9 Temporary Restraining Orders and Preliminary Injunctions

GREGORY J. SCANDAGLIA
WILLIAM J. RYAN
Scandaglia & Ryan
Chicago

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I. Introduction

II. Temporary Restraining Orders

I. INTRODUCTION

A. [9.1] Scope of Chapter

This chapter discusses temporary restraining orders (TROs) and preliminary injunctions as they arise in the context of business disputes. Consistent with this purpose, the chapter focuses on the use of these equitable remedies in business and commercial litigation and, when possible, cites caselaw from business and commercial litigation cases. Occasionally, however, when the leading case or cases on a particular issue do not involve business and commercial litigation, cases from other areas of the law may, of necessity, be cited.

For ease of reference, the cases cited in §§9.14 – 9.67 below pertain to TROs unless expressly so noted; likewise, the cases cited in §§9.68 – 9.121 below pertain to preliminary injunctions, although they may also pertain to TROs. As the standards for obtaining relief for TROs and preliminary injunctions are in many cases identical, the practitioner wishing for a fuller understanding of a particular issue may wish to consult the appropriate sections of both parts of the chapter (*i.e.*, both §§9.19 – 9.29 and §§9.71 – 9.79, when looking for required elements).

The primary focus of this chapter, as with most IICLE chapters, is Illinois state law. The authors are aware, however, that Illinois practitioners may frequently seek injunctive relief in the federal courts as well, whether pursuant to diversity jurisdiction or for other reasons. For this reason, this chapter also addresses federal law pertaining to TROs and preliminary injunctions and provides caselaw from Illinois federal district courts, the Seventh Circuit, and the United States Supreme Court. However, more specialized applications of injunctions under federal question jurisdiction, such as intellectual property or particular federal statutes, are outside the scope of this chapter.

While the subject matter of this chapter encompasses the legal and practical considerations of obtaining preliminary or temporary injunctive relief in commercial litigation, often a decision regarding temporary or preliminary relief can in fact be case-dispositive because it either achieves the actual litigation goals of one of the parties or puts in place a status quo that leads to a negotiated settlement. In any event, the legal and strategic considerations of preliminary or temporary injunctions are often different from those raised by the issuance, modification, and dissolution of permanent injunctions. For these reasons, this chapter is restricted to interlocutory injunctions — TROs and preliminary injunctions — and does not address the broader subject area involving permanent injunctions. Permanent injunctions are addressed in II ILLINOIS CIVIL PRACTICE §§4.55 – 4.68 (IICLE, 2003, Supp. 2006).

B. Background

1. [9.2] Temporary Restraining Orders and Preliminary Injunctions Defined

Temporary restraining orders and preliminary injunctions are preliminary, interlocutory injunctive remedies. Courts grant these remedies prior to the resolution of a controversy on the merits. *See O'Brien v. White,* 219 Ill.2d 86, 846 N.E.2d 116, 118 – 119, 301 Ill.Dec. 154 (2006); *People ex rel. Klaeren v. Village of Lisle,* 202 Ill.2d 164, 781 N.E.2d 223, 230, 269 Ill.Dec. 426

(2002); *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry.*, 195 Ill.2d 356, 748 N.E.2d 153, 159, 254 Ill.Dec. 707 (2001); *Hartlein v. Illinois Power Co.*, 151 Ill.2d 142, 601 N.E.2d 720, 726 – 727, 176 Ill.Dec. 22 (1992); *Steel City Bank v. Village of Orland Hills*, 224 Ill.App.3d 412, 586 N.E.2d 625, 628, 166 Ill.Dec. 667 (1st Dist. 1991). *See also Paddington Corp. v. Foremost Sales Promotions, Inc.*, 13 Ill.App.3d 170, 300 N.E.2d 484, 487 (1st Dist. 1973).

In general, preliminary injunctions and TROs are equitable remedies by which a party is directed to perform some act or is ordered to refrain from doing something. *Skolnick v. Altheimer & Gray*, 191 Ill.2d 214, 730 N.E.2d 4, 11, 246 Ill.Dec. 324 (2000); *In re a Minor*, 127 Ill.2d 247, 537 N.E.2d 292, 299, 130 Ill.Dec. 225 (1989). An order that requires or commands performance of a positive act is called a "mandatory" injunction. *Continental Cablevision of Cook County, Inc. v. Miller*, 238 Ill.App.3d 774, 606 N.E.2d 587, 597, 179 Ill.Dec. 755 (1st Dist. 1992). Mandatory preliminary injunctions are not favored by courts. *Kilhafner v. Harshbarger*, 245 Ill.App.3d 227, 614 N.E.2d 897, 899, 185 Ill.Dec. 456 (3d Dist.), *appeal denied*, 152 Ill.2d 561 (1993); *Rao Electrical Equipment Co. v. Macdonald Engineering Co.*, 124 Ill.App.2d 158, 260 N.E.2d 294, 301 (1st Dist. 1970). Thus, a party seeking a mandatory injunction must show the existence of an extreme emergency or great necessity such that its need for relief is clearly established and free from doubt. *Northrop Corp. v. AIL Systems, Inc.*, 218 Ill.App.3d 951, 578 N.E.2d 1208, 1210, 161 Ill.Dec. 562 (1st Dist. 1991).

Most often, the purpose of interlocutory injunctions is to "freeze" or pause an ongoing controversy by preserving the status quo until a hearing or further order and/or until the case can be decided on the merits. *Klaeren, supra*, 781 N.E.2d at 230; *Callis, Papa, Jackstadt & Halloran, supra*, 748 N.E.2d at 159; *Hartlein, supra*, 601 N.E.2d at 726; *Buzz Barton & Associates, Inc. v. Giannone*, 108 Ill.2d 373, 483 N.E.2d 1271, 1277, 91 Ill.Dec. 636 (1985) ("effect and purpose [of interlocutory injunction] is to keep matters in statu quo until a hearing or further order"), quoting *Nestor Johnson Manufacturing Co. v. Goldblatt*, 371 Ill. 570, 21 N.E.2d 723, 725 (1939); *Bradford v. Wynstone Property Owners' Ass'n*, 355 Ill.App.3d 736, 823 N.E.2d 1166, 1169, 291 Ill.Dec. 580 (2d Dist. 2005).

In order to obtain injunctive relief, a party must establish the following elements: (a) a clearly ascertainable right that needs protection; (b) the fact that the party would suffer irreparable injury without the protection of an injunction; (c) the absence of an adequate remedy at law; and (d) a likelihood of success on the merits. *Mohanty v. St. John Heart Clinic, S.C.*, No. 101251, 2006 Ill. LEXIS 1689 at *12 (Dec. 21, 2006); *Klaeren, supra*, 781 N.E.2d at 230; *Callis, Papa, Jackstadt & Halloran, supra*, 748 N.E.2d at 159; *Continental Cablevision, supra*, 606 N.E.2d at 595; *American Telephone & Telegraph Co. v. Village of Arlington Heights*, 174 Ill.App.3d 381, 528 N.E.2d 1000, 1003 – 1004, 124 Ill.Dec. 109 (1st Dist. 1988).

Generally, TROs and preliminary injunctions are similar in the type of relief that they provide as well as in the elements that must be established in order to achieve them. Key differences between these two types of interlocutory relief include whether they may be obtained without notice to the adverse party (TROs may be, but preliminary injunctions always require notice), and the duration of the relief (TROs typically have a duration of ten days, renewable once for good

cause, or until the earliest possible hearing for a preliminary injunction, while preliminary injunctions may remain until the case is disposed of on the merits). For a further discussion of the difference between TROs and preliminary injunctions see §9.9 below.

TROs are subdivided into two types: (a) the TRO granted with notice to the adverse parties; and (b) the TRO granted without notice (*i.e.*, ex parte) to the adverse parties. *Harper v. Missouri Pacific R.R.*, 264 Ill.App.3d 238, 636 N.E.2d 1192, 1197, 201 Ill.Dec. 760 (5th Dist.), *appeal denied*, 157 Ill.2d 500 (1994). Generally, TROs issued without notice to the adverse party are disfavored; they require a showing of immediate harm and irreparable damage and often a showing that with notice the adverse party would destroy the substance of the litigation or otherwise prevent the court from addressing the situation prompting the motion for the TRO. TROs issued with notice to the adverse party are similar in form and effect to preliminary injunctions, although their duration is generally shorter. For further discussion of the differences between TROs with and without notice, see §§9.15 – 9.18 below.

As mandatory injunctions and permanent injunctions are outside the scope of this chapter, this chapter discusses only TROs and preliminary injunctions that order a party to refrain from doing something. Like a TRO, a preliminary injunction is designed to provide relief to an injured party and to maintain the status quo; unlike a TRO, it is not necessarily of extremely brief duration, as it is intended to preserve the status quo until the trial judge considers the merits of the plaintiff's claim. *New York Life Insurance Co. v. Sogol,* 311 Ill.App.3d 156, 724 N.E.2d 105, 108, 243 Ill.Dec. 796 (1st Dist. 1999); *Weitekamp v. Lane,* 250 Ill.App.3d 1017, 620 N.E.2d 454, 458, 189 Ill.Dec. 486 (4th Dist. 1993).

2. Statutory Authority

a. [9.3] Illinois

The rules and requirements governing temporary restraining orders and preliminary injunctions are set out, respectively, in §§11-101 and 11-102 of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.* Reflecting the legislature's heightened concern for the potential burden imposed by the granting of a motion for a TRO (and particularly one granted without notice), the TRO provisions of §11-101 are spelled out in significant detail:

> **No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of signing; shall be filed forthwith in the clerk's office; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after the signing of the order, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the granting of the extension shall be stated in the written order of the court. In**

> **case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he or she does not do so, the court shall dissolve the temporary restraining order.**
>
> **On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.**
>
> **Every order granting an injunction and every restraining order shall set forth the reasons for its entry; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.** 735 ILCS 5/11-101.

Although the requirements for orders specified in the first paragraph of §11-101 apply only to TROs and not preliminary injunctions, the last paragraph of §11-101 applies to preliminary injunctions as well as TROs. In particular, the orders should be specific in their terms and in the description of the acts sought to be restrained, which description must be set forth in the order itself and not merely by reference to another document. Also, the reasons for the entry of the injunction shall be specified, and the order shall only be binding on the parties (and their officers, employees, agents, and attorneys) and others in active concert or participation with them who receive actual notice.

Section 11-102 states only that notice must be given to the adverse party before a hearing takes place and a preliminary injunction is entered.

> **No court or judge shall grant a preliminary injunction without previous notice of the time and place of the application having been given the adverse party.** 735 ILCS 5/11-102.

The reason for the notice requirement reflected in §11-102 is that a preliminary injunction is likely to have a considerably longer duration than a TRO. The possible prejudice to the adverse party against whom an ex parte TRO is granted is limited by the extremely short duration of the ex parte TRO. Because a preliminary injunction has a longer duration, notice is therefore required.

b. [9.4] Federal

Rule 65 of the Federal Rules of Civil Procedure governs temporary restraining orders and preliminary injunctions in federal court. Under the federal scheme, the distinction between a TRO

and a preliminary injunction is the concept of notice. Thus, a TRO is essentially defined as a preliminary injunction without notice. Conversely, Rule 65 requires that notice be given with all preliminary injunctions and treats TROs issued with notice to the adverse party as preliminary injunctions. *Budget Rent A Car Corp. v. Harvey Kidd Automotive*, 249 F.Supp.2d 1048, 1049 (N.D.Ill. 2003); *Coca-Cola Co. v. Alma-Leo U.S.A., Inc.*, 719 F.Supp. 725, 726 (N.D.Ill. 1989), citing 11 Charles Alan Wright and Arthur Raphael Miller, FEDERAL PRACTICE AND PROCEDURE §2951, p. 499 (1973). Rule 65(a) governs preliminary injunctions, and Rule 65(b) sets out the provisions for TROs issued without notice:

> **(a) Preliminary Injunction.**
>
> **(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.**
>
> **(2) *Consolidation of Hearing with Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.**
>
> **(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who**

obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. Fed.R.Civ.P. 65(a), 65(b).

3. Strategic Purpose of a Temporary Restraining Order or Preliminary Injunction

a. [9.5] In General

Parties to a business dispute generally seek temporary restraining orders or preliminary injunctions to preserve the status quo pending further adjudication of the case on the merits. *See O'Brien v. White*, 219 Ill.2d 86, 846 N.E.2d 116, 119, 301 Ill.Dec. 154 (2006); *People ex rel. Klaeren v. Village of Lisle*, 202 Ill.2d 164, 781 N.E.2d 223, 230, 269 Ill.Dec. 426 (2002); *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry.*, 195 Ill.2d 356, 748 N.E.2d 153, 159, 254 Ill.Dec. 707 (2001); *Hartlein v. Illinois Power Co.*, 151 Ill.2d 142, 601 N.E.2d 720, 726, 176 Ill.Dec. 22 (1992); *Buzz Barton & Associates, Inc. v. Giannone*, 108 Ill.2d 373, 385, 483 N.E.2d 1271, 1275, 91 Ill.Dec. 636 (1985); *Bradford v. Wynstone Property Owners' Ass'n*, 355 Ill.App.3d 736, 823 N.E.2d 1166, 1169, 291 Ill.Dec. 580 (2d Dist. 2005). This function of protecting or preserving an existing state of affairs is a traditional purpose of preliminary injunctive relief. Litigants, however, may also seek interlocutory injunctions to prevent the occurrence of an irreparable harm to their business interest and relationships (735 ILCS 5/11-101) or to prevent the destruction or dissipation of their property or assets (*see Save the Prairie Society v. Greene Development Group, Inc.*, 323 Ill.App.3d 862, 752 N.E.2d 523, 530, 256 Ill.Dec. 643 (1st Dist. 2001) (holding that high-density development could irreparably harm character of area and thus destroy or dissipate value or character of property); *Forest Preserve District of Cook County v. Mount Greenwood Bank Land Trust 5-0899*, 219 Ill.App.3d 524, 579 N.E.2d 1066, 1069, 162 Ill.Dec. 252 (1st Dist. 1991)).

b. [9.6] Preservation of Status Quo

When the movant seeks an interlocutory injunction to preserve the status quo, it often seeks to prevent the adverse party from taking a certain threatened future action. This form of anticipatory legal action is directed to stopping an adversary before they commence the conduct detrimental to the putative plaintiff's business. For example, a business may learn that in the near future, a former employee plans to open a directly competing business across the street in defiance of a restrictive covenant preventing him or her from working in that field within three miles of the movant's business. In this example, it is clear that the status quo refers to the situation before this certain action occurs (*i.e.*, before the former employee opens the competing business).

The situation and definition of "status quo" is somewhat less certain when the activity that the movant hoped to prevent has already commenced. "Although the general practice is to preserve the status quo by keeping all actions at rest, 'it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the

irreparable injury on the complainant.'" *American Telephone & Telegraph Co. v. Village of Arlington Heights,* 174 Ill.App.3d 381, 528 N.E.2d 1000, 1004, 124 Ill.Dec. 109 (1st Dist. 1988) (injunction granted to prevent city from stopping company's installation of cable system properly preserved status quo), quoting *Deisenroth v. Dodge,* 350 Ill.App. 20, 111 N.E.2d 575, 577 (2d Dist. 1953). Therefore, further analysis of what is meant by the term "status quo" is in order.

Illinois courts have defined "status quo" as the "last, actual, peaceable, uncontested status which preceded the pending controversy." *Postma v. Jack Brown Buick, Inc.,* 157 Ill.2d 391, 626 N.E.2d 199, 202, 193 Ill.Dec. 166 (1993). In *Postma,* a car dealer had sold his dealership to the plaintiff subject to approval by General Motors, which approval General Motors denied. The plaintiff sued both the dealer and General Motors, seeking to enjoin the dealer from terminating the sale contract and seeking to enjoin General Motors from exercising its right of first refusal and buying the dealership itself. The court held that the last peaceable, uncontested status was the situation that existed immediately prior to General Motors' rejection of the car dealer's proposal for the dealership transfer to the plaintiff and its decision to exercise its right of first refusal. The court affirmed the trial court's denial of the plaintiff's motion for a preliminary injunction against General Motors because the plaintiff was not seeking to preserve this state of affairs, but rather seeking to force General Motors to approve the plaintiff as a dealer so that he and not General Motors could take over the dealership. Because this would change the status quo of the parties rather than preserve it, the court held that it would have been an abuse of discretion for the trial court to grant the preliminary injunction under these circumstances.

Similarly, in *Northwestern Steel & Wire Co. v. Industrial Commission of Illinois,* 254 Ill.App.3d 472, 627 N.E.2d 71, 193 Ill.Dec. 912 (1st Dist. 1993), the First District reversed a modified temporary restraining order when it determined that the modified TRO altered the status quo. The court held that the last peaceable, uncontested status of the case was when the plaintiff was a self-insurer of its' workers' compensation claims prior to the amendment of the Industrial Commission's rules. The modified TRO, which had found the amended rule at issue unconstitutional and ordered the Commission to provide the plaintiff with a hearing, actually altered the status quo (and decided the merits of the claim as well), so the grant of the modified TRO was improper. *See also O'Brien v. White,* 219 Ill.2d 86, 846 N.E.2d 116, 118 – 119, 301 Ill.Dec. 154 (2006) (noting but not ruling on appellate court's reversal of TRO on ground that TRO enjoining State Board of Elections from certifying judicial vacancies changed status quo when Board had already certified said vacancies).

By seeking to preserve the status quo, the movant seeks to preserve things as they were before the controversy began. *See County of DuPage v. Gavrilos,* 359 Ill.App.3d 629, 834 N.E.2d 643, 651 – 652, 296 Ill.Dec. 86 (2d Dist. 2005) (affirming grant of TRO closing adult business when, in action between zoning jurisdiction and property owner, last peaceable state of existence between parties was state without zoning violation). In practice, this often means just before the controversy began. *See, e.g., Duval v. Severson,* 15 Ill.App.3d 634, 304 N.E.2d 747, 752 (1st Dist. 1973) (in stockholder suit regarding salary dispute, last peaceable, uncontested status of case was period before board meeting at which dispute arose, rather than earlier time when payment of disputed salaries began). If granted, the TRO or preliminary injunction will halt the activity in controversy pending further resolution of the matter.

c. [9.7] Prevention of Occurrence of Wrong or Further Injury

Although described as another purpose for obtaining interlocutory injunctive relief, the prevention of injury is in fact the reason why parties seek to preserve the status quo in the first place — either to prevent an injury from occurring or to prevent further injury when the activity at issue is ongoing. *Bollweg v. Richard Marker Associates, Inc.,* 353 Ill.App.3d 560, 818 N.E.2d 873, 887, 288 Ill.Dec. 938 (2d Dist. 2004) (affirming grant of preliminary injunction against developer when developer's construction project increased flow of water across plaintiff's property, constituting transgression of continuing nature); *Central Water Works Supply, Inc. v. Fisher,* 240 Ill.App.3d 952, 608 N.E.2d 618, 623, 181 Ill.Dec. 545 (4th Dist. 1993) (affirming grant of preliminary injunction enforcing covenant not to compete against successful salesperson when loss of customers and sales and threat of continuing nature of same sufficiently demonstrated irreparable injury that plaintiff sought to prevent). For a more detailed discussion of the nature of a threatened or ongoing injury, see §9.23 below.

d. [9.8] Prevention of Destruction or Dissipation of Property

The prevention of the destruction or dissipation of property is another purpose for obtaining interlocutory injunctive relief. Property may be unique or irreplaceable, making its destruction or dissipation an irreparable harm appropriate for injunctive relief. *See Save the Prairie Society v. Greene Development Group, Inc.,* 323 Ill.App.3d 862, 752 N.E.2d 523, 530 – 531, 256 Ill.Dec. 643 (1st Dist. 2001) (holding that high-density development could irreparably harm character of area and thus destroy or dissipate character and/or value of property); *Forest Preserve District of Cook County v. Mount Greenwood Bank Land Trust 5-0899,* 219 Ill.App.3d 524, 579 N.E.2d 1066, 1069, 162 Ill.Dec. 252 (1st Dist. 1991) (reversing denial of preliminary injunction to county forest preserve district against construction developer whose destruction of flora, fauna, and scenic beauty of land district wanted to acquire for public benefit would be irreparable and final).

C. [9.9] Differences Between Temporary Restraining Orders and Preliminary Injunctions

The general purpose of obtaining either a temporary restraining order or a preliminary injunction is to preserve the status quo pending further determination of the merits. Moreover, as shown in §9.19 below, the elements (often described as "factors") that the movant must prove are generally the same for both types of interlocutory injunctions. As a result, many litigants — and even some courts — make the mistake of blurring the lines between the two or, worse yet, treating them as interchangeable. *See Buzz Barton & Associates, Inc. v. Giannone,* 108 Ill.2d 373, 483 N.E.2d 1271, 1277, 91 Ill.Dec. 636 (1985) ("In far too many cases the distinction between a temporary restraining order, a preliminary injunction, and a permanent injunction becomes blurred during the proceedings."); *Petrzilka v. Gorscak,* 199 Ill.App.3d 120, 556 N.E.2d 1265, 1267, 145 Ill.Dec. 363 (2d Dist. 1990).

Despite the similarities, there are significant differences between TROs and preliminary injunctions, and it is essential to be fully aware of these differences when determining which type of relief to seek. There are three particular areas in which TROs and preliminary injunctions are substantially different: notice; the duration of the injunction; and the scope of the hearing.

Regarding notice, a TRO may be granted ex parte (*i.e.*, without notice to the other party) in emergency situations, although it is preferable when possible to give notice to the opposing party. As TROs issued without notice to the adverse party are disfavored, they require a showing of immediate harm and irreparable damage, and the order has seven specific requirements. See §9.15 below. A preliminary injunction, on the other hand, always requires notice to the opposing party in order to be granted, largely because its longer duration would highly prejudice an adverse party against whom an ex parte injunction is improvidently granted. See §§9.68 – 9.69 below.

Regarding the duration of the injunction, a TRO without notice is entered for a ten-day period, renewable once for good cause; a TRO with notice may be entered for a limited duration until there is a hearing on a preliminary injunction. In federal court, the duration of a TRO with notice is treated the same as that of a preliminary injunction, if the TRO hearing is an evidentiary one. If not, the duration is the same as it is in state court for a TRO with notice (*i.e.*, until an evidentiary hearing may be held on the motion for a preliminary injunction). See §§9.48 – 9.50 below. In contrast, a preliminary injunction may have a significantly longer duration than a TRO granted in state court or granted in federal court absent an evidentiary hearing (*i.e.*, pending trial of the case on the merits). See §9.99 below.

Finally, regarding the scope of the hearing, the type of hearing that is required depends on the type of relief sought. Hearings for TROs are generally summary proceedings conducted without testimony in Illinois state court, although federal courts sometimes hold evidentiary proceedings. See §§9.44 – 9.47 below. In contrast, hearings for preliminary injunctions are limited evidentiary hearings with testimony if an answer is filed, although they may be summary proceedings, if no answer is filed. It is also worth noting that as the time frames for adverse parties to respond are longer for preliminary injunctions than for TROs, answers are more likely to be filed.

D. [9.10] Bond Requirement

The decision to grant a temporary restraining order, and to a certain extent a preliminary injunction, is almost by definition based on a less than complete record. See, *e.g.*, Kenneth R. Berman, *Litigating Preliminary Injunctions: Sudden Justice On A Half-Baked Record*, 15 Prac.Litig. 4, 31 (July 2004). Because a judge fashions such a powerful (if temporary) form of relief on a summary record, there is a very real danger that the party against whom the injunction is granted is itself injured when it later becomes clear that the injunction was improvidently granted. Accordingly, in order to provide relief for parties against whom an injunction was wrongfully entered, both Illinois and federal courts permit (Illinois) or require (federal) the posting of a bond or security by the party seeking injunctive relief. See §§9.51 – 9.52 and §9.100 below.

E. Jurisdiction and Venue

1. [9.11] Subject Matter Jurisdiction

Under the Illinois Constitution, the Illinois circuit courts have plenary jurisdiction — original jurisdiction of all justiciable matters. ILL.CONST. art. VI, §9. Nevertheless, the trial court must

have subject matter jurisdiction to issue an injunction. The Illinois Supreme Court has held that the trial courts lack subject matter jurisdiction to enter injunctions in certain areas in which injunctive relief is unavailable, such as enjoining the executive or legislative branches of government. See §§9.30 – 9.31 below.

As with other matters, the jurisdiction of federal district courts to grant interlocutory injunctive relief is limited to the areas over which these courts have subject matter jurisdiction (*i.e.,* a suit based on the Constitution, laws, or treaties of the United States) or when there is complete diversity between the parties and the amount in controversy exceeds $75,000. See 28 U.S.C. §§1331, 1332.

When the plaintiff seeks damages, it is relatively easy to determine whether the case will meet the $75,000 amount in controversy required for the federal district court to have jurisdiction. When the plaintiff seeks only injunctive relief, however, the answer is less clear. In the Seventh Circuit, the jurisdictional amount is assessed under the "either viewpoint" rule by looking at either the benefit to the plaintiff or the cost to the defendant of the requested relief. In the class action context, the court will examine each named plaintiff's claim and the cost to the defendant of complying with an injunction directed to the plaintiff. *Uhl v. Thoroughbred Technology & Telecommunications, Inc.*, 309 F.3d 978, 983 (7th Cir. 2002) (jurisdictional amount is assessed by "looking at either the benefit to the plaintiff or the cost to the defendant" in complying with injunction); *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 607 (7th Cir. 1997) (if one named plaintiff meets jurisdictional minimum, other named defendants and class members can "piggyback" on this plaintiff's claim); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 53 L.Ed.2d 383, 97 S.Ct. 2434, 2443 (1977) ("it is well established that the amount in controversy is measured by the value of the object of the litigation"); *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 393, 395 (7th Cir. 1979) ("the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce"), quoting *Ronzio v. Denver & Rio Grande Western R.R.*, 116 F.2d 604, 606 (10th Cir. 1940); *Patterson v. Regions Bank*, No. 06-cv-469-DRH, 2006 U.S.Dist. LEXIS 86029 at *10 (S.D.Ill. Nov. 27, 2006) (because court only has jurisdiction over plaintiffs' claim and it is uncertain whether remaining "similar" claims would actually be contested, "it would be inappropriate, at this juncture, to aggregate the value of pecuniary damages Defendant may incur" regarding those claims).

As in Illinois state courts, federal district courts are without jurisdiction to grant injunctive relief in certain areas for which this relief is unavailable, such as enjoining the branches of government. See §§9.80 – 9.85 below.

2. [9.12] Personal Jurisdiction

The usual principles concerning jurisdiction over persons or corporate defendants residing or present in Illinois and non-Illinois residents who are not present in Illinois apply to applications for temporary restraining orders and preliminary injunctions. The Code of Civil Procedure authorizes trial courts to consider motions for TROs and preliminary injunctions upon notice to the defendant. 735 ILCS 5/11-101, 5/11-102. (Of course, notice is not necessary under §11-101 for ex parte TROs.)

The usual requirements for federal courts to obtain personal jurisdiction over individuals or corporate defendants apply to TROs and preliminary injunctions as well. *See generally Green v. Green,* 233 F.2d 642 (7th Cir. 1956).

3. [9.13] Venue

The venue provisions of the Code of Civil Procedure (735 ILCS 5/2-101 through 5/2-109) govern actions for temporary restraining orders and preliminary injunctions unless a special statute providing injunctive relief applies. See 9.125 – 9.128 below for examples of special Illinois statutes.

Fed.R.Civ.P. 65, 28 U.S.C. §§1331 – 1332, and special federal statutes providing injunctive relief govern actions for injunctions for TROs and preliminary injunctions in federal courts.

