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# Preliminary Injunction Litigation: Winning or Defeating Emergency Motions

Obtaining Pretrial Relief in Federal Court and Enforcing the Order Through Contempt Remedies

TUESDAY, JULY 21, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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# Preliminary Injunction Litigation: Winning or Defeating Emergency Motions

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# Introduction

- Preliminary injunctions and temporary restraining orders ("TROs") are extraordinary remedies. The power of the Court is invoked on an interim, emergency, and potentially ex parte basis prior to trial.
- In cases of true emergencies, preliminary injunctions and TROs are a valuable tool to obtain emergency relief.
- In other cases, preliminary injunctions and TROs can be a costly (in terms of legal fees and business distraction) procedural gambit.

# Overview

- What is an injunction?
  - A court order commanding or preventing an action. *Black's Law Dictionary* (9th ed.). Operates *in personam*—party is required to do a particular thing or is prohibited from doing a particular thing.
- TROs v. Preliminary Injunctions
  - Preliminary injunctions are effective until a trial on the merits is held or case otherwise concludes
  - Temporary restraining orders are effective until a preliminary injunction hearing may be held
    - Under Federal Rules of Civil Procedure, limited to 14 days absent good cause.
    - TRO may be granted on ex parte basis.

# Standard for Obtaining a TRO or Preliminary Injunction

- Standard for obtaining a TRO typically uses the same factors as the preliminary injunction test. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). But, the time-period for which irreparable harm is evaluated is different to reflect the different time period for which a TRO will be effective. *See* Fed. R. Civ. P. 65(b)(1)(A).
- Most jurisdictions, including most federal courts, use a four-factor test much like that outlined in the Supreme Court's case of *eBay v. MercExchange*, 547 U.S. 338 (2006). These four factors include: (1) the likelihood of success on the merits; (2) irreparable harm if the injunction is not granted; (3) the balance of hardships between the parties; and (4) the public interest

# Standard for Obtaining a TRO or Preliminary Injunction

- The first two factors much each be established before preliminary relief may be granted. Thus, although identified as factors, they are more properly seen as required elements.
- In several circuits, however, courts use the "serious questions" test. Under this test greater showing of harm can compensate for a lesser showing of likelihood of success on the merits. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011) (discussing test used by Second, Seventh, and Ninth Circuits).

# Standard for Obtaining a TRO or Preliminary Injunction

- State court standards vary, and often use factors similar to the *eBay* factors. There may be subtle variations, for example, Minnesota state courts use the following five factor test:

(1) the nature and background of the relationship between the parties, (2) harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial, (3) likelihood that one party or the other will prevail on the merits, (4) aspects which permit or require consideration of public policy, (5) administrative burdens involved in judicial supervision and enforcement of the temporary decree. *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn.1965).

# Standard for Obtaining a TRO or Preliminary Injunction

- Regardless of the standard used, irreparable harm and some showing of likelihood of success on the merits are fundamental to obtaining relief.
- A higher standard may apply for a "mandatory injunction."
  - Mandatory injunctions compel an act (e.g., an order compelling a transfer of title of property), whereas prohibitory injunctions prohibit an act (e.g., an order to refrain from transferring title to property).
  - Some courts will require a "clear showing" for mandatory injunctions. *E.g.*, *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 406 (2d Cir. 2011).

# Specific Types of Cases: strategic considerations and procedural hurdles

- Intellectual property (patent, trademark, copyright)
- Trade secrets
- Covenants not to compete
- Asset preservation

# Patent cases: strategic considerations and procedural hurdles

- Injunctions involving patents
  - Preliminary injunctions where patentees seek to enjoin infringers from further infringement pending trial.
  - May seek a recall of products.
  - May enjoin termination of patent licenses.

# Patent cases: strategic considerations and procedural hurdles

- Strategic consideration—validity challenges
  - The burdens associated with invalidity are different on a preliminary injunction motion
  - Because the movant (generally the plaintiff) bears the burden of proof to show entitlement to injunctive relief, the movant must show defendant is not likely to succeed on merits of affirmative defenses. *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1359 (Fed. Cir. 2001). This means defendant can defeat a motion for injunction by establishing a "substantial question" concerning invalidity of the patent. *Id.* at 1350-51.

