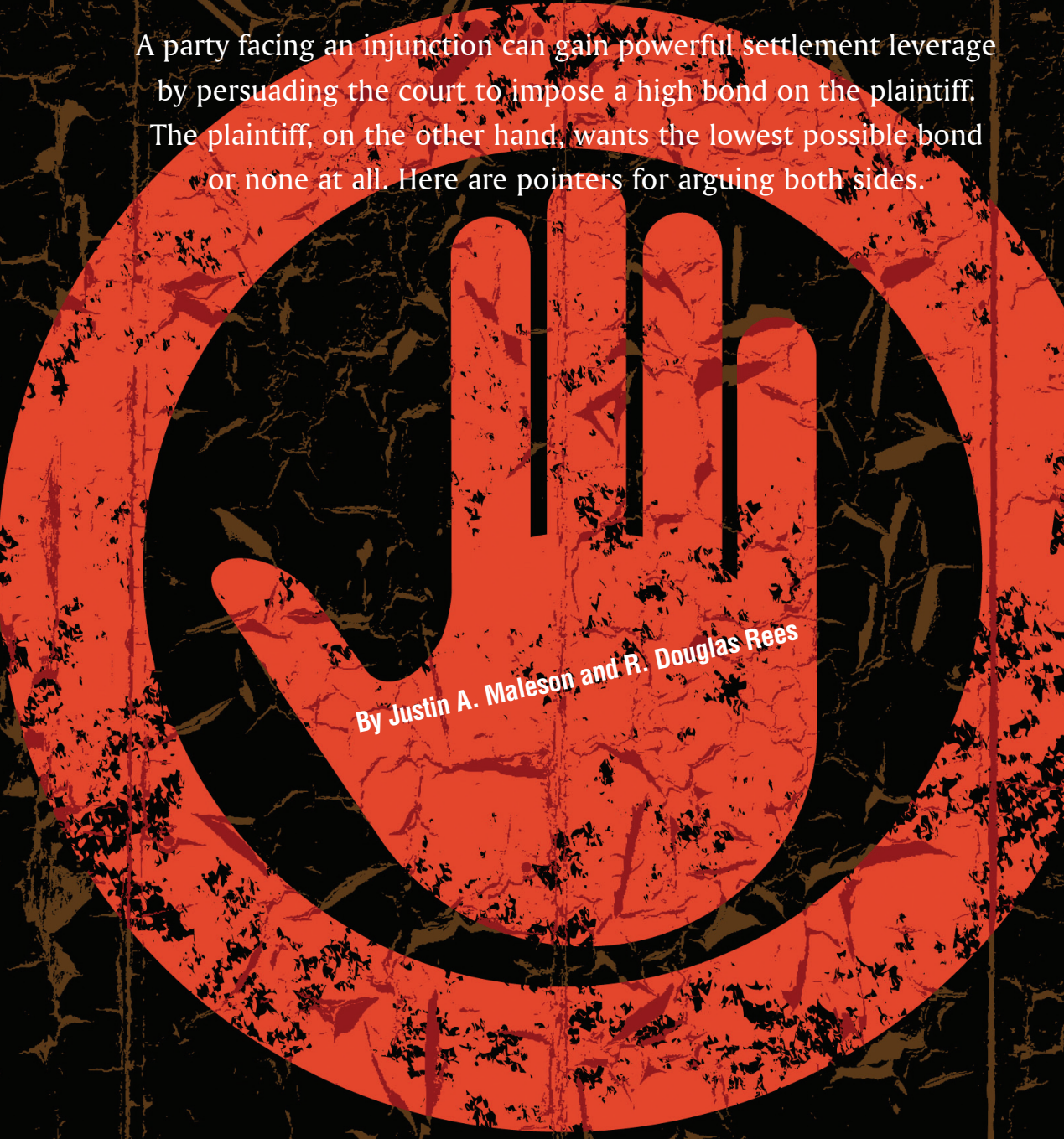


# A Practical Guide to Injunction Bonds Under Illinois Law

A party facing an injunction can gain powerful settlement leverage by persuading the court to impose a high bond on the plaintiff. The plaintiff, on the other hand, wants the lowest possible bond or none at all. Here are pointers for arguing both sides.



