Tennessee Judicial Conference—March 2021

Tennessee Civil Procedure Rule 65 Injunctions

By Chancellor Ellen Hobbs Lyle

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Governing Rule 65 and How It Is Organized

"An injunction is a judicial process or mandate operating *in personam* by which, upon certain established principles of equity, a party is required to do or refrain from doing a particular thing." BLACK'S LAW DICTIONARY (11th ed. 2019) injunction.

The power to issue injunctive relief under Tennessee law is regulated by Tennessee Civil Procedure Rule 65. The first subsection 65.01 of the Rule provides three kinds of injunctive relief:

— restraining order,
— temporary injunction, or
— permanent injunction.

Subsection 65.03 pertains solely to restraining orders. Following that, subsection 65.04 pertains only to temporary injunctions.

The other subsections 65.02, 65.06, 65.06 pertain to both restraining orders and temporary injunctions. Subsection 65.02 provides the requisites for the orders and who is bound by the orders. Subsection 65.05 governs bonds. Subsection 65.06 provides for contempt proceedings for enforcement of the orders.

Subsection 65.07 is a carve out excepting restraining orders and injunctions in domestic relations cases from the provisions of Rule 65. Subsection 65.07 authorizes the judge in domestic relations cases to issue those orders "upon such terms and conditions and remain in force and for such time as shall seem just and proper to the judge . . . and the provisions of this Rule shall be followed only insofar as deemed appropriate by said judge."

Case law explaining and demonstrating the function of each of these subsections of Rule 65 is provided below.

Subsection 65.03—Restraining Orders

Rule 65.03. Restraining Order

(1) When Authorized. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party can be heard in opposition; and

(B) the applicant's attorney (or pro se applicant) certifies in writing efforts made to give notice and the reasons why it should not be required.

(2) Officers Who May Grant or Dissolve. A restraining order may be granted only by a judge of the court in which the action is pending or is to be filed; provided that if the judge of that court is disqualified, disabled, or absent from the county, it may be granted by any judge having statutory power to enjoin or restrain. A restraining order may be dissolved on motion by the judge of the court in which the action is pending, or if this judge is disqualified, disabled or absent from the county, by a judge of a court having comparable jurisdiction. Before a restraining order may be granted or dissolved by one other than the judge of the court in which the action is pending, or is to be filed, the party applying therefor must show by affidavit the disqualifications, disability or absence of the judge and the fact that no judge has refused such relief.

(3) Issuance, Signing and Filing. Every restraining order shall be indorsed with the date and hour of issuance, shall be signed by the judge granting it, and shall be forthwith filed in the clerk's office.

(4) Service. A copy of the restraining order for each party to be restrained shall be delivered to a person authorized to serve a summons. Such person shall forthwith serve the order as provided by Rule 4.04 and forthwith make return thereof on the order. If a restraining order is issued at the commencement of an action, a copy shall be served with the summons.

(5) Binding Effect and Duration. A restraining order becomes effective and binding on the party to be restrained at the time of service or when the party is informed of the order, whichever is earlier. Every temporary restraining order granted without notice shall expire by its terms within such time after entry, not to exceed fifteen days, as the Court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period, or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

T.R.C.P. 65.03

Emergency Relief—"Restraining order" is the most emergency relief under Rule 65. A restraining order signifies circumstances so sudden and demanding that the law takes the unusual step of permitting the applicant to dispense with notice to the other side in seeking the relief. The power to grant relief *ex parte* is checked by requiring in Rule 65.03(1) specific verified facts compelling immediate relief before a hearing with the other side can be convened and information about notice to the other side.

Short Duration—15 Days—In addition to emergency, the other aspect of a TRO is short duration, which is just common sense—if the relief has been granted quickly without a hearing and notice to the other side the relief should only be a band-aid to patch over until a more thorough examination can be done. By contrast, present but less imminent harm is relieved by a temporary injunction.

Difference Between Temporary Restraining Order and Temporary Injunction—Do not confuse the term restraining order with temporary injunction. Rule 65 establishes these as two very distinct terms with different meaning and uses.

The foregoing distinctions come right out of Rule 65.

Notice—The most significant distinction between a temporary restraining order and a temporary injunction is that a restraining order may be granted

without notice (Rule 65.03(1)); whereas "no temporary injunction shall be issued without notice to the adverse party." (Rule 65.04(1)).

Duration—A restraining order expires within 15 days of issuance (Rule 65.03(5)). A temporary injunction, by contrast, remains in force until modified or dissolved on motion, or until a permanent injunction is granted or denied (Rule 65.04(5)).

Scope—A restraining order addresses the very limited period of harm that will be suffered before notice can be given to the other side (Rule 65.03(1)). A temporary injunction addresses the longer period of harm that will occur pending final judgment. (Rule 65.04(2)).

Different Outcomes—Because of the additional competing facts and legal arguments provided by the adversary on the temporary injunction, it is not uncommon for a court to issue an *ex parte* restraining order until a hearing with all parties present can be conducted on the application for a temporary injunction and then dissolve the restraining order and deny issuance of a temporary injunction based on the new information and arguments in the opposition. *See,* e.g. *King v. Bank of America*, No. W2018-01177-COA-R3-CV, 2020 WL 7861368 *3 (Tenn. Ct. App. Dec. 29, 2020) (Court entered restraining order to prevent eviction but then dismissed complaint and denied application for a temporary injunction).

TRO Checklist

Requirements of Complaint or Application

1. **Facts Needed**—Present or imminent violation of rights that will result in immediate and irreparable harm before notice can be served and a hearing held under certain conditions as specified above—TRCP 65.03(1)

2. **Facts Must Be Sworn To**—The filing of a verified complaint or application supported by affidavits—TRCP 65.03(1)

3. **Must State It Is The First Application for Such Relief**—T.C.A. § 29-1-107

4. **Notice Affidavit—Include Verification in Complaint and Separate Certification on Notice**—"[S]pecific facts in an affidavit or verified complaint clearly show that immediate and irreparable injury . . . will result to applicant before the adverse

party can be heard in opposition" AND certification in writing "that efforts were made to give notice and the reasons why it should not be required. T.R.C.P. 65.03(1).

Duration—Only lasts 15 days from date of entry, can be extended 15 more days for good cause shown or longer with consent of opposition.

Subsection 65.04—Temporary Injunctions

Rule 65.04. Temporary Injunction

(1) Notice. No temporary injunction shall be issued without notice to the adverse party.

(2) When Authorized. A temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

(3) Officers Who May Grant, Modify or Dissolve. A temporary injunction may be granted, modified or dissolved on motion by a judge of the court in which the action is pending, or if this judge is disqualified, disabled or absent from the county, by a judge of a court having comparable jurisdiction.

(4) Issuance, Filing and Entry. Every temporary injunction shall be indorsed with the date and hour of issuance, shall be signed by the judge granting it and shall forthwith be filed in the clerk's office and entered.

