

JENNER & BLOCK

*Practice Series*

Temporary Restraining Orders and  
Preliminary Injunctions  
in Illinois State and Federal Courts

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IN ILLINOIS STATE AND FEDERAL COURTS**

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**I. TROs and PRELIMINARY INJUNCTIONS: THE BASICS**

**A. Statutory Authority**

1. Illinois: 735 ILCS 5/11-101 et seq.
2. Federal: FRCP 65
  - a. FRCP 65(a) governs preliminary injunctions. FRCP 65(b) governs TROs issued without notice. If a TRO with notice is extended beyond 20 days, it is treated as a preliminary injunction. *United Airlines, Inc. v. U.S. Bank, N.A.*, 406 F. 3d 918 (7th Cir. 2005).

**B. Purpose**

1. Illinois and federal courts consistently describe a TRO as an equitable remedy that is issued in exceptional and emergency circumstances when necessary to preserve the status quo until the court has an opportunity to rule on a motion for preliminary injunction after an evidentiary hearing. *See, e.g., Coca-Cola Co. v. Alma-Leo U.S.A., Inc.*, 719 F. Supp. 725, 726-27 (N.D. Ill. 1989).
  - a. Illinois: *Northwestern Steel & Wire Co. v. Indus. Comm'n*, 254 Ill. App. 3d 472, 476, 627 N.E.2d 71, 75 (1st Dist. 1993) (defining “status quo” as the last actual, peaceable, uncontested status preceding the controversy); *Abdulhafedh v. Secretary of State*, 161 Ill. App. 3d 413, 416, 514 N.E.2d 563, 565 (2d Dist. 1987) (TRO is a drastic remedy issued in exceptional circumstances to cover a brief period of time).
  - b. Federal: *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958) (defining “status quo” as the “last uncontested status which preceded the pending controversy” and granting in part, denying in part); *Illusions Too Reality, LLC v. City of Harvey*, 2003 U.S. Dist. LEXIS 1530, at \*11 (N.D. Ill. Feb. 4, 2003) (defining purpose of TRO and granting TRO).

2. The court will not decide controverted facts or the merits in the context of a motion for a TRO. *Jacob v. C & M Video, Inc.*, 248 Ill. App. 3d 654, 664, 618 N.E.2d 1267, 1274-75 (5th Dist. 1993); *Choudhry v. Jenkins*, 559 F.2d 1085, 1088 (7th Cir. 1977).

### **C. Two Types of TROs**

#### **1. TRO without Notice (ex parte)**

- a. TROs without notice are disfavored. *Nagel v. Gerald Dennen & Co.*, 272 Ill. App. 3d 516, 520-21, 650 N.E.2d 547, 551 (1st Dist. 1995); *Am. Can Co. v. Mansukhani*, 742 F.2d 314, 321 (7th Cir. 1984) (TROs are granted ex parte only in “extremely limited” circumstances).
- b. Under Illinois and federal law, a motion for a TRO without notice must be supported by a verified complaint or affidavit(s). 735 ILCS 5/11-101; FRCP 65(b). Note that as a technical matter, this does not apply to TROs with notice, although good practice is to submit a verified complaint or affidavits with any motion for a TRO.
- c. Before issuing a TRO without notice, Illinois courts may require the plaintiff to establish that, during the period it would take to give notice, the opponent would destroy the substance of the litigation or otherwise obstruct the court from addressing the situation prompting the motion for TRO. *C.D. Peters Const. Co., Inc. v. Tri-City Reg’l Port Dist.*, 281 Ill. App. 3d 41, 48, 666 N.E.2d 44, 48-49 (5th Dist. 1996); *Hirschauer v. Chicago Sun-Times*, 192 Ill. App. 3d 193, 201, 548 N.E.2d 630, 635-36 (1st Dist. 1989).
- d. Federal practice requires the plaintiff’s attorney to submit a declaration indicating the steps taken to attempt to notify the opposing party of the ex parte motion. FRCP 65(b).
- e. Under Illinois and federal law (735 ILCS 5/11-101 and FRCP 65(b)) any order granting an ex parte TRO must:
  - i. be endorsed with the date and hour of signing
  - ii. be filed immediately in the clerk’s office
  - iii. define the injury and state why it is irreparable

- iv. explain why no notice was given
- v. expire by its own terms, not to exceed 10 days
- vi. set the motion for a preliminary injunction for hearing at the earliest possible time

