FROM THE
BAR
SPRING 2008 • ISSUE 40

"When a substantive rule of Puerto Rico law for the issuance of preliminary injunctions in dealer contract cases clashes with a federal procedural rule, is there a doubt as to which one should apply?"

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By way of introduction, we are writing about the interplay between Puerto Rico's dealer contract law (commonly known as "Law 75") and Rule 65(c) of the Federal Rules of Civil Procedure.

Because Law 75 is a public policy remedial statute, the cases have interpreted its provisions liberally to allow the issuance, by a federal court sitting in diversity, of a preliminary injunction based on proof of a dealer's contract and a prima facie showing of lack of just cause, but without evidence of irreparable harm or a showing of an inadequate remedy at law.

Normally, a federal court would not grant a preliminary injunction under Federal Rule 65 without a showing that the traditional prerequisites for injunctive relief (that most of us as trial lawyers know well) have been satisfied. Thus, we believe that there is potential conflict between a state substantive rule and a federal rule of civil procedure.

First Circuit cases have held, without addressing the "Hanna v. Plummer

issue" (380 U.S. 460 (1965)) that results from the clash between FRCP 65(c) and Law 75, that the "Erie doctrine" (Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)) requires a federal court in diversity cases to apply Puerto Rico's substantive norms, and that Law 75 is substantive and does not require a showing of irreparable harm or even likelihood of success on the merits. Waterproofing Systems v. Hydro-Stop, 440 F.3d 440 (1st Cir. 2006), citing De Moss v. Kelly Services, 493 F.2d 1012, 1015 (1st Cir. 1974); accord Re-Ace v. Wheeled Coach Industries, 363 F.3d 51 (1st Cir. 2004).

The issue is not as clear cut as it may seem. In V. Suarez v. Dow Brands, 337 F. 3d 1 (1st Cir 2003), the First Circuit had said that "[t]he statutory provision for preliminary injunctive relief [in Law 75] neither specifies nor forbids that

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The Federal Bar Association Newsletter
Puerto Rico Chapter

The interplay between Puerto Rico's Law 75 and Rule 65(c) of the Federal Rules of Civil Procedure

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the dealer show a likelihood of success on the merits, 10 P.R. Laws Ann. § 278b-1, and the case law appears to be divided on whether there is such a requirement. See Luis Rosario, Inc. v. Amana Refrigeration, Inc., 733 F.2d 172, 173 (1st Cir.1984); Cobos Liccia v. DeJean Packing Co., 24 P.R. Offic. Trans. 896 (1989); Systema de Puerto Rico, Inc., supra."

To further complicate things, precedents of other circuits are at odds with the First Circuit. Following Hanna, other circuits that have confronted conflicting state substantive laws, have applied federal procedural standards to determine the appropriateness of issuing a preliminary injunction. See e.g. Ferrero v. Associated Materials, Inc., 923 F.2d 1441, 1448 (11th Cir. 1991)(Federal Rule 65 displaces Georgia's substantive law that presumes that injunctions are appropriate remedies except in limited circumstances); Southern Milk Sales, Inc. v. Martin, 924 F.2d 98, 102 (6th Cir. 1991)(FRCP 65 overrides a Michigan statute that requires the granting of injunctive relief to restrain acts that encourage breach of contracts).

If it is an absolute certainty that Law 75 overrides FRCP 65(c) in diversity cases, then it would be difficult to reconcile that reasoning with the First Circuit's holding in Gil de Rebollo v. Miami Heat, 137 F.3d 56 (1st Cir. 1998), that Federal Rule of Civil Procedure 68 (attorney's fees are not recoverable even if a monetary judgment is less than a valid offer) preempts Puerto Rico's substantive standards in Rule of Civil Procedure 35.[1] (which does allow attorney's fees). The explanation could be as simple as that the Miami Heat panel conducted a Hanna v. Plummer analysis that other panels in the cases construing Law 75 may have overlooked because it was not raised on appeal.

We think that a valid argument can be made that federal courts, even in diversity cases, are required to follow federal procedural standards under Hanna v. Plummer when in conflict with state substantive law, including Law 75. The argument goes that FRCP 65 would preempt Law 75, as applied, unless a federal court has the power to grant a preliminary injunction without a showing of irreparable harm, likelihood of success on the merits and inadequacy of legal remedies.