(5) Binding Effect and Duration. A temporary injunction becomes effective and binding on the party enjoined when the order is entered. It shall remain in force until modified or dissolved on motion or until a permanent injunction is granted or denied.

(6) Findings of Fact and Conclusions of Law. In granting, denying or modifying a temporary injunction, the court shall set forth

findings of fact and conclusions of law which constitute the grounds of its action as required by Rule 52.01.

(7) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the Court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision [65.04(7)] shall be so construed and applied as to save to the parties any rights they may have to trial by a jury.

T.R.C.P. 65.04

Mandatory v. Prohibitory Injunction—"A mandatory injunction is one which alters the status quo and orders the defendant to take action to remedy the alleged wrong." *Fisher v. Hargett*, 604 S.W.3d 381, 394-395 (Tenn. 2020) (citing Lawrence A. Pivnick, 2 Tenn. Cir. Ct. Prac. § 31.2 (Dec. 2019 update). A mandatory injunction is such extraordinary relief that it is to be granted only "in exceptional circumstances." *Fisher*, 604 S.W.3d at 395.

Four Factor Test—Like the federal courts, Tennessee courts consider four factors in determining whether to issue a temporary injunction:

— the likelihood that the plaintiff will succeed on the merits,

— the threat of irreparable harm to the plaintiff if the injunction is not issued,

— the balance between the harm and the injury that granting the injunction would inflict on the defendant; and

— the public interest.

Fisher v. Hargett, 604 S.W.3d 381, 394 (Tenn. 2020); *Moody v. Hutchinson*, 247 S.W.3d 187, 199-200 (Tenn. Ct. App. 2007). *South Cent. Tenn. R.R. Auth. v. Harakas*, 44 S.W.3d 912, 919 n.6 (Tenn. Ct. App. 2000) (quoting Robert F. Banks, Jr. & June F.

Entman, Tennessee Civil Procedure § 4-3(l) (1999)). *See also, Union Planters' Bank & Trust Co. v. Memphis Hotel Co.*, 139 S.W. 715, 718-19 (Tenn. 1911); *Butts v. S. Fulton*, 565 S.W.2d 879, 882 (Tenn. Ct. App. 1977) (citing *Wilson v. Louisville & Nashville L.R. Co.*, 12 Tenn. App. 327 (Tenn. Ct. App. 1930)); *Henry County v. Summers*, 547 S.W.2d 247, 251 (Tenn. Ct. App. 1976) (citing *King v. Elrod*, 268 S.W.2d 103 (Tenn. 1953)); *Kaset v. Combs*, 434 S.W.2d 838, 841 (Tenn. Ct. App. 1968) (citing *Greene County Tire & Supply, Inc. v. Spurlin*, 338 S.W.2d 597 (Tenn. 1960), *Herbert v. W.G. Bush & Co.*, 298 S.W.2d 747 (Tenn. Ct. App. 1956)).

Findings of Fact and Conclusions of Law Required on Four Factors—It is reversible error for a trial judge not to provide findings of fact and conclusions of law "when granting, denying or modifying a temporary injunction." TENN. R. CIV. P. 65.04(6); *Williams v. Goins*, No. 2018-01024-COA-R3-CV, 2018 WL 3198799 (Tenn. Ct. App. June 26, 2018).

Application of Factor: Likelihood of Success With Alleged Constitutional Violation—When a temporary injunction is sought on the basis of an alleged constitutional violation, the factor of likelihood of success on the merits is the determinative factor. *Id.* "A plaintiff's failure to show likelihood of success on the merits is usually fatal." *Id.*

Application of Factor: Likelihood of Success on the Merits—Quantum of Proof—To demonstrate the factor of likelihood of success on the merits, the quantum of proof is that the movant must "clearly show . . . that its rights are being or will be violated." TENN. R. CIV. P. 65.04(2); *Moody v. Hutchinson*, 247 S.W.3d 187, 199 (Tenn. Ct. App. 2007). Where there are issues of fact, there is not sufficient evidence under Tennessee law to issue an injunction. An example of where the movant failed to meet this standard is provided in *Clark Tower, LLC v. Wells Fargo Bank, N.A.*, 178 A.D.3d 547, 548, 114 N.Y.S.3d 339, 2019 N.Y. Slip Op. 0897 (N.Y. App. 2019), quoting as follows.

> In any event, plaintiff did not "clearly show[ ]" that its "rights are being or will be violated" (Tenn. R Civ. P. 65.04 [2]), as required to demonstrate a probability of success on the merits (*Moody v Hutchison*, 247 S.W.3d 187, 199 [Tenn. Ct. App. 2007]). The claim that defendants unreasonably withheld consent to refinancing is belied by the record, which shows that defendants requested details concerning the new lender's appraisal, plaintiff's request to assign Note B to an entity sharing common ownership with it, and plaintiff's tardy admission that the refinancing package was also to be secured by a second property for which plaintiff had not provided an appraisal. Contrary to plaintiff's contention, defendants did not initially consent by issuing loan payoff estimates that expired the same day they

> were issued. Issues of fact concerning whether defendants unreasonably withheld consent, or waived the requirement to pay rents into the lockbox, are not sufficient under Tennessee law to warrant an injunction (*Moody*, 247 S.W.3d at 199-200; *accord Milton v Harness*, 2017 WL 837704, *4, 2017 Tenn. App. LEXIS 154, *12-13 [2017]; *see also Essa Realty Corp. v J. Thomas Realty Corp*., 70 A.D.3d 483, 483 894 N.Y.S.2d 417 [1st Dept 2010]).

Another example where a movant failed to provide clear facts of immediate and irreparable harm is quoted as follows from *Hughes v. Tennessee Dept. of Correction*, No. M2016-02212-COA-R3-CV, 2017 WL 4125378 (Tenn. Ct. App. Sept. 18, 2017).

> In his Petition, Mr. Hughes asserted that his constitutional rights were being violated at HCCF by the staff, in particular, that the staff had denied him "the right to file requests, grievances, speak to [his] attorney's (sic), receive adequate medical, religious worship, sanitary food, and several other very serious issues . . . ." Mr. Hughes's Petition and subsequent motion contain no factual allegations in support of his claims. Rather, Mr. Hughes submitted to the trial court various documents, including copies of grievance records and medical requests. These documents, however, tend to disprove rather than support Mr. Hughes's position.
>
> For example, the documentation submitted by Mr. Hughes belies his complaint that he was improperly restricted to his cell by HCCF staff and thus caused to miss a legal filing deadline. Rather, Mr. Hughes's documentation demonstrates that this restriction was actually caused by a prison-wide modified lockdown. Mr. Hughes's documentation further demonstrates that his grievances and medical requests were received and answered, as well as his request to attend church services. Aside from this documentation, Mr. Hughes presented no factual information upon which an analysis of potential harm could be conducted.

