

EXTRAORDINARY REMEDIES—A DECISION TREE

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The University of Texas School of Law
40th Annual Page Keeton Civil Litigation Conference
October 27-28, 2016
Austin

I. INTRODUCTION

All clients want their relief—and they want it right now. But tying up assets and controlling conduct prior to a judgment requires an “extraordinary” remedy. This paper walks you through a decision tree of whether and how you should pursue an injunction or other remedy to freeze or protect physical, financial or intellectual assets.¹



II. QUESTIONS AND ANSWERS

Client's Question: Can't you make the bad guys stop transferring assets? Can't you make them stop stealing my customers and trade secrets?

Answer 1: You'll need to wait for trial.

Answer 2: Maybe, if

- there is a cause of action against the defendant
- there is a probable right to the relief sought

¹ Leading authors have written thorough and thoughtful guides to a broad spectrum of extraordinary remedies: injunction, receivership, attachment, garnishment, sequestration, and even quo warranto. Mark C. Walker, et al., *Extraordinary Remedies: Some Remedies Every Trial Lawyer Should Know, or, Overcoming Newton's Law of Inertia*, 2010 WINTER SEMINAR (Texas Ass'n of Defense Counsel, pub.) (walking through each of the listed remedies); Aaron Z. Tobin & Sara G. Witmeyer, *Tips on Expedited and Extraordinary Relief*, ADVANCED IN HOUSE COUNSEL COURSE 2016 (State Bar of Texas, pub.) (focusing on the business client/general counsel).

In addition to reviewing those articles, practitioners should review statutes providing for injunctive relief under the Agriculture Code, Alcoholic Beverage Code, Business & Commerce Code, Business Organizations Code, Code of Criminal Procedure, Education Code, Election Code, Family Code, Finance Code, Government Code, Health & Safety Code, Insurance Code, Labor Code, Local Government Code, Natural Resources Code, Occupations Code, Probate Code, Property Code, Special District Local Laws Code, Tax Code, Texas Business Corporation Act, Texas Revised Civil Statutes, Transportation Code and Water Code. Walker, *supra*.

- there is a probable, imminent and irreparable injury in the interim
 - “Irreparable” means injured party can’t be adequately compensated in damages or the damages can’t be measured by any certain pecuniary standard (*Butnaru v. Ford Motor Co.*, 84 S.W.3d 198 (Tex. 2002))
- the client can post bond
- and, most importantly, the judge agrees with you—denial of a temporary restraining order is not appealable at all,² and “whether or not to grant a temporary injunction is within the court’s sound discretion.”³

III. FREEZING ASSETS



A. Prejudgment Attachment is Prohibited Under Common Law

Texas common law prohibits prejudgment attachment: “It is contrary to the policy of the law to permit a creditor who has no judgment to go into a court of equity and restrain a debtor from selling, removing, or disposing of his property at his pleasure, pending a common law action.” *Lane v. Baker*, 601 S.W.2d 143, 145 (Tex. Civ. App.—Austin 1980, no writ). Restraining assets based upon the chance of a future judgment “puts the cart before the horse.” *Harper v. Powell*, 821 S.W.2d 456, 457 (Tex. App.—Corpus Christi 1992, no writ). Unless an

² “No statutory provision permits an appeal from a temporary restraining order.” See *Lesikar v. Rappeport*, 899 S.W.2d 654, 655 (Tex. 1995); ... see also TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 2004–05) (specifically permitting appeal of interlocutory orders in ten instances, but not including the grant or denial of a temporary restraining order).” *Nikolouzos v. St. Luke’s Episcopal Hosp.*, 162 S.W.3d 678, 680-81 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

³ “Because the decision to grant or deny a temporary injunction lies within the sound discretion of the trial court, we will not disturb that decision absent a *clear abuse of discretion*. . . . We must not substitute our judgment for that of the trial court unless the trial court’s action was so arbitrary that it exceeded the bounds of reasonable discretion. . . . We review the evidence before the trial court in the light most favorable to the court’s ruling, draw all reasonable inferences from the evidence, and defer to the trial court’s resolution of conflicting evidence.” *ICON Ben. Adm’rs II, L.P. v. Abbott*, 409 S.W.3d 897, 902 (Tex. App.—Austin 2013, pet. denied) (emphasis added) (citing *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002)).

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First appeared as part of the conference materials for the
40th Annual Page Keeton Civil Litigation Conference session
"Extraordinary Remedies"