BURR ALERT

# Practice Tips for Opposing TROs and Preliminary Injunctions

By John Morrow & Walker Beauchamp April 2020

COVID-19 and the accompanying shelter-in-place restrictions may spur the onset of a serious economic recession. The conventional wisdom is that litigation is counter-cyclical, and tends to increase during economic downturns. Burr & Forman is often called to defend clients facing claims for Temporary Restraining Orders ("TROs") and preliminary injunctive relief, and may well field more of these requests if the current health and economic crises cause litigation to trend upwards. Below is an overview of considerations practitioners should keep in mind in defending against TROs and preliminary injunction matters under Alabama law.

## APPLICABLE STANDARDS

The Alabama Rules of Civil Procedure ("ARCP") were patterned after the Federal Rules of Civil Procedure, and therefore, federal case law and commentary can serve as persuasive authority in interpreting the ARCP.[i]

TRO procedure is unique in that it allows a party to obtain temporary injunctive relief from the court without notice to or the appearance of the opposing party. According to ARCP 65(b), a TRO is only appropriate where "it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party … can be heard in opposition." Further, a TRO applicant must give the court written certification showing: (a) its efforts to give the opposing party advanced notice of the request, or (b) why the notice should not be required. Issuance should be denied if the party seeking a TRO fails to strictly follow these Rule 65(b) requirements.[ii] Because TROs may be issued without notice, they are limited in duration to 10 days, unless the court orders otherwise. Preliminary injunctions, however, are issued only after a hearing that affords the adverse party "a fair opportunity to oppose the application and to prepare for such opposition."[iii]

Other than the procedural difference regarding notice to the opposing party, "[t]he elements required for the issuance of a TRO are the same as the elements required for the issuance of a preliminary injunction."[iv] Thus, in Alabama, a party seeking a preliminary injunction or TRO has the burden of demonstrating, with "sufficient evidence", each of the following:

> (1) that without the injunction the plaintiff would suffer immediate and irreparable injury; (2) that the plaintiff has no adequate remedy at law; (3) that the plaintiff has at least a reasonable chance of success on the ultimate merits of his case; and (4) that the hardship imposed on the defendant by the injunction would not unreasonably outweigh the benefit accruing to the plaintiff.[v]

If the applicant fails to establish any of these elements, then a preliminary injunction should not be entered.[vi]

Alabama courts "will not use the extraordinary power of injunctive relief merely to allay an apprehension of a possible injury; the injury must be imminent and irreparable..."[vii] Alabama courts have construed "irreparable injuries" to mean those that cannot "be adequately compensated for by damages at law."[viii] Thus, the first two factors for assessing the appropriateness of injunctive relief in Alabama overlap with one another considerably. "A plaintiff that can recover damages has an adequate remedy at law" such that the plaintiff's request for injunctive relief fails under the second element (requiring plaintiff to have "no adequate remedy at law") in addition to the first (suffering an "irreparable injury").[ix] Further, Alabama courts have denied injunctions where plaintiffs claim irreparable injuries and lack of legal remedies using "unsupported conjecture" rather than competent evidence.[x]

As to the required showing of "at least a reasonable chance of success on the ultimate merits", it should be noted that Alabama's approach to this factor is more liberal than the 11th Circuit's, which requires plaintiffs to show a "substantial likelihood of success on the merits."[xi] Alabama courts have routinely used this "reasonable chance of success" standard since the mid-90s, but prior case law that has not been expressly overruled required plaintiffs to show a "reasonable **probability**" of success (i.e., not a "chance", but more of a likelihood of success).[xii] Defense counsel should therefore consider using this alternative phrasing that was more commonplace several decades ago. Regardless of how this standard is articulated, Alabama courts have consistently held that preliminary relief may be denied "[w]here there is grave doubt as to complainant's right."[xiii] Thus, defense counsel should always highlight the ways in which plaintiff's standing or claims are tenuous.