Consolidation of Hearing on Temporary Injunction with Trial on the Merits—Rule 65.04(7) provides for consolidation of the hearing on the application for a temporary injunction with advancing and conducting a trial on the merits. Even though the subsection states that "after" the commencement of the hearing on the application for a temporary injunction the trial court can consolidate, case law has restricted this provision with the law that notice of consolidation must come at a time which affords parties a full opportunity to present their case.

> TGS is correct in that, under Rule 65.04(7), a hearing may be consolidated "[b]efore or after the commencement of the hearing of an application for a preliminary injunction. . . ." However, we note the proposition quoted in *Clinton Books* that notice, if not provided before the hearing commences, must come "at a time which will still afford the parties a full opportunity to present their respective cases." *Id.* at 755 (quoting *Univ. of Texas*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175). We do not believe that "after the commencement" extends to after the *conclusion* of a hearing, when the witnesses are done testifying and the parties are giving their closing arguments. Based on the record before us, the Trial Court declared sua sponte at hearing's end that it intended to consolidate the injunction hearing with a trial on the merits even though the evidentiary portion of the hearing was over. In our judgment, that notice was too late to afford Moody a full opportunity to make his case.
>
> TGS contends that Moody should have objected at the time or moved to prevent consolidation before entry of the May 2018 injunction order, which was a non-final order subject to change. However, Moody did later attempt to amend his answer to include additional affirmative defenses only to be denied. Based on this record, Moody never had a meaningful opportunity to prepare for trial on the merits in this matter, including the opportunity to conduct discovery or assert applicable affirmative defenses.
>
> Notice provided after the fact is not notice. It is a pronouncement. We conclude that the Trial Court's pronouncement at the end of the April 27, 2018 hearing that it was invoking Rule 65.04(7) did not qualify as adequate notice, if it can be deemed notice at all, of consolidation of trial on the merits. We vacate the Trial Court's judgment as it pertains to Moody's alleged violation of the Agreement and remand for further proceedings consistent with this Opinion.

Total Garage Store, LLC v. Moody, M2019-01342-COA-R3-CV, 2020 WL 6892012 *8-*9 (Tenn. Ct. App. Sept. 2, 2019).

Another example of use of Rule 65.04(7) consolidation is *Robertson v. Tennessee Secondary School Athletic Association*, W2019-00015-COA-R3-CV, 2019 WL 3337095 (Tenn. Ct. App. July 25, 2019).

Helpful Local Rule Procedures for Temporary Injunction Hearings—Three judicial districts (20th, 21st and 23rd) have a local rule which provides that hearings on motions/applications for temporary injunctions are conducted on affidavits, declarations or sworn pleadings. No oral, in-person testimony is introduced without permission of the court. So, for example, Section 15.02 of the Twenty-first District's Local Rules provides,

> Section 15.02. Hearings
>
> All applications for temporary injunctive and other forms of extraordinary interlocutory relief shall be heard upon sworn pleadings or affidavit and/or deposition unless a party, prior to the time of the hearing, requests and obtains permission of the court for the introduction of oral testimony and so notifies all other counsel of record.

These Local Rules are efficient yet fair. By eliminating oral, in-person testimony, the Local Rule insures that the temporary injunction hearing does not turn into a mini-trial or discovery session. These Local Rules are fair because the movant's burden of clear evidence and a substantial likelihood of success on the merits lessens the need for credibility determinations—the justification for oral, in-person testimony—and lessens the justification for rebuttal proof by a movant—also a justification for oral, in-person testimony. Requiring proof to be provided by verified pleadings, affidavits or declarations is consistent with the preliminary, pendente lite nature of a temporary injunction.

Here is the breakdown of Local Rules from all 31 judicial districts on conducting hearings on temporary injunctions:

- heard on affidavit/declarations/deposition, no oral testimony unless requested and granted: **3 judicial districts** (20th, 21st, & 23rd)
- heard "on sworn pleadings, affidavits, counter-affidavits, depositions and/or testimony": **4 judicial districts** (24th, 26th, 28th, 30th)
- "shall be heard upon oral testimony": **1 judicial district** (3rd)
- Local Rule does not specify procedure for hearing: **8 judicial districts** (9th, 10th, 11th, 13th, 16th, 17th, 19, 31st)
- No Local Rule addressing procedure: **15 judicial districts** (1st, 2nd, 4th, 5th, 6th, 7th, 8th, 12th, 14th, 15th, 18th, 22nd, 25th, 27th, 29th)

Subsection 65.05—Injunction Bond

Rule 65.05. Injunction Bond

(1) Except in such actions as may be brought on pauper's oath, no restraining order or temporary injunction shall be granted except upon the giving of a bond by the applicant, with surety in such sum as the court to whom the application is made deems proper, for the payment of such costs and damages as may be incurred or suffered by any person who is found to have been wrongfully restrained or enjoined. The address of the surety shall be shown on the bond.

(2) A surety upon a bond under the provisions of this Rule submits to the jurisdiction of the court. The surety's liability may be enforced on motion without the necessity of an independent action. The motion shall be served on the surety as provided by Rule 5 at least 20 days prior to the date of the hearing thereon.

(3) A party restrained or enjoined may move the court for additional security; and if it appear on such motion that the surety is insufficient or the amount of the bond is insufficient, the court may vacate the restraining order or temporary injunction unless within a reasonable time sufficient security is given.

Bond is Required—A restraining order and a temporary injunction order must set a bond to be posted by the applicant. TRCP 65.05. Tennessee law requires the posting of a bond before one is entitled to the restraint or injunction. *Larry E. Parrish, P.C. v. Strong*, No. M2017-02451-COA-R3-CV, 2018 WL 6843402 *10 (Tenn. Ct. App. December 28, 2018). When a trial court enforces an injunction where no bond has been posted, the injunction is subject to being dissolved. Two exceptions are that applicants proceeding on a pauper's oath are not required to post a bond, and the State of Tennessee is not required to post a bond when proceeding under certain statutes such as: Consumer Protection, TENN. CODE ANN. § 47-18-2105; Contractor's Act, TENN. CODE ANN. § 62-6-122; Liquified Petroleum Safety Act, TENN. CODE ANN. § 68-135-111.

Different from Cost Bond—An injunctive bond is different from a cost bond; the former recites that it secures not only court costs but also damages. A defective bond renders the judgment voidable. *Overnite Transportation Company v. Teamsters Local Union 480*, 2004 WL 383313 (Tenn. Ct. App.).

How to Set the Amount and Recovery on the Bond—In setting the amount, Rule 65.01(2) instructs the court to consider what damages the nonmoving party will suffer if wrongfully restrained. Not every preliminary injunction which is subsequently dissolved constitutes a wrongfully issued injunction. To recover on a bond, the defendant is not required to show bad faith. *South Central Tennessee Railroad Authority v. Harakas,* 44 S.W.3d 912, 918, 919 (Tenn. Ct. App. 2000). The defendant must show he was wrongfully restrained or enjoined. *Id*. at 915. "The plain language of the rule establishes that the purpose of requiring a bond as a condition precedent to the issuance of a restraining order or preliminary injunction is 'to provide a mechanism for reimbursing an enjoined party for harm it suffers as a result of an improvidently issued injunction or restraining order.'" *Id*. (quoting *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999)). The meaning of wrongfully restrained or enjoined is "when it turns out the party had the right all along to do what it was enjoined from doing." *Id*. "Part of the rationale behind being a bond is to discourage a party from seeking an injunction for tenuous reasons." *Id*.

