AMERICAN JOURNAL OF TRIAL ADVOCACY

VOLUME 29:2
FALL 2005

CUMBERLAND SCHOOL OF LAW
SAMFORD UNIVERSITY BIRMINGHAM ALABAMA

Settling the Law in the Circuits: Presenting Hearsay Evidence in a Preliminary Injunction Hearing

Michael J. Lichtenstein[†]

Abstract

Although many circuits have settled law allowing the admission of hearsay evidence in preliminary injunction hearings, half of the circuits have not resolved the issue. This Article reviews the law in the various circuits regarding the use of relaxed evidentiary standards at the preliminary injunction stage.

I. Introduction

As any law student who has taken a course in Evidence knows, the use of hearsay evidence,[1] absent some exception,[2] is prohibited in a trial.[3] However, some courts are willing to ignore the hearsay rule when considering requests to issue preliminary injunctions. Many courts have applied a more relaxed evidentiary standard in the context of requests for injunctive relief. The basis for the application of a more relaxed standard is usually the exigent nature of the hearings and the unavailability of more rigorous evidence at this early stage in a case. Some circuits, such as the First, Ninth, and Fifth Circuits, have long settled law allowing the use of hearsay evidence in preliminary injunction hearings. Other circuits, such as the Tenth and the Third Circuits have recently attempted to settle the law regarding the use of hearsay evidence in preliminary injunction hearings. The Seventh Circuit has not definitively allowed the use of hearsay evidence in such proceedings.

[†] B.A. (1979), Brandeis University; M.A., Ph.D. (1982), University of Pennsylvania; J.D. (1988), American University, Washington College of Law. The author is a shareholder in Shulman, Rogers, Gandal, Pordy & Ecker, P.A. of Rockville, Maryland. His practice areas include workouts, bankruptcy litigation, and commercial litigation.

[1] FED. R. EVID. 802. Hearsay is an out of court statement "offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801.

[2] FED. R. EVID. 803, 804 and 807.

[3] FED. R. EVID. 802.

This Article examines the law in the different circuits as to the admissibility of hearsay evidence in preliminary injunction hearings. Trial lawyers should be aware of the law in their jurisdiction, especially in the unsettled circuits. In those circuits, the courts may vary from district to district as to the admissibility of hearsay evidence in preliminary injunction hearings. It is especially important for trial lawyers in those jurisdictions to know the decisions in their circuit and be prepared to argue those holdings in the light most favorable to the facts of their particular cases. However, regardless of whether a trial lawyer is in a settled circuit or an unsettled circuit, that lawyer should be prepared to cite the relevant authorities when seeking to introduce hearsay evidence in a hearing to obtain preliminary injunctive relief.[4]

II. The Preliminary Injunction

In federal court, a request for the issuance of a preliminary injunction is made pursuant to Rule 45 of the Federal Rules of Civil Procedure. "It is well settled that a preliminary injunction is an extraordinary remedy, and that it should not be issued unless the movant's right to relief is 'clear and unequivocal.'"[5] Courts typically apply a four-prong standard to determine whether or not to grant injunctive relief: (1) the likelihood that the moving party will succeed on the merits, (2) the likelihood of harm to the nonmoving party if the injunction is granted, (3) whether the moving party will suffer irreparable injury unless the injunction is granted, and (4) the public interest.[6] Several circuits do not consider all four factors

---

[4] This strategy applies equally to requests for a temporary restraining order.

[5] Heidman v. S. Salt Lake City, 348 F.3d 1182, 1188 (10th Cir. 2003).

