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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 28 days, it may be treated as a preliminary injunction. *United Airlines, Inc. v. U.S. Bank, N.A.*, 406 F.3d 918, 923 (7th Cir. 2005).

B. Purpose of a TRO

1. Illinois and federal courts 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.
 - a. Illinois: *Nw. 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. Sec’y 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”); *Illusions Too Reality, LLC v. City of Harvey*, No. 02 C 7272, 2003 WL 260335, at *5 (N.D. Ill. Feb. 4, 2003) (TRO is an emergency remedy issued to maintain the status quo).
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. 735 ILCS 5/11-101; FRCP 65(b). As a technical matter, this does not apply to TROs with notice, but good practice is to submit a verified complaint or affidavits with any motion for a TRO. *See Roxana Cmty. Unit Sch. Dist. No. 1 v. WRB Refining, LP*, 2012 IL App (4th) 120331, ¶ 20, 973 N.E.2d 1073, 1079 (affirming preliminary injunction based on unverified complaint where defendant received notice, entered an appearance, and participated at the hearing).
- 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 interfere with the court’s ability to address the situation prompting the motion for TRO. *C.D. Peters Constr. Co. 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. Chi. Sun-Times*, 192 Ill. App. 3d 193, 201, 548 N.E.2d 630, 635-36 (1st Dist. 1989).
- d. Federal rules require 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 (14 days under FRCP 65(b)(2)); and
 - 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. Sec’y of State*, 161 Ill. App. 3d 413, 417, 514 N.E.2d 563, 565 (2d Dist. 1987) (reversing trial court’s entry of TRO).
 - i. A TRO issued with notice and for an unlimited duration is the same type of relief as a preliminary injunction. *In re Estate of Wilson*, 373 Ill. App. 3d 1066, 1075, 869 N.E.2d 824, 833 (1st Dist. 2007); *Murges v. Bowman*, 254 Ill. App. 3d 1071, 1079-80, 627 N.E.2d 330, 336 (1st Dist. 1993).
 - ii. If a preliminary hearing is not scheduled by agreement or because the enjoined party asks for more time for discovery, a TRO may extend for more than 10 days without becoming a preliminary injunction. *Vill. of Lake in the Hills v. Athans Co.*, No. 2-11-1092, 2011 WL 10457432, at *5-6 (Ill. Ct. App. Nov. 8, 2011); *People Gas Light & Coke Co. v. City of Chi.*, 117 Ill. App. 3d 353, 357, 453 N.E.2d 740, 743 (1st Dist. 1983).
- 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 suffice. *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 & Special Remedies* § 16.32 (2009), available at www.iicle.com; see also *Hadley v. Dep’t of Corrs.*, 362 Ill. App. 3d 680, 684, 840 N.E.2d 748, 753 (4th Dist. 2005) (noting rigorous pleading requirements for injunctive relief).
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, 116, 470 N.E.2d 997, 1002 (1984); *PaineWebber Inc. v. Can Am Fin. Grp., 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 the responding party. *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, 573 (1993) (arguing that a TRO should be decided based on the pleadings and non-evidentiary arguments of counsel, while preliminary injunctions are decided after an evidentiary hearing).
 - a. “[A] hearing on a motion for a TRO is a summary proceeding, and even if the defendant files a verified answer, the court still proceeds in a summary fashion, hearing only arguments on the motion for the TRO.” *Passon*, 242 Ill. App. 3d at 263, 608 N.E.2d at 1349.
 - b. 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, 193, 867 N.E.2d 563, 571 (3d Dist. 2007) (affirming grant of preliminary injunction).

- c. Generally, an evidentiary hearing is necessary before imposing a preliminary injunction. *Vill. of Lake in the Hills v. Athans Co.*, No. 2-11-1092, 2011 WL 10457432, at *4 (Ill. Ct. App. Nov. 8, 2011).
2. Federal: Although an evidentiary hearing is not required for a TRO under FRCP 65(b), a hearing 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 Chi.*, 209 F. Supp. 2d 935, 936-37 (N.D. Ill. 2002), *rev'd on other grounds*, 319 F.3d 967 (7th Cir. 2003). You 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, a hearing is generally required unless the defendant's response fails to create a genuine issue of material fact. *In re Aimster Copyright Litig.*, 334 F.3d 643, 653-54 (7th Cir. 2003) (affirming preliminary injunction despite district judge's refusal to hold evidentiary hearing).