Subsections 65.02 and 65.06—Requisites; Parties Bound; Enforcement/Contempt

> **Rule 65.02. Requisites of Restraining Order or Injunction; Parties Bound**
>
> **(1) Every restraining order or injunction shall be specific in terms and shall describe in reasonable detail, and not by reference to the complaint or other document, the act restrained or enjoined.**
>
> **(2) Every restraining order or injunction shall be binding upon the parties to the action, their officers, agents and attorneys; and upon other persons in active concert or participation with them who receive actual notice of the restraining order or injunction by personal service or otherwise.**

T.R.C.P. 65.02.

Rule 65.06—Contempt for Compliance or Punishment

Rule 65.06. Enforcement of Restraining Orders and Injunctions

Upon a showing by affidavit or other evidence of the breach or threatened breach of a restraining order or injunction, compliance with such order or injunction may be compelled or its disobedience punished as a contempt by a judge of the court in which the action is pending, or if this judge is disqualified, disabled or absent from the county, by a judge of a court having comparable jurisdiction.

Order Must Be Specific—As a practical matter, a court order which commands a person to desist from conduct or mandates certain actions must be specific so the person knows, i.e. has notice, of the forbidden conduct or required actions. Violation of a restraining order or injunction is punishable by contempt. If the order is not clear and the offender was uncertain or did not understand, the requisite intent for contempt is not present.

> A person may not be held in civil contempt for violating an order unless the order expressly and precisely spells out the details of compliance in a way that will enable reasonable persons to know exactly what actions are required or forbidden. *Sanders v. Air Line Pilots Ass'n Int'l*, 473 F.2d 244, 247 (2d Cir.1972); *Hall v. Nelson*, 282 Ga. 441, 651 S.E.2d 72, 75 (2007); *Marquis v. Marquis*, 175 Md.App. 734, 931 A.2d 1164, 1171 (2007); *Cunningham v. Eighth Judicial Dist. Ct. of Nev.*, 102 Nev. 551, 729 P.2d 1328, 1333–34 (1986); *Petrosinelli v. People for the Ethical Treatment of Animals, Inc.*, 273 Va. 700, 643 S.E.2d 151, 154–55 (2007). The order must, therefore, be clear, specific, and unambiguous. *See Doe v. Bd. of Prof'l Responsibility*, 104 S.W.3d at 471; *Long v. McAllister–Long*, 221 S.W.3d at 14 [footnote omitted].
>
> Vague or ambiguous orders that are susceptible to more than one reasonable interpretation cannot support a finding of civil contempt. *City of Gary v. Major*, 822 N.E.2d 165, 170 (Ind.2005); *Judge Rotenberg Educ. Ctr., Inc. v. Comm'r of Dep't of Mental Retardation*, 424 Mass. 430, 677 N.E.2d 127, 137 (1997); *Ex parte Slavin*, 412 S.W.2d at 45. Orders need not be "full of superfluous terms and specifications adequate to counter any flight of fancy a contemner may imagine in order to declare it vague." *Ex parte Blasingame*, 748 S.W.2d 444, 446 (Tex.1988) (quoting *Ex parte McManus*, 589 S.W.2d 790, 793 (Tex.Civ.App.—Dallas 1979)). They must, however, leave no reasonable basis for doubt regarding their

meaning. *Int'l Longshoremen's Ass'n, Local No. 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967); *Salt Lake City v. Dorman–Ligh*, 912 P.2d 452, 455 (Utah Ct.App.1996).

Orders alleged to have been violated should be construed using an objective standard that takes into account both the language of the order and the circumstances surrounding the issuance of the order, including the audience to whom the order is addressed. *United States v. Bernardine*, 237 F.3d 1279, 1282 (11th Cir.2001); *United States v. Young*, 107 F.3d 903, 907–08 (D.C.Cir.1997). Ambiguities in an order alleged to have been violated should be interpreted in favor of the person facing the contempt charge. *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir.2006); *Levin v. Tiber Holding Corp.*, 277 F.3d 243, 251 (2d Cir.2002); *Town of Virgil v. Ford*, 184 A.D.2d 901, 585 N.Y.S.2d 559, 560 (1992); *Greene v. Finn*, 153 P.3d at 951. Determining whether an order is sufficiently free from ambiguity to be enforced in a contempt proceeding is a legal inquiry that is subject to de novo review. *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir.1991); *In re Leah S.*, 284 Conn. 685, 935 A.2d 1021, 1027 (2007); *City of Wisconsin Dells v. Dells Fireworks, Inc.*, 197 Wis.2d 1, 539 N.W.2d 916, 924 (1995) [footnote omitted].

* * *

Because the May 17, 2005 order did not clearly and unambiguously prohibit petitions pursuant to Tenn.Code Ann. § 10–7–505(a), it cannot provide the basis for holding Mr. Konvalinka and Ms. Lawrence in civil contempt for filing their petition seeking access to public records. The language of the order prevents a finding of willful disobedience on the part of either Mr. Konvalinka or Ms. Lawrence because they could have believed reasonably that the order did not extend to separate actions under Tenn.Code Ann. § 10–7–505(a). Accordingly, the Court of Appeals' decision to hold Mr. Konvalinka and Ms. Lawrence in civil contempt must be reversed because it is inconsistent with the applicable legal standards and because it lacks evidentiary support.

Konvalinka v. Chattanooga Hamilton County Hosp. Authority, 249 S.W.3d 345, 355-356, 360 (Tenn. 2008)

An example of text of a permanent injunction which the Court of Appeals affirmed as not vague or overbroad is as follows.

> In the case at bar, the trial court made the following findings in the restraining order entered on March 28, 2019:
>
> 1. The Stockholders' Agreement ("SA") § 3.2.2 prohibits Wellmont from competing with [the PHO] for payors with existing [PHO] contracts and from soliciting such payors, and the exception in SA § 3.2.2(i) for "competing" networks allows only competition for and solicitation of persons or entities which do not have networks composed of [PHO] personnel.
>
> 2. The jury found that Wellmont breached SA § 3.
>
> 3. The jury found that HPI members are third-party beneficiaries of SA § 3.
>
> 4. The jury found that Wellmont has breached its fiduciary duties of care and loyalty to HPI and its members.
>
> 5. The jury found that Wellmont committed an intentional tort damaging HPI and its members.
>
> So that Wellmont does not repeat such conduct, the Court, hereby, ENJOINS Wellmont from engaging in any conduct inconsistent with the terms of the Court's Findings regarding SA § 3 above. The Court also ENJOINS Wellmont from retaliating against HPI, its members, and the witnesses in this lawsuit (i) for participation in this lawsuit; (ii) for testimony given in this lawsuit; or [(iii)] in general, for advancing the interest of the [PHO] or HPI in this lawsuit.