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**I**njunction bonds are designed to protect the subject of a temporary restraining order (TRO) or preliminary injunction<sup>1</sup> if the court later rules that it shouldn't have been issued. Failing to address the bond issue up front can result in missed opportunities for both sides.

A party that faces an injunction may be able to halt the moving party's momentum and gain leverage by persuading the court to impose a high bond. On the other hand, a party seeking an injunction should be prepared to seek the lowest possible bond.

This article addresses the bond issue under Illinois law from the perspectives of the parties seeking and opposing an injunction.

### **What can the plaintiff argue to avoid posting a substantial bond (or any bond at all)?**

As the moving party, you've just persuaded the court to enter a TRO when, without hesitation, the enjoined party asks the court to impose a high bond on your client. The last thing you want to do is win an injunction, only to have the court impose a bond that is more than your client can afford. The goal now is to persuade the court to require no bond or, at a minimum, the lowest possible bond justified by the record.

Because you've already established credibility in convincing the court to enter the injunction, use that to your advantage and keep the bond argument simple. Here are points to consider in making your case.

**Under Illinois law, whether to impose a bond is within the court's discretion.**<sup>2</sup> The amount of a bond also is within the court's discretion.<sup>3</sup> The court's discretion is so broad that the refusal to require a bond, even if erroneous, does not void the injunction order.<sup>4</sup>

**Show that the record provides "good cause" for not requiring a bond.** The record must show that "good cause" exists for the court to issue an injunction without bond.<sup>5</sup> This can be accomplished by alleging facts in the complaint or submitting affidavits showing that issuing the injunction without bond is the proper course of action.<sup>6</sup>

**Courts have recognized a variety of factors that weigh in favor of issuing an injunction without bond or with a low bond.** These include:

- No likelihood of harm to enjoined party.<sup>7</sup>
- Hardship to moving party.<sup>8</sup>
- Not-for-profit status of moving party.<sup>9</sup>
- No need for bond where movant has a history of satisfying debts to enjoined party.<sup>10</sup>
- Potential harm alleged by enjoined party includes remote or speculative

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### **A party that fails to request a bond or object to the lack of a bond waives the issue.**

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damages that are not recoverable, even if the injunction is later found to have been wrongfully issued.<sup>11</sup>

In short, keep the bond argument simple. Focus on the court's discretion, the facts showing "good cause" for imposing no or low bond, and examples from case law where courts entered an injunction with no or low bond under similar circumstances.

### **What can the defendant argue to get a bond?**

Despite your best efforts, the court just entered a preliminary injunction against your client. Now's the time to go on the offensive. The goal is to persuade the court to impose a bond that is as high as possible (see below). This will help you gain leverage and force the plaintiff to be more serious in settlement discussions.

It may also force the plaintiff to rethink whether it wants to expose itself to the risks associated with a wrongfully entered injunction. The plaintiff may be unable to post the bond or pay damages if the court later finds the injunction was

1. "[A] temporary restraining order issued with notice and a preliminary injunction issued with notice are the same type of relief...." *In re Estate of Wilson*, 373 Ill. App. 3d 1066, 1075 (1st Dist. 2007) (quotations omitted).

2. 735 ILCS 5/11-103.

3. *Id.*; see also *New York Bank Note Co. v. Kerr*, 77 Ill. App. 53, 54 (1st Dist. 1898).

4. 735 ILCS 5/11-103; see also *Save the Prairie Society v. Greene Development Group, Inc.*, 338 Ill. App. 3d 800, 804 (1st Dist. 2003); *American Warehousing Services, Inc. v. Weitzman*, 169 Ill. App. 3d 708, 713 (1st Dist. 1988); *K.E.K. Corp. v. American Continental Homes, Inc.*, 31 Ill. App. 3d 1017, 1021 (2d Dist. 1975).

5. *Hill v. Village of Pawnee*, 16 Ill. App. 3d 208, 210 (4th Dist. 1973).