Finally, in order to issue a preliminary injunction, the court must engage in a balancing test to determine that the hardship imposed on the enjoined defendant does not unreasonably outweigh the benefit to the plaintiff. As explained by the Alabama Supreme Court, "[i]n applying these standards, the trial court, in its discretion and given the facts and circumstances of each case, may consider and weigh the relative hardships that each party may suffer against the benefits that may flow from the grant of the preliminary injunction."[xiv] Thus, trial courts are allowed to "balance the equities" in deciding whether to grant injunctive relief, and may consider the "convenience" and "comparative injuries" each party would experience if the request is granted or denied:[xv]

> Injunctions are never granted when they are against good conscience, or productive of hardship, oppression, injustice, or public or private mischief, and it may be said to be the duty of the court whose jurisdiction is invoked to secure injunctive relief, when considering the application, to consider and weigh the relative convenience and inconvenience and the comparative injuries to the parties and to the public which would result from the granting or refusal of the injunction sought.[xvi]

Accordingly, any Alabama litigant objecting to a preliminary injunction should highlight any undue hardships or burdens likely to result from the injunctive relief, whether they be a risk that certain business opportunities or relationships could be jeopardized, interference with contract relations and obligations, etc. Because there is some precedent for considering the injuries that the "public" may encounter by the issuance of an injunction, potential harm to non-parties (e.g., vendors or customers) could be relevant as well.

## SETTING THE BOND

As a general rule, a TRO or injunction will not issue unless the movant posts a security bond pursuant to ARCP 65(c).[xvii] Alabama courts have wide discretion in setting the bond amount, but there are no reported Alabama cases articulating a defined set of standards or criteria that a trial court must look to in exercising its discretion. Instead, the Alabama Supreme Court has merely held that the bond amount must be "appropriate", and reflect what the trial judge "deems proper."[xviii] There are, however, a number of opinions that articulate the policy and legal rationales for determining the bond amount in ways that may support a client's case for a significant bond amount.[xix] The Alabama Supreme Court has also cautioned judges to "be careful to require an adequate bond" when issuing preliminary injunctions.[xx]

The party advocating for a specific bond amount has the burden of establishing at least a "rational basis" for the proposed amount,[xxi] and according to relevant commentary, a party's proposed bond amount should be supported using evidence that is as strong as that which the party would submit at trial to support a damages calculation (e.g., expert witness testimony).[xxii] A party may also move the court to increase or decrease the amount of the bond while the restraining order of injunction is in effect.[xxiii]

Further, federal cases and commentary can serve as persuasive authority in questions of bond-setting.[xxiv] In federal courts, it is generally accepted that the trial court should "fix a bond amount in what it considers to be the amount necessary to pay the costs and damages sustained by parties found to be have been wrongfully enjoined."[xxv] This includes incidental and consequential damages to the extent they are "directly attributable to the improvidently issued injunction",[xxvi] and may include potential legal liability to non-parties.[xxvii]
Defense counsel should maximize the amount of damages their client is eligible to recover for "improvidently issued" injunctions by advocating for the highest bond possible. A high bond may also tend to discourage frivolous litigation or stave off the injunction entirely. Defense counsel should emphasize that:

> in setting the amount of security for a preliminary injunction, the trial court should err on the high side. An error in setting the bond too high is not serious, because the fee to post bond is usually a fraction of the amount of the bond and because any recovery on the bond would have to be supported by proof of actual damages. On the other hand, an error on the low side may produce irreparable injury, because damages for an erroneous preliminary injunction may not exceed the amount of the bond.[xxviii]

If the plaintiff is wealthy, then defense counsel should highlight plaintiff's ability to pay a substantially high bond. For example, in *Monarch Chem. Works, Inc. v. Exon*, 452 F. Supp. 493 (D. Neb. 1978), *aff'd sub nom*. *Monarch Chem. Works, Inc. v. Thone*, 604 F.2d 1083 (8th Cir. 1979), the court assessed a $10,000 bond against plaintiffs despite the likelihood of a wrongful injunction finding being "slight" because of plaintiff's ability to pay. According to the court, "[t]he ability of the moving party to put up a sufficient bond is significant" and weighs against the assessment of a more nominal bond. *Id*. at 503.