# Patent cases: strategic considerations and procedural hurdles

- Certain types of patents may have special considerations:
  - Drug patents, which impact public health. *See 3M Unitek Corp. v. Ormco Co.*, 96 F. Supp. 2d 1042, 1052 (C.D. Cal. 2000) (discussing injunction of products alleged to infringe patents where those products have significant effect on public health).
  - Similar for life saving medical devices. *Cordis Corp. v. Boston Sci. Corp.*, 2003 U.S. Dist. LEXIS 21338 (D. Del. Nov. 21, 2003).
- Multi-feature products (e.g., cell phones).
  - To enjoin sale of product must show that patented feature drives demand—causal nexus between infringement and harm. *Apple, Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314, 1324 (Fed. Cir. 2012).

# Patent cases: strategic considerations and procedural hurdles

- Presumption of irreparable harm
  - Formerly, patent owners enjoyed a presumption of irreparable harm once they established a likelihood of showing infringement of a valid patent.
  - The Federal Circuit rejected the rule after the Supreme Court's decision in *eBay*, which criticized "categorical" rules in applying the four factor test. *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1149 (Fed. Cir. 2011)
- "[L]ost sales standing along are insufficient to prove irreparable harm" because they are presumed to be compensable though damages. Lost market share and price erosion could lead to a conclusion of irreparable harm. However, those must be proven or "at least substantiated with some evidence" and shown to be caused by ongoing infringement.
- Loss of only one distributor to an infringer is insufficient to show irreparable harm. *Automated Merchandising Systems, Inc. v. Crane* (Fed Cir. Dec. 16, 2009).

# Trademark cases: strategic considerations and procedural hurdles

- Because trademark infringement necessarily implicates confusion by its nature it suggests irreparable harm.
- Accordingly, application of the *eBay* case has cause some consternation among courts.
  - Many jurisdictions hold that, in light of *eBay*, movant must prove irreparable harm. *E.g.*, *Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 217 (3d Cir. 2014); *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., 736 F.3d 1239, 1249 (9th Cir. 2013)*
  - Some courts, however, continue to presume irreparable harm. *3M Co. v. Starsiak*, No. 20-cv-1314 (SRN/TNL), 2020 U.S. Dist. LEXIS 112387, at *20 (D. Minn. June 26, 2020).

# Copyright cases: strategic considerations and procedural hurdles

- Like trademark cases, prior presumption is being rejected in light of eBay decision. *See Flexible Lifeline Sys. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir. 2011) (holding no presumption of irreparable harm and discussing similar holdings in other circuits).
- However, in balancing harms, the Second and Ninth Circuits, the most important in copyright cases because together they are resident to the publishing, music, software and acting community rarely require hardship to the defendant to be balanced at all if the plaintiff can show that it is likely to succeed on the merits of its claim. Even the remaining circuits, which nominally consider this factor in all cases, generally "tip the balance of hardships in the plaintiffs favor to the extent that it has shown a likelihood of success on the merits."

# Trade Secrets cases: strategic considerations and procedural hurdles

- Trade secrets litigation is unique in that the subject matter of the litigation (presumptively public proceedings) is by definition a secret.
- Therefore, trade secret plaintiffs will invariably need to seek an early protective order and to seal its motion papers.
- Trade secret defendants will invariably argue that their principals need to view materials in order to defend themselves.
- Prior to initiating trade secrets lawsuit and seeking interim injunctive relief—the plaintiffs must be prepared to articulate what its trade secrets are and what the harm from disclosure in litigation will be.

# Trade Secrets cases: strategic considerations and procedural hurdles

- The presumption of irreparable harm and affect of *eBay* is more hotly debated in trade secrets cases than other IP areas (which are trending away from a presumption).
  - Finding a presumption of irreparable harm once likelihood of success in misappropriation established. *Freedom Med., Inc. v. Sewpersaud*, No. 6:20-cv-771-Orl-37GJK, 2020 U.S. Dist. LEXIS 109337, at *16 (M.D. Fla. June 23, 2020); *Moss Holding Co. v. Fuller*, No. 20-cv-01043, 2020 U.S. Dist. LEXIS 39068, at *22 (N.D. Ill. Mar. 6, 2020)
  - Finding no presumption of irreparable harm. Cutera, Inc. v. Lutronic Aesthetics, Inc., No. 2:20-cv-00235-KJM-DB, 2020 U.S. Dist. LEXIS 44167, at *19 (E.D. Cal. Mar. 12, 2020); *Espiritu Santo Holdings, LP v. Libero Partners, LP*, 2019 U.S. Dist. LEXIS 84844, at *64 (S.D.N.Y. May 14, 2019).