[6] *See, e.g.*, Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Sch., 373 F.3d 589, 593 (4th Cir. 2004) (applying the four part balancing test in reversing the district court's denial of appellant's request for preliminary injunction), *remanded to* 368 F. Supp. 2d 416 (D. Md. 2005); McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453, 459 (6th Cir. 1997) (overruling the district court's application of the balancing test based on likelihood of success on the merits); Church v. City of Huntsville, 30 F.3d 1332, 1341-42 (11th Cir. 1994) (reversing the district court's grant of a preliminary injunction based in part on lack of standing and in part on likelihood of success on the merits); Sierra Club v. F.D.I.C., 992 F.2d 545, 551-52 (5th Cir. 1993) (vacating district court's grant of preliminary injunction and remanding for more detailed consideration applying the four part test); Fed. Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495, 499 (4th Cir. 1981) (applying the four part test to the facts of the case); Zervas v. District of Columbia, Civ. A. No. 91-117 SSH, 1992 WL 232089, at *1

equally and instead apply a balancing test when determining whether to grant injunctive relief.[7] For example, the Tenth Circuit has held that, where the movant has established the three "harm" factors tip decidedly in its favor, the probability of success requirement is somewhat relaxed.[8]

In 1981, the United States Supreme Court held that "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits."[9] In *University of Texas v. Camenisch*, a deaf graduate student sued the University for failing to pay for a sign-language interpreter and sought a preliminary injunction.[10] The district court granted an injunction and the Fifth Circuit affirmed, holding that under the "balance of hardships" test the defendant was likely to be successful on the merits.[11] Although the payment issue was moot at this point,[12] the Supreme Court focused on the appropriate standard for issuing a preliminary injunction.[13]

In *Camenisch*, the Supreme Court observed that the limited purpose of a preliminary injunction is merely to preserve the relative positions

---

(D.D.C. July 10, 1992) (unreported decision) (granting plaintiff's motion for preliminary injunction based on the four part balancing test).

[7] *See* Owner Operator Indep. Drivers Ass'n v. Swift Transp. Co., 367 F.3d 1108, 1111 (9th Cir. 2004); *see also* Davenport v. Int'l Bhd. of Teamsters, 166 F.3d 356, 361 (D.C. Cir. 1999) (holding that the four factors of the balancing test "interrelate on a sliding scale and must be balanced against each other"); Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp., 17 F.3d 691, 693 (4th Cir. 1994) (emphasizing that the four factors are not weighted equally); *In re* Eagle-Picher Indus., 963 F.2d 855, 859 (6th Cir. 1992) (noting the four factors are to be balanced against one another and are intended to be flexible).

[8] Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1246 (10th Cir. 2001); *see also* Otero Sav. & Loan Ass'n v. Fed. Reserve Bank of Kan. City, Mo., 665 F.2d 275, 278 (10th Cir. 1981) (holding that "[w]hen the other three requirements for a preliminary injunction are satisfied, 'it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation'") (quoting Continental Oil Co. v. Frontier Ref. Co., 338 F.2d 780, 782 (10th Cir. 1964)).

[9] Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) (citing Progress Dev. Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961)).

[10] 451 U.S. 390, 392 (1981).

[11] *Camenisch*, 451 U.S. at 392-93.

[12] By the time the Supreme Court heard the case, the university had paid for the interpreter, and the student had graduated. *Id.* at 393.

[13] *Id.* at 394.

of the parties until trial.[14] The Court reasoned that, "[g]iven this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits."[15] Because a preliminary injunction hearing is less formal than a full trial, less complete evidence is required for an injunction than at trial.[16] Accordingly, a party is not required to prove a case in full at the preliminary injunction stage, and must only present evidence that proves the elements necessary to warrant a preliminary injunction.[17] However, the Supreme Court's decision in *Camenisch* did not settle the issue of admissibility of hearsay evidence in a preliminary injunction hearing; instead, it only laid the foundation for the circuit courts to independently decide that issue.

III. The Use of Hearsay in a Preliminary Injunction Hearing

A. The Settled Circuits

The circuit courts have decided the issue of admissibility of hearsay evidence in a preliminary injunction hearing independently, with differing results. Out of the twelve federal judicial circuits, only five circuits have allowed the use of hearsay evidence in preliminary injunction hearings, with one circuit implicitly leaning towards admissibility.[18] Of all the

---

[14] *Id.* at 395; *see also* Washington Capitals Basketball Club, Inc. v. Barry, 419 F.2d 472, 476 (9th Cir. 1969) (noting that the purpose of preliminary injunction is to preserve status quo).

