

Contracting For Irreparable Harm



Law360, New York (June 02, 2014, 11:04 AM ET) -- You are the general counsel of a small technology company negotiating the contract with your main software vendor, who is crucial to your company's daily operations. You know that once the contract is underway, a refusal by the software vendor to perform could have devastating effects on your business. What allows you to sleep at night is the provision you drafted specifying that a breach by the vendor would cause "irreparable harm" entitling your company to injunctive relief.

Or, imagine you advise a national company that is acquiring a smaller, regional business and hiring the business's owners to ensure some continuity as the company expands. You are worried that the business's owners will accept the payout and eventually leave the company to compete against it, potentially once they have learned valuable trade secrets. Rather than risk this happening, you have drafted employment contracts that stipulate any violation of the noncompete agreement would cause "irreparable harm" and thus, entitle the company to an injunction preventing the employees from working competitively.

Of course, these are just two examples out of a multitude. "Irreparable harm" clauses may be found across the legal spectrum and may range from the general (any breach of the agreement constitutes "irreparable harm") to the highly specific ("irreparable harm" occurs if X happens). In most cases, these clauses are meant to protect the deal struck in a contract and ensure specific performance, but they have also been utilized as a means of securing a preliminary injunction while a claim is pending.

The ubiquity of provisions stipulating to "irreparable harm" in business contracts probably leaves many attorneys and clients with the inaccurate impression that the courts will honor such provisions — and issue injunctions in the case of a breach — as a matter of course. As it turns out, in most jurisdictions, the nonbreaching party is likely to find itself disappointed if the facts do not line up in support of an injunction regardless of what the parties agreed to in the contract.

Courts are usually reluctant to issue injunctions, and will not grant them as a matter of right.[1] For this

reason “irreparable harm” clauses place courts in the awkward position of choosing between honoring the parties’ agreement and respecting the traditional bounds of law and equity. Indeed, courts have reacted to “irreparable harm” provisions with varying degrees of approval.

Delaware courts have concluded that these provisions should be given something akin to a rebuttable presumption in favor of a finding of irreparable harm. That is, unless the facts “plainly” indicate that there is no irreparable harm as a result of the breach, the provisions will be given effect.[2] The Delaware courts recognize that enforcing these agreements can pose some danger because they could have the effect of “confer[ring] equitable jurisdiction” when there is none.[3] But still, the courts have explained their deferential treatment of these provisions by stressing the importance of giving effect to parties’ contractual agreements.[4]

Courts in a few other jurisdictions give such provisions short shrift. Many courts have concluded that these contractual provisions should be given “little weight”[5] when evaluating a request for an injunction.[6] Indeed, these courts view the provisions as “insufficient prop[s]”[7] which, even though they are agreements between the parties, “are not binding on a court.”[8]

Still, most courts, including New York state courts, have sought a middle ground by factoring the parties’ agreement into their overall analysis of whether an injunction is a proper remedy.[9] For these courts, the provision alone is not sufficient evidence of irreparable harm to allow for an injunction; they instead conduct an independent inquiry into whether irreparable harm does in fact exist.[10] Contrary to Delaware’s posture, both of these less deferential approaches seem to be — as one court has noted — “based upon the court’s zealous protection of their equitable jurisdiction — consistent with the traditional view that the parties cannot enlarge the availability of specific performance or injunction by dispensing with the criteria for such relief.”[11]

We suggest that the best way to employ “irreparable harm” provisions is in a targeted and narrow manner, identifying precisely which duties breached would cause irreparable harm, and how. This would signal to the court that the parties who best know their transaction and their respective positions anticipate irreparable harm arising from a limited range of defined and well-considered circumstances. This specificity could go a long way toward eliminating the court’s suspicion that parties who employ broad “irreparable harm” provisions are attempting to confer a court’s equitable powers unto themselves. And instead courts may look to these narrower stipulations as significant evidence that irreparable harm is likely to occur because the parties have made an informed prediction that it will occur based on all the information available to them.[12] The more specific the provision, the more weight a court is likely to give the parties’ predictions if the ultimate breach mirrors the prediction made in the “irreparable harm” contract provision.

A court is less likely to enforce a very general clause that would seek to provide an injunction for the most insignificant of breaches. By individually tailoring the provision to fit the needs of a particular transaction, parties may find themselves in a better position to persuade a reluctant court to enforce the parties’ bargained-for agreement.

If you remember one thing from this piece, remember this: No lawyer should promise that an irreparable harm provision is a surefire way to secure an injunction. In the best case scenario, the client is essentially afforded a presumption of enforceability — but if the facts do not support a finding of irreparable harm, the client will find itself out of luck. Under the least favorable circumstances, the provision will be largely ignored.

—By Michael Frisch, Abigail Bartine and Rachel Barbat, Mayer Brown LLP

Michael Frisch and Abigail Bartine are associates in Mayer Brown's Chicago office. Both are litigators and specialize in commercial disputes, as well as matters related to white collar defense and compliance. Rachel Barbat is a summer associate in the firm's Chicago office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Instead, injunctive relief is an equitable remedy that a court will only grant when there is no adequate remedy at law. Normally this means that an injunction is only available when monetary damages are insufficient to remedy the harm that results from a breach. Before a court will issue a preliminary injunction, it goes through a four-part analysis, in which the moving party must demonstrate that: (1) it “is likely to succeed on the merits,” (2) it “is likely to suffer irreparable harm in the absence of preliminary relief,” (3) “the balance of equities tips in [its] favor,” and (4) “an injunction is in the public interest.” *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).

