

Injunctions in Real Estate Litigation

One of the most potent, and at times necessary, weapons in a real estate litigator's arsenal is an order from a court that prevents a party from taking certain action: an injunction. Injunctions can be used to bring disputes to a head quickly and protect vital interests in real property. The expedited remedy that injunctive relief may afford, however, implicates important practical and strategic considerations that are different than more "typical" lawsuits. This e-alert provides a general overview of injunctive relief so that one faced with a dispute can begin to discern, in consultation with a Reinhart real estate attorney, whether injunctive relief may be an option.

Injunctions are broadly applicable in a wide range of real estate litigation matters, provided the facts and law support such an order. Injunctions may be issued to prevent any action that may impair the value of property, prevent trespass or improper encroachment onto property, require the termination of a public nuisance, protect easement rights, protect riparian rights, protect against improper condemnation (i.e., governmental taking), and many others. Reinhart real estate litigators have pursued and obtained injunctive relief in these areas; personally, I have obtained injunctions from courts to prevent a road expansion project that would have caused the excavation and destruction of a client's property; prevented the construction of a home that, if built to plans, would have violated a subdivision's deed restrictions; barred the unreasonable interference with easements caused by parking vehicles on an ingress/egress area and placing a gate at the entryway to an easement area; and many others.

Injunctive relief is available at various stages of a lawsuit. Ultimately, successful pursuit of injunctive relief ends with obtaining a permanent injunction. Such an injunction is issued at the termination of a lawsuit as part of a final judgment and forever afterward governs the relationship of the parties with respect to certain facts and claims. A permanent injunction typically cannot be obtained until after months or years of proceedings before a trial court and the resolution of any appeals related to the trial court action.

Because such a lengthy delay in obtaining permanent injunctive relief can render such an injunction (once it is obtained) meaningless, the law allows parties to attempt to obtain more expeditious injunctive relief in the form of temporary restraining orders (TROs) and temporary injunctions. If a party can make certain showings persuasive to a trial court, it can obtain a TRO and/or a temporary

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injunction at a relatively early stage of any lawsuit. A TRO is an order a party can obtain from a court at the very outset of a lawsuit and, often, without the adverse party's knowledge that it is seeking such an order. For example, on the same day that a party files a summons and complaint, it may also file a motion for a TRO and visit with the judge *ex parte* (i.e., outside the presence of any adverse party) and argue that it is entitled to a TRO. If the judge agrees, he or she likely would sign a TRO prepared by the attorney, who will then arrange for the summons, complaint, motion and TRO to be served upon the adverse party. Thus, at the same time the adverse party learns that he is subject of a lawsuit, the adverse party is also under the immediate obligation to cease and desist from taking certain action or threatened action.

The extraordinary nature of a TRO—in which a party can obtain a court order prior to the adverse party having their "day in court"—is balanced by the extremely temporary nature of that order. Often, TROs are effective for only a matter of days before the court conducts a more thorough hearing, involving both parties, to address the propriety of injunctive relief. At this hearing, with a more full airing of the controversy, the court typically decides whether the terms of the TRO will remain in place. If it decides to keep the injunction in place, the resulting injunction is called a "temporary injunction" and it often governs the relationship between the parties until a permanent injunction is issued or the case is dismissed, either of which may take months or years to reach. If the court decides against continuing the terms of the TRO, the adverse party is not enjoined from taking certain action or threatened action and the party who sought injunctive relief must use the ensuing several months or years to try to persuade the judge to nonetheless issue a permanent injunction as part of its final judgment.

Because temporary injunctive relief is extraordinary, the law also imposes certain proof requirements on a person seeking such relief. In summary, the showings required by the court are intended to limit the risk that the court will wrongfully grant a temporary injunction in haste. Therefore, before the court will grant a temporary injunction, the party seeking the injunction must demonstrate that money damages are unavailable or would not fairly compensate for the injury that is occurring or is about to occur. If money can compensate an injured party, then a court will be more inclined (and perhaps bound by law, under certain circumstances) to require that party to seek monetary rather than injunctive relief. Moreover, the party seeking temporary injunctive relief must demonstrate that an injunction would maintain the status quo of the relationship between the parties, i.e., that threatened future action can only be avoided by a court order.

Also, the party seeking an injunction must demonstrate that it has a reasonable probability of success on the merits of its claim. In other words, the party seeking the injunction must persuade the court—at a very early stage in the proceedings—that it probably will win the lawsuit after the many months or years of litigation that may ensue before a final judgment is issued. Finally, the party seeking the injunction must post a bond in an amount set by the court and payable to the adverse party. The bond is payable to the enjoined party if the court ultimately concludes that a temporary injunction it granted in the case was wrongly granted and caused the enjoined party to suffer damages.

The structure of litigation over TROs and temporary injunctions have significant practical effects on litigation strategy. The extraordinarily fast pace at which a TRO and a temporary injunction hearing take place require the parties to undertake an enormous amount of work at an accelerated pace. Typical lawsuits allow for months of "discovery" in which the parties exchange written inquiries and take depositions of witnesses. Where temporary injunctive relief is sought, however, that timeframe is compacted into several days or a few weeks. The showings required by the court at a temporary injunction hearing make necessary the "front loaded" nature of such litigation. Most importantly, the requirement that the party seeking an injunction show a "reasonable probability of success on the merits" drives this early and comprehensive case presentation. Frankly, if a judge has determined that one party has a reasonable probability of success on the merits of this case, that determination is a bellwether for how the case will proceed in the future. It becomes an uphill climb for the other party to try to essentially talk the judge out of his or her earlier ruling. It is not unusual, therefore, for many cases to effectively terminate following the court's decision on the issuance of a temporary injunction. Rather than invest further resources in trying to persuade a judge to change his or her mind, the losing party at a temporary injunction hearing often seriously considers raising the white flag. Similarly, a party that attempts to, but fails to, obtain a temporary injunction should get a good sense of the court's hesitancy to grant it an injunction now or in the future.

Consequently, the decision whether to attempt to obtain injunctive relief should be thoroughly considered by the party, with a careful weighing of costs and benefits. The process for attempting to obtain temporary injunctive relief is labor-intensive and takes place in a compressed amount of time. As a result, a party must be willing to devote substantial resources—of both time and attorneys' fees—if it wants to best position itself for success. If a party is faced with seeking



injunctive relief or essentially waiving or giving up important rights, then there may be no choice but to seek such relief. At Reinhart, our real estate litigators are intricately familiar with the standards for obtaining injunctive relief and the practical consideration that should be taken into account. We are happy to consult with any client to determine whether injunctive relief affords an appropriate remedy in a given situation and to design the best method for obtaining that relief.

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