**2. TRO with Notice**

- a. Illinois: Illinois law permits a TRO with notice to be in place for more than 10 days only if a preliminary injunction hearing is scheduled within a short period of time. *Friedman v. Thorson*, 303 Ill. App. 3d 131, 137, 707 N.E.2d 624, 627 (1st Dist. 1999). “To allow a TRO of unlimited duration is to have a preliminary injunction without allowing the defendant a fair opportunity to show why an injunction should not be issued.” *Abdulhafedh v. Secretary of State*, 161 Ill. App. 3d 413, 417, 514 N.E.2d 563, 565 (2d Dist. 1987) (reversing trial court’s entry of TRO).
- b. Federal: Where a TRO is entered with notice but without an evidentiary hearing, the TRO should be for a limited duration until an evidentiary hearing can be held. *Coca-Cola Co. v. Alma-Leo U.S.A., Inc.*, 719 F. Supp. 725, 726-27 (N.D. Ill. 1989).
- c. Adequacy of Notice
  - i. Illinois: Notice is sufficient if in a form authorized by Ill. S. Ct. Rule 11(b), but even informal notice may be sufficient. *Am. Warehousing Servs., Inc. v. Weitzman*, 169 Ill. App. 3d 708, 715, 533 N.E.2d 366, 370 (1st Dist. 1988) (notice by telephone thirty minutes prior to the hearing was sufficient).
  - ii. Federal: Notice, even made to the attorney rather than the adverse party, is preferred over no notice at all. FRCP 65 advisory committee’s note.

**D. Pleading Requirements To Obtain a TRO or Preliminary Injunction**

- 1. “The standards for pleading injunctive relief are much more rigorous than for a complaint seeking other equitable relief.” Hon. Richard A. Siebel, *Injunctions*, CHANCERY AND SPECIAL REMEDIES, § 16.30 (2004) available at [www.iicle.com](http://www.iicle.com).

2. The complaint should set forth clearly and concisely the specific facts that support injunctive relief. *Sadat v. Am. Motors Corp.*, 104 Ill. 2d 105, 115-16, 470 N.E.2d 997, 1002 (1984); *PaineWebber Inc. v. Can Am Fin. Group, Ltd.*, No. 87 C 6890, 1987 WL 16012, at \*1 (N.D. Ill. Aug. 19, 1987).
  - a. Material allegations must be based on facts, not hearsay, speculation, or “information and belief.” *Heerey v. Berke*, 179 Ill. App. 3d 927, 939, 534 N.E.2d 1277, 1284 (1st Dist. 1989).
  - b. Conclusory allegations are insufficient and provide easy fodder for defendants. *Belden v. Tri-Star Producing Co.*, 106 Ill. App. 3d 192, 202, 435 N.E.2d 927, 934 (5th Dist. 1982) (“[T]he complaint must allege facts . . . and cannot present mere conclusions unsubstantiated by facts.”); *PaineWebber*, 1987 WL 16012, at \*2 (denying TRO that failed to supply the court with sufficient facts and relied on “bald assertions”).

#### **E. Evidentiary Hearings**

1. Illinois: On a petition for a TRO, evidentiary hearings are not required, and may not be permitted. *Passon v. TCR, Inc.*, 242 Ill. App. 3d 259, 263, 608 N.E.2d 1346, 1349 (2d Dist. 1993); *see also* Thomas J. O’Brien & Richard A. Jurczyk, “TRO Petitions: Is An Evidentiary Hearing Required?,” 81 Ill. B.J. 572 (1993) (arguing that TRO should be decided based on the pleadings and non-evidentiary arguments of counsel, while preliminary injunctions are decided after an evidentiary hearing).
2. Federal: Although an evidentiary hearing is not required for a TRO under FRCP 65(b), they may be held. *See, e.g., Echo Travel, Inc. v. Travel Assocs., Inc.*, 870 F.2d 1264, 1265 (7th Cir. 1989); *Dombrowski v. Dowling*, 459 F.2d 190, 191 (7th Cir. 1972); *First Def. Legal Aid v. City of Chicago*, 209 F. Supp. 2d 934, 934-35 (N.D. Ill. 2002), *rev’d on other grounds*, 319 F.3d 967 (7th Cir. 2003). The practitioner should confirm that the TRO hearing will be a summary, non-evidentiary proceeding to determine if emergency relief should be entered pending an evidentiary hearing on the request for a preliminary injunction.
3. Although FRCP 65(a) does not expressly require an evidentiary hearing before a *preliminary injunction* is issued, courts and commentators have indicated that the need for a hearing is implicit in the rule. 6 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 65.21 (3d ed. 2005).