[15] *Camenisch*, 451 U.S. at 395; *see also* GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1210 (9th Cir. 2000) (rejecting defendant's contention that the district court's decision altered the status quo of the parties); SKF USA, Inc. v. United States, 316 F. Supp. 2d 1322, 1326 (C.I.T. 2004) (finding that the purpose of preliminary injunction is to preserve relative position of parties).

[16] *See Camenisch*, 451 U.S. at 395. The Supreme Court also noted that findings of fact and conclusions of law made by a court granting injunctive relief are not binding at a trial on the merits. *Id.*

[17] *See id.* A court does have the ability to consolidate a trial on the merits with a hearing on an application for a preliminary injunction. FED. R. CIV. P. 65(a)(2).

[18] The Ninth, First, and Fifth Circuits were the first to decide that hearsay evidence is admissible in a preliminary injunction hearing. *See* Sierra Club v. FDIC, 992 F.2d

circuits, the Ninth Circuit has the oldest settled law as to the use of hearsay evidence in a preliminary injunction hearing. In *Flynt Distributing Co. v. Harvey*, the plaintiff sued for breach of a distribution agreement and sought a preliminary injunction.[19] The plaintiff, and movant, argued that injunctive relief was necessary because the defendants were planning to dispose of their assets.[20] In the lower court, the defendants objected to the court's consideration of what the defendant characterized as hearsay evidence in connection with the request for a preliminary injunction, but the trial court rejected their argument and granted the preliminary injunction.[21] On appeal, the Ninth Circuit reversed the granting of an injunction because of the availability of money damages,[22] but the court also addressed the issue of hearsay evidence.[23]

In *Harvey*, the Ninth Circuit agreed with the trial court that admission of the hearsay evidence was proper, given the exigent circumstances of the case.[24] The court noted that the urgency of obtaining injunctive relief requires prompt adjudication, and that expedited process makes it difficult to obtain affidavits from witnesses who would be competent to testify at trial.[25] In consideration of the exigent circumstances in *Harvey*, the Ninth Circuit concluded that "[t]he trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing

---

545 (5th Cir. 1993); Asseo v. Pan Am. Grain Co., 805 F.2d 23 (1st Cir. 1986); Flynt Distrib. Co. v. Harvey, 734 F.2d 1389 (9th Cir. 1984). The Third and the Tenth Circuits have more recently followed suit, and the Seventh Circuit has implicitly suggested the admissibility of hearsay evidence. *See* KOS Pharms., Inc. v. Andrx, 369 F.3d 700 (3d Cir. 2004); Heideman v. S. Salt Lake City, 348 F.3d 1182 (10th Cir. 2003); Illinois *ex rel.* Hartigan v. Peters, 871 F.2d 1336, 1342 (7th Cir. 1989).

[19] 734 F.2d 1389, 1391 (9th Cir. 1984).

[20] *Harvey*, 734 F.2d at 1394-95.

[21] *Id.*

[22] *Id.* at 1396. The Ninth Circuit concluded that the movant had an adequate remedy at law. *Id.* at 1392.

[23] *Id.* at 1394.

[24] *Id.*

[25] *Id.*; *see also* Glow Indus. v. Lopez, 252 F. Supp. 2d 962, 966 n.1 (C.D. Cal. 2002) (noting that "[d]istrict courts have discretion to consider otherwise inadmissible evidence in ruling on application for . . . preliminary injunction"); Michaels v. Internet Entm't Group, Inc., 5 F. Supp. 2d 823, 832 n.2 (C.D. Cal. 1998) (noting that courts "may consider hearsay at the preliminary injunction stage" of a trial and that for preliminary injunction purposes "the hearsay nature of the assertions goes to their weight, not their admissibility").

irreparable harm before trial."[26] However, the court ultimately concluded that the money damages available to the plaintiff were adequate relief and that a preliminary injunction was not appropriate.[27] So although the defendants prevailed on appeal, the Ninth Circuit successfully created a legal standard for the admission of hearsay evidence in a preliminary injunction hearing.

