

**INJUNCTION PRACTICE  
IN VIRGINIA  
STATE AND FEDERAL COURTS**

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## **I. INJUNCTIVE RELIEF: AN OVERVIEW**

### **A. PURPOSE**

The purpose of the injunction is to “protect property or other rights from irreparable injury by prohibiting or commanding certain acts.” 42 Am. Jur. 2d INJUNCTIONS § 1 (2003); *see also Madsen v. Women’s Health Center, Inc.*, 512 U.S. 735 (1994). An injunction will not issue for the purpose of punishing past offenses, but will issue only in those cases where the court is convinced that injunctive relief is necessary to prevent future violations. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

### **1. PERMANENT VS. PRELIMINARY INJUNCTIONS**

Injunctive relief may be divided temporally into that which enjoins a party permanently and that which enjoins a party preliminarily. A permanent injunction is obtained upon the disposition of a cause of action seeking injunctive relief, typically by final decree granting the requested injunction. *See generally* VA. CODE § 8.01-622 (2003)<sup>1</sup>; *see also* FED.R.CIV.P. 65 (2003)<sup>2</sup>. By contrast, a preliminary injunction is granted at the outset of a case for the sole purpose of “preserv[ing] the relative positions of the parties” during the pendency of the case or a shorter period as designated by the court. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 755 (1986). Because of the immediacy of the acts sought to be cured by preliminary injunction, “the necessity for an expeditious resolution often means that the injunction is issued on a procedure less stringent than that which prevails at the subsequent trial on the merits of the application for injunctive relief.” *Id.* at 755-56.

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<sup>1</sup> *See* Appendix A for VA. CODE § 8.01-622 (2003).

<sup>2</sup> *See* Appendix B for FED.R.CIV.P. 65 (2003).

A preliminary injunction may in some cases be obtained *ex parte* by the moving party. See VA. CODE § 8.01-629 (2003); *Cohen v. Rosen*, 157 Va. 71, 76 (1931) (“It is obvious from this statute that the requirement for notice rests largely in the discretion of the trial judge, and this has always been the approved practice”) (citing former statute); see also Fed.R.Civ.P. 65(b) (2003) (as to temporary restraining orders); but see Fed.R.Civ.P. 65(a) (2003) (as to preliminary injunctions).

## **2. PROHIBITORY VS. MANDATORY INJUNCTIONS**

Injunctive relief may be divided procedurally into that which prohibits a party from taking certain action and that which compels a party to take certain action. The function of the prohibitory injunction is “not to repair or penalize a wrong previously consummated, but either to maintain the *status quo*, to restrain the continued commission of an on-going wrong, or to prevent the future commission of an anticipated wrong.” *WTAR Radio-TV Corp. v. City Council of Virginia Beach*, 216 Va. 892, 894-95 (1976); see also *Large v. Clinchfield Coal Co.*, 239 Va. 144, 148 (1990). By contrast, “[t]he function of the mandatory injunction is to undo an existing wrongful condition; . . . its use is justified only when it appears that, if it is not applied, the wrongful condition is likely to continue.” *WTAR*, 216 Va. at 895. Although federal and state courts view both remedies as extraordinary, courts generally disfavor mandatory injunctions as the harsher of the two. See 42 Am. Jur. 2d INJUNCTIONS § 5 (2003); see also *Virginian Ry. Co. v. Echols*, 117 Va. 182, 184 (1915) (“A mandatory injunction will not be granted upon a preliminary hearing except in cases of strong and imperious necessity, where the right to the injunction is clear”).

