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Be Quick on the Draw When a TRO is Warranted

By David Graff and Alexander Litt

A temporary restraining order, or TRO, is a powerful remedy in litigation that can be utilized both as a weapon and a shield. A restraining order is utilized to protect your rights before another person or entity can cause harm to you and maintain the status quo between the parties before a full trial on the merits can be had. Accordingly, a temporary restraining order is very common in business disputes, particularly to protect intellectual property.

Because a restraining order is such a powerful remedy, the court does not grant one lightly. The standard to obtain a TRO or preliminary injunction is a showing of a likelihood of:

- success on the merits,
- irreparable injury to the plaintiff in the absence of injunctive relief,
- balance of hardships or equities favoring the moving party, and
- the requested relief not being outweighed by public policy considerations.

A TRO is simply an expedited, temporary form of preliminary injunctive relief. By seeking a TRO, a plaintiff is essentially telling the court that its need for relief is emergent. As the Florida Supreme Court once stated, “relief delayed is relief denied.” *Capraro v. Lanier Business Products, Inc.*, 466 So.2d 212, 213 (Fla. 1985).

Accordingly, one of the most important factors to consider when seeking a TRO is the immediacy of the need and acting on it. The Second Circuit has explained, “preliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs’ rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action.”¹ Furthermore, New York CPLR 6301 specifically states that a TRO will be granted where it is shown to be necessary to prevent “immediate and irreparable injury.” In order to show the immediacy of the injury, the client and the attorneys must

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act quickly to bring this potential injury to the court's attention. If the moving party unreasonably delays making the application to the court, it is likely that the court will not find the immediacy of the need, and deny the TRO. Because TROs are designed to maintain the status quo between the parties, the moving party must act before the status is changed.

A common use of a TRO is in employment disputes when an employee attempts to change firms or companies. That employee may be in breach of his or her noncompete agreement. However, if the former employer delays bringing the action until after the former employee has begun work at a competitor, a court may find that the injury is not immediate and irreparable warranting a TRO. If the employer does act immediately, and obtains a TRO against the individual preventing that employee from competing against it, this provides a huge tactical advantage to the employer for the remainder of the litigation.

After the order is granted, the TRO will remain in place until a hearing on the merits of a preliminary injunction can be heard. While this should be set at the earliest time possible, the reality is that a TRO can remain in place for weeks, or even months prior to a hearing. Because a TRO is decided prior to the final adjudication of the case, it sets a tone for the ac-

tion and can provide a great deal of leverage to the plaintiff in settlement negotiations. The TRO may even prove dispositive for the plaintiff, bringing a quick and effective resolution to the matter.

Undoubtedly, what constitutes an unreasonable delay will vary case to case. Courts may even excuse delay that can be reasonably explained, such as pre-litigation settlement negotiations or investigating the facts.² Nonetheless, it is still important to act swiftly because courts have found that as little as 12 days may be an unreasonable delay.³ Thus, when a potential injury arises that may warrant the need for a TRO, it is important to consult with an attorney as soon as possible. ▲

ENDNOTES

¹ *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985).

² *Kraft Gen'l Foods, Inc. v. Allied Old English, Inc.*, 831 F. Supp. 123, 136, n. 12 (S.D.N.Y. 1993) (moving party "should not be penalized for any delay arising out of settlement efforts"); *Computer Assocs. Int'l*, 784 F. Supp. at 987 (excusing delay where plaintiffs used time prior to seeking preliminary injunction to conduct an extensive investigation to gather necessary facts required to support complex action).

³ *Roberts v. Atl. Recording Corp.*, 892 F. Supp. 83, 88 (S.D.N.Y. 1995)

About Anderson Kill

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