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No Adequate Remedy at Law: The Devil's in the Adequacy

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The phone rings, and your valued client commences the discussion. At best, you immediately discern your client's tone as concerned or frustrated. At worst, your client is irate and exceptionally loud, and while on the call you reluctantly email your significant other to advise that your weekend plans have just changed. While the facts, claims, defenses and circumstances that prompt such calls are infinite, the message, instruction or demand, is not. Your client demands that you rush into court to obtain a temporary restraining order. This is the plight of transactional attorneys and business litigators who are engaged to produce such results.

Jurisdiction and Venue Considerations

Attorneys and seasoned litigants may fall victim to the common misconception that a complaint seeking injunctive relief must be filed in the Chancery Division, General Equity Part. No such mandate exists. While there is no concrete litmus test that warrants strict reliance, and although New Jersey Court Rules 4:3-1 and 4:3-2 provide guidance, the most accepted analysis begins with determining if the primary relief sought is legal in nature, and whether the restraints sought are merely ancillary. In this event, then, the action is properly venued in the Law Division, which, like the Chancery Division, has the power to dispense interlocutory relief.[1] Thus, to determine where to properly commence an action, counsel should evaluate whether a client's primary right, or the principal relief sought, is equitable in nature.

Cases are properly brought in general equity where "the plaintiff's primary right of the principal relief sought is equitable in nature."[2] Examples of causes of action that sound in equity, among a myriad of others, are: partition actions, reformation of instruments, rescission of contracts, appointment of various receiverships, actions for specific performance, partnership dissolution, imposition of trusts, and shareholder actions, including both derivative suits and actions brought pursuant to the minority oppression statute. Conversely, where the primary relief sought is a money judgment, the matter should be filed in the Law Division. Frequent misfilings in the Chancery Division include, for example: actions

for ejectment, actions in lieu of prerogative writs, matrimonial actions, and palimony actions.[3]

Attorneys should be aware that merely inserting an equitable claim in the *ad damnum* clause will not justify the commencement of an action in general equity, nor will temporary restraints or preliminary interlocutory relief be viewed as a cause of action; rather, such interim relief is more properly defined as a remedy. The clarity of a chancellor's lens to identify the true relief sought is acute.

Inevitably, this inquiry, which does not provide a bright line rule, may be subject to varying interpretations, and in some circumstances may either accommodate or preclude an attorney from making a strategic choice regarding where to commence an action. To be sure, however, each complaint filed in the Chancery Division will be scrutinized for chancery jurisdiction, and in the event it is determined that the principal relief is not equitable in nature, the court will *sua sponte* enter an order transferring the case to the Law Division.[4]

Once an action is commenced in either trial division, Rule 4:3-1(b) allows parties to the action to move to transfer the action between the Law Division and Chancery Division. In circumstances where the equitable relief requested is disposed of in its entirety in a court of equity, the matter is transferable to the Law Division by the chancery court in its discretion, or retained by a chancellor via ancillary jurisdiction. Notably, Rule 4:3-1(b) does not permit a retransfer of cases.

Procedural Requirements

Injunctive relief is an extraordinary equitable remedy entered upon a showing by clear and convincing evidence that the party is entitled to the relief sought.[5] Colorfully coined the *strong arm* of equity, entry of a preliminary injunction allows the court to investigate and determine the ultimate merits of a matter and just result while maintaining the *status quo* or avoiding future harm. Such relief is considered drastic because the party subject to an injunction is compelled, under coercive powers of the court, to act or not act; essentially, an injunction is a command precluding the exercise of free choice or action. Interlocutory relief may be either temporary, preliminary or permanent.

A party who seeks injunctive relief must do so by way of Rule 4:52, which requires an order to show cause (OTSC) to be simultaneously filed with the plaintiff's verified complaint. The OTSC requires the defendant to show cause on the return date why an interlocutory injunction should not be issued. The application must be accompanied by a brief.[6] Counsel are cautioned against simply citing the applicable standard in lieu of factual analysis. The OTSC may include a request for temporary interim injunctive relief in the form of a temporary restraining order (TRO). A TRO can be issued immediately on an emergent basis without prior notice to the adverse party (by way of *ex parte* application, which is rare) or with notice but without an opportunity to oppose by way of briefing.

The TRO seeks to preserve the *status quo* until both parties can more fully present their positions to the court on the return date of the OTSC. As described below, the harm to be shown to warrant issuance of a TRO must be immediate and irreparable, demonstrated by specific facts in an affidavit or verified complaint.

It is imperative that counsel be aware that a TRO and a preliminary interlocutory injunction are not functionally equivalent; rather, each is a separate remedy tailored to address a particular type of factual scenario at a particular point in time. A TRO is issued on an emergent basis upon the filing of an OTSC, and is designed to preserve the *status quo* until the parties have the opportunity on the return date of the OTSC to more fully articulate their positions to the court. A preliminary injunction is issued on the return date of the OTSC. The preliminary injunction, which contemplates notice, submission of opposition and reply papers, and oral argument on the return date, may endure until the matter is fully adjudicated or until a successful application (traditionally upon two days' notice) is made for its dissolution.