6. See *Flanagan v. Knight*, 67 Ill. App. 2d 71, 82 (1st Dist. 1966) ("The facts justifying the issuance of the injunction without bond must be alleged in the complaint..."); *Seay & Thomas, Inc. v. Kerr's, Inc.*, 58 Ill. App. 2d 391, 404 (1st Dist. 1965) (affirming injunction but remanding for hearing on bond where the record was silent as to the reasons for not requiring bond).

7. *Save the Prairie Society*, 338 Ill. App. 3d at 805 ("court may dispense with security where there has been no proof of likelihood of harm to the party enjoined"); *Carriage Way Apartments v. Pojman*, 172 Ill. App. 3d 827, 836 (2d Dist. 1988) (no abuse of discretion where no bond imposed because injunction order required plaintiff to post funds in escrow, and thus, potential for loss to enjoined party was minimal); see also *In re Marriage of Meyer*, 146 Ill. App. 3d 83, 87 (1st Dist. 1986) ("there is insufficient evidence to show that the injunction will impose any financial hardship on plaintiff" who is the "chairman and chief executive officer of a major corporation, earning a substantial salary").

8. *Save the Prairie Society*, 338 Ill. App. 3d at 804 (non-commercial case stating that "party's limited financial resources can provide good cause for requiring no bond"); *Gold v. Ziff Communications Co.*, 196 Ill. App. 3d 425, 436 (1st Dist. 1989) (commercial case stating that "[w]hen imposition of bond would be an undue hardship on plaintiff in a preliminary injunction, it is not an abuse of discretion not to order the imposition of bond").

9. *Save the Prairie Society*, 338 Ill. App. 3d at 804 ("Plaintiff's status as a not-for-profit corporation may warrant waiver of the bond requirement, especially where the corporation serves the public interest."). But see *Rochester Buckhart Action Group v. Young*, 394 Ill. App. 3d 773, 780 (4th Dist. 2009) ("No rule of law states that in every case where the public interest is involved the court may, without any further showing, order the issuance of a temporary injunction without bond." (quotations omitted)).

10. *Falcon, Ltd. v. Cor's Natural Beverages, Inc.*, 165 Ill. App. 3d 815, 822 (1st Dist. 1987) (affirming injunction without bond where "[d]efendants offered no evidence at the hearing to support the notion that a bond was required," plaintiffs "never failed to pay [defendants] for their purchases," and plaintiffs' president "already obtained a \$100,000 line of credit...pledging his personal residence as collateral, to secure the payment of beverages purchased from defendants"); see also *A.J. Dralle, Inc. v. Air Techs., Inc.*, 255 Ill. App. 3d 982, 995 (2d Dist. 1994) (no abuse of discretion for trial court's failure to require bond where the parties "shared a relationship in the industry for several years" and the "record does not indicate that Dralle has failed to pay for its purchases from ATI or has suffered other financial problems during its tenure as distributor for ATI," but reversing injunction on other grounds).

11. *Stocker Hinge Manufacturing Co. v. Darnel Industries, Inc.*, 99 Ill. App. 3d 340, 345-46 (1st Dist. 1981) [hereinafter *Stocker Hinge I*] (holding gift for expert witness, courthouse parking fees, and advertising costs were not recoverable because they were "too remote and indirect"), *rev'd on other grounds*, 94 Ill. 2d 535 (1983); *Cromwell Paper Co. v. Wellman*, 23 Ill. App. 2d 263, 267 (1st Dist. 1959) ("damages which are remote, speculative and incapable of ascertainment cannot be allowed").

wrongfully entered.

Here are points to consider in making your case for a bond.

**Ask for a bond; but at a minimum, object to the lack of a bond.** A party that fails to request a bond or object to the lack of a bond waives the issue.<sup>12</sup>

**Show that the record does not provide “good cause” for refusing to require a bond.** As noted above, although the court has discretion to enter an injunc-

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**In commercial cases, financial hardship to the movant should not be a primary consideration in setting the bond.**

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tion without bond, the record must show “good cause” for the court’s refusal to require a bond.<sup>13</sup> “A mere recital in the injunction order that the bond is excused for good cause shown is insufficient.”<sup>14</sup> Rather, “the facts justifying the issuance of an injunction without bond must be alleged in the complaint.”<sup>15</sup>

**Because a preliminary injunction proceeding allows a party to obtain relief without proving the merits of its case, the bond requirement acts as a safeguard to prevent “spurious litigation.”** Although a party need only raise a “fair question” about the existence of a protectable right to obtain temporary relief,<sup>16</sup> the Illinois Supreme Court has explained that “[t]o allow a party, before a dispute is resolved on the merits, to interfere in the activities of another without being held liable for damages caused by the interference, if proved to be in error, would be inequitable and would invite spurious litigation.”<sup>17</sup> The bond acts as a safeguard against spurious litigation.

