



# Recovering Damages for Wrongfully Issued Injunctions in Illinois

By John J. D'Attomo

*The court issued a TRO against your client without notice and, in your view, based on a frivolous legal theory. What relief is available? This article reviews the applicable statutory provisions and the cases interpreting them.*

The judge entered a TRO against your client. The TRO was issued without notice and, in your view, based on a frivolous legal theory. Is relief available? Barring an immediate appeal, is your only recourse to present a vigorous defense at the preliminary injunction hearing?

The answers: 1) maybe and 2) no. Two provisions of the Code of Civil Procedure provide a mechanism for attacking a questionable TRO or preliminary injunction. Section 11-108 of the Illinois Code of Civil Procedure ("the Code") permits an enjoined party to request dissolution of a temporary restraining order or preliminary injunction.<sup>1</sup> A corollary provision, section 11-110 of the Code, provides for a mandatory award to compensate an enjoined party for damages resulting from a wrongfully issued injunction.<sup>2</sup>

While these rules offer an opportunity for relief, they also pose traps for the unwary. This article discusses recovery of damages under section 11-110 and the proper application of this statutory remedy.

## I. The Injunction Must Be "Dissolved"

Section 11-110 provides "an unusual and summary remedy."<sup>3</sup> Damages are recoverable under section 11-110 only where an injunction is "dissolved."<sup>4</sup> An injunction is dissolved for purposes of section 11-110 where there is a judicial determination that it was "wrongfully issued" prior to a final judgment on the merits.<sup>5</sup> This judicial determination may occur in the trial or reviewing court.<sup>6</sup> The "wrongfulness" of an injunction is assessed based on the circumstances ex-

isting at the time the injunction was issued.<sup>7</sup>

Section 11-110 applies only to preliminary injunctions and temporary restraining orders, not to permanent injunctions.<sup>8</sup> Damages are recoverable upon partial dissolution of the injunction on the same basis as complete dissolution.<sup>9</sup>

Although the courts have not clearly defined the circumstances under which an injunction will be adjudged wrongfully issued and thus "dissolved" for purposes of section 11-110, they have made clear the circumstances under which an injunction is not "dissolved"—where the trial court issues a TRO but subsequently determines that the movant is not entitled to a preliminary injunction.<sup>10</sup> In those circumstances, the TRO simply expires by its own terms, having served its purpose of maintain-

1. 735 ILCS 5/11-108.

2. 735 ILCS 5/11-110.

3. *Schein v City of Virden*, 5 Ill 2d 494, 504, 126 NE2d 201, 206 (1955).

4. 735 ILCS 5/11-110; *Stocker Hinge Mfg. Co. v Darnel Industries, Inc.*, 94 Ill 2d 535, 543, 447 NE2d 288, 292-93 (1983).

5. *Id.*; *Buzz Barton & Associates, Inc. v Giannone*, 108 Ill 2d 373, 382, 483 NE2d 1271, 1275 (1985); *Emerson Electronic Co. v Sherman*, 150 Ill App 3d 832, 835-36, 502 NE2d 414, 416-17 (1st D 1986). An order dissolving an injunction upon stipulation of the parties may serve as the requisite judicial determination. *Marion Metal & Roofing Co. v Wood*, 243 Ill App 3d 890, 895-96, 612 NE2d 1049, 1053 (5th D 1993).

6. 735 ILCS 5/11-110 (an injunction may be dissolved "by the circuit court or by the reviewing court.").

7. See *Amschler v Remijas*, 341 Ill App 262, 93 NE2d 386 (1st D 1950) (injunction enforcing racially restrictive covenant was not wrongfully issued where such covenants were ruled unenforceable subsequent to issuance of injunction).

8. *Buzz Barton* at 385, 483 NE2d at 1276-77.

9. *Cromwell Paper Co. v Wellman*, 23 Ill App 2d 263, 266-67, 162 NE2d 500, 502 (1st D 1959).

10. *Schein* at 503, 126 NE2d at 206; *Emerson* at 836, 602 NE2d at 417.

ing the status quo pending the preliminary injunction hearing.<sup>11</sup> A TRO that expires by its own terms is not dissolved but is "functus officio," having served its purpose pending a hearing on the merits.<sup>12</sup>

Nor is a TRO dissolved where the plaintiff obtains a preliminary injunction following the issuance of a TRO. Where the movant has successfully obtained a preliminary injunction, the previously issued TRO is not dissolved but simply merged into the preliminary injunction.<sup>13</sup>

The same principles govern the relationship between a preliminary injunction and permanent injunction. A preliminary injunction is not dissolved where permanent injunctive relief is denied. The preliminary injunction simply expires by its own terms. Further, a preliminary injunction is not dissolved where the movant obtains a permanent injunction; the preliminary injunction is merged into the permanent injunction.

The denial of a motion to dissolve is immediately appealable.<sup>14</sup> Absent an interlocutory appeal, an order denying a motion to dissolve becomes the law of the case that the injunction was properly issued precluding the recovery of damages under section 11-110.<sup>15</sup>

A motion to dissolve may be made before or after an answer is filed.<sup>16</sup> The grounds asserted in support of a motion to dissolve are not waived by failing to raise them at the time the injunction is issued.<sup>17</sup>

Judicial policy favors motions to dissolve, particularly where a TRO issues ex parte or with only minimal notice.<sup>18</sup> In those circumstances, a motion to dissolve provides the trial court with an opportunity to void or modify the TRO and thereby avoid an otherwise unnecessary appeal.<sup>19</sup> The motion-to-dissolve requirement is designed to reduce the number of would-be appeals raising errors that might otherwise be cured through an adversary hearing.<sup>20</sup> A motion to dissolve also presents an opportunity for the parties to enter an agreed TRO pending a preliminary injunction hearing.<sup>21</sup>

The decision whether to dissolve an injunction rests within the broad discretion of the court.<sup>22</sup> The court may deny a motion to dissolve where the plaintiff shows a "fair question" as to the existence of the right claimed.<sup>23</sup> Where an order denying a motion to dissolve is

appealed, the sole question is whether the trial court abused its discretion in denying the motion to dissolve.<sup>24</sup> The question whether the plaintiff satisfied the requirements for injunctive relief is not at issue.<sup>25</sup>

## II. The Meaning of "Wrongfully Issued"

The term "wrongfully issued" has special meaning in Illinois injunction practice and is distinguishable from the standard for recovery on an injunction bond.<sup>26</sup> As a general rule, an injunction is "wrongfully issued" where the underlying complaint does not support the issuance of injunctive relief or the injunction is otherwise inherently defective. For example, in *Buzz Barton & Associates, Inc. v Giannone*,<sup>27</sup> a preliminary injunction was wrongfully issued where a former employer (the plaintiff) failed to demonstrate a protectable interest supporting the noncompetition covenant it sought to enforce. Absent a protectable interest, the plaintiff failed to establish a "clearly ascertainable right" in need of protection – an essential element for preliminary injunctive relief.

Similarly, in *Knapp v Palos Community Hospital*,<sup>28</sup> a preliminary injunction was wrongfully issued where the physician-plaintiffs failed to show a likelihood of success on their claim seeking reinstatement of their medical staff privileges. Following an interlocutory appeal and dissolution of the injunction, the trial court awarded damages under section 11-110. Plaintiffs appealed the award of damages. The appellate court affirmed, again finding that the preliminary injunction was wrongfully issued but on the separate ground that the trial court improperly exercised jurisdiction over plaintiffs' complaint.

A preliminary injunction barring a municipality from laying off certain firefighters was held wrongfully issued in *International Association of Firefighters Local No. 23 v City of East St. Louis*.<sup>29</sup> There, the plaintiff union obtained the injunction based on allegations that the proposed layoffs would violate the collective bargaining agreement in effect between the parties. On appeal, the court concluded that the preliminary injunction was issued in contravention of the Illinois Anti-Injunction Act and was thus wrongfully issued.

A temporary restraining order was

11. *Schein* at 503-04, 126 NE2d at 206. But cf. *Jefco Laboratories, Inc. v Carroo*, 136 Ill App 3d 826, 483 NE2d 1004 (1st D 1985) (holding that TRO was properly dissolved by the trial court, and thus had not expired, where TRO was dissolved after preliminary injunction hearing had commenced).

12. *Schein* at 503-04, 126 NE2d at 206.

13. *Id.*; *Emerson* at 837, 502 NE2d at 418.

14. Ill S Ct Rule 307(a)(1).

15. *Stocker Hinge* at 544, 447 NE2d at 292; *Panduit Corp. v All States Plastic Mfg. Co.*, 84 Ill App 3d 1144, 1151, 405 NE2d 1316, 1322 (1st D 1980).

16. 735 ILCS 5/11-108; *International Ass'n of Firefighters Local No. 23 v City of East St. Louis*, 206 Ill App 3d 580, 584, 565 NE2d 264, 266 (5th D 1990) (denial of motion to dissolve preliminary injunction was error even where motion to dissolve was filed six months after preliminary injunction was issued); see also *American Dixie Shops v Springfield Lords, Inc.*, 8 Ill App 2d 129, 130 NE2d 532 (3d D 1955) (motion to dissolve made three months after injunction was issued was proper).

17. *City of East St. Louis* at 584, 565 NE2d at 266-67.

18. *Harper v Missouri Pacific R. Co.*, 264 Ill App 3d 238, 244-46, 636 NE2d 1192, 1198-99 (5th D 1994), appeal denied, 642 NE2d 1279 (1994), cert denied, 520 US 1224 (1997).

19. *Id.*

20. See *Bohn Aluminum & Brass Co. v Barker*, 55 Ill 2d 177, 184, 303 NE2d 1, 5 (1973).

21. *Harper* at 244-46, 636 NE2d at 1198-99.

22. See *City of East St. Louis* at 584, 565 NE2d at 266; *Stoller v Village of Northbrook*, 162 Ill App 3d 1001, 1008, 516 NE2d 355, 360 (1st D 1987), appeal denied, 118 Ill 2d 552, 520 NE2d 393 (1988).

23. *Stoller* at 1008, 516 NE2d at 360 (citing *Schuler v Wolf*, 372 Ill 386, 389, 24 NE2d 162, 165 (1939)); *People ex rel Stony Island Church of Christ v Mannings*, 156 Ill App 3d 356, 362, 509 NE2d 572, 576 (1st D 1987).

24. *Stoller* at 1009, 516 NE2d at 360.

25. *Id.*

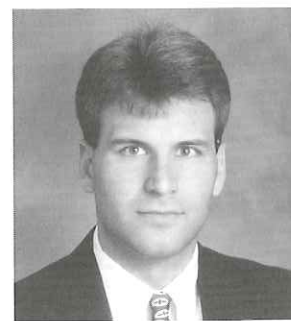
26. See infra, Section V.

27. *Buzz Barton*, 108 Ill 2d 373, 483 NE2d 1271 (1985).

28. *Knapp v Palos Community Hosp.*, 176 Ill App 3d 1012, 531 NE2d 989 (1st D 1988), appeal denied, 537 NE2d 810, cert denied, 493 US 847 (1989).

29. *City of East St. Louis*, 206 Ill App 3d 580, 565 NE2d 264 (5th D 1990).

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wrongfully issued in *Hirschauer v Chicago Sun-Times*.<sup>30</sup> In *Hirschauer*, the trial court issued a TRO requiring the defendant newspaper publisher to continue selling newspapers to plaintiff *Hirschauer*, a wholesale purchaser. On appeal, the court found that plaintiff's

prior to final disposition of the action, the court may provide otherwise.<sup>36</sup> Because an adjudication that the injunction was wrongfully issued is a prerequisite to recovering damages under section 11-110, involuntary dismissal of the action prior to adjudication may pre-

Not holding the movant liable for all resulting damages would be inequitable and invite spurious litigation.<sup>43</sup>

## IV. Beware the Short-Term Injunction

A procedural trap arises where the term of the injunction is relatively short. For example, where a preliminary injunction issues to enforce a six-month noncompetition covenant, the term of the injunction may expire before the propriety of the court's order is decided on appeal. An injunction that expires by its own terms cannot be dissolved "because a court cannot dissolve that which no longer exists."<sup>44</sup>

To preserve the damages issue, the enjoined party must move to dissolve the injunction in the trial court.<sup>45</sup> While it is probably futile to present the trial judge with a motion to dissolve immediately after the court has entered a pre-

**If you're defending a TRO or preliminary injunction, be prepared to file a motion to dissolve. If it's successful, you'll obtain immediate relief.**

complaint failed to allege facts sufficient to support either legal theory asserted in his complaint. Accordingly, he failed to establish a "fair question" as to the right claimed – an essential element for injunctive relief. In further support of its holding, the court noted that plaintiff obtained the temporary restraining order without notice and without any showing that notice would have been impractical.<sup>31</sup>

The movant's bad faith in procuring an ex parte TRO renders it inherently defective and is grounds for dissolving it. Where a TRO is issued ex parte, the Code requires that the movant proceed with a motion for preliminary injunction at the "earliest possible time."<sup>32</sup> If the movant fails to proceed in this expedited fashion, the court "shall" dissolve the TRO.<sup>33</sup> This rule prevents a party who obtains an ex parte TRO from effectively extending it by delaying an adversary hearing on the underlying claim. A movant's failure to bring a motion for preliminary injunction based on the court's expedited schedule suggests that the party procured the TRO in bad faith.

## III. An Award of Damages Is Mandatory

After dissolution of a TRO or preliminary injunction, the circuit court "shall" award damages to compensate the restrained party for all damages suffered as a result of the injunction.<sup>34</sup> The right to recover damages under section 11-110 accrues immediately upon dissolution of the injunction and the restrained party may file a petition for damages anytime after dissolution.<sup>35</sup>

Although the terms of section 11-110 contemplate that damages be awarded

include recovery.<sup>37</sup> Therefore, a restrained party that has filed both a motion to dissolve and a motion to dismiss must obtain a ruling on the motion to dissolve first to recover damages.

Although the Illinois Supreme Court has admonished that section 11-110 be strictly construed,<sup>38</sup> courts have construed section 11-110 in favor of the recovery of damages. At least one court has deemed a claim for damages under section 11-110 as a counterclaim precluding a voluntary dismissal of the underlying complaint to avoid an assessment of damages.<sup>39</sup> Another decision holds that a court should not entertain new or amended pleadings designed to cure the wrongfulness of the injunction before addressing a pending motion to dissolve.<sup>40</sup>

While a mandatory award of "all" damages suffered by the enjoined party might be considered a harsh remedy, the Illinois courts deem this result justified based on the nature of preliminary injunctive relief. Preliminary injunctive relief is an extraordinary remedy that allows the movant to restrain another from engaging in conduct it otherwise has a legal right to pursue without proving its case on the merits.<sup>41</sup> "It is this extraordinary characteristic of temporary restraining orders and preliminary injunctions which distinguishes them from other types of litigation and justifies holding the moving party liable for all damages if the preliminary injunction or temporary restraining order is later found to have been wrongfully issued."<sup>42</sup>

Thus, by seeking the extraordinary remedy of injunctive relief, the movant assumes the risk that the injunction might be found "wrongfully issued."

30. *Hirschauer v. Chicago Sun-Times*, 192 Ill App 3d 193, 548 NE2d 630 (1st D 1989).

31. Other courts have similarly found an injunction "wrongfully issued" for lack of notice. See *Boltz v Estate of Byrant*, 175 Ill App 3d 1056, 530 NE2d 985 (1st D 1988); *Saugamo Elec. Co. v International Union, United Auto., Aerospace and Agr. Implement Workers*, 42 Ill App 3d 563, 356 NE2d 389 (4th D 1976); *Daskal v Daskal*, 71 Ill App 2d 471, 219 NE2d 4 (1st D 1966); *American Dixie Shops*, 8 Ill App 2d 129, 130 NE2d 532 (3d D 1955); *People ex rel Thrasher v Eisenberg*, 288 Ill 304, 123 NE 532 (1919).

32. 735 ILCS 5/11-101 (West 2001).

33. *Id.*

34. 735 ILCS 5/11-110.

35. *Illinois Funeral Home Owners Ass'n v Cemetary Workers, Greens Attendants and Institutional Emp. Union, Local No. 106*, 19 Ill App 2d 375, 379, 153 NE2d 865, 866 (1st D 1958) (citations omitted).

36. *Liberty Nat. Bank of Chicago v Neuberry*, 6 Ill App 2d 252, 256, 127 NE2d 269, 272 (1st D 1955); *Leonard v Pearce*, 271 Ill App 428, 1933 WL 2620 (2d D 1933).

37. See *Meyer v Marshall*, 62 Ill 2d 435, 439-40, 343 NE2d 479, 482-83 (1976) (failure to obtain ruling on motion to dissolve preliminary injunction before trial barred recovery of fees under § 11-110); *Concerned Boone Citizens, Inc. v M.I.G. Investments, Inc.*, 144 Ill App 3d 334, 494 NE2d 180 (2d D 1986) (damages were not recoverable under § 11-110 where trial court entered order dismissing complaint prior to ruling on pending motion to dissolve).

38. *Stocker Hinge* at 543, 447 NE2d at 291.

39. *Marion Metal*, 243 Ill App 3d 890, 612 NE2d 1049.

40. See *Boltz v Estate of Byrant*, 175 Ill App 3d at 1063, 530 NE2d at 989 (1st D 1988).

41. *Buzz Barton* at 382, 483 NE2d at 1275.

42. *Id.* at 382, 483 NE2d at 1275.

43. *Id.* at 383, 483 NE2d at 1276.

44. *Emerson* at 836, 502 NE2d at 417.

