

Factors Involved in Granting and Denying Preliminary Injunctions in Virginia State Courts

by **Bradfute W. Davenport**

In Virginia state courts, the law concerning the award of temporary injunctions is muddy. The problem arises from the lack of a clear statutory or judicial pronouncement on the standards to be applied. Legislatively, the award of temporary injunctions is governed by Virginia Code § 8.01-628, which provides with simple elegance that a temporary injunction may only be awarded where the court is “satisfied of the plaintiff’s equity.”¹ This sparse language offers circuit courts little guidance in determining the merits of plaintiffs’ requests for injunctive relief. Judicially, there is little precedent from the Supreme Court of Virginia to guide the circuit courts. Because orders granting or refusing temporary injunctions are typically not appealable, the Supreme Court has yet to clearly articulate the standards to be applied in addressing requests for injunctive relief.² Virginia circuit courts have therefore been left largely to their own devices and have applied conflicting tests to requests for relief. The result has been an uneven analysis of requests for temporary injunctions, based on circuit courts’ use of principles applicable to permanent injunctions in state courts or temporary injunctions in federal courts.

There are two principal areas of confusion. First, circuit courts often apply the test for injunctive relief laid down by the Fourth Circuit in *Blackwelder Furniture Co. v. Selig Mfg., Inc.*³ Yet, the Supreme Court has never stated whether this is the test to be applied for a court to be

“satisfied of the plaintiff’s equity.” Additionally confusing is the lack of consistency in the standards applied to the *Blackwelder* factors, especially the “likelihood of success on the merits” factor, and the relatively spare treatment of the “public interest” factor in the case law.

The second primary area of confusion concerns whether requirements in addition to the *Blackwelder* test exist for the award of relief. Much of the lack of clarity arises from circuit courts’ broad application of permanent injunction case law to plaintiffs’ requests for temporary injunctive relief. Under this analysis, circuit courts have required that plaintiffs demonstrate as prerequisites to relief both the potential for irreparable harm should the injunction not issue, and a lack of adequate remedy at law, but the distinction between these two requirements is unclear. Nor are circuit courts clear that a finding of potential irreparable harm is distinct from the balancing of harms required by the *Blackwelder* test. Also, some circuit courts have created an additional requirement of imminent, and not speculative or potential, harm that appears to conflict with case law holding some speculative harms to be necessarily irreparable.

The *Blackwelder* Test (and its Misstatements)

Virginia circuit courts have often looked to the Fourth Circuit for guidance on the test to be applied in preliminary injunctive cases. The courts have relied primarily on

the Fourth Circuit’s four-factor “balance-of-hardship” test contained in *Blackwelder*.⁴ Much of the Virginia courts’ reliance on *Blackwelder* may be explained by the Fourth Circuit’s statement in *Capital Tool and Mfg. v. Maschnefabrik Herkules* that “there is no great difference between federal and Virginia standards for preliminary injunctions. Both draw on the same equitable principles.”⁵ The Supreme Court of Virginia, however, has never said that. Nor has it ever said that the Fourth Circuit was right.⁶ Nevertheless, the *Blackwelder* test has remained the predominant test for the award of temporary injunctions in Virginia.

In *Blackwelder*, the Fourth Circuit held that courts should consider (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest.⁷ In analyzing a plaintiff’s request for injunctive relief, the court ruled that the “first step” is to balance the likelihood of irreparable harm to the plaintiff with the likelihood of harm to the defendant.⁸ The court explained that “if a decided imbalance of hardship should appear in plaintiff’s favor,” then a lesser demonstration of likelihood of success would be required.⁹ In such a case, the plaintiff need only “raise [] questions going to the merits so serious, substantial, difficult and doubtful, as to make

them fair ground for litigation and thus for more deliberate investigation.”¹⁰ “As the probability of irreparable injury diminishes,” however, the likelihood of success assumes greater significance in a court’s analysis.¹¹ The *Blackwelder* court also noted that no “minimum of probable injury” to the plaintiff is required.¹² Instead, the “relative quantum and quality of plaintiff’s likely harm” is to be balanced against the costs to the defendant should the injunction be granted.¹³