Highlands Physicians, Inc. v. Wellmont Health System, No. E2019-00554-COA-R3-CV, 2020 WL 5754574, at *37 (slip opinion) (Tenn. Ct. App. 2020).

Contempt Authorized Even if Later Restraining Order or Injunction Is Reversed—Civil and criminal contempt are authorized for a court to enforce compliance with or punish disobedience of a restraining order or injunction. This is so even though the restraining order or injunction may later be reversed or vacated on appeal.

> In *Nashville Corporation v. United Steelworkers of America, CIO*, 187 Tenn. 444, 215 S.W.2d 818 (Tenn. 1948), our Supreme Court observed that the power to punish for contempt was "one of the highest prerogatives of a court of justice." *Id*. at 821. The Court went on to state that the party upon whom an order or command of the court operates "is not allowed to speculate upon the equity of the bill, or the legality or regularity of the order or decree, or of the writ issued thereon; but his simple duty is to obey; and when he disobeys it is a duty the court owes to itself and to the public to punish him at once." *Id*. (citations omitted). In *State v. Jones*, 726 S.W.2d 515 (Tenn. 1987), our Supreme Court reaffirmed the principle that with proper jurisdiction, "even though the trial judge's order is erroneous and is reversed on appeal, an adjudication of contempt for failure to obey that order will be sustained." *Id*. at 517.
>
> We have determined that the Trial Court erred by invoking Tenn. R. Civ. P. 65.04(7) without providing adequate notice and vacated that aspect of its judgment accordingly. However, that does not excuse Moody's conduct. While Moody contends that the injunction order was "void" for lack of notice, he cites no authority in support of that contention. Moody only lacked notice that the Trial Court was going to invoke Rule 65.04(7) and consolidate the hearing. Moody did not lack notice of the hearing itself, nor does he attack the Trial Court's jurisdiction. The Trial Court's May 2018 injunction order was a valid, lawful order even though vacated on appeal. Until the Trial Court modified or set aside its order, or a higher court reversed or vacated the Trial Court's judgment, Moody was required to obey the Trial Court's order. He did not. Discerning no reversible error, we affirm the Trial Court in its finding Moody guilty of criminal contempt.

Total Garage Store, LLC v. Moody, M2019-01342-COA-R3-CV, 2020 WL 6892012 *11 (Tenn. Ct. App. Nov. 24, 2020) (slip opinion).

Willful Disobedience To Spirit of Injunction Is Criminal Contempt—"Taken in its entirety and in context, the proof is beyond a reasonable doubt that Mr. Walker, as settlor of the trust and its sole beneficiary, sought 'to evade responsibility for violating an injunction by doing through subterfuge that which, while not in terms a violation, yet produces the same effect by accomplishing substantially that which [he] w[as] enjoined from doing,' [citation omitted]." *Family Trust Services, LLC v. REO Holdings, LLC*, No. M2016-02524-COA-R3-CV, 2018 WL 2203216 *7 (Tenn. Ct. App. May 14, 2018).

Provisional, Not Conclusive

Restraining orders and temporary injunctions enforce rights and prevent wrongs while a lawsuit is pending. They are provisional remedies and are authorized only when the circumstances are immediate and irreparable.

The effect of extraordinary relief under TRCP 65 is that it is provisional in nature and it does not conclude a right:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary injunction hearing. Findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at a trial on the merits. . . .

University of Texas v. Camenisch, 451 U.S. 395 (1981).

As further explained in *South Cent. Tenn. R.R. Auth. v. Harakas*, 44 S.W.3d 912, 919 (Tenn. Ct. App. 2000):

> Situations exist where the initial seeking and issuance of a temporary restraining order or temporary injunction were appropriate . . . but the court nonetheless declines to issue a permanent injunction.

There is, however, a caveat to the foregoing. Statements made in affidavits or statements made on the witness stand can be used as an admission at time of trial. Further, Rule 65.04(7) provides that "any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial."

Appellate Review

Abuse of Discretion Standard—The trial court's decision to grant the plaintiffs' request for a temporary injunction is discretionary and is reviewed under an abuse of discretion standard. *Fisher v. Hargett*, 604 S.W.3d 381, 395 9Tenn. 2020) (citing *Gentry v. McCain*, 329 S.W.3d 786, 793 (Tenn. Ct. App. 2010), perm. app. denied (Tenn. Oct. 18, 2010); *Hughes v. Tenn. Dep't of Corr*., No. M2016-02212-COA-R3-CV, 2017 WL 4125378, at *2 (Tenn. Ct. App. Sept. 18, 2017); *Curb Records, Inc. v. McGraw*, No. M2011-02762-COA-R3-CV, 2012 WL 4377817, at *3 (Tenn. Ct. App. Sept. 25, 2012), perm. app. denied (Tenn. Feb. 12, 2013). "A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence." *Harmon v. Hickman Cmty. Healthcare Servs., Inc*., 594 S.W.3d 297, 305–06 (Tenn. 2020) (citations omitted)).

***De Novo* Standard**—Whether the trial court applied an incorrect legal standard is a question of law and is reviewed *de novo* with no presumption of correctness. *Id*. (citing *Funk*, 570 S.W.3d at 211 (citing *Wallace v. Metro. Gov't of Nashville*, 546 S.W.3d 47, 52 (Tenn. 2018))).

Questions of Fact; Documentary Evidence—Questions of fact normally are reviewed de novo but with a presumption of correctness unless the evidence preponderates otherwise. *Id.* (citing Tenn. R. App. P. 13(d) (2020); *Hughes v. Tenn. Bd. of Prob. and Parole*, 514 S.W.3d 707, 712 (Tenn. 2017)).

Where, however, the evidence is documentary and there was no live testimony, only declarations, the appellate court affords no deference and no presumption of correctness to the trial court's findings of fact. *Id*. (citing *Kelly v. Kelly*, 445 S.W.3d 685, 693 (Tenn. 2014) ("When findings are based on documentary evidence, an appellate court's ability to assess credibility and to weigh the evidence is the same as the trial court's. Accordingly, when factual findings are based on documentary evidence, an appellate court may draw its own conclusions with regard to the weight and credibility to be afforded that documentary evidence." (Citation omitted)); *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783-84 (Tenn. 1999) (citing *Corcoran v. Foster Auto GMC, Inc*., 746 S.W.2d 452, 456 (Tenn. 1988))).

Areas of the Law Where Rule 65 Relief Is Frequently Applied For

Noncompete Agreements

A contract used by employers in Tennessee and a standard part of the documents many employees are required to execute upon commencement of employment is a "noncompete agreement." These contracts are used by employers to protect their business by precluding employees from going to work for a competitor upon cessation of their work for the employer.