## **F. Consolidation with the Merits**

1. Illinois: The court will not decide controverted facts or the merits in the context of a motion for a TRO. *Jones v. Dep't of Public Aid*, 373 Ill. App. 3d 184, 192 (3d Dist. 2007) (affirming grant of preliminary injunction).
2. Federal: A preliminary injunction hearing may be consolidated with the trial on the merits under FRCP 65(a)(2) provided the parties are given sufficient notice consistent with the requirements of due process. *Dupuy v. Samuels*, 423 F.3d 714, 722 n.2 (7th Cir. 2005). Consolidation is within the court's discretion. *Id.*

## **G. The Bond Requirement**

1. Illinois: A bond is discretionary. 735 ILCS 5/11-103.
  - a. The amount of the bond is discretionary, and should be related to the damage the defendant would suffer if the TRO was wrongfully entered. 735 ILCS 5/11-103.
  - b. The trial court record should show good cause for refusing to require a bond. *Hill v. Vill. of Pawnee*, 16 Ill. App. 3d 208, 210, 305 N.E.2d 740, 742 (4th Dist. 1973); *Schaefer v. Stephens-Adamson Mfg. Co.*, 36 Ill. App. 2d 310, 316, 183 N.E.2d 575 (1st Dist. 1962).
  - c. Failure to request a bond or object to the lack of a bond waives the issue. *Cent. Water Works Supply, Inc. v. Fisher*, 240 Ill. App. 3d 952, 960, 608 N.E.2d 618, 624 (4th Dist. 1993).
  - d. Even if the court erroneously refuses to enter a bond, the TRO is still valid. *Am. Warehousing Servs., Inc. v. Weitzman*, 169 Ill. App. 3d 708, 713, 533 N.E.2d 366, 369 (1st Dist. 1988).

2. Federal: A bond is required. FRCP 65(c).

“No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.” FRCP 65(c).

- a. The issuance of a bond is mandatory, absent extraordinary circumstances. *Geneva Assurance Syndicate, Inc. v. Med.*

*Emergency Services Assocs.*, 1992 U.S. Dist. LEXIS 6167, at \*42 (N.D. Ill. Apr. 29, 1992).

- b. The amount of the bond is left to the discretion of the court. *Am. Hosp. Supply Corp. v. Mueller*, 780 F.2d 589 (7th Cir. 1986).
- c. The purpose of the bond is to guarantee payment of costs and damages incurred by a party who is wrongfully enjoined or restrained. *LaSalle Capital Group, Inc. v. Alexander Doll Co.*, 1995 U.S. Dist. LEXIS 14338, at \*7 (N.D. Ill. Oct. 2, 1995).
- d. The bond need not be presented with the request for TRO; however, the TRO will not be effective unless and until a bond has been posted.

#### **H. The Form of TRO**

- 1. Similar requirements under Illinois and federal law. *See* 735 ILCS 5/11-101; FRCP 65(b). The text of the TRO entered by the court must comply with the applicable rules:
  - a. Shall contain the reasons for entry of the TRO.
  - b. Shall be specific in terms.
  - c. Shall describe in reasonable detail, without reference to other documents, the act sought to be restrained.
  - d. *See* requirements above for TRO issued without notice.
- 2. TROs are binding upon the parties to the action, their officers, agents, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the TRO. 735 ILCS 5/11-101; FRCP 65(b). *See Lake Shore Asset Mgmt. Ltd. v. Commodity Fut. Trading Comm'n*, 511 F.3d 762 (7th Cir. 2007).

## II. THE LEGAL ELEMENTS

- A. Illinois: Illinois courts consistently require a plaintiff to establish four elements with specific facts: (1) a protectable right; (2) irreparable harm; (3) an inadequate remedy at law; and (4) a likely success on the merits. *Murges v. Bowman*, 254 Ill. App. 3d 1071, 1081, 627 N.E.2d 330, 337 (1st Dist. 1993).
- B. Federal: Federal courts generally apply a two-step analysis. First, federal courts determine if there is (1) a likelihood of success on the merits, (2) a threat of irreparable harm, and (3) an inadequate remedy at law. If those conditions are satisfied, the court must then (4) balance the hardships, and (5) consider the impact on public interest. *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007) (applying “sliding scale” analysis); *Promatek Indus. v. Equitrac Corp.*, 300 F.3d 808, 811 (7th Cir. 2002) (affirming grant of preliminary injunction). The standards for a TRO and a preliminary injunction are identical. *Illusions Too Reality, LLC v. City of Harvey*, 2003 U.S. Dist. LEXIS 1530, at \*11 (N.D. Ill. Feb. 4, 2003) (granting TRO).
- C. Common Elements. The elements applied under Illinois and federal law are discussed below:

### 1. Irreparable Harm

- a. Irreparable injury is defined as “harm that cannot be prevented or fully rectified by the final judgment after trial.” *Roland Machine Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) (reversing grant of preliminary injunction).
- b. Transgressions of a continuing nature are sufficient. *Central Water Works Supply, Inc. v. Fisher*, 240 Ill. App. 3d 952, 959, 608 N.E.2d 618, 623 (4th Dist. 1993).
- c. If the TRO is sought ex parte, the injury must be immediate and irreparable. FRCP 65(b).

