the adverse party. To cover those situations in which notice cannot be reasonably given, Rule 65 provides for temporary restraining orders (or TROs). A temporary restraining order is like a preliminary injunction but, if it is issued without notice to the adverse party, its duration is limited to ten days. Within that ten day period, the court must then conduct a hearing on notice to the adverse party of the plaintiff's motion for preliminary injunction. Thus, at that hearing, the TRO would dissolve and be replaced by a preliminary injunction — or not — as the court determines.

The interplay and relationship between preliminary injunctions and temporary restraining orders is also seen in the appellate rules. Preliminary injunctions entered by the district court have generally been appealable to the court of appeals just like final judgments. 28 U.S.C. § 1292. On the other hand, temporary restraining orders have generally not been appealable from the district court to the court of appeals because of their very short duration. See, e.g., 19 J. Moore, *Moore's Federal Practice* § 203.10[5](3d. ed. 2001). Under F.R.B.P. 8001 and 28 U.S.C. § 158, however, it appears that, with leave of the district court, appeals of both preliminary injunctions and temporary restraining orders may be taken from the bankruptcy court to the district court. As a practical matter, it would be difficult to prosecute an effective appeal from the bankruptcy court's TRO because of its

short duration and the fact that the bankruptcy court shortly will be conducting a hearing on notice to the adverse party of the plaintiff's motion for preliminary injunction.

With this general background, how does one obtain a TRO or a preliminary injunction?

#### *Temporary Restraining Orders*

To obtain a TRO, the adversary plaintiff files a motion for temporary restraining order separate from the adversary complaint itself. The plaintiff also files an independent motion for preliminary injunction. The motions should be supported by allegations of specific facts either stated in the verified complaint or supported by accompanying affidavits that demonstrate irreparable injury will occur absent the issuance of the TRO and that show the irreparable injury is so imminent that notice and a hearing on a motion for preliminary injunction is impractical if not impossible. In the motion or the supporting affidavits, counsel must also certify the efforts, if any, that have been made to give the opposing party notice of the relief sought and the reasons supporting the claim that notice should not be required.

The motions should describe precisely the conduct sought to be enjoined and set forth facts on which the court can make a reasoned determination as to the amount of security which must be posted if the movant is not a debtor, trustee, or debtor in possession.

The movant should file a supporting brief or legal memorandum. In the supporting brief, the plaintiff should address the following controlling issues: (1) the likelihood that the moving party will ultimately prevail on the merits of the claim; (2) the irreparable nature

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of the threatened injury and the reason that notice cannot be given; (3) the potential harm that might be caused to the opposing parties or others if the order is issued; and (4) the public interest, if any.

Counsel should also comply with L.B.R. 9004-2(d) governing requests for emergency or expedited treatment.

The movant should also submit a proposed form of temporary restraining order. The proposed TRO should set forth the reasons for its issuance, be specific in its terms, and describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained.

Given the bankruptcy court's congested calendar and the emergency nature of the requested relief, the court typically must decide motions for TRO on the papers and without giving the moving party the opportunity for a hearing to develop the record. It is imperative, therefore, that counsel seeking a TRO make a complete record on the papers justifying the relief counsel requests. Counsel should be mindful that the court will be unfamiliar with the underlying dispute, its factual predicate, and the parties' positions. Counsel should, therefore, strive to set forth the facts in an organized, concise, and understandable manner. A mere chronological listing of historical events is usually unpersuasive without also providing some context.

If the court enters a TRO, the court will also schedule a hearing on the motion for preliminary injunction. If the court denies the TRO and the reason for the denial would not as a matter of law preclude the issuance of a preliminary injunction, the court will schedule for hearing the motion for preliminary injunction or otherwise determine how it will consider that motion. In either event, counsel for the plaintiff would then complete service of process and all papers and orders on the adverse party.

### *Preliminary Injunctions*

If counsel seeks a preliminary injunction with notice but does not seek a TRO without notice, counsel should nevertheless follow the steps described above for TROs with the exception of addressing the issue of why notice cannot be given. In the moving papers, as part of counsel's compliance with L.B.R. 9004-2(d), counsel should also inform the court of all facts necessary for the court to determine when a hearing should be scheduled, such as when the threatened harm is to occur.

Typically, any hearing the court conducts on a motion for preliminary injunction will be limited to oral argument. Counsel representing the opposing party, therefore, should file opposing affidavits no later than the day preceding the hearing, just as is done in summary judgment practice under Rule 56. If the papers and the hearing reveal a factual dispute requiring the taking of testimony and evidence, the court can direct the hearing accordingly. Opposing counsel should also file a brief or opposing legal memorandum. Depending upon the practice and preferences of the presiding judge, counsel will also want to ensure the judge has an opportunity to review the opposing brief before the hearing.

### *Conclusion*

Preliminary injunctions and TROs are extraordinary remedies and are not routinely issued. When the facts warrant, however, they can be powerful tools to assist the parties, counsel, and the court in litigation. You will want to start your request for relief by reviewing the terms of the rules and complying strictly with them. When you have the right facts, packaging your requests for temporary and preliminary injunctive relief in the manner suggested here will maximize your chances of getting the relief you request in an efficient and effective manner.