II. TEMPORARY RESTRAINING ORDERS

A. [9.14] General Showing Needed To Obtain a Temporary Restraining Order

The purpose of a temporary restraining order is to preserve the status quo pending a hearing to determine whether the court should grant a preliminary injunction. *Passon v. TCR, Inc.,* 242 Ill.App.3d 259, 608 N.E.2d 1346, 1350, 181 Ill.Dec. 872 (2d Dist. 1993); *Stocker Hinge Manufacturing Co. v. Darnel Industries, Inc.,* 94 Ill.2d 535, 447 N.E.2d 288, 291, 69 Ill.Dec. 71 (1983). The decision to grant a TRO rests with the sound discretion of the trial court. *Stocker Hinge, supra,* 447 N.E.2d at 291. Ex parte TROs are disfavored; they require an "emergency" situation, and even then, some notice, however informal, is preferable to none at all. *Nagel v. Gerald Dennen & Co.,* 272 Ill.App.3d 516, 650 N.E.2d 547, 551, 208 Ill.Dec. 853 (1st Dist. 1995) (notice must be given to opposing party unless immediate harm and irreparable damage would result if notice is given and hearing is held). A TRO issued without notice is an emergency remedy that may be used only in exceptional circumstances and for a brief duration. *See Hirschauer v. Chicago Sun-Times,* 192 Ill.App.3d 193, 548 N.E.2d 630, 635, 139 Ill.Dec. 245 (1st Dist 1989) (reversing grant of ex parte TRO when plaintiff failed to show irreparable harm or why notice could not have been given), *appeal dismissed,* 131 Ill.2d 559 (1990); *American Can Co. v. Mansukhani,* 742 F.2d 314, 321 (7th Cir. 1984) (ex parte TROs are granted only in "extremely limited" situations).

Because ex parte TROs are disfavored, Illinois courts require the plaintiff to establish that during the period it would take for the movant to give notice, the opponent would destroy the substance of the litigation or otherwise prevent the court from addressing the situation prompting the motion for the *TRO. C.D. Peters Construction Co. v. Tri-City Regional Port District,* 281 Ill.App.3d 41, 666 N.E.2d 44, 48 – 49, 216 Ill.Dec. 876 (5th Dist. 1996); *G&J Parking Co. v. City of Chicago,* 168 Ill.App.3d 382, 522 N.E.2d 774, 777, 119 Ill.Dec. 112 (1st Dist. 1988) (reversing denial of motion to vacate ex parte TRO when complaint did not contain sufficient factual allegations of immediate and irreparable harm to alleviate need for notice). More generally, an ex parte TRO may not be entered unless it clearly appears, from specific facts

supported by affidavits or a verified complaint and not just facts based on information and belief, that immediate loss and irreparable injury, loss, or damage will result to the movant before notice can be served on the opposing party and a hearing can be held. 735 ILCS 5/11-101; Fed.R.Civ.P. 65(b). *See Hirschauer, supra,* 548 N.E.2d at 635.

The following are some examples of business cases in which TROs were granted and later upheld. In *Murges v. Bowman,* 254 Ill.App.3d 1071, 627 N.E.2d 330, 194 Ill.Dec. 214 (1st Dist. 1993), the appellate court upheld a TRO that had been imposed on defendant attorneys who had taken files and employees with them when they left the plaintiff's law firm. In *American Warehousing Services, Inc. v. Weitzman,* 169 Ill.App.3d 708, 533 N.E.2d 366, 127 Ill.Dec. 494 (5th Dist. 1988), the appellate court upheld a TRO that had been entered against a defendant landlord who, in connection with a rent dispute, had locked the gates to the plaintiff's premises a month before the plaintiff's lease expired. Finally, in *C.D. Peters, supra,* the appellate court upheld the entry of a TRO against the successful bidder in a construction project and the district that had granted the bid when the suit was brought by the low bidder who had failed to win the bid.

B. Provisions Regarding Notice and Lack Thereof

1. [9.15] Temporary Restraining Orders Without Notice

Section 11-101 of the Code of Civil Procedure and Fed.R.Civ.P. 65(b) set out the following requirements for any order granting an ex parte temporary restraining order:

a. The date and hour of issuance is indorsed on the order.

b. It is filed forthwith in the clerk's office and entered of record.

c. It defines the injury.

d. It states why the injury is irreparable.

e. It states why the motion was granted without notice.

f. It specifies an expiration date not to exceed ten days after its entry, which date may be extended once for a like period for good cause shown or longer if the party against whom it is directed consents that it may be extended for a longer period.

g. If it is extended, the reasons for the extension are entered of record.

If a TRO is granted without notice, the application for a preliminary injunction shall be "set for hearing at the earliest possible time" and should take "precedence over all matters except older matters of the same character." 735 ILCS 5/11-101. If the party who obtained the TRO fails to proceed with the application for a preliminary injunction at the time appointed for the hearing, the court shall dissolve the TRO. *Id.*

2. Temporary Restraining Orders with Notice

a. [9.16] Illinois

When notice is given, the seven requirements of §11-101 of the Code of Civil Procedure pertaining to temporary restraining orders without notice (see §9.15 above) do not apply. 735 ILCS 5/11-101 pertains only to TROs without notice, and 735 ILCS 5/11-102 pertains only to preliminary injunctions. As a result, there is some uncertainty as to the requirements for TROs with notice, which fall in a middle ground. See §§9.49 and 9.50 below for the duration of TROs with notice.

The Illinois Supreme Court, essentially following the federal scheme, has said that when proper notice is given, TROs follow the rules for preliminary injunctions:

> **[**A**] temporary restraining order issued with notice is, in its practical results, no different than a preliminary injunction issued with notice. . . . Accordingly, we hold that a temporary restraining order issued with notice and a preliminary injunction issued with notice, neither of limited duration, are the same type of relief, and whether referred to under either term require a showing of the likelihood of ultimate success on the merits of the case.** *Kable Printing Co. v. Mount Morris Bookbinders Union Local 65-B,* 63 Ill.2d 514, 349 N.E.2d 36, 40 (1976).

Although there are differences under Illinois law between the duration of TROs with notice and the duration of preliminary injunctions, as well as the nature of the hearings for the TRO with notice and the preliminary injunction (see §9.45 below), in other respects, TROs with notice are treated similarly to preliminary injunctions. *See id.*

b. [9.17] Federal

A temporary restraining order with notice is treated the same as a preliminary injunction. *Budget Rent A Car Corp. v. Harvey Kidd Automotive,* 249 F.Supp.2d 1048, 1049 (N.D.Ill. 2003); *Coca-Cola Co. v. Alma-Leo U.S.A., Inc.,* 719 F.Supp. 725, 726 – 727 (N.D.Ill. 1989), citing 11 Charles Alan Wright and Arthur Raphael Miller, FEDERAL PRACTICE AND PROCEDURE §2951, p. 499 (1973).

c. [9.18] Sufficiency

Because of the emergency nature of the temporary restraining order and the haste with which they are filed, courts adopt a pragmatic approach to what constitutes sufficient notice. In Illinois state court, notice is sufficient if it is in a form authorized by Illinois Supreme Court Rule 11(b), but even informal service may be sufficient. *American Warehousing Services, Inc. v. Weitzman,* 169 Ill.App.3d 708, 533 N.E.2d 366, 370, 127 Ill.Dec. 494 (1st Dist. 1988) (notice by telephone 30 minutes before hearing was sufficient); *Nagel v. Gerald Dennen & Co.,* 272 Ill.App.3d 516, 650 N.E.2d 547, 551, 208 Ill.Dec. 853 (1st Dist. 1995) ("some notice, however informal, is greatly to be preferred to none at all"), quoting *Sangamo Electric Co. v. United Automobile, Aerospace & Agricultural Implement Workers of America International Union,* 42 Ill.App.3d

563, 356 N.E.2d 389, 391, 1 Ill.Dec. 263 (4th Dist. 1976). *But see Board of Trustees of Community College District No. 508, County of Cook v. Cook County College Teachers Union Local 1600*, 42 Ill.App.3d 1056, 1061, 356 N.E.2d 1089, 1093, 1 Ill.Dec. 807 (1st Dist. 1976) (notice at 9:50 a.m. of a motion heard that day at 11:00 a.m. held to be insufficient notice when counsel was on his way to court and judge failed to wait for him before entering TRO). In federal courts, even minimal notice is preferred to no notice, such as when notice is made to the attorney rather than the adverse party. See Notes of Advisory Committee on 1966 amendments, Note to Subdivision (b), Fed.R.Civ.P. 65.

PRACTICE POINTER

✓ When seeking a TRO, always give notice unless you are sure of (and can specifically support) the principle that affording the adverse party notice will lead to the destruction of the purpose of the litigation. Ex parte TROs are highly disfavored; as shown in §9.14 above, in *Hirschauer v. Chicago Sun-Times*, 192 Ill.App.3d 193, 548 N.E.2d 630, 635 – 636, 139 Ill.Dec. 245 (1st Dist 1989) (reversing grant of ex parte TRO when plaintiff failed to show irreparable harm or why notice could not have been given), *appeal dismissed*, 131 Ill.2d 559 (1990), and *G&J Parking Co. v. City of Chicago*, 168 Ill.App.3d 382, 522 N.E.2d 774, 777 – 778, 119 Ill.Dec. 112 (1st Dist. 1988) (reversing denial of motion to vacate ex parte TRO when complaint did not contain sufficient factual allegations of immediate and irreparable harm to alleviate need for notice), ex parte TROs are often reversed or dissolved even when granted. Informal notice by telephone, even shortly before the hearing for the TRO, is likely to be sufficient. When opposing counsel is on the way to court for the hearing, as in *Cook County Teachers Union, supra*, ask the judge to wait for him or her to appear, if necessary, before ruling on your application for a TRO.

C. Elements or "Factors" To Be Established by the Verified Complaint

1. [9.19] The Four Basic Factors

The elements required for a court to issue a temporary restraining order or a preliminary injunction are often referred to as "factors," perhaps because courts tend to be flexible in the determination of these requirements and vary somewhat in the order in which they are listed and the nomenclature used to describe them. Also, although the legal standards for a TRO and a preliminary injunction are basically the same in both Illinois state and federal courts, there is slight variation between the courts in how the analysis is described and framed.

In Illinois state courts, the four factors that a movant must satisfy to obtain a TRO are that (a) the plaintiff possesses a clearly ascertainable right that is in need of protection, (b) the plaintiff has a likelihood of success on the merits, (c) the plaintiff will suffer irreparable harm if the application for a TRO is not granted, and (d) the plaintiff has no adequate remedy at law. *See, e.g., Bradford v. Wynstone Property Owners' Ass'n*, 355 Ill.App.3d 736, 823 N.E.2d 1166, 1169, 291 Ill.Dec. 580 (2d Dist. 2005); *County of DuPage v. Gavrilos*, 359 Ill.App.3d 629, 834 N.E.2d

643, 649, 296 Ill.Dec. 86 (2d Dist. 2005); *Murges v. Bowman,* 254 Ill.App.3d 1071, 627 N.E.2d 330, 337, 194 Ill.Dec. 214 (1st Dist. 1993); *Jacob v. C & M Video, Inc.,* 248 Ill.App.3d 654, 618 N.E.2d 1267, 1274, 188 Ill.Dec. 697 (5th Dist. 1993).

Illinois federal courts follow a two-step analysis set out by the Seventh Circuit. In the first step, they determine if there is a likelihood of success on the merits, a threat of irreparable harm, and an inadequate remedy at law. If the movant satisfies these substantive factors, the court then balances the hardships on the parties if the TRO is granted or not and considers the impact of the granting of the motion on public interest. *International Profit Associates, Inc. v. Paisola,* 461 F.Supp.2d 672, 675 (N.D.Ill. 2006); *Budget Rent A Car Corp. v. Harvey Kidd Automotive,* 249 F.Supp.2d 1048, 1049 (N.D.Ill. 2003); *Coca-Cola Co. v. Alma-Leo U.S.A., Inc.,* 719 F.Supp. 725, 727 (N.D.Ill. 1989); *Illusions Too Reality, LLC v. City of Harvey,* No. 02 C 7272, 2003 U.S.Dist. LEXIS 1530 at *11 (N.D.Ill. Jan. 31, 2003) (standards for TRO and preliminary injunction are functionally identical in Seventh Circuit).

In practice, although the basic factors that a movant must meet to obtain a TRO in Illinois state court and federal courts are similar, there are some key differences. First, the showing of likelihood required in Illinois state courts is that the movant has raised a "fair question" as to its likelihood of success (*Gavrilos, supra,* 834 N.E.2d at 649; *Murges, supra,* 627 N.E.2d at 337), while the showing required in Illinois federal courts is even lower (*i.e.,* that the movant has a "better than negligible" likelihood of success if the balance of harms is in its favor) (*Omega Satellite Products Co. v. City of Indianapolis,* 694 F.2d 119, 123 (7th Cir. 1982)). Second, the balance of harms to the two parties is not an element that must be established in Illinois state courts, while analysis of the balance of harms and the public interest are required as the second step of analysis in Illinois federal courts. *See, e.g., Paisola, supra,* 461 F.Supp.2d at 675; *Budget Rent A Car, supra,* 249 F.Supp.2d at 1049; *Coca-Cola, supra,* 719 F.Supp. at 727. Third, under the "sliding scale" approach used in the Seventh Circuit, the federal court must determine how likely the movant's chance of success is in order to help determine the balance of the relative harms. *Roland Machinery Co. v. Dresser Industries, Inc.,* 749 F.2d 380, 387 (7th Cir. 1984).

PRACTICE POINTER

✓ Many practitioners believe that because of the low showing required for likelihood of success in Illinois federal courts, it is easier to obtain interlocutory relief in Illinois federal courts than in Illinois state courts. If your client is seeking injunctive relief and you have the option of filing in either court and if the balance of harms does not clearly favor the adverse party, it may be good strategy to file your complaint in Illinois federal district court rather than in state court, particularly when the harm to your client from denial of the TRO would be very great and the harm to the defendant from granting it very small. *See Omega Satellite, supra,* 694 F.2d at 123.

2. [9.20] Ascertainable Claim for Relief

The first element or factor that a movant must establish in order to be granted a temporary restraining order is that he or she has a clearly ascertainable claim for relief, also described as a

"protectable right." *Murges v. Bowman,* 254 Ill.App.3d 1071, 627 N.E.2d 330, 337, 194 Ill.Dec. 214 (1st Dist. 1993), quoting *Tierney v. Village of Schaumburg,* 182 Ill.App.3d 1055, 538 N.E.2d 904, 907, 131 Ill.Dec. 529 (1st Dist. 1989). *See also C.D. Peters Construction Co. v. Tri-City Regional Port District,* 281 Ill.App.3d 41, 666 N.E.2d 44, 48, 216 Ill.Dec. 876 (5th Dist. 1996). Although the claim for relief is described as "clearly ascertainable" (*Hartlein v. Illinois Power Co.,* 151 Ill.2d 142, 601 N.E.2d 720, 727, 176 Ill.Dec. 22 (1992)), the party seeking the TRO need only show that there is a "fair question" of the existence of the protectible right and that the court should preserve the status quo until the case can be decided on the merits to prevent immediate harm (*Murges, supra,* 627 N.E.2d at 337, quoting *People ex rel. Stony Island Church of Christ v. Mannings,* 156 Ill.App.3d 356, 509 N.E.2d 572, 576, 108 Ill.Dec. (1st Dist. 1987); *C.D. Peters Construction, supra,* 666 N.E.2d at 48, quoting *Buzz Barton & Associates, Inc. v. Giannone,* 108 Ill.2d 373, 483 N.E.2d 1271, 1275, 91 Ill.Dec. 636 (1985); *Hirschauer v. Chicago Sun-Times,* 192 Ill.App.3d 193, 548 N.E.2d 630, 636, 139 Ill.Dec. 245 (1st Dist. 1989), *appeal dismissed,* 131 Ill.2d 559 (1990); *Jacob v. C & M Video, Inc.,* 248 Ill.App.3d 654, 618 N.E.2d 1267, 1275, 188 Ill.Dec. 697 (5th Dist. 1993) (plaintiff must show "prima facie case that there is a fair question as to the existence of the rights claimed"), quoting *Dixon Association for Retarded Citizens v. Thompson,* 91 Ill.2d 518, 440 N.E.2d 117, 120, 64 Ill.Dec. 565 (1982)). *See also Mohanty v. St. John Heart Clinic, S.C.,* No. 101251, 2006 Ill. LEXIS 1689 at **12 – 13 (Dec. 21, 2006) ("On appeal, we examine only whether the party seeking the injunction has demonstrated a *prima facie* case that there is a fair question concerning the existence of the claimed rights."), quoting *People ex rel. Klaeren v. Village of Lisle,* 202 Ill.2d 164, 781 N.E.2d 223, 230, 269 Ill.Dec. 426 (2002); *Stocker Hinge Manufacturing Co. v. Darnel Industries, Inc.,* 94 Ill.2d 535, 447 N.E.2d 288, 69 Ill.Dec. 71 (1983) (holding that when TRO was dissolved at time application for preliminary injunction was denied, denial of preliminary injunction did not mean that TRO had been improvidently granted because TRO merges with preliminary injunction when preliminary injunction is granted and becomes functus officio when preliminary injunction is not granted).

3. Likelihood of Success on the Merits

a. [9.21] Illinois

Before it issues a temporary restraining order, the court must find that there is a likelihood that the movant will succeed on the merits of the case. *Murges v. Bowman,* 254 Ill.App.3d 1071, 627 N.E.2d 330, 337, 194 Ill.Dec. 214 (1st Dist. 1993). While making that determination, however, the court should not actually decide contested issues of fact or the ultimate merits of the case. *Northwestern Steel & Wire Co. v. Industrial Commission of Illinois,* 254 Ill.App.3d 472, 627 N.E.2d 71, 74, 193 Ill.Dec. 912 (1st Dist. 1993) (holding that trial court abused its discretion when ruling on constitutionality of rule, which ruling impermissibly decided merits of claim). The movant need only raise a fair question as to the likelihood of success on the merits, a fairly low standard. *Murges, supra,* 627 N.E.2d at 337; *C.D. Peters Construction Co. v. Tri-City Regional Port District,* 281 Ill.App.3d 41, 666 N.E.2d 44, 48, 216 Ill.Dec. 876 (5th Dist. 1996) (plaintiff raised fair question as to merits of its case when it showed that defendant's contentions in opposition "would appear subject to some dispute"); *Boner v. Drazek,* 55 Ill.2d 279, 302 N.E.2d 280, 284 (1973).

In *C.D. Peters Construction, supra,* the trial court initially granted an ex parte TRO to the plaintiff, the low bidder on a construction project who was not awarded the bid, but later denied the plaintiff a preliminary injunction at the hearing for same and dissolved the TRO. The defendants then moved for statutory damages, which the trial court denied. In affirming the denial, the appellate court noted that the plaintiff's pleadings had raised a fair question about the existence of its right to injunctive relief. Although the defendant alleged that the plaintiff was unwilling to complete the project in a timely and efficient manner, the plaintiff presented evidence that its bid was $70,000 lower than the successful bidder's and that it had been the successful bidder on over 60 other projects with the port district, apparently completing all such contracts on time. Even though family members of the owners of the plaintiff company had opposed the project at issue and had publicly sought modifications to the project, the court held that the plaintiff had presented sufficient evidence to raise a fair question as to the existence of its right to relief.

b. [9.22] Federal

For a federal court to issue a temporary restraining order, the movant's likelihood of success must be better than negligible. *Omega Satellite Products Co. v. City of Indianapolis,* 694 F.2d 119, 123 (7th Cir. 1982); *International Profit Associates, Inc. v. Paisola,* 461 F.Supp.2d 672, 676 (N.D.Ill. 2006). This "threshold is low." *Roland Machinery Co. v. Dresser Industries, Inc.,* 749 F.2d 380, 387 (7th Cir. 1984). This standard "surely does not require a finding that it is more likely than not that one side will prevail." *Oxford Capital Illinois, L.L.C. v. Sterling Payroll Financial, L.L.C.,* No. 01 C 1173, 2002 U.S.Dist. LEXIS 4372 at *12 n.2 (N.D.Ill. Mar. 15, 2002) (noting that there is no conceptual reason why opposing parties may not each be granted temporary restraining orders in same case because each party may have better than negligible likelihood of success on merits). Unlike the practice in Illinois state courts, the federal district court must make a fairly specific determination of the movant's likelihood of success in order to help determine the balance of the relative harms. *Roland Machinery, supra,* 749 F.2d at 387. *See Omega Satellite, supra,* 694 F.2d at 123 (when movant's likelihood of success is great, balance-of-harms analysis can favor adverse party, yet movant may still prevail; however, when movant's likelihood of success is small, balance of harms must favor it).

4. [9.23] Irreparable Harm

To be awarded a temporary restraining order, a plaintiff must show that it will suffer "irreparable harm" if relief is not granted. *Smith Oil Corp. v. Viking Chemical Co.,* 127 Ill.App.3d 423, 468 N.E.2d 797, 803, 82 Ill.Dec. 250 (2d Dist. 1984) (affirming award of damages to defendant on dissolution of TRO when there was no evidence plaintiff's ex-employees had actually taken trade secrets at issue and plaintiffs had thus failed to show irreparable harm); *Kanter & Eisenberg v. Madison Associates,* 116 Ill.2d 506, 508 N.E.2d 1053, 108 Ill.Dec. 476 (1987) (when plaintiff business tenants sought TRO preventing their eviction and were granted preliminary injunction, injunctive relief was improvidently entered when plaintiffs failed to show how they would be irreparably harmed by paying rent and awaiting trial on merits). Irreparable harm is "harm that cannot be prevented or fully rectified by the final judgment after trial." *Roland Machinery Co. v. Dresser Industries, Inc.,* 749 F.2d 380, 386 (7th Cir. 1984).

In *Murges v. Bowman,* 254 Ill.App.3d 1071, 627 N.E.2d 330, 194 Ill.Dec. 214 (1st Dist. 1993), the plaintiff sought and received a TRO requiring the defendant lawyers to account for funds earned on the files they improperly took with them when they left the firm, and the court later modified the TRO to deny the defendants access to fees earned on contested files pending issuance of the preliminary injunction. The appellate court noted that the defendants had not even challenged the trial court's finding that the plaintiff would suffer irreparable harm if the TRO were not granted, and the trial court did not abuse its discretion by denying the motion to dissolve the TRO or by modifying the TRO.

If the movant is seeking an ex parte TRO, the injury must be immediate and irreparable, and usually part of the irreparable harm analysis is whether the plaintiff would show irreparable harm if it gave notice to the defendant. 735 ILCS 5/11-101; Fed.R.Civ.P. 65(b). In *Paddington Corp. v. Foremost Sales Promotions, Inc.*, 13 Ill.App.3d 170, 300 N.E.2d 484, 487 (1st Dist. 1973), the First District found that the defendant liquor retailer's refusal to stop offering the plaintiff's products for sale at less than the prices stipulated by the plaintiff pursuant to the provisions of the former Fair Trade Act would result in imminent and irreparable injury to the plaintiff, further destroying the substance of the controversy (the plaintiff's good will), and was an appropriate situation for the entry of an ex parte TRO pending an evidentiary hearing for a preliminary injunction. The ex parte TRO was entered after the court had scheduling problems with the plaintiff's original application for a preliminary injunction, for which the defendant had notice and had told the court that it would not maintain the status quo pending the hearing, so the appellate court found that a sufficient emergency existed to grant the ex parte TRO.

In *G&J Parking Co. v. City of Chicago*, 168 Ill.App.3d 382, 522 N.E.2d 774, 777 – 778, 119 Ill.Dec. 112 (1st Dist. 1988), the appellate court held that an ex parte TRO was improperly entered when the plaintiff stated that it would suffer irreparable harm were its application for a TRO not granted but failed to demonstrate how it would be irreparably harmed by notifying the defendants of the hearing.

5. [9.24] Inadequate Remedy at Law

As with all equitable remedies, the movant must show that it has an inadequate remedy at law. If there is a legal or equitable remedy that will make the movant whole after trial, temporary injunctive relief should not issue. *Kanter & Eisenberg v. Madison Associates,* 116 Ill.2d 506, 508 N.E.2d 1053, 1056 – 1057, 108 Ill.Dec. 476 (1987) (plaintiffs had adequate remedy at law when they were financially able to pay rent and await outcome of trial on merits).

Injunctive relief is not proper when money damages provide an adequate remedy. *Allstate Amusement Company of Illinois, Inc. v. Pasinato,* 96 Ill.App.3d 306, 421 N.E.2d 374, 375 – 376, 51 Ill.Dec. 866 (1st Dist. 1981). A temporary restraining order will not lie when money damages are sufficient and the movant's pleadings fail to state facts on which it can be concluded that the adverse party is in imminent danger of insolvency or unable to pay an award for money damages. *Id.*

In federal cases, this element is often considered in conjunction with the requirement of irreparable harm. For example, in *Coca-Cola Co. v. Alma-Leo U.S.A., Inc.,* 719 F.Supp. 725, 729

(N.D.Ill. 1989), the court's analysis of the plaintiff's trademark dilution claim subsumed the inadequate remedy of law element within the irreparable harm element: " 'It is the very nature of dilution to gnaw away insidiously at the value of a mark.' [*Hyatt Corp. v. Hyatt Legal Services*, 736 F.2d 1153, 1158 (7th Cir. 1984).] That injury would be irreparable, not because money damages would fail to make the plaintiff whole, but rather because Coca-Cola cannot be expected to quantify the probable reduction in revenue." In other words, the court considered the touchstone of inadequate remedy of law analysis — that money damages would either fail to make the plaintiff whole or be unquantifiable — as part of its irreparable harm analysis. *See also International Profit Associates, Inc. v. Paisola*, 461 F.Supp.2d 672, 679 (N.D.Ill. 2006) (finding inadequate remedy at law and irreparable harm when defendant's alleged infringement of plaintiff's trademarks would lead to "incalculable loss of its reputation with its customers"; court stated that "because it is difficult to assess [such] damages [they] are considered to have no adequate remedy at law, and to be irreparable").

In Illinois state cases, the lack of an adequate remedy factor also sometimes merges with the irreparable harm factor because, if there is an adequate remedy at law, there is no irreparable harm. *Petrzilka v. Gorscak*, 199 Ill.App.3d 120, 556 N.E.2d 1265, 1268, 145 Ill.Dec. 363 (2d Dist. 1990) ("Irreparable harm is the most common method of proving an inadequate remedy at law and denotes transgressions of a continuing nature so that redress cannot be had at law.").

6. Balancing of Hardships

a. [9.25] Illinois

In Illinois state courts, the movant does not need to show that the balancing of hardships favors the granting of the temporary restraining order, but this is a factor that some courts may consider. *See, e.g., Lucas v. Peters*, 318 Ill.App.3d 1, 741 N.E.2d 313, 325 – 326, 251 Ill.Dec. 719 (1st Dist. 2000) (stating in passing, in action for preliminary injunction, that court considering injunctive relief should balance harms and that they have done so in plaintiffs' favor).

PRACTICE POINTER

✓ Although the balancing-of-harms factor generally is not weighed in Illinois state court TRO opinions, a careful practitioner may wish to make a quick reference to this factor in his or her client's motion for a TRO, particularly when he or she feels that the balance of harms clearly favors his or her client.

b. [9.26] Federal

The balancing of harms is determined by a sliding-scale analysis. The stronger the movant's showing that it is likely to succeed on the merits, the less strong a showing it is required to make on the balance-of-harms factor. *See Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 123 (7th Cir. 1982) (when movant's likelihood of success is great, balance-of-harms analysis can favor adverse party, yet movant may still prevail; however, when movant's likelihood of success is small, balance of harms must favor it).

7. [9.27] Impact on Public Interest

In Illinois state courts, the movant does not need to show that the public interest weighs in favor of the granting of its application for a temporary restraining order, but the court may consider this factor. *See Prairie Eye Center, Ltd. v. Butler*, 305 Ill.App.3d 442, 713 N.E.2d 610, 615, 239 Ill.Dec. 79 (4th Dist. 1999) (considering importance in Illinois public policy of freedom to contract in covenant to compete case seeking preliminary injunction), *appeal denied*, 185 Ill.2d 665 (1999). In federal courts, this factor is considered simply as additional weight in favor of granting the application (if the public interest would be positively affected by the relief sought), or denying it (if the public interest would be harmed by the relief sought). *See, e.g., Crossbow, Inc. v. Glovemakers, Inc.*, 265 F.Supp. 202, 208 (N.D.Ill. 1967) (finding public interest benefits from increased competition in action for preliminary injunction under Lanham Act).