### 2. Inadequate Remedy at Law

- a. An adequate remedy is one that is clear, complete, and as practical and efficient as the potential equitable remedy. *Cranberg v. Didrickson*, 279 Ill. App. 3d 886, 890, 665 N.E.2d 398, 401 (1st Dist. 1996).
- b. “In saying that the plaintiff must show that an award of damages at the end of trial will be inadequate, we do not mean wholly ineffectual; we mean seriously deficient as a remedy for the harm suffered.” *Roland Machine Co. v. Dresser Indus., Inc.*, 749 F.2d

380, 386 (7th Cir. 1984) (reversing grant of preliminary injunction). The court in *Roland* identified various ways in which a damages remedy may be inadequate:

- i. The damage award may come too late to save the plaintiff's business.
  - ii. The plaintiff may not be able to finance its lawsuit against the defendant without the revenues from its business that the defendant is threatening to destroy.
  - iii. Damages may be unobtainable from the defendant because it may become insolvent before a final judgment can be entered and collected.
  - iv. The nature of the plaintiff's loss may make damages very difficult to calculate. For example, loss of customer goodwill and damage to one's reputation are intangible harms for which it is virtually impossible to ascertain precise economic consequences. *SMC Corp. v. Lockjaw, LLC*, 481 F. Supp. 2d 918, 928 (N.D. Ill. 2007) (granting preliminary injunction).
- c. This element is often considered together with the requirement of irreparable harm. *See, e.g., Libertarian Party v. Packard*, 741 F.2d 981, 984 (7th Cir. 1984).

### 3. **A Likelihood of Success on the Merits**

- a. Illinois: The plaintiff must "(1) raise a fair question as to the existence of the right claimed, (2) lead the court to believe that he will probably be entitled to the relief prayed for if the proof sustains his allegations, and (3) make it appear advisable that the positions of the parties stay as they are until the court has an opportunity to consider the merits of the case." *Abdulhafedh v. Secretary of State*, 161 Ill. App. 3d 413, 417, 514 N.E.2d 563, 565 (2d Dist. 1987). *See also Bradford v. Wynstone Prop. Owners' Ass'n*, 355 Ill. App. 3d 736, 739, 823 N.E.2d 1166, 1169 (2d Dist. 2005) (plaintiff must establish all four elements "by a preponderance of the evidence"); *Jacob v. C & M Video, Inc.*, 248 Ill. App. 3d 654, 664, 618 N.E.2d 1267, 1275 (5th Dist. 1993) (Plaintiff must show a "prima facie case that there is a fair question as to the existence of the rights claimed").

- b. Federal: “It is enough that ‘the plaintiff’s chances are better than negligible.’” *Brunswick Corp. v. Jones, Jr.*, 784 F.2d 271, 275 (7th Cir. 1986) (affirming grant of preliminary injunction).
  - i. The “threshold is low.” *Roland Machine Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984) (reversing grant of preliminary injunction).
  - ii. This standard “does not require a finding that it is more likely than not that one side will prevail.” *Oxford Capital Illinois, L.L.C. v. Sterling Payroll Fin., L.L.C.*, 2002 U.S. Dist. LEXIS 4372, at \*12 n.2 (N.D. Ill. Mar. 15, 2002). It is possible that both the plaintiff and the defendant may have a “better than negligible” likelihood of success. *Id.*
  - iii. The federal court must determine how likely the success is, because this affects the balancing of the relative harms (*see* “Balancing of Hardships” below). *Roland Machine*, 749 F.2d at 387.

#### 4. **Balancing of Hardships**

- a. Illinois: Illinois courts considering a *preliminary injunction* require the plaintiff to show that the balance of the hardships weighs in favor of granting the preliminary injunction. *See Delta Med. Sys. v. Mid-America Med. Sys., Inc.*, 331 Ill. App. 3d 777, 789, 772 N.E.2d 768, 778 (1st Dist. 2002). This technically is not required on a petition for a TRO, although it is sometimes considered. *Wilson v. Wilson*, 217 Ill. App. 3d 844, 848, 577 N.E.2d 1323, 1326 (1st Dist. 1991).
- b. Federal: The irreparable harm the nonmovant will suffer if an injunction is granted is weighed against the irreparable damage the movant will suffer if it is not. *Meridian Mut. Ins. Co. v. Meridian Ins. Group*, 128 F.3d 1111, 1120 (7th Cir. 1997) (reversing denial of preliminary injunction).
  - i. The balancing of the harms involves a “sliding scale” analysis – the greater the movant’s likelihood of success on the merits, the less strong a showing the movant must make that the balancing of harms weighs in its favor. *Promatek Indus. v. Equitrac Corp.*, 300 F.3d 808, 811 (7th Cir. 2002) (affirming grant of preliminary injunction); *Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 314 (7th Cir. 1994) (affirming denial of preliminary injunction).