Their common use, however, is not mirrored by commonplace enforcement of noncompete agreements in the law. For good reason, as explained herein, noncompete agreements are different from the garden variety contract. To be enforceable, noncompete agreements must meet strict criteria under Tennessee law and are an area where a judge has the unusual authority to rewrite the agreement.

These agreements are considered herein because they are frequently the issue under Tennessee Civil Procedure Rule 65 applications for restraining orders or temporary injunctions.

Tennessee Noncompete Law

A quick and practical guide to Tennessee noncompete law is *Vantage Technology, LLC v. Cross*, 17 S.W.3d 637 (Tenn. Ct. App. 1999). It not only explains the underlying policies of the law but also provides a helpful list and analysis of facts to consider in determining if such an agreement is enforceable.

Protectible Business Interest—At the outset, *Vantage* explains why enforcement of noncompete agreements in Tennessee is not to be taken for granted. The *Vantage* court's explanation is that noncompete agreements are not *per se* enforceable because the agreements are in restraint of trade. Accordingly, employers are required to make a preliminary showing before they can assert breach of the noncompete by the employee and seek enforcement. The employer is required to demonstrate that without the protection of the noncompete agreement the employer will be subjected to unfair competition:

> Several principles guide the determination of whether an employer has a business interest properly protectable by a non-competition covenant. Because an employer may not restrain ordinary competition, it must show the existence of special facts over and above ordinary competition [citation omitted]. These facts must be such that without the covenant, the employee would gain an unfair advantage in future competition with the employer [citation omitted] [emphasis added].

Vantage Technology, LLC v. Cross, 17 S.W.3d 637, 644 (Tenn. Ct. App. 1999).

Especially helpful is the identification by the *Vantage Technology* court of considerations to examine in determining whether an employee would gain an unfair advantage in future competition with the employer:

> Considerations in determining whether an employee would have such an unfair advantage include (1) whether the employer provided the employee with specialized training; (2) whether the employee is given access to trade or business secrets or other confidential information; and (3) whether the employer's customers tend to associate the employer's business with the employee due to the employee's repeated contacts with the customers on behalf of the employer [citation omitted]. These considerations may operate individually or in tandem to give rise to a properly protectable business interest.

Id. With respect to each of these considerations: specialized training, access to confidential information, relationship with customers, the *Vantage* court explains the underlying policy:

> Specialized Training
> An employer does not have a protectable interest in the *general* knowledge and skill of an employee. *Hasty*, 671 S.W.2d at 473. This is not only true of knowledge and skill brought into the employment relationship, but also true as to that acquired during the employment relationship, even if the employee obtained such general knowledge and skill through expensive training. *See Hasty*, 671 S.W.2d at 473. . . .
>
> In contrast, an employer may have a protectable interest in the *unique* knowledge and skill that an employee receives through special training by his employer, at least when such training is present along with other factors tending to show a protectable interest. *Id.* . . .
>
> * * *
>
> Access to Confidential Information
> An employer has a legitimate business interest in keeping its former employees from using the former employer's trade or business secrets or other confidential information in competition against the former employer. *Hasty*, 671 S.W.2d at 473. A trade secret is defined as any secret "formula, process, pattern, device or compilation of information that is used in one's

> business and which gives him an opportunity to obtain an advantage over competitors who do not use it." *Hickory Specialties, Inc. v. B & L Labs., Inc.*, 592 S.W.2d 583, 586 (Tenn. App.1979) (quoting *Allis-Chalmers Mfg. Co. v. Continental Aviation & Eng'g Corp.*, 255 F. Supp. 645, 653 (E.D. Mich.1966)). . . .
>
> What constitutes "confidential information" is somewhat less clear. In *Heyer-Jordan & Assocs., Inc. v. Jordan*, 801 S.W.2d 814 (Tenn. App.1990), we held that the identities of the employer's customers did not amount to "confidential business information" within the meaning of the employment agreement because such information was generally available in the trade. We reasoned that "confidential information" is analogous to "trade secret" and that, because customer identities are not secret, they cannot be considered confidential.
>
> * * *
>
> Relationship With Customers
>
> An employer may also have a legitimate protectable interest in the relationships between its employees and its customers. *See Hasty*, 671 S.W.2d at 473. It is often the case that the customer associates the employer's business with the employee due to the employee's repeated contacts with the customer. The employee in essence becomes "the face" of the employer. This relationship is based on the employer's goodwill. The employee's role in this relationship is merely that of the employer's agent. In this role, the employee is made privy to certain information that is personal, if not technically confidential. Because this relationship arises out of the employer's goodwill, the employer has a legitimate interest in keeping the employee from using this relationship, or the information that flows through it, for his own benefit. This is especially true if this special relationship exists along with the elements of confidential information and/or specialized training.

Vantage Technology, LLC v. Cross, 17 S.W.3d 637, 644 -646 (Tenn. Ct. App. 1999).

As you can see, with noncompete agreements the enforcer's burden is different from most breach of contract cases. Before the employer proceeds to its claims of breach of the noncompete agreement by the employee, the employer must first demonstrate the

special facts and circumstances detailed above. Without this preliminary demonstration that the contract is enforceable, the employee's breach is not assailable.

Reasonableness of Noncompete Restrictions—But even if the employer succeeds in the preliminary showing of a protectible business interest, as the *Vantage* court noted, there is "one final hurdle" to clear before enforcement of the agreement is available. This final hurdle pertains to the reasonableness of the limitations provided for in the agreement. This inquiry relates to the scope of the noncompete agreement and its narrow construction to protect, only as is necessary, the employer's interest. A court has wide latitude in this area. A court may hold the entire noncompete provision invalid if overly broad or modify/rewrite the agreement:

> To be enforceable, a covenant not to compete must clear one final hurdle. The scope of a covenant not to compete must be reasonable in that "the time and territorial limits involved must be no greater than is necessary to protect the business interests of the employer." *Allright Auto Parks*, 409 S.W.2d at 363. If the scope of the covenant is reasonable as written, it will be enforced as written. If the scope is unnecessarily burdensome to the employee, however, it will be enforced only "to the extent that [it is] reasonably necessary to protect the employer's interest 'without imposing undue hardship on the employee when the public interest is not adversely affected.'" *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 37 (Tenn.1984) (quoting in part *Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368, 370 (Iowa 1971)). Hence, a court may modify an unreasonable covenant so as to render it reasonable. To protect against employers drafting overly broad language secure in the knowledge that the sole sanction would be modification to the maximum extent allowed, courts will hold the entire covenant invalid if credible evidence supports a finding that the covenant is deliberately unreasonable and oppressive. *Central Adjustment Bureau*, 678 S.W.2d at 37. With respect to territorial limitations, covenants that embrace an area in which the employee never performed services are unreasonable unless the employee possesses knowledge of the employer's trade secrets. *Allright Auto Parks*, 409 S.W.2d at 364.

Vantage, 17 S.W.3d at 647.

These are the basic principles of Tennessee noncompete law.