F. Consolidation With the Merits

1. Illinois: A preliminary injunction hearing may be consolidated with a trial on the merits only when the parties are given sufficient notice prior to the hearing, in accordance with due process requirements. *See Elec. Design & Mfg. Inc. v. Konopka*, 272 Ill. App. 3d 410, 415-16, 649 N.E.2d 619, 623-24 (1st Dist. 1995) (reversing order instituting permanent injunction because notice was insufficient to grant ultimate relief).
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 due process requirements. *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 any bond is discretionary, and should be related to the damage the defendant would suffer if the TRO or preliminary injunction was wrongfully entered. 735 ILCS 5/11-103.
 - i. The purpose of requiring the plaintiff to post a bond "is to assure defendant that the damages will be paid in the event the preliminary injunction is later dissolved, and damages for the unlawful suing out of the injunction are assessed

against plaintiff.” *Schaefer v. Stephens-Adamson Mfg. Co.*, 36 Ill. App. 2d 310, 315-16, 183 N.E.2d 575, 578 (1st Dist. 1962); *see also Hill v. Vill. of Pawnee*, 16 Ill. App. 3d 208, 210, 305 N.E.2d 740, 742 (4th Dist. 1973); *Hoffman v. City of Evanston*, 101 Ill. App. 2d 440, 444, 243 N.E.2d 478, 480 (1st Dist. 1968).

- ii. For a discussion of the types of damages a wrongfully enjoined party may recover, see Part III.D, below.
- b. Factors considered by courts in setting or excusing bond.
- i. Hardship to the moving party. Courts have applied this principle in both commercial and non-commercial cases. *See, e.g., Save the Prairie Soc’y v. Greene Dev. Grp., Inc.*, 338 Ill. App. 3d 800, 804, 789 N.E.2d 389, 392 (1st Dist. 2003) (non-commercial case); *Gold v. Ziff Commc’ns Co.*, 196 Ill. App. 3d 425, 436, 553 N.E.2d 404, 411 (1st Dist. 1989) (commercial case). However, in commercial cases, the moving party “can be assumed capable of bearing most bond requirements, so hardship to them is less of a factor.” *Prairie Society*, 338 Ill. App. 3d at 805, 789 N.E.2d at 393.
 - ii. The moving party’s not-for-profit status. *See Prairie Society*, 338 Ill. App. 3d at 804, 789 N.E.2d at 392-93. *But see Rochester Buckhart Action Grp. v. Young*, 394 Ill. App. 3d 773, 780, 914 N.E.2d 1251, 1257 (4th Dist. 2009) (“[N]o rule of law states ‘that in every case where the public interest is involved the court may, without any further showing, order the issuance of a temporary injunction without bond.’”).
 - iii. The moving party’s inability to post bond may provide good cause to require bond: “The allegation that plaintiffs are ‘substantially without funds’ is ‘good cause’ for the court to require a bond rather than ‘good cause’ to excuse a bond” because it “affirmatively shows that if the injunction were improvidently issued, plaintiffs would be unable to respond for any substantial damages suffered by defendants.” *Schaefer v. Stephens-Adamson Mfg. Co.*, 36 Ill. App. 2d 310, 316, 183 N.E.2d 575, 579 (1st Dist. 1962).
 - iv. Where the likelihood of harm to the enjoined party is minimal, bond may be set low or excused altogether. *See, e.g., Prairie Society*, 338 Ill. App. 3d at 805, 789 N.E.2d at 393; *Carriage Way Apartments v. Pojman*, 172 Ill. App. 3d 827, 836, 527 N.E.2d 89, 95 (2d Dist. 1988). There is less

likelihood of harm where the movant has a history of satisfying debts to the enjoined party. *See, e.g., A.J. Dralle, Inc. v. Air Techs., Inc.*, 255 Ill. App. 3d 982, 995, 627 N.E.2d 690, 699 (2d Dist. 1994); *Falcon, Ltd. v. Corr's Natural Beverages, Inc.*, 165 Ill. App. 3d 815, 822, 520 N.E.2d 831, 835-36 (1st Dist. 1987).

- c. The record should show good cause for the trial court's refusal 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*, 36 Ill. App. 2d at 316, 183 N.E.2d at 578.
 - i. "A mere recital in the injunction order that the bond is excused for good cause shown is insufficient." *Town of Cicero v. Wielander*, 35 Ill. App. 2d 456, 469, 183 N.E.2d 40, 47 (1st Dist. 1962).
 - ii. Facts supporting an injunction issued without bond should be alleged in the complaint. *Id.*; *Hill*, 16 Ill. App. 3d at 211, 305 N.E.2d at 742; *Compton v. Paul K. Harding Realty Co.*, 87 Ill. App. 2d 219, 224, 231 N.E.2d 267, 270 (5th Dist. 1967).
- d. 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).
- e. 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).
- f. The court may refuse to allow the moving party to post a letter of credit instead of a bond. *Powell v. Home Run Inn, Inc.*, 202 Ill. App. 3d 94, 101-02, 559 N.E.2d 803, 808 (1st Dist. 1990).

