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The Way to Stay

FOCUS COLUMN

By Benjamin G. Shatz and Christopher D. LeGras

The hearing did not go well and the judge has issued a mandatory injunction against your client. Obviously your client does not want to have to comply with the injunction, and is willing to appeal the adverse order. But does merely filing an appeal relieve the client from having to comply? It depends on whether the order comes from a state or federal court.

Under California law, perfecting an appeal from a mandatory injunction automatically stays the injunction. *Paramount Pictures Corp. v. Davis*, 228 Cal.App.2d 827 (1964). There is no comparable automatic stay in federal practice. Instead, any stay pending appeal is at the discretion of the district judge - the same judge who ordered the injunction in the first place - or the Court of Appeal.

Under Section 916(a) of the California Code of Civil Procedure, the perfecting of an appeal stays the proceedings below. While numerous exceptions to this general rule render it toothless in most situations, it applies with full force to mandatory injunctions. The trial court has no authority to hinder the stay of a mandatory injunction once an appeal is perfected, unless a specific statute provides otherwise. *Agricultural Labor Relations Bd. v. Superior Court*, 149 Cal.App.3d 709 (1983). The reason is straightforward: A mandatory injunction works a change in the status quo, and therefore a stay is necessary to preserve the parties' positions and prevent the Court of Appeal's decision from being mooted. This automatic stay applies only to mandatory, and not prohibitory, injunctions. And the appeal does not completely divest the trial court of jurisdiction; the trial court may continue to "proceed upon any other matter embraced in the action and not affected by the judgment or order" on appeal. Cal. Code Civ. Proc. Section 916(a). And the trial court has inherent authority to modify the injunction. See 6 Witkin, Cal.Proc.4th (1997) Prov. Rem. Section 396.

Stays on appeal from mandatory injunctions in federal court are not automatic. A party must affirmatively demonstrate entitlement to a stay based on the circumstances of the case. Typically, this means asking the district court for a stay, and if unsuccessful there, asking the appeals court. At both levels, stays pending appeal are entirely a matter of judicial discretion.

The first step is to ask the district court for a stay under Federal Rule of Civil Procedure 62(c). Success at this level may be difficult, however, because the same judge already has determined that a mandatory injunction should be imposed. If asking the district court for a stay would be impracticable, then one may ask the appeals court in the first instance. *Chemical Weapons Working Group v. United States Dept. of the Army*, 101 F.3d 1360 (10th Cir. 1996). The better practice is to give the district court the first opportunity to grant or deny relief; the appeals court will expect this. See Schwarzer, et al., Cal. Prac. Guide Fed. Civ. Pro. Before Trial (Rutter Group 2005) Section 13:220.

If the district court denies a stay, the next step is to petition the appeals court under Federal Rule of Appellate Procedure 8(a). Such a motion must explain that the district court denied a stay and must supply the reasoning for that denial. In addition, the motion must explain why a stay is appropriate, supported by facts in the record or other sworn statements. Again the chances of success may not be good. The standard of review is for abuse of discretion, and the appeals court will defer to the district court's analysis. *Regents of University of California v. ABC*, 747 F.2d 511 (9th Cir. 1984).

The district court and appeals court apply the same four-factor test when determining whether to issue an injunction in the first instance. In *Hilton v. Braunskill*, 481 U.S. 770 (1987), a New Jersey prison inmate successfully petitioned the district court for habeas corpus, and the court ordered mandatory injunctive relief, i.e., his release. The district court and the 3rd U.S. Circuit Court of Appeals both denied the state's motion for a stay of the injunction pending appeal. The Supreme Court vacated the 3rd Circuit's ruling and set forth a four-part test for a stay: (1) whether the stay applicant has made a strong showing of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the

stay will substantially injure other parties; and (4) where the public interest lies. Following the Supreme Court, most circuit courts subsequently adopted verbatim the *Hilton* test for stays of mandatory injunctions pending appeal.

The 9th Circuit typically applies an analysis that pre-dates *Hilton* and slightly varies from that test. Under *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983), a moving party may show either (1) a probability of success on the merits and the likelihood of irreparable injury; or (2) that serious legal questions are raised and that the balance of hardships tilts sharply in its favor. These two prongs are not mutually exclusive, but form part of a sliding scale continuum. As one court subsequently noted, "the required degree of irreparable harm increases as the probability of success decreases." *Oakland Tribune Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374 (9th Cir. 1985).

Even though *Lopez* pre-dates *Hilton*, many California district courts continue to apply the *Lopez* "sliding scale" analysis instead of the *Hilton* test. See *General Teamsters Union Local No. 439 v. Sunrise Sanitation Services, Inc.*, 2006 WL 2091947 (E.D.Cal. July 26, 2006), and *Miller v. Carlson*, 768 F.Supp. 1341 (N.D. Cal. 1991).

Other California district courts reject *Lopez*. For example, in *Environmental Protection & Information Center v. U.S. Forest Service*, 2006 WL 2084856 (E.D.Cal. July 25, 2006), the plaintiff relied on the *Lopez* "sliding scale" analysis in seeking a stay. The court denied the request, citing *Hilton*. See also *Faurot v. Barton*, 2006 WL 2669317 (E.D.Cal. Sept. 18, 2006) (applying Hilton).

To further confuse matters, since the two prongs of the *Lopez* analysis are not clearly delineated, courts apply them inconsistently. Some courts simply weigh the probability of success on the merits against the potential injury should the injunction remain in force. The greater the potential harm, the less is needed to show a likelihood of success, and vice versa. E.g., *U.S. v. Midway Heights County Water District,* 695 F.Supp. 1072 (E.D. Cal. 1988). Other courts analyze the seriousness of the legal questions relative to the balance of hardship. *Bates v. Jones*, 958 F.Supp. 1446 (C.D. Cal. 1997). And one court even blended the elements of the two tests, treating probability of success and serious legal questions as one consideration, and irreparable harm and balance of hardships as another. *Protect Our Waters v. Flowers*, 377 F.Supp.2d 882 (E.D. Cal. 2004).

In most cases, whether the court follows *Hilton* or *Lopez*, the result will be the same. But it is possible that a court's choice of authority could affect the outcome of a stay request. For example, in one case, a district court analyzed all four *Hilton* factors, and concluded that, even though plaintiffs had made a strong showing of likely success on the merits, "because Plaintiffs have not made a strong showing as to the other three *Hilton* factors, the Court declines to give the Plaintiffs a 'break' on the question of strong likelihood of success on the merits." *Digital Communications Network, Inc. v. AB Cellular Holding*, 1999 WL 1044234 (C.D. Cal. Aug. 19, 1999). In contrast, under the *Lopez* analysis, the strong showing of success on the merits alone might suffice for a stay.

As a practical matter, inconsistency in district court rulings should not alter one's strategy in seeking a stay. Both lines of cases require the presentation of essentially the same elements, albeit in different ways. While a *Hilton* court is more likely to balance all four elements, a *Lopez* court will zero in on the one or two it finds most compelling.

Appealing from a mandatory injunction is no straightforward affair, and practitioners should be aware of the major difference between state and federal practice. Diligent practitioners must recognize the subtle difference between the *Hilton* four-factor test and the 9th Circuit's hybrid *Lopez* two-step analysis - and which version of *Lopez* may come into play. Finding earlier rulings on stay requests from your particular judge may prove useful. In any event, the soundest approach is to diligently prepare a request and make the strongest arguments why your client's interests will be irreversibly harmed by having to comply with the injunction pending appeal.

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