

Chancery Applies Preliminary Injunction Standard to a Motion for a TRO

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Litigation is fast-paced in the Delaware Court of Chancery, but when a litigant files a motion for expedited relief, the pace and the complexity increase as well. A recent case, *Roseton OL LLC v. Dynegey Holdings Inc.* serves as a prime example.

In *Roseton*, the court denied a request to issue a temporary restraining order, but made its decision based on the standard applied to a motion for preliminary injunction. The time between the filing of the initial complaint and the Chancery Court's 57-page memorandum opinion spanned about a week, and the Delaware Supreme Court reviewed and denied an interlocutory appeal of the Court of Chancery's decision within another week. In total, the entire case lasted only two weeks from the complaint to the final appellate ruling.

Requests for injunctive relief are by nature fast-paced, with the irony being that the goal of injunctive relief is to bring everything to a complete stop. However, it is critical to spend the time to know whether you should seek a preliminary injunction or a TRO and more importantly what standard of review the court will apply to your request. The answer is not always clear.

One key consideration is timing. The general rule is that if your client fears that the soon-to-be defendant will take action while you are gathering facts and information to seek temporary relief from the court, you should seek a TRO. If you have time to more fully present an issue to the court, give the other side time to respond and allow the court ample time to decide the issue, with at least some discovery, you probably have time to seek a preliminary injunction. The rationale is that TROs are meant for situations where there is no time for the plaintiff to provide adequate notice to the defendant and insufficient time for the defendant to be heard before the threatened action sought to be enjoined actually takes place. Generally, a TRO may be granted *ex parte*, and a PI requires that both parties present facts and argument. However, the practice in the Court of Chancery is for the party filing the TRO to give the defendant notice that the action was filed and the court will ask counsel for the plaintiff at the scheduling of the TRO hearing if notice of the hearing was provided to the other side.

Recently the Court of Chancery re-emphasized the importance of providing notice to an adverse party on a motion for a TRO pursuant to Rule 65(b)(2), which provides that:

"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."

In a Chancery Court decision filed on Aug. 15, *Smart Home Inc. v. Selway*, the plaintiff's demonstration of imminent irreparable harm was too speculative to justify issuing an *ex parte* TRO. The plaintiff tried to establish that the defendant, an estranged employee/investor of Smart Home Inc., "wrongfully removed" \$6,000 from Smart Home's bank account without permission

long after he had been fired as an employee, and that Smart Home may be forced to stop operations due to the lack of funds to pay its bills and keep up with customer demand. Even though the court found that the plaintiff had shown a colorable claim, the court was not convinced that the plaintiff would suffer irreparable harm if an ex parte TRO was issued; nor was the court convinced that issuing an ex parte TRO in that situation would withstand due process scrutiny. The Smart Home case serves as a reminder that an ex parte TRO is an extraordinary remedy that increases the burden on the plaintiff to show that "irreparable harm will occur during the time it will take to serve [the defendant and his bank], and to allow them an opportunity to be heard."

Both TROs and preliminary injunctions are used to prevent imminent irreparable injury and provide similar relief. The standard for a TRO is less stringent than the standard for a preliminary injunction, but seeking a TRO when a preliminary injunction is more appropriate is shortsighted, since the court will apply the standard required under the circumstances.

Of course, there are always cases that don't fit the conventional mold — Roseton being a perfect example. The plaintiffs in Roseton filed a motion for a TRO to prevent the defendant from consummating a transaction that was scheduled to close one week from the date the complaint was filed. Plaintiffs moved for a TRO rather than a preliminary injunction because of the very abbreviated time frame (i.e., five business days).

The plaintiffs filed their complaint and a contemporaneous motion for a TRO on a Friday. The motion was fully briefed by the parties (an opening brief, an answering brief and a reply brief) and the court held a hearing on the TRO motion on Monday. After the hearing, both the plaintiffs and the defendants submitted supplemental briefs. In its decision, the Court of Chancery analyzed the case under the more stringent preliminary injunction standard (even though the plaintiff only moved for a TRO). According to the court, both parties had a sufficient opportunity to present their arguments and to develop a full record for the court's consideration, and the court had a sufficient amount of time to make an informed decision (and write a 57-page memorandum).

In its decision, the court identified several factors in deciding on the appropriate standard, including: the length of time the plaintiffs waited to file the complaint after they learned of the proposed transaction; whether the record presented to the court contained the key documents (including contracts between the parties); the degree to which the movant is in a position to control evidence that would permit it to make a more substantial showing on the merits of its claims; the nature of the underlying claim(s) in the lawsuit; and the amount of time the court had to consider the motion.

The court stated that the plaintiffs in Roseton waited 12 days after receiving constructive notice of the transaction before filing their TRO motion. The court found that while 12 days was not an unreasonable period of time (such that laches might apply), "it provided plaintiffs with sufficient time to explore, at least preliminarily, the relevant facts, their alleged legal rights and obligations, and the legal theories on which they might base an application for a TRO or preliminary injunctive relief."

The court also found that the record in Roseton contained substantially all of the documents relevant to the dispute and the relationship between the parties. The court noted that the claims revolved around a contract executed more than a decade earlier, and as movants, the plaintiffs were in a position to provide extrinsic evidence to aid the court in interpreting that contract and in determining the intent of the parties.