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

"The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security." FRCP 65(c).

- a. The issuance of a bond is mandatory, absent extraordinary circumstances. *Geneva Assurance Syndicate, Inc. v. Med. Emergency Servs. Assocs.*, No. 92 C 1652, 1992 U.S. Dist. LEXIS

6167, at *42 (N.D. Ill. Apr. 27, 1992). Extraordinary circumstances may include cases involving constitutional rights. *Smith v. Bd. of Elec. Comm'rs*, 591 F. Supp. 70, 72 (N.D. Ill. 1984) (not requiring bond because doing so “would condition the exercise of plaintiffs’ constitutional rights upon their financial status”).

- b. The amount of the bond is left to the discretion of the court. *Smith v. Office of Civilian Health & Med. Program of Uniformed Servs.*, 97 F.3d 950, 954 n.5 (7th Cir. 1996).
- 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 Grp., Inc. v. Alexander Doll Co.*, No. 95 C 1640, 1995 U.S. Dist. LEXIS 14338, at *7 (N.D. Ill. Sept. 28, 1995).
- d. The bond need not be presented with the request for TRO or preliminary injunction; however, the TRO or preliminary injunction will not be effective unless and until a bond has been posted. *See Mead Johnson & Co. v. Abbott Labs.*, 209 F.3d 1032, 1033 (7th Cir. 2000) (noting that bond is “a condition to preliminary injunctive relief” but that posting bond is voluntary; if the plaintiff believes the bond is too high it may withdraw its claim); *Coyne-Delany Co. v. Capital Dev. Bd.*, 717 F.2d 385, 394 (7th Cir. 1983) (“If bond is too high [plaintiff] can drop the suit”).
- e. The court may terminate the injunction if the movant fails to post the required bond. *See Jano Justice Sys., Inc. v. Burton*, No. 08-cv-3209, 2010 WL 2012941, at *10-11 (C.D. Ill. May 20, 2010).
- f. A bond is not required where the parties have agreed to waive the requirement. *See, e.g., Roche Diagnostics Corp. v. Med. Automation Sys., Inc.*, 646 F.3d 424, 428-29 (7th Cir. 2011) (affirming the district court’s decision to issue injunction without bond where contract waived both parties’ right to an injunction bond).

H. The Form of TRO or Preliminary Injunction

1. Similar requirements under Illinois and federal law. *See* 735 ILCS 5/11-101; FRCP 65(d). The text of the order entered by the court must comply with the applicable rules:
 - a. Shall contain the reasons for entry of injunctive relief.
 - b. Shall be specific in terms.

- c. Shall describe in reasonable detail, without reference to other documents, the act sought to be restrained.
 - d. For a TRO issued without notice, see the requirements identified in Part I.C.2, above.
2. TROs and preliminary injunctions 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 order. 735 ILCS 5/11-101; FRCP 65(d)(2). *Lake Shore Asset Mgmt. Ltd. v. Commodity Futures Trading Comm'n*, 511 F.3d 762, 766-67 (7th Cir. 2007).
- a. Failure to comply with the terms of a TRO or preliminary injunction, even if erroneously entered, may be grounds for a finding of contempt. *See Schallau v. City of Northlake*, 82 Ill. App. 3d 456, 467, 403 N.E.2d 266, 274 (1st Dist. 1979) (civil contempt); *City of Chi. v. King*, 86 Ill. App. 2d 340, 354, 230 N.E.2d 41, 48 (1st Dist. 1967) (criminal contempt).
 - b. If an injunction is reversed, however, the contempt sanctions/order should also be dissolved, at least in the context of civil contempt. *Schallau*, 82 Ill. App. at 467, 403 N.E.2d at 274 (“[A] civil contempt finding falls with the reversal of the underlying order.”).