Practice Pointers

Contained below are excerpts from **trial court decisions** which demonstrate findings of fact and conclusions of law in applying Tennessee Civil Procedure Rule 65 to noncompete cases.

(1) Confidential Information

(a) Employee's Length of Employment, Level of Responsibility

Example 1

Excerpt—"Defendant Johnson was a short time employee of the plaintiff. Although he had previously worked for the plaintiff prior to 2000, defendant Johnson's most recent employment with the plaintiff lasted only 9 months. Additionally, only three of those months were in the Nashville office—the locus for the geographical restriction of the noncompete agreement the plaintiff seeks to enforce. It is also undisputed that the plaintiff was not a member of management or even a team leader or manager of a sales office. He was one of several salespersons employed by the plaintiff in Nashville.

* * *

As to whether Mr. Johnson was given access to confidential information, the reasonable inference the Court draws from the record is that to a certain extent Mr. Johnson was. In his sales job he necessarily received customer lists and helpful information to sell the customer such as their preferences, rental schedules, billing practices, customer contacts and plaintiff's pricing. But, again, this access is mitigated by the short term defendant Johnson worked for the plaintiff (three months in Nashville, nine months overall), very little time to collect or mentally absorb and memorize such information. Moreover, there is no evidence that defendant Johnson downloaded by computer confidential information or failed to return confidential manuals or lists or documents."

Example 2

Excerpt—"At the outset, the Court finds that relevant to both these *Vantage* considerations is that the defendants held influential, proprietary positions with the plaintiff. At the time they left the plaintiff's employment the defendants were long-term, highly compensated sales executives employed as Vice Presidents of Sales.

Specifically related to trade secrets and confidential information, the Court finds from the affidavit of ----------, the defendants' former boss, that the defendants attended plaintiff's Strategic Leadership Meeting in 2009. Defendants were among only 16 top-level executives invited to the meeting

out of approximately 120 sales employees and 1,100 total employees. At the meeting business strategies were developed for the year 2010 and beyond. Attachments to the affidavit reveal that the discussions included candid assessment of problems and weaknesses within ---------- for top-level management as well as the ---------- and ---------- merger, discussed *infra*."

(b) Shelf Life of Information

Excerpt—"Taking each in turn, the affidavits filed with the Court establish that the business of buying and selling food chemicals is very fluid and changes rapidly. The affidavit of ---------- at paragraphs 4, 19 and 22 establishes that the food chemical business is like trading in commodities and that prices are in constant fluctuation for a particular chemical. Other reasons prices fluctuate, according to the affidavit of ---------- at paragraphs 22-25, include shipping charges, availability of product, volume of product, the value of international currency, and the nature of the demand. According to ---------- affidavit, prices change daily and there is no such thing as a "price list." Prices are what a particular wholesaler or distributor is quoting on a particular day for a particular shipment. Due to the volatile market, the importation of food chemicals is highly speculative. Sales in the food chemical business are conducted orally or over email. The process is very flexible with buyers and sellers shopping around for the best prices for their individualized product needs.

The foregoing facts have several implications for the plaintiff's claim that its price margin constitutes Confidential Information that ---------- has access to. ---------- alleged confidential price margin is determined by the circumstances of the industry cited above—constant fluctuation of prices for specific chemicals, like commodity trading. That fluctuation means that any information ---------- had access to concerning ---------- price margin when he left in February of 2010 has become outdated and is useless."

(c) Remembered Information

Excerpt—"Tennessee law protects against use, disclosure and dissemination of information only if the applicant demonstrates that what is involved is Confidential Information. Remembered business information such as business prices, specific needs and business habits of certain customers, relationships established between an employee and certain customers, and customers lists where the identity of customers can be easily ascertained from other sources is not protectable under Tennessee law. *See B&L Corp. v. Thomas & Thorngren, Inc.*, 162 S.W.3d 189, 211 (Tenn. Ct. App. 2004); *Venture Express v. Zilly*, 973 S.W.2d 602, 606 (Tenn. Ct. App.

1998); *Heyer-Jordan & Assoc. v. Jordan*, 801 S.W.2d 814, 820-21 (Tenn. Ct. App. 1990); *Selox, Inc. v. Ford*, 675 S.W.2d 474, 475 (Tenn. 1984)."

With respect to ---------- other item of alleged Confidential Information, a customer list, there is no evidence in the record of an official ---------- customer list or permanent compilation of customers. That being the case, all that ---------- has demonstrated is that ---------- is calling upon and using his remembered business information about customers in the industry or using methods he has developed over his 12 years in the industry of ascertaining customers from publicly accessible sources. The affidavits in the case establish that persons in the industry use the internet to identify suppliers and customers.

The plaintiff, then, has failed to demonstrate in this case that it has any Confidential Information to protect. That absence of Confidential Information requires the Court to deny parts 2 and 3 (*supra* at 3) of the temporary injunction the plaintiff requests."

(2) Relationship With Customers

Example 1

Excerpt—"The second *Vantage* consideration shown in the record is that the defendants had repeated contact with the plaintiff's customers. The record establishes that the defendants had relationships with customers based on their long histories as ---------- sales representatives, an influential sales division of the plaintiff, and that the defendants continued to personally call on customers after becoming managers. While it is true that in late 2009 the defendants' responsibilities shifted to developing prospective accounts, this change in responsibility came at the end of their employment with the employer and just before they left. Moreover, up until the time the defendants left the plaintiff's employment, they were privy to current information regarding the plaintiff's existing customers. They participated in meetings and conversations with other members of the ---------- sales team and had access to reports and databases regarding pricing, rate, credit information and other proprietary data for all of ---------- customers. The record establishes that the defendants, through their years at ---------- and their rise in the corporate ladder, have knowledge of certain customers' histories, contract renewal dates, and the plaintiff's staffing and sales cycle as well as awareness of areas of opportunity which would not otherwise be known outside of the company.

The totality of the inside information and proprietary customer relationships the record reveals that the defendants gained while working for the plaintiff, the Court concludes, provides them with an unfair advantage if they were to compete with the plaintiff."

Example 2

Excerpt—"Finally, the facts discussed above about rapid price changes in this industry and that the industry is driven by prices also undercut ---------- argument that ---------- breach of loyalty provides a basis for injunctive relief. The record developed thus far establishes that business is conducted by email and telephone, and customers use brokers based on price. That evidence establishes that single sales can be diverted, but it is not the kind of industry where a customer's entire business for a long duration can be "stolen." Thus, the record establishes that any misconduct defendant engaged in while he was employed by plaintiff in terms of promoting his son's company and breaching a duty of loyalty resulted in immediate and isolated damage but not ongoing injury or harm."

