

**28th Annual
Labor and Employment Law Conference**

**LITIGATING NON-COMPETE AND TRADE SECRET CASES
AFTER THE INJUNCTION HEARING**

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LITIGATING NON-COMPETE AND TRADE SECRET CASES AFTER THE INJUNCTION HEARING

I. INTRODUCTION

When an ex-employer obtains preliminary injunctive relief against an ex-employee in a non-compete or trade secrets case, settlement often occurs shortly thereafter. If an ex-employee cannot compete, or use what has been found to be a trade secret, there is often nothing left of any significance that justifies further litigation.

However, this is not always the case. This paper focuses on what can happen after the temporary injunction hearing, and how the ruling can affect the rest of the case. It is important to plan for options post-injunction. Choices made at the injunction phase can have a substantial effect on the rest of the case.

II. THE IMPORTANCE AND EFFECT OF INJUNCTIVE RELIEF IN EMPLOYMENT CASES.

A. General Requirements For Injunctive Relief

A temporary injunction is an extraordinary remedy which does not issue as a matter of right. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (party moving for injunctive relief must show a viable cause of action against each party being enjoined, a probable right to relief sought, and a probable, imminent and irreparable injury in the interim). Damages are usually an adequate remedy, and the requirement of demonstrating interim and irreparable injury is not taken lightly. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993). Irreparable injury means that the injuries in question are such that the plaintiff could not be compensated by an adequate remedy at law, such as with money or damages measured in monetary terms. *T-N-T Motorsports v. Henessy Motorsports*, 965 S.W.2d 18, 23-24 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd).

Often there is a debate as to who may be altering—not maintaining—the status quo. At a temporary injunction hearing, the question before the trial court is whether the applicant is entitled to preserve the status quo of the litigation's subject matter pending a trial on the merits. *Butnaru*, 84 S.W.3d at 204; see *State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975) (defining status quo as “last, actual, peaceable, non-contested status that preceded the pending controversy”).

B. Defenses To Injunctive Relief

It is common for employers to race to the courthouse to enjoin a former employee from starting a competing business or from stealing a customer. If the employer is successful, it may have leverage to effect a favorable settlement.

On the other hand, the strategy may backfire if injunctive relief is denied. Additionally, matters may arise that have effects throughout the case.

1. *Failure to Show Imminent Risk Of Injury*

If an employer seeks injunctive relief too early, it may be unable to prove enough to obtain injunctive relief. In order to obtain the extraordinary remedy of injunctive relief, a party must show an imminent risk of irreparable injury. *Cardinal Health Staffing Network, Inc. v. Bowen*, 106 S.W.3d 230, 235–36 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (concluding that the evidence supported the trial court's implicit finding that an employer did not suffer irreparable harm from former employee's breach of a non-competition agreement because, among other things, employer produced no evidence of economic damages since employee's departure).

Fear of possible injury is not enough to obtain an injunction. *Washington DC Party Shuttle, LLC v. IGuide Tours*, 406 S.W.3d 723, 742 (Tex. App.—Houston [14th Dist.] 2013, pet. denied); see *Reach Grp., L.L.C. v. Angelina Grp.*, 173 S.W.3d 834, 838 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (explaining that testimony that company could be put at “great risk” by former employee's competition did not support injunctive relief because it “established only a fear of possible injury” (quoting *EMSL Analytical, Inc. v. Younker*, 154 S.W.3d 693, 697 (Tex. App.—Houston [14th Dist.] 2004, no pet.)). An injunction is not proper when the claimed injury is merely speculative. *Frey v. DeCordova Bend Estates Owners Ass'n*, 647 S.W.2d 246, 248 (Tex. 1983); *Jordan v. Landry's Seafood Rest., Inc.*, 89 S.W.3d 737, 742 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

2. *Failure To Show Irreparable Injury (i.e., Inadequate Remedy At Law)*

Irreparable injuries are those for which the injured party cannot be adequately compensated by damages or for which damages cannot be measured by any certain pecuniary standard. *IGuide Tours*, 406 S.W.3d at 741; *Butnaru*, 84 S.W.3d at 204. A party's claim that it will lose business does not necessarily support injunctive relief if the damages can be calculated. *Reach Group, L.L.C. v. Angelina Group*, 173 S.W.3d 834, 838 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (no irreparable injury where damages could be calculated); *Daily Int'l Sales Corp. v. Eastman Whipstock, Inc.*, 662 S.W.2d 60, 64 (Tex. App.—Houston [1st Dist.] 1983, no writ) (holding that the trial court reasonably could conclude that loss of business and loss of profits caused by the wrongful appropriation and use of trade secrets was curable by monetary damages).

3. *Laches*

Since equitable principles apply to injunctive relief, showing that the plaintiff has unreasonably delayed may result in the denial of injunctive relief. *Landry's Seafood, Inn v. Wiggins*, 919 S.W.2d 924, 927 (Tex. App.—Houston [14th Dist.] 1996, no writ). The law is well-established that delay in seeking injunctive relief is “an important factor bearing on the need for a preliminary injunction. *Embarcadero Technologies, Inc. v. Redgate Software, Inc.*, 1:17-cv-444-RP, 2017 WL 5588190, *3-4 (W.D. Tex. Nov. 20,

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First appeared as part of the conference materials for the 28th Annual Labor and Employment Law Conference session "Covenants and Related Post-Employment Disputes"