THE AVAILABILITY OF Injunctive Relief IN COMMERCIAL DISPUTES

Clarifying Michigan's Preliminary-Injunction Standard

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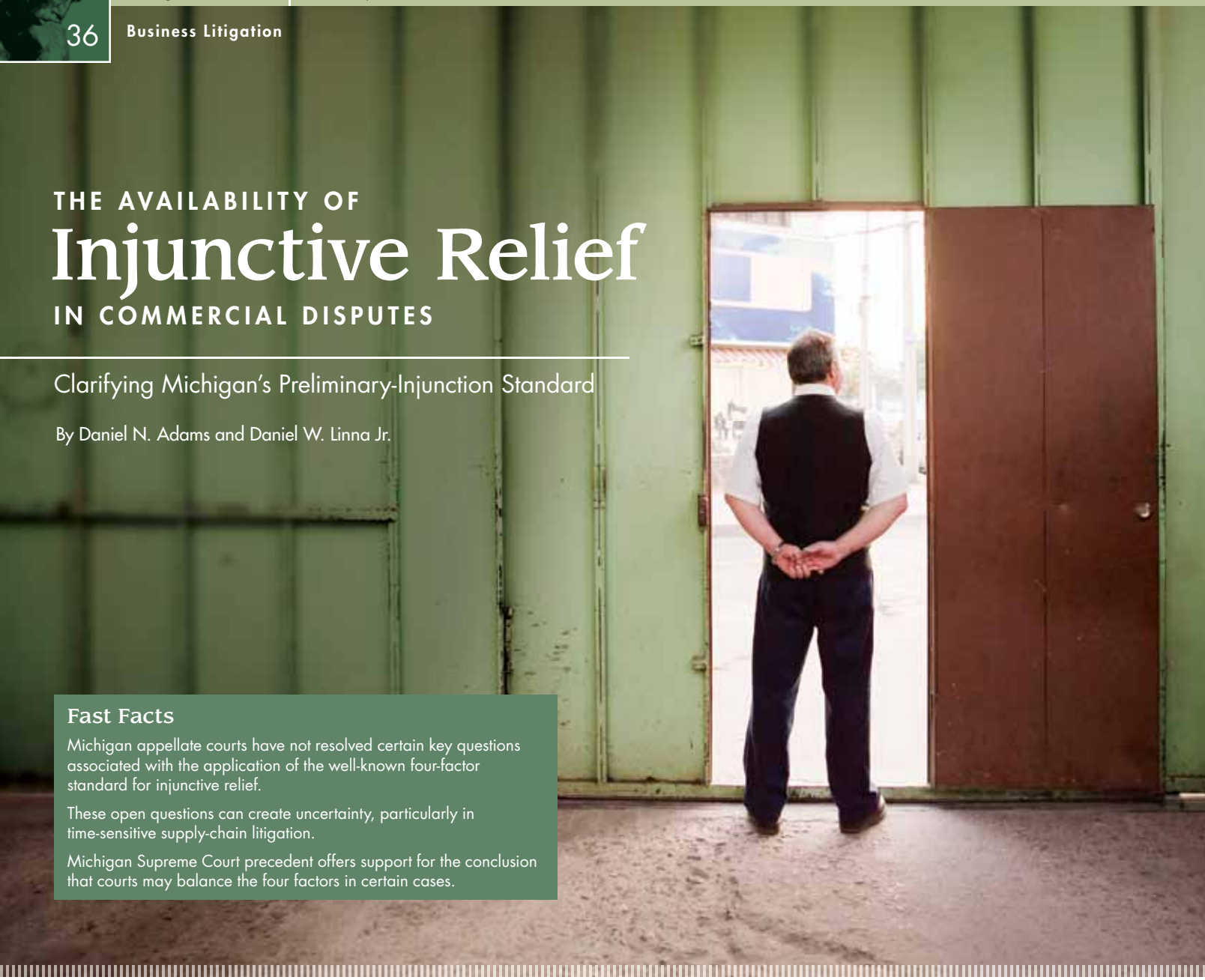

Fast Facts

Michigan appellate courts have not resolved certain key questions associated with the application of the well-known four-factor standard for injunctive relief.