# Noncompete Litigation has similarities

- First step: Determine if the noncompetition covenant is enforceable
  - Is the agreement reasonable in geographic scope and duration? limitations?
  - Can the court rewrite or "blue pencil" the agreement?
    - Courts in most states can; states that are exceptions include Georgia, Nebraska, and Wisconsin
    - Generally, courts will blue pencil the agreement to effectuate the intent of the parties
    - On the other hand, courts will decline to blue pencil if the agreement suggests overreaching by the drafter, as evidenced by such issues as a lack of geographical or temporal limits.
    - If the court blue-pencils, will the resulting agreement effectuate the client's goals?

# Noncompete Litigation (cont.)

Second Step: Determine desired forum

- State vs. federal
- Does the agreement contain a choice of law provision?
- Does a valid contractual forum selection clause control?
  - In federal court, a forum selection clause is typically deemed enforceable as "a manifestation of the parties preference for a convenient forum." *Jumara v. State Farm Ins.Co*., 55 F.3d 873, 880 (3rd Cir. 1995).

# Noncompete Litigation (cont.)

- Third step: When to HOLD and when to FOLD:
  - The best outcome for both parties may be settlement before injunctive relief is granted or denied-you may want to avoid invalidation.
  - Consider reaching a compromise:
    a. Rewrite a less restrictive restriction.
    b. Have counsel fees and other expenses paid to move on.

# Defending Against Emergency Injunctive Relief

- General strategy considerations:
  - Does the information qualify as a trade secret?
    - Did the opponent treat the information in a confidential manner?
    - Has the information been provided to others in the past?
    - Is it generally available to the public?
    - Is the information generally available from other sources? (See TGC Corp. v. HTM Sports, B.V., 896 F. Supp. 751 (E.D. Tenn. 1995) (finding information ascertainable from another source is not a trade secret))

# Defending Against Emergency Injunctive Relief (cont.)

- Did the employee accused of misappropriation have the information before joining the plaintiff company?
- Note:  this argument may not apply if the original information has been further developed or engineered by the plaintiff.
- Does a monetary remedy provide full relief? (See Campbell Soup v. Giles, 47 F.3d 467 (1st Cir. 1995) (affirming denial of injunctive relief because the plaintiff could in theory be made whole through an award of damages))

# Injunctions to Preserve Assets

- Quite common under English law and family law matters in the US, not that common in commercial litigation.
- Certain states have better laws for creditors than others.
- Little uniformity exists among the states.
- Fed. R. Civ. P. 69-Execution-in accord with the state in which the court is located.

# Injunction to Preserve Assets-continued.

- Post-judgment remedies

- NY CPLR 5222-Restraining notice

- Basically a garnishment of all debts and property of a judgment debtor in which the named party has an interest.
- Effective to freeze assets or prevent further fraudulent conveyances.
- Consistent with state uniform laws preventing fraudulent conveyances.

# Injunction to Preserve Assets- continued.

- New York Practice and Law Rule 7502(c) provides that where an arbitration is pending or about to be commenced, a court may entertain a prejudgment application for an order for attachment or for a preliminary injunction to preserve assets.

- *Monquion v. Gliklad*, 55 Misc. 3d 1212 (A), NY (April 6, 2017); *Rockwood Pigments NA v. Elements Chromium LP*, 124 A.D. 3d 509 (1rst Dept. 2015).

# Injunction to Preserve Assets- continued.

- **Pennsylvania Rule 3118. Supplementary relief in aid of execution.**
- (a) On petition of the plaintiff, after notice and hearing, the court in which a judgment has been entered may, before or after the issuance of a writ of execution, enter an order against any party or person
- (1) enjoining the negotiation, transfer, assignment or other disposition of any security, document of title, pawn ticket, instrument, mortgage, or document representing any property interest of the defendant subject to execution;
- (2) enjoining the transfer, removal, conveyance, assignment or other disposition of property of the defendant subject to execution;
- (3) directing the defendant or any other party or person to take such action as the court may direct to preserve collateral security for property of the defendant levied upon or attached, or any security interest levied upon or attached;
- (4) directing the disclosure to the sheriff of the whereabouts of property of the defendant;
- (5) directing that property of the defendant which has been removed from the county or concealed for the purpose of avoiding execution shall be delivered to the sheriff or made available for execution; and
- (6) granting such other relief as may be deemed necessary and appropriate.
- …
- (c) Violation of the mandate or injunction of the court may be punished as a contempt.

# TRO Procedure

- The Court may issues a TRO without notice to the other side if the following conditions are met:
  - (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
  - (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

  Fed. R. Civ. P. 65(b).