The balancing of these factors led the court to apply the more stringent preliminary injunction standard, and ultimately deny plaintiffs' request for relief. While the procedural posture of the motion was certainly more akin to that of a motion for a TRO, the court transformed the motion for a TRO into a motion for a preliminary injunction for the reasons explained.

Comparatively, in an order issued by the Chancery Court Aug. 10 in *Verizon of Delaware v. Communications Workers of America Local Nos. 13100 and 13101*, where the plaintiff moved for a preliminary injunction to enjoin the defendants from causing damage to plaintiff's property and putting plaintiff's employees in fear of entering and exiting their workplace, the Court of Chancery issued a preliminary injunction only hours after the motion was filed. The order imposed serious restrictions on defendant union workers' picketing and striking activities; however, since the court was able to hear arguments from both parties and consider all the pertinent evidence within a very short time frame, the court granted the motion. There was no discussion of the preliminary injunction standard in the short order that the court signed.

HOW TO PREVAIL

To prevail on a motion for a TRO, the plaintiff must show: (i) the existence of a colorable claim; (ii) the irreparable harm that will be suffered if relief is not granted; and (iii) a balancing of hardships favoring the moving party.

To prevail on a motion for a preliminary injunction, the plaintiff must show: (i) a reasonable probability of success on the merits; (ii) that they will suffer irreparable injury if an injunction does not issue; and (iii) that the balance of the equities favors the issuance of an injunction.

It must also be emphasized that a prerequisite for a TRO or a preliminary injunction is a bond in an amount that will sufficiently cover damages caused to the defendant should it ultimately be determined that injunctive relief was improvidently granted, and the defendant was wrongfully enjoined.

This remains a determinative factor when deciding whether to seek a TRO or a preliminary injunction. When seeking a TRO, the court does not consider whether the plaintiff's claim would be meritorious after a trial — the court only looks to whether there is a prima facie claim. The claim must be "truly litigable." In making this determination, the court will treat the plaintiff's allegations as true. Establishing a "colorable claim" is a relatively low threshold.

By comparison, to establish a reasonable probability of success on the merits, the plaintiff first must set out the elements of the claim asserted, the legal standard that the court should apply in reviewing that claim and the pertinent facts to show that there is a reasonable probability that the plaintiff will ultimately succeed. Even if the burden of proof falls on the defendant under normal

circumstances (i.e., at trial), the plaintiff bears the burden of showing a reasonable probability of success on the merits when seeking a PI. In the 1984 case *Joseph v. Shell Oil Co.*, for example, the Chancery Court held that on a motion for preliminary injunction where shareholders were challenging the fairness of a tender offer, the plaintiffs bore the burden of establishing that there was a reasonable probability that they would succeed on the merits if a trial were held, even though the defendants would bear the burden of persuasion at trial.

The "colorable claim" element used in considering a TRO is also one of the elements that the court uses to determine whether a party is entitled to expedited proceedings. While applying the colorable claim standard to determine whether a party is entitled to expedited proceedings, the movant must also show that imposing the extra and possibly substantial cost of expedited proceedings on the defendants and the public is justified, as demonstrated in the Aug. 3 Chancery Court case *In re Ness Technologies Inc.*

IMMEDIATE THREAT

The prerequisite for establishing the imminent threat of irreparable harm element is the same for TROs and preliminary injunctions. A plaintiff must clearly demonstrate a genuine (as opposed to speculative) harm for which he has no adequate remedy at law, and that a refusal to issue a TRO or preliminary injunction would be a "denial of justice," as the Roseton court said. Once a threat of imminent, irreparable injury is demonstrated, the court will often be inclined to grant the requested temporary relief unless the claim is frivolous, the risk of harm in granting the remedy greatly outweighs the risk of denying it, or that the plaintiff's delay in seeking the preliminary relief contributed to the emergent nature of the motion.

In Roseton, the court was not persuaded by the plaintiffs' arguments that they would suffer imminent irreparable harm, on the basis that their claim would only cause harm if various contingencies occurred. Further, depending on which of the contingencies occurred, the plaintiffs would have an adequate remedy at law, which would obviate the need for equitable relief.

BALANCING THE EQUITIES

Although the phraseology is sometimes different, in essence the balancing element for TROs and preliminary injunctions is the same. The court weighs the harm that will be caused to the plaintiff if the requested relief is not granted and the harm that will be caused to the defendant if the requested relief is granted. The court will only grant the requested relief if balancing analysis weighs in favor of the moving party.

Ultimately, weighing and balancing the factors is a matter for the court's discretion. There is no requirement that the court give each factor equal weight; if there is a strong showing on one factor, the court is free to give that factor more weight. However, there are some practical tips that will guide you through the murky waters: (1) don't assume the court can (or will) condense months of litigation into a single work week; (2) if the moving party will be irreparably injured in a matter of hours or days, you should consider a TRO; (3) if there is more time before irreparable injury would occur (and thus it would be possible to propound and receive discovery), or if the moving party was part of the delay (either by delaying in paying your

retainer or failing to understand the enormity of a situation soon enough), you should consider a preliminary injunction; and (4) present all the available relevant evidence to the court.

The first step in the process is convincing the court to provide expedited scheduling. If expedited scheduling is not granted, one may not have the opportunity to present one's case fully at a hearing to seek emergent injunctive relief. That analysis often involves an initial cursory substantive review of the claims by the court at the hastily arranged scheduling conference. Thus, the first impression the court has of your case may have a significant impact on the outcome of the case.

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