**The extraordinary relief of a preliminary injunction is even more extraordinary where no bond is required.** A movant raises a “very serious question” when it asks the court to be excused from providing a bond.<sup>18</sup> “[C]ourts should only issue preliminary injunctions, or temporary restraining orders, without bond with great caution.”<sup>19</sup>

**Arguing for the highest possible bond**

Now that you’ve persuaded the court to impose a bond, here are ways to persuade the court to set the bond as high as possible.

**The purpose of bond is to ensure that an enjoined party will be made whole if it is later determined that the injunction was wrongfully issued.** The purpose in requiring a bond “is to assure defendant that the damages will be paid in the event the preliminary injunction is later dissolved, and damages for the unlawful suing out of the injunction are assessed against plaintiff.”<sup>20</sup>

**The bond requirement is intended to be read in conjunction with the damages requirement; thus, recoverable damages should be considered in setting the bond.** The Illinois Supreme Court has held that “the

party who is wrongfully issued a preliminary injunction is liable for all damages caused by the wrongful issuance.”<sup>21</sup> Section 11-103 (“Bond”) provides that if the court imposes a bond it should be sufficient “for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.”<sup>22</sup> Section 11-110 (“Assessing damages”) provides that in “all cases where a temporary restraining order or a preliminary injunction is dissolved... the circuit court...shall...determine and enter judgment in favor of the party who was injured by such temporary restraining order or preliminary injunction for the damages which the party suffered as a result thereof...”<sup>23</sup> These sections “are intended to be read together, with section 9 [replaced with 11-103] granting to the court the authority to require a bond for damages and section 12 [replaced with 11-110] prescribing the proper procedure to be followed in applying for a damage award.”<sup>24</sup>

**Courts have recognized a variety of damages that a defendant might recover if it shows that the injunction was wrongfully issued.** These include:

- Attorney fees and litigation expenses incurred in dissolving the injunction.<sup>25</sup>
- Lost profits.<sup>26</sup>
- Lost sales.<sup>27</sup>
- Lost employee wages.<sup>28</sup>
- Lost opportunities to solicit poten-

tial customers.<sup>29</sup>

- Harm from delayed expansion of business.<sup>30</sup>

**In commercial cases, financial hardship to the movant should not be a primary consideration in setting the bond.** “Applicants in commercial cases...can be assumed capable of bearing most bond requirements, so hardship to them is less of a factor.”<sup>31</sup> Additionally, in *Schaefer v. Stephens-Adamson Manufacturing*

12. *Central Water Works Supply, Inc. v. Fisher*, 240 Ill. App. 3d 952, 960 (4th Dist. 1993).

13. *Hill v. Village of Pawnee*, 16 Ill. App. 3d 208, 210 (4th Dist. 1973); *Schaefer v. Stephens-Adamson Mfg. Co.*, 36 Ill. App. 2d 310, 316 (1st Dist. 1962); *Town of Cicero v. Wielander*, 35 Ill. App. 2d 456, 469 (1st Dist. 1962).

14. *Town of Cicero*, 35 Ill. App. 2d at 469.

15. *Id.*; see also *Hill*, 16 Ill. App. 3d at 211; *Compton v. Paul K. Harding Realty Co.*, 87 Ill. App. 2d 219, 224 (5th Dist. 1967) [hereinafter *Compton I*].

16. *Buzz Barton & Associates, Inc. v. Giamone*, 108 Ill. 2d 373, 382-83 (1985).

17. *Id.* at 383 (citations omitted); see also *Rochester Buckhart Action Group v. Young*, 394 Ill. App. 3d 773, 780 (4th Dist. 2009).

18. *Schaefer*, 36 Ill. App. 2d at 315.