These open questions can create uncertainty, particularly in time-sensitive supply-chain litigation.

Michigan Supreme Court precedent offers support for the conclusion that courts may balance the four factors in certain cases.

When a counterparty to a commercial contract refuses to perform, an important consideration before initiating a lawsuit is whether a court will enter a preliminary injunction compelling the counterparty to continue to perform its obligations pending trial. This is particularly important in supply-chain disputes, where buyers often rely on a sole-source supplier for just-in-time deliveries of specialized goods. While the four-factor standard for preliminary injunctive relief is well known, how the standard should be applied is not well developed. For example: Do courts balance these factors? How strong a showing of a "likelihood of success" is required? What qualifies as "irreparable harm"? Uncertainty regarding the answers to these questions can make it difficult for potential litigants to assess their positions. But this need not be the case. Careful analysis of Michigan caselaw provides additional guidance on how potential litigants and courts should analyze these factors.

Michigan's Preliminary-Injunction Standard

The purpose of a preliminary injunction is to preserve the status quo so that the parties' rights may be determined without injury to either in the interim.[1] Michigan's preliminary-injunction standard is well known:

> Whether a preliminary injunction should issue is determined by a four-factor analysis: [1] harm to the public interest if an injunction issues; [2] whether harm to the applicant in the absence of a stay outweighs the harm to the opposing party if a stay is granted; [3] the strength of the applicant's demonstration that the applicant is likely to prevail on the merits; and [4] demonstration that the applicant will suffer irreparable injury if a preliminary injunction is not granted.[2]

Courts often add the gloss that "[i]njunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury."[3]

Are Michigan Trial Courts Permitted to Balance the Injunctive-Relief Factors?

Federal courts in the Sixth Circuit apply a similar four-factor test when determining whether to issue a preliminary injunction, and balance the factors to determine whether the movant is entitled to injunctive relief.[4] Michigan state courts have not expressly adopted a balancing approach. Balancing, however, is not inconsistent with the often-cited standard established by the Michigan Supreme Court in *Mich State Employees Ass'n v Dep't of Mental Health* (hereinafter *MSEA*). Additionally, support for a balancing approach can be found in cases predating *MSEA,* such as *Niedzialek v Journeymen Barbers, Hairdressers & Cosmetologists' International Union of America, Local No. 552*.[5]

In *Niedzialek,* the plaintiff sought to enjoin members of a local union from picketing outside his shop because it was disrupting his business.[6] The trial court denied the plaintiff's request for an injunction.[7] On appeal, the Michigan Supreme Court reversed. The Court observed that, although the plaintiff's likelihood of success on the merits could not "be decided until there is a hearing on the merits," it was clear that if "the picketing is continued in the interim until a hearing on the merits, plaintiff will suffer irreparable injury."[8] Moreover, granting the injunction and enjoining the union from picketing would not cause "any permanent or irreparable injury to [the union], even if the ultimate determination should be that the picketing was lawful."[9] Thus, although the plaintiff's likelihood of success remained unclear from the lower court record, the Court held that *"[i]t is the settled policy of this Court under such circumstances to grant to a litigant who is threatened with irreparable injury temporary injunctive relief and thereby preserve the original status quo."*[10]

Niedzialek establishes that a court should accord greater weight to the irreparable-harm balancing factor and grant an injunction if (1) the facts remain unclear or the merits cannot be determined without a full hearing but the moving party shows threatened irreparable injury and (2) the party opposing the injunction makes no showing that it will sustain material ultimate damage or deprivation of rights.[11]

The balancing approach that flows from *Niedzialek* could help resolve motions for injunctive relief where the strength of the movant's showing of a "likelihood of success" on the merits appears to be a close question, particularly when the case is in its initial stages.[12] Applying this approach, if the movant shows threatened irreparable injury and the nonmovant makes no such showing, the trial court should enter a preliminary injunction so long as the suit presents issues of controverted merit. Given this flexibility, a trial court may be able to eliminate the need for an evidentiary hearing to attempt to determine the strength of the movant's case on the merits. This is particularly important in the early stages of a complex commercial case when conducting an evidentiary hearing is not only inefficient for the parties and the court, but also just as likely to further confuse as it is to clarify the issues.