8. [9.28] Pleading Requirements Relaxed When Statute Expressly Authorizes Injunctive Relief

It is not necessary for complaints seeking interlocutory injunctive relief based on statutes that expressly authorize injunctive relief to allege all of the four basic factors. See §9.19 above. The general rule allowing for the relaxation of pleading requirements when a statute expressly authorizes injunctive relief applies to statutes in which the state or a governmental agency is expressly authorized to seek injunctive relief. For example, in an action for a preliminary injunction under the Nursing and Advanced Practice Nursing Act (see 225 ILCS 65/20-75(a)), the Supreme Court held that because the Illinois legislature has already assumed that violations of the Act cause irreparable injury for which there is no adequate remedy, these factors do not need to be pled, and the state or agency seeking the temporary restraining order or preliminary injunction need only show violation of the Act and that the Act specifically allows injunctive relief. *People ex rel. Sherman v. Cryns*, 203 Ill.2d 264, 786 N.E.2d 139, 149 – 150, 271 Ill.Dec. 881 (2003). *See also County of DuPage v. Gavrilos*, 359 Ill.App.3d 629, 834 N.E.2d 643, 648 – 649, 296 Ill.Dec. 86 (2d Dist. 2005); *County of Kendall v. Rosenwinkel*, 353 Ill.App.3d 529, 818 N.E.2d 425, 434 – 435, 288 Ill.Dec. 737 (2d Dist. 2004) (holding that Counties Code specifically provides for injunctive relief for zoning violations (see 55 ILCS 5/5-12017, 5/5-13004), so county was only required to prove violation of Code, but upon remand, trial court should balance equities if it finds that violation was unintentional). Moreover, once the violation of a statute has been established, the court has no discretion to refuse to grant the injunctive relief authorized by the statute. *Sherman, supra*, 786 N.E.2d at 150; *People ex rel. Madigan v. Petco Petroleum Corp.*, 363 Ill.App.3d 613, 841 N.E.2d 1065, 1075 – 1076, 299 Ill.Dec. 333 (4th Dist. 2006) (holding that when trial court altered its finding of liability as to individual defendant but not corporate defendant, it did not have discretion to refuse to grant requested injunctive relief against petroleum corporation that was found to have violated Illinois Oil and Gas Act (see 225 ILCS 725/11)).

The general rule is limited, however, to cases involving statutes that specifically authorize injunctive relief and also may not apply to nongovernmental plaintiffs. *Sadat v. American Motors Corp.*, 104 Ill.2d 105, 470 N.E.2d 997, 83 Ill.Dec. 577 (1984) (affirming dismissal of individual plaintiff's complaint for failure to plead traditional factors for injunctive relief under Magnuson-Moss Warranty — Federal Trade Commission Improvement Act, which authorizes only general

equitable relief). *Compare Postma v. Jack Brown Buick, Inc.*, 157 Ill.2d 391, 626 N.E.2d 199, 204, 193 Ill.Dec. 166 (1993) (not applying general rule in preliminary injunction case when Motor Vehicle Franchise Act creates purely private right of action to redress purely private injuries, and Act is neither tool for public officials to use in enforcing law, nor such that isolated violation presumed to cause irreparable harm to country as whole, as with Title VII of Civil Rights Act of 1964); *eBay Inc. v. MercExchange, L.L.C.*, ___ U.S. ___,164 L.Ed.2d 641, 126 S.Ct. 1837, 1841 (2006) (holding that generally applicable four-factor test for permanent injunctive relief applies to disputes arising under federal patent statute, and rejecting Federal Circuit's " 'general rule,' unique to patent disputes, 'that a permanent injunction will issue once infringement and validity have been adjudged' "), quoting *MercExchange, L.L.C. v. eBay Inc.*, 401 F.3d 1323, 1338 (Fed.Cir. 2005).

PRACTICE POINTER

✓ The general rule applies to statutes in which the state or a governmental agency is expressly authorized to seek injunctive relief and it is not clear that a private plaintiff may take advantage of the pleading relaxation. Moreover, the penalty for failure to plead the traditional factors when required is dismissal. Therefore, it is prudent for the practitioner to always plead all of the traditional factors for injunctive relief. In commercial or business litigation, the statutory relaxation rule is likely to be relevant only when the practitioner is representing an individual or company who has been sued by the state or a governmental agency. In such a case, it is essential to know that when the statute expressly authorizes injunctive relief, it is pointless to allege that the government has failed to prove the traditional elements required for injunctive relief, and it is also important to understand that the court is without discretion to refuse the application for TRO or preliminary injunction when the government has adequately demonstrated the defendant's violation of the statute.

9. [9.29] Enforceability of Contractually Stipulated Injunctions

In some contracts (such as employment contracts containing restrictive covenants), the parties stipulate that an injunction may issue against the party that breaches the agreement, or the parties acknowledge that a violation of the agreement would result in irreparable harm for which no adequate remedy at law exists. Although no Illinois cases directly address the extent to which such a contractual provision is enforceable, one court has dealt with the issue.

In *Best Coin-Op, Inc. v. Old Willow Falls Condominium Ass'n*, 120 Ill.App.3d 830, 458 N.E.2d 998, 76 Ill.Dec. 344 (1st Dist. 1983) (*Best Coin-Op I*), the First District affirmed the denial of the plaintiff's application for a preliminary injunction when the plaintiff sued pursuant to a contract that contained both (a) an injunction provision stating that the lessor consents to entry of a temporary restraining order and/or permanent injunction for violation of the agreement, and (b) an arbitration provision stating that no litigation shall be instituted except to confirm the award of the arbitrators. The appellate court declined to resolve the apparent conflict between the two contractual clauses and held that even if the plaintiff were entitled to seek injunctive relief in

court, it was not entitled to an injunction because the only damages that the plaintiff had identified were monetary. *See also Best Coin-Op, Inc. v. Paul F. Ilg Supply Co.*, 189 Ill.App.3d 638, 545 N.E.2d 481, 487, 136 Ill.Dec. 957 (1st Dist. 1989), *aff'g Best Coin-Op I, supra.*

The *Best Coin-Op* courts appear to stand for the proposition that in Illinois state courts, the four traditional factors must be pled because a contractual provision under which a party consents to entry of an injunction against it does not divest the trial court of its discretion to determine whether interlocutory injunctive relief should issue. It is unclear, however, if an Illinois state court would decide whether a contractual provision stipulating to the entry of injunctive relief is a factor to be weighed in its decision or should be ignored as void.

In the somewhat-related context discussed in §9.28 above, the Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, ___ U.S. ___, 164 L.Ed.2d 641, 126 S.Ct. 1837, 1841 (2006), held that "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and [this] discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards." *eBay,* which demonstrates the Court's disapproval of short cuts that avoid the traditional framework by which a court determines the need for injunctive relief, provides further support for the *Best Coin-Op* courts' holdings, but the *eBay* Court also failed to elucidate whether such a contractual provision should be considered as a factor or ignored.

PRACTICE POINTER

✓ If the movant seeks a TRO or preliminary injunction when there is a contractual stipulation as to the entry of injunctive relief, the movant must still demonstrate that it is entitled to relief under the traditional factors. The practitioner may mention the existence of the injunction clause, state that it demonstrates the intent of the parties, and argue that it should be another factor to consider in deciding whether the movant is entitled to injunctive relief. However, the movant is unlikely to prevail if it argues that the contract's injunction provision automatically entitles it to relief if it establishes that there was a violation of the contract.

D. When Temporary Restraining Orders Are Unavailable

1. [9.30] Granting the Ultimate Relief

Courts should not enter temporary restraining orders when to do so would grant the movant the ultimate relief that it seeks in the complaint. The main reason is that the court should not actually decide contested issues of fact or the ultimate merits of the case at this stage of the litigation. *Northwestern Steel & Wire Co. v. Industrial Commission of Illinois,* 254 Ill.App.3d 472, 627 N.E.2d 71, 75, 193 Ill.Dec. 912 (1st Dist. 1993). Also, the hearing for a TRO is a summary proceeding in which the parties do not have a chance to fully present the merits of the case, but rather only present arguments. *See Passon v. TCR, Inc.*, 242 Ill.App.3d 259, 608 N.E.2d 1346, 1349, 181 Ill.Dec. 872 (2d Dist. 1993).

In *Northwestern Steel & Wire, supra,* the trial court improperly ruled on the merits of the case by ruling that the Industrial Commission's 1991 amendment of 50 Ill.Admin. Code §7100.70 was unconstitutional. Instead, the trial court should have decided whether the plaintiff had raised a fair question as to whether the amended §7100.70 was unconstitutional.

PRACTICE POINTER

✓ Although it is difficult for a movant for a TRO to prevent a trial court from making an improper ruling on the merits sua sponte, the movant may improve its chances for a correct ruling at the summary TRO hearing by stating in conclusion that it only has to raise a fair question as to whether it is entitled to relief on the stated ground (and, at this summary and early stage of the litigation, can do no more than that), and it has more than met this standard.

2. [9.31] Other Contexts in Which Temporary Restraining Orders Are Unavailable

There are a number of contexts in which temporary restraining orders and preliminary injunctions are generally not available (although many of these contexts are likely to be of limited application to business and commercial litigation).

Generally, courts should not rule on the constitutionality of a statute when ruling on an application for a TRO. As shown in §9.30 above, a summary hearing is an inapt occasion for determining the constitutionality of a statute and, moreover, such a ruling is likely to constitute an impermissible adjudication of the merits of the case. *See Northwestern Steel & Wire Co. v. Industrial Commission of Illinois,* 254 Ill.App.3d 472, 627 N.E.2d 71, 75, 193 Ill.Dec. 912 (1st Dist. 1993); *Lake Louise Improvement Ass'n v. Multimedia Cablevision of Oak Lawn, Inc.,* 157 Ill.App.3d 713, 510 N.E.2d 982, 985, 109 Ill.Dec. 914 (1st Dist. 1987).

Courts will not usually grant TROs to enjoin the acts of public officials unless the acts are ultra vires (*i.e.,* outside the scope of their authority) or illegal. *See, e.g., Illinois Federation of Teachers v. Board of Trustees, Teachers' Retirement System of State of Illinois,* 191 Ill.App.3d 769, 548 N.E.2d 64, 66, 138 Ill.Dec. 834 (4th Dist. 1989). In *Board of Trustees,* the plaintiff sought a TRO and preliminary injunction to enjoin the teachers' retirement system from attempting to collect retirement fund contributions. The appellate court reversed the grant of a preliminary injunction, holding that the defendant state agency's actions were neither illegal nor ultra vires.

Absent a statute authorizing the use of injunctions to combat criminal activities (*e.g.,* the Illinois Streetgang Terrorism Omnibus Prevention Act, which authorizes injunctive relief against activities of criminal street gangs and their members (740 ILCS 147/35)), courts generally will not grant a TRO to enjoin criminal activity. *See, e.g., People ex rel. Martin v. Kuca,* 245 Ill.App. 202, 207 – 208 (4th Dist. 1924) (court in injunction proceeding has no jurisdiction in matters merely criminal or merely legal that do not affect any right to property).

A court will not grant a TRO to enjoin another court. Although it may enjoin an individual over whom it has jurisdiction from filing a lawsuit or proceeding with a suit before a judge in a foreign state in order to prevent oppression or fraud, the exercise of this power must be "invoked with great restraint to avoid distressing conflicts and reciprocal interference with jurisdiction." *Pfaff v. Chrysler Corp.,* 155 Ill.2d 35, 610 N.E.2d 51, 54, 182 Ill.Dec. 627 (1992) (affirming reversal of entry of injunction against defendants from proceeding with claims in Texas court when there was no evidence that Texas litigation was vexatious and harassing).

E. [9.32] Affirmative Defenses

As a practical matter, counsel representing the party against whom a temporary restraining order is being sought are likely to have limited notice before the hearing on the movant's application for a TRO. As a result, there may not be sufficient time to prepare a verified answer denying the material allegations of the plaintiff's verified complaint. If possible, however, counsel should do so. If there is insufficient time to prepare and file an answer, counsel may inform the court of his or her intention to file a verified answer and present it at the hearing for the TRO or as soon as possible.

One reason that counsel should consider filing a verified answer is that the court can consider affirmative defenses only if a verified answer has been filed. *See Danville Polyclinic, Ltd. v. Dethmers,* 260 Ill.App.3d 108, 631 N.E.2d 842, 847, 197 Ill.Dec. 620 (4th Dist. 1994) (affirmative defenses can be considered in determining likelihood of plaintiff's prevailing, but cannot be resolved, at hearing for preliminary injunction). As a practical matter, there may be testimony at a hearing for a preliminary injunction, but a hearing for a TRO is summary and will consist only of counsel's arguments, so for affirmative defenses to become a part of defense counsel's arguments at a TRO hearing, they must have been entered into evidence as part of a verified answer.

At this stage of the litigation, the court should not actually decide contested issues of fact or the ultimate merits of the case. *Northwestern Steel & Wire Co. v. Industrial Commission of Illinois,* 254 Ill.App.3d 472, 627 N.E.2d 71, 74 – 75, 193 Ill.Dec. 912 (1st Dist. 1993). There may, however, be available affirmative defenses that avoid these limitations, including prematurity (*Northtown Bank of Decatur v. Becker,* 31 Ill.2d 529, 202 N.E.2d 540, 542 (1964) (suit for preliminary injunction to enjoin director of financial institutions from issuing permit to organize proposed banks was premature when no such permits had been issued and key preliminary steps in forming proposed banks had not been taken)), failure to exhaust administrative remedies and laches (*Midland Enterprises, Inc. v. City of Elmhurst,* 226 Ill.App.3d 494, 589 N.E.2d 1019, 1024, 1027, 168 Ill.Dec. 619 (2d Dist. 1992) (reversing denial of district's counterclaim seeking injunction when business failed to exhaust administrative remedies prior to seeking judicial relief and holding that doctrine of laches may prevent injunction against shopping center when state failed for at least 15 years to seek removal of illegal berm that prevented flooding)), and unclean hands (*McCann v. R.W. Dunteman Co.,* 242 Ill.App.3d 246, 609 N.E.2d 1076, 1083, 182 Ill.Dec. 542 (2d Dist. 1993) (in application for injunction prohibiting defendant asphalt company from misusing easement, court considered but rejected defendants' unclean hands defense that plaintiffs harassed and intimidated defendants as insufficiently supported)).

F. [9.33] Burden of Proof

As the movant, the party seeking interlocutory injunctive relief bears the burden of satisfying the court that it has met the four basic factors necessary to obtain relief. See §9.19 above. *Hartlein v. Illinois Power Co.,* 151 Ill.2d 142, 601 N.E.2d 720, 726 – 727, 176 Ill.Dec. 22 (1992) (holding, in preliminary injunction case, that plaintiff failed to establish existence of clear and ascertainable right in need of protection). What is less clear is the standard of proof defining this burden. Some courts state that these four factors need to be established by a preponderance of the evidence (*Bradford v. Wynstone Property Owners' Ass'n,* 355 Ill.App.3d 736, 823 N.E.2d 1166, 1169, 291 Ill.Dec. 580 (2d Dist. 2005); *Passon v. TCR, Inc.,* 242 Ill.App.3d 259, 608 N.E.2d 1346, 1350, 181 Ill.Dec. 872 (2d Dist. 1993)), while others have used the "clear and convincing evidence" standard (*Seymour v. Harris Trust & Savings Bank of Chicago,* 264 Ill.App.3d 583, 636 N.E.2d 985, 1000, 201 Ill.Dec. 553 (1st Dist. 1994) (in counterclaim seeking injunctive relief, defendants had to present clear and convincing evidence, not just preponderance)).

Both standards are evidentiary standards of proof for determining facts. However, the court is not to determine issues of fact in ruling on a motion for an interlocutory injunction (*Hartlein, supra,* 601 N.E.2d at 727), which makes the application of either of these standards problematic. At this stage of the litigation, the court is not evaluating the evidence. Put another way, "[t]he plaintiff is not required to make out a case which would entitle him to judgment at trial; rather, he need only show that he raises a 'fair question' about the existence of his right and that the court should preserve the status quo until the case can be decided on the merits." *Hirschauer v. Chicago Sun-Times,* 192 Ill.App.3d 193, 548 N.E.2d 630, 635, 139 Ill.Dec. 245 (1st Dist 1989) (citing *Stocker Hinge Manufacturing Co. v. Darnel Industries, Inc.,* 94 Ill.2d 535, 447 N.E.2d 288, 291, 69 Ill.Dec. 71 (1983)), *appeal dismissed,* 131 Ill.2d 559 (1990).

In determining whether the movant has raised a fair question about the existence of a clearly ascertainable right, the court determines whether the movant has asserted a legally cognizable claim and will be entitled to the injunctive relief sought if the facts as alleged entitle it to this relief. These are questions of law, not fact.

To meet its burden on the other three factors, the plaintiff (1) need only raise a "fair question" as to the likelihood of success on the merits (*Hirschauer, supra,* 548 N.E.2d at 636); (2) must show that the irreparable harm is reasonably certain and not just hypothetical (*Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry.,* 195 Ill.2d 356, 748 N.E.2d 153, 162, 254 Ill.Dec. 707 (2001) (holding that any harm suffered by plaintiff law firm was too remote and speculative to support injunctive relief)); and (3) does not need to prove the lack of an adequate legal remedy, as this is a legal question to be determined by the court.

Perhaps the best summary of the showing that the plaintiff must make to meet its burden of proof and demonstrate that it is entitled to a temporary restraining order is provided in *Abdulhafedh v. Secretary of State,* 161 Ill.App.3d 413, 514 N.E.2d 563, 565, 112 Ill.Dec. 900 (2d Dist. 1987), in which the court held that the movant must

> **(1) raise a fair question as to the existence of the right claimed, (2) lead the court to believe that he will probably be entitled to the relief prayed for if the proof sustains**

his allegations, and (3) make it appear advisable that the positions of the parties stay as they are until the court has an opportunity to consider the merits of the case.

G. The Plaintiff's Pleadings

1. Verified Complaint

a. [9.34] All Facts Necessary To Support a Temporary Restraining Order Must Be Clearly Pled

Any complaint filed in an Illinois state court, including a verified complaint seeking a temporary restraining order, must be able to state a claim (*i.e.,* to state the facts necessary to support a cognizable action against the defendant if the facts are as alleged). 735 ILCS 5/2-603(a). Each individual cause of action must be stated in separate counts, counterclaims, defenses, or matters in reply. 735 ILCS 5/2-603(b), 5/2-613(a).

In general, pleadings are liberally construed with a view to doing substantial justice between the parties. 735 ILCS 5/2-603(c). Because of the extraordinary nature of the relief provided by an interlocutory injunction, however, the pleading standard is heightened. Facts alleged on information and belief are insufficient and will not entitle a plaintiff to an interlocutory injunction (*Maas v. Cohen Associates, Inc.,* 112 Ill.App.3d 191, 445 N.E.2d 517, 520, 68 Ill.Dec. 69 (1st Dist. 1983)), and neither will conclusory allegations unsupported by facts (*Redfern v. Sullivan,* 111 Ill.App.3d 372, 444 N.E.2d 205, 209, 67 Ill.Dec. 166 (4th Dist. 1982)). A complaint must therefore allege specific facts so that it clearly shows the plaintiff's right to a TRO on its face. *See Miollis v. Schneider,* 77 Ill.App.2d 420, 222 N.E.2d 715, 719 – 720 (2d Dist. 1966) (holding amended complaint failed to show plaintiff's right to ex parte TRO); *Hope v. Hope,* 350 Ill.App. 190, 112 N.E.2d 495, 497 (1st Dist. 1953) (complaint for TRO must show on its face clear right to relief, and facts relied on to establish this right must be clearly stated and verified).

(1) [9.35] Ascertainable claim for relief

The plaintiff must plead facts showing that he or she has standing to pursue injunctive relief (*i.e.,* he or she is the lawful possessor of the property or rights that he or she wants to preserve and protect). *Postma v. Jack Brown Buick, Inc.,* 157 Ill.2d 391, 626 N.E.2d 199, 202, 193 Ill.Dec. 166 (1993); *Murges v. Bowman,* 254 Ill.App.3d 1071, 627 N.E.2d 330, 337, 194 Ill.Dec. 214 (1st Dist. 1993). The plaintiff must also plead facts that demonstrate a clearly ascertainable right in need of protection — that there is a "fair question" of the existence of this protectable right and that the court should preserve the status quo until the case can be decided on the merits to prevent immediate harm. *C.D. Peters Construction Co. v. Tri-City Regional Port District,* 281 Ill.App.3d 41, 666 N.E.2d 44, 48, 216 Ill.Dec. 876 (5th Dist. 1996).

(2) [9.36] Likelihood of success on the merits

Before it issues a temporary restraining order, the court must find that there is a likelihood that the movant will succeed on the merits of the case. From a pleading perspective, the plaintiff

must state a claim in order to demonstrate any likelihood of success on the merits. *Murges v. Bowman,* 254 Ill.App.3d 1071, 627 N.E.2d 330, 337 – 338, 194 Ill.Dec. 214 (1st Dist. 1993) (by stating claim and raising fair question as to his protectible interest in right he claimed, plaintiff adequately demonstrated likelihood of success on merits).

(3) [9.37] Irreparable harm

To obtain a temporary restraining order, a plaintiff must plead sufficient facts to demonstrate that he or she will suffer irreparable injury if the application for injunctive relief is not granted. *Kanter & Eisenberg v. Madison Associates,* 116 Ill.2d 506, 508 N.E.2d 1053, 108 Ill.Dec. 476 (1987). In *Kanter & Eisenberg,* the plaintiff sought a TRO and was granted a preliminary injunction. The plaintiff alleged in conclusory fashion that it would suffer irreparable harm without the grant of injunctive relief but failed to allege facts demonstrating how it would suffer irreparable harm. In reversing the grant of a preliminary injunction to the plaintiff, the Supreme Court held, "A court faced with a request for temporary injunctive relief must first consider whether the plaintiff will sustain irreparable harm by waiting for a decision on the merits." 508 N.E.2d at 1055. The court concluded that because the plaintiff had not produced any evidence showing how it would have been irreparably harmed by awaiting the outcome of the trial on the merits, the preliminary injunction it received should not have been granted.

(4) [9.38] Inadequate remedy at law or in equity

In order to obtain a temporary restraining order, a plaintiff must plead and demonstrate with specific facts that it is without an adequate legal or equitable remedy. *See Kanter & Eisenberg v. Madison Associates,* 116 Ill.2d 506, 508 N.E.2d 1053, 1055, 108 Ill.Dec. 476 (1987). For a legal or equitable remedy to be sufficiently adequate to deprive a court sitting in equity of its power to grant injunctive relief, "the remedy 'must be clear, complete, and as practical and efficient to the ends of justice and its prompt administration' " as the injunctive relief sought. *Bio-Medical Laboratories, Inc. v. Trainor,* 68 Ill.2d 540, 370 N.E.2d 223, 227, 12 Ill.Dec. 600 (1977); *K.F.K. Corp. v. American Continental Homes, Inc.,* 31 Ill.App.3d 1017, 335 N.E.2d 156, 159 (2d Dist. 1975). *See also Roland Machinery Co. v. Dresser Industries, Inc.,* 749 F.2d 380, 386 (7th Cir. 1984) ("In saying that the plaintiff must show that an award of damages at the end of trial will be inadequate, we do not mean wholly ineffectual; we mean seriously deficient as a remedy for the harm suffered.").

b. [9.39] Prayer for Relief Must Be Specific

In the prayer for relief, the plaintiff should specifically pray for injunctive relief, articulating whether a temporary restraining order, preliminary injunction, or both are being sought. In addition, the plaintiff should specify the terms of the proposed injunction, making sure that it is narrowly tailored. Overbroad terms are not only more likely to lead to the proposed injunctive relief being denied in the first place, but are also more likely to make any relief that is granted be overturned later on appeal.

c. [9.40] The Need for Verification

An application for a temporary restraining order or preliminary injunction may be included within the complaint, in which case the complaint must be verified. Otherwise, the movant may request the TRO or preliminary injunction by motion filed at the same time as the complaint or later and supported by affidavits. See 735 ILCS 5/11-101; *Board of Education of Dolton School District 149 v. Miller*, 349 Ill.App.3d 806, 812 N.E.2d 688, 694, 285 Ill.Dec. 868 (1st Dist. 2004) (reversing grant of injunctive relief when movant filed request that was neither complaint, counterclaim, nor motion for injunctive relief and was neither verified nor supported by affidavits), citing III Clark Asahel Nichols, ILLINOIS CIVIL PRACTICE §35:16, p. 38 (rev. ed. 2002). In *Exchange National Bank of Chicago v. Cullerton*, 17 Ill.App.3d 392, 308 N.E.2d 284 (1st Dist. 1974), the trial court dismissed the plaintiff trustee's unverified complaint seeking a TRO and declaratory relief in a property tax dispute, and it denied the plaintiff's unverified motion for a TRO. In affirming the dismissal, the First District court held that because neither the complaint nor the motion for a TRO was verified, and "[s]uch verification was essential to the court's granting of such an order," the trial court properly denied the motion for a TRO. 308 N.E.2d at 286.

The verified complaint and/or motion for a TRO for preliminary injunction must meet the general requirements for verification by certification set forth in 735 ILCS 5/1-109, and any affidavits must meet the requirements set forth in S.Ct. Rule 191. Moreover, when any pleading is verified, every subsequent pleading must also be verified, unless the court excuses this requirement. 735 ILCS 5/2-605(a).

PRACTICE POINTER

✓ Verification is essential in a complaint and/or motion seeking a TRO because the court determines whether to grant the TRO based only on the allegations in the pleadings, which must be verified to constitute evidence. Although the same objective may be accomplished by filing affidavits with a motion for a TRO or preliminary injunction instead of a verified complaint, the holding in *Exchange National Bank, supra*, suggests that it is safer practice to consider whether to use affidavits in addition to a verified complaint or motion, rather than instead of a verified complaint or motion.

2. [9.41] Motion for Temporary Restraining Order and Summary of Plaintiff's Filings

The plaintiff usually files the following when seeking a temporary restraining order: (a) a verified complaint; (b) a motion for a TRO, with supporting affidavits if possible, together with a memorandum of law in support of same; and (c) a notice of motion. Notice of motion for a TRO must be given "unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon." 735 ILCS 5/11-101. A motion for a preliminary injunction is frequently combined with the motion for the TRO, appearing as alternate relief requested.

H. The Defendant's Pleadings

1. [9.42] Answer

The requirements in the Code of Civil Procedure and the Federal Rules of Civil Procedure that apply generally to answers also apply to answers filed in response to verified complaints filed in conjunction with motions for temporary restraining orders.

Answers must contain an explicit admission or denial of each allegation of the complaint or other pleading to which it relates. 735 ILCS 5/2-610(a). If a pleader can in good faith deny any of the allegations in a paragraph of the opposing party's pleading, or all of the allegations in the paragraph that are not specifically admitted, the pleader may do so without paraphrasing or separately describing each allegation denied. S.Ct. Rule 136(a). Allegations not specifically denied are admitted unless a party states in the party's answer that he or she has no knowledge thereof sufficient to form a belief and attaches an affidavit of the truth of the statement of want of knowledge. 735 ILCS 5/2-610(b). Finally, if the defendant has any affirmative defenses to assert against the plaintiff's claim, he or she must state the affirmative defense in the answer, as well as the facts that support the affirmative defense. 735 ILCS 5/2-613(d).

The analogous rules for answers to TROs to be filed in federal courts are found in Fed.R.Civ.P. 8(b) – 8(d).