II. THE LEGAL ELEMENTS FOR TROs AND PRELIMINARY INJUNCTIONS

- A. Illinois: Illinois courts require a plaintiff seeking injunctive relief to establish four elements with specific facts: (1) a protectable right; (2) irreparable harm; (3) an inadequate remedy at law; and (4) a likelihood of success on the merits. *Ill. Beta Chapter of Sigma Phi Epsilon Fraternity Alumni Bd. v. Ill. Inst. of Tech.*, 409 Ill. App. 3d 228, 231, 946 N.E.2d 1118, 1122 (1st Dist. 2011); *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 when deciding whether to grant injunctive relief. They first 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*, No. 02 C 7272, 2003 U.S. Dist. LEXIS 1530, at *11 (N.D. Ill. Jan. 31, 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 Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) (reversing grant of preliminary injunction); *see also Happy R Secs., LLC v. Agri-Sources, LLC*, 2013 IL App (3d) 120509, ¶ 35, 988 N.E.2d 972, 979 (irreparable harm means that “monetary damages cannot adequately compensate the injury and the injury cannot be measured by pecuniary standards”) (quoting *Hensley Constr., LLC v. Pulte Home Corp.*, 399 Ill. App. 3d 184, 190, 926 N.E.2d 965, 971 (2d Dist. 2010)).
- b. Transgressions of a continuing nature are sufficient. *Cent. Water Works Supply, Inc. v. Fisher*, 240 Ill. App. 3d 952, 959, 608 N.E.2d 618, 623 (4th Dist. 1993); *see also Pro’s Sports Bar & Grill, Inc. v. City of Country Club Hills*, 589 F.3d 865, 868 (7th Cir. 2009) (finding plaintiff sufficiently alleged irreparable harm if forced to continue operating under more limited, revised liquor license).
- c. Allegations that the defendant’s actions will impair the plaintiff’s business relations or goodwill may constitute irreparable harm. *YTB Travel Network of Ill., Inc. v. McLaughlin*, No. 09-cv-369-JPG, 2009 WL 1609020, at *5 (S.D. Ill. June 9, 2009); *Travelport, LP v. Am. Airlines, Inc.*, 2011 IL App (1st) 111761, ¶ 40, 958 N.E.2d 1075, 1085.
- d. If the TRO is sought ex parte, the injury must be immediate and irreparable. FRCP 65(b); 735 ILCS 5/11-101.

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. *Leen v. Carr*, 945 F. Supp. 1151, 1157 (N.D. Ill. 1996); *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 Mach. 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. Whether there is an adequate remedy at law is often considered together with whether there is irreparable harm. *See, e.g., Libertarian Party v. Packard*, 741 F.2d 981, 984 (7th Cir. 1984); *see also Clinton Landfill, Inc. v. Mahomet Valley Water Auth.*, 406 Ill. App. 3d 374, 380, 973 N.E.2d 725, 730 (4th Dist. 2010) (explaining that irreparable harm and adequacy of a remedy at law are separate factors).
- d. A court is unlikely to find a remedy at law inadequate where "the gravamen of a complaint is breach of contract and the trial court could award damages if it found a breach occurred." *Ill. Beta Chapter of Sigma Phi Epsilon Fraternity Alumni Bd. v. Ill. Inst. of Tech.*, 409 Ill. App. 3d 228, 232, 946 N.E.2d 1118, 1122 (1st Dist. 2011); *see also Van Sany v. Dupo Cmty. Unit Sch. Dist.*, No 5-12-0052, 2012 WL 7110520, at *2 (Ill. Ct. App. Feb. 10, 2012) (reversing TRO where motion was "nothing more than a request that the circuit court order the [defendant] to pay money to her").
- e. "Where land is the subject matter of the agreement, the inadequacy of the legal remedy is well-settled." *Happy R Secs., LLC v. Agri-Sources, LLC*, 2013 IL App (3d) 120509, ¶ 37, 988 N.E.2d 972, 980 (quoting *Heritage Standard Bank & Trust Co. v. Steel City Nat'l Bank*, 234 Ill. App. 3d 48, 56, 599 N.E.2d 1283, 1288 (1st Dist. 1985)).

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

- a. Illinois: To show a likelihood of success on the merits, a party only needs to raise “a fair question about the existence of his right and that the court should preserve the status quo until the case can be decided on the merits.” *In re Estate of Wilson*, 373 Ill. App. 3d 1066, 1075, 869 N.E.2d 824, 833 (1st Dist. 2007); *see also Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 72, 589 N.E.2d 640, 647 (1st Dist. 1992).
- 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 Mach. 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 Ill., L.L.C. v. Sterling Payroll Fin., L.L.C.*, No. 01 C 1173, 2002 U.S. Dist. LEXIS 4372, at *12 n.2 (N.D. Ill. Mar. 14, 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 Mach.*, 749 F.2d at 387.
 - iv. The moving party only needs to demonstrate it is likely to prevail on one claim. *See Jano Justice Sys., Inc. v. Burton*, No. 08-cv-3209, 2010 WL 2012941, at *10 (C.D. Ill. May 20, 2010) (“Therefore, because the Plaintiff is likely to succeed on the merits of at least one claim, the preliminary injunction can remain in effect.”).