While many Virginia circuit courts purport to adhere to the *Blackwelder* test, some courts nevertheless apply their own unique standards in determining whether to grant relief. For example, the circuit court in *Smith v. Loudoun County Public Schools* considered “(1) the likelihood of prevailing on the merits, (2) the likelihood of irreparable harm should the injunction not be granted, (3) the balance of hardship between the parties, and (4) the preservation of the status quo.”¹⁴ Under *Blackwelder*, however, the “balance of hardship” refers to the four-factor test as a whole.¹⁵ Additionally, the Fourth Circuit, in *Rum Creek Coal Sales*, held that “preservation of the status quo”...does not symbolize an additional separate test.”¹⁶ Nevertheless, other Virginia circuit courts have also held that “preservation of the ‘status quo’” is an additional factor to be considered.¹⁷ The court in *Smith* is not alone in adopting unique standards for the award of temporary injunctive relief, contrary to the holding in *Blackwelder*.¹⁸

Plaintiff’s Likelihood of Success on the Merits

Another confusing aspect of the award of temporary injunctions in Virginia arises from the lack of uniformity in the burdens of proof and priorities applied to the various factors of the *Blackwelder* test. In

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its *Blackwelder* decision, the Fourth Circuit held that plaintiffs would not be required to make a “strong showing of success as a prerequisite to relief.”¹⁹ Instead, courts should weigh the relative harms to parties first, focusing on the likelihood of success only where the likelihood of harm is equal.²⁰ Nevertheless, some Virginia circuit courts require a strong demonstration of likelihood of success by plaintiffs.²¹ On the other hand, some circuit courts have required that plaintiffs demonstrate only a “reasonable likelihood of succeeding on the merits,” permitting an even further reduced demonstration of irreparable harm where a “clear showing of a reasonable likelihood of success” has been made.²²

Public Interest

Similarly, the “public interest” factor of the *Blackwelder* test has been inconsistently applied by Virginia courts. While it is often mentioned by circuit courts as a factor to be considered, it is rarely examined in detail. The Fourth Circuit, in *Rum Creek Coal Sales*, noted that this factor is generally the least important, stating that “[t]he public interest factor does not appear always to be considered at length in preliminary injunction analyses.”²³ Some circuit courts have failed to even list the public interest among the factors to be considered.²⁴ On the other hand, some circuit court cases address the public interest at length.²⁵

Additional Requirements for Injunctive Relief in Virginia

Irreparable Harm/Lack of Adequate Remedy At Law

Additional confusion concerning the award of temporary injunctions in Virginia arises from circuit courts’ reliance on Virginia Supreme Court decisions concerning permanent injunctive relief, in addition to the test in *Blackwelder*. Because no Supreme Court decision exists addressing temporary injunctions, some circuit courts have created a compound test for temporary injunctive relief that is a mix of the *Blackwelder* factors with the requirements for permanent injunctive relief in Virginia. The resulting test provides for the additional requirement that a plaintiff “prove that he would suffer irreparable harm if the injunction were not granted and that he did not have an adequate remedy at law.”²⁶ This prerequisite to injunctive relief is viewed by courts as being distinct from the “balancing of harms” under *Blackwelder*, and as involving distinct elements required to be demonstrated separately by plaintiffs seeking relief. For example, the Fairfax County Circuit Court in *Cubic Toll Systems, Inc. v. Virginia Dept. of Transportation* analyzed the issue whether an adequate remedy existed at law separately from the issue of irreparable damage.²⁷ Similarly, the Fairfax County Circuit Court in *Seniors Coalition, Inc. v. Senior Foundation, Inc.* held that lack of adequate remedy at law is an additional and distinct, while related, requirement. The

court stated that “to the Fourth Circuit’s list of factors must be added the plaintiff’s lack of an adequate remedy at law, which is closely associated with irreparable harm.”²⁸

Assuming that circuit courts are correct in their reliance on permanent injunction cases to add additional requirements to the *Blackwelder* test, confusion arises because irreparable harm and lack of adequate remedy at law have been treated as distinct requirements even though the line of demarcation is fuzzy. Instead, these “requirements” should be acknowledged as fundamentally the same, in order to avoid confusion. The Supreme Court’s ruling in *Carbaugh* approximates this approach, holding that “lack of proof of irreparable harm is generally fatal. A court of equity will not issue an injunction, an extraordinary remedy, if the petitioner has an adequate remedy at law for the redress of his injury.”²⁹ This statement makes clear that “lack of proof of irreparable harm” generally results from the presence of an “adequate remedy at law.”³⁰ Much of the confusion arose from the Supreme Court’s subsequent interpretation of the *Carbaugh* statement to mean that two distinct requirements exist.³¹ Nevertheless, the Fairfax County Circuit Court in *Christian Defense Fund v. Winchell & Assoc., Inc.*, understood that this distinction is difficult to draw, holding that “[t]he principal inquiry regarding plaintiff’s ‘irreparable harm’ is whether an adequate remedy exists at law.”³² Nevertheless, many Virginia courts continue to adhere to the notion that these are separate requirements.³³