As in the Ninth Circuit, it has been long settled law in the First Circuit that the use of hearsay evidence in a preliminary injunction hearing is permissible.[28] In *Asseo v. Pan American Grain Co.*, the Regional Director of the National Labor Relations Board filed a complaint alleging unfair labor practices and sought preliminary injunctive relief at the district court level.[29] After conducting a three day evidentiary hearing in which the court heard live testimony and accepted into evidence transcripts of employees' prior testimony before an administrative law judge, the court granted the injunction.[30] On appeal, the First Circuit rejected the appellants' contention that the district court should not have accepted into evidence the transcripts from the hearing before the administrative law judge because they were inadmissible hearsay.[31]

In *Asseo*, the First Circuit noted that "[a]ffidavits and other hearsay materials are often received in preliminary injunction hearings."[32] The court recognized that the dispositive question was not the characterization of the evidence as hearsay.[33] Instead, the court indicated that the real issue at hand was "whether, weighing all the attendant factors, including the need for expedition, this type of evidence was appropriate given the character and objectives of the injunctive proceeding."[34] The First Circuit

---

[26] *Harvey*, 734 F.2d at 1394; *see also* Ross-Whitney Corp. v. Smith Kline & French Labs., 207 F.2d 190, 198 (9th Cir. 1953) (stating that preliminary injunctions may be granted on the basis of affidavits).

[27] *Harvey*, 734 F.2d at 1396.

[28] Asseo v. Pan Am. Grain Co., 805 F.2d 23 (1st Cir. 1986).

[29] 805 F.2d 23, 24 (1st Cir. 1986).

[30] *Asseo*, 805 F.2d at 25.

[31] *Id.* at 25-26.

[32] *Id.* at 26.

[33] *Id.*

[34] *Id.* (comparing SEC v. Frank, 388 F.2d 486 (2d Cir.1968) *with* Ross-Whitney Corp. v. Smith Kline & French Labs, 207 F.2d 190, 198 (9th Cir.1953)).

concluded that the lower court correctly considered this evidence in the preliminary injunction hearing, noting that there was live testimony and the appellant had the opportunity to cross-examine the witness during the ALJ hearing.[35] The court's decision in *Asseo* settled the law in the First Circuit with regard to the use of hearsay evidence in preliminary injunction hearings, allowing such evidence in light of the expedient nature of preliminary injunction hearings.[36]

More recently, the Fifth Circuit has followed suit with the Ninth and the First Circuits in clarifying the law on using hearsay evidence in preliminary injunction hearings. In *Sierra Club v. F.D.I.C.*, the district court enjoined the F.D.I.C. from approving the sale of an environmentally sensitive tract of land at the Sierra Club's request.[37] The district court granted the injunctive relief without receiving evidence or entering findings of fact.[38] On appeal, the Sierra Club argued there was no need for the district court to enter findings of fact because the parties agreed on the material facts.[39] In reviewing the case, the Fifth Circuit affirmed the district court's admission of the hearsay evidence and clarified its standard for the use of such evidence in a preliminary injunction setting.[40]

In its analysis, the Fifth Circuit noted it had previously held that a court may issue a preliminary injunction without an evidentiary hearing when the facts are not disputed.[41] The *Sierra Club* court reasoned, "at the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence."[42] Under this rationale, the *Sierra Club* court held that a court may accept deposition transcripts and affidavits as evidence.[43] Ultimately, the Fifth Circuit agreed that in the

---

[35] *Id.* at 26.

[36] *Id.*

[37] 992 F.2d 545, 547 (5th Cir. 1993).

[38] *Sierra Club*, 992 F.2d at 547.

[39] *Id.* at 551.

[40] *Id.*

[41] *Id.* (citing Fed. Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 558-59 (5th Cir. 1987)).

[42] *Id.*; *see also* Millenium Rests. Group, Inc. v. City of Dallas, 181 F. Supp. 2d 659, 661 n.3 (N.D. Tex. 2001) (finding hearsay evidence acceptable in a preliminary injunction proceeding).