The seeds of this controversy may have begun in Aybar v. F&B Mfg. Co., Inc., 498 F. Supp. 1184 (D.P.R. 1980). There, the district court (Pérez-Giménez, J.) held that, to prevail on a motion for a preliminary injunction under Law 75, a plaintiff has the burden to establish irreparable injury, convince the court that the balance of injury favors the granting of an injunction, and make a showing of a probability of success at trial on the merits. In fact, the court recognized that "in order to grant the remedy there has got to be a showing of irreparable injury or probability of success on the merits" (Our emphasis) Aybar v. F&B Mfg. Co., Inc., 498 F.Supp. at 1192.

The district court addressed specifically the question "whether the rules of civil procedure are applicable or not to the remedies issued under 10 L.P.R.A. 278(b)(1)" and determined that they were. Id. After considering the legislative history and the judicial reality that gave rise to the adoption of the injunctive remedy in Law 75, the district court held that such incorporation was intended to clear whatever doubts existed as to the faculty of the courts to order provisional remedies in lawsuits involving distribution contracts. However, it was made clear that the enactment of Article 3-A of Act 75 "did not intend to create a sui generis injunctive relief completely divorced from procedural safeguards." Id., at 1192. Further, the court stated that injunctive relief contemplated in Act 75 is not independent or divorced from the provisions of the Rules of Civil Procedure. While it recognized certain flexibility in granting the remedy, the court said that such flexibility was "not a detraction from the procedural safeguards". Id.[1]

Later, in Picker Int'l v. Kodak Caribbean, Ltd., 826 F. Supp. 610 (D. P.R. 1993), the district court (Laffitte, J.) recognized the trend in the case law of the Supreme Court of Puerto Rico to consider both the equity tests established in the classic injunction case law, as well as the public policy behind the enactment of Law 75, in considering whether to issue the injunctive relief contemplated in the Act. (Citing Systema de Puerto Rico, Inc. v. Interface Int., Inc., 123 D.P.R. 379, 23 P.R. Offic. Trans. 379, at 6 (1989)).

In the Picker Int'l v. Kodak Caribbean, Ltd. decision, the court emphasized that decisions of the Puerto Rico Supreme Court on Law 75 support the proposition that there is no material difference between the criteria used to consider an injunction under Law 75 and the standards applicable to traditional preliminary injunctions:

"The moving party has the burden of showing why the request for preliminary injunction should be granted. Cobos Liccia v. Dejean Packing Co., 89 JTS 104, 7253 (1989). Courts should not be quick to issue preliminary injunctions in these cases; the equities and interests of all sides must be carefully considered. Systema, 89 JTS at 6655, English translation at 6. In evaluating a request for a preliminary injunction under Law 75, a court must consider (1) the public policy of the law, (2) the interests of the parties, and (3) whether the plaintiff is a dealer. Cobos Liccia, 89 JTS at 7254; P.R. Laws Ann. tit. 10, § 278b-1.

The first two criteria mentioned above — public policy and the parties' interests — are similar to the traditional

1 The district court in Aybar further stated that the ruling in DeMoss v. Kelly Services, 493 F.2d 1012, 1015 (1st Cir. 1974), could "in no way impl[y] that the provisional remedies comprised in Public Law 75 are independent from the provisions of the Rules of Civil Procedure."

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test for a preliminary injunction. The traditional test has four factors: the threat of an irreparable injury to the moving party; a balancing of the relevant equities, especially with regard to potential harm to the nonmoving party; the likelihood that the moving party will ultimately succeed on the merits; and whether an injunction would serve the public interest. Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 5 (1st Cir. 1991). The Law 75 requirements to consider the parties' interests and the law's public policy would necessarily require a court to consider whether there exists a threat of irreparable injury to the plaintiff. These Law 75 requirements would also require the court to balance the relevant equities, especially with regard to the potential harm that a preliminary injunction would have on the nonmoving party. Additionally, a consideration of the public policy of Law 75 would involve an examination of whether there was just cause for the termination of the contract. This would in effect be an examination of the movant's likelihood of success. See Luis Rosario, Inc. v. Amana Refrigeration, Inc., 733 F.2d 172, 173 (1st Cir. 1984). (Our emphasis, footnotes omitted). 826 F. Supp. at 613.