Additionally, defense counsel should highlight any defects or weaknesses in plaintiff's claims and the ultimate chances of success on the merits. Courts are more likely to fix low or nominal bonds where the plaintiff's likelihood of success on the merits appears especially high or all-but assured.[xxix] Finally, unlike its federal counterpart, ARCP 65(c) expressly states that "reasonable attorney fees" may be factored in when setting the bond amount. Arguably, then, Alabama's rule could be construed as requiring *higher* bonds than FRCP 65. Because the prospect of having to post a significant bond may well discourage a plaintiff from pursuing injunctive relief in the first place, defense counsel should be sure and present a persuasive case for a high bond.

**To discuss this further, please contact:**

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[i] *Hilb, Rogal & Hamilton Co. v. Beiersdoerfer,* 989 So. 2d 1045, 1056 n.3 (Ala. 2007).

[ii] *See* Ex parte *Hutson*, 2016 WL 483384, at *4 (Ala. Ct. App. 2016).

[iii] *S. Homes, AL, Inc. v. Bermuda Lakes, LLC*, 57 So. 3d 100, 104 (Ala. 2010) (citation omitted); ARCP 65(a).

[iv] *Lott v. E. Shore Christian Ctr.*, 908 So. 2d 922, 927 (Ala. 2005).

[v] *Ormco Corp. v. Johns*, 869 So. 2d 1109, 1113 (Ala. 2003) (citing *Perley for Benefit of Tapscan, Inc. v. Tapscan, Inc.*, 646 So. 2d 585, 587 (Ala. 1994)).

[vi] *Blount Recycling, LLC v. City of Cullman*, 884 So. 2d 850, 853 (Ala. 2003).

[vii] *Martin v. City of Linden*, 667 So. 2d 732, 736 (Ala. 1995) (emphasis added). *See also* Ex parte B2K Sys., LLC, 162 So. 3d 896, 904 (Ala. 2014) ("a mere possibility of irreparable harm is insufficient to justify the drastic remedy of a preliminary injunction") (citation omitted).

[viii] *Benetton Services Corp. v. Benedot, Inc.,* 551 So. 2d 295, 299 (Ala. 1989).

[ix] *See Monte Sano Research Corp. v. Kratos Def. & Sec. Sols., Inc*., 99 So. 3d 855, 862 (Ala. 2012), *as modified on denial of reh'g* (June 22, 2012).

[x] *Teleprompter of Mobile, Inc. v. Bayou Cable TV*, 428 So. 2d 17, 20 (Ala. 1983) (denying injunction where movant made no showing of a specific injury; "there is no testimony in the record to indicate that [the activity movant sought to enjoin] cost it any customers, damaged its reputation, or in anywise caused a loss of business").

[xi] *See Four Seasons Hotels And Resorts, B.V. v. Consorcio Barr, S.A*., 320 F.3d 1205, 1210 (11th Cir. 2003) (emphasis added). The Alabama Supreme Court adopted and applied this 11th Circuit standard in *City of Birmingham v. Link Carnival, Inc*., 514 So. 2d 792, 795 (Ala. 1987), but this proved to be an aberration. While the case has not been expressly overruled, it was disapproved of in *Seymour v. Buckley*, 628 So. 2d 554, 557 (Ala. 1993), which reaffirmed how Alabama applies separate and distinct standards when reviewing requests for injunctive relief.

[xii] *See Alabama Ed. Ass'n v. Bd. of Trustees of Univ. of Alabama*, 374 So. 2d 258, 261 (Ala. 1979) ("the burden is on the complainant to satisfy the trial court that there is at least a reasonable probability of ultimate success on the merits

of the controversy"); *Marshall Durbin & Co. of Jasper v. Jasper Utilities Bd*., 483 So. 2d 399, 400 (Ala. 1986); *Massey v. Disc Mfg., Inc*., 601 So. 2d 449, 454 (Ala. 1992); *Martin v. First Fed. Sav. & Loan Ass'n of Andalusia*, 559 So. 2d 1075, 1078 (Ala. 1990).