[43] *Sierra Club*, 992 F.2d at 551.

absence of disputed facts, a court may issue a preliminary injunction without an evidentiary hearing, so long as the record supports the court's decision.[44] The Fifth Circuit's decision in *Sierra Club* settled the law in that circuit, holding that hearsay evidence is admissible in a preliminary injunction hearing and further noting that such an evidentiary hearing is not necessary where there are no disputed facts with regard to the preliminary injunction.[45]

Unlike the Ninth, First, and Fifth Circuits, the Third Circuit only recently established a standard for the use of hearsay evidence in a preliminary injunction hearing. In *KOS Pharmaceuticals, Inc. v. Andrx Corp.*, the Third Circuit allowed the party seeking a preliminary injunction to establish the necessary elements with hearsay evidence.[46] *KOS Pharmaceuticals* involved alleged trademark infringement relating to an anti-cholesterol drug.[47] The lower court denied the plaintiff's request for a preliminary injunction to prevent the use of a trademark.[48] The evidence presented with the preliminary injunction request consisted primarily of a certification by the plaintiff's vice president of marketing, which was based upon information reported to him by employees and information he acquired when he reviewed voice mails and electronic mails.[49] Andrx objected to the admissibility and probative value of the evidence, but the district court never ruled on the objections.[50] On appeal the defendant challenged the admissibility and reliability of the certification, arguing it was self-serving and uncorroborated hearsay.[51]

On appeal, the Third Circuit reversed and remanded with instructions to enter a preliminary injunction.[52] The Third Circuit ruled that the certification could provide an adequate basis for preliminary relief even if it

---

[44] *Id.* (finding no need to conduct evidentiary hearing for a preliminary injunction, especially when there are no factual disputes) (citing *Dixon*, 835 F.2d at 558-59).

[45] *Id.*

[46] 369 F.3d 700 (3d Cir. 2004).

[47] *KOS Pharms.*, 369 F.3d at 703. The movant sought to prevent a competitor from using a similar mark to promote its own anti-cholesterol drug. *Id.*

[48] *Id.* at 708.

[49] *Id.* at 706-07.

[50] *Id.* at 706 n.6.

[51] *Id.* at 718.

[52] *Id.* at 703.

contained multiple levels of hearsay and was not based solely upon personal knowledge.[53] The *KOS Pharmaceuticals* court acknowledged that "sister Circuits have recognized that '[a]ffidavits and other hearsay materials are often received in injunction proceedings.'"[54] The court noted that the rulings in other circuits were "consistent with the lack of any rule in the preliminary injunction context akin to the strict rules governing the form of affidavits that may be considered in summary judgment proceedings."[55] Accordingly, the *KOS Pharmaceuticals* court concluded that "[d]istrict courts must exercise their discretion in 'weighing all the attendant factors, including the need for expedition,' to assess whether, and to what extent, affidavits or other hearsay materials are 'appropriate given the character and objectives of the injunctive proceeding.'"[56] Ultimately, the Third Circuit found that "the district court clearly erred in denying [the plaintiff's] motion for a preliminary injunction."[57] The court's ruling in *KOS Pharmaceuticals* created a standard for courts in the Third Circuit to follow, and that standard clarified the law regarding the use of hearsay evidence in preliminary injunction hearings in the Third Circuit.

Like the Third Circuit, the Tenth Circuit, in *Heideman v. South Salt Lake City*, has recently created a standard for its courts to follow with regard to the use of hearsay evidence in preliminary injunction hearings.[58]

---

[53] *Id.* at 718.

[54] *Id.* (quoting Asseo v. Pan Am. Grain Co., 805 F.2d 23, 26 (1st Cir. 1986)); *see* Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1171 (7th Cir. 1997); Levi Strauss & Co. v. Sunrise Int'l Trading, Inc., 51 F.3d 982, 985 (11th Cir. 1995) (stating that "[a]t the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction"); *Sierra Club*, 992 F.2d at 551 (stating that courts at preliminary injunction stage "may rely on otherwise inadmissible evidence, including hearsay evidence") (citing *Dixon*, 835 F.2d at 558-59); *Asseo*, 805 F.2d at 26 (noting that "[a]ffidavits and other hearsay materials are often received in preliminary injunction proceedings"); Flynt Distrib. Co. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984) (stating that a trial court may give some weight to inadmissible evidence when considering whether to grant a preliminary injunction); *cf.* Heideman v. S. Salt Lake City, 348 F.3d 1182, 1188 (10th Cir. 2003) (stating that "the Federal Rules of Evidence do not apply to preliminary injunction hearings").