The Success-on-the-Merits Factor: Is There a Clear Standard?

While certain success is clearly not the standard, Michigan appellate courts have not spoken with clarity on how lower courts should analyze the success-on-the-merits factor. In many cases, Michigan courts have interpreted *MSEA* as requiring lower courts to analyze "the likelihood that the applicant will prevail on the merits."[13] But in some cases, Michigan courts have suggested that a party must demonstrate that it "is likely to prevail on the merits."[14]

These variations may not reflect a substantive disagreement on the applicable legal standard. Like Michigan state courts, federal courts also apply a bewildering variety of formulations of this factor, but these "verbal differences do not seem to reflect substantive disagreement" on the applicable standard—i.e., that a plaintiff "must present a prima facie case but need not show that he is certain to win."[15]

Still, these cases suggest that courts may be applying two and possibly even three different standards. To evaluate "the likelihood that the applicant will prevail on the merits" suggests a flexible standard that is consistent with the *MSEA* "strength of demonstration" language.[16] On the other hand, requiring a moving party to show that it is "likely" to prevail suggests something more rigid and mathematical—that a movant must meet a clear "more likely than not" threshold to merit an injunction.[17]

No Michigan court appears to have addressed this potential inconsistency. Should a court have occasion to do so, the affirmation of a flexible, *MSEA*-type standard seems likely. A rigid, mechanical standard is inconsistent with the nature of equitable remedies, which "[do] not follow automatically on the establishment of a strict legal right," but instead apply where the remedy is "compatible with the equities of the case."[18] Moreover, the "likely to prevail" standard thrusts upon the litigant, who may be seeking injunctive relief before any discovery has been taken, a daunting evidentiary burden at an early stage of the case. The modest goal of the success-on-the-merits factor—determining whether the movant has pleaded a claim "on which he might ultimately obtain relief"—does not demand the imposition of an exacting, more-likely-than-not standard.[19]

> THE PURPOSE OF A PRELIMINARY INJUNCTION IS TO PRESERVE THE STATUS QUO SO THAT THE PARTIES' RIGHTS MAY BE DETERMINED WITHOUT INJURY TO EITHER IN THE INTERIM.

IN THE COMMERCIAL CONTEXT, COURTS HAVE FOUND IRREPARABLE HARM WHERE, FOR EXAMPLE, THE MOVING PARTY WILL LOSE CUSTOMERS, GOODWILL, OR BUSINESS.

The Irreparable-Harm Element

A party can show irreparable injury by demonstrating that the absence of an injunction will cause "a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty."[20] In the commercial context, courts have found irreparable harm where, for example, the moving party will lose customers, goodwill, or business.[21]

When a seller refuses to ship unique goods in a just-in-time supply-chain case, the buyer often alleges that the interruption in supply will force it to cease operations, resulting not only in catastrophic damages (which the seller may not be able to satisfy), but also the loss of customers and goodwill—hallmarks of irreparable harm. In some cases, however, the seller asserts it has refused to supply goods because the buyer has refused to pay a price increase required or permitted under the parties' contract. In these situations, sellers assert that there is no irreparable harm because the buyer can simply pay the price increase, continue to receive goods, and then sue the seller for return of the disputed price increase.

This was the court's holding in *Thyssenkrupp Fabco Corp v Heidtman Steel Prods, Inc, CA*.[22] In *Thyssenkrupp,* a steel supplier, citing higher commodity prices, refused to ship material to the plaintiff unless the plaintiff agreed to pay a higher price.[23] The court, applying Michigan law, denied the plaintiff's motion for a preliminary injunction because, among other things, the plaintiff had not established that it would suffer irreparable harm.[24] This element, the court held, is not met if the buyer can avoid irreparable harm by paying the seller's demand, can afford to pay the demand, and can seek a judgment for money damages.[25]