2. [9.43] Summary of Defendant's Filings

As stated in §9.32 above, counsel representing the party against whom a temporary restraining order is being sought are likely to have limited notice before the hearing on the movant's application for a TRO. As a result, there may not be sufficient time to prepare a verified answer denying the material allegations of the plaintiff's verified complaint. If possible, however, counsel should do so. A well-prepared defendant will file a verified answer with any affirmative defenses that he or she is able to assert and a brief memorandum of law in opposition to the motion for a TRO.

A defendant who files a motion to dismiss or strike the complaint under 735 ILCS 5/2-615 or 5/2-619 should be prepared to file a verified answer if the motion to dismiss is either denied or entered and continued for briefing and oral argument. With the limited amount of time in which to respond, a defendant may choose to file the motion to dismiss at a later stage in the proceedings.

I. The Temporary Restraining Order Hearing

1. [9.44] Temporary Restraining Order Without Notice

As stated in §9.14 above, ex parte temporary restraining orders are disfavored and so carry a higher than normal pleading standard. The court must be satisfied that an emergency exists based on the plaintiff's complaint. The hearing on a motion for an ex parte TRO is a summary proceeding at which the court examines the plaintiff's verified complaint to test that the factors it

sets out are supported by specific allegations of fact and entitle the plaintiff to relief. The court does not consider evidence in the sense that there is no testimony; the court relies on the verified allegations in the pleadings. *Passon v. TCR, Inc.*, 242 Ill.App.3d 259, 608 N.E.2d 1346, 1349, 181 Ill.Dec. 872 (2d Dist. 1993) ("a hearing on a motion on a TRO is a summary proceeding, and even if the defendant files a verified answer [*i.e.*, making the hearing a motion for a TRO with notice], the court still proceeds in a summary fashion, hearing only arguments on the motion for the TRO"). *See also Lawter International, Inc. v. Carroll*, 107 Ill.App.3d 938, 438 N.E.2d 590, 63 Ill.Dec. 659 (1st Dist. 1982) (trial court entered TRO against defendants without holding evidentiary hearing). The court will frequently require a bond. Finally, the order granting the TRO must fully comply with 735 ILCS 5/11-101, setting out the findings for each factor to be proven as well as all of the requirements contained therein. In federal court, a TRO without notice is also granted after a summary hearing. See Fed.R.Civ.P. 65(b).

In *Passon, supra*, the court noted that the classification of an order as a TRO or preliminary injunction will determine the type of hearing required: hearings on motions for TROs are summary proceedings, while evidentiary hearings are required for applications for preliminary injunctions when the defendant files a verified answer denying material allegations in the complaint. At the beginning of the hearing in *Passon, supra*, the trial court stated that it was to decide whether a TRO should be issued, yet after a summary hearing and over the defendant's objections, it entered the plaintiff's proposed order for a preliminary injunction. The First District court held that the trial court abused its discretion by entering the order for a preliminary injunction without an evidentiary hearing and reversed the order.

PRACTICE POINTER

✓ Practitioners representing the defendant at a TRO hearing should look carefully at the proposed order that the plaintiff submits if the plaintiff's application for a TRO is granted. Counsel should object if the plaintiff attempts to instead submit a proposed order for a preliminary injunction, reminding the court that an evidentiary hearing would be required for the court to enter an order granting a preliminary injunction.

2. Temporary Restraining Order with Notice

a. [9.45] Illinois

The hearing on a motion for a temporary restraining order with notice is also a summary proceeding, with the court hearing only the parties' arguments on the motion even when the defendant has filed a verified answer to the complaint. *Passon v. TCR, Inc.*, 242 Ill.App.3d 259, 608 N.E.2d 1346, 1349, 181 Ill.Dec. 872 (2d Dist. 1993), citing *Lawter International, Inc. v. Carroll*, 107 Ill.App.3d 938, 438 N.E.2d 590, 591, 63 Ill.Dec. 659 (1st Dist. 1982). Motions to dismiss or strike the complaint under 735 ILCS 5/2-615 may either be ruled on (because the motion alleges that the complaint is facially deficient) or it may be entered and continued. Motions to dismiss the complaint under 735 ILCS 5/2-619 are likely to be entered and continued, with the court setting a schedule for briefing and argument as it hears the application for a TRO.

b. [9.46] Federal

In federal courts, as in Illinois state courts, an evidentiary hearing is not required for a temporary restraining order. See Fed.R.Civ.P. 65(b). Although courts may decide motions for TROs without considering evidence offered by the defendant, courts do consider a defendant's evidence when he or she provides it. *See, e.g., Echo Travel, Inc. v. Travel Associates, Inc.*, 870 F.2d 1264 (7th Cir. 1989) (affirming striking of plaintiff's affidavits when they were not part of relevant consumer class in unfair competition claim). When a plaintiff seeks a TRO with notice and this leads to an evidentiary hearing, the district court treats the matter as if it were an application for a preliminary injunction. *Budget Rent A Car Corp. v. Harvey Kidd Automotive*, 249 F.Supp.2d 1048, 1049 (N.D.Ill. 2003), citing *Coca-Cola Co. v. Alma-Leo U.S.A., Inc.*, 719 F.Supp. 725, 726 – 727 (N.D.Ill. 1989).

3. [9.47] Contested Facts and Merits of Case Not Decided at Hearing for Temporary Restraining Order

While deciding whether to grant the motion for a temporary restraining order, the trial court should not actually decide contested issues of fact or the ultimate merits of the case. *Northwestern Steel & Wire Co. v. Industrial Commission of Illinois*, 254 Ill.App.3d 472, 627 N.E.2d 71, 75, 193 Ill.Dec. 912 (1st Dist. 1993); *Jacob v. C & M Video, Inc.*, 248 Ill.App.3d 654, 618 N.E.2d 1267, 1274 – 1275, 188 Ill.Dec. 697 (5th Dist. 1993). *See Choudhry v. Jenkins*, 559 F.2d 1085, 1088 (7th Cir. 1977). Thus, none of the preliminary evaluations that the judge makes in ruling on the motion for a TRO, such as the plaintiff's likelihood of success on the merits or the irreparable harm that the plaintiff would suffer absent relief, have preclusive effect on the judge or the jury at the merits stage of the case.

PRACTICE POINTER

✓ As a practical matter, it is nevertheless important for the defendant to file a verified answer to the motion for TRO if possible, because early opinions formed by the judge about the merits of the plaintiff's case and based solely on the plaintiff's complaint may be more difficult to change at the merits stage of the trial if the judge has not been exposed to the defendant's position from the beginning.

J. Duration of the Temporary Restraining Order

1. [9.48] Temporary Restraining Order Entered Without Notice to Opposing Party

A temporary restraining order entered without notice to the opposing party expires after ten days but may be extended once for another ten days "for good cause shown," or longer if "the party against whom the order is directed consents that it may be extended for a longer period." 735 ILCS 5/11-101. *See Goodwin v. Puccini*, 319 Ill.App.3d 485, 745 N.E.2d 163, 165, 253 Ill.Dec. 389 (2d Dist. 2001) (holding that defendant consented to extension of TRO). The caselaw also reflects the general 20-day limit. *Abdulhafedh v. Secretary of State*, 161 Ill.App.3d 413, 514 N.E.2d 563, 565, 112 Ill.Dec. 900 (2d Dist. 1987) (holding that trial court abused its discretion by extending TRO for 98 days without evidentiary hearing).

Other Illinois statutes with specific (and different) provisions regarding the duration of ex parte TROs take precedence over §11-101 in cases in which those statutes apply. *See, e.g., People v. Conrail Corp.,* 245 Ill.App.3d 167, 613 N.E.2d 784, 791, 184 Ill.Dec. 467 (5th Dist. 1993) (§11-101 does not apply to injunctive actions under Environmental Protection Act, which requires hearing within three days of entry of ex parte injunction (415 ILCS 5/43(a))); *People v. Van Tran Electric Corp.,* 152 Ill.App.3d 175, 503 N.E.2d 1179, 1185, 105 Ill.Dec. 173 (5th Dist. 1987) (action for injunctive relief under Environmental Protection Act is governed by injunction provisions of Act, not general equitable principles).

Fed.R.Civ.P. 65(b) is identical in its terms to §11-101. It is worth noting, however, that under Fed.R.Civ.P. 65(b), a TRO may be extended beyond the 20-day limit by agreement of the parties. *Levas & Levas v. Village of Antioch, Illinois,* 684 F.2d 446, 448 n.1 (7th Cir. 1982).

The party who obtained the ex parte TRO must proceed with the application for a preliminary injunction on the date set for the hearing. Otherwise, the court will dissolve the TRO. 735 ILCS 5/11-101; Fed.R.Civ.P. 65(b).

2. Temporary Restraining Order Entered With Notice to Opposing Party

a. [9.49] Illinois

There is no ten-day limit for a temporary restraining order when notice is given to the opposing party. A TRO entered with notice typically lasts either until a specified date or until the scheduled date for the hearing on the preliminary injunction. In *Jurco v. Stuart,* 110 Ill.App.3d 405, 442 N.E.2d 633, 636, 66 Ill.Dec. 207 (1st Dist. 1982), the First District Appellate Court explained why, due to the summary nature of the TRO hearing even when notice has been given, the TRO that is issued should not have the same duration as a preliminary injunction:

> **The problem arises in cases such as the one at bar where there has been a summary proceeding with notice and a temporary restraining order is issued but no hearing date is set. The effect then is to have an order with significant consequences extant with only a limited opportunity on the part of a party to resist such an order. To allow a temporary restraining order of unlimited duration is to have a preliminary injunction . . . without giving the one party a fair opportunity to oppose the application and to show if he can why an injunction should not issue. . . . A preliminary injunction then maintains the status quo during the pendency of a trial on the merits. . . .**
>
> **A defendant should be allowed to present evidence and legal argument. . . . Oral argument is not proper evidence. . . .**
>
> **Because of the evidentiary hearing requirement for a preliminary injunction, we do not believe that the instant order emanating from a summary proceeding, albeit with notice, for an unspecified duration is within the statutory scheme envisioned by the legislature. *Although a temporary restraining order with notice may exist beyond***

10 days, the hearing must be set within a short time thereafter so as to prevent the potential significant consequences of only a summary proceeding to exist more than a short period of time. **[**Emphasis added.**] [**Citations omitted.**]**

b. [9.50] Federal

The duration of a temporary restraining order with notice in federal court depends on the kind of TRO hearing there is. If it is a summary proceeding, as in Illinois state court, the duration of the TRO is the same as it is in state court. If it is an evidentiary hearing, then the TRO is treated as a preliminary injunction, and the duration is that of a preliminary injunction.

A TRO with notice is treated as a preliminary injunction. *Levas & Levas v. Village of Antioch, Illinois*, 684 F.2d 446, 448 (7th Cir. 1982); *Budget Rent A Car Corp. v. Harvey Kidd Automotive*, 249 F.Supp.2d 1048, 1049 (N.D.Ill. 2003). Although courts may decide motions for TROs without considering evidence offered by the defendant, courts do consider a defendant's evidence when he or she provides it. *See, e.g., Echo Travel, Inc. v. Travel Associates, Inc.*, 870 F.2d 1264, 1265 (7th Cir. 1989). *See also Coca-Cola Co. v. Alma-Leo U.S.A., Inc.*, 719 F.Supp. 725, 726 – 727 (N.D.Ill. 1989) ("When the opposing party actually receives notice of the application for a restraining order, the procedure that is followed does not differ functionally from that of an application for a preliminary injunction and the proceeding is not subject to any special requirements."), quoting 11 Charles Alan Wright and Arthur Raphael Miller, FEDERAL PRACTICE AND PROCEDURE §2951, p. 499 (1973).

Unlike the practice in Illinois state courts, TRO hearings in federal courts may be evidentiary hearings in which the parties provide the evidence. When there is no evidentiary hearing, the TRO should be for a limited duration until an evidentiary hearing can be held for the preliminary injunction. *Id.* When there is an evidentiary hearing, the TRO is considered a preliminary injunction and may have the duration of a preliminary injunction. *Levas & Levas*, *supra*, 684 F.2d at 448.

K. The Bond Requirement

1. [9.51] Illinois

The court has the discretion to decide whether to require the plaintiff to post a bond before it issues a temporary restraining order or preliminary injunction. 735 ILCS 5/11-103. If the court requires a bond, the amount of the bond should be related to the damage the defendant would suffer if it was wrongfully enjoined. *Id.* If the court refuses to require a bond, the record should show good cause for the refusal. *Hill v. Village of Pawnee*, 16 Ill.App.3d 208, 305 N.E.2d 740, 742 (4th Dist. 1973) (courts should only issue TROs without bond with great caution and should show good cause in record for doing so); *Schaefer v. Stephens-Adamson Manufacturing Co.*, 36 Ill.App.3d 310, 183 N.E.2d 575, 578 – 579 (1st Dist. 1962).

The TRO is still valid even when the court's refusal to enter a bond is erroneous. *American Warehousing Services, Inc. v. Weitzman*, 169 Ill.App.3d 708, 533 N.E.2d 366, 369, 127 Ill.Dec.

494 (1st Dist. 1988). However, the failure of a defendant to request a bond or object to the court's decision to not require a bond waives the issue. *Central Water Works Supply, Inc. v. Fisher*, 240 Ill.App.3d 952, 608 N.E.2d 618, 624, 181 Ill.Dec. 545 (4th Dist. 1993) (affirming entry of preliminary injunction).

PRACTICE POINTER

✓ Because failure to object to the court's decision not to require a bond waives the issue, even defense counsel who receives last-minute notice of a TRO hearing and is unprepared for the hearing should at least remember to request a bond and object if the court denies his or her request.

2. [9.52] Federal

Fed.R.Civ.P. 65(c) requires all nongovernmental plaintiffs to post a bond or "security" before a temporary restraining order or preliminary injunction can become effective. *See International Profit Associates, Inc. v. Paisola*, 461 F.Supp.2d 672, 681 (N.D.Ill. 2006) ("plaintiff shall be required to post a bond of $10,000 in order for this TRO to take effect"). The bond is intended to guarantee the plaintiff's payment of costs and damages suffered by a defendant who is wrongfully enjoined. *LaSalle Capital Group, Inc. v. Alexander Doll Co.*, No. 95 C 1640, 1995 U.S.Dist. LEXIS 14338 at *7 (N.D.Ill. Sept. 28, 1995) (to collect damages on TRO bond, party must prove TRO was wrongfully issued and party seeking recovery under bond suffered damages resulting from wrongful issue of TRO). A defendant who is wrongfully enjoined may receive a hearing regarding the plaintiff's liability and damages for the wrongfully entered TRO even if the underlying case has already been dismissed. *Showtime Marketing, Inc. v. Doe*, 95 F.R.D. 355, 357 (N.D.Ill. 1982).

L. Form of the Temporary Restraining Order

1. [9.53] Contents of the Temporary Restraining Order

As shown in §§9.3 and 9.4 above, 735 ILCS 5/11-101 and Fed.R.Civ.P. 65(b) bear identical requirements for the form of a temporary restraining order that is entered without notice to the opposing party:

a. The date and hour of issuance are indorsed on the order.

b. It is filed forthwith in the clerk's office and entered of record.

c. It defines the injury.

d. It states why the injury is irreparable.

e. It states why the motion was granted without notice.

f. It specifies an expiration date not to exceed ten days after its entry, which date may be extended once for a like period for good cause shown or longer if the party against whom it is directed consents that it may be extended for a longer period.

g. If it is extended, the reasons for the extension are entered of record.

The requirements for TROs with notice in both Illinois state courts and federal courts are the same as the requirements for preliminary injunction orders. *See Kable Printing Co. v. Mount Morris Bookbinders Union Local 65-B,* 63 Ill.2d 514, 349 N.E.2d 36, 40 (1976); *Budget Rent A Car Corp. v. Harvey Kidd Automotive,* 249 F.Supp.2d 1048, 1049 (N.D.Ill. 2003).

An order granting a TRO with notice, like an order granting a preliminary injunction, has numerous requirements in order to be enforceable. It must be definite, clear, and precise in its terms so that the party who is restrained will have no excuse for failing to understand or obey the order. *Carriage Way Apartments v. Pojman,* 172 Ill.App.3d 827, 527 N.E.2d 89, 97, 122 Ill.Dec. 717 (2d Dist. 1988) (reversing grant of preliminary injunction because it was imprecise and overly broad). The order must state expressly what acts are to be restrained and not rely on any other documents. *Howard Johnson & Co. v. Feinstein,* 241 Ill.App.3d 828, 609 N.E.2d 930, 936, 182 Ill.Dec. 396 (1st Dist. 1993) (remanding order granting preliminary injunction that referred to noncompetition agreements and did not include specifically within order which actions were to be enjoined). It must state the reasons for entry of the order, making specific findings for each factor. *See S.T. Enterprises, Inc. v. Brunswick Corp.,* 57 Ill.2d 461, 315 N.E.2d 1, 8 – 9 (1974). Finally, it must be narrowly tailored, going no further than is necessary to protect the plaintiff's rights. *Lake Louise Improvement Ass'n v. Multimedia Cablevision of Oak Lawn, Inc.,* 157 Ill.App.3d 713, 510 N.E.2d 982, 985, 109 Ill.Dec. 914 (1st Dist. 1987).

2. [9.54] Persons Affected by the Order

Both 735 ILCS 5/11-101 and Fed.R.Civ.P. 65(d) state that a temporary restraining order is "binding only upon the parties to the action, their officers, agents, [servants,] employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." *See also Great Western Cities, Inc. v. Binstein,* 536 F.Supp. 808, 811 (N.D.Ill. 1982) (because parent corporation of defendant company and its officer/shareholder were not officers, agents, servants, employees, or attorneys of defendant corporation and because plaintiff failed to provide evidence that they actively participated with defendant corporation to evade consent decree providing injunctive relief, they were not bound to follow consent decree and thus were not in contempt of court).

M. Motion To Dissolve Temporary Restraining Order

1. [9.55] Timing of Motion To Dissolve

For a temporary restraining order entered without notice, the defendant should file a motion to dissolve the order as soon as possible and seek a hearing on the motion to dissolve within two

days or sooner from the time of service (not issuance) of the TRO. *Harper v. Missouri Pacific R.R.*, 264 Ill.App.3d 238, 636 N.E.2d 1192, 1198 – 1199, 201 Ill.Dec. 760 (5th Dist. 1994) (when defendant had notice, it must file motion to dissolve within two days of issuance; likewise, plaintiffs who are not granted TRO must file petition and notice of appeal within two days of denial of TRO); 735 ILCS 5/11-101; Fed.R.Civ.P. 65(b). In general, a motion to dissolve may be made before or after an answer is filed (735 ILCS 5/11-108), but it must be filed before the TRO expires, or the issue is moot (*People v. Conrail Corp.*, 245 Ill.App.3d 167, 613 N.E.2d 784, 792, 184 Ill.Dec. 467 (5th Dist. 1993)).

2. [9.56] Grounds for Motion To Dissolve

When a temporary restraining order is dissolved by the circuit court or by the reviewing court, the party against whom the TRO was entered may seek damages by filing a petition under oath in the circuit court setting forth the nature and amount of the damages that it suffered. 735 ILCS 5/11-110. Even if the circuit court fails to assess damages, there is no bar to the party's later filing an action on the bond. *Id.*

In order to succeed on the petition for damages, a petitioner must show that the TRO was wrongfully issued and the petitioner suffered damages therefrom; it is not sufficient for the TRO to be dissolved by merging into the preliminary injunction, or by the court's deciding not to grant a preliminary injunction at the hearing for same. *C.D. Peters Construction Co. v. Tri-City Regional Port District*, 281 Ill.App.3d 41, 666 N.E.2d 44, 216 Ill.Dec. 876 (5th Dist. 1996); *Hirschauer v. Chicago Sun-Times,* 192 Ill.App.3d 193, 548 N.E.2d 630, 635, 139 Ill.Dec. 245 (1st Dist. 1989), *appeal dismissed,* 131 Ill.2d 559 (1990). The court may dissolve a TRO when the restrained party can demonstrate that the circumstances on which the TRO was granted have changed. *Truck Drivers, Oil Drivers, Filling Station & Platform Workers, Local 705 v. Almarc Manufacturing, Inc.*, 553 F.Supp. 1170, 1175 – 1176 (N.D.Ill. 1982). TROs may also be dissolved even in the absence of a change in the facts or the law provided a sufficient basis exists for the court to dissolve the TRO. *See Doe v. Illinois Department of Professional Regulation,* 341 Ill.App.3d 1053, 793 N.E.2d 119, 123 – 124, 275 Ill.Dec. 639 (1st Dist. 2003) (referring to "interlocutory" injunctions and dissolving preliminary injunction). The proceeding is summary, and the court decides the motion on the weight of the evidence. 735 ILCS 5/11-108. The plaintiff may support the complaint and the defendant may support the answer by filing affidavits with the same, which may be read into evidence on the hearing of the motion to dissolve. 735 ILCS 5/11-109. Whether to dissolve the TRO or preliminary injunction is a matter of discretion for the court. *International Association of Firefighters Local No. 23 v. City of East St. Louis,* 206 Ill.App.3d 580, 565 N.E.2d 264, 266, 152 Ill.Dec. 22 (5th Dist. 1990) (dissolving preliminary injunction).

3. [9.57] Effect on Temporary Restraining Order of Removal to Federal Court

Counsel for the defendant in a case in which the plaintiff has already obtained a temporary restraining order may be considering whether to remove the case to federal court. What then becomes of the existing interlocutory injunction issued by the state court?

If a defendant removes a case to federal court after a TRO has been issued, the TRO remains in effect under 28 U.S.C. §1450, which states that when a case is removed from a state court to a

United States district court, all injunctions, orders, and other proceedings determined in state court before removal shall remain in full force and effect until the district court modifies or dissolves them. TROs, therefore, do not immediately lapse upon removal to federal court. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County,* 415 U.S. 423, 39 L.Ed.2d 435, 94 S.Ct. 1113, 1122 (1974). After removal, the case is governed by federal law, so a defendant would move to dissolve or modify a TRO on short notice to the party who obtained the order. 94 S.Ct. at 1125, citing Fed.R.Civ.P. 65(b).

N. Appeals of Temporary Restraining Orders

1. [9.58] Illinois

Grants and denials of temporary restraining orders, and orders dissolving, modifying, refusing to dissolve, or refusing to modify TROs, may be appealed under S.Ct. Rule 307(d). Under Rule 307(d), the appellant is required to file a petition (along with the notice of appeal as authorized in Rule 307(a)) in writing, stating the relief requested and the grounds therefor, as well as a supporting record with the complaint, TRO petition, and order granting or denying same that is certified by either the clerk of the trial court or the affidavit of the attorney or party filing the appeal.

Under Rule 307(d), the appellant has only two days from the entry of the order granting or denying the TRO, or granting or denying the motion to dissolve or modify the TRO, in which to file its appeal. The appeal must be made under Rule 307(d), with its two-day limit, and not Rule 307(a), with its 30-day limit, because Rule 307(d) explicitly refers to TROs, while Rule 307(a) applies to preliminary injunctions and not TROs. *Goodwin v. Puccini,* 319 Ill.App.3d 485, 745 N.E.2d 163, 166, 253 Ill.Dec. 389 (2d Dist. 2001). When an appellant fails to appeal the denial of a TRO within two days under Rule 307(d), or a preliminary injunction within 30 days under Rule 307(a), the appellate court is without jurisdiction over the issue. *Sadler v. Creekmur,* 354 Ill.App.3d 1029, 821 N.E.2d 340, 346, 290 Ill.Dec. 289 (3d Dist. 2004). If the TRO was issued without notice, the party without notice may file its appeal within two days of service of the TRO. *Harper v. Missouri Pacific R.R.,* 264 Ill.App.3d 238, 636 N.E.2d 1192, 1199, 201 Ill.Dec. 760 (5th Dist. 1994).

As shown in §9.47 above, the general rule is that the factual determinations made at the interlocutory injunction stage of the case do not have preclusive effect later. At least one court, however, has held that when a party failed to appeal the denial of its petition for a TRO under Rule 307(d), but instead chose to appeal the dismissal of the complaint on which the petition for a TRO was based, the issues in the complaint count on which the petition for the TRO was based constituted the law of the case. *Strata Marketing, Inc. v. Murphy,* 317 Ill.App.3d 1054, 740 N.E.2d 1166, 1174, 251 Ill.Dec. 595 (1st Dist. 2000). The Illinois Supreme Court subsequently held, however, that failure to appeal the denial of a stay of arbitration under Rule 307 does not waive the right to dispute the arbitrability of the dispute in an appeal from a final judgment confirming the arbitration award. *Salsitz v. Kreiss,* 198 Ill.2d 1, 761 N.E.2d 724, 730, 260 Ill.Dec. 541 (2001) (holding that Rule 307 is permissive and that "the party has the option of waiting until after final judgment has been entered to seek review of the circuit court's interlocutory order"). The *Salsitz* court did not refer to *Strata Marketing,* so it is unclear to what extent *Strata Marketing* is still good law.

PRACTICE POINTER

✓ In light of the uncertainty as to what extent *Strata Marketing, supra,* will be applied, counsel should consider immediately appealing an unfavorable order granting or denying the TRO, or granting or denying the motion to dissolve or modify the TRO. Regardless of whether such a ruling may constitute the law of the case if not appealed, the decision to grant or deny the TRO would likely be moot anyway by the time final judgment is rendered.

2. [9.59] Federal

Unlike the practice in Illinois state courts, temporary restraining orders issued in federal district courts generally may not be appealed unless they have the effect of a preliminary injunction. *See County, Municipal Employees' Supervisors' & Foremen's Union Local 1001 v. Laborers' International Union of North America,* 365 F.3d 576, 578 (7th Cir. 2004). When there is an evidentiary hearing, the TRO is considered a preliminary injunction and may have the duration of a preliminary injunction. *Levas & Levas v. Village of Antioch, Illinois,* 684 F.2d 446, 448 (7th Cir. 1982). Thus, a TRO granted after an evidentiary hearing should be appealable as a preliminary injunction. In addition, TROs that are extended beyond 20 days may be appealable as preliminary injunctions "no matter what the rendering judge may have called them." *United Airlines, Inc. v. U.S. Bank N.A.,* 406 F.3d 918, 923 (7th Cir. 2005).

3. [9.60] Standard of Review

The granting or denial of a temporary restraining order is within the sound discretion of the trial court. *Stocker Hinge Manufacturing Co. v. Darnel Industries, Inc.,* 94 Ill.2d 535, 447 N.E.2d 288, 291, 69 Ill.Dec. 71 (1983). Because Illinois state courts have discretion to grant or deny petitions for TROs, the standard for review of an order granting or denying TROs or preliminary injunctions is "abuse of discretion." *Mohanty v. St. John Heart Clinic, S.C.,* No. 101251, 2006 Ill. LEXIS 1689 at *13 (Dec. 21, 2006); *Desnick v. Department of Professional Regulation,* 171 Ill.2d 510, 665 N.E.2d 1346, 1352, 216 Ill.Dec. 789 (1996). *See also Hartlein v. Illinois Power Co.,* 151 Ill.2d 142, 601 N.E.2d 720, 727, 176 Ill.Dec. 22 (1992) ("the only question before the reviewing court is whether there is a sufficient showing to sustain the order of the trial court"); *Hirschauer v. Chicago Sun-Times,* 192 Ill.App.3d 193, 548 N.E.2d 630, 635, 139 Ill.Dec. 245 (1st Dist. 1989) ("The decision to issue a TRO is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion"); *Passon v. TCR, Inc.,* 242 Ill.App.3d 259, 608 N.E.2d 1346, 1350 – 1351, 181 Ill.Dec. 872 (2d Dist. 1993) (in entering order for preliminary injunction at hearing for TRO when no evidentiary hearing was held, trial court abused its discretion).

As the grant or denial of petitions for TROs is not appealable in federal courts unless the TROs are treated as (and in effect considered to be) preliminary injunctions, the standard of review for appeals of these grants or denials in the federal courts is the standard of review for the

appeal of the grant or denial of preliminary injunctions, which is abuse of discretion. *Christian Legal Society v. Walker,* 453 F.3d 853, 871 (7th Cir. 2006) ("This Court, like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction."), quoting *Ashcroft v. American Civil Liberties Union,* 542 U.S. 656, 159 L.Ed.2d 690, 124 S.Ct. 2783, 2790 (2004).