[55] *KOS Pharms.*, 369 F.3d at 718. In a summary judgment proceeding, an affidavit must be made on personal knowledge and must be based on admissible facts. FED. R. CIV. P. 56(e).

[56] *Id.* at 719 (quoting *Asseo*, 805 F.2d at 26).

[57] *Id.* at 732.

[58] 348 F.3d 1182, 1188-89 (10th Cir. 2003).

Although the court's result in *Heideman* was inconsistent with the result of *KOS Pharmaceuticals* insofar as the issuance of a preliminary injunction, the Tenth Circuit's standard was consistent with the Third Circuit's standard.[59] In *Heideman*, the trial court considered a First Amendment challenge to an ordinance banning nude dancing.[60] The dancers sought a preliminary injunction, which the trial court denied and the Tenth Circuit affirmed, noting that its review was limited to the propriety of the lower court denying the request for injunctive relief.[61] At the hearing on the preliminary injunction, the only evidence other than the ordinance itself that the plaintiffs presented was plaintiffs' affidavits and testimony about "their perceptions of future economic harm that they would suffer in the absence of an injunction."[62]

In its review, the Tenth Circuit was mindful of the Supreme Court's admonition in *University of Texas v. Camenisch*[63] that "'a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.'"[64] The *Heideman* court noted that "[a] hearing for preliminary injunction is generally a restricted proceeding, often conducted under pressured time constraints, on limited evidence and expedited briefing schedules."[65] Accordingly, the court reasoned that "[t]he Federal Rules of Evidence do not apply to preliminary injunction hearings."[66] Because a preliminary injunction hearing is not a trial on the merits, the majority reasoned that the use of hearsay evidence in such a hearing is not damaging to the ultimate outcome of the case.[67] In *Heideman*, the court found that the plaintiffs failed to produce evidence that the anti-dancing ordinance,

---

[59] *See Heideman*, 348 F.3d at 1188.

[60] *Id.* at 1184-87.

[61] *Id.* at 1184-85. The appeal was not a challenge to the ordinance. Rather, appellants only challenged the denial of the request for preliminary injunctive relief. *Id.* at 1185. The Tenth Circuit applied an abuse of discretion standard. *Id.* at 1188.

[62] *Id.* at 1187.

[63] 451 U.S. 390 (1981).

[64] *Heideman*, 348 F.3d at 1188 (quoting *Camenisch*, 451 U.S. at 395).

[65] *Id.*

[66] *Id.*; *see, e.g.*, SEC v. Cherif, 933 F.2d 403, 412 n.8 (7th Cir. 1991); *Asseo*, 805 F.2d at 25-26; United States v. O'Brien, 836 F. Supp. 438, 441 (S.D. Ohio 1993).

[67] *See Heideman*, 348 F.3d at 1188.

during the period of litigation, would "have an irreparable effect in the sense of making it difficult or impossible to resume their activities or restore the status quo ante in the event they prevail."[68] Accordingly, a preliminary injunction was not appropriate, even though the court deemed hearsay evidence permissible in a preliminary injunction hearing.[69] Thus, the court's analysis in *Heideman* settled the law in the Tenth Circuit regarding the use of hearsay evidence in a preliminary injunction hearing.

