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"STOP! In the Name of the Law!": Using Injunctions to Protect Your Business


Michael Smith


Jason Newman


Vani Gujuluva


Jennifer Paine

Michael Smith is a civil defense attorney who focuses on trucking litigation, automobile negligence, contractor liability and commercial litigation.

Jason Newman practices in the areas of civil defense, intellectual property and environmental law. He is a registered patent attorney with experience in patent, trademark and copyright litigation

Vani Gujuluva is a civil defense attorney who focuses on insurance defense intellectual property and commercial litigation.

Jennifer Paine is a civil and domestic litigation attorney who focuses on insurance defense, commercial litigation and divorce and custody litigation.

Cardelli Lanfear P.C.
322 West Lincoln
Royal Oak, Michigan 48067

248.850.2179 Phone
248.544.1191 Fax

jnewman@cardellilaw.com
msmith@cardellilaw.com
vgujuluva@cardellilaw.com
jpaine@cardellilaw.com
cardellilaw.com

If the thought of a supplier suddenly going rogue and derailing your business keeps you up at night, you are not alone. In the world of commercial litigation, the balancing act in supply chains, exclusive dealing contracts and just-in-time delivery plans makes for a perfect storm when a supplier wants to exact (or coerce) a better deal "or else." The "or else," of course, is a breach of contract, which your business would have to litigate in court. And the thought of court probably keeps you up at night, too.

Is there a procedure to shelter from that storm? Yes. Enter the injunction.

What Are Injunctions and Why Are They Useful Tools?

An injunction is an equitable remedy, which if granted results in a court order that requires and/or prohibits an opposing party from doing specific acts. It is a powerful tool that can be utilized in many contexts: especially, supply chain/Uniform Commercial Code (UCC) cases and commercial litigation.

Injunctions are especially useful in supply chain/UCC matters. Supply chains often involve several different companies working together including suppliers, manufacturers and retailers, to produce and/or distribute a specific product. When disputes arise that threaten the continuity of the supply chain, it can have substantial impact on the companies involved, their employees and the public at large. Accordingly, injunctions can be a powerful tool in preserving the *status quo*.

While interruptions in supply chain management may pose the most obvious risk to a commercial entity, there are several other instances where injunctive relief can be used to protect a company's legitimate business interests. In cases involving unfair competition, tortious interference or breach of restrictive covenants, a company may seek a preliminary injunction at the beginning of its case to prevent the harmful action from continuing throughout the lengthy litigation process. A preliminary injunction can be used to prevent systematic employee raiding by a competitor (*Tata Consultancy Servs v Systems Int'l*, 31 F3d 416 (CA 6, 1994), a breach of a non-compete or non-solicitation agreement by a former employee (*Id*), or the unfair/illegal transfer of trade secrets (*Johns-Manville Corp. v. Guardian Indus. Corp.*, 586 F. Supp. 1034, 1074 (ED Mich. 1983).

Standard for Obtaining a Preliminary Injunction

What evidence will you need to win your case? In most states and in federal courts, there are four factors to be balanced:

1. **Likelihood of Success on the Merits**: In reviewing the first factor, the court must estimate the legal strength of your claim. A plaintiff must demonstrate with the facts available that it is likely to prevail in its claim as a matter of law. This is often the most difficult hurdle in obtaining injunctive relief because many of the facts may not be available to the plaintiff at the outset of the case.

2. **Irreparable Harm**: "Irreparable harm" means damages that cannot be compensated by a simple calculation of monetary damages. Overstreet v. Lexington-Fayette Urban County Government, 305 F.3d 566, 578 (6th Cir. 2002). Allegations of monetary harm are, however, sufficient to support a finding of irreparable harm if the nature of the plaintiff's loss would make damages difficult to calculate. Basicomputer Corp. v. Scott, 973 F.2d 507 (6th Cir. 1992).

3. **Substantial Harm to Others and (4.) Public Interest**: The court must consider any potential harm to the defendant or to the public interest when deciding whether to grant a preliminary injunction. This factor often weighs in favor of a corporate client seeking enforcement of an agreement or the cessation of unfair competition.