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-Am. 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 non-movant 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. Grp.*, 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 E. 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 injunction; if the public interest would be positively affected, then this factor weighs in favor of granting the injunction. *See, e.g., FATSUSA v. FATSUSA Farrag & Stipsits GmbH*, No. 02 C 8191, 2002 U.S. Dist. LEXIS 22840, at *12 (N.D. Ill. Nov. 25, 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 E. 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).
- c. An injunction may be denied where it will disrupt state or local government functions. *See Jano Justice Sys., Inc. v. Burton*, No. 08-cv-3209, 2010 WL 2012941, at *10-11 (C.D. Ill. May 20, 2010) (defendant allowed to maintain IT programs related to providing information to law enforcement).

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)(2)
 - a. A TRO entered without notice “expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.”
 - b. A TRO may be extended by agreement among the parties. *Levas & Levas v. Vill. of Antioch*, 684 F.2d 446, 448 n.1 (7th Cir. 1982); see also *Chi. United Indus., Ltd. v. City of Chi.*, 445 F.3d 940, 942 (7th Cir. 2006) (observing that parties agreed to extend TRO by a month).
3. The party who obtained the TRO must proceed with the preliminary injunction on the date set. If not, the court must dissolve the TRO. 735 ILCS 5/11-101; FRCP 65(b)(3).

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. FRCP 65(b); *Harper v. Mo. Pac. R.R.*, 264 Ill. App. 3d 238, 244, 636 N.E.2d 1192, 1197-98 (5th Dist. 1994).

2. **Dissolution is Discretionary**

- a. Whether to dissolve a TRO rests within the sound discretion of the trial court. *Int'l Ass'n of Firefighters v. City of E. St. Louis*, 206 Ill. App. 3d 580, 584, 565 N.E.2d 264, 266 (5th Dist. 1990); *Casey K. v. St. Anne Cmty. High Sch. Dist. No. 302*, 400 F.3d 508, 513 (7th Cir. 2005).

3. **Circumstances Justifying Dissolution**

- a. 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 continued imposition of injunctive relief. *Local 705 v. Almarc Mfg., Inc.*, 553 F. Supp. 1170, 1175 (N.D. Ill. 1982); *see also Nw. Steel & Wire Co. v. Indus. Comm'n*, 254 Ill. App. 3d 472, 476, 627 N.E.2d 71, 74 (1st Dist. 1993) (TRO may be modified when conditions have changed).
- b. A TRO also may be dissolved “where the court finds that equity no longer justifies its continuance.” *Lake Shore Club of Chi. v. Lakefront Realty Corp.*, 79 Ill. App. 3d 918, 927, 398 N.E.2d 893, 900 (1st Dist. 1979); *see also Eads Coal Co. v. United Mine Workers of Am., Dist. 12*, 27 Ill. App. 3d 692, 702-03, 327 N.E.2d 115, 123 (5th Dist. 1975).
- c. Another reason justifying dissolution of a TRO is to show that the court abused its discretion by entering the TRO in the first place. *Murges v. Bowman*, 254 Ill. App. 3d 1071, 1081, 627 N.E.2d 330, 337 (1st Dist. 1993).

4. **Resisting a Motion to Dissolve**

- a. To resist a motion to dissolve, “a plaintiff need not make out a case which would entitle him to relief at the final hearing, he need only make a *prima facie* showing that he raises a fair question as to the existence of the right he claims.” *People ex rel. Stoney Island Church of Christ v. Mannings*, 156 Ill. App. 3d 356, 362, 509 N.E.2d 572, 576 (1st Dist. 1987); *see also Helping Others Maintain Env'tl. Standards v. Bos*, 406 Ill. App. 3d 669, 697, 941 N.E.2d 347, 373 (2d Dist. 2010) (affirming denial of motion to dissolve preliminary injunction); *Stoller v. Vill. of Northbrook*, 162 Ill. App. 3d 1001, 1008-09, 516 N.E.2d 355, 360 (1st Dist. 1987) (affirming denial of motion to dissolve TRO).