In Systema de Puerto Rico v. Interface Int'l, supra, the Puerto Rico Supreme Court was faced with the question of which test controls the issuance of the statutory remedy established in Article 3-A of Law 75. The controversy arose when the trial court did not deem it necessary to examine and apply the traditional test laid down by the case law when dealing with the issuance of the classical injunction. Consequently, the issue raised on appeal was that the court below had erred in failing to consider traditional injunction tests when passing on the advisability of issuing the provisional remedy under Article 3-A of Law 75. Ultimately, the injunction was reversed as invalid.

In addressing the controversy, the court discussed the origins and enactment of Article 3-A of Law 752 and concluded that the courts were expressly required, by way of Article 3-A, "to consider the interests of the parties and the socioeconomic purpose of this legislation when making the balance of equities in passing on the convenience of issuing a temporary remedy." Id., at 387. However, the court advised that judicial discretion was not to be exercised automatically, "[a] thorough examination of the evidence and a careful balance of the interests and equities of the parties is necessary". Id.

> THE TRADITIONAL TEST HAS FOUR FACTORS: THE THREAT OF AN IRREPARABLE INJURY TO THE MOVING PARTY; A BALANCING OF THE RELEVANT EQUITIES, ESPECIALLY WITH REGARD TO POTENTIAL HARM TO THE NONMOVING PARTY; THE LIKELIHOOD THAT THE MOVING PARTY WILL ULTIMATELY SUCCEED ON THE MERITS; AND WHETHER AN INJUNCTION WOULD SERVE THE PUBLIC INTEREST.

Thus, far from holding that a showing of irreparable injury or probability of success in the case on the merits should be ignored or excluded from the analysis, as suggested in dicta in De Moss v. Kelly Services, Inc., 493 F.2d at 1015, the Supreme Court of Puerto Rico addressed this specific question and held that "[t]o exercise their functions in a responsible manner, the courts should apply the equity tests established in the classical injunction case law, tempered for purposes of Act No. 75."[3]

If judicial flexibility were to be enough to grant injunctive relief under Law 75 in appropriate cases, without or with a lesser a showing of irreparable harm and probability of success on the merits, — as De Moss v. Kelly Services, supra, suggests via dicta — such a proposition would collide directly with FRCP 65. One would think that Law 75, as interpreted by Puerto Rico's Supreme Court, can coexist with FRCP 65 and that no real collision exists. However, in Waterproofing Systems the First Circuit recently reinforced a real conflict that may have existed since De Moss by affirming a preliminary injunction without the required equitable showings. And, a direct conflict with a federal rule of civil procedure that applies to the issue would, under Hanna v. Plummer, 380 U.S. 460 (1965), displace and preempt state substantive law. See Gil de Rebollo v. Miami Heat, 137 F.3d 56 (1st Cir. 1998) (holding that FRCP 68 preempts Puerto Rico Rule 35.1 for there is a direct collision as Rule 68 does not allow recovery of attorney's fees as part of costs even if Rule 35.1 were considered substantive law).

The court's dicta in De Moss v. Kelly, supra, and First Circuit progeny, may be inconsistent with the interest of uniformity in federal procedure that Hanna, 380 U.S. at 463, sought to reinforce. The Supreme Court established a test to determine how a court should choose between a federal

2 In its analysis, the court referred to legislative debates during the enactment of Article 3-A, in which the existence of irreparable damages was a salient concern and thus an important criteria for judicial consideration: "approval of this measure would clearly establish the courts' discretion to grant provisional remedies, thus precluding acts which could cause irreparable damages, while the question of whether or not there is just cause for the termination of the contractual relation is being elucidated." Report of the Senate Committee on Industry and Commerce on H.B. 1275 and S.B. 943, 25 Diario de Sesiones 831." (Our emphasis) Systema, 123 D.P.R. at 386.

3 The Supreme Court of Puerto Rico went further to hold that "[t]he equitable nature of this remedy also allows the use of classical defenses of laches, clean hands, and estoppel." Systema, 123 D.P.R. at 387.