O. Damages for Wrongfully Entered Temporary Restraining Orders

1. [9.61] Illinois

A party who suffers damages from a wrongly entered temporary restraining order may seek to recover its damages from the party who obtained the TRO. Under §11-110 of the Code of Civil Procedure, when a TRO or preliminary injunction is dissolved or vacated by the trial court or reversed on appeal, the trial court shall determine and enter judgment after the party who claims damages caused by the wrongly entered interlocutory injunction files a petition under oath that sets forth the nature and amount of the damages suffered. *See Buzz Barton & Associates, Inc. v. Giannone,* 108 Ill.2d 373, 483 N.E.2d 1271, 1274, 91 Ill.Dec. 636 (1985). The trial court assesses and awards damages after the TRO has been dissolved but before final disposition of the case. 735 ILCS 5/11-110. The failure of the court to assess damages will not operate as a bar to an action on the injunction bond. *Id.; Buzz Barton, supra,* 483 N.E.2d at 1274. A court may award damages in excess of the amount of the bond. *Kohlsaat v. Crate,* 144 Ill. 14, 32 N.E. 481 (1892).

If the TRO expires on its own terms, this does not constitute a dissolution for purposes of §11-110. *Panduit Corp. v. All States Plastic Manufacturing Co.,* 84 Ill.App.3d 1144, 405 N.E.2d 1316, 1320 – 1321, 40 Ill.Dec. 224 (1st Dist. 1980). Also, dissolution of the TRO at the conclusion of a preliminary injunction hearing does not mean that the TRO was wrongly entered. *C.D. Peters Construction Co. v. Tri-City Regional Port District,* 281 Ill.App.3d 41, 666 N.E.2d 44, 48, 216 Ill.Dec. 876 (5th Dist. 1996). Rather, the court must expressly find that the TRO was wrongly entered to entitle the adverse party to damages. *Stocker Hinge Manufacturing Co. v. Darnel Industries, Inc.,* 94 Ill.2d 535, 447 N.E.2d 288, 292, 69 Ill.Dec. 71 (1983).

Attorneys' fees that arise out of actions taken to reverse or dissolve a wrongly entered TRO are recoverable (*Bank of Lyons v. Schultz,* 22 Ill.App.3d 410, 318 N.E.2d 52, 58 – 59 (1st Dist. 1974)), but not attorneys' fees that are connected to the trial of the merits of the case, so the attorney for the restrained party should segregate the time spent on litigating the TRO from time spent on the merits of the case. *See American Warehousing Services, Inc. v. Weitzman,* 169 Ill.App.3d 708, 533 N.E.2d 366, 368, 127 Ill.Dec. 494 (1st Dist. 1988).

2. [9.62] Federal

As in Illinois state courts, a movant must be able to prove that the temporary restraining order was wrongly entered and that the movant suffered damages as a result of the wrongly entered TRO. *LaSalle Capital Group, Inc. v. Alexander Doll Co.,* No. 95 C 1640, 1995 U.S.Dist. LEXIS 14338 at *7 (N.D.Ill. Sept. 28, 1995). Unlike Illinois state practice, attorneys' fees generally may not be recovered in federal courts. *Coyne-Delany Co. v. Capital Development Board of State of Illinois,* 717 F.2d 385, 390 (7th Cir. 1983).

P. Temporary Restraining Order Summary — Checklists of Practical Considerations

1. [9.63] Checklist for Plaintiffs When Preparing the Pleadings

- Decide whether to seek a temporary restraining order and preliminary injunction (pled in the alternative) together in the motion for TRO. (This is common practice.)

- Decide whether to proceed without notice. As a general rule, give notice unless you have reason to believe that providing the opponent with notice (a) would lead to the destruction of the substance of the litigation or (b) would otherwise defeat the purpose of the litigation. Consider how you would support this allegation.

- If you decide to provide notice, consider immediately sending the opponent a litigation hold letter. This will put the opponent on notice not to destroy any property or other evidence at issue pending the results of the hearing for the motion for the TRO.

- If you proceed without notice, be prepared to explain your efforts to give notice (required by declaration in federal court), and/or be prepared to explain convincingly why you believe giving the opponent notice would destroy the purpose of the litigation.

- If the complaint seeks a TRO, it must be verified. (If the complaint itself doesn't seek a TRO, the motion for a TRO must be verified or have attached affidavits.) The verified complaint may also be supported by affidavits, particularly when the movant seeks a TRO ex parte. The affidavits should be narrow and state only what is necessary to support the complaint.

- The allegations must be specific, factual, and based on personal knowledge. They cannot be conclusory and based on hearsay or "information and belief."

- For the TRO itself, seek relief that is reasonable and not overbroad. It must be narrowly tailored and designed to preserve the status quo and prevent irreparable harm. Overbroad prayers for relief are more likely to be denied, dissolved, modified, or reversed on interlocutory appeal.

- Prepare a proposed order with the relief clearly and specifically stated.

- Include the following in your filing: (a) a verified complaint; (b) a motion for TRO (possibly jointly seeking a preliminary injunction); (c) memorandum of law in support; and (d) a notice of motion/certificate of service.

2. [9.64] Checklist for Plaintiffs at the Temporary Restraining Order Hearing and Beyond

- The temporary restraining order hearing is a summary hearing. Be prepared to impress upon the judge the emergency nature of your motion and why your client will suffer irreparable harm absent relief. Focus on the four basic elements you need to establish your entitlement to the TRO.

- Be prepared to post bond. Argue why it is not necessary in Illinois state court or why it should be minimal in federal court.

- If your petition for a TRO is denied, push for a quick preliminary injunction hearing, not only to protect your client but also to impress on the court that your client's need is serious and real.

- If the petition for a TRO is denied, determine whether an interlocutory appeal is needed. Remember that under S.Ct. Rule 307(d), you have only two days in which to file the appeal.

- If the petition is granted, get a near-term date for the preliminary injunction hearing. If in federal court and the TRO hearing is an evidentiary hearing, confirm that the order is equivalent to an order granting a request for a preliminary injunction and a hearing for a preliminary injunction is thus not necessary because the duration of the order will be until the hearing of the case on the merits.

- Begin to prepare the discovery needed for the preliminary injunction hearing. Determine whether to file a motion for expedited discovery. Respond quickly to the defendant's discovery requests and seek the same quick response from the defendant. Begin to line up and prepare witnesses for the evidentiary hearing for the preliminary injunction.

3. [9.65] Checklist for Defendants When Preparing the Pleadings

- Even if you have very limited notice before the temporary restraining order hearing, try to get something on file before the hearing. Obviously, the comprehensiveness of your response will depend on the time you have in which to prepare.

- Confirm that the litigation is in the proper forum by determining whether the plaintiff has sufficiently alleged the bases for personal jurisdiction, subject matter jurisdiction, and venue. In state court, analyze whether injunctive relief is a proper remedy; in federal court, also consider general issues of subject matter and/or diversity jurisdiction.

- Analyze whether the plaintiff's complaint states a claim. Make sure that it is a verified complaint and move to strike under 735 ILCS 5/2-615 if it is not. If you have time, consider a combined memorandum in opposition to the plaintiff's motion for a TRO and in support of a motion to dismiss.

- Prepare a verified answer denying the plaintiff's material allegations. Determine whether affidavits are necessary or even advisable at this point. At least deny the material allegations, if possible, even if there is insufficient time to prepare a complete answer (and so stating).

- Determine whether you have any available affirmative defenses. Consider prematurity and ripeness, failure to exhaust administrative remedies, laches, unclean hands, and equitable estoppel.

- If there is insufficient time to prepare and file a verified answer, tell the court that you plan to file a verified answer, motion to dismiss, or anything else that you were not able to accomplish. If you determine that the complaint states a claim, submit a verified answer at the TRO hearing or as soon as possible afterwards.

- If there is sufficient time, determine whether to file a short brief in opposition to the petition for the TRO or to save your opposition for the oral presentation at the hearing.

- Look at the plaintiff's verification, and determine whether there are any allegations based on information and belief or conclusory allegations. Be prepared to strongly attack any such allegations and hold the plaintiff to meeting his or her burden of proof for the TRO.

- With sufficient time, a well-prepared defendant files a verified answer (with or without affidavits) with any available affirmative defenses and a brief memorandum of law in opposition to the plaintiff's motion for a TRO.

4. [9.66] Checklist for Defendants at the Temporary Restraining Order Hearing and Beyond

- Be prepared to argue that the plaintiff has not met his or her burdens of demonstrating (a) an ascertainable need for relief, (b) sufficient emergency, (c) irreparable harm, (d) chance of success on the merits, or (e) the other factors. Also argue that the plaintiff's factual allegations, or evidence, if there is an evidentiary hearing in federal court, (a) are not based on personal knowledge, (b) are hearsay, (c) are conclusory, or (d) are insufficiently specific.

- If the temporary restraining order is granted, argue that it should be for a short period of time and should expire at the soonest possible hearing for a preliminary injunction.

- If the date for the preliminary injunction hearing is not within a short period of time, argue that the TRO is effectively a preliminary injunction and remind the court that it is reversible error to enter a preliminary injunction without an evidentiary hearing.

- In state court, argue for a large bond amount and object if the court denies your bond request. Remember that failure to request a bond or to object to its denial waives the issue. In federal court, where a bond is mandatory, argue for a large amount.

- Support requests for a larger bond by specifically showing how much the TRO will damage your client's interests. The more concretely you can demonstrate a financial cost to your client, the more likely you are to get a large bond.

- If the request for a TRO is granted, ask for a quick hearing on the preliminary injunction, particularly when the restraint is onerous for your client.

- If the request for a TRO is granted, determine whether to prepare a motion for expedited discovery for the preliminary injunction hearing. Formulate a discovery plan.

- If the request for TRO is denied, the denial should work in your favor and serve as leverage in settlement negotiations, so consider not pushing for an early hearing on the preliminary injunction.

5. [9.67] Checklist of General Temporary Restraining Order Considerations for Both Parties

- Call the judge's clerk and find out how the judge approaches hearings for temporary restraining orders. (In both state and federal courts, there may be significant difference from judge to judge in the type of TRO hearing allowed; federal courts generally allow for more variation as to whether TRO hearings are evidentiary.)

- Ask the clerk whether the judge permits any oral argument or simply rules on the pleadings and whether the judge only permits the oral arguments of the attorneys or also permits evidentiary hearings with witnesses.

- Arguments at TRO hearings are generally summaries of your legal arguments. However, even in a summary hearing, use any documents incorporated into your pleadings to refute your opponent's allegations. Avoid hurting your credibility with the judge in an effort to score more points at the TRO hearing.

- On the other hand, also be aware that cases frequently settle after the grant of a preliminary injunction. As you prepare for the TRO hearing, remember that the hearing on the preliminary injunction is likely to be the key battle. If you lose at the TRO hearing, follow the tips to best prepare for the preliminary injunction hearing.

- At the TRO hearing, both parties should be prepared to focus on the basic factors on which the plaintiff needs to succeed in order to obtain the TRO. Both parties should also be prepared to discuss any weaknesses in the opponent's affidavits, verification, or factual allegations.

- Witnesses are unlikely at a TRO hearing but will be needed for the preliminary injunction hearing. Select and prepare your witnesses for this hearing.

III. PRELIMINARY INJUNCTIONS

A. [9.68] General Showing Required To Obtain a Preliminary Injunction

Similar to temporary restraining orders, a preliminary injunction is intended to preserve the status quo. A TRO preserves the status quo until a hearing may be held to determine whether a preliminary injunction is appropriate. *Passon v. TCR, Inc.*, 242 Ill.App.3d 259, 608 N.E.2d 1346, 1350, 181 Ill.Dec. 872 (2d Dist. 1993); *Stocker Hinge Manufacturing Co. v. Darnel Industries, Inc.*, 94 Ill.2d 535, 447 N.E.2d 288, 291, 69 Ill.Dec. 71 (1983). A preliminary injunction, on the other hand, is intended to preserve the status quo pending a decision on the merits of the case. *Bollweg v. Richard Marker Associates, Inc.*, 353 Ill.App.3d 560, 818 N.E.2d 873, 883, 288

Ill.Dec. 938 (2d Dist. 2004); *Nickels v. Burnett,* 343 Ill.App.3d 654, 798 N.E.2d 817, 825, 278 Ill.Dec. 433 (2d Dist. 2003). It is an extreme remedy that should be employed only when an emergency exists and serious harm would result if the injunction is not issued. *Bollweg, supra,* 818 N.E.2d at 883; *People ex rel. Klaeren v. Village of Lisle,* 202 Ill.2d 164, 781 N.E.2d 223, 230, 269 Ill.Dec. 426 (2002). A further difference between TROs and preliminary injunctions is that a court may not grant a preliminary injunction without previous notice to the adverse party. 735 ILCS 5/11-102.

A court may not grant a preliminary injunction without a showing that (1) the party seeking the injunction possesses a clear right or interest in need of protection, (2) the party has no adequate remedy at law, (3) the party will be irreparably harmed if the preliminary injunction is not granted, and (4) there is a reasonable likelihood that the party will succeed on the merits. *Bollweg, supra,* 818 N.E.2d at 883; *People ex rel. White v. Travnick,* 346 Ill.App.3d 1053, 806 N.E.2d 270, 276, 282 Ill.Dec. 295 (2d Dist. 2004); *Mohanty v. St. John Heart Clinic, S.C.,* No. 101251, 2006 Ill. LEXIS 1689 at *12 (Dec. 21, 2006). Additionally, the court must decide whether the balance of hardships between the parties warrants granting a preliminary injunction. *Keefe-Shea Joint Venture v. City of Evanston,* 332 Ill.App.3d 163, 773 N.E.2d 1155, 1160, 266 Ill.Dec. 85 (1st Dist. 2002); *Bollweg, supra,* 818 N.E.2d at 883.

A plaintiff seeking a preliminary injunction need not carry the same burden of proof that is required to prevail on the ultimate issue. *Keefe-Shea, supra,* 773 N.E.2d at 1160; *Bollweg, supra,* 818 N.E.2d at 883. Rather, a plaintiff need only make a prima facie showing that there is a fair question as to the existence of the claimed right and that the circumstances lead to a reasonable belief that the plaintiff will be entitled to the relief sought. *Bollweg, supra,* 818 N.E.2d at 883; *Village of Westmont v. Lenihan,* 301 Ill.App.3d 1050, 704 N.E.2d 891, 895, 235 Ill.Dec. 318 (2d Dist. 1998).

The decision to grant or deny a preliminary injunction rests within the sound discretion of the trial court, and a reviewing court will overturn a trial court's decision regarding whether to grant a preliminary injunction only if the trial court abused its discretion. *Desnick v. Department of Professional Regulation,* 171 Ill.2d 510, 665 N.E.2d 1346, 1351, 216 Ill.Dec. 789 (1996); *Chicago Health Clubs, Inc. v. Picur,* 124 Ill.2d 1, 528 N.E.2d 978, 981, 124 Ill.Dec. 87 (1988); *Bollweg, supra,* 818 N.E.2d at 883; *Klaeren, supra,* 781 N.E.2d at 231. However, if the decision to grant or deny a preliminary injunction is predicated on the determination of a question of law, such as the enforceability of a restrictive covenant not to compete in an employment contract, the court will review the determination de novo. *Mohanty, supra,* 2006 Ill. LEXIS 1689 at *13.

The discussion of preliminary injunctions in this chapter contains occasional references to federal practice. See §§9.71, 9.73, 9.76, and 9.77 below. The intermittent references are intended to draw the reader's attention to areas of significant difference between state and federal practice in Illinois. Further explanation of the federal standards, including citations to federal case law, may be found in §§9.107 – 9.121 below.

B. [9.69] Notice of Motion Is Required

"No court or judge shall grant a preliminary injunction without previous notice of the time and place of the application having been given the adverse party." 735 ILCS 5/11-102. *See also Electronic Design & Manufacturing Inc. v. Konopka,* 272 Ill.App.3d 410, 649 N.E.2d 619, 623, 208 Ill.Dec. 563 (1st Dist. 1995). Notice pursuant to S.Ct. Rule 11(b) is sufficient.

C. [9.70] Court Must Hold a Hearing Before Preliminary Injunction May Issue if Defendant Has Answered or Responded

> **Where the defendant answers or responds to the plaintiff's complaint, the trial court must hold a hearing to determine the legal sufficiency of that complaint and to resolve any questions of material fact. [***Carriage Way Apartments v. Pojman,* 172 Ill.App.3d 827, 527 N.E.2d 89, 94, 122 Ill.Dec. 717 (2d Dist. 1988)**]. Where the defendant does not answer or respond, however, the trial court need not hold a hearing because the sole question is whether the complaint is legally sufficient. *Carriage Way Apartments,* 172 Ill.App.3d at 835 – 36. . . . Consequently, if the defendant does not answer or respond, the trial court may not receive or consider extraneous evidence when deciding whether to issue the preliminary injunction.** *Russell v. Howe,* 293 Ill.App.3d 293, 688 N.E.2d 375, 378, 227 Ill.Dec. 894 (2d Dist. 1997).

A defendant is entitled to an evidentiary hearing if there are controverted material facts and a verified answer has been filed. *Carriage Way Apartments, supra,* 527 N.E.2d at 94; *Paddington Corp. v. Foremost Sales Promotions, Inc.,* 13 Ill.App.3d 170, 300 N.E.2d 484 (1st Dist. 1973). Such a hearing is more than a summary hearing, but less than a full hearing on the merits. *Passon v. TCR, Inc.,* 242 Ill.App.3d 259, 608 N.E.2d 1346, 1349, 181 Ill.Dec. 872 (2d Dist. 1993). The trial court will not decide contested issues of fact or the merits of the case. *Health Professionals, Ltd. v. Johnson,* 339 Ill.App.3d 1021, 791 N.E.2d 1179, 1192, 274 Ill.Dec. 768 (3d Dist. 2003); *Hartlein v. Illinois Power Co.,* 151 Ill.2d 142, 601 N.E.2d 720, 727, 176 Ill.Dec. 22 (1992); *Dixon Association for Retarded Citizens v. Thompson,* 91 Ill.2d 518, 440 N.E.2d 117, 120, 64 Ill.Dec. 565 (1982); *Lonergan v. Crucible Steel Company of America,* 37 Ill.2d 599, 229 N.E.2d 536, 542 (1967); Thomas J. O'Brien and Richard A. Jurczyk, *TRO Petitions: Is an Evidentiary Hearing Required?,* 81 Ill.B.J. 572 (1993). No factual findings made at a preliminary injunction hearing are preclusive; findings made at such a hearing will not bind a judge or jury when hearing the case on the merits. *Health Professionals, supra,* 791 N.E.2d at 1192; *Hartlein, supra,* 601 N.E.2d at 726; *Lonergan, supra,* 229 N.E.2d at 542; *Electronic Design & Manufacturing Inc. v. Konopka,* 272 Ill.App.3d 410, 649 N.E.2d 619, 623, 208 Ill.Dec. 563 (1st Dist. 1995) (findings may be made, but do not have preclusive effect of res judicata); *Dixon Association, supra.* If affirmative defenses have been filed, the defendant may present evidence of these defenses to argue against the plaintiff's likelihood of success on the merits. *Danville Polyclinic, Ltd. v. Dethmers,* 260 Ill.App.3d 108, 631 N.E.2d 842, 847, 197 Ill.Dec. 620 (4th Dist. 1994).

D. [9.71] Required Elements

The elements required for a court to issue a temporary restraining order or a preliminary injunction are often referred to as "factors," perhaps because courts tend to be flexible in the

determination of these requirements and vary somewhat in the order in which they are listed and the nomenclature used to describe them. Also, although the legal standards for a TRO and a preliminary injunction are basically the same in both Illinois state courts and federal courts, there is slight variation between the two types of courts in how the analysis is described and framed.

In Illinois state courts, the four factors that a movant must satisfy to obtain a preliminary injunction are as follows: (1) the party seeking relief possesses a clearly ascertainable right that is in need of protection; (2) the party has a likelihood of success on the merits; (3) the party will suffer irreparable harm if the application for a preliminary injunction is not granted; and (4) the party has no adequate remedy at law. *See, e.g., Bradford v. Wynstone Property Owners' Ass'n*, 355 Ill.App.3d 736, 823 N.E.2d 1166, 1170, 291 Ill.Dec. 580 (2d Dist. 2005); *County of DuPage v. Gavrilos*, 359 Ill.App.3d 629, 834 N.E.2d 643, 649, 296 Ill.Dec. 86 (2d Dist. 2005); *People ex rel. Klaeren v. Village of Lisle*, 202 Ill.2d 164, 781 N.E.2d 223, 230, 269 Ill.Dec. 426 (2002); *Murges v. Bowman*, 254 Ill.App.3d 1071, 627 N.E.2d 330, 337, 194 Ill.Dec. 214 (1st Dist. 1993); *Jacob v. C & M Video, Inc.*, 248 Ill.App.3d 654, 618 N.E.2d 1267, 1274 – 1275, 188 Ill.Dec. 697 (5th Dist. 1993). See also §9.19 above.

Illinois federal courts follow a two-step analysis set out by the Seventh Circuit. In the first step, they determine if there is a likelihood of success on the merits, a threat of irreparable harm, and an inadequate remedy at law. If the movant satisfies these substantive factors, the court then balances the hardships on parties if the preliminary injunction is granted or not and considers the impact of the granting of the motion on public interest. *International Profit Associates, Inc. v. Paisola*, 461 F.Supp.2d 672, 675 (N.D.Ill. 2006); *Budget Rent A Car Corp. v. Harvey Kidd Automotive*, 249 F.Supp.2d 1048, 1049 (N.D.Ill. 2003); *Coca-Cola Co. v. Alma-Leo U.S.A., Inc.*, 719 F.Supp. 725, 727 (N.D.Ill. 1989) (while labeled request for TRO, case more closely resembles motion for preliminary injunction and court stated at outset that it would apply traditional standards governing preliminary injunctions); *Illusions Too Reality, LLC v. City of Harvey*, No. 02 C 7272, 2003 U.S.Dist. LEXIS 1530 at *11 (N.D.Ill. Jan. 31, 2003) (standards for TRO and preliminary injunction are functionally identical in Seventh Circuit); *Teamsters Local Unions Nos. 75 & 200 v. Barry Trucking, Inc.*, 176 F.3d 1004, 1011 (7th Cir. 1999); *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386 – 387 (7th Cir. 1984) ("likelihood of success" and "irreparable harm" elements are considered on sliding scale whereby the greater the likelihood of success, the less stringent the showing need be that balance of hardships weighs in movant's favor).

In practice, although the basic factors that a movant must meet to obtain a preliminary injunction in Illinois state and federal courts are similar, there are some key differences. First, the showing of likelihood required in Illinois state courts is that the movant has raised a "fair question" as to its likelihood of success (*Tie Systems, Inc. v. Telcom Midwest, Inc.*, 203 Ill.App.3d 142, 560 N.E.2d 1080, 1086, 148 Ill.Dec. 483 (1st Dist. 1990); *Gavrilos, supra*, 834 N.E.2d at 649; *Murges, supra*, 627 N.E.2d at 337), while the showing required in Illinois federal courts is even lower — the movant has a "better than negligible" likelihood of success if the balance of harms is in its favor (*Roland Machinery, supra*, 749 F.2d at 387; *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 123 (7th Cir. 1982)). Second, the balance of harms to the two parties is not an element that must be established in Illinois state courts, while analysis of the

balance of harms and public interest are required as the second step of analysis in Illinois federal courts. *See, e.g., Paisola, supra,* 461 F.Supp.2d 675; *Budget Rent A Car, supra,* 249 F.Supp.2d at 1049; *Coca-Cola, supra,* 719 F.Supp. at 727. Third, under the "sliding scale" approach used in the Seventh Circuit, the federal court must determine how likely the movant's chance of success is in order to help determine the balance of the relative harms. *Roland Machinery, supra,* 749 F.2d at 387.

PRACTICE POINTER

✓ Many practitioners believe that because of the low showing required for likelihood of success in Illinois federal courts, it is easier to obtain interlocutory relief in Illinois federal courts than in Illinois state courts. If your client is seeking injunctive relief and you have the option of filing in either court and if the balance of harms does not clearly favor the adverse party, it may be good strategy to file your complaint in Illinois federal district court rather than in state court, particularly when the harm to your client from denial of the preliminary injunction would be very great and the harm to the defendant from granting it very small. *See Omega Satellite, supra,* 694 F.2d at 123. However, it is important to be aware that a bond or security is required by Fed.R.Civ.P. 65(c) for preliminary injunctions issued in federal court. Conversely, under 735 ILCS 5/11-103, the posting of a bond is left to the discretion of the trial court in Illinois state courts.

1. [9.72] Ascertainable Claim for Relief

The first element or factor that a movant must establish in order to obtain a preliminary injunction is that he or she has a clearly ascertainable claim for relief. *Scheffel & Co. v. Fessler,* 356 Ill.App.3d 308, 827 N.E.2d 1, 6, 292 Ill.Dec. 854 (5th Dist.), *appeal denied,* 216 Ill.2d 683 (2005); *Murges v. Bowman,* 254 Ill.App.3d 1071, 627 N.E.2d 330, 337 – 338, 194 Ill.Dec. 214 (1st Dist. 1993); *C.D. Peters Construction Co. v. Tri-City Regional Port District,* 281 Ill.App.3d 41, 666 N.E.2d 44, 48, 216 Ill.Dec. 876 (5th Dist. 1996). This is sometimes referred to as the "protectable interest" factor. *Scheffel & Co., supra,* 827 N.E.2d at 5 – 6. Whether the claimant has a clearly ascertainable right in need of protection is a threshold issue. *Hartlein v. Illinois Power Co.,* 151 Ill.2d 142, 601 N.E.2d 720, 726, 176 Ill.Dec. 22 (1992); *Wilson v. Illinois Benedictine College,* 112 Ill.App.3d 932, 445 N.E.2d 901, 906, 68 Ill.Dec. 257 (2d Dist. 1983). If no ascertainable claim exists, there is no possibility for success on the merits. *See Board of Education of Dolton School District 149 v. Miller,* 349 Ill.App.3d 806, 812 N.E.2d 688, 694, 285 Ill.Dec. 868 (1st Dist. 2004) (finding that there is "no known cause of action that would allow a court to force anyone to improve the property of another simply because a court concluded that the improvements would be a good idea").

Although the claim for relief is described as "clearly ascertainable," the party seeking the preliminary injunction need only show that there is a "fair question" of the existence of the protectible right and that the court should preserve the status quo until the case can be decided on the merits to prevent immediate harm. *Tie Systems, Inc. v. Telcom Midwest, Inc.,* 203 Ill.App.3d 142, 560 N.E.2d 1080, 1086, 148 Ill.Dec. 483 (1st Dist. 1990); *Buzz Barton & Associates, Inc. v. Giannone,* 108 Ill.2d 373, 483 N.E.2d 1271, 1278, 91 Ill.Dec. 636 (1985); *Murges, supra,* 627

N.E.2d at 337 – 338; *C.D. Peters Construction, supra,* 666 N.E.2d at 48; *Hirschauer v. Chicago Sun-Times,* 192 Ill.App.3d 193, 548 N.E.2d 630, 636, 139 Ill.Dec. 245 (1st Dist. 1989), *appeal dismissed,* 131 Ill.2d 559 (1990); *Jacob v. C & M Video, Inc.,* 248 Ill.App.3d 654, 618 N.E.2d 1267, 1275, 188 Ill.Dec. 697 (5th Dist. 1993) (plaintiff must show "prima facie case that there is a fair question as to the existence of the rights claimed"), quoting *Dixon Association for Retarded Citizens v. Thompson,* 91 Ill.2d 518, 440 N.E.2d 117, 120, 64 Ill.Dec. 565 (1982). *See also Mohanty v. St. John Heart Clinic, S.C.,* No. 101251, 2006 Ill. LEXIS 1689 at **12 – 13 (Dec. 21, 2006) ("On appeal, we examine only whether the party seeking the injunction has demonstrated a *prima facie* case that there is a fair question concerning the existence of the claimed rights"), quoting *People ex rel. Klaeren v. Village of Lisle,* 202 Ill.2d 164, 781 N.E.2d 223, 230, 269 Ill.Dec. 426 (2002).

