

Stop That Wrecking Ball – Requests for Emergency Injunctive Relief

By Arthur G. Boylan

As long as there is business litigation, there will be a need for emergency injunctive relief to prevent the proverbial wrecking ball from smashing through your client's business.

Across virtually all businesses, situations calling for emergency injunctive relief will occur from time to time. For example, when an employee departs for the competition in blatant violation of a non-compete agreement, the business will likely want to not only sue but also consider injunctive relief. Similarly, when a fraudster somehow attained a position of trust with your client and abused that trust, you may need immediate emergency relief. You need to act to protect your client; and you need to act immediately.

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The basic factors considered by Minnesota courts for emergency relief are well

known: (1) the nature of the relationship between the parties before the dispute giving rise to the request for relief; (2) the harm to be suffered by the moving party if the preliminary injunction is denied as compared to that inflicted on the nonmoving party if the injunction issues pending trial; (3) the likelihood of success on the merits; (4) the public interest; and (5) the administrative burdens in enforcing a temporary decree. *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965).

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To determine if the client has a case to meet this standard, witnesses must be interviewed, facts must be analyzed, and legal theories investigated. So, what do you need to do?

First, trust your instincts. Typically, even in the very first phone call, you already begin to develop a sense of whether there are facts that will support a high de-

gree of likelihood to succeed on the merits and irreparable harm. There needs to be a clear legal theory and compelling facts. If you will not be able to explain the need for emergency relief in less than three minutes after the initial phone call, then seriously

consider whether to forgo the request for emergency relief. After all, a failed motion for emergency relief may irreparably damage your case. To prevail, your case must be compelling and speak to both the heart and the mind of the court. If it is not one of these cases, do not seek emergency relief. Second, select your forum with the utmost care. The importance of the forum is amplified when considering emergency relief. A whole series of questions need to be answered immediately. Should you be in state or federal court? What county? Do you have the facts for jurisdiction in federal court? Is there an arbitration clause? If so, does the arbitration clause have the necessary qualifying language to permit a court to provide preliminary injunctive relief? Choose poorly on any of these items and the defendant will have the opportunity to make a mess of your request for emergency relief by seizing on one or



more technical issues. In addition to these issues, your choice of forum has practical import. Notwithstanding the Rules of Civil Procedure, some district court administrators attempt to impose their own *home-spun* requirements before any request for emergency relief can be presented to a judge. It certainly does not help your client avoid the wrecking ball if you choose a forum that imposes such requirements without realizing it. Choosing your forum can be critical to success.

Third, decide if the circumstances warrant seeking *ex parte* relief. In virtually all cases, you must provide notice of your request for emergency relief to the other party in advance and provide the court an explanation of your efforts to do so. But what if you have reason to believe that the bad actors will take advantage of the notice to harm your client? If there is a legitimate fear and an attorney provides a statement as to why no notice should be provided, it is possible to obtain emergency injunctive relief on an *ex parte* basis. This is reserved for very rare instances, but it can be an effective tool for businesses that are taking every measure to protect themselves, their employees and their customers.

In a case involving a request for emergency relief, you and your client will need to prepare the facts, analyze the substantive claims, choose a forum, and make strategic decisions that may have a long-lasting impact on the particular matter and case. Your case and argument needs to be clear and compelling; and there is little room for error.

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