# TRO Procedure

- An “ex parte TRO may be appropriate “where notice to the adverse party is impossible either because the identity of the adverse party is unknown or because a known party cannot be located in time for a hearing.” *Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006) (quotation marks omitted). If notice could be given, very narrow and exceptional circumstances exist where ex parte proceedings are appropriate, such as where party would frustrate future prosecution of action by destroying evidence. *Id.*
- If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. Fed. R. Civ. P. 65.

# Evidentiary Hearings

- No right to an evidentiary hearing: courts have discretion whether or not to hold an evidentiary hearing.
  - Therefore, a TRO or preliminary injunction may be granted on the papers alone, may be granted after an oral argument, or conduct a full blown evidentiary hearing.
- Local practices vary widely regarding whether or not to expect an evidentiary hearing and when a judge may exercise his or her discretion to vary from local practice.
- Evidentiary hearing most likely where there are credibility determinations needed to decide disputed fact issues. *All Care Nursing Serv., Inc. v. Bethesda Memorial Hosp., Inc.*, 887 F.2d 1535, 1538 (2d Cir. 1989).

# Evidentiary Hearings—Rules of Evidence

- If the Court does convene an evidentiary hearing, the evidentiary rules are relaxed. *Rubin ex rel. N.L.R.B. v. Vista Del Sol Health Servs., Inc.*, – F. Supp. 3d –, 2015 WL 294101, at *6 (C.D. Cal. Jan. 21, 2015); *Nilson v. JPMorgan Chase Bank, N.A.*, 690 F. Supp. 2d 1231, 1238 n.2 (D. Utah 2009).
- Even so, the Court may reduce the weight given to inadmissible evidence such as hearsay. *Mullins v. City of N.Y.*, 626 F.3d 47, 52 (2d Cir. 2010).

# Evidentiary Hearings—Expert Testimony

- Preliminary injunctions often require expert testimony.
- Because the rules of evidence do not necessarily apply, *Daubert* and its progeny (in which the Court serves as a gatekeeper for a jury) do not apply either. *United HealthCare Ins. Co. v. AdvancePCS*, No. 01-2320 (RHK/JMM), 2002 U.S. Dist. LEXIS 28262, at *17 (D. Minn. Mar. 1, 2002). However, many courts will nonetheless require a showing of reliability similar to *Daubert*. *A.A. v. Raymond*, No. 2:13-cv-01167-KJM-EFB, 2013 U.S. Dist. LEXIS 102459, at *11-12 (E.D. Cal. July 22, 2013).
  - Procedurally, rather than holding an independent *Daubert* hearing, the Court may simply allow an expert to testify and then simply decide admissibility and weight after the hearing. *Id.*; *Megadyne Med. Prods. v. Triad Surgical Techs., Inc.*, No. 2:00-CV-548-ST, 2001 U.S. Dist. LEXIS 26510, at *4 (D. Utah July 11, 2001).

# Evidentiary Hearings—Presumptions

- As discussed before a presumption of irreparable harm formerly applied in certain intellectual property cases, but there is a trend away from presumptions in light of the Supreme Court's decision in *eBay*.
- In addition to certain IP cases, a presumption of irreparable harm continues to apply in certain circumstances such as:
  - Constitutional rights. *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012).
  - Statutorily required injunctions. *First W. Capital Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1142 (10th Cir. 2017).
  - Agreements in which the parties bargain for injunctive relief—relevant but not binding on court. *Mattress Safe, Inc. v. J.T. Eaton & Co.*, No. 1:18-CV-2915-MHC, 2019 U.S. Dist. LEXIS 115524, at *26-27 (N.D. Ga. Jan. 15, 2019) (collecting cases).

# Expedited Discovery

- Under state and federal rules, no discovery may be taken by the plaintiff/petitioner immediately as a matter of right.
- Courts may grant expedited discovery and allow document productions, third party subpoenas and depositions prior to an answer and prior to the normal scheduling under the procedural rules.
- In order to obtain expedited discovery, you must make a showing that irreparable harm may occur if the right to discovery is not granted.
- From a practical point of view, discovery may be desirable by the court if it will simplify the issues, presentation or the decision.

# Expedited Discovery continued.

- A showing must be made which is almost tantamount to a preliminary injunction showing.
- Expedited discovery may be the best tool to be used by the responding party to defend against a claim of irreparable harm.

The rule is to request very narrow, targeted and limited discovery to show the court the precise issue that needs to be proven would be aided by limited discovery.

May also be requested to defeat any temporary restraints.

# Drafting or Reviewing the Proposed Order

- Step one-before you file for an injunction, draft the relief or order you desire so you can focus on the proofs necessary to obtain the relief.
- Step two-is the relief sought legal and feasible to enforce?
- Step three-How objective can the order be so that the court is not a manager or overseer of the prohibited conduct? Is an overseer required in order to effect the relief?
- Who should have notice of the order and the proceedings to allow the order to be enforced?
- Who is bound by the express provisions of the order?

# Drafting the Proposed Order

- Federal Rule of Civil Procedure 65 provides …
- "(d) Contents and Scope of Every Injunction and Restraining Order.
- (1) Contents. Every order granting an injunction and every restraining order must:
- (A) state the reasons why it issued;
- (B) state its terms specifically; and
- (C) describe in reasonable detail–and not by referring to the complaint or other document–the act or acts restrained or required.
- (2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:
- (A) the parties;
- (B) the parties' officers, agents, servants, employees, and attorneys; and
- (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)."

# Enforcement of Injunction Orders

- Violations of Injunction Orders are punishable as contempt of any order.

- "There are two types of contempt: criminal and civil." *Walsh v. Free (In re Free)*, 466 B.R. 48, 57 (Bankr. W.D. Pa. 2012), quoting *Walsh v. Bracken (In re Davitch)*, 336 B.R. 241, 251 (Bankr. W.D. Pa. 2006).

- It is within a federal court's power and discretion to hold a defendant in criminal contempt and punish by fine, imprisonment, or both, for disobedience or resistance to an order of the court. 18 U.S.C.S. § 401(3). "Any person who commits criminal contempt may be punished . . . after prosecution on notice." Fed. R. Crim. P. 42.

# Enforcement continued

- "The two types of contempt also have different burdens of proof and relations to the underlying proceeding. Civil contempt must be proved by 'clear and convincing' evidence, while criminal contempt must be proved beyond a reasonable doubt." *United States v. Juror No. One*, 866 F. Supp. 2d 442 (E.D. Pa. 2011) (citing *United States v. Pozsgai*, 999 F.2d 719, 735 (3d Cir. 1993)).

- While civil contempt proceedings are "ordinarily a part of the underlying action," criminal contempt proceedings are separate; they "are between the public and the defendant, and are not a part of the original cause." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444-445 (1911).

# Enforcement continued

- "Civil contempt is remedial in nature, serving to coerce compliance with a court order or to compensate the other party for losses sustained due to noncompliance. By complying. . .a civil contemnor can purge the contempt." United States v. Pozsgai, 999 F.2d 719, 735 (3d Cir. 1993) (citing Hicks on Behalf of Feiock v. Feiock, 485 U.S. 624, 632 (1988)).

- Criminal contempt is "retroactive . . .seeking to penalize previous violations. It [is] punitive rather than remedial, because it. . .[seeks] to vindicate the authority of the Court to enjoin [a defendant] from continuing [the offending activities]." Id. E.g., Chadwick v. Janecka, 312 F.3d 597, 608 (3d Cir. 2002) (quoting Gompers, 221 U.S. at 441, "[c]ivil confinement 'is remedial, and for the benefit of the complainant,' whereas criminal confinement 'is punitive.'").

# Enforcement continued

- "It is well established that criminal penalties may not be imposed in civil contempt proceedings." In re Grand Jury Investigation, 600 F.2d 420, 424-5 (3d Cir. 1979).
- Criminal contempt is appropriate where a Defendant has done "an act forbidden." Criminal contempt is an ineffective and inappropriate remedy for a civil wrong (such as failure to pay a judgment or failure to make full disclosure) because "[i]mprisonment [for a definite term] cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience.".

# Enforcement continued

- Where the injunction requires the payment of money or the deposit or turnover of something:
- Imprisonment will not give Plaintiffs what they want – payment by Defendant. Although a complainant might derive some "incidental benefit" from a defendant's definite imprisonment because it "tends to prevent a repetition of the disobedience," the potential effect of such imprisonment "will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or vice versa." Gompers v. Bucks Stone and Range Co, 221 U.S. at 498-499.
- "[C]riminal contempt sanctions [are] restricted to 'those instances where the court must vindicate its authority.'" United States v. Juror No. One, 866 F. Supp. 2d 442, 446 (E.D. Pa. 2011) (quoting Waste Conversion, Inc., 893 F.2d 605, 612 (3d Cir. 1990)).

# Enforcement continued

- Most civil cases result in enforcement of an injunction through progressive orders and disincentives issued by the court.
- Note that an injunction can require the payment of money, but ultimately, the outcome of the case will be a money judgment.
- Once a money judgment is entered, that disposes of the case.
- The injunction will merge into the money judgement, rather than remain an obligation unless the injunction expressly remains and the court expressly retains jurisdiction to enforce the injunction.

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