Michigan appellate courts have not extensively analyzed this issue—i.e., whether the buyer's ability to pay the requested price increase precludes a finding of irreparable harm. Nevertheless, *Thyssenkrupp* and cases like it may be distinguishable where, for example, paying the price increase will cause "immeasurable injury" to the buyer's reputation or leave it with "a negative cash flow and insufficient funds to operate its business."[26] Additionally, a buyer can show irreparable harm when collecting on a judgment for an invalid price increase would be difficult or impossible.[27]

Conclusion

Michigan caselaw offers support for the proposition that courts can balance the preliminary-injunction factors to obtain an equitable result; that a litigant need only demonstrate some "likelihood" of success to merit injunctive relief; and that buyers in time-sensitive supply disputes can and do obtain orders compelling sellers to continue to perform during the pendency of a case. Still, Michigan higher courts have not clearly resolved some key issues associated with the application of the preliminary-injunction standard. These uncertainties are most likely to matter at the margins—e.g., when a party must seek injunctive relief early in the litigation without the benefit of discovery and where the merits of the case are complicated or do not clearly favor one side. In these cases, assessing the risks of litigation and the likelihood of obtaining injunctive relief becomes more difficult. ■

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FOOTNOTES

1. *Alliance for the Mentally Ill of Mich v Dep't of Community Health,* 231 Mich App 647, 655–656; 588 NW2d 133 (1999); *Niedzialek v Journeymen Barbers, Hairdressers & Cosmetologists' International Union of America, Local No. 552,* 331 Mich 296; 49 NW2d 273 (1951).
2. *Mich State Employees Ass'n v Dep't of Mental Health,* 421 Mich 152, 158–159; 365 NW2d 93 (1984) (citation omitted).
3. *Pontiac Fire Fighters Union Local 376 v City of Pontiac,* 482 Mich 1, 8; 753 NW2d 595 (2008) (quotation marks and citations omitted).
4. See, e.g., *Performance Unlimited, Inc v Questar Publishers, Inc,* 52 F3d 1373, 1381 (CA 6, 1995); *In re Delorean Motor Co,* 755 F2d 1223, 1228–1229 (CA 6, 1985).
5. *Niedzialek,* n 1 *supra.*
6. *Id.* at 298–299.
7. *Id.* at 297.
8. *Id.* at 300.
9. *Id.*
10. *Id.* (emphasis added).
11. See 10A Michigan Pleading & Practice (2d ed, rev vol 2005), §76:137, p 930 (stating that "[i]t is an abuse of discretion to deny a temporary injunction where the plaintiff shows threatened irreparable injury and the defendant makes no showing that he or she will sustain material ultimate damage or deprivation of rights." (citing, among other cases, *Niedzialek,* n 1 *supra*)); see also *Steggles v Nat'l Discount Corp,* 326 Mich 44, 49; 39 NW2d 237 (1949) (stating that "[t]he general rule is that whenever courts have found a mandatory injunction essential to the preservation of the status quo and a serious inconvenience and loss would result to plaintiff and there would be no great loss to defendant, they will grant it.").
12. See, e.g., *Kyklos Bearing Int'l v General Motors LLC,* unpublished opinion of the Oakland County Circuit Court, issued December 8, 2010 (Docket No. 10-111554-CK) (stating, from the bench, that Michigan courts are not required to balance the preliminary-injunction factors: "That may be the case in the federal system, but that's not the case here in state court."), rev'd, unpublished order of the Court of Appeals, entered February 10, 2011 (Docket No. 301881) (granting motion for peremptory reversal and entering a preliminary injunction pending trial without addressing whether trial courts should balance the preliminary-injunction factors).
13. See, e.g., *Northern Warehousing, Inc v Dep't of Education,* 475 Mich 859; 714 NW2d 287 (2006) (citing *MSEA,* n 2 *supra* at 157–158).
14. See, e.g., *Henry v Dow Chem Co,* 473 Mich 63, 96 n 27; 701 NW2d 684 (2005).