Experienced chancery practitioners often view the result of an initial application under Rule 4:52 as setting the tone of the entire matter, and, frequently, the case can be won or lost at this point in time.

Crowe v. De Gioia

The standard for issuance of a preliminary injunction is set forth in the seminal Supreme Court case of *Crowe v. De Gioia*.[7] *Crowe* is to business litigators in New Jersey what decisions like *Hadley v. Baxendale* and *Palsgraf v. Long Island Railroad Co.* are to first-year law students. Pursuant to *Crowe*, to warrant the interlocutory relief requested, whether temporary or preliminary, the movant must demonstrate: 1) irreparable harm is likely if the relief is denied; 2) the material facts are not substantially disputed and there exists a reasonable probability of ultimate success on the merits; and 3) the balance of the hardship to the parties favors the issuance of the requested relief. In addition, the movant must have no adequate remedy at law that would otherwise serve to remedy the wrong that is the subject of the complaint.

In ascertaining the adequacy of a legal remedy, a court of equity may act if the legal remedy is illusory under the specific circumstances of a specific case.

The mere fact that the relief ultimately sought by the movant may be equated with money damages does not necessarily mean that a court will withhold its equitable powers if the court determines the money damages to be illusory.[8] Examination is not confined to simply terming relief as money damages; those money damages must be "adequate" under the given circumstances.[9]

With *Crowe* having articulated the applicable legal test to be applied, the next step in the equation requires application of that legal test to the specific facts at issue in a particular case. This requires attorneys to analyze *Crowe* prongs, including an analysis of the hybrid component that a movant has no adequate remedy at law. Facially, the analysis articulated in *Crowe* appears not to be complex or obscure. However, the application of that law to the unique facts of a particular case with persuasive analysis of how the particular dispute meshes with the *Crowe* standard often distinguishes successful applications from those that do not vault the requisite legal standard. As each fact pattern is client-driven and client-specific, business litigators often find that the application of the *Crowe* analysis produces varying results.

Adequacy of Legal Remedies

The no adequate remedy at law requirement is necessarily tied to the first prong that must be satisfied for an injunction to issue—that irreparable harm is likely if the relief requested is denied. As articulated by *Crowe*, in order for the court to make a finding of irreparable harm, the movant must demonstrate that it "cannot be redressed adequately by monetary damages," thereby suggesting that the availability of monetary damages belies a claim of irreparable injury. In other words, the plaintiff must have no adequate remedy at law.[10]

As recognized by the Chancery Division in *Delaware River and Bay Authority v. York Hunter Const., Inc.*, the "statement of the necessary condition does not address in and of itself the question of what constitutes an 'adequate' remedy at law or when harm is 'redressed adequately' by monetary damages."[11] Thus, the court itself has recognized the flexibility inherent in the articulated standard. Harm not adequately redressed by monetary damages has been found, for example, where there is threatened the improper use or disclosure of an employer's trade secrets, where there is injury to a business, and in *pendente lite* cases.[12] For example, when a competitor has obtained trade secrets, "[t]he cat is out of the bag and there is no way of knowing to what extent their use has caused damage or loss."[13] Likewise, where former employees opened the same type of business as their former employer despite the existence of restrictive covenants prohibiting them from doing so within a three-mile radius, the court has found the plaintiff-former employer to have satisfied the irreparable injury prong because, among other things, of the difficulty in ascertaining the monetary value of the loss of business.[14] In the *pendente lite* context, where an unmarried cohabitant was threatened with loss of her home of 14 years, and of her only means of support, the potential harm to her was deemed irreparable.[15]

Also, the Third Circuit has recognized that the possibility of a worker being denied adequate medical care as a result of having no insurance would constitute "substantial and irreparable injury."[16]

Thus, while some fact patterns may appear to cry out for the type of relief contemplated by *Crowe*, for example where a business is threatened with imminent collapse or a breach of contract would lead to the destruction of one's business,[17] the majority of cases do not. An easy bright line application is usually not in the cards for the practicing attorney seeking relief pursuant to *Crowe*. Often, it is the monetary damage/adequate remedy at law component that proves to be the Achilles' heel in satisfying the *Crowe* standard.