### **B. STATE AND FEDERAL PRACTICE IN VIRGINIA**

Virginia state and federal practice regarding injunctive relief is governed by statute and rules of procedure. Injunctive relief under Virginia law is governed generally by VA. CODE § 8.01-622 (2003) and case law interpreting it. Injunctive relief under

federal law is governed generally by Rule 65 of the Federal Rules of Civil Procedure and case law interpreting it. Although injunction practice in state and federal court varies slightly, the factors considered by courts in determining whether to grant or deny injunctive relief are similar. *See, e.g., Capital Tool & Mfg. Co. v. Herkules*, 837 F.2d 171, 173 (4th Cir. 1988) (“ . . . there is no great difference between federal and Virginia standards for preliminary injunctions”); *Hughes Network Systems, Inc. v. Interdigital Communications Corp.*, 17 F.3d 691, 693 (4<sup>th</sup> Cir. 1994); *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4<sup>th</sup> Cir. 1991) (followed by Virginia circuit courts in *Fund for Animals, Inc. v. Virginia State Board of Elections*, 53 Va. Cir. 405, 407 (City of Richmond 2000) and *HotJobs.com, Ltd. v. Digital City, Inc.*, 53 Va. Cir. 36, 39 (Fairfax County 2000)).

Notwithstanding the general state and federal guidelines, numerous statutes under Virginia and federal law are specifically tailored to provide for or prohibit injunctive relief upon the occurrence of certain events. These events range from campground violations (Va. Code § 35.1-7 (2003)) to disclosure of trade secrets (Va. Code § 59.1-337 (2003)) to federal tax violations (28 U.S.C. § 1341 (2003)) to infractions of federal anti-trust laws (15 U.S.C. § 4 (2003)). Because a plaintiff may benefit significantly from seeking injunctive relief under the authority of a state or federal statute (*see infra*), practitioners are wise to research the availability of such statutes at the outset of their case.

## **II. ELEMENTS OF PROOF**

The decision to grant or deny injunctive relief lies within the sound discretion of the trial court. *Hughes*, 17 F.3d at 693. To that end, the trial court, whether state or federal, must make an equitable determination of the plaintiff’s right to injunctive relief in light of “the existence of impending irreparable injury.” *Capital Tool*, 837 F.2d at

172-73; *see also Manchester Cotton Fields v. Manchester*, 66 Va. 825, 831-32 (1875); *Bershader v. Prospect Dev. Co.*, 47 Va. Cir. 20, 32-33 (Fairfax County 1998). The trial court's decision will be set aside only for abuse of discretion. *Hughes*, 17 F.3d at 693. In no case, however, will injunctive relief be granted where other remedies are available to the complaining party.

#### **A. PRELIMINARY INJUNCTIONS**

The proof required to obtain a preliminary injunction is twofold. The first element requires a showing of a lack of an adequate legal remedy. *See Cutting v. Carter*, 14 Va. 424 (1809) (refusing injunctive relief where “no impediment appeared to the action of waste at law”); *Blue Ridge Poultry & Egg Co. v. Clark*, 211 Va. 139, 143 (1970); *Cooper v. Tazewell Square Apts., Ltd.*, 577 F.Supp. 1483, 1488 (W.D. Va. 1984). The second element, generally regarded as “balancing the hardships” of the parties, requires a showing that irreparable harm to be suffered by the plaintiff if an injunction is *not* granted outweighs the harm to be suffered by the defendant if the injunction is granted. *See Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195-96 (4th Cir. 1977).

Virginia state and federal courts routinely divide the “balancing of hardships” element into a consideration of four factors:

- (i) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is not granted;
- (ii) the likelihood of harm to the defendant if the preliminary injunction is granted;
- (iii) the likelihood the plaintiff will succeed on the merits; and
- (iv) the public interest.

*Hughes*, 17 F.3d at 693, *citing Blackwelder*, 550 F.2d at 195-96; *Fund for Animals*, 53 Va. Cir. at 407; *HotJobs.com*, 53 Va. Cir. at 39; *see also Hanky v. City of Richmond*, 532

F.Supp. 1298 (E.D. Va. 1982) (analyzing order of inquiry under balance of hardship test). Of the four factors, the weighing of hardships to the parties is the most important. *Hughes*, 17 F.3d at 693.