[xiii] *Valley Heating, Cooling & Elec. Co. v. Alabama Gas Corp*., 237 So. 2d 470, 472 (Ala. 1970).

[xiv] *Plantation Manor, Inc. v. Lee*, 647 So. 2d 728, 730 (Ala. 1994).

[xv] TILLEY'S ALABAMA EQUITY § 3:4 (5th ed.).

[xvi] *Saunders v. Florence Enameling Co*., 540 So. 2d 651, 655 (Ala. 1988) (emphasis added) (quoting another opinion which recognized the "comparative injury doctrine" articulated in an *American Jurisprudence* section (56) on injunctions).

[xvii] *Lightsey v. Kensington Mortg. & Fin. Corp*., 315 So. 2d 431, 434 (Ala. 1975).

[xviii] *Water Works & Sewer Bd. of City of Birmingham v. Anderson*, 530 So. 2d 193, 198 (Ala. 1988).

[xix] *Miller v. Wood*, 60 So. 2d 353, 354 (Ala. 1952) (injunction bond "is required as a protection against the abuse of this extraordinary process and to prevent oppression by its use"); *see also Sycamore Mgmt. Grp., Inc. v. Coosa Cable Co.*, 81 So. 3d 1224, 1237 (Ala. 2011) (Murdock, J., dissenting) ("The reason our rules require the posting of a bond as a prerequisite to the issuance of a preliminary injunction is to insure not just against the risk that the defendant has been wrongfully restrained, but to insure against the peculiar risk that is attendant to the imposition of such a restraint without the benefit of the full measure of due process normally available from a trial court.").

[xx] *City of Birmingham v. Wilkinson*, 194 So. 548, 555 (Ala. 1940) (emphasis added).

[xxi] 6 Callmann on Unfair Comp., Tr. & Mono. § 23:52 (4th Ed.); Int'l Equity Investments, Inc. v. Opportunity Equity Partners Ltd., 441 F. Supp. 2d 552, 566 (S.D.N.Y. 2006), *aff'd*, 246 F. App'x 73 (2d Cir. 2007) ("the burden is on the party seeking security to establish a rational basis for the amount of the proposed bond.").

[xxii] 2 Bus. & Comm. Lit. in Fed. Cts.. § 17:16 (ABA 4th ed.).

[xxiii] 13 Moore's Federal Practice - Civil § 65.50.

[xxiv] *Hilb, Rogal & Hamilton Co. v. Beiersdoerfer,* 989 So. 2d 1045, 1056 n.3 (Ala. 2007).

[xxv] *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 297 F.R.D. 633, 636 (N.D. Ala. 2014).

[xxvi] 11A FED. PRAC. & PROC. CIV. § 2954 (Wright & Miller 3d ed.).

[xxvii] *Brown v. City of Upper Arlington*, 637 F.3d 668, 674 (6th Cir. 2011) (in a case where homeowners sought to enjoin city from cutting down a tree, the court recognized that the tree's posing "a serious risk of injury to passers-by and thus of potential liability to the City" could be relevant to the bond).

[xxviii] 13 Moore's Federal Practice - Civil § 65.50 (2019) (emphasis added) (citing *Mead Johnson & Co. v. Abbott Labs*., 201 F.3d 883, 888 (7th Cir.), *opinion amended on denial of reh'g*, 209 F.3d 1032 (7th Cir. 2000)).

[xxix] *See Petro Franchise Sys., LLC v. All Am. Properties, Inc*., 607 F. Supp. 2d 781, 801 (W.D. Tex. 2009); *N.Y.C. Triathlon, LLC v. NYC Triathlon Club, Inc*., 704 F .Supp. 2d 305, 345 (S.D.N.Y. 2010) (declining to require the posting of a bond where "the likelihood of [plaintiff's] success on the merits is overwhelming").