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✓ Preliminary injunctions are often presented in civil actions, including antitrust, civil rights, constitutional law, copyright, employment, environmental, patent, securities, and trademark actions. Preliminary injunctions are most often sought in the following situations: (a) executive or key employee unfair competition; (b) general unfair competition; (c) asset ownership disputes; (d) business interruption disputes; (e) government injunctions; and (f) parallel litigation proceedings.

2. [9.73] Likelihood of Success on the Merits

Before it issues a preliminary injunction, the court must find that there is a likelihood that the movant will succeed on the merits of the case. *Murges v. Bowman,* 254 Ill.App.3d 1071, 627 N.E.2d 330, 337 – 338, 194 Ill.Dec. 214 (1st Dist. 1993). The standard is fairly low as the movant need only raise a "fair question" as to the likelihood of success on the merits. *Id.; C.D. Peters Construction Co. v. Tri-City Regional Port District,* 281 Ill.App.3d 41, 666 N.E.2d 44, 48, 216 Ill.Dec. 876 (5th Dist. 1996) (plaintiff raised fair question as to merits of its case when it showed that defendant's contentions in opposition "would appear subject to some dispute"); *Boner v. Drazek,* 55 Ill.2d 279, 302 N.E.2d 280, 284 (1973). The court should not actually decide contested issues of fact or the ultimate merits of the case. *Northwestern Steel & Wire Co. v. Industrial Commission of Illinois,* 254 Ill.App.3d 472, 627 N.E.2d 71, 74, 193 Ill.Dec. 912 (1st Dist. 1993) (holding that trial court abused its discretion when ruling on constitutionality of rule, which ruling impermissibly decided merits of claim). To demonstrate a likelihood of success on the merits, the claimant need only (a) raise a "fair question" as to the existence of the right claimed, (b) persuade court that he or she will probably be entitled to the relief sought, and (c) make the preservation of the status quo appear sound until the merits are decided. *Tie Systems, Inc. v. Telcom Midwest, Inc.,* 203 Ill.App.3d 142, 560 N.E.2d 1080, 1086, 148 Ill.Dec. 483 (1st Dist. 1990); *Buzz Barton & Associates, Inc. v. Giannone,* 108 Ill.2d 373, 483 N.E.2d 1271, 1277 – 1278, 91 Ill.Dec. 636 (1985). Courts will not issue preliminary injunctions if the controversy is moot. *Agency, Inc. v. Grove,* 362 Ill.App.3d 206, 839 N.E.2d 606, 609, 298 Ill.Dec. 283 (2d Dist. 2005).

If the subject of the suit is property that may be destroyed, the plaintiff may not need to meet this element. *Save the Prairie Society v. Greene Development Group, Inc.*, 323 Ill.App.3d 862, 752 N.E.2d 523, 530 – 531, 256 Ill.Dec. 643 (1st Dist. 2001).

In federal court, the standard is extremely low as the movant need only show a "better than negligible" likelihood of success. See §9.116 below. *See also Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 387 (7th Cir. 1984); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 123 (7th Cir. 1982); *International Profit Associates, Inc. v. Paisola*, 461 F.Supp.2d 672, 676 (N.D.Ill. 2006).

3. [9.74] Irreparable Harm

To be awarded a preliminary injunction, a plaintiff must show that it will suffer irreparable harm if relief is not granted. *Postma v. Jack Brown Buick, Inc.*, 157 Ill.2d 391, 626 N.E.2d 199, 193 Ill.Dec. 166 (1993); *Smith Oil Corp. v. Viking Chemical Co.*, 127 Ill.App.3d 423, 468 N.E.2d 797, 803, 82 Ill.Dec. 250 (2d Dist. 1984) (affirming award of damages to defendant upon dissolution of injunction when there was no evidence plaintiff's ex-employees had actually taken trade secrets at issue and plaintiffs had thus failed to show irreparable harm); *Kanter & Eisenberg v. Madison Associates*, 116 Ill.2d 506, 508 N.E.2d 1053, 108 Ill.Dec. 476 (1987) (when plaintiff business tenants sought injunction preventing their eviction and were granted preliminary injunction, injunctive relief was improvidently entered when plaintiffs failed to show how they would be irreparably harmed by paying rent and awaiting trial on merits). Irreparable harm is "harm that cannot be prevented or fully rectified by the final judgment after trial." *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386 (7th Cir. 1984).

In order to prevail on this factor, the harm expected by the plaintiff must be reasonably certain and not merely possible. *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry.*, 195 Ill.2d 356, 748 N.E.2d 153, 162, 254 Ill.Dec. 707 (2001). Harm need not be strictly irreparable; it is sufficient if the harm is continuing in nature. *Lucas v. Peters*, 318 Ill.App.3d 1, 741 N.E.2d 313, 325, 251 Ill.Dec. 719 (1st Dist. 2000); *Bollweg v. Richard Marker Associates, Inc.*, 353 Ill.App.3d 560, 818 N.E.2d 873, 887, 288 Ill.Dec. 938 (2d Dist. 2004). The harm may not be of a nature that it can be prevented or rectified by the final judgment after trial.

4. [9.75] Inadequate Remedy at Law

As with all equitable remedies, the movant must show that it has an inadequate remedy at law. If there is a legal or equitable remedy that will make the movant whole after trial, temporary injunctive relief should not issue. *Kanter & Eisenberg v. Madison Associates*, 116 Ill.2d 506, 508 N.E.2d 1053, 1057, 108 Ill.Dec. 476 (1987) (plaintiffs had adequate remedy at law when they were financially able to pay rent and await outcome of trial on merits).

Injunctive relief is not proper when money damages provide an adequate remedy. *Allstate Amusement Company of Illinois, Inc. v. Pasinato*, 96 Ill.App.3d 306, 421 N.E.2d 374, 375 – 376, 51 Ill.Dec. 866 (1st Dist. 1981). This element may be considered in relation to the element of irreparable harm because if an adequate remedy at law exists, the harm is, by definition, not irreparable. *Petrzilka v. Gorscak*, 199 Ill.App.3d 120, 556 N.E.2d 1265, 1268, 145 Ill.Dec. 363

(2d Dist. 1990) ("Irreparable harm is the most common method of proving an inadequate remedy at law and denotes transgressions of a continuing nature so that redress cannot be had at law."). Courts determine whether a legal remedy is adequate by asking whether the legal remedy is clear, complete, and as practical and efficient as the equitable remedy sought. *Tamalunis v. City of Georgetown,* 185 Ill.App.3d 173, 542 N.E.2d 402, 413, 134 Ill.Dec. 223 (4th Dist. 1989). If a legal or equitable remedy will make the plaintiff whole after trial, a preliminary injunction is inappropriate. *Kanter & Eisenberg, supra,* 508 N.E.2d at 1055; *Northrop Corp. v. AIL Systems, Inc.,* 218 Ill.App.3d 951, 578 N.E.2d 1208, 161 Ill.Dec. 562 (1st Dist. 1991). If money damages are an adequate remedy, an injunction is inappropriate. *Allstate Amusement, supra,* 421 N.E.2d at 375 – 376. However, if the future loss is impossible to adequately calculate or money damages are difficult to quantify at the time of the hearing, an injunction may be appropriate. *Eagle Books, Inc. v. Jones,* 130 Ill.App.3d 407, 474 N.E.2d 444, 448, 85 Ill.Dec. 716 (4th Dist.), *cert. denied,* 106 S.Ct. 249 (1985). Also, if the financial condition of the defendant would render money damages worthless, money damages may be inadequate and an injunction may be appropriate. *Bowman v. Dixon Theatre Renovation, Inc.,* 221 Ill.App.3d 35, 581 N.E.2d 804, 808, 163 Ill.Dec. 650 (2d Dist. 1991). Other courts, however, have held that money damages must be impossible — and not merely difficult — to calculate in order to show that a legal remedy is inadequate. *Wilson v. Wilson,* 217 Ill.App.3d 844, 577 N.E.2d 1323, 1333 – 1334, 160 Ill.Dec. 752 (1st Dist. 1991). Other available remedies, such as mandamus or specific performance, may also preclude the issuance of an injunction. *Lyle v. City of Chicago,* 357 Ill. 41, 191 N.E. 255, 256 – 257 (1934); *Kanter & Eisenberg, supra.*

5. [9.76] Balancing of Hardships

Courts often undertake a balancing of equities (sometimes called "relative hardships") before deciding whether to issue an injunction. *See, e.g., Lucas v. Peters,* 318 Ill.App.3d 1, 741 N.E.2d 313, 325 – 326, 251 Ill.Dec. 719 (1st Dist. 2000) (court considering injunctive relief should balance harms). The hardship borne by the plaintiff if the injunction is not granted is weighed against the hardship borne by the defendant if the injunction is granted. *Limestone Development Corp. v. Village of Lemont,* 284 Ill.App.3d 848, 672 N.E.2d 763, 767, 219 Ill.Dec. 910 (1st Dist. 1996); *Gold v. Ziff Communications Co.,* 196 Ill.App.3d 425, 553 N.E.2d 404, 410 – 411, 142 Ill.Dec. 890 (1st Dist. 1989). *See also Scheffel & Co. v. Fessler,* 356 Ill.App.3d 308, 827 N.E.2d 1, 6, 292 Ill.Dec. 854 (5th Dist.), *appeal denied,* 216 Ill.2d 683 (2005). The plaintiff must show that the balance of the hardships weighs in favor of granting the preliminary injunction.

In federal court, the balancing of harms is determined by a "sliding scale" analysis. The stronger the movant's showing that it is likely to succeed on the merits, the less strong a showing it is required to make on the balance-of-harms factor. See §9.116 below. *See also Omega Satellite Products Co. v. City of Indianapolis,* 694 F.2d 119, 123 (7th Cir. 1982) (when movant's likelihood of success is great, balance-of-harms analysis can favor adverse party, yet movant may still prevail; however, when movant's likelihood of success is small, balance of harms must favor it).

PRACTICE POINTER

✓ Federal courts in the Seventh Circuit apply a sliding-scale formula whereby the relative hardship of a defendant in complying with a preliminary injunction is less important if the plaintiff has demonstrated a very high likelihood of success on the merits. While this formula has not strictly been adopted by Illinois State courts, it is still a powerful argument to make for the balancing of equities.

6. [9.77] Public Interest

A party seeking a preliminary injunction does not need to show that the public interest weighs in favor of granting the injunction, but the court may consider this factor. *See Prairie Eye Center, Ltd. v. Butler,* 305 Ill.App.3d 442, 713 N.E.2d 610, 615, 239 Ill.Dec. 79 (4th Dist.) (considering importance in Illinois public policy of freedom to contract in covenant to compete case seeking preliminary injunction), *appeal denied,* 185 Ill.2d 665 (1999), *appeal after remand,* 329 Ill.App.3d 293 (4th Dist. 2002). Put simply, if an injunction harms the public interest, this factor weighs against granting it. Conversely, if the public interest is positively affected by the injunction, such as the public benefit derived from competition in the marketplace, this factor weighs in favor of granting the injunction. *Id*.

In federal courts, this factor is considered simply as additional weight in favor of granting the application (if the public interest would be positively affected by the relief sought) or denying it (if the public interest would be harmed by the relief sought). See §9.117 below. *See, e.g., Crossbow, Inc. v. Glovemakers, Inc.,* 265 F.Supp. 202, 208 (N.D.Ill. 1967) (finding public interest benefits from increased competition in Lanham Act action for preliminary injunction).

7. [9.78] Pleading Requirements Relaxed When Statute Expressly Authorizes Injunctive Relief

Like temporary restraining orders, the pleading requirements for a preliminary injunction are relaxed when a statute expressly authorizes injunctive relief. See the discussion in §9.28 above.

8. [9.79] Enforceability of Contractually Stipulated Injunctions

The discussion in §9.29 above relating to the enforceability of contractually stipulated injunctions with regard to temporary restraining orders applies equally to preliminary injunctions.

E. Preliminary Injunctions Are Not Available in Certain Contexts

1. [9.80] Courts Will Not Issue a Preliminary Injunction That Grants the Ultimate Relief

It is inappropriate to grant a preliminary injunction if it would grant the ultimate relief sought in the complaint because hearings for preliminary injunctions are summary proceedings. *Continental Cablevision of Cook County, Inc. v. Miller,* 238 Ill.App.3d 774, 606 N.E.2d 587, 597,

179 Ill.Dec. 755 (1st Dist. 1992) (bond would not be required if ultimate relief were granted and terms of injunction varied from those provided under cable access provisions of Counties Code (55 ILCS 5/5-1096), pursuant to which plaintiff filed suit); *Passon v. TCR, Inc.*, 242 Ill.App.3d 259, 608 N.E.2d 1346, 1349, 181 Ill.Dec. 872 (2d Dist. 1993) (hearings for temporary restraining order or preliminary injunction are summary proceedings only). The trial court should not decide contested issues of fact or the merits of the case during its hearing on whether to grant a preliminary injunction. *Hartlein v. Illinois Power Co.*, 151 Ill.2d 142, 601 N.E.2d 720, 727, 176 Ill.Dec. 22 (1992); *Dixon Association for Retarded Citizens v. Thompson*, 91 Ill.2d 518, 440 N.E.2d 117, 120, 64 Ill.Dec. 565 (1982); *Lonergan v. Crucible Steel Company of America*, 37 Ill.2d 599, 229 N.E.2d 536, 542 (1967). Granting the ultimate relief as a preliminary injunction deprives the defendant of a substantive hearing on the merits. *Buzz Barton & Associates, Inc. v. Giannone*, 108 Ill.2d 373, 483 N.E.2d 1271, 1278, 91 Ill.Dec. 636 (1985).

2. [9.81] The Constitutionality of Statutes Will Not Generally Be Considered at the Preliminary Injunction Stage

As a general rule, a trial court will not consider the constitutionality of a statute at the preliminary injunction stage. The constitutionality of a statute should be resolved only, if at all, to the extent required by the matter before the court. Remember, any injunction "must be reasonable and go no further than is essential to safeguard plaintiff's rights." *Lake Louise Improvement Ass'n v. Multimedia Cablevision of Oak Lawn, Inc.*, 157 Ill.App.3d 713, 510 N.E.2d 982, 985, 109 Ill.Dec. 914 (1st Dist. 1987). *See also County of Cook v. Village of Rosemont*, 293 Ill.App.3d 713, 688 N.E.2d 1192, 1195, 228 Ill.Dec. 215 (1st Dist. 1997); *Desnick v. Department of Professional Regulation*, 171 Ill.2d 510, 665 N.E.2d 1346, 1351, 216 Ill.Dec. 789 (1996).

3. [9.82] Public Officials Will Not Generally Be Enjoined

Generally, courts will only grant preliminary injunctions against public officials if their acts warranting an injunction are outside the scope of their authority or are unlawful. *Hadley v. Illinois Department of Corrections*, 362 Ill.App.3d 680, 840 N.E.2d 748, 752, 298 Ill.Dec. 635 (4th Dist. 2005), *appeal granted*, 218 Ill.2d 538 (2006); *Sherman v. Board of Fire & Police Commissioners of City of Highland*, 111 Ill.App.3d 1001, 445 N.E.2d 1, 5 – 6, 67 Ill.Dec. 709 (5th Dist. 1982); *Illinois Federation of Teachers v. Board of Trustees, Teachers' Retirement System of State of Illinois*, 191 Ill.App.3d 769, 548 N.E.2d 64, 66, 138 Ill.Dec. 834 (4th Dist. 1989); *Board of Education of Niles Township High School District No. 219 v. Board of Education of Northfield Township High School District No. 225*, 112 Ill.App.3d 212, 445 N.E.2d 464, 470, 68 Ill.Dec. 16 (1st Dist. 1983). Injunctions may also be proper to prevent the perversion of the judicial process through the enforcement of a statute. *Adams Apple Distributing Co. v. Zagel*, 152 Ill.App.3d 157, 501 N.E.2d 302, 305, 103 Ill.Dec. 281 (1st Dist. 1986) (injunction proper when statute is being used as deliberate harassment, through repetitious prosecutions, of person or group).

4. [9.83] Criminal Activity Will Not Generally Be Enjoined

Unless the criminal conduct also serves as a separate basis for equitable intervention, courts will not enjoin criminal activity. *Eagle Books, Inc. v. Jones*, 130 Ill.App.3d 407, 474 N.E.2d 444, 450, 85 Ill.Dec. 716 (4th Dist.), *cert. denied*, 106 S.Ct. 249 (1985). An injunction may be pursued

against a criminal nuisance, but only if a criminal prosecution would be an inadequate remedy. *Village of Riverdale v. Allied Waste Transportation Inc.*, 334 Ill.App.3d 224, 777 N.E.2d 684, 692, 267 Ill.Dec. 881 (1st Dist. 2002); *City of Chicago v. Festival Theatre Corp.*, 91 Ill.2d 295, 438 N.E.2d 159, 167, 63 Ill.Dec. 421 (1982). However, as noted in §9.31 above, the Illinois Streetgang Terrorism Omnibus Prevention Act authorizes injunctions to restrain criminal activities of gangs and gang members. 740 ILCS 147/35.

5. [9.84] A Court Will Not Enjoin Another Court

A court will not issue an injunction against another court but may enjoin a person from instituting an action in another court to prevent oppression or fraud. *Pfaff v. Chrysler Corp.*, 155 Ill.2d 35, 610 N.E.2d 51, 62, 182 Ill.Dec. 627 (1992). The injunction is directed only at the party and is not intended to direct or control the other court.

PRACTICE POINTER

✓ When seeking an injunction regarding parallel court proceedings or the threat of parallel proceedings, be sure to frame your request as an injunction against the other party and not against the other court.

6. [9.85] Courts Will Not Issue Injunctions if Preempted by Federal Statute

A court will not issue an injunction to regulate out-of-state activity that is preempted by federal legislation. Preemption serves the valuable purpose of minimizing regulatory chaos, unpredictability, and innumerable interstate conflicts that are created when one state asserts jurisdiction over an out-of-state source. *People ex rel. Madigan v. PSI Energy, Inc.*, 364 Ill.App.3d 1041, 847 N.E.2d 514, 516, 301 Ill.Dec. 504 (5th Dist. 2006). Preemption may be presumed when the federal legislation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation. *International Paper Co. v. Ouellette*, 479 U.S. 481, 93 L.Ed.2d 883, 107 S.Ct. 805, 811 (1987). If state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress or if it interferes with the methods by which the federal statute was designed to accomplish its goal, the state law is preempted. *Id.; PSI Energy, supra*, 847 N.E.2d at 516.

F. [9.86] Affirmative Defenses

Affirmative defenses, such as laches, prematurity, failure to exhaust administrative remedies, and unclean hands, may be raised as affirmative defenses to the issuance of a preliminary injunction as well as affirmative defenses against the merits of the plaintiff's case. *Bowman v. County of Lake*, 29 Ill.2d 268, 193 N.E.2d 833, 839 – 840 (1963) (laches); *Northtown Bank of Decatur v. Becker*, 31 Ill.2d 529, 202 N.E.2d 540, 542 (1964) (prematurity); *Midland Enterprises, Inc. v. City of Elmhurst*, 226 Ill.App.3d 494, 589 N.E.2d 1019, 1024, 168 Ill.Dec. 619 (2d Dist. 1992) (failure to exhaust administrative remedies); *McCann v. R.W. Dunteman Co.*, 242 Ill.App.3d 246, 609 N.E.2d 1076, 1083, 182 Ill.Dec. 542 (2d Dist. 1993) (unclean hands).

Affirmative defenses may only be considered if a verified answer has been filed. *Danville Polyclinic, Ltd. v. Dethmers*, 260 Ill.App.3d 108, 631 N.E.2d 842, 847, 197 Ill.Dec. 620 (4th Dist. 1994).

PRACTICE POINTER

✓ If the plaintiff requests a preliminary injunction in his or her complaint, the defendant's complaint must be verified. If the plaintiff filed a verified complaint, the defendant's answer must also be verified pursuant to 735 ILCS 5/2-605. If the plaintiff has not filed a verified complaint, however, but you suspect that the plaintiff will request a preliminary injunction by a later motion, you should file a verified answer if you wish to raise your affirmative defenses at the preliminary injunction hearing.

G. [9.87] The Standard of Proof Is Unclear

As the movant, the party seeking interlocutory injunctive relief bears the burden of satisfying the court that it has met the four basic factors necessary to obtain relief. See §9.19 above. *Hartlein v. Illinois Power Co.*, 151 Ill.2d 142, 601 N.E.2d 720, 726 – 727, 176 Ill.Dec. 22 (1992) (holding, in preliminary injunction case, that plaintiff failed to establish existence of clear and ascertainable right in need of protection). What is less clear is the standard of proof defining this burden. Some courts state that these four factors need to be established by a preponderance of the evidence (*Weitekamp v. Lane*, 250 Ill.App.3d 1017, 620 N.E.2d 454, 458, 189 Ill.Dec. 486 (1st Dist. 1993); *Cameron v. Bartels*, 214 Ill.App.3d 69, 573 N.E.2d 273, 275, 157 Ill.Dec. 855 (4th Dist. 1991); *Harper v. Missouri Pacific R.R.*, 264 Ill.App.3d 238, 636 N.E.2d 1192, 1203, 201 Ill.Dec. 760 (5th Dist. 1994); *Bradford v. Wynstone Property Owners' Ass'n*, 355 Ill.App.3d 736, 823 N.E.2d 1166, 1169, 291 Ill.Dec. 580 (2d Dist. 2005); *Passon v. TCR, Inc.*, 242 Ill.App.3d 259, 608 N.E.2d 1346, 1350, 181 Ill.Dec. 872 (2d Dist. 1993)), while others have used the "clear and convincing evidence" standard (*Seymour v. Harris Trust & Savings Bank of Chicago*, 264 Ill.App.3d 583, 636 N.E.2d 985, 1000, 201 Ill.Dec. 553 (1st Dist. 1994) (in counterclaim seeking injunctive relief, defendants had to present clear and convincing evidence, not just preponderance); *Heim v. Herrick*, 344 Ill.App.3d 810, 800 N.E.2d 1244, 1246, 279 Ill.Dec. 661 (4th Dist. 2003) (clear and convincing standard); *Hartlein, supra*, 601 N.E.2d at 726 – 727 (using neither standard); *Buzz Barton & Associates, Inc. v. Giannone*, 108 Ill.2d 373, 483 N.E.2d 1271, 91 Ill.Dec. 636 (1985) (neither)).

The preponderance of evidence and clear and convincing standards are standards of proof for determining facts. Yet a court is not to determine issues of fact at a hearing for a preliminary injunction. *Hartlein, supra*, 601 N.E.2d at 727; *Dixon Association for Retarded Citizens v. Thompson*, 91 Ill.2d 518, 440 N.E.2d 117, 120, 64 Ill.Dec. 565 (1982); *Lonergan v. Crucible Steel Company of America*, 37 Ill.2d 599, 229 N.E.2d 536, 542 (1967). This makes the application of either standard problematic. At the preliminary injunction hearing, decisional standards should be applied rather than evidentiary standards. Put another way, "[t]he plaintiff is not required to make out a case which would entitle him to judgment at trial; rather he need only show that he raises a 'fair question' about the existence of his right and that the court should

preserve the status quo until the case can be decided on the merits." *Hirschauer v. Chicago Sun-Times*, 192 Ill.App.3d 193, 548 N.E.2d 630, 635, 139 Ill.Dec. 245 (1st Dist 1989) (citing *Stocker Hinge Manufacturing Co. v. Darnel Industries, Inc.*, 94 Ill.2d 535, 447 N.E.2d 288, 291, 69 Ill.Dec. 71 (1983)), *appeal dismissed*, 131 Ill.2d 559 (1990).

For the threshold issue of whether the plaintiff has a clearly ascertainable right in need of protection, the court should determine, first, whether the right asserted is legally cognizable and, second, whether the facts as alleged would entitle the plaintiff to the injunctive relief sought. *Hartlein, supra*, 601 N.E.2d at 727. The facts themselves need not be proven at this point by any standard. This determination is a question of law, not one of fact.

To meet its burden on the remaining factors, the plaintiff (1) need only raise a fair question as to the likelihood of success on the merits (*Hirschauer, supra*, 548 N.E.2d at 636); (2) must show that the irreparable harm is reasonably certain and not just hypothetical (*Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry.*, 195 Ill.2d 356, 748 N.E.2d 153, 162, 254 Ill.Dec. 707 (2001) (holding that any harm suffered by plaintiff law firm was too remote and speculative to support injunctive relief); and (3) does not need to prove the lack of an adequate legal remedy as this is a legal question to be determined by the court.

Perhaps the best summary of the showing that the plaintiff must make to meet its burden of proof and demonstrate that it is entitled to a preliminary injunction is provided in *All Seasons Excavating Co. v. Bluthardt*, 229 Ill.App.3d 22, 593 N.E.2d 679, 682, 170 Ill.Dec. 790 (1st Dist. 1992), in which the court held that the petitioner need only

> **(a) raise a fair question as to the existence of the right claimed, (b) lead the court to believe that he will probably be entitled to the relief prayed for if the proof should sustain his allegations, and (c) make it appear advisable that the position of the parties should stay as they are until the court has had an opportunity to consider the case on the merits.**

H. Pleadings

1. Complaint

a. [9.88] All Facts Necessary To Support a Preliminary Injunction Must Be Clearly Pled

Any complaint in Illinois must plead the facts necessary to support a cognizable action against a defendant. *Board of Education of Dolton School District 149 v. Miller*, 349 Ill.App.3d 806, 812 N.E.2d 688, 694, 285 Ill.Dec. 868 (1st Dist. 2004); 735 ILCS 5/2-603(a). Each separate cause of action must be stated in a separate count, counterclaim, or defense. 735 ILCS 5/2-603(b), 5/2-613.

Ordinarily, pleadings are liberally construed with a view to doing substantial justice between the parties. 735 ILCS 5/2-603(c). But because a preliminary injunction is such an extraordinary remedy, the pleading standards are much more rigorous, and a court will issue a preliminary injunction only if the complaint clearly illustrates the plaintiff's right to injunctive relief on its

face. *Sadat v. American Motors Corp.*, 104 Ill.2d 105, 470 N.E.2d 997, 1002, 83 Ill.Dec. 577 (1984); *Lakefront Realty Corp. v. Lorenz*, 19 Ill.2d 415, 167 N.E.2d 236, 238 (1960); *McGinty v. Skoog Construction Co.*, 52 Ill.App.2d 456, 202 N.E.2d 112 (4th Dist. 1964) (abst.); *Hope v. Hope*, 350 Ill.App. 190, 112 N.E.2d 495, 497 (1st Dist. 1953).

The complaint must clearly and concisely set forth sufficient facts to entitle the plaintiff to an injunction. *Belden v. Tri-Star Producing Co.*, 106 Ill.App.3d 192, 435 N.E.2d 927, 934, 62 Ill.Dec. 129 (5th Dist. 1982); *Gage v. Village of Wilmette*, 233 Ill.App. 30, 38 – 39 (1st Dist. 1924). Facts alleged on information and belief do not support the issuance of a preliminary injunction. *Maas v. Cohen Associates, Inc.*, 112 Ill.App.3d 191, 445 N.E.2d 517, 520, 68 Ill.Dec. 69 (1st Dist. 1983). In fact, the sufficiency of the complaint may be used on appeal as the test for whether a preliminary injunction was properly ordered. *Tri Square Realty Corp. v. Bressler*, 17 Ill.App.2d 336, 149 N.E.2d 798, 800 (1st Dist. 1958).