Practitioners should be cautioned that satisfaction of the factors listed above does not guarantee issuance of a preliminary injunction. As the Fourth Circuit Court of Appeals admonished in *Hughes*, “while the factors articulated in *Blackwelder* guide the district court’s judgment on a preliminary injunction motion, the decision to grant or deny relief lies within that court’s sound discretion...” *Id.*

## **B. PERMANENT INJUNCTIONS**

Permanent injunctive relief is granted when the equities of a case are such that the plaintiff will suffer irreparable harm in the absence of the requested injunction. *See Blue Ridge Poultry*, 211 Va. at 143; *see also Cooper*, 577 F.Supp. at 1488 (“The basis of injunctive relief in federal courts has always been irreparable harm and inadequacy of legal remedies”).

A permanent injunction will issue upon satisfaction of the same elements of proof as required for a preliminary injunction, though the standard of proof for permanent relief is necessarily more stringent. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 326 (1999); *see also Thornburgh*, 476 U.S. at 755 (1986) (preliminary injunctions are “issued on a procedure less stringent than that which prevails at the subsequent trial on the merits of the application for injunctive relief”). The United States District Court for the Western District of Virginia has thus stated the inquiry as follows: “In determining whether this court should issue a permanent injunction, the court must decide (1) whether the plaintiff has succeeded on the merits; (2) if so, whether there is an adequate remedy at law; (3) whether the balance of hardship favors the plaintiff; (4) what injunctive relief is appropriate.” *Cooper*, 577 F.Supp. at 1488.

### **C. STATUTORY INJUNCTIONS**

The hurdles of proof required for a typical injunction may be significantly relaxed when the availability of injunctive relief is provided by statute. The Virginia Supreme Court has consistently held that, “When a statute empowers a court to grant injunctive relief, the party seeking an injunction is not required to establish the traditional prerequisites, *i.e.*, irreparable harm and lack of an adequate remedy at law, before the injunction can issue.” *Virginia Beach S.P.C.A., Inc. v. South Hampton Roads Veterinary Ass’n*, 229 Va. 349, 354 (1985). Federal courts hold similarly. *See Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 338 (4th Cir. 1983) (“Where a statute authorizes injunctive relief for its enforcement, plaintiffs need not plead and prove irreparable injury”). To the contrary, “[a]ll that is required is proof that the statute or regulation has been violated.” *Virginia Beach S.P.C.A.*, 229 Va. at 354; *see also Capital Tool*, 837 F.2d at 172-73.

## **III. PROCEDURAL CONSIDERATIONS**

### **A. JURISDICTION**

In Virginia state court, authority to issue injunctions is vested in the circuit courts and lies either at law or in equity. VA. CODE § 8.01-622 (2003) (“An injunction may be awarded to protect any plaintiff in a suit for specific property, pending either at law or in equity. . .”). In federal court, authority to issue injunctions is generally vested in the district courts while authority to review the issuance of injunctions is vested in the courts of appeals. 28 U.S.C. § 1292 (2003). The All Writs Act, 28 U.S.C. § 1651(a) (2003), authorizes the United States Supreme Court to issue an injunction against enforcement of a state statute. *See, e.g., Brown v. Gilmore*, 533 U.S. 1301 (2001) (refusing to enjoin observation of ‘minute of silence’ at start of each day in Virginia public schools).

## **B. DURATION OF PRELIMINARY INJUNCTIONS**

In both state and federal court, a preliminary injunction must be limited in its duration. VA. CODE § 8.01-624 (2003); FED.R.CIV.P. 65 (2003). Depending on the circumstances of the case, the party seeking a preliminary injunction will typically request that it extend such that the force of the injunction will not lapse before trial may be had on the merits. The Virginia statute specifically permits extension of the duration of a preliminary injunction in the discretion of the trial court. *Id.*