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procedural rule and a conflicting state substantive rule: where a Federal Rule is sufficiently broad to cover the point in dispute, but conflicts with a state law, the court must apply the Federal Rule unless it transgresses the limits of the Rules Enabling Act or the Constitution. Hanna v. Plummer, 380 U.S. at 471-72 ("The Erie rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that Erie commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, Erie commanded the enforcement of state law"); Gil de Rebollo v. Miami Heat, 137 F.3d at 65 (citing Commercial Union Ins. Co. v. Walbrook Ins. Co., 41 F.3d 764, 772 (1st Cir. 1994); Daigle v. Maine Med. Ctr., Inc., 14 F.3d 684, 689 (1st Cir. 1994).

The provisional remedies under Article 3-A of Law 75 provide the following:

> In any litigation in which there is... involved the termination of a dealer's contract..., the Court may grant, during the time the litigation is pending resolution, any provisional remedy... ordering any of the parties, or both, to continue, in all its terms, the relation established by the dealer's contract, and/or to abstain from performing any act or any omission in prejudice thereof. In any case in which the provisional remedy herein provided is requested, the Court shall consider the interests of all parties concerned and the purposes of the public policy contained in this chapter.

FRCP 65 and its interpretive case law prescribe the manner and the conditions under which a federal court may or may not grant a preliminary injunction. In the First Circuit, every federal district court looking to determine the appropriateness of granting or denying a preliminary injunction under Rule 65, shall use a quadripartite test, taking into account: (a) the threat of an irreparable injury to the moving party[4]; (b) a balancing of the relevant equities, especially with regard to potential harm to the nonmoving party; (c) the likelihood that the moving party will ultimately succeed on the merits[5]; and (d) whether an injunction would serve the public interest. Sampson v. Murray, 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974) (satisfaction of four prong test is mandatory); Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 5 (1st Cir. 1991).

The federal procedural standards have been codified by reference in FRCP 65. See generally Wright & Miller, Federal Practice and Procedure: Civil § 2943 (1973). Accordingly, FRCP 65(c), as applied, is sufficiently broad to cover the point in dispute under the Hanna v. Plummer analysis so that if Law 75 departs from the equitable standards a collision with the Federal Rule is inevitable.

As previously discussed, with the enactment of Article 3-A, the Puerto Rico legislature did not contemplate an ample and unrestricted equitable right, but merely a clarification as to the use of a remedy not divorced from the procedural safeguards embodied in the Rules of Civil Procedure. The fact that the burden is less stringent and a court has flexibility in granting the remedy should not detract from the federal procedural safeguards.

To sum up, the First Circuit should consider, en banc, the issue whether there is a real conflict between FRCP 65 and Law 75 in the applicable standards for preliminary injunctions in diversity cases, and if there is, whether the equitable standards embodied in FRCP 65(c) preempt Law 75 as applied. Unless the First Circuit takes a different approach from the cases decided and published by various panels, an actual conflict exists with decisions of the Sixth and Eleventh Circuits (and possibly Supreme Court precedent) that could be ripe for Supreme Court review.

4 "[I]rreparable harm is not assumed; it must be demonstrated [and] speculative injury does not constitute a showing of irreparable harm." Narragansett Indian Tribe v. Guilbert, 934 F.2d at 6-7.

5 "Likelihood of success cannot be woven from the gossamer threads of speculation and surmise". Narragansett Indian Tribe v. Guilbert, 934 F.2d at 6.

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tic Violence (through which an automated system will be developed to register all protection warrants); and the creation of Controlled Substances Specialized Courtrooms (Drug Courts).

RELATIONS WITH THE U.S. DISTRICT COURT

At the conclusion of his presentation, Hon. Hernández Denton made an important announcement: the acceptance of an invitation from U.S.D.C. Chief Judge José Antonio Fusté to form part of a Committee on Relations with the Commonwealth of Puerto Rico Judiciary, created by the Federal Court.

Hon. Hernández Denton congratulated Chief Judge Fusté and all the judges of the U.S. District Court for the District of Puerto Rico for this initiative, and both Chief Judges expressed great satisfaction with the initiative to tighten the relations of both forums. This Committee will allow the coordination of resources on legal education and enlarge the judges' participation in legal conferences, among other things. Further, it will permit both courts to take the necessary initiatives to defend the legal independence of all judges.