Although the Seventh Circuit has not explicitly decided the issue of whether hearsay evidence is permissible in a preliminary injunction hearing, it has expressly allowed the use of affidavits in support of a preliminary injunction.[70] In *Illinois ex rel. Hartigan v. Peters*, the State of Illinois prosecuted the defendant for selling cars with deceptive mileage readings.[71] The State sought a preliminary injunction to freeze the defendant's assets, and introduced affidavits in support of the preliminary injunction.[72] The defendant appealed the denial of his motion to vacate the preliminary injunction, and the Seventh Circuit ultimately held that the district court did not abuse its discretion in granting the injunction.[73]

In its analysis, the Seventh Circuit noted that, "[a]s a general rule, the district judge should not resolve a motion for a preliminary injunction on the basis of affidavits alone."[74] However, the court noted that when the district court conducts an evidentiary hearing for the preliminary injunction, the judge has discretion to consider written documentation when determining whether to grant the injunction.[75] The court stated that "to obtain an injunction authorized by the Illinois Consumer Fraud Act,

---

[68] *Id.* at 1189; *see, e.g.*, Greater Yellowstone Coalition v. Flowers, 321 F.3d 1250, 1258 (10th Cir. 2003) (finding irreparable harm when there was danger of actual death of eagles and destruction of their breeding grounds if developer was allowed to proceed); Ohio Oil Co. v. Conway, 279 U.S. 813, 813-14 (1929) (finding irreparable harm in the payment of an allegedly unconstitutional tax when state law did not provide a remedy for the return of the paid tax should the statute ultimately be found invalid).

[69] *Heideman*, 348 F.3d at 1188, 1200.

[70] Illinois *ex rel.* Hartigan v. Peters, 871 F.2d 1336, 1342 (7th Cir. 1989).

[71] 871 F.2d 1336, 1338 (7th Cir. 1989).

[72] *Id.*

[73] *Id.* at 1338, 1342.

[74] *Id.* at 1342 (citing Medeco Sec. Locks, Inc. v. Swiderek, 680 F.2d 37, 38 (7th Cir. 1981)).

[75] *See id.*

the Attorney General must have provided some evidence that the defendant violated the Act."[76] To that end, the Seventh Circuit concluded that the introduction of four affidavits in support of a preliminary injunction was permissible, where the defendant did not appear at the hearing to contest the admission of what he characterized as hearsay evidence.[77] Although the *Peters* court did not specifically address the introduction of hearsay evidence in a preliminary injunction hearing, it did permit the introduction of affidavits, which are commonly considered hearsay, in a preliminary injunction hearing. Even though the direct issue of the admissibility of all hearsay evidence in a preliminary injunction hearing has not been addressed by the Seventh Circuit, the court's holding in *Peters* will likely establish the permissibility of hearsay evidence in a preliminary injunction hearing.[78]

B. The Unsettled Circuits

Although no circuit with settled law on the use of hearsay in a preliminary injunction hearing currently prohibits the use of hearsay in such a hearing, half the circuits still have not resolved the issue. To date, the district courts in these circuits are free to decide whether or not to admit hearsay evidence in a preliminary injunction hearing and will continue to issue inconsistent rulings on the matter until the circuit courts of appeal or the Supreme Court issues a definitive ruling on the issue to settle the law. The law concerning whether hearsay evidence may be properly admitted during a preliminary injunction proceeding remains unsettled in the Second,[79] Fourth,[80] Sixth,[81] Eighth,[82] and Eleventh[83] Circuits. No

---

[76] *Id.* (citing People *ex rel.* Hartigan v. Stianos, 475 N.E.2d 1024, 1028 (Ill. App. Ct. 1985)).

[77] *Id.* at 1342-43.

[78] *See* Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1171 (7th Cir. 1997) (finding that "[a]ffidavits are ordinarily inadmissible at trials but they are fully admissible in summary proceedings, including preliminary-injunction proceedings"); Objectwave Corp. v. Authentix Network, Inc., No. 00C7823, 2001 WL 204768, at *4 (N.D. Ill. 2001) (noting that "affidavits and other evidence not admissible at trial may be considered at injunction hearing").

[79] *See* S.E.C. v. Prater, 289 F. Supp. 2d 39, 50 n.7 (D. Conn. 2003) (noting that a district court may rely upon hearsay when considering a motion for a preliminary injunction); Lavin, Inc. v. Colonia, Inc., 776 F. Supp. 125, 127 (S.D.N.Y. 1991) (noting

decisions in the D.C. Circuit directly address whether hearsay evidence is permissible in a preliminary injunction hearing.[84]

IV. Conclusion

The absence of admissible evidence should not deter a trial lawyer from seeking to obtain preliminary injunctive relief. At the preliminary

---

with apparent approval that hearsay evidence had been previously introduced at a preliminary injunction hearing); Butcher v. Gerber Prods. Co., 8 F. Supp. 2d 307, 314 (S.D.N.Y. 1988) (distinguishing the permitted use of affidavits during motion for preliminary injunction from unaccepted use during summary judgment).