19. *Hill*, 16 Ill. App. 3d at 210.

20. *Schaefer*, 36 Ill. App. 2d at 315-16; see also *Hill*, 16 Ill. App. 3d at 210; *Hoffman v. City of Evanston*, 101 Ill. App. 2d 440, 444 (1st Dist. 1968).

21. *Buzz Barton & Associates, Inc.*, 108 Ill. 2d at 382; see also *Rochester Buckhart Action Group*, 394 Ill. App. 3d at 780 (reversing trial court’s refusal to award damages and remanding to “allow defendant the opportunity to prove any damages he incurred as a result of the preliminary injunction”); *Compton v. Paul K. Harding Realty Co.*, 6 Ill. App. 3d 488, 497 (5th Dist. 1972) [hereinafter *Compton II*] (wrongfully enjoined party may recover losses that “are the actual, natural and proximate result of the wrong committed by the restraining order” if they are not “so uncertain as to be incapable of ascertainment” (quotations omitted)).

22. 735 ILCS 5/11-103.

23. *Id.* § 5/11-110.

24. *Stocker Hinge Manufacturing Co. v. Darnel Industries, Inc.*, 94 Ill. 2d 535, 544 (1983) [hereinafter *Stocker Hinge I*].

25. *Stocker Hinge I*, 99 Ill. App. 3d at 342, *rev’d on other grounds*, 94 Ill. 2d 535; *Compton II*, 6 Ill. App. 3d at 497.

26. *Stocker Hinge I*, 99 Ill. App. 3d at 345 (“loss of profits” recoverable when “proved to be the ‘actual, natural and proximate result of the . . . restraining order’”), *rev’d on other grounds*, 94 Ill. 2d 535.

27. *Powell v. Home Run Inn, Inc.*, 202 Ill. App. 3d 94, 102 (1st Dist. 1990) (reversing injunction and holding it proper to increase bond based, in part, on sales the enjoined party may have lost during injunction period).

28. *Id.* (considering wages the enjoined party’s employees may have lost during injunction period in holding it proper to increase bond).

29. *Buzz Barton & Associates, Inc. v. Giamone*, 108 Ill. 2d 373, 383 (1985) (holding plaintiff-former employer liable for damages caused by wrongful injunction that prohibited enjoined party from soliciting plaintiff’s customers where plaintiff failed to show a clearly ascertainable right in those customers).

30. *Rochester Buckhart Action Group v. Young*, 394 Ill. App. 3d 773, 780 (4th Dist. 2009) (party wrongfully enjoined from continuing construction of and expanding hog farm was entitled to damages resulting from injunction).

31. *Save the Prairie Society v. Greene Development Group, Inc.*, 338 Ill. App. 3d 800, 805 (1st Dist. 2003) (requiring no bond to support injunction in non-commercial case).

Co., the appellate court held that “the allegation that plaintiffs are ‘substantially without funds’ is ‘good cause’ for the court to require a bond rather than ‘good cause’ to excuse a bond” because it “affirmatively shows that if the injunction were improvidently issued, plaintiffs would be unable to respond for any substantial damages suffered by defendants.”<sup>32</sup>

**The moving party may not post a letter of credit instead of bond.** In *Powell v. Home Run Inn, Inc.*, the appellate court held that the “circuit court abused its discretion by allowing [the movants] to

give letters of credit instead of a bond. The plain language of section 11-103 states that applicants must give bond. Moreover, [the movants] have cited no decisions under this section, and our own research has disclosed no decisions, which support the proposition that letters of credit may be given in lieu of a bond.”<sup>33</sup>

In short, the party seeking a bond should emphasize that the purpose of the bond requirement is to protect the enjoined party from harm caused by a wrongful injunction. Focus on the facts showing that the injunction will expose

your client to substantial and specific harm.

## Conclusion

Important work is just beginning when a TRO or preliminary injunction is issued. These pointers and the supporting law will help you craft a winning argument for or against an injunction bond. ■

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32. *Schaefer v. Stephens-Adamson Manufacturing Co.*, 36 Ill. App. 2d 310, 316 (1st Dist. 1962).

33. *Powell*, 202 Ill. App. 3d at 101-02 (citation omitted).

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