A similar area in which circuit court analysis of requests for injunctive relief can be improved concerns the Supreme Court’s holding that a showing of irreparable harm is essential to an award of a permanent injunction and the circuit courts’

extrapolation of that principle to temporary injunctions.³⁴ Despite this requirement, some circuit courts have analyzed plaintiffs’ requests for relief without making an express finding of potential irreparable harm.³⁵ Assuming that circuit courts’ addition of permanent injunction-like requirements is correct in temporary injunction cases, many of these courts confuse the necessity of a separate finding of the potential for irreparable harm with the balancing of harms that is to take place under the *Blackwelder* test. Such a finding of potential irreparable harm should be made separately by courts before ruling on plaintiffs’ motions.³⁶

No Speculative Harm?

Another area of uncertainty is whether plaintiffs seeking temporary injunctions must demonstrate potential imminent, non-speculative harm. Some circuit courts have cited this as an additional requirement for injunctive relief. For example, the Warren County Circuit Court in *Am-Cor.com, Inc. v. Stevens* held that “[t]he party seeking relief must show that the alleged harm is imminent, and not merely speculative or potential.”³⁷ In denying the plaintiff’s motion, the court reasoned that “[g]iven the nascent nature of their respective businesses, it is highly speculative as to whether the two corporate parties will ever generate any substantial income.”³⁸ Thus, the court denied injunctive relief because new businesses with necessarily speculative future income streams were involved.³⁹ On the other hand, the presence of alleged speculative and otherwise incalculable damages has led other courts to find that irreparable harm clearly existed.⁴⁰ While the “imminent harm” requirement is likely valid, it is better understood as denying injunctive relief for merely “hypothetical future” harms not yet warranting action by the court.⁴¹

Conclusion

The varying analysis of requests for preliminary injunctive relief taken by Virginia’s circuit courts deserves a more uniform approach. Whether this is an issue for the Supreme Court or the General Assembly is beyond the scope of this article, but fair application of the law for all parties requires that a clear statement of the standards for injunctive relief be clearly articulated. **VBA**

NOTES

1. *Id.*
2. Review by “a justice of the Supreme Court” may be sought by petition pursuant to Virginia Code Section 8.01-626, but there are no reported decisions under the statute that address the factors involved in granting or denying preliminary injunctions.
3. *Id.*, 550 F.2d 189 (4th Cir. 1977). See also *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991) (restituting and consolidating the *Blackwelder* test).
4. 550 F.2d at 196. In doing so, the courts have noted the absence of a clear statement by the Supreme Court of Virginia of the test to be applied. See, e.g., *Christian Defense Fund v. Winchell & Assoc., Inc.*, 47 Va. Cir. 148 (Fairfax County, 1998) (“The Virginia Supreme Court has not yet decided a case that delineates the standards to be applied in granting or denying a preliminary injunction.”); *Professional Heating and Cooling, Inc. v. Donald G. Smith and Freedom Mechanical, Inc.*, 2004 Va. Cir. LEXIS 56 (City of Norfolk) (“I am not aware of any decisions of the Supreme Court of Virginia on the issue.”).
5. 837 F.2d 171 (4th Cir. 1988). See, e.g., *Goldbecker v. Board of Sup’rs of Fairfax County*, 38 Va. Cir. 584 (Spotsylvania County, 1994); *Fettig v. Touchstone Development*, 54 Va. Cir. 357 (2001).
6. Nevertheless, the Virginia Civil Benchbook, developed by the Judicial Conference of Virginia, does cite *Blackwelder* as providing the test for the award of preliminary injunctions. 1-7 VIRGINIA CIVIL BENCHBOOK § VI(C)(2) (2003-04 ed.).
7. *Blackwelder*, 550 F.2d at 194-197. See, also, *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991) (summarizing the *Blackwelder* test).
8. *Id.* at 195.
9. *Id.*
10. *Id.* (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 743 (2nd Cir. 1953)). The court noted that “the importance of the probability of success [would increase] as the probability of irreparable injury diminishes.” *Id.* at 195. However, where the likelihood of irreparable harm was simply “possible,” the likelihood of success could be “decisive.” *Id.* The court further explained that even in such cases, the likelihood of success remained “merely on strong factor to be weighed alongside both the likely harm to the defendant and the public interest.” *Id.*

