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Don't Be Afraid to Make Your Own Dicta

Sometimes you have to declare what the case law merely implies

By Kenneth F. Oettle

As researchers and brief writers, we are always seeking to match our facts to the facts in cases with good dicta and, where necessary, to distinguish our facts from the facts in cases with bad dicta. This is one of the challenges of advocacy under stare decisis.

Sometimes, we find only bad dicta or no dicta at all. Instinct tells us that our client has a decent case, and we think that some court must have declared that persons in our client's situation deserve relief, but no court has addressed our fact pattern. In such cases, we may need to create our own dicta.

Suppose, for example, that you represent a small specialty food store that has leased space in a shopping center anchored by a department store. Many of your client's food products are also sold by the department store, which has a specialty food section. Nothing in your client's lease says that it can't sell specialty foods, but the "exclusivity clause" in the anchor tenant's recorded lease says that no other store in the shopping center can sell, among other things, specialty foods.

The exclusivity clause is enforceable if your client had actual notice of it. Your client did not have actual notice, but it had constructive notice by reason of the anchor tenant's lease being recorded.

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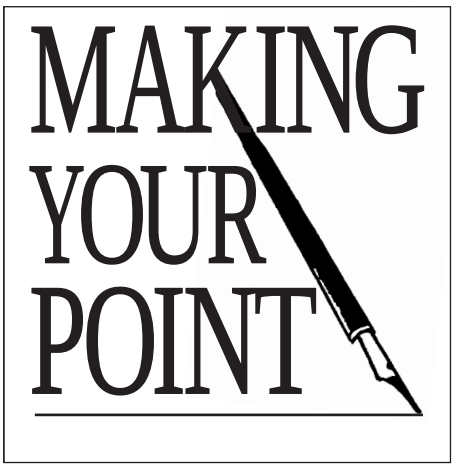
The custom in the shopping center industry is for non anchor tenants to rely on the landlord to identify pertinent use restrictions. As a consequence, tenants such as your client almost never perform a title search. No court has addressed whether this customary reliance on the landlord can override the constructive notice provided by a recorded lease.

The anchor tenant has filed a complaint and an Order to Show Cause why your client should not be preliminarily



enjoined from selling its specialty food products in the shopping center. The anchor tenant contends that at a minimum, your client had constructive notice of the exclusivity clause. If the court grants a preliminary injunction, your client will go out of business because specialty food accounts for nearly all its sales.

Your research quickly leads to the classic three-part test for preliminary injunctive relief: (1) likelihood of success on the merits; (2) irreparable harm to the moving party; and (3) balancing of the equities. The cases say that the most important criteria for determining whether to grant a preliminary injunction are likelihood of success on the merits and irreparable harm.

Because of the threat to its business, your client is strongest on the third element, the balancing of the equities. But this element is said to be subordinate to success on the merits and irreparable harm, both of which are troublesome.

On the merits, the anchor tenant will have plenty of cases declaring the importance of constructive notice. Unless custom in the industry overrides, you may lose.

As for irreparable harm, exclusivity clauses in shopping center leases can support permanent injunctions because of the difficulty in calculating damages over the full term of the offending lease. No exclusivity cases have involved preliminary injunctions. As far as you know, no court has opined that the likely destruction of a business precludes preliminary injunctive relief.

You did find an old case that says courts should be cautious in granting a preliminary injunction that would destroy a business, but that court also said the plaintiff "should have a very good case" to obtain the preliminary injunction. The anchor tenant claims to have a very good case because of constructive notice. You are reluctant to invoke the portion of the dictum about being cautious with preliminary injunctions because the rest of the dictum (that plaintiff can obtain a preliminary injunction with a "very good case") could be quoