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INTRODUCTORY COMMENT

Rule 65 provides various procedural rules for the issuance of preliminary injunctions and temporary restraining orders. In doing so it tends to fix uniform nomenclature for injunctive orders pending hearing and final disposition of a suit. As used in the rule, the term preliminary injunction means an injunction issued to prevent irreparable injury, loss, or damage, and ordinarily to preserve the status quo during the pendency of a suit until it is finally determined on the merits.¹ In contrast a temporary restraining order means an injunction to prevent irreparable injury, loss, or damage, and ordinarily to preserve the status quo until a preliminary injunction is heard and decided. A final injunction (not dealt with by Rule 65) is the injunction granted as final relief after the merits have been heard.

The terms "temporary restraining order" and "preliminary injunction," are not necessarily used in practice in various states to label the types of injunctions described above. It should be noted that other terms are sometimes used in federal forms. The most common deviation is to describe a preliminary injunction under Rule 65 as a temporary injunction. The term, "temporary injunction", is also used in some statutes, and in cases governed by such a statute it is properly used in the appropriate forms.

Rule 65(a) deals with applications for preliminary injunctions including consolidation of the hearing thereon with the final trial. Rule 65(b) deals with mechanics of securing a temporary restraining order. Rule 65(c) deals with security. Rule 65(d) deals with the scope and form of preliminary injunctions and temporary restraining orders (as well as final injunctions). Comments referring to the subdivisions are added to the appropriate forms.

1. See § 5271, Comment, and § 5297, Comment, No. 2.

A. APPLICATIONS FOR PRELIMINARY INJUNCTION;
DISSOLUTION AND REINSTATEMENT OF
INJUNCTION

§ 5271. Motion for Preliminary Injunction—General Form

[F.R.C.P. Rule 65(a)]

[Title of Court and Cause]

Plaintiffs, _____ and _____, move the Court for a preliminary injunction in the above entitled cause enjoining the defendants, and _____ and _____, their agents, servants, employees and attorneys, [and those persons in active concert or participation with them] from

The grounds in support of this motion are as follows:

1. _____
2. _____

Unless restrained _____ and _____ will immediately [*state action defendants will take unless restrained*].

Immediate and irreparable injury, loss, and damage will result to the plaintiffs by reason of the threatened action of the defendants, as more particularly appears in the verified complaint filed herein and the attached affidavit of _____. The plaintiffs have no adequate remedy at law.

If this preliminary injunction be granted, the injury, if any, to defendants herein, if final judgment be in their favor, will be inconsiderable and will be adequately indemnified by bond.

[Add if appropriate: Plaintiffs further move the Court that the trial of this action on the merits be advanced and consolidated with the hearing of this motion for preliminary injunction. The grounds in support of consolidation are as follows: *Add matter similar to matter in second paragraph of form in § 5272.*]

Attorney for Plaintiffs.

Address: _____

COMMENT

Analysis

1. Preliminary Injunctions—Governing Rule
2. Procedures for Procuring Preliminary Injunctions
3. Requirement of Notice
4. Requirement of Findings of Fact and Conclusions of Law

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5. Procedures and Forms When Temporary Restraining Order is Not Sought
6. Procedures and Forms When a Temporary Restraining Order is Sought
7. Motion for Temporary Restraining Order and Preliminary Injunction
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15. Injunctions and Restraining Orders in Three-Judge Court Cases Under 28 U.S.C.A. § 2284
16. Consolidation of Hearing on Preliminary Injunction with Trial on Merits

1. Preliminary Injunctions—Governing Rule

Rule 65(a) provides, "No preliminary injunction shall be issued without notice to the adverse party."

A second paragraph provides, "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 (a) (2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury."

Rule 65(d) deals with the form and scope of a preliminary injunction. Injunctions in three-judge court cases are considered in Chapter 76.

2. Procedures for Procuring Preliminary Injunctions

Procedures for securing preliminary injunctions (injunctions to preserve the status quo pending final decision of the suit) vary with local practice. They may also vary dependent upon whether a temporary restraining order is also sought to preserve the status quo until application for the preliminary injunction is heard and decided. (Although applications for temporary restraining orders may be necessary or desirable when applications for preliminary injunctions are to be made, there may be situations in which it is not necessary to apply for a temporary restraining order in addition to an application for a preliminary injunction.)

3. Requirement of Notice

Rule 65(a) requires notice before issuance of a preliminary injunction. The requirement of notice means that the adverse party has a right to a hear-

ing on an application for a preliminary injunction.² It has been suggested that there is no right to notice if only issues of law are to be decided,³ but even in such a situation there should be a right to notice and hearing.⁴

4. Requirement of Findings of Fact and Conclusions of Law

Findings of fact and conclusions of law are required for the grant or denial of a preliminary injunction.⁵

The required manner of service of notice is not completely clear. Local practice should be ascertained, but presumably service of notice may be had under the terms of Rule 5(a)-(c), which by its terms seems to govern service, at least if the defendant has been served summons and complaint. However, orders to show cause why a preliminary injunction should not be issued may direct the manner of service. And if such an order to show cause is to be served with the complaint, it should be served as the complaint is served under Rule 4. Requirements for manner of service are within the discretion of the judge.⁶

5. Procedures and Forms When Temporary Restraining Order is Not Sought

a. **Obtaining Preliminary Injunction by Noticing Complaint (and Prayer of Complaint) Without Motion or Order to Show Cause—Variant Procedures.** Normally, hearings on matters alleged in the complaint are not brought on for pre-trial hearing without a motion or at least an order to show cause. However, at least in some districts it may be possible to bring the complaint with prayer for preliminary injunction on for hearing for the preliminary injunction merely by serving and filing a notice of such hearing or by securing the service of such notice by the clerk.⁷

Variations of this procedure may exist in local practice. For example, application or motion without notice may be made for an order setting a hearing on the prayer in the complaint. The responsive order setting a hearing may provide for service of the application, order for hearing, and complaint by the marshal or that notice of the order be given by the clerk. Appropriate forms are included in this chapter.⁷

b. **Obtaining Preliminary Injunction by Motion Procedure.** Because Rule 7(b) provides that "an application to the court for an order shall be by motion, etc.,"⁸ it seems required that application for a preliminary injunc-

2. See discussion in Barron & Holtzoff (Wright), *Federal Practice and Procedure*, § 1433.

3. It was stated in *Securities and Exchange Comm. v. Graye*, D.C.N.Y.1957, 156 F.Supp. 544, that a hearing is not required when only issues of law are involved.

4. See comment to this effect in Barron & Holtzoff (Wright), *Federal Practice and Procedure*, § 1433.

5. Rule 52 requires findings of fact and conclusions of law "in granting or refusing interlocutory injunctions." See also § 5327, Comment.

6. See the leading case of *Franz v. Franz*, C.C.A.8th, 1926, 15 F.2d 797.

7. See §§ 5282-5286.

8. See § 1629, Comment.

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tion should be by a writing entitled a motion, and that motion practice applicable generally to other motions should be resorted to by applicant.⁹ This type of procedure is often used. In ordinary motion procedure Rule 6(d) provides that "a written motion, other than one which may be heard ex parte, and notice of hearing thereof, shall be served not later than 5 days before the time specified for the hearing, unless a different time is fixed by these rules or by order of the court", a provision which should be read with Rule 6(a) providing for computation of time.¹⁰ In case a notice period of less than the specified five day period is desired, such lesser time can presumably be fixed by an order responding to a motion or application ex parte for an order fixing

9. The following excerpt from the opinion in *Walling v. Moore Milling Co.*, D.C.Va.1945, 62 F.Supp. 378, explains in part the viewpoint stated in the text, "Upon the question of whether or not it was proper to bring plaintiff's motion for a preliminary injunction to a hearing upon an order to show cause, upon consideration I am satisfied that such a procedure was improper. I overruled defendant's motion to quash the order to show cause, and I think such motion was properly overruled because the service upon defendant of the order to show cause, accompanied by a copy of the complaint and supporting affidavit, took the place of notice to defendant that a motion would be made for a preliminary injunction against it at the time and place stated in the order to show cause, and defendant was in no wise prejudiced by this unusual procedure.

"However, I do not think that I should have adopted the procedure of substituting an order to show cause in place of the procedure set out in the Federal Rules of Civil Procedure in Rules 7 (b) and 65. These Rules are perfectly clear, and set out the standard procedure for bringing on for hearing a motion for a preliminary injunction. I can see no useful purpose to be served by deviating from this standard procedure. In legal effect, I do not see where either the plaintiff or the defendant is helped or hindered by the entry of an order to show cause. However, from a practical standpoint, the procedure by way of a show cause order imposes upon the plaintiff the additional burden of appearing before the court with his motion for a show cause order; it also imposes upon the court the burden of hearing the mo-

tion for a show cause order and determining from the complaint and supporting affidavit, if such be filed, whether or not a prima facie case for an injunction is made out. In my opinion, no useful purpose is accomplished thereby. A plaintiff, who desires a preliminary injunction, need only give his notice of such motion, as provided in the Rules.

"The only authority cited to me on the subject is *United States v. Rollnick*, D.C., 33 F.Supp. 863. Although this case was not an injunction case, the following observation made therein is pertinent here (33 F.Supp. at page 865): 'Furthermore, with regard to the rule to show cause, since the effective date of the New Rules of Civil Procedure, rules to show cause have not been properly a part of civil practice. Rule 7(b) provides that all applications to the Court for orders shall be by motion. The rules and forms then clearly indicate that motions are brought before the court by means of "notice of motion" which serves the purpose of a rule to show cause, and obviates the necessity for obtaining such a rule.'

"It is therefore my conclusion that, although defendant has not been prejudiced and therefore the issuance of the rule to show cause against it was harmless error, nevertheless, the entry of the rule to show cause was improper, and plaintiff's motion for a preliminary injunction should have been brought to a hearing in the manner prescribed by the Rules of Civil Procedure."

See also § 1631, Comment.

10. See § 1526, Comment.

less than five days notice for the motion for preliminary injunction.¹¹ Thus, even though the complaint should and does pray for a preliminary injunction, it is common to apply for the injunction by a motion therefore. This chapter contains appropriate motion forms. In order for a motion to be made, there does not seem to be any requirement that the prayer of the complaint must also pray for a preliminary injunction. At the same time it has been held that the complaint must allege grounds for the injunction.¹² Thus it seems that as a matter of routine the complaint should be drafted with an appropriate prayer for a preliminary injunction if it is to be sought. This chapter contains forms of prayers.

It is conceivable that in some instances a preliminary injunction could be obtained with a minimum of delay so that a temporary restraining order would be unnecessary. However this motion procedure is made practical in any event by the fact that a temporary restraining order can be obtained, if appropriate, pending determination of the motion for preliminary injunction.

It should be emphasized that although the above-described procedure for obtaining a preliminary injunction by motion is prescribed by the federal rules, the variations and the alternative procedures described in this comment and in § 5297, Comment, are found in local practice in district courts.¹³

c. **Obtaining Preliminary Injunction by Procedures Employing an Order to Show Cause.** Based upon the prayer in the complaint (and/or affidavits) it is acceptable practice in various districts to apply by local procedure for an order to show cause why a preliminary injunction should not issue. Although a motion form for a preliminary injunction might be unnecessary, it is sometimes used in this procedure.¹⁴

6. Procedures and Forms When a Temporary Restraining Order is Sought

See § 5297, Comment.

7. Motion for Temporary Restraining Order and Preliminary Injunction

See § 5297, Comment No. 4.

8. Converting Temporary Restraining Order in Effect to a Preliminary Injunction

It would be possible to continue a temporary restraining order obtained after a hearing so that it would be effective pending final determination of the entire suit and thus in effect convert it into a preliminary injunction, but findings of fact and conclusions of law would be necessary. A temporary

11. See §§ 1525, 1526, and § 1526, Comment.

12. See discussion in Barron & Holtzoff (Wright), Federal Practice and Procedure, § 1433.

13. Written opinions contain recitation of or reference to other procedures

without comment. For example, see *MacCormick v. McCoy*, D.C.Mo.1950, 94 F.Supp. 772 (temporary restraining order with order to show cause why preliminary injunction should not issue).

14. See forms in §§ 5286-5288.

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restraining order could not be so continued by the terms of Rule 65(b).¹⁵ However, a temporary restraining order could probably be converted by consent.¹⁶

9. Verification of Complaint and Affidavits

Rule 65 does not require that the complaint be verified in order to serve as the basis for a preliminary injunction. However, if the complaint is to be used to establish facts (and thus in effect is to be used as an affidavit), it has been held that it must be verified.¹⁷ For this purpose the complaint may be verified by separate affidavit.¹⁸ Affidavits may be used at hearings and in fact, with permission of the judge, oral testimony could be taken and other evidence could be admissible.

However, it should be noted that the complaint must allege grounds for injunctive relief.¹⁹

10. Security

Security requirements are discussed in § 5323, Comment.

11. Dissolving or Vacating Preliminary Injunctions

See § 5293, Comment.

12. Orders Granting and Denying Preliminary Injunctions and Temporary Restraining Orders

See § 5327, Comment.

13. Grounds for Preliminary Injunctions—Persons Affected

The grounds for preliminary injunctions and persons affected are discussed in Barron & Holtzoff (Wright), Federal Practice, Secs. 1431, 1433, and 1437. Rule 65 has no effect on jurisdiction or grounds for issuing injunctions.

14. Statutes Related to Rule 65

Rule 65(a) provides, "These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges."

15. Under the terms of Rule 65(b), a temporary restraining order which was extended beyond the two 10-day periods mentioned in Rule 65(b) was held not to be a valid restraining order. National Mediation Board v. Air Line Pilots Ass'n, International, C.A.D.C. 1963, 323 F.2d 305.

16. See also § 5303, Comment.

17. Thermex Co. v. Lawson, D.C.Ill. 1939, 25 F.Supp. 414.

18. Brown v. Bernstein, D.C.Pa.1943, 49 F.Supp. 497.

19. See Barron & Holtzoff (Wright), Federal Practice and Procedure, § 1433.

Statutes affecting injunctions as between employer and employee include 29 U.S.C.A. § 101 et seq. (the Norris La Guardia Act) and 29 U.S.C.A. § 160(e)-(1) (concerning the obtaining of injunctions in connection with unfair labor practices, etc.). For injunctions in interpleader cases see §§ 3016-3018. For three-judge court procedures see Chapter 76.

15. Injunctions and Restraining Orders in Three-Judge Court Cases Under 28 U.S.C.A. § 2284

It is important to refer to the related forms regarding three-judge courts in Chapter 76.

16. Consolidation of Hearing on Preliminary Injunction with Trial on Merits

The provision of Rule 65(a) concerning consolidation with the trial on the merits is explained by the 1966 Advisory Committee Note as follows,

"Subdivision (a) (2). This new subdivision provides express authority for consolidating the hearing of an application for a preliminary injunction with the trial on the merits. The authority can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application will be relevant to the merits and will be presented in such form as to qualify for admission on the trial proper. Repetition of evidence is thereby avoided. The fact that the proceedings have been consolidated should cause no delay in the disposition of the application for the preliminary injunction, for the evidence will be directed in the first instance to that relief, and the preliminary injunction, if justified by the proof, may be issued in the course of the consolidated proceedings. Furthermore, to consolidate the proceedings will tend to expedite the final disposition of the action. It is believed that consolidation can be usefully availed of in many cases.

"The subdivision further provides that even when consolidation is not ordered, evidence received in connection with an application for a preliminary injunction which would be admissible on the trial on the merits forms part of the trial record. This evidence need not be repeated on the trial. On the other hand, repetition is not altogether prohibited. That would be impractical and unwise. For example, a witness testifying comprehensively on the trial who has previously testified upon the application for a preliminary injunction might sometimes be hamstrung in telling his story if he could not go over some part of his prior testimony to connect it with his present testimony. So also, some repetition of testimony may be called for where the trial is conducted by a judge who did not hear the application for the preliminary injunction. In general, however, repetition can be avoided with an increase of efficiency in the conduct of the case and without any distortion of the presentation of evidence by the parties.

"Since an application for a preliminary injunction may be made in an action in which, with respect to all or part of the merits, there is a right to trial by jury, it is appropriate to add the caution appearing in the last sentence of the subdivision. In such a case the jury will have to hear all the evidence bearing on its verdict, even if some part of the evidence has already been heard by the judge alone on the application for the preliminary injunction.

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PRELIMINARY INJUNCTIONS

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"The subdivision is believed to reflect the substance of the best current practice and introduces no novel conception."

Sections 5272 and this section suggest a form for consolidation authorized by Section 65(a). Ordinarily it would appear desirable for the plaintiff to include the application for consolidation in the motion for a preliminary injunction, rather than to make a separate motion such as that suggested in § 5272, if consolidation is desired. However, it seems possible that the defendant might under some circumstances desire consolidation, and apparently he could then make a motion such as that in § 5272.

§ 5272. **Motion for Consolidation of Hearing on Preliminary Injunction with Trial of the Action**

[F.R.C.P. Rule 65(a)]

[*Title of Court and Cause*]

Defendant, _____, moves that the trial on the merits be advanced and consolidated with the hearing on plaintiff's application in this action for a preliminary injunction.

The grounds in support of this motion are as follows: A substantial part of the evidence offered on plaintiff's said application will be relevant to the merits and will be presented in such form as to qualify for admission at the trial proper. Such evidence includes evidence

_____. Repetition of evidence will be avoided, no delay in the disposition of the application for preliminary injunction will result from consolidation, and the final disposition of the action will be expedited.

Respectfully submitted,

Attorney for Plaintiff.

Address: _____

Cross Reference

See § 5271, Comment.

§ 5273. **Motion for Preliminary Injunction—Enjoining Defendant from Using Information Acquired from Employment with Plaintiff**

[F.R.C.P. Rule 65(a)]

[*Title of Court and Cause*]

The plaintiff, _____ Inc., moves the Court for a preliminary injunction in the above entitled cause enjoining the defendant _____, his agents, employees and all other persons, firms or corporations, acting or claiming to act in his behalf, or in concert with him: (1)