- ii. In weighing the harm to the non-moving party, the court considers whether an injunction bond would compensate those harms. *Gateway Eastern Ry., Co. v. Terminal R.R. Assoc. of St. Louis*, 35 F.3d 1134, 1140 (7th Cir. 1994) (affirming grant of preliminary injunction).

**5. Impact on Public Interest**

- a. If the public interest would be harmed by the injunctive relief sought, then this factor weighs in favor of denying the TRO; if the public interest would be positively affected, then this factor weighs in favor of granting the TRO. *See, e.g., FATSUSA v. FATSIFarrag & Stipsits GmbH*, 2002 U.S. Dist. LEXIS 22840, at \*12 (N.D. Ill. Nov. 26, 2002) (public interest benefits from increased competition).
- b. The primary concern here is to ensure that issuing an injunction will not disserve or harm the public interest. *Gateway Eastern Ry., Co. v. Terminal R.R. Assoc. of St. Louis*, 35 F.3d 1134, 1139 n.3 (7th Cir. 1994) (affirming grant of preliminary injunction).

**III. AFTER THE TRO HEARING**

**A. Expiration and Extension**

1. Illinois: 735 ILCS 5/11-101
  - a. TROs without notice expire after 10 days.
  - b. The 10-day limitation may be extended for an additional 10 days for good cause shown.
  - c. Courts are reluctant to grant more than one 10-day extension, thereby limiting TROs to a maximum of 20 days. *Abdulhafedh v. Sec’y of State*, 161 Ill. App. 3d 413, 416-17, 514 N.E.2d 563, 565 (2d Dist. 1987) (finding that circuit court abused its discretion by extending TRO for 98 days without an evidentiary hearing).
  - d. TROs with notice may be in force for longer than 10 days, but only if a preliminary injunction hearing is scheduled within a short period of time. *Friedman v. Thorson*, 303 Ill. App. 3d 131, 137, 707 N.E.2d 624, 627 (1st Dist. 1999).

2. Federal: FRCP 65(b)
  - a. A TRO entered without notice shall “expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.”
  - b. A TRO may be extended beyond 20 days by agreement among the parties. *Levas & Levas v. Vill. of Antioch*, 684 F.2d 446, 448 n.1 (7th Cir. 1982).
3. The party who obtained the TRO must proceed with the preliminary injunction on the date set. If not, the court will dissolve the TRO. 735 ILCS 5/11-101; FRCP 65(b).

## **B. Motion to Dissolve**

1. If a TRO is entered ex parte, the defendant may file a motion to dissolve the order. The motion should be filed as soon as possible, and should request a hearing within two days of the TRO being served. *Harper v. Missouri Pac. R.R.*, 264 Ill. App. 3d 238, 244, 636 N.E.2d 1192, 1197-98 (5th Dist. 1994); FRCP 65(b).
2. A TRO may be dissolved where the restrained party demonstrates that the circumstances of the case have changed, or that it would be severely injured by the injunctive relief. *Local 705 v. Almarc Mfg., Inc.*, 553 F. Supp. 1170, 1175 (N.D. Ill. 1982).
3. Whether to dissolve a TRO rests with the sound discretion of the trial court. *Int’l Ass’n of Firefighters v. City of East St. Louis*, 206 Ill. App. 3d 580, 584, 565 N.E.2d 264, 266 (5th Dist. 1990); *Casey K. v. St. Anne Cmty. High School Dist. No. 302*, 400 F.3d 508, 513 (7th Cir. 2005).
4. Effect of Removal to Federal Court
  - a. If case is removed after TRO is issued, the TRO remains in effect under 28 U.S.C. § 1450: “Whenever any action is removed from a State court to a district court of the United States . . . [a]ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court.” Thus, interlocutory orders entered by the state court do not automatically lapse upon removal. *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers, Local No. 70*, 415 U.S. 423, 436 (1974).

- b. Once a case is removed to federal court, its course is governed by federal law, and therefore “a party against whom a temporary restraining order has been issued can move to dissolve or modify the injunction, upon short notice to the party who obtained the order.” *Id.* at 441 (citing FRCP 65(a)).