[80] *See* Am. Angus Ass'n v. Sysco Corp., 829 F. Supp. 807, 816 (W.D.N.C. 1992) (stating that "[h]earsay evidence may be considered in a preliminary injunction hearing"); *see also* Commodity Futures Trading Comm'n v. IBS, Inc., 113 F. Supp. 2d 830, 850 (W.D.N.C. 2000) (rejecting defendant's argument that affidavits presented as evidence in support of plaintiff's motion for preliminary injunction were insufficient), *affirmed by* Commodity Futures Trading Comm'n v. Kimberlynn Creek Ranch, Inc., 276 F.3d 187 (4th Cir. 2000).

[81] *See* Family Trust Found. of Ky., Inc. v. Wolnitzek, 345 F. Supp. 2d 672, 699 n.10 (E.D. Ky. 2004) (noting that the Sixth Circuit has not explicitly stated that hearsay may be considered when ruling on a preliminary injunction, but surveying other circuits and concluding that hearsay evidence should be given some weight), *stay denied by* Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n, 388 F.3d 224 (6th Cir. 2004).

[82] *See* Advantage Media, L.L.C. v. City of Hopkins, 379 F. Supp. 2d 1030, 1037 (D. Minn. 2005) (finding that a particular hearsay statement, taken alone, was not sufficient evidence to support a preliminary judgment). *But see* Easy Returns Worldwide, Inc. v. United States, 266 F. Supp. 2d 1014, 1017 n.3 (E.D. Mo. 2003) (recognizing that evidence submitted in support of preliminary motion was hearsay, but stating that the court would give the parties some latitude as to admissibility due to the nature of the hearing).

[83] *See* Noble v. Tooley, 125 F. Supp. 2d 481, 483 (M.D. Fla. 2000) (finding defendants' hearsay objections unwarranted at the preliminary injunction stage, where the court may rely on affidavits and other hearsay materials). *But see* Ocean Bio-Chem, Inc. v. Turner Network Television, Inc., 741 F. Supp. 1546, 1559 (S.D. Fla. 1990) (stating that if affidavits submitted by the plaintiff are hearsay then the affidavits are inadmissible to support motion for preliminary judgment). *C.f.* Levi Strauss & Co. v. Sunrise Int'l Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995) (noting that "[a]t the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction"); CBS, Inc. v. Primetime 24 Joint Venture, 9 F. Supp. 2d 1333, 1342 (S.D. Fla. 1998) (noting that affidavits and other hearsay materials may be considered during preliminary injunction hearings) (citing Asseo v. Pan Am. Grain Co., 805 F.2d 23, 26 (1st Cir. 1986)).

[84] *But c.f.* Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 7 (D.C. Cir. 1998) (holding that affidavits previously submitted in support of preliminary injunction were inadmissible hearsay, insufficient to defeat summary judgment).

injunction stage, in light of the urgent nature of the hearings, many courts apply a more relaxed evidentiary standard. Accordingly, many courts appreciate the difficulty of obtaining admissible evidence at an early stage in the case before the parties have had an opportunity to conduct discovery. However, courts are mindful that evidence presented at a preliminary injunction hearing, which is not a hearing on the merits, will not necessarily be accepted at trial.

Trial lawyers should keep in mind that, "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."[85] When presenting evidence at a preliminary injunction hearing, trial lawyers should remember that the law of different circuits may vary, and the law within the same circuit may vary among the district courts if the circuit courts of appeal have not yet decided the admissibility of hearsay evidence in preliminary injunction hearings. That said, although some courts may accept hearsay evidence, the more admissible evidence that is made available to a court, the greater the likelihood that a court will grant a request for a preliminary injunction.

---

[85] FED. R. CIV. P. 65(a)(2).