5. Effect of Removal to Federal Court

- a. If a case is removed after a TRO or preliminary injunction is issued, the TRO or preliminary injunction 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
 - a. Unlike federal TRO practice under FRCP 65(b), grants and denials of TROs or preliminary injunctions may be appealed. *Id.*; *see also* Ill. S. Ct. Rule 307(a)(1); *Santella v. Kolton*, 393 Ill. App. 3d 889, 901, 912 N.E.2d 1248, 1259 (1st Dist. 2009).
 - b. Under Rule 307(a)(1), the appellate court has jurisdiction over appeals from interlocutory orders “granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction.” Ill. S. Ct. Rule 307(a)(1).
 - c. When determining whether an order constitutes an appealable injunctive order under Rule 307(a)(1), courts “look to the substance of the action, not its form.” *Santella*, 393 Ill. App. 3d at 901, 912 N.E.2d at 1259.
 - i. “Actions of the circuit court having the force and effect of injunctions are appealable even if labeled as something else.” *Id.* (quotations omitted).
 - ii. Relief is injunctive when it operates *in personam* and requires a person to do or refrain from doing a particular thing. *Id.*

- d. Even where an order grants relief that is injunctive in character, Rule 307(a)(1) does not apply to make the order immediately appealable unless it also is interlocutory. *Id.* at 903, 912 N.E.2d at 1260.
 - i. “Rule 307(a)(1) applies only to interlocutory injunction orders that merely preserve the status quo pending a decision on the merits, conclude no rights, and are limited in duration, in no case extending beyond the conclusion of the actions.” *Id.*
 - ii. Rule 307(a)(1) “does not apply to permanent orders, which are orders that are not limited in duration and alter the status quo.” *Id.*
- e. Notice of interlocutory appeal and petition for appeal must be filed within two days of entry of the TRO. Ill. S. Ct. Rule 307(d); *Friedman v. Thorson*, 303 Ill. App. 3d 131, 136, 707 N.E.2d 624, 627 (1st Dist. 1999).
 - i. If the TRO was issued ex parte, the party may file its appeal within two days of service of the TRO. *Harper v. Mo. Pac. R.R.*, 264 Ill. App. 3d 238, 246, 636 N.E.2d 1192, 1199 (5th Dist. 1994).
- f. TRO 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 petition.
 - vi. No replies are allowed without court approval.
- g. The appellate court will consider and decide the petition within five days after the petitioner has filed the petition, supporting record, any supporting memorandum, and the time for any responding memorandum has expired. Ill. S. Ct. Rule 307(d)(4).
- h. No oral arguments.

- i. A circuit court’s decision to grant or deny an injunction or TRO will be reviewed only for abuse of discretion. *Five Mile Westin N. Shore SPE, LLC v. Berkadia Commercial Mortg., LLC*, 2012 IL App (1st) 122812, ¶ 15.
 - j. “The ultimate grant or denial of [a] permanent injunction does not dictate whether the preliminary injunction should have been dissolved.” *Helping Others Maintain Env’tl. Standards v. Bos*, 406 Ill. App. 3d 669, 698, 941 N.E.2d 347, 373 (2d Dist. 2010) (holding that trial court did not abuse discretion in denying motion to dissolve preliminary injunction despite later denying motion for permanent injunction).
2. Federal:
 - a. TROs are not appealable as interlocutory orders, but preliminary injunctions are. *Local 1001 v. Laborers’ Int’l Union of N. Am.*, 365 F.3d 576, 578 (7th Cir. 2004); 28 U.S.C. § 1292(a)(1).
 - b. TROs that are extended beyond 28 days may be appealable as preliminary injunctions. FRCP 65(b)(2); *see also United Airlines, Inc. v. U.S. Bank N.A.*, 406 F.3d 918 (7th Cir. 2005) (finding TRO may only last 20 days under prior version of Rule 65(b)). *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 generally* 735 ILCS 5/11-110; FRCP 65(c).
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 Grp., Inc. v. Alexander Doll Co.*, No. 95 C 1640, 1995 U.S. Dist. LEXIS 14338, at *7 (N.D. Ill. Sept. 28, 1995).
3. 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).
4. If a court enters a TRO but then later denies the preliminary injunction, “the restrained party has been ‘wrongfully restrained.’” *Triumph v. Ward*, No. 11 C 7927, 2011 WL 6754044, at *4 (N.D. Ill. Dec. 22, 2011); *but see C.D. Peters Constr. Co. v. Tri-City Reg’l Port Dist.*, 281 Ill. App. 3d 41, 46, 666 N.E.2d 44, 47 (5th Dist. 1996) (mere dissolution of TRO after preliminary injunction hearing does not mean that the TRO was

wrongfully entered; “a prior adjudication that the [TRO] was wrongfully issued is a prerequisite to the recovery of statutory damages.”).