## C. Appeals

1. Illinois: Ill. S. Ct. Rule 307(d)
  - a. Unlike federal TRO practice under FRCP 65(b), grants and denials of TROs may be appealed.
  - b. Notice of interlocutory appeal and petition for appeal must be filed within two days of entry of the TRO. *Friedman v. Thorson*, 303 Ill. App. 3d 131, 136, 707 N.E.2d 624, 627 (1st Dist. 1999).
  - c. If the TRO was issued ex parte, the party may file its appeal within two days of service of the TRO. *Harper v. Missouri Pac. R.R.*, 264 Ill. App. 3d 238, 246, 636 N.E.2d 1192, 1199 (5th Dist. 1994).
  - d. Appeal Documents: Ill. S. Ct. Rule 307(d)
    - i. Notice of Interlocutory Appeal to the trial court
    - ii. Petition for Appeal
    - iii. Certified supporting record with complaint, TRO petition and TRO entered by the trial court
    - iv. Optional supporting memorandum of up to fifteen pages
    - v. Respondent may file response brief not to exceed fifteen pages within two days of the filing of the appeal petition
    - vi. No replies are allowed without court approval
  - e. The appellate court will consider the petition within four days (within two days after respondent’s brief is due)
  - f. No oral arguments

2. Federal:
  - a. TROs generally are not appealable. *Local 1001 v. Laborers' Int'l Union of N. Am.*, 365 F.3d 576, 578 (7th Cir. 2004).
  - b. TROs are appealable only if they have the effect of a preliminary injunction (e.g., by being extended beyond 20 days). *United States v. Board of Education*, 11 F.3d 668, 671-72 (7th Cir. 1993); 28 U.S.C. § 1292(a)(1).
  - c. TROs that are extended beyond 20 days may be appealable as preliminary injunctions. *United Airlines, Inc. v. U.S. Bank N.A.*, 406 F.3d 918 (7th Cir. 2005). *But see Geneva Assurance & Syndicate, Inc. v. Med. Emergency Servs. Ass'n*, 964 F.2d 599, 600 (7th Cir. 1992) (TRO extended by agreement until preliminary injunction hearing was not appealable).

**D. Damages for Wrongfully Issued TROs**

1. *See* 735 ILCS 5/11-110; FRCP 65(b).
2. To collect damages on a TRO bond, the adverse party must prove (a) the TRO was wrongfully issued, and (b) that it suffered damages as a result of the wrongfully issued TRO. *LaSalle Capital Group, Inc. v. Alexander Doll Co.*, 1995 U.S. Dist. LEXIS 14338, at \*7 (N.D. Ill. Oct. 2, 1995). The court must enter a finding (either on a motion to dissolve or on appeal) that the TRO was wrongfully entered. *Stocker Hinge Mfg. Co. v. Darnel Indus., Inc.*, 94 Ill. 2d 535, 543-44, 447 N.E.2d 288, 292 (1983) (dissenting opinion).
3. Dissolution of the TRO at the conclusion of a preliminary injunction hearing does not mean it was wrongfully entered. *C.D. Peters Const. Co. v. Tri-City Regional Port Dist.*, 281 Ill. App. 3d 41, 46, 666 N.E.2d 44, 47 (5th Dist. 1996).
4. **Damages and Attorneys' Fees**
  - a. Damages are limited to those actual damages suffered during the life of the TRO. *Label Printers v. Pflug*, 246 Ill. App. 3d 435, 439-41, 616 N.E.2d 706, 709-10 (2d Dist. 1993); *VictorMaxx Tech., Inc. v. Koy*, 1998 U.S. Dist. LEXIS 3642, at \*2 (N.D. Ill. Mar. 20, 1998).

- b. Attorneys' fees
  - i. Illinois: Attorneys' fees arising out of actions taken to reverse or dissolve a wrongfully entered TRO are recoverable. *Bank of Lyons v. Schultz*, 22 Ill. App. 3d 410, 418, 318 N.E.2d 52, 58-59 (1st Dist. 1974).
  - ii. Federal: Because the bond is meant to cover the damages resulting from the effect of the injunction itself, attorneys' fees generally are not recoverable. *Coyne-Delany Co. v. Capital Development Board*, 717 F.2d 385, 390 (7th Cir. 1983).