15. See 11A Wright, Miller, Kane & Marcus, Federal Practice and Procedure (2d ed 2010) §2948.3; cf. *Henry v Dow Chem Co,* n 13 *supra* at 96 n 27 (stating that the purpose of this factor is to show "whether the movant has pleaded a claim on which he *might* ultimately obtain relief") (emphasis added).
16. See *Verhelle v Eveland,* 347 Mich 612, 619; 81 NW2d 397 (1957) (interpreting the term "likelihood of success" in context of application to organize a bank as "a probability of success" or a "favorable chance of success").
17. See *Moll v Abbott Laboratories,* 444 Mich 1, 22; 506 NW2d 816 (1993) (defining "likely" as "Probable. In all probability. Likely is a word of general usage and common understanding, broadly defined as of such nature or so circumstantial as to make something probable and having a better chance of existing or occurring than not.") (quoting Black's Law Dictionary 925 (6th ed 1990)) (internal citations omitted).
18. 43A Corpus Juris Secundum Injunctions (2004) §80; see also *Oosterhouse v Brummel,* 343 Mich 283, 289; 72 NW2d 6 (1955) (stating that "[c]ourts of equity…grant or withhold injunctive relief depending upon the accomplishment of an equitable result in the light of all of the circumstances surrounding the particular case.").
19. See *Henry v Dow Chem Co,* n 14 *supra* at 96 n 27 (stating that the purpose of this factor is to show "whether the movant has pleaded a claim on which he *might* ultimately obtain relief.") (emphasis added).
20. *Thermatool Corp v Borzym,* 227 Mich App 366, 377; 575 NW2d 334 (1998); see also *Almetals, Inc v Wickeder Westfalenstahl, GmbH,* No. 08-10109, 2008 WL 2026122, at *8; 2008 US Dist LEXIS 87403, at *21 (ED Mich, 2008) (citation omitted) (granting permanent injunction where aggrieved party could not afford price increase and had no alternative source of clad metal and thus damages would be incalculable and irremediable).
21. *Mich Bell Telephone Co v Engler,* 257 F3d 587, 599 (CA 6, 2001); *Ross-Simons of Warwick, Inc v Baccarat, Inc,* 102 F3d 12, 20 (CA 1, 1996) ("loss of a… product line may create a threat of irreparable injury if it is likely that customers (or prospective customers) will turn to competitors who do not labor under the same handicap."); see also *AK Steel Corp v Colton,* unpublished opinion of the US District Court for the Eastern District of Michigan, issued November 30, 2001 (Docket No. 01-74279); 2001 WL 1636957, at *3; 2001 US Dist LEXIS 20314, at *14–15 (finding irreparable harm and granting injunction where movant would suffer competitive injury and loss of goodwill, and such injuries would be difficult to quantify); *Kyklos Bearing Int'l v General Motors LLC,* unpublished per curiam opinion of the Court of Appeals, issued February 10, 2011 (Docket No. 301881) (affirming the trial court's holding that GM would suffer irreparable harm if an injunction was not issued compelling supplier to perform).
22. *Thyssenkrupp Fabco Corp v Heidtman Steel Prods, Inc, CA,* No. 04-74331 (ED Mich 2005); see also *Ventra Ionia Main, LLC v Sabic Innovative Plastics US, LLC,* unpublished opinion of the Oakland County Circuit Court, issued July 9, 2010 (Docket No. 10-111700-CK); *Intermet Corp v PBR Int'l USA LTD, CA,* unpublished opinion of the Oakland County Circuit Court, issued April 17, 2007 (Docket No. 07-081811-CK).
23. *Thyssenkrupp,* n 22 *supra* at *3.
24. *Id.* at *8–9.
25. *Id.*
26. *Almetals,* n 20 *supra* at *21–22.
27. See, e.g., *Tri-State Generation & Transmission Ass'n, Inc v Shoshone River Power, Inc,* 805 F2d 351, 355 (CA 10 1986) ("Difficulty in collecting a damage judgment may support a claim of irreparable injury."); Calton, *Specific Performance,* in Michigan Contract Law (Trentacosta, rev ed, 2010), §14.6, p 343 ("[Specific performance is appropriate] [e]ven if a legal remedy such as an award of damages might nominally be available but would be futile because the defendant is insolvent or has demonstrated that he or she will continue to infringe on plaintiff's rights.").