45. *Id.* ("The key to the preservation of the question of damages for short term preliminary injunctions lies in the timely filing in the trial court of a motion to dissolve the injunction."); see also *Keene v Lane*, 137 Ill App 3d 793, 485 NE2d 450 (2d D 1985) (issue of whether TRO was wrongfully issued was moot where TRO expired by its own terms prior to disposition on appeal and defendant failed to file motion to dissolve).

liminary injunction, the motion is necessary to avoid having the issue of damages rendered moot should the term of the preliminary injunction expire before the case is decided on appeal.<sup>46</sup>

In *Panduit Corp. v All States Plastic Mfg. Co., Inc.*,<sup>47</sup> the plaintiff brought suit against a former employee and his new employer seeking to enforce a restrictive covenant. The court entered a TRO enjoining the employee from working

dants moved to dissolve the TRO, they failed to take an interlocutory appeal of the order denying that motion.

#### V. Injunction Bond v Statutory Damages

Although an injunction bond also protects an enjoined party from damages resulting from a TRO or preliminary injunction, section 11-110 is a "separate and distinct" means of recovering

the injunction was wrongfully issued. Thus, a party who does not recover damages under section 11-110 may nonetheless seek damages on the bond.

An enjoined party can typically recover on an injunction bond if he or she ultimately prevails on the merits. The terms of section 11-110 expressly acknowledge that a different, less onerous standard governs the recovery of damages under an injunction bond.<sup>48</sup> This

## The "unusual" remedy provided by section 11-110 can transform an initial defeat into a litigation victory.

for his new employer. The defendants' motion to dissolve the TRO was denied, and no interlocutory appeal of that order was taken.

The court thereafter entered a preliminary injunction enjoining the former employee from working for his new employer for the duration of the two-year period specified in the restrictive covenant. No motion to dissolve the preliminary injunction was filed. The defendants then timely appealed the order granting the preliminary injunction. By the time of oral argument in the appellate court, the preliminary injunction had expired by its own terms.

The defendant employer argued that the appeal was not moot and sought to have the court review both the issuance of the TRO and preliminary injunction. The defendant argued that it was entitled to a ruling on the merits because, if the preliminary injunction was wrongfully issued, it was entitled to have damages assessed against plaintiff.

The court disagreed, stating that "[e]xpiration of an injunction by its own terms is not equivalent to the dissolution of the injunction for the purposes of [section 11-110], and an injunction that has expired by its own terms can no longer be dissolved because a court cannot dissolve that which no longer exists."<sup>48</sup>

The court noted that the key to preserving damages is to file a motion to dissolve the preliminary injunction. Because defendants failed to do so, the issue of whether the preliminary injunction was wrongfully issued had not been preserved. Nor would the court review whether the TRO was wrongfully issued because, although the defen-

damages.<sup>49</sup> An injured party may recover damages under section 11-110 regardless of whether the plaintiff has posted a bond.<sup>50</sup>

Unlike the Federal Rules of Civil Procedure,<sup>51</sup> the Illinois Code of Civil Procedure does not require the party seeking injunctive relief to post a bond. The circuit court has discretion to determine whether a bond is required and, if so, how large it should be.<sup>52</sup> Where a bond has been posted, it provides an alternative basis upon which an enjoined party can recover damages.<sup>53</sup>

A party can recover on an injunction bond even if there was no finding that

46. See *Emerson* at 837-38, 502 NE2d at 418 (rejecting assertion that filing motion to dissolve "would have been a useless act").

47. *Panduit*, 84 Ill App 3d 1144, 405 NE2d 1316 (1st D 1980).

48. *Id.* at 1149, 405 NE2d at 1320.

49. *Montgomery Ward & Co. v United Retail, Wholesale & Dept. Store Emp. of America, CIO*, 348 Ill App 198, 202, 108 NE2d 784, 786 (1st D 1952); see also *Warner v Wende*, 228 Ill App 153 (1st D 1923) (distinguishing action to collect on bond from statutory petition for damages).

50. *Montgomery Ward* at 202-03, 108 NE2d at 786.

51. See Fed R Civ P 65(c).

52. 735 ILCS 5/11-103.

53. A wrongfully issued injunction may also give rise to a claim for damages under a malicious prosecution theory where the restrained party can show evidence of his or her arrest, a seizure of property, or some other special injury. See *Bank of Lyons v Schultz*, 78 Ill 2d 235, 399 NE2d 1286 (1980) (preliminary injunction barring distribution of insurance proceeds for nine years sufficient to establish a seizure of property or other special injury for purposes of a malicious prosecution claim against bank). Thus, under certain circumstances, damages might still be recoverable in the absence of a bond and absent a viable claim under § 11-110.

54. See 735 ILCS 5/11-110 ("However, a failure so to assess damages as hereinabove set out shall not operate as a bar to an action upon the injunction bond.")



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