11. *Id.* (“The importance of probability of success increases as the probability of irreparable injury diminishes, and where the latter may be characterized as simply “possible,” the former can be decisive.”). The court further explained that the likelihood of success would “assume real significance” where the harm to the parties “stood at equipoise.” *Id.* at 196, n.3.

12. *Id.*

13. *Id.*

14. 1999 WL 378762.

15. *Blackwelder*, 550 F.2d at 196 (“Thus in this circuit the trial court standard for interlocutory injunctive relief is the balance-of-hardship test.”).

16. *Rum Creek Coal Sales*, 926 F.2d at 360. The Fourth Circuit’s opinion in *Blackwelder* supports this statement, holding that “preserving the status quo ante litem” merely explains the relatively light showing required for the award of a temporary injunction. 550 F.2d at 197.

17. See, e.g. *Smith*, 1999 WL 378762 (citing *Blackwelder* as providing that the fourth factor is “preservation of the status quo”); *Brown v. Spivak*, 38 Va. Cir. 517 (Fairfax County, 1992) (holding “maintenance of the status quo” as factor to be considered). See, also, 1-7 VIRGINIA CIVIL BENCHMARK § VI (2003-04 ed.).

18. See, e.g., *Wheeler v. Fredericksburg Orthopaedic Associates, Inc., and Mid-Atlantic Health Alliance, Inc.*, 44 Va. Cir. 399, 401 (City of Fredericksburg, 1998) (holding that test for temporary injunction includes whether defendant and public will suffer irreparable harm). See also BRYSON ON VIRGINIA CIVIL PROCEDURE, § VII-E (2003) (“In deciding whether to grant a preliminary injunction, the court will consider the likelihood of the plaintiff’s ultimate success on the merits, irreparable injury to the plaintiff should it not be granted or to the defendant should it be granted, and the existence of an adequate remedy at common law.”).

19. *Blackwelder*, 550 F.2d at 196.

20. *Id.*

21. See, e.g., *McNeal v. Richmond Memorial Hosp.*, 36 Va. Cir. 531 (City of Richmond, 1995) (“There is also a requirement that the plaintiff prove there is a substantial likelihood of success on the merits.”).

22. *Goldbecker*, 37 Va. Cir. 584 (Spotsylvania County, 1994) (citing *Vardell v. Vardell*, 225 Va. 351 (1983)). Cf. *McNeal v. Richmond Memorial Hosp.*, 36 Va. Cir. 531, 532 (City of Richmond, 1995) (requiring demonstration of “substantial likelihood of success on the merits” as independent prerequisite to relief, discussed *infra*).

23. *Id.* at 366.

24. See, e.g., *Professional Heating and Cooling*, 2004 Va. Cir. LEXIS 56 (City of Norfolk) (failing to mention public interest); *Conners v. Excalibur Cable Communications, Ltd.*, 2000 Va. Cir. LEXIS 641 (Fairfax County) (failing to mention public interest, as well as making separate findings concerning lack of adequate remedy at law and irreparable injury).

25. See, e.g., *HotJobs.com*, 53 Va. Cir. 36 (Fairfax County, 2000).

26. *Wright*, 232 Va. at 223 (citing *Carbaugh*, 225 Va. at 314 (emphasis added)). An additional area of confusion arises from the

Supreme Court of Virginia’s statement, in *Wright*, that the plaintiff must “prove” irreparable harm. Assuming that the *Blackwelder* test is the correct test to be applied, such a requirement is seemingly in conflict with the Fourth Circuit’s holding that the irreparable harm requirement may be satisfied even where such harm is merely “possible.” See, e.g., *Federal Leasing, Inc. v. Underwriters at Lloyd’s*, 650 F.2d 495, 499 (4th Cir. 1981) (noting that in such cases the probability of success “may become decisive” (citing *Blackwelder*, 550 F.2d at 195)).