#### IV. SPECIAL CONSIDERATIONS

##### A. Arbitration Clauses

##### 1. Emergency Injunctive Relief Pending Arbitration

- a. Illinois: Although Illinois courts have not directly addressed this issue, decisions from other states and the Seventh Circuit suggest that a court may enter emergency injunctive relief pending arbitration.
  - i. The Illinois Arbitration Act, 710 ILCS 5/1 et seq., is based on the Uniform Arbitration Act ("UAA"), and other jurisdictions interpreting the UAA have allowed injunctive relief pending arbitration. *See, e.g., Hughley v. Rocky Mtn. Health Maint. Org., Inc.*, 927 P.2d 1325, 1330 (Colo. 1996) (holding that a "trial court's grant of injunctive relief is proper so long as it does not invade the province of the arbitrator by reaching the merits of the dispute"); *Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co.*, 506 N.E.2d 140, 145 (Mass. 1987) (same).
  - ii. In interpreting this issue under the Federal Arbitration Act, the Seventh Circuit stated that there is "no meaningful difference between Illinois and federal policy as to the propriety of injunctive relief." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Salvano*, 999 F.2d 211, 214 n.3 (7th Cir. 1993).

- b. Federal: “[D]istrict courts are not precluded as a general matter from issuing preliminary injunctive relief pending arbitration.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 214 (7th Cir. 1993).
  - i. **Majority Approach** (1st, 2nd, 3rd, 4th, 7th, 6th, 9th): A court may enter preliminary injunctive relief despite an arbitration clause “where the plaintiff satisfi[es] the requisites for obtaining such relief under the four usual factors justifying injunctions.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 214 (7th Cir. 1993) (citing *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 351 (7th Cir. 1983)).
  - ii. **Minority Approach** (8th): A court may not enter preliminary injunctive relief if the matter is subject to arbitration unless the underlying contract contains “qualifying contractual language” that contemplates injunctive relief. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1292 (8th Cir. 1984); *See also, Peabody Coalsales Co. v. Tampa Elec. Co.*, 36 F.3d 46, 47 n.3 (8th Cir. 1994) (defining “‘qualifying contractual language’ as language which provides the court with clear grounds to grant relief without addressing the merits of the underlying arbitrable dispute”).

## 2. **Limitation of Courts’ Authority to Grant Injunctive Relief**

- a. Any preliminary injunctive relief issued expires when an arbitration panel is available to review the issue. *Salvano*, 999 F.2d at 215.
- b. “Once assembled, an arbitration panel can enter whatever temporary injunctive relief it deems necessary to maintain the status quo.” *Id.*

## 3. **Injunctive Relief under Other Rules**

- a. The Revised Uniform Arbitration Act (2000) expressly authorizes courts to grant injunctive relief to preserve the status quo until an arbitrator is appointed and able to act. Revised Uniform Arbitration Act § 8(a).
- b. The arbitration rules of many organizations give the arbitrators the authority to grant preliminary relief. *See, e.g.*, JAMS International Arbitration Rules, Article 26.1. (“At the request of any party, the

Tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.”); CPR Rules for Non-Administered Arbitration, Rule 13.1 (“At the request of a party, the Tribunal may take such interim measures as it deems necessary.”)

- c. The American Arbitration Association (AAA) Commercial Arbitration Rules contain “Optional Rules for Emergency Measures of Protection.” AAA Comm Arb R-O-1 (Applicability).
  - i. Under the rules, the AAA appoints an emergency arbitrator within one business day of receiving written notice from the party requesting emergency relief.
  - ii. This emergency procedure does not automatically apply to all parties who agree to arbitrate under the AAA. Rather, parties must expressly adopt these rules in the arbitration clause or by special agreement.

## **B. Mandatory Injunctions**

1. Preliminary mandatory injunctions are used to maintain the status quo when the status quo is a “condition of action” and the condition of rest is exactly what will inflict irreparable injury upon the complainant. *Brooks v. LaSalle Nat’l Bank*, 11 Ill. App. 3d 791, 799, 298 N.E.2d 262, 268 (1st Dist. 1973); *Gary Joint Venture v. Friendly Ice Cream Corp.*, No. 87 C 886, 1987 WL 12691, at \*5 (N.D. Ill. June 15, 1987) (“[A] mandatory injunction is an extraordinary remedial process . . . and commands the performances of some positive act, some duty that the defendant is either refusing or failing to perform.”).
2. Preliminary mandatory injunctions are disfavored. *Shodeen v. Chicago Title and Trust Co.*, 162 Ill. App. 3d 667, 673, 515 N.E.2d 1339, 1344 (2d Dist. 1987); *Jordan v. Wolke*, 593 F.2d 772, 774 (7th Cir. 1979) (“[Preliminary mandatory injunctions] are ordinarily cautiously viewed and sparingly issued.”).
  - a. Preliminary mandatory injunctions will only be issued on the clearest equitable grounds. *Ambassador Foods Corp. v. Montgomery Ward & Co.*, 43 Ill. App. 2d 100, 105, 192 N.E.2d 572, 575 (1st Dist. 1963) (“For a court to find that there exists the extreme urgency or great necessity justifying a mandatory injunction, the need for such relief must, indeed, be clearly established and free from doubt.”); *W.A. Mack, Inc. v. Gen. Motors Corp.*, 260 F.2d 886, 890 (7th Cir. 1958) (stating that preliminary

mandatory injunctions should only be issued upon the “clearest equitable grounds”).