[2] See *Kansas City Southern & Kara Sub, Inc. v. Grupo*, C.A. No. 20518-NC, 2003 Del. Ch. LEXIS 116, at *21 (Del. Ch. Nov. 4, 2003) (citing *Vitalink Pharmacy Services v. GranCare, Inc.*, 1997 Del. Ch. LEXIS 116 (Del. Ch. Aug. 7, 1997)). One other court has taken a similar deferential approach. See *LNB Bancorp, Inc. v. Osborne*, No. 1:09-CV-643, 2011 U.S. Dist. LEXIS 137705, at *19 (N.D. Ohio Nov. 30, 2011).

[3] *Id.*

[4] *Id.*; *Gildor v. Optical Solutions, Inc.*, C.A. No. 1416-N, 2006 Del. Ch. LEXIS 110, at *37 (Del. Ch. June 5, 2006) (“Delaware courts do not lightly trump the freedom to contract and, in the absence of some countervailing public policy interest, courts should respect the parties’ bargain. [* * *] [A]s long as the parties did not include the irreparable harm stipulation as a sham, i.e., when an adequate remedy at law clearly exists, or simply as a means to confer jurisdiction on this court, then the stipulation will be upheld”).

[5] *La Jolla Cove Investors, Inc. v. Goconnect Ltd.*, 11CV1907 JLS (JMA), 2012 U.S. Dist. LEXIS 62948, at *11 (S.D. Cal. May 4, 2012) (quoting *Riverside Publ. Co. v. Mercer Publ. LLC*, No. C11-1249, 2011 U.S. Dist. LEXIS 85853, at *8 (W.D. Wash. Aug. 4, 2011)).

[6] *Id.* at *11-12, n.2; *Smith, Bucklin & Assocs., Inc. v. Sonntag*, 83 F.3d 476, 481 (D.C. Cir. 1996); *Laidlaw*,

Inc. v. Student Transp. of Am., Inc., 20 F. Supp. 2d 727, 766 (D.N.J. 1998).

[7] Smith, Bucklin & Assocs., Inc., 83 F.3d at 481.

[8] Guttenberg v. Emery, No. 13-2046 (JDB), 2014 U.S. Dist. LEXIS 37101, at *33 (D.D.C. Mar. 19, 2014).

[9] See, e.g., Cent. Transp. Servs. v. Cole, No. 13-1295, 2013 U.S. Dist. LEXIS 159732 at *15 (D. Kan. Nov. 6, 2013); Flextronics Int'l, Ltd. v. Parametric Tech., Corp., No. C13-0034 PSG, 2013 U.S. Dist. LEXIS 133403, at *24-25 (N.D. Cal. Sept. 16, 2013); MWI Veterinary Supply Co. v. Wotton, 896 F. Supp. 2d 905, 914 (D. Idaho 2012); Dickey's Barbecue Rests., Inc. v. GEM Inv. Group, L.L.C., No. 3:11-CV-2804-L, 2012 U.S. Dist. LEXIS 54448 (N.D. Tex. Apr. 18, 2012); Gramercy Warehouse Funding v. Colfin Jih Funding, 11 Civ. 9715 (KBF), 2012 U.S. Dist. LEXIS 3244, at *11-12 (S.D.N.Y. Jan. 6, 2012); Deangelo Bros. v. Clarius, 3:CV-06-0466, 2006 U.S. Dist. LEXIS 57846, at *40, n.5 (M.D. Pa. Aug. 17, 2006); Dominion Video Satellite v. Echostar Satellite, 356 F.3d 1256, 1263-64 (10th Cir. 2004); Imprimis Investors LLC v. Indus. Imaging Corp., QDS 22701503, 2008 N.Y. Misc. LEXIS 7384, at *16-17 (N.Y. Sup. Ct. Sept. 7, 2008).

[10] E.g., Gramercy Warehouse Funding, 2012 U.S. Dist. LEXIS 3244, at *11 (“[T]his Court is both required and entitled to make an independent finding of irreparable harm before issuing the extraordinary relief of a TRO.”).

[11] Imprimis Investors LLC, 2008 N.Y. Misc. LEXIS 7384, at *13.

[12] See Flextronics Int'l, Ltd. v. Parametric Tech., Corp., 2013 U.S. Dist. LEXIS 133403, at *25 (reasoning that since “the parties recognized the difficulty of keeping track of unauthorized copies” and inserted the “irreparable harm” clauses “to address that concern,” the clauses were solid evidence of irreparable harm); Gramercy Warehouse Funding, 2012 U.S. Dist. LEXIS 3244, at *11-12 (declining to enforce the contractual provision because it “contain[ed] no specificity or reference to particular facts” and did not deserve “significant weight” in the court’s decision).