5. If a party demonstrates that its opponent wrongfully obtained a TRO, its right to damages is presumed and can only be rebutted by a showing of “good reason.” *Triumph*, 2011 WL 6754044, at *5. A party’s good faith in seeking the TRO is not a “good reason” to avoid presumed damages for a wrongfully obtained TRO. *Id.* The party seeking damages still has the burden to prove what non-speculative damages were proximately caused by its having been wrongfully restrained. *Id.*
6. “The issue of damages is a question of fact and, accordingly, a trial court’s findings will not be disturbed on appeal unless it is against the manifest weight of the evidence.” *Doornbos Heating & Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.*, 403 Ill. App. 3d 468, 485, 932 N.E.2d 1073, 1089 (1st Dist. 2010).
7. **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*, No. 98 C 1697, 1998 U.S. Dist. LEXIS 3642, at *2 (N.D. Ill. Mar. 20, 1998).
 - b. “[D]amages which are remote, speculative and incapable of ascertainment cannot be allowed.” *Cromwell Paper Co. v. Wellman*, 23 Ill. App. 2d 263, 267, 162 N.E.2d 500, 502 (1st Dist. 1959); accord *Triumph*, 2011 WL 6754044, at *5.
 - c. Types of damages a wrongfully enjoined party may recover include:
 - i. Lost profits. *Stocker Hinge Mfg. Co. v. Darnel Indus., Inc.*, 99 Ill. App. 3d 340, 345, 425 N.E.2d 550, 554-55 (1st Dist. 1981), *rev’d on other grounds*, 94 Ill. 2d 535, 447 N.E.2d 288 (1983) (stating that “loss of profits [] would be recoverable” when “proved to be the ‘actual, natural and proximate result of the . . . restraining order,’” but finding that “the profits allegedly lost here do not fall within that category”).
 - ii. Lost sales. *Powell v. Home Run Inn, Inc.*, 202 Ill. App. 3d 94, 102, 559 N.E.2d 803, 808 (1st Dist. 1990) (reversing injunction and increasing bond based, in part, on sales the enjoined party may have lost during the injunction period).

- iii. Lost employee wages. *Id.* (considering the wages the enjoined party's employees may have lost during the injunction period in reversing injunction and increasing bond).
 - iv. Lost opportunities to solicit potential customers. *Buzz Barton & Assocs., Inc. v. Giannone*, 108 Ill. 2d 373, 382-83, 483 N.E.2d 1271, 1275-76 (1985) (holding plaintiff-former employer liable for all damages caused by wrongful injunction that prohibited enjoined party from soliciting plaintiff's customers where plaintiff failed to show a clearly ascertainable right in those customers).
 - v. Harm from delayed expansion of business. *Rochester Buckhart Action Grp. v. Young*, 394 Ill. App. 3d 773, 780, 914 N.E.2d 1251, 1258 (4th Dist. 2009) (party wrongfully enjoined from continuing construction and expanding hog farm was entitled to damages resulting from the injunction).
- d. Attorneys' fees and litigation expenses are recoverable in some circumstances under Illinois law, but generally not recoverable under federal law.
- i. Illinois: Attorneys' fees arising out of actions taken to reverse or dissolve a wrongfully entered TRO are recoverable. *Stocker Hinge Mfg. Co. v. Darnel Indus., Inc.*, 99 Ill. App. 3d 340, 342, 425 N.E.2d 550, 552 (1st Dist. 1981), *rev'd on other grounds*, 94 Ill. 2d 535, 447 N.E.2d 288 (1983); *Bank of Lyons v. Schultz*, 22 Ill. App. 3d 410, 418, 318 N.E.2d 52, 58-59 (1st Dist. 1974); *Compton v. Paul K. Harding Realty Co.*, 6 Ill. App. 3d 488, 497, 285 N.E.2d 574, 580 (5th Dist. 1972).
 - ii. Federal: Under FRCP 54(d), the prevailing party is entitled to costs, unless the court directs otherwise. Attorneys' fees are generally only recoverable upon a showing of bad faith. *Coyne-Delany Co. v. Capital Dev. Bd.*, 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 do not appear to have 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.” *Salvano*, 999 F.2d at 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 Commercial Arbitration 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. Chi. Title & 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 Enters., 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. A request for an ex parte TRO must be supported by a verified complaint or affidavits, but this is good practice for any request for a TRO, with or without notice. Consider the need for more than one “verifier.”
2. Don’t over-reach with affidavits. The affidavit is a road-map for cross-examination.
3. Seek relief that is reasonable and narrowly tailored to preserve the status quo and prevent irreparable harm. Make sure to explain why there is no adequate remedy at law.
4. Along with the verified complaint, present a motion and supporting brief for a TRO and a preliminary injunction with any necessary supporting affidavits. Make sure all factual statements are true and supported. The moving party must present a *prima facie* case that it is entitled to relief.
5. Prepare a draft order with the required statutory components and the requested relief plainly stated. Consider whether to set a timeframe for the duration of the TRO and a date for a preliminary injunction hearing.
6. Think hard about notice. Courts usually want to see an effort to give reasonable notice. If seeking a TRO without notice, be prepared to explain what efforts were made to give notice (this is required by declaration in federal court).
7. Be prepared to post bond. Argue why bond should not be required (Illinois) or why the bond amount should be minimal (federal). Direct the court’s attention to: (1) the economic hardship to the moving party; (2) the public purpose for which the TRO was brought; (3) the fact that constitutional rights are in issue; and/or (4) that the likelihood of harm to the enjoined party is minimal. Make sure the facts supporting these arguments appear in the complaint. Remember that in federal court, a TRO or preliminary injunction may not be effective without a bond.
8. Prepare discovery needed for a preliminary injunction hearing or a trial on the merits. Consider filing a motion for expedited discovery. Anticipate discovery requests from the defendant and develop the plaintiff’s strategy of quick response to discovery requests.
9. If the TRO is denied, press for a quick preliminary injunction hearing.
10. Consider whether to seek to combine the preliminary injunction hearing with a trial on the merits.