- b. “Generally, Illinois courts have refused to enter mandatory injunctions to enforce contracts which by their terms call for a succession of acts whose performance can not be consummated by one transaction, and which required protracted supervision and direction.” *New Park Forest Assoc. II v. Rogers Enter., Inc.*, 195 Ill. App. 3d 757, 762, 552 N.E.2d 1215, 1218 (1st Dist. 1990) (refusing to enter a TRO enjoining tenant from vacating shopping center in violation of lease’s continuous occupancy provision).

## V. TRO PRACTICE POINTERS

### A. For the Plaintiff:

1. Particularly if seeking ex parte TRO, the complaint must be verified or supported by affidavits: consider need for more than one “verifier.”
2. Don’t over-reach with affidavits: the affidavit is road-map for cross-examination.
3. Seek relief that is reasonable and narrowly tailored to preserve status quo and prevent irreparable harm.
4. Along with verified complaint, present motion and supporting brief for TRO and Preliminary Injunction.
5. Prepare draft Order with required language and TRO relief plainly stated.
6. Think hard about notice: courts usually want to see effort to give reasonable notice. If seeking a TRO without notice, be prepared to explain efforts to give notice (required by declaration in federal court).
7. Be prepared to post bond. Argue why bond should not be required (Illinois) or why amount should be minimal (federal). Remember that in federal court, a TRO or preliminary injunction may not be effective without a bond.
8. Prepare discovery needed for preliminary injunction hearing; consider motion for expedited discovery. Anticipate discovery requests from defendant and develop plaintiff’s strategy of quick response to discovery requests.
9. If TRO is denied, press for quick preliminary injunction hearing.

10. If TRO is granted, consider pressing ahead on the merits in lieu of a preliminary injunction hearing.
11. In Illinois, consider whether to seek a substitution of judge. 735 ILCS 5/2-1001(a)(2).
12. Manage client expectations. Discuss fees. Understand ultimate goal. Consider negotiated resolution.

**B. For the Defendant:**

1. Clear conflicts. If representing multiple defendants, get appropriate waivers.
2. Venue/Jurisdiction. Confirm that litigation is in the right forum by considering issues of personal and subject-matter jurisdiction, and venue. Consider whether case can be removed to federal court.
3. File or tender appearance before addressing court.
4. Determine if complaint will survive a motion to dismiss; consider joint memorandum in opposition to TRO and in support of motion to dismiss.
5. Prepare verified answer denying material allegations. If don't have time to prepare complete answer, deny material allegations, if possible. If answer is filed, can still move for judgment on the pleadings or summary judgment.
6. Inform court of intention to file motion to dismiss or verified answer. If complaint states a claim, present verified answer at TRO hearing or ASAP.
7. Prepare short brief opposing TRO. Consider whether to file or present orally. Think hard before submitting counter-affidavits. Likely will not be considered by Illinois court. May be better to press for date for evidentiary hearing.
8. Focus on any conclusory allegations in plaintiff's complaint. Use these against plaintiff.
9. Carefully check verification offered by plaintiff, and compare to any allegations "on information and belief."
10. Confirm ground rules with court: issue is whether to enter short-term TRO until there can be an evidentiary hearing.

11. If TRO will be for an extended period before preliminary injunction hearing, argue that TRO effectively would be a preliminary injunction, and note that under Illinois law, it is reversible error to enter a preliminary injunction without evidentiary hearing. In other words, court should not enter a preliminary injunction (or its equivalent) without an evidentiary hearing.
12. Be prepared to argue for significant bond if TRO is entered.
13. Consider what discovery you need for a preliminary injunction hearing. Prepare discovery and consider whether to move for expedited discovery.
14. If TRO is entered press for quick preliminary injunction hearing. If TRO is denied, delay may be in your favor.
15. Consider equitable defenses, *e.g.*:
  - a. Is request for injunction estopped by an equitable defense?
  - b. Does the plaintiff have clean hands?
16. In Illinois, consider whether to seek a substitution of judge. 735 ILCS 5/2-1001(a)(2).
17. Manage client expectations. Discuss fees. Understand ultimate goal. Consider negotiated resolution.