27. 37 Va. Cir. 522, 522-523 (Fairfax County, 1993) (finding that denial of participation in bid process constituted irreparable harm, and inability to calculate lost profits constituted inadequate remedy at law).

28. *Id.*, 39 Va. Cir. 344 (Fairfax County, 1996) (citing *Wright*, 232 Va. 218 (1986)). Cf. *Plate v. Kincannon Place Condo. Unit Owners’ Ass’n Bd. of Dirs.*, 30 Va. Cir. 323, 325 (Fairfax County, 1993) (holding that “whether adequate remedy at law exists” is an additional factor to be weighed against *Blackwelder* factors, but is not an independent prerequisite).

29. *Carbaugh*, 225 Va. at 314.

30. *Id.*

31. See endnote 18, *supra*.

32. 47 Va. Cir. 148 (Fairfax County, 1998). See also *Am-Cor, Inc. v. Stevens*, 56 Va. Cir. 245 (Warren County, 2001) (“The concept of irreparable harm is premised on the lack of an adequate remedy at law.” (citing *Carbaugh*, 225 Va. at 314)). See also *Health & Racquet Club, Inc. v. Fitness Today of Charlottesville*, 29 Va. Cir. 61, 70 (Albemarle County, 1992) (holding that plaintiff must “demonstrate that the injury which it would suffer if the injunction were not granted would be grievous and material and would not be adequately reparable in money damages” (citing *Callaway v. Webster*, 98 Va. 790, 792 (1900) (“By the term, ‘irreparable injury’ it is not meant that there must be no physical possibility of repairing the injury. All that is meant is that the injury would be a grievous one, or at least a material one, and not adequately reparable in damages.”))).

33. See, e.g., *McNeal v. Richmond Memorial Hosp.*, 36 Va. Cir. 531, 532 (City of Richmond, 1995).

34. See, e.g., *Bradlees Tidewater, Inc. v. Walnut Hill Inv., Inc.*, 239 Va. 468, 471-472 (1990) (“[A]s a general rule, proof of irreparable damage is absolutely essential to the award of injunctive relief.” (citing *Carbaugh*, 225 Va. at 314)). The Fourth Circuit, in *Rum Creek Coal Sales*, similarly held that a plaintiff “must show that it will sustain irreparable harm without a preliminary injunction. The ‘balance of hardship’ test does not negate the requirement that [a plaintiff] show some irreparable harm.” *Id.*, 926 F.2d at 360.

35. See, e.g., *Ross v. Laurel Glen Homeowners Ass’n, Inc.*, 43 Va. Cir. 205 (Fairfax County, 1997) (granting temporary injunction after analysis only of merits of plaintiff’s claim).

36. See also *McNeal v. Richmond Memorial Hosp.*, 36 Va. Cir. 531, 532 (City of Richmond, 1995) (holding that plaintiff must also demonstrate “substantial likelihood of

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success on the merits” as independent prerequisite to relief, in addition to those noted *supra*).

37. 56 Va. Cir. 245 (Warren County, 2001) (citing *Ridgwell v. Brasco Bay Corp.*, 254 Va. 458, 462-463 (1997)).

38. *Id.*

39. See also *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 28 Va. Cir. 220, 222 (City of Charlottesville, 1992) (“Even if [calculation of plaintiff’s damages is] not precisely determinable, complainant’s economic loss, unless it threatens the existence of the business itself, generally is not considered irreparable.”).

40. See, e.g., *HotJobs.com, Ltd. v. Digital City, Inc.*, 53 Va. Cir. 36, 45 (Fairfax County, 2000) (“There is substantial support in Virginia for the proposition that irreparable harm is sustained, and injunctive relief appropriate, when it would be very difficult or impossible to quantify monetary damages with precision.” (citing *Black & White Cars*, 247 Va. 426 (1994)). See also *Blackwelder*, 550 F.2d at 197 (holding that irreparability includes losses that cannot be calculated with precision, like loss of goodwill).

41. See, e.g., *Wilson v. City of Salem*, 50 Va. Cir. 429, 434 (City of Salem, 1999) (denying temporary injunction for unlawful act where such act not imminent).