(1) [9.89] Ascertainable claim for relief

A plaintiff must plead facts that demonstrate that he or she is the lawful possessor (*Postma v. Jack Brown Buick, Inc.*, 157 Ill.2d 391, 626 N.E.2d 199, 202 – 203, 193 Ill.Dec. 166 (1993); *Dennis E. v. O'Malley*, 256 Ill.App.3d 334, 628 N.E.2d 362, 371, 194 Ill.Dec. 865 (1st Dist. 1993); *Murges v. Bowman*, 254 Ill.App.3d 1071, 627 N.E.2d 330, 337, 194 Ill.Dec. 214 (1st Dist. 1993)) of a clearly ascertainable right in need of protection (*Hartlein v. Illinois Power Co.*, 151 Ill.2d 142, 601 N.E.2d 720, 726 – 727, 176 Ill.Dec. 22 (1992)), such as rights under a covenant not to compete (*Buzz Barton & Associates, Inc. v. Giannone*, 108 Ill.2d 373, 483 N.E.2d 1271, 1278, 91 Ill.Dec. 636 (1985)) or confidentiality agreement (*Strata Marketing, Inc. v. Murphy*, 317 Ill.App.3d 1054, 740 N.E.2d 1166, 1175, 251 Ill.Dec. 595 (1st Dist. 2000)), or for the preservation of property (*Save the Prairie Society v. Greene Development Group, Inc.*, 323 Ill.App.3d 862, 752 N.E.2d 523, 530 – 531, 256 Ill.Dec. 643 (1st Dist. 2001)) or enforcement of statutory rights (*People v. Fiorini*, 143 Ill.2d 318, 574 N.E.2d 612, 623, 158 Ill.Dec. 499 (1991); *Salsitz v. Kreiss*, 198 Ill.2d 1, 761 N.E.2d 724, 731, 260 Ill.Dec. 541 (2001)).

(2) [9.90] Likelihood of success on the merits

To demonstrate a likelihood of success on the merits, the claim must be well-grounded in law (James M. Fischer, UNDERSTANDING REMEDIES, pp. 248 – 249 (1999)), and the complaint must state a cause of action (*Strata Marketing, Inc. v. Murphy*, 317 Ill.App.3d 1054, 740 N.E.2d 1166, 1178 – 1179, 251 Ill.Dec. 595 (1st Dist. 2000), citing *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995)) that is pled with sufficient facts and specificity to withstand a motion to strike under 735 ILCS 5/2-615. In *Strata Marketing, supra*, the plaintiff alleged that the defendant could not operate or function without relying on the plaintiff's alleged trade secrets. This allegation was sufficient to overcome a motion to dismiss (and was therefore sufficiently pled to support a likelihood of success on the merits) because, if proven, it would entitle the plaintiff to relief.

PRACTICE POINTER

✓ In order to demonstrate a likelihood of success on the merits, a plaintiff must adequately plead his or her claim. Thus, for instance, in the context of a trade secret, the plaintiff must plead that the information at issue (a) is a trade secret, (b) was misappropriated by the defendant, and (c) was or will be used in the defendant's business.

(3) [9.91] Irreparable harm

Irreparable harm does not mean that the harm inflicted is beyond the possibility of repair or beyond compensation in damages or even that injury is great, but rather that the transgression is of a continuing nature of such constant and frequent occurrence that redress cannot be had at law. *Board of Education of Niles Township High School District No. 219 v. Board of Education of Northfield Township High School District No. 225,* 112 Ill.App.3d 212, 445 N.E.2d 464, 469, 68 Ill.Dec. 16 (1st Dist. 1983); *Kanter & Eisenberg v. Madison Associates,* 116 Ill.2d 506, 508 N.E.2d 1053, 1055, 108 Ill.Dec. 476 (1987); *Redfern v. Sullivan,* 111 Ill.App.3d 372, 444 N.E.2d 205, 67 Ill.Dec. 166 (4th Dist. 1982); *Belden v. Tri-Star Producing Co.,* 106 Ill.App.3d 192, 435 N.E.2d 927, 934, 62 Ill.Dec. 129 (5th Dist. 1982). Irreparable harm follows any continuing injury that is not adequately safeguarded. *Tierney v. Village of Schaumburg,* 182 Ill.App.3d 1055, 538 N.E.2d 904, 907, 131 Ill.Dec. 529 (1st Dist. 1989). Merely stating as an unsupported conclusion that the plaintiff will suffer irreparable harm is insufficient, but irreparable harm and inadequate remedy at law do not need to be pled when seeking statutory relief although it is safer to do so. *See People v. Fiorini,* 143 Ill.2d 318, 574 N.E.2d 612, 623, 158 Ill.Dec. 499 (1991); *Sadat v. American Motors Corp.,* 104 Ill.2d 105, 470 N.E.2d 997, 1002, 83 Ill.Dec. 577 (1984).

(4) [9.92] Inadequate remedy at law or in equity

A plaintiff must demonstrate in his or her pleadings that there is no other adequate remedy at law (*City of Chicago v. Festival Theatre Corp.,* 91 Ill.2d 295, 438 N.E.2d 159, 167, 63 Ill.Dec. 421 (1982)) or at equity (*Kanter & Eisenberg v. Madison Associates,* 116 Ill.2d 506, 508 N.E.2d 1053, 1055, 108 Ill.Dec. 476 (1987)) before a court will grant a preliminary injunction. *Redfern v. Sullivan,* 111 Ill.App.3d 372, 444 N.E.2d 205, 67 Ill.Dec. 166 (4th Dist. 1982); *Belden v. Tri-Star Producing Co.,* 106 Ill.App.3d 192, 435 N.E.2d 927, 934, 62 Ill.Dec. 129 (5th Dist. 1982). As usual, a general allegation unsupported by specific facts is insufficient. *Larkin v. Howlett,* 19 Ill.App.3d 343, 311 N.E.2d 367 (4th Dist. 1974). For an alternative remedy to be considered adequate, it must be clear and complete and provide the same practical and efficient resolution as an injunction would. *Tamalunis v. City of Georgetown,* 185 Ill.App.3d 173, 542 N.E.2d 402, 413, 134 Ill.Dec. 223 (4th Dist. 1989); *Festival Theatre, supra,* 438 N.E.2d at 167; *Borrowman v. Howland,* 119 Ill.App.3d 493, 457 N.E.2d 103, 75 Ill.Dec. 313 (4th Dist. 1983). Money damages, generally considered an adequate remedy (*Allstate Amusement Company of Illinois, Inc. v. Pasinato,* 96 Ill.App.3d 306, 421 N.E.2d 374, 376, 51 Ill.Dec. 866 (1st Dist. 1981)), are not adequate if unique property is involved, if the injury is of such a nature that the damages cannot reasonably be ascertained, or if the injury is so remote or collateral to the harm that a court would not award money damages. *Amigleo v. Bernardi,* 175 Ill.App.3d 449, 529 N.E.2d 1020, 1023, 124 Ill.Dec. 903 (1st Dist. 1988), *appeal denied,* 124 Ill.2d 553 (1989).

b. [9.93] Pray for Specific Relief

The plaintiff's prayer for relief should specifically ask for an injunction and articulate the terms of the proposed injunction. An application for a preliminary injunction may be included in the original complaint, in which case the complaint must be verified, or it may be requested by a motion filed at the same time and supported by proper affidavits. But absent a proper request, it is inappropriate for a court to grant injunctive relief. *Board of Education of Dolton School District 149 v. Miller*, 349 Ill.App.3d 806, 812 N.E.2d 688, 694, 285 Ill.Dec. 868 (1st Dist. 2004).

c. [9.94] Complaint Must Be Verified

A complaint seeking a preliminary injunction must be verified and may not be based merely on information and belief. *Board of Education of Dolton School District 149 v. Miller*, 349 Ill.App.3d 806, 812 N.E.2d 688, 694, 285 Ill.Dec. 868 (1st Dist. 2004); *Maas v. Cohen Associates, Inc.*, 112 Ill.App.3d 191, 445 N.E.2d 517, 520, 68 Ill.Dec. 69 (1st Dist. 1983).

PRACTICE POINTER

✓ The trial court will look first to the verified complaint when a preliminary injunction is sought. Be sure that your complaint is verified and alleges facts (not just conclusions of fact or law) sufficient to satisfy the four basic elements discussed in §§9.89 – 9.92 above. Additional considerations that should be pled in the plaintiff's verified complaint are that (1) the balance of equities weighs in favor of granting the injunction, and (2) the public interest benefits from, or is unaffected by, the grant of an injunction. Conclusory allegations and allegations made on information and belief will not be considered. Be certain that the complaint and verification satisfy the standards of S.Ct. Rule 191, and if the complaint is verified by certification, 735 ILCS 5/1-109 must also be observed. Remember, if any pleading is verified, every subsequent pleading must also be verified, unless verification is excused by the court. 735 ILCS 5/2-605(a).

2. [9.95] Motion for Preliminary Injunction

An application for a preliminary injunction "may be included in the original complaint, in which case the complaint must be verified, or it may be requested by a motion filed at the same time or later and supported by proper affidavits. *Board of Education of Dolton School District 149 v. Miller*, 349 Ill.App.3d 806, 812 N.E.2d 688, 694, 285 Ill.Dec. 868 (1st Dist. 2004), quoting III Clark Asahel Nichols, ILLINOIS CIVIL PRACTICE §35:16, p. 38 (rev. ed. 2002).

PRACTICE POINTER

✓ A motion for a preliminary injunction is often included with a temporary restraining order motion as an alternative form of relief.

See the sample form of an emergency motion for a temporary restraining order and preliminary injunction in §9.129 below.

3. [9.96] Defensive Pleadings

A defendant should file a verified answer, affirmative defenses, and a memorandum of law in opposition to a motion for a preliminary injunction or temporary restraining order. The defendant should consider filing a motion to strike under 735 ILCS 5/2-615 or a motion to dismiss under 735 ILCS 5/2-619 but should be prepared with a verified answer in case the motion to strike or dismiss is denied or continued for briefing and oral argument. If a defendant files and then withdraws a §2-619 motion in order to file an answer to the complaint, the defendant should request an order authorizing him or her to withdraw this motion and file an answer without prejudice to any subsequent affirmative matters raised by the §2-619 motion. An answer must contain an explicit admission or denial of each allegation of the pleading to which it relates. 735 ILCS 5/2-610(a). If a defendant can deny all allegations in a paragraph or all remaining allegations, the defendant need not separately describe each allegation of this paragraph. S.Ct. Rule 136(a). Allegations not specifically denied are admitted unless the party states that he or she lacks sufficient information to form a belief as to the truth of the allegation and attaches an affidavit swearing that the declaration of want of knowledge is true. 735 ILCS 5/2-610(b). Affirmative defenses, if any exist, must be stated in the answer. 735 ILCS 5/2-613(d).

4. [9.97] Injunctive Relief May Be Sought Against a Third Party Under Certain Circumstances

A defendant against whom an injunction is sought may seek injunctive relief against a third party if the third party's alleged liability is derivative of the original defendant's liability and not an entirely separate and independent claim, even one arising from the same general facts. 735 ILCS 5/2-406(b); *People v. Fiorini,* 143 Ill.2d 318, 574 N.E.2d 612, 620 – 621, 158 Ill.Dec. 499 (1991).

I. [9.98] All Persons or Entities with Knowledge of an Injunction Are Bound by It

Any person or entity with knowledge of the contents of an injunction order is subject to punishment for contempt of court for any violation of this order. Injunctions are binding to the parties in the action on the parties to the action, their officers, agents, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order. 735 ILCS 5/11-101.

J. [9.99] Duration

A preliminary injunction may last until (1) adjudication on the merits, (2) a specified date certain, (3) a further hearing as specified in the order granting the injunction, or (4) until it is vacated or dissolved. *Bohn Aluminum & Brass Co. v. Barker,* 55 Ill.2d 177, 303 N.E.2d 1 (1973); *Keefe-Shea Joint Venture v. City of Evanston,* 364 Ill.App.3d 48, 845 N.E.2d 689, 700, 300 Ill.Dec. 800 (1st Dist. 2005); *Bullard v. Bullard,* 66 Ill.App.3d 132, 383 N.E.2d 684, 687, 22 Ill.Dec. 876 (5th Dist. 1978).

K. [9.100] Bond

In its discretion, a court may require the party seeking an injunction to give bond to pay for costs and damages incurred by any party found to have been wrongfully enjoined or restrained. 735 ILCS 5/11-103. If a party fails to request a bond at the hearing, this party waives the right to do so. *Central Water Works Supply, Inc. v. Fisher,* 240 Ill.App.3d 952, 608 N.E.2d 618, 624, 181 Ill.Dec. 545 (4th Dist. 1993).

See the sample form of an injunction bond in §9.133 below.

L. [9.101] Order

To be enforceable, the order granting an injunction must be definite, clear, and precise so that the party enjoined will have no excuse for failing to obey it. *Carriage Way Apartments v. Pojman,* 172 Ill.App.3d 827, 527 N.E.2d 89, 97, 122 Ill.Dec. 717 (2d Dist. 1988); *Streif v. Bovinette,* 88 Ill.App.3d 1079, 411 N.E.2d 341, 44 Ill.Dec. 372 (5th Dist. 1980). The order must make specific findings relating to each necessary element, state the reasons for granting an injunction, enumerate the specific behavior that is enjoined, and specify the duration of the injunction, without reference to other documents. *Howard Johnson & Co. v. Feinstein,* 241 Ill.App.3d 828, 609 N.E.2d 930, 936, 182 Ill.Dec. 396 (1st Dist. 1993); *Hoda v. Hoda,* 122 Ill.App.2d 283, 258 N.E.2d 386 (2d Dist. 1970); 735 ILCS 5/11-101. If the bond requirement is waived, the order should explain why. *Carriage Way Apartments, supra,* 527 N.E.2d at 95; *Streif, supra.* The injunction itself should be reasonable and do no more than is necessary to protect the specific rights at stake. *Lake Louise Improvement Ass'n v. Multimedia Cablevision of Oak Lawn, Inc.,* 157 Ill.App.3d 713, 510 N.E.2d 982, 109 Ill.Dec. 914 (1st Dist. 1987); *Binder Plumbing & Heating, Inc. v. Plumbers & Pipefitters Local Union No. 99,* 253 Ill.App.3d 972, 625 N.E.2d 934, 192 Ill.Dec. 779 (4th Dist. 1993).

PRACTICE POINTER

✓ The order granting the injunction should state specific findings on (1) each of the four traditional factors, (2) reasons for granting the injunction order, (3) the specific acts restrained, (4) the date and time the injunction order was issued, and (5) the bond or reason for not requiring a bond.

See the sample form of an order for a preliminary injunction in §9.132 below.

M. [9.102] Motion To Dissolve

A court may hear a motion to dissolve an injunction any time before the injunction expires, before or after an answer is filed. *Doe v. Illinois Department of Professional Regulation,* 341 Ill.App.3d 1053, 793 N.E.2d 119, 123, 275 Ill.Dec. 639 (1st Dist. 2003); 735 ILCS 5/11-108. If an answer has been filed, the motion to dissolve will be decided on the weight of the evidence. 735 ILCS 5/11-108. Hearings on motions to dissolve are summary proceedings, and a court may

dissolve an injunction even if the evidence has not changed. The decision whether to dissolve an injunction rests in the sound discretion of the court. *International Association of Firefighters Local No. 23 v. City of East St. Louis*, 206 Ill.App.3d 580, 565 N.E.2d 264, 266, 152 Ill.Dec. 22 (5th Dist. 1990).

N. Appeal

1. [9.103] Stay Orders

One may not appeal an order compelling mediation and staying court proceedings pending completion of mediation (*Short Brothers Construction, Inc. v. Korte & Luitjohan Contractors, Inc.*, 356 Ill.App.3d 958, 828 N.E.2d 754, 756, 293 Ill.Dec. 444 (5th Dist. 2005)), but one may appeal an order denying a motion for partial stay of litigation (*Allianz Insurance Co. v. Guidant Corp.*, 355 Ill.App.3d 721, 839 N.E.2d 113, 118, 298 Ill.Dec. 126 (2d Dist. 2005)).

2. [9.104] Preliminary Injunctions

Appeals relating to preliminary injunctions are governed by S.Ct. Rule 307. *Skolnick v. Altheimer & Gray*, 191 Ill.2d 214, 730 N.E.2d 4, 11, 246 Ill.Dec. 324 (2000). The substance, rather than the form, of the order determines whether Rule 307 applies. *Goodrich Corp. v. Clark*, 361 Ill.App.3d 1033, 837 N.E.2d 953, 958, 297 Ill.Dec. 502 (4th Dist. 2005). If an injunction was granted ex parte, the party wishing to appeal must first present, on notice, a motion to the trial court to vacate the order. S.Ct. Rule 307(b). Otherwise, a notice of interlocutory appeal must be filed with the appellate court within 30 days from the entry of the order being appealed. S.Ct. Rule 307(a). An appeal is moot if the injunction expires before the appellate court rules. *Multiut Corp. v. Draiman*, 359 Ill.App.3d 527, 834 N.E.2d 43, 55, 295 Ill.Dec. 818 (1st Dist. 2005).

3. [9.105] Standard of Review on Appeal Is Abuse of Discretion

Because the decision whether to grant, deny, modify, dissolve, or extend an injunction is entrusted to the sound discretion of the trial court, this decision will be reversed on appeal only if the court abused its discretion. *Desnick v. Department of Professional Regulation*, 171 Ill.2d 510, 665 N.E.2d 1346, 1352, 216 Ill.Dec. 789 (1996); *Hartlein v. Illinois Power Co.*, 151 Ill.2d 142, 601 N.E.2d 720, 176 Ill.Dec. 22 (1992). Some courts have used a "manifest weight of the evidence" standard to determine whether the trial court abused its discretion. *See, e.g., Heritage Standard Bank & Trust Co. v. Steel City National Bank*, 234 Ill.App.3d 48, 599 N.E.2d 1283, 1287, 175 Ill.Dec. 269 (1st Dist. 1992); *Continental Cablevision of Cook County, Inc. v. Miller*, 238 Ill.App.3d 774, 606 N.E.2d 587, 595, 179 Ill.Dec. 755 (1st Dist. 1992); *George S. May International Co. v. International Profit Associates*, 256 Ill.App.3d 779, 628 N.E.2d 647, 652, 195 Ill.Dec. 183 (1st Dist. 1993); *Fischer v. Brombolich*, 207 Ill.App.3d 1053, 566 N.E.2d 785, 793, 152 Ill.Dec. 908 (5th Dist. 1991). *See also Lake in the Hills Aviation Group, Inc. v. Village of Lake in the Hills*, 298 Ill.App.3d 175, 698 N.E.2d 163, 168, 232 Ill.Dec. 325 (2d Dist. 1998) (appellate court will not set aside trial court's determination absent "manifest abuse of discretion"). This is tantamount to changing the standard of review and is especially inappropriate in light of the fact that the trial court makes no factual determinations when issuing a preliminary injunction.

Questions of law are reviewed de novo by the appellate court. *Lyon v. Department of Children & Family Services,* 209 Ill.2d 264, 807 N.E.2d 423, 430, 282 Ill.Dec. 799 (2004). A mistake of law by the trial court, while not an abuse of discretion, is grounds for reversal of a decision relating to a preliminary injunction. *Desnick, supra.*

PRACTICE POINTER

✓ Always check for the latest version of the S.Ct. Rule 307 when preparing an appeal.

O. [9.106] Damages for Wrongful Entry of Preliminary Injunction

If a preliminary injunction is dissolved by the trial or appellate court (and not simply by expiration on its own terms) prior to the final disposition of the action, the party wrongfully enjoined can recover whatever damages were caused by the preliminary injunction. 735 ILCS 5/11-110; *Buzz Barton & Associates, Inc. v. Giannone,* 108 Ill.2d 373, 483 N.E.2d 1271, 1274 – 1275, 91 Ill.Dec. 636 (1985); *Panduit Corp. v. All States Plastic Manufacturing Co.,* 84 Ill.App.3d 1144, 405 N.E.2d 1316, 1320, 40 Ill.Dec. 224 (1st Dist. 1980); *Meyer v. Marshall,* 62 Ill.2d 435, 343 N.E.2d 479, 482 (1976); *Schien v. City of Virden,* 5 Ill.2d 494, 126 N.E.2d 201, 206 (1955); *Stocker Hinge Manufacturing Co. v. Darnel Industries, Inc.,* 94 Ill.2d 535, 447 N.E.2d 288, 291, 69 Ill.Dec. 71 (1983); *C.D. Peters Construction Co. v. Tri-City Regional Port District,* 281 Ill.App.3d 41, 666 N.E.2d 44, 47, 216 Ill.Dec. 876 (5th Dist. 1996). The issue of damages for a wrongfully issued injunction may be preserved by timely filing a motion to dissolve the injunction, even if this motion itself becomes moot because it was not ruled on by the court before the injunction expired. *Hirschauer v. Chicago Sun-Times,* 192 Ill.App.3d 193, 548 N.E.2d 630, 634, 139 Ill.Dec. 245 (1st Dist. 1989); *Emerson Electric Co. v. Sherman,* 150 Ill.App.3d 832, 502 N.E.2d 414, 417, 104 Ill.Dec. 151 (1st Dist. 1986); *Meyer, supra,* 343 N.E.2d at 482 – 483. A wrongfully enjoined party may recover only damages directly caused by the injunction and efforts to have it dissolved or reversed (including attorneys' fees and litigation costs), but the amount of damages recoverable is not limited by the amount of the bond posted. *Kohlsaat v. Crate,* 144 Ill. 14, 32 N.E. 481, 482 (1892). It is important to carefully track the amount of time and costs an attorney spends specifically seeking to overturn an erroneous injunction because no money may be recovered that was spent in connection with the merits of the case. *Scherzer v. Keller,* 321 Ill. 324, 151 N.E. 915, 919 (1926); *Kolin v. Leitch,* 351 Ill.App. 66, 113 N.E.2d 806, 808 – 809 (1st Dist. 1953). *Cf. American Warehousing Services, Inc. v. Weitzman,* 169 Ill.App.3d 708, 533 N.E.2d 366, 370, 127 Ill.Dec. 494 (1st Dist. 1988); *Cromwell Paper Co. v. Wellman,* 23 Ill.App.2d 263, 162 N.E.2d 500, 502 – 503 (1st Dist. 1959).

PRACTICE POINTER

✓ Always track attorney time spent on efforts to overturn an injunction separately from time spent on other aspects of the case.

P. Federal Practice

1. [9.107] Federal Rule of Civil Procedure 65

Preliminary injunctions are often brought at the beginning of litigation and requested in the complaint, but requests for preliminary injunctions may also be raised later by motion or an order to show cause.

Fed.R.Civ.P. 65 does not describe a detailed procedure, and neither does it articulate the type of hearing required.

"No preliminary injunction shall be issued without notice to the adverse party." Fed.R.Civ.P. 65(a)(1). Notice of the hearing should be served at least five days prior to the hearing. Fed.R.Civ.P. 6(d). *See also People ex rel. Hartigan v. Peters,* 871 F.2d 1336, 1341 (7th Cir. 1989) (notice that included date of hearing and name of judge but omitted time was sufficient because defendant could have contacted court to determine "what was going on"). Affidavits must be submitted to the other party at least one day before the hearing. Fed.R.Civ.P. 6(d).

A hearing must be held to give the defendant a fair opportunity to oppose the issuance of a preliminary injunction. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County,* 415 U.S. 423, 39 L.Ed.2d 435, 94 S.Ct. 1113, 1121 n.7 (1974) (notice required by Rule 65(a) before preliminary injunction can issue implies hearing in which defendant is given fair opportunity to oppose application and to prepare for such opposition).

> **Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.** Fed.R.Civ.P. 65(a)(2).

If the preliminary injunction is granted, the order must state findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a). This provides the appellate court with an adequate record to review and ensures that the trial court carefully reviews the evidence. See also Fed.R.Civ.P. 65(d), requiring that the injunction be specific in terms and describe in reasonable detail the act or acts to be restrained.

2. [9.108] The Supreme Court Has Not Articulated a Clear Standard

Despite inconsistency between the various circuits, the courts all agree that (a) the primary purpose of a preliminary injunction is to maintain the status quo until the trial on the merits (*Roland v. Air Line Employees Association, International,* 753 F.2d 1385, 1392, n.9 (7th Cir. 1985) (although there are times when preliminary injunction must mandate rather than prohibit

action)), (b) the district court has broad discretion to grant or deny preliminary injunctions (*Advent Electronics, Inc. v. Buckman*, 112 F.3d 267, 274 (7th Cir. 1997)), and (c) a preliminary injunction is an extraordinary remedy that should be used sparingly (*Chicago District Council of Carpenters Pension Fund v. K & I Construction, Inc.*, 270 F.3d 1060, 1064 (7th Cir. 2001)).

3. [9.109] The Seventh Circuit Uses a Sliding-Scale, Five-Part Test

Under the five-part test, the party seeking an injunction must show (a) there is no adequate remedy at law; (b) there will be irreparable harm if the injunction is not granted; (c) there is a better than negligible likelihood of success on the merits; (d) the balance of hardships weighs in favor of the party seeking an injunction, with the greater the likelihood of success, the less weight being accorded to the balance of hardships; and (e) granting the injunction serves, or at least does not harm, the public interest. *Teamsters Local Unions Nos. 75 & 200 v. Barry Trucking, Inc.*, 176 F.3d 1004, 1011 (7th Cir. 1999); *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386 – 387 (7th Cir. 1984).

4. [9.110] Security Is Required

Fed.R.Civ.P. 65(c) requires a bond or security to be posted before a preliminary injunction becomes effective. The security is to be in an amount deemed proper by the court for the payment of costs and damages that may be incurred by any party found to have been wrongfully enjoined. *Ty, Inc. v. Publications International Ltd.*, 292 F.3d 512, 516 (7th Cir. 2002) (injunction bond is to compensate defendant, in event defendant prevails on merits, for harm that injunction entered before final decision caused him or her).

5. [9.111] Anyone with Knowledge of the Order Is Subject to an Injunction

Injunctions and temporary restraining orders are binding on the parties to the action and their officers, agents, employees, and attorneys and on those persons in active concert or participation with them who receive actual notice of the order. 735 ILCS 5/11-101; Fed.R.Civ.P. 65(d).

6. Elements

a. [9.112] The Legal Standards for a Temporary Restraining Order and a Preliminary Injunction Are Identical

The standards for a temporary restraining order and a preliminary injunction are functionally identical in the Seventh Circuit. *Abbott Laboratories v. Sandoz, Inc.*, No. 05 C 5373, 2006 U.S.Dist. LEXIS 90747 at *5 (N.D.Ill. Dec. 15, 2006).

b. [9.113] The Two-Step Analysis

The sliding-scale, five-part test enumerated in §9.109 above is generally applied using a two-step analysis. First, the questions of likelihood of success on the merits, threat of irreparable harm, and inadequate remedy at law are considered. Next, courts balance the hardships and consider the impact on the public interest. *See Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386 – 389 (7th Cir. 1984).

(1) [9.114] Irreparable harm

Irreparable harm is harm that cannot be prevented or fully rectified by the final judgment after the trial. *Roland Machinery Co. v. Dresser Industries, Inc.,* 749 F.2d 380, 386 (7th Cir. 1984). When the only remedy requested at trial is damages, the elements of irreparable harm and inadequate remedy at law merge, and the remaining question is determined by whether the plaintiff will be made whole if he or she prevails on the merits and is awarded the damages sought. *Id.* Transgressions of a continuing nature, such as constant breach of contract resulting in damage to the good will of a business, are sufficient to establish irreparable harm. *Fasti USA v. Fasti Farrag & Stipsits GmbH,* No. 02 C 8191, 2002 U.S.Dist. LEXIS 22840 at **11 – 12 (N.D.Ill. Nov. 25, 2002), citing *Prentice Medical Corp. v. Todd,* 145 Ill.App.3d 692, 495 N.E.2d 1044, 1051, 99 Ill.Dec. 309 (1st Dist. 1986).