(3) Characteristics of Business: Territory, kind, manner of operation

Example 1

Excerpt—"Turning, then, to the question of competition, the Court concludes that this is the weak point in the plaintiff's case at this preliminary, pre-discovery juncture of the lawsuit. The facts of record with respect to the defendants' present employment are that the defendants work for ---------- soliciting trucking companies to purchase fuel from ---------- truck stops. ---------- business is that it owns a number of retail plazas and truck stops serving, primarily, the food, fuel and parking needs of the trucking industry. Although ---------- sells fuels to trucking companies, it is not in the business of selling fuel cards, and the plaintiff admits that ---------- is not the plaintiff's competitor. Accordingly, it is undisputed that in their present employment the defendants do not sell card services products in competition with the plaintiff."

Example 2

Excerpt—"The December 11, 2008 affidavit of ----------, a professional engineer, and employee and stockholder of defendant, who also developed a customized waste heating system for industrial and commercial design for defendant, explains the difference between its manner of conducting business and that of the plaintiff. The hallmark of the manner in which defendant conducts its heat recovery system business is that its systems are custom designed according to each customer's specific needs. Made-to-order equipment or systems is not standard. In fact, defendant presently has a patent pending on one of its designs. Also, as established by the March 20, 2009 affidavit of ----------, defendant, after design and installation,

monitors continuously, from its office, on a daily basis, the systems it installs. Further, defendant's business is large industrial plants, and payment is derived from proven energy savings, not charges for each item of equipment installed or item of engineering or design work.

From these affidavits, the Court concludes that defendant's manner of business is a package that frequently includes design, installation, operation, monitoring, repair and payment, that is custom-geared to large industrial plants who want a turnkey job and who want to "out source" maintenance and monitoring to a service provider. This package concept is completely different from the manner in which plaintiff conducts its business which is a job by job, task by task approach, and pay by the installation, repair or whatever the specific task may be. The Court, therefore, concludes that a customer seeking the kind of product and service offered by defendant is unlikely to contact and/or retain the plaintiff to do the work. While the proof establishes that there is a possibility the plaintiff, with use of a subcontracted professional engineer, could, perhaps, put together a package system and payment plan like defendant, that is not typical for the plaintiff or what it is known for. The Court thus concludes that the manner of each business is sufficiently different that the plaintiff and defendant are not competitors even though there is overlap in territory and the nature of the business. It is, then, not reasonable to enforce the noncompete agreement, and the Court grants the defendant's motion to dissolve the October 2008 temporary injunction. Defendant ---------- may perform work for defendant in the restricted area of paragraph 8.3(a) of the parties' Purchase Agreement. The plaintiff is permitted to withdraw the bond it posted to secure the injunction."

(4) Customers Leaving

Excerpt—"As for the evidence in paragraph 10 of the affidavit of president of the plaintiff, that from December 2009 to January 2010 he is aware of 4 of plaintiff's customers who have rented from H&E since defendant's departure, and the affidavit testimony of plaintiff's sales representative, ----------, that a customer said its business followed defendant to ----------, the Court concludes this evidence does not demonstrate that necessary heightened requirement of unfair competition. This evidence is proof of ordinary competition. The affidavits do establish that the defendants are competing with the plaintiff for the same customer base. But there is no evidence that this competition is based on anything but defendant's skills and personality, and perhaps customer jitters about plaintiff's bankruptcy.

There is, for example, no evidence that the defendants are using defendant's knowledge of plaintiff's pricing to undercut rental rates."

(5) Economic Hardship/Balancing of the Equities

Excerpt—"Finally, there is the plaintiff's argument that it will suffer economic harm beyond the competitive threat posed by the defendants. The plaintiff argues that refusal of this Court to enforce the company's restrictive covenants against Mr. Johnson will eviscerate the plaintiff's policy of restrictive covenants with all of its employees and have a global effect on the Chapter 11 plaintiff. This circumstance, the Court concludes, it may not consider. The case law is clear that each noncompete agreement and restrictive covenant must be considered on a case by case basis. Whether a restrictive covenant is enforceable depends on the unique facts of the terms and history of the particular employee's position with the employer and the particular facts of the industry. A prime example in this case is that defendant Johnson was a short-term, non-managerial and non-supervisory employee. Less protection is needed. A review of the case law reveals that greater protection from restrictive covenants may be warranted with longer term employees and members of management.

Based upon all of these personal and financial circumstances, the Court concludes that the economic hardship to Mr. Johnson, based upon the evidence to date, outweighs the threatened harm to the plaintiff's business by Mr. Johnson's work for H&E."

(6) Narrowly Tailored Relief

Excerpt—"The Court's analysis of these contending facts is that there is a threat of harm that could unfold. In other words, the Court's assessment of the harm is that the defendants pose a threat of unfair competition to the plaintiff, but it is a threat that is indirect and will have to go through several channels to produce harm.

In fashioning a remedy to address this threatened harm, the standard the Court must apply is that Rule 65 of the Tennessee Rules of Civil Procedure does permit the Court to provide relief for a potential violation. The other standard the Court must adhere to is that equity requires relief to be narrowly tailored to precisely address the potential harm.

Employing these standards, the Court determines that the remedy the Court shall issue while the plaintiff is engaging in discovery is a "firewall." That is, a document that sets up an information barrier between the defendants and employees, and between the defendants and ---------- employees conjoined in sales and promotions with ---------- employees,

shall be signed by the defendants, ----------, and ----------, and shall be filed with the Court."

Foreclosures

There are two specialized statutes to be aware of when dealing with foreclosures: Tennessee Code Annotated sections 29-23-201 and 202. They are quoted as follows.

§ 29-23-201. Notice

(a) No judge or chancellor shall grant an injunction to stay the sale of real estate conveyed by deed of trust or mortgage, with a power of sale, executed to secure the payment of a loan of money, unless the complainant gives five (5) days' notice to the trustee or mortgagee of the time when, place where, and of the judge or chancellor before whom, the application for injunction is to be made.

(b) No judge or chancellor shall act upon the application unless the same is accompanied by proof, evidenced by return of a sheriff, constable, or attorney, that notice has been served on the trustee or mortgagee, or that the trustee or mortgagee is not to be found in the county of usual residence, or is a nonresident.

§ 29-23-202. Application; contents

The party applying for relief in such case shall distinctly state how, when, and to whom the debt or any part of the debt secured aforementioned has been paid, or any circumstances of fraud which vitiate the contract.

Case law interpreting these statutes states that Tennessee law offers "limited" relief to homeowners who seek to enjoin nonjudicial foreclosure sales before they occur. There are only two grounds for a court to enjoin a foreclosure sale: repayment of the debt or fraud that would vitiate the contract. Section 29-23-202 requires a party seeking to enjoin a foreclosure to state distinctly the circumstances of how, when and to whom the debt has been paid or the details of any alleged fraud. *Dauenhauer v. Bank of New York Mellon*, 2013 WL 209250 (M.D. Tenn. Jan. 16, 2013). *See also Kershaw v. Federal Land Bank of Louisville*, 556 F. Supp. 693, 699 (FN. 1) (M.D. Tenn. 1983); *Citimortgage, Inc. v. Drake*, 410 S.W.3d 797 (Tenn. Ct. App. 2013).