New Jersey courts have, in certain prescribed instances, evidenced a willingness to issue an injunction even when there may be an *adequate* remedy at law. In this regard, the Appellate Division has recognized that "an injunction will not *ordinarily* issue where there is an adequate remedy at law;" however, those instances are limited to where, despite the existence of the availability of money damages, a financial remedy would be wholly inadequate. For example, in *Disposmatic Corp. v. Mayor and Council of Town of Kearny*, the court indicated that a violation of the public bidding statutes may be remedied by money damages as the injury is purely financial. However, an action for damages would be clearly inadequate because the public bidding statutes serve to guard against corruption and favoritism, and their aim is to secure for the public unfettered competition. As a result, an action for damages is not adequate, and only an injunction could ensure that "the door remains tightly closed to the evils...to be averted."[18]

Likewise, in the context of a cause of action for specific performance, which like the standard for a preliminary interlocutory relief requires that there be no adequate remedy available at law to afford the relief requested, the court has expressed a willingness to order specific performance as a remedy, even for a seller of real estate where equitable considerations require that the relief be granted.[19] Such dispensation of relief, while frequently awarded to a buyer of real estate due to the uniqueness of the real estate component, is rarely given to a seller.

However, a court may find that a buyer's actions may be so inequitable as to warrant specific performance on behalf of a seller of real estate. Accordingly, the mere fact that the relief ultimately sought by the movant may be equated with money damages does not necessarily mean that a court will withhold its equitable powers.[20]

Risk Management and the Victory Matrix

Whether at the client interview stage or concurrent with the ongoing litigation, business litigators are frequently confronted with the *money question,* not the adequacy or inadequacy of money damages analysis as discussed above, but the real money question and the driving force behind the commencement of the type of litigation described herein. To wit, can the temporary restraining order be obtained? More globally, can the case be won? The answer to these questions and the creative disclaimer-driven responses that are often more complex than the substantive legal and factual questions that shape the underlying litigation are prototype examples of what the business community would rate paramount, subordinate only to the hourly billing model, if called upon for a legal makeover. Perhaps there exists a more client-friendly response that does not ruffle those practitioners whose style is protective-oriented.

The victory matrix described below, to be used by a client as a component, but not exclusively, to answer the broad questions as to the potential success of a case, reads as follows:

The victory matrix has inherent within it two variables that contribute to outcome; one of which is substantially more varied than the other. First, the matrix assumes the high quality of the New Jersey judiciary, thereby presenting a *de minimis* variation that may askew the matrix. Second, and subject to extraordinary variation, is the quality of a jury's deliberations. The latter variable, the jury factor, should be the subject of strategic pleading and venue selection as matrix number three favors a bench trial with matrix number six embracing the jury variable.

Endnotes

1. *See* Pressler, Current N.J. Court Rules (Gann 2008), Comment 2 on R. 4:3-1.
2. R. 4:3-1(a)(1).
3. *See* William J. Dreier & Paul Rowe, *Guidebook to Chancery Practice in New Jersey,* Ch. VI (6th ed. 2005).
4. *See* R. 4:3-1(b).
5. *Dolan v. De Capua,* 16 N.J. 599, 614 (1955).
6. R. 4:52-1(c).
7. 90 N.J. 126 (1982).
8. *See Apollo Technologies Corp. v. Centrosphere Indus Corp.,* 805 F. Supp. 1157, 1207-08 (D.N.J. 1992).
9. *See First Nat'l State Bank of N.J. v. Commonwealth Federal Savings and Loan Ass'n,* 455 F. Supp. 464, 470 (D.N.J. 1978), *aff'd,* 610 F.2d. 164 (3d Cir. 1979).
10. *See, e.g., Morris County Transfer Station, Inc. v. Frank's Sanitation Service, Inc.,* 260 N.J. Super. 570, 575 (App. Div. 1992); *A. Hollander & Sons, Inc. v. Imperial Fur Blending Corp.,* 2 N.J. 235 (1949); *Professional Plan Examiners of N.J., Inc. v. Lefante,* 750 F.2d 282 (3d Cir. 1984).
11. 344 N.J. Super. 361, 365 (App. Div. 2001).
12. *See* 47 New Jersey Practice, *Civil Trial Practice Handbook* §55:2 (William S. Greenberg & John E. Flaherty) (2006).
13. *National Starch & Chemical Corp. v. Parker Chemical Corp.,* 219 N.J. Super. 158, 162-163 (App. Div. 1987).
14. *J.H. Renarde, Inc. v. Sims,* 312 N.J. Super. 195, 203 (App. Div. 1998).
15. *Crowe,* 90 N.J. at 133.
16. *United Steelworkers of America v. Fort Pitt Steel Casting,* 598 F.2d 1273 (3d Cir. 1979).
17. *See* n. 10, *supra.*
18. *See Disposmatic Corp. v. Mayor and Council of Town of Kearny,* 162 N.J. Super. 489 (Ch. Div. 1978).
19. *See Mesa Dev. Corp. VIII v. Myer,* 260 N.J. Super. 363 (App. Div. 1992); *Centex Homes v. Boag,* 128 N.J. Super. 385 (Ch. Div. 1974).
20. *Apollo Technologies Corp.,* 805 F. Supp. at 1207-1208.

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