In federal court, the duration of a temporary restraining order (as opposed to a preliminary injunction) is set by rule. FED.R.CIV.P. 65(b) (2003). Under Rule 65(b), a temporary restraining order will not exceed ten days unless the court extends the time for good cause shown or the party enjoined by the order consents to an extension. *Id.*

## **C. INJUNCTION BOND**

In both state and federal court, no preliminary injunction will issue without the plaintiff posting an appropriate bond, except that (i) Virginia statute permits a court to waive the bond requirement where requiring a bond would be improper or unnecessary and (ii) federal law does not require the United States or its officers or agencies to post bond. VA. CODE § 8.01-631 (2003); FED.R.CIV.P. 65(c) (2003). The purpose of the bond is to provide for “payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.” FED.R.CIV.P. 65(c) (2003). Federal local rules for the Eastern District of Virginia include special requirements for injunction bonds. *See* FED.R.CIV.P. 65 (2003) (E.D. VA.).<sup>3</sup>

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<sup>3</sup> *See* Appendix C for FED.R.CIV.P. 65 (2003) (E.D.VA.).

#### **IV. PRACTICE TIPS**

##### **A. CONTRACT FOR CONSENT TO INJUNCTIVE RELIEF**

An injunction may be more easily obtained if the party against whom the injunction is sought has consented to the injunctive relief, typically by way of a settlement or other agreement. The Virginia Supreme Court has approved issuance of injunctions where authorized by agreement:

If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that which the parties have already said by way of covenant -- that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not, then, a question of convenience or inconvenience, or of the amount of damage or injury. It is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves.

*Sonoma Development, Inc. v. Miller*, 258 Va. 163, 169 (1999).

##### **B. NARROWLY TAILOR THE INJUNCTION ORDER**

Both Virginia and federal law require that an order granting injunctive relief be narrowly tailored to the specific relief sought. *Thanh Van Tran v. Gwinn*, 262 Va. 572, 584-85 (2001) (vacating injunction where “the injunction issued was not tailored to the offensive activities, was overbroad, and exceeded the authority of the trial court”); FED.R.CIV.P. 65(d) (2003) (“Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. . .”).

As the Virginia Supreme Court explained in *Thanh Van Tran*,

A “first principle of justice” is that an injunction not be so vague as to “put the whole conduct” of a defendant at the “peril of a summons for contempt.” Instead, courts must navigate carefully between the extremes of issuing a decree that is so vague and overreaching that all actions by the defendant might potentially violate the decree and a decree that is so limited as to be ineffective in preventing the harm contemplated by the ordinance. In considering this injunction, therefore, we are mindful that

an injunction must be specific, be no more than necessary, and not be solely a command to comply with the law.

*Thanh Van Tran*, 262 Va. at 584-85 (citations omitted). Narrowly tailoring the order in the trial court may prevent reversal on appeal.

**C. INCLUDE FINDINGS OF FACT IN THE INJUNCTION ORDER**

Including findings of fact in the injunction order may also eliminate the possibility of reversal of an injunction order on appeal. *See, e.g., Alberti v. Cruise*, 383 F.2d 268 (4th Cir. 1967) (reversing injunction order where order failed to show finding that plaintiff lacked adequate remedy at law and failed to show finding of irreparable harm).

**D. REMEMBER THE TEMPORARY RESTRAINING ORDER**

In federal court, explore the option of obtaining a temporary restraining order in advance of a preliminary injunction. While the duration of the temporary restraining order is limited, the order may be granted without written or oral notice to the adverse party. FED.R.CIV.P. 65(d) (2003).

**E. INCLUDE A CLAIM FOR INJUNCTIVE RELIEF WITH ONE FOR DECLARATORY JUDGMENT**

Many practitioners include a claim for injunctive relief with one for declaratory judgment. The effect is to protect the plaintiff against the failure of a single cause of action. Likewise, with little variance in proof, the plaintiff may be able to show that the same wrongful acts sought to be prevented in the future by injunction were just as wrongful in the past. The possibility of the latter proof increases potential recovery for a party seeking the injunction.