11. In Illinois, consider whether to seek a substitution of judge. 735 ILCS 5/2-1001(a)(2). This must be done before the court signals how it might rule on the merits.
12. Take steps to preserve all potentially relevant evidence. Ask the other side to do the same.
13. Manage client expectations and discuss fees. Make sure everyone understands the ultimate goal, and consider a negotiated resolution.

B. For the Defendant:

1. Clear conflicts. If you are representing multiple defendants, get the appropriate waivers.
2. Venue/Jurisdiction. Confirm that the litigation is in the right forum by considering issues of personal and subject-matter jurisdiction, and venue. Consider whether the case can be removed to federal court.
3. In Illinois, consider whether to seek a substitution of judge. 735 ILCS 5/2-1001(a)(2). This must be done before the court signals how it might rule on the merits.
4. File or tender an appearance before the addressing court.
5. Determine if the complaint will survive a motion to dismiss. Consider filing a joint memorandum in opposition to the TRO and in support of a motion to dismiss.
6. Prepare a verified answer denying the material allegations. If there is insufficient time to prepare a complete answer, deny the material allegations, if possible. If the answer is already filed, the defendant can move for judgment on the pleadings or summary judgment.
7. Inform the court of your intention to file a motion to dismiss or verified answer. If the complaint states a claim, present the verified answer at the TRO hearing or ASAP.
8. Prepare a short brief opposing the TRO. Consider whether to file the brief or present it orally. Think about the pros and cons of submitting counter-affidavits, keeping in mind that the hearing on the TRO should not be an evidentiary hearing.
9. Focus on any conclusory allegations or allegations pled on “information and belief.” These cannot support a TRO.
10. Confirm ground rules with the court; the issue is whether the court should enter a short-term TRO until there can be an evidentiary hearing.

11. If the TRO will be for an extended period before the preliminary injunction hearing can be held, argue that the TRO effectively would be a preliminary injunction, and note that under Illinois law, it is reversible error to enter a preliminary injunction without an evidentiary hearing. The court should not enter a preliminary injunction (or its equivalent) without an evidentiary hearing.
12. Be prepared to argue for a significant bond if a TRO is entered. Remind the court that it may only excuse a bond for “good cause,” and should only do so sparingly to avoid “spurious litigation.” In commercial cases, the moving party is presumed capable of bearing most bond requirements. Emphasize the potential damages of a wrongfully entered injunction.
13. Consider what discovery you need for a preliminary injunction hearing. Prepare discovery requests and consider whether to move for expedited discovery.
14. If the TRO is entered, press for a quick preliminary injunction hearing. If the TRO is denied, delay may be in your favor.
15. Consider equitable defenses, such as waiver, estoppel, and unclean hands.
16. Take steps to preserve all potentially relevant evidence. Ask the other side to do the same.
17. Manage client expectations and discuss fees. Make sure everyone understands the ultimate goal, and consider a negotiated resolution.
18. If the TRO is entered, make sure the client understands its obligation to ensure compliance.