Tips for Optimizing Your Request for a Preemptive Injunction

There are several strategies you can employ to maximize your likelihood of success. The first and most important thing you can do is reevaluate all of your contracts now. Each contract should specify what constitutes an irreparable harm. For example, contract language that "the parties agree that any default in their obligations as set forth in this contract will irreparably harm their business reputation and goodwill and cannot be compensated by money damages."

If litigation is likely, also do the following:

A. Immediately Issue a Litigation Hold Letter

If an injunction lawsuit is even remotely likely, issue a litigation hold letter to your team immediately. This way, the evidence your company needs to prove its case is accessible.

Litigation hold letters require employees to suspend all protocols that relate to destruction of data that may be relevant to the potential litigation (for example, automatic email purging.)

Accessibility is crucial for two reasons. First, the sooner and easier you can produce key evidence, the sooner and easier it is to file for an injunction with your court. Second, and perhaps more importantly, opponents often claim they "need discovery" *for the sole purpose of slowing down the injunction process and to gain leverage in negotiations.*

By comparison, great companies identity their key players likely to be in possession of relevant material, inventory it and have it ready to provide to the opponent immediately.

B. Prompt, Specific Petition about Irreparable Harm

Provide specific, prompt examples of the irreparable harm your company will suffer without an injunction.

Courts equate "irreparable harm" with "emergency," and the longer your company waits to apply for an injunction, the less likely you are to convince a judge there is an emergency. Judges, like all people, also respond better to concrete examples – like the Tier III supplier that will go out of business or the contract that will go unfilled, causing job loss – so be sure to provide as much detail as possible. Vague statements of "business loss" are unpersuasive – and, moreover, are what money damages compensate. The goal for an injunction petition is to show why money damages are insufficient.

Provide the court with affidavits from your suppliers, plant managers, accountants, etc., and copies of contracts that will go unfulfilled. For supply chain cases, provide photographs and replicas showing why your company's part is essential to the whole, photographs of shops that will close, etc. The point is to provide the court with a vivid picture and persuasive case that irreparable harm that will result.

C. Use Market Reports and Business Records

Market reports and business records show the extent of damage that will be done without an injunction. In all states, business records are admissible into evidence so long as they are maintained in the regular course of business and contain information that the business typically records (for example, profit and loss statements). Market reports are also generally admissible as public records, provided they are from a reliable source, such as a public or academic reporting body. Both will show your company's reach over the market and the number of interests at stake in the case.

D. Emphasize Goodwill and Business Reputation

As a matter of law, loss of goodwill and damage to business reputation are irreparable harms. So, emphasize them! For an injunction to issue, the court must find the harm is not fully compensable by money damages (such as, for example, ordering your company's opponent to pay you the difference for having to secure your part from another supplier). *See Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir.1992). The likely interference with customer relationships resulting from the breach of a contract is the kind of injury for which monetary damages are difficult to calculate. "The loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute. Similarly, the loss of fair competition that results from the breach of a non-competition covenant is likely to irreparably harm an employer." Id. at 512 (internal citations omitted).

Vague statements about "harm to goodwill" are unpersuasive – discuss it with specific examples, by reference to connections in the community. For example, if your company's loss will cause a local plant to shut down, or render your company in breach of another contract or render inept to negotiate, say so. Now is the time when (appropriately placed) self-promotion is necessary. Have an executive available to sign an affidavit and testify.

E. Case Consolidation

In most states, an injunction lawsuit is a two-step process: a temporary, or preliminary, injunction issues while the case is scheduled for trial to determine whether a permanent injunction should issue. In the meantime, your opponent will request discovery (see point A) and leverage you to settle out of fear that the case will not resolve before time is up for your company. This is a particular risk for courts that do not have mandatory decision deadlines. In those courts, your case could proceed to trial and yet not decision issue before your contract expires. To avoid these risks, in your petition ask that the court consolidate the process. Rather than decide first whether a temporary injunction should issue, set an immediate trial on the merits.

Your ability to offer discovery on a short turnaround time, thanks to that litigation hold letter, will go far here.

Strike promptly, and strike thoroughly, and you will likely stop your rogue supplier in the name of the law from dismantling your business once and for all. P