

Stop!: Temporary Restraining Orders and Injunctions

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In the bankruptcy context, a lawsuit between parties is referred to as an adversary proceeding. Our commercial clients sometimes ask us to explain the relationship between an adversary proceeding and injunctive relief in a bankruptcy case.

Depending upon a party's position in the case, they often come to understand that, beyond the protections afforded by the automatic stay, bankruptcy law also provides for separate injunctions that may be sought through the commencement of an adversary proceeding.

An adversary proceeding "is defined by the Bankruptcy Rules as a proceeding before a bankruptcy judge for legal, equitable or declaratory relief that arises under applicable law."^[1]

They have all the same attributes of a lawsuit, including the filing and service of a formal complaint, and follow the Federal Rules of Civil Procedure.^[2] Adversary proceedings are governed by the Federal Rules of Bankruptcy Procedure Rules 7001 through 7087 (the "**Bankruptcy Rules**").

Under Bankruptcy Rule 7001, an adversary proceeding is defined as a number of different types of proceedings.^[3] One is a proceeding to obtain an injunction or other equitable relief.

We have written many client alerts over the years discussing the automatic stay injunction. See "[Bank Freezes and the Automatic Stay](#)"; "[The Automatic Stay: Even Pre-Petition Seizures May Be Covered](#)"; "[Automatic Stay Violators and Pre-Petition Seizures](#)"; "[Violations of the Automatic Stay: Willful or Technical? Void or Voidable? Distinctions Without a Difference](#)"; "[Why Is This Injunction Different From All Other Injunctions? The Automatic Stay, An Update.](#)"

In this client alert, we shift our focus to distinguishing between a temporary restraining order, a preliminary injunction and a final or permanent injunction.

Temporary restraining orders are usually only in effect for a short period of time, not exceeding 14 days.^[4]

"A temporary restraining order may be granted without notice, with respect to conduct which is the basis of a proceeding for injunctive relief, upon a showing by affidavit or a verified complaint of facts demonstrating that immediate and irreparable injury, loss or damage will result, and certification by the applicant's attorney, in

writing, of the reasons why notice should not be required.”[5]

On the other hand, preliminary injunctions are often sought to preserve the status quo between the parties pending a final determination of the merits of the action.[6] This is an “extraordinary equitable remedy that a court has discretion to order to prevent irreparable injury to any party during pending litigation until final judgment and to protect the court’s ability to render a meaningful decision on the merits of the litigation.”[7]

It is the plaintiff’s burden to establish the following elements when seeking a preliminary injunction:

1. “The plaintiff is likely to suffer irreparable harm in the absence of preliminary injunctive relief.
2. He or she is likely to succeed on the merits.
3. The balance of equities weighs in the plaintiff’s favor.
4. An injunction is in the public interest.”[8]

Contrary to a preliminary injunction a final or permanent injunction, may only be issued after an adjudication of the merits.[9]

Permanent injunctions are “a means of finally settling a dispute.”[10] Similar to preliminary injunctions, there is also a four-factor test that must be satisfied in order to obtain a permanent injunction:

1. “There is proof of irreparable injury;
2. There is no adequate remedy at law;
3. Upon weighing the balance of hardships, an injunction is appropriate;
4. A permanent injunction would not be against the public interest.”[11]

The difference between the preliminary injunction test and the permanent injunction test is that irreparable injury has already occurred when considering a permanent injunction.

Another difference between the two tests is that a party seeking a permanent injunction “must establish not just a likelihood of success on the merits but must demonstrate actual success on the merits.”[12]

Regardless of the type of injunction being sought, the determination of whether to grant the injunction is fact-specific, and the court will balance the interests of all involved before issuing any order granting an injunction.

Please note this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and the recipient. If you have any questions regarding the provisions discussed above, or any other aspect of bankruptcy law, please contact Michael H. Traison, Esq. (mtraison@cullenllp.com) at 312.860.4230 or Kelly McNamee, Esq. (kmcnamee@cullenllp.com) at 516.296.9166.

Footnotes

[1] 6 Collier Bankruptcy Practice Guide P 107.02.

[2] *Id.*

[3] Bankruptcy Rule 7001 defines an adversary proceeding as:

- a proceeding to recover money or property- except a proceeding to compel the debtor to deliver property to the trustee, a proceeding by an individual debtor to recover tangible personal property under § 542(a), or a proceeding under § 554(b), § 725, Rule 2017, or Rule 6002;
- a proceeding to determine the validity, priority, or extent of a lien or other interest in property- except a proceeding under Rule 3012 or Rule 4003(d);
- a proceeding to obtain authority under § 363(h) to sell both the estate's interest in property and that of a co-owner;
- a proceeding to revoke or object to a discharge- except an objection under § 727(a)(8) or (a)(9), or § 1328(f);
- a proceeding to revoke an order confirming a plan in a Chapter 11, 12, or 13 case;
- a proceeding to determine whether a debt is dischargeable;
- a proceeding to obtain an injunction or other equitable relief- except when the relief is provided in a Chapter 9, 11, 12, or 13 plan;
- a proceeding to subordinate an allowed claim or interest;
- a proceeding to obtain a declaratory judgment related to any proceeding described in (a)-(h); and
- a proceeding to determine a claim or cause of action removed under 28 U.S.C. § 1452.

[4] *Id.*

[5] 2 Collier Bankruptcy Practice Guide P 39.05.

[6] 13 Moore's Federal Practice – Civil § 65.20.

[7] 1 Moore's Manual—Federal Practice and Procedure § 10A.22.

[8] *Id.*

[9] Wagstaffe Prac Guide: Fed Civil Proc Before Trial § 31-II.

[10] *Id.*

[11] 2 Collier Bankruptcy Practice Guide P 39.03.

[12] 1 Moore's Manual—Federal Practice and Procedure § 10A.23.

Practices

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