(2) [9.115] Inadequate remedy at law

Preliminary injunctions are an extraordinary measure. For this reason, a court will exercise its power to grant injunctive relief only if there is no adequate remedy otherwise available. Determining that damages are inadequate is not the same as determining that they are "wholly ineffectual." *Roland Machinery Co. v. Dresser Industries, Inc.,* 749 F.2d 380, 386 (7th Cir. 1984). Damages may be inadequate for four reasons: (a) the award may come too late to save the plaintiff's business; (b) the plaintiff may not be able to finance his or her lawsuit without revenues from the business that the defendant is threatening to destroy; (c) damages may be unobtainable due to the defendant's financial condition or insolvency before the award may be collected; and (d) the nature of the plaintiff's loss may make damages very difficult to calculate. *Id.*

In federal cases, this element is often considered in conjunction with the requirement of irreparable harm in the absence of an injunction. *Libertarian Party of Indiana v. Packard,* 741 F.2d 981, 984 – 985 (7th Cir. 1984); *Roland Machinery, supra,* 749 F.2d at 386 (when only remedy sought at trial is damages, requirements of irreparable harm (*i.e.,* harm that cannot be prevented or fully rectified by final judgment after trial) and inadequate remedy at law merge). For example, in *Coca-Cola Co. v. Alma-Leo U.S.A., Inc.,* 719 F.Supp. 725, 729 (N.D.Ill. 1989), the court's analysis of the plaintiff's trademark dilution claim subsumed the inadequate remedy at law element within the irreparable harm element, finding that because "dilution . . . gnaw[s] away insidiously at the value of a mark . . . [t]hat injury would be irreparable, not because money damages would fail to make the plaintiff whole, but rather because Coca-Cola cannot be expected to quantify the probable reduction in revenue." In other words, the court considered the touchstone of inadequate remedy at law analysis (*i.e.,* that money damages would either fail to make the plaintiff whole or be unquantifiable) as part of its irreparable harm analysis. *See also International Profit Associates, Inc. v. Paisola,* 461 F.Supp.2d 672, 679 (N.D.Ill. 2006) (finding inadequate remedy at law and irreparable harm when defendant's alleged infringement of plaintiff's trademarks will lead to "incalculable loss of its reputation with its customers" and finding that because it is difficult to assess these damages, they "are considered to have no adequate remedy at law, and to be irreparable").

(3) [9.116] Likelihood of success on the merits and balancing of harms

The balancing of harms is determined by a "sliding scale" analysis. The stronger the movant's showing that it is likely to succeed on the merits, the less strong a showing it is required to make on the balance-of-harms factor. *See Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 123 (7th Cir. 1982) (when movant's likelihood of success is great, balance-of-harms analysis can favor adverse party, yet movant may still prevail; however, when movant's likelihood of success is small, balance of harms must favor it).

The likelihood of success must be better than negligible. *Id.* The threshold is low. *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 387 (7th Cir. 1984). It does not require a finding that one side is any more likely than the other to prevail, and it is possible that a better than negligible likelihood of success may be satisfied by both parties. *Oxford Capital Illinois, L.L.C. v. Sterling Payroll Financial, L.L.C.*, No. 01 C 1173, 2002 U.S.Dist. LEXIS 4372 at *12 n.2 (N.D.Ill. Mar. 15, 2002); *Roland Machinery, supra*, 749 F.2d at 387. Equity jurisdiction exists only to remedy legal wrongs. Unless the plaintiff can show a probability of success, there is no basis to invoke the court's equitable powers. *Roland Machinery, supra*, 749 F.2d at 387.

Unlike the practice in Illinois state courts, the federal district court must make a fairly specific determination of the movant's likelihood of success in order to help determine the balance of the relative harms. *Roland Machinery, supra*, 749 F.2d at 387. *See Omega Satellite, supra*, 694 F.2d at 123. If the plaintiff has shown a better than negligible likelihood of success, the court must attempt to determine the degree of likelihood because this prong affects the analysis balancing hardships. *Id.* The sliding scale utilizes the movant's likelihood of success on the merits. If likelihood of success is high, balance of harms is less significant; if success is unlikely, the movant must make a stronger showing on relative hardships. *Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 314 (7th Cir. 1994). When balancing the relative equities, the court must also consider any irreparable harm the defendant might suffer if the injunction is granted and whether that harm could be cured by the defendant ultimately prevailing on the merits or fully compensated by the injunction bond the plaintiff is required to post. *Roland Machinery, supra*, 749 F.2d at 387; Fed.R.Civ.P. 65(c).

(4) [9.117] Impact on public interest

If issuing the injunction benefits the public interest, this factor weighs in favor of granting the injunction. If the issue of the injunction will hurt the public interest, this factor weighs against granting the injunction. *Platinum Home Mortgage Corp. v. Platinum Financial Group, Inc.*, 149 F.3d 722, 726 (7th Cir. 1998) (recognizing that public interest benefits from competition); *Fasti USA v. Fasti Farrag & Stipsits GmbH*, No. 02 C 8191, 2002 U.S.Dist. LEXIS 22840 at **12 – 13 (N.D.Ill. Nov. 25, 2002).

c. [9.118] Persons Bound by the Order

An injunction or temporary restraining order is binding "upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

Fed.R.Civ.P. 65(d). *See Rockwell Graphic Systems, Inc. v. DEV Industries, Inc.,* 91 F.3d 914, 919 – 920 (7th Cir. 1996) (enumerating two lines of cases interpreting "active concert or participation" with respect to third-parties: (1) nonparties, who are successors in interest to named parties, are bound with respect to subject matter of injunction; and (2) parties may subject themselves to injunction's proscriptions by aiding or abetting named parties in concerted attempt to subvert those proscriptions).

d. [9.119] Motion To Dissolve

An injunction may be dissolved if the enjoined party demonstrates a change in circumstances or that it would be severely injured by the continued injunction. *Truck Drivers, Oil Drivers, Filling Station & Platform Workers, Local 705 v. Almarc Manufacturing, Inc.,* 553 F.Supp. 1170, 1175 (N.D.Ill. 1982). The decision to dissolve an injunction rests with the sound discretion of the trial court. *Casey K. v. St. Anne Community High School District No. 302,* 400 F.3d 508, 513 (7th Cir. 2005).

All injunctions entered prior to the removal of a case from state to federal court remain in full force and effect until dissolved or modified by the federal court. 28 U.S.C. §1450; *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County,* 415 U.S. 423, 39 L.Ed.2d 435, 94 S.Ct. 1113, 1117 – 1118 (1974). Once a case has been removed to federal court, any motion to dissolve or modify the injunction will be governed by federal law. *Granny Goose, supra,* 94 S.Ct. at 1117 – 1118.

e. [9.120] Damages for Wrongfully Entered Injunctions

To collect damages on an injunction bond, the adverse party must prove (1) the injunction was wrongfully issued, and (2) the party suffered damages as a result of the wrongfully issued injunction. *LaSalle Capital Group, Inc. v. Alexander Doll Co.,* No. 95 C 1640, 1995 U.S.Dist. LEXIS 14338 at *7 (N.D.Ill. Sept. 28, 1995); Fed.R.Civ.P. 65(c).

Because the bond is intended to cover the damages resulting from the effect of the injunction, attorneys' fees are not generally recoverable. *Coyne-Delany Co. v. Capital Development Board of State of Illinois,* 717 F.2d 385, 390 (7th Cir. 1983).

f. [9.121] Appeals

Federal courts of appeal have jurisdiction over interlocutory orders granting, continuing, modifying, refusing, or dissolving injunctions or refusing to dissolve or modify injunctions, except when a direct review may be had in the Supreme Court. 28 U.S.C. §1292(a)(1). Under Rule 4 of the Federal Rules of Appellate Procedure, appeals from orders relating to injunctions may be had as of right. Seventh Circuit courts apply an abuse of discretion standard when reviewing preliminary injunctions. *Christian Legal Society v. Walker,* 453 F.3d 853, 871 (7th Cir. 2006).

IV. [9.122] ANY PERSON OR ENTITY IN VIOLATION OF AN INJUNCTION ORDER IS SUBJECT TO PUNISHMENT FOR CONTEMPT OF COURT

Any person or entity with knowledge of the contents of an injunction order is subject to punishment for contempt of court for any violation of the order. *Porter v. Alexenburg,* 396 Ill. 57, 71 N.E.2d 58, 59 – 60 (1947). In addition to violations of the express terms of an injunction, a person or entity may also face punishment for violating the purpose of an injunction. *People ex rel. Department of Transportation v. Fansler,* 103 Ill.App.3d 149, 430 N.E.2d 741, 742, 58 Ill.Dec. 709 (4th Dist. 1982). A person or entity not a party to the lawsuit may face punishment for contempt for aiding and abetting a party to the lawsuit to violate the injunction, even if the party himself or herself is not found guilty of contempt. *People ex rel. Scott v. Master Barbers & Beauty Culturists Ass'n,* 9 Ill.App.3d 981, 293 N.E.2d 393, 397 (1st Dist. 1973). The court that granted the injunction order has the power to punish any violation of the injunction, even if the order is on appeal and even if the order is reversed on appeal. *A.R. Barnes & Co. v. Chicago Typographical Union No. 16,* 232 Ill. 402, 83 N.E. 932, 934 (1908); *Cory Corp. v. Fitzgerald,* 403 Ill. 409, 86 N.E.2d 363, 366 – 367 (1949).

Criminal or civil contempt proceedings are initiated by filing a verified petition. Punishment, within the court's discretion, may include fines or prison terms but must not be excessive. If a violation of an injunctive order also constitutes a violation of a criminal statute, punishment that is comparable to punishment for this crime is appropriate. *People ex rel. Environmental Protection Agency v. Illinois Central R.R.,* 12 Ill.App.3d 549, 298 N.E.2d 737, 738 (4th Dist. 1973); *People v. Sequoia Books, Inc.,* 172 Ill.App.3d 627, 527 N.E.2d 50, 58, 122 Ill.Dec. 687 (2d Dist.), *appeal denied,* 123 Ill.2d 565 (1988), *cert. denied,* 109 S.Ct. 2447 (1989). However, even contumacious violations do not give rise to a claim for damages by the offended party. *Kukla v. Kukla,* 184 Ill.App.3d 585, 540 N.E.2d 510, 512, 132 Ill.Dec. 770 (1st Dist. 1989). It is improper to award damages for contempt of court to a party to the lawsuit. *Eberle v. Greene,* 71 Ill.App.2d 85, 217 N.E.2d 6, 10 (3d Dist. 1966).

V. STATUTORY REMEDIES

A. [9.123] Compelling or Staying Arbitration

Under the Uniform Arbitration Act, a party may seek an order to compel arbitration and stay court proceedings or to stay arbitration in favor of court proceedings. 710 ILCS 5/2. The only question with respect to these orders is whether there is a valid arbitration agreement between the parties. *School District No. 46, Kane, Cook & DuPage Counties, Illinois v. Del Bianco,* 68 Ill.App.2d 145, 215 N.E.2d 25, 30 (2d Dist. 1966) (party may obtain stay of arbitration proceedings if there is no agreement to arbitrate); *Board of Trustees of Junior College District No. 508, County of Cook v. Cook County College Teachers Union, Local 1600,* 22 Ill.App.3d 1053, 318 N.E.2d 197, 199 (1st Dist. 1974) (sole issue is whether there is agreement to arbitrate), *aff'd,* 62 Ill.2d 470 (1976); *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr,* 124 Ill.2d 435, 530 N.E.2d 439, 443, 125 Ill.Dec. 281 (1988) (court proceeding may be stayed pending final outcome of arbitration). If the existence of such an agreement is disputed, the court will hold a summary hearing and then rule accordingly. 710 ILCS 5/2(a).

B. [9.124] No Injunctions or Restraining Orders for Labor Disputes

The Labor Dispute Act permits injunctions or restraining orders with respect to labor disputes only if violence, threats, or intimidation are involved. *Binder Plumbing & Heating, Inc. v. Plumbers & Pipefitters Local Union No. 99*, 253 Ill.App.3d 972, 625 N.E.2d 934, 938, 192 Ill.Dec. 779 (4th Dist. 1993). The operative language in the Labor Disputes Act is that persons may act "peaceably and without threats or intimidation" when picketing a company. 820 ILCS 5/1. Further, because of the free speech rights protesters are entitled to exercise, isolated acts of coercion or violence do not justify the extraordinary remedy of injunctive relief. *Binder Plumbing, supra*, 625 N.E.2d at 939.

C. [9.125] Trademarks May Be Protected with Injunctions

The owner of a registered trademark may enjoin unauthorized manufacture, use, display, or sale of any counterfeits or imitations of this mark by another. 765 ILCS 1036/70. In order to prevail on a trademark claim, the owner of the mark must show that (1) its mark is a valid mark entitled to legal protection, (2) the defendant is using a similar mark, and (3) the defendant's use of a similar mark creates a "likelihood of confusion" by the consuming public. *Rosario D. Salerno's Sons, Inc. v. Butta*, 263 Ill.App.3d 42, 635 N.E.2d 1339, 1342, 200 Ill.Dec. 756 (1st Dist. 1994), quoting *Thompson v. Spring-Green Lawn Care Corp.*, 126 Ill.App.3d 99, 466 N.E.2d 1004, 1010, 81 Ill.Dec. 202 (1st Dist. 1984). When the use of a trademark misrepresents the origin or status of a product to the public, a preliminary injunction is proper. *Lums Restaurant Corp. v. Bloomington Restaurant Investments, Inc.*, 92 Ill.App.3d 1143, 416 N.E.2d 751, 753, 48 Ill.Dec. 478 (4th Dist. 1981).

D. [9.126] Trade Secrets May Be Protected with Injunctions

Under the Illinois Trade Secrets Act, actual or threatened misappropriations of trade secrets may be enjoined. 765 ILCS 1065/3. *See Strata Marketing, Inc. v. Murphy*, 317 Ill.App.3d 1054, 740 N.E.2d 1166, 1177, 251 Ill.Dec. 595 (1st Dist. 2000), citing *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995). If a plaintiff can establish that (1) its information is sufficiently secret to give it a competitive advantage, and (2) it took affirmative measures to prevent others from acquiring or using the information, it can establish the existence of a clearly ascertainable right or protectable interest under the Act. *Liebert Corp. v. Mazur*, 357 Ill.App.3d 265, 827 N.E.2d 909, 921, 293 Ill.Dec. 28 (1st Dist. 2005).

E. [9.127] Statutory Injunction Actions Brought by the State

The Attorney General or a state's attorney may enjoin individuals from certain professional practices for which they are not properly certified, licensed, or registered, such as hospital operators (210 ILCS 85/15), architects (225 ILCS 305/23), funeral directors and embalmers (225 ILCS 41/15-45), plumbers (225 ILCS 320/29), fundraisers (225 ILCS 460/9), public accountants (225 ILCS 450/30), and physicians (225 ILCS 60/61).

The Attorney General or a state's attorney may obtain an injunction against any person or entity for any actual or threatened violation of the Consumer Fraud and Deceptive Business Practices Act. 815 ILCS 505/7.

The Attorney General or a state's attorney may obtain an injunction under the Environmental Protection Act. 415 ILCS 5/43, 5/45; *People ex rel. Ryan v. Agpro, Inc.*, 214 Ill.2d 222, 824 N.E.2d 270, 291 Ill.Dec. 694 (2005).

F. [9.128] Statutory Injunction Actions Brought by Individuals

Any person injured in his or her business or property by a violation of the Illinois Antitrust Act, or threatened with such injury, can seek an injunction and, if successful, recover costs and reasonable attorneys' fees. 740 ILCS 10/7.

Any person likely to be damaged by a deceptive trade practice may be granted injunctive relief on reasonable terms. 815 ILCS 510/3. Proof of monetary damage or intent to deceive is not required, but if the defendant willfully engaged in a deceptive trade practice, the court may award costs and attorneys' fees. *Id.*

Any party injured by criminal eavesdropping may obtain an injunction prohibiting further eavesdropping by the eavesdropper and by or on behalf of his principal. 720 ILCS 5/14-6.

VI. APPENDIX — SAMPLE FORMS

A. [9.129] Emergency Motion for Temporary Restraining Order and Preliminary Injunction

IN THE CIRCUIT COURT OF _____ COUNTY, ILLINOIS
_____ DIVISION

_____	**)**	
	)	
v.	**)**	**No. _____**
	)	
_____	**)**	
	)	

EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiff, _____, through its attorneys, _____, moves this Court, pursuant to 735 ILCS 5/11-101, for entry of a temporary restraining order, and a preliminary injunction thereafter, restraining Defendant, _____, from soliciting customers of Plaintiff on whose accounts Defendant worked during the [three years**] prior to the termination of [**his**] [**her**] employment with Plaintiff. In support of this Motion, Plaintiff submits the affidavit of _____, Plaintiff's [**Vice President of Sales**], and Plaintiff's Memorandum of Law.**

Plaintiff has filed a Verified Complaint for Injunction and Other Relief (Verified Complaint) and further states as follows:

1. Plaintiff is engaged in the design, manufacture, and sale of _____ throughout the States of Illinois and [Wisconsin**].**

2. At the inception of [his**] [**her**] employment with Plaintiff, on _____, 20___, Defendant executed an employment agreement containing a covenant restricting Defendant for [**one year**] after the termination of [**his**] [**her**] employment with Plaintiff from soliciting customers of Plaintiff on whose accounts [**he**] [**she**] worked during the [**three years**] prior to the termination of [**his**] [**her**] employment with Plaintiff (Restrictive Covenant).**

3. Defendant voluntarily terminated [his**] [**her**] employment with Plaintiff on _____, 20__.**

4. Since leaving Plaintiff's employ, Defendant has been soliciting customers of Plaintiff located in Illinois on whose accounts [he**] [**she**] has worked within the past [**three years**].**

5. The injunctive relief Plaintiff seeks is necessary to restore the status quo ante and to protect Plaintiff from substantial and irreparable injury to its business that Plaintiff will sustain if Defendant is permitted to continue to breach the Restrictive Covenant. The substantial and irreparable injury that Plaintiff has and will continue to sustain is set forth in Plaintiff's Verified Complaint.

6. The Verified Compliant sets forth Plaintiff's clearly ascertainable right to protect its near permanent customer relationships and demonstrates the likelihood of Plaintiff's success on the merits of its claims against Defendant.

7. Plaintiff has no adequate remedy at law or in equity for the injury it has sustained and will continue to sustain unless Defendant's conduct is restrained.

8. Plaintiff has substantial assets, is listed on the [Midwest Stock Exchange**], and has its principal office located in _____ County, Illinois.**

WHEREFORE, Plaintiff prays for entry of the following orders:

A. A Temporary Restraining Order, without bond, restraining Defendant from soliciting customers of Plaintiff located in the States of Illinois and [Wisconsin**] and on whose accounts Defendant worked since _____, 20___, pending hearing on Plaintiff's Motion for Preliminary Injunction; and**

B. An Order providing for expedited discovery and a hearing date on Plaintiff's Motion for Preliminary Injunction.

Dated: _____, 20__.

_____
Plaintiff

By: _____
One of Its Attorneys

[attorney information**]**

B. [9.130] Order for Temporary Restraining Order with Notice

[Caption**]**

TEMPORARY RESTRAINING ORDER

This cause coming to be heard on Plaintiff's Motion for Temporary Restraining Order, due notice having been given and Defendant having appeared through counsel; the Court having considered Plaintiff's Verified Complaint, Plaintiff's Motion for Temporary Restraining Order, Plaintiff's Memorandum of Law in support thereof, Defendant's Verified Answer, and Defendant's Memorandum of Law in opposition to Plaintiff's Motion; and the Court having considered the affidavits submitted by the parties, the testimony of the witnesses and their credibility, and the arguments of counsel, finds as follows:

1. Plaintiff has shown that it has a clearly ascertainable right in need of protection, namely _____.

2. Plaintiff has shown that there is a fair question that Plaintiff will succeed on the merits because _____.

3. Plaintiff has shown that it will suffer irreparable harm if an injunction does not issue, namely _____; and

4. Plaintiff has shown that it has no adequate remedy at law or in equity other than an injunction because _____.

WHEREFORE, IT IS HEREBY ORDERED:

A. Defendant is temporarily restrained from soliciting those customers of Plaintiff located in the States of Illinois and [Wisconsin**] on whose accounts Defendant worked during the [**three years**] prior to the termination of [**his**] [**her**] employment with Plaintiff.**

B. This Temporary Restraining Order shall remain in full force and effect pending hearing on Plaintiff's Motion for Preliminary Injunction on _____, 20__, unless sooner modified or dissolved.

C. Bond is waived because [show good cause**].**

[or**]**

C. This Temporary Restraining Order is conditioned upon Plaintiff filing a surety bond in the amount of $_____ in form approved by this Court.

D. Hearing on Plaintiff's Motion for Preliminary Injunction is set for _____, 20__, at _____ [a.m.**] [**p.m.**].**

E. This Temporary Restraining Order is entered at _____ [a.m.**] [**p.m.**] on _____, 20__.**

Dated: _____, 20__.

Enter:

_____
Judge

[attorney information**]**

C. [9.131] Order for Temporary Restraining Order Without Notice

[Caption**]**

TEMPORARY RESTRAINING ORDER WITHOUT NOTICE

This cause coming to be heard on Plaintiff's Motion for Temporary Restraining Order, no notice having been given; the Court having considered Plaintiff's affidavit submitted in support of proceeding without notice, Plaintiff's Verified Complaint, Plaintiff's Motion for Temporary Restraining Order, and Plaintiff's Memorandum of Law in support thereof, finds as follows:

1. Plaintiff has shown that there is a strong probability that serious [specify the damage**] damage will occur if notice is served prior to a hearing on Plaintiff's Motion for Temporary Restraining Order;**

2 Plaintiff has shown that it has a clearly ascertainable right in need of protection, namely _____;

3. Plaintiff has shown that there is a fair question that Plaintiff will succeed on the merits;

4. Plaintiff has shown that it will suffer irreparable harm if an injunction does not issue, namely _____; and

5. Plaintiff has shown that it has no adequate remedy at law or in equity in that absent issuance of a temporary restraining order, _____.

WHEREFORE, IT IS HEREBY ORDERED:

A. Defendant is temporarily restrained from soliciting those customers of Plaintiff located in the States of Illinois and Wisconsin on whose accounts Defendant worked during the three years prior to the termination of [his**] [**her**] employment with Plaintiff.**

B. This Temporary Restraining Order shall remain in full force and effect for [ten days**] from the date hereof or until _____ [**a.m.**] [**p.m.**] on _____, 20__, unless sooner modified or dissolved by this Court.**

[C. Bond is waived because (show good cause).**]**

[or**]**

[C. This Temporary Restraining Order is conditioned upon Plaintiff filing a surety bond in the amount of $_____ in form approved by this Court.**]**

D. This Temporary Restraining Order is entered at _____ [a.m.**] [**p.m.**] on _____, 20__.**

Dated: _____, 20__.

Enter:

_____

Judge

[attorney information**]**

D. [9.132] Order for Preliminary Injunction

[Caption**]**

PRELIMINARY INJUNCTION

This cause coming to be heard on Plaintiff's Motion for Preliminary Injunction, due notice having been given and Defendant having appeared through counsel; the Court

having considered Plaintiff's Verified Complaint, Plaintiff's Motion for Preliminary Injunction, Plaintiff's Memorandum of Law in support thereof, Defendant's Verified Answer, and Defendant's Memorandum of Law in opposition to Plaintiff's Motion; and the Court having considered the affidavits submitted by the parties, the testimony of the witnesses and their credibility, and the arguments of counsel, finds as follows:

1. Plaintiff has shown that it has a clearly ascertainable right in need of protection, namely _____.

2. Plaintiff has shown that there is a fair question that Plaintiff will succeed on the merits because _____.

3. Plaintiff has shown that it will suffer irreparable harm if an injunction does not issue, namely _____; and

4. Plaintiff has shown that it has no adequate remedy at law or in equity other than an injunction because _____.

WHEREFORE, IT IS HEREBY ORDERED:

A. Defendant is preliminarily enjoined from soliciting those customers of Plaintiff located in the States of Illinois and [Wisconsin**] on whose accounts Defendant worked during the [**three years**] prior to the termination of [**his**] [**her**] employment with Plaintiff.**

B. This Preliminary Injunction shall remain in full force and effect pending trial on the merits unless sooner modified or dissolved.

[C. Bond is waived because (show good cause).**]**

[or**]**

[C. This Preliminary Injunction is conditioned upon Plaintiff filing a surety bond in the amount of $_____ in form approved by this Court.**]**

D. This Preliminary Injunction is entered at _____ [a.m.**] [**p.m.**] on _____, 20__.**

Dated: _____, 20__.

Enter:

_____

Judge

[attorney information**]**

E. [9.133] Injunction Bond

[Caption**]**

INJUNCTION BOND

On _____, 20__, this Court entered a [Temporary Restraining Order**] [**Preliminary Injunction**] against Defendant.**

If the [Temporary Restraining Order**] [**Preliminary Injunction**] is dissolved and the Court finds that the [**Temporary Restraining Order**] [**Preliminary Injunction**] was wrongfully issued, we jointly and severally agree to pay to Defendant any damages and costs that the Court finds Defendant has sustained or incurred.**

The obligation of the bond is limited to $_____.

Dated: _____, 20__.

_____
Plaintiff

By: _____
[Title**]**

[Insurer**]**

By: _____
Its Attorney-in-Fact as Surety

Approved: _____, 20__.

_____
Judge

[attorney information**]**

F. [9.134] Motion To Dissolve Temporary Restraining Order or Preliminary Injunction

[Caption**]**

MOTION TO DISSOLVE [TEMPORARY RESTRAINING ORDER**]**
[PRELIMINARY INJUNCTION**]**

Defendant, _____, through [his**] [**her**] attorneys, moves, pursuant to 735 ILCS 5/11-108, to dissolve the [**Temporary Restraining Order**] [**Preliminary Injunction**] entered on _____, 20__. In support of this Motion, Defendant states as follows:**

1. On _____, 20__, this Court entered a [Temporary Restraining Order**] [**Preliminary Injunction**] enjoining Defendant from soliciting certain customers of Plaintiff located within the States of Illinois and [**Wisconsin**].**

2. The [Temporary Restraining Order**] [**Preliminary Injunction**] was based on Defendant's purported violation of a Restrictive Covenant in an employment agreement restricting Defendant from soliciting certain customers of Plaintiff located within the States of Illinois and [**Wisconsin**] for a period of [**one year**] after termination of Defendant's employment with Plaintiff.**

3. Since at least _____, 20____, Plaintiff has abandoned its [earlier product**] manufacturing and sales business and currently engages only in the business of the manufacture and sale of [**new product**].**

4. Plaintiff no longer has a manufacturing and sales business to protect by a restrictive covenant.

5. Defendant does not engage in the business of the manufacture and sale of [new product**].**

6. Plaintiff no longer faces irreparable injury. Any damages claimed by Plaintiff would be recoverable under Plaintiff's claim for breach of contract.

7. In further support of this Motion, Defendant has attached as Exhibit A the affidavit of _____, former sales manager for Plaintiff.

WHEREFORE, Defendant prays for entry of the following orders:

A. The [Temporary Restraining Order**] [**Preliminary Injunction**] entered on _____, 20__, is hereby dissolved; and**

B. Plaintiff shall pay to Defendant $_____, such amount representing the costs and reasonable attorneys' fees expended by Defendant to dissolve the [Temporary Restraining Order**] [**Preliminary Injunction**] entered on _____, 20__.**

Dated: _____, 20__.

_____
Defendant

By: _____
Attorney for Defendant

[attorney information**]**

VERIFICATION

_____, being first duly sworn, on oath states that [he**] [**she**] is the Defendant in the above captioned matter and that the facts alleged in the foregoing Motion To Dissolve [**Temporary Restraining Order**] [**Preliminary Injunction**] are true.**

_____
Defendant

By: _____
Attorney for Defendant

Subscribed and Sworn to before me
this _____ day of _____, 20__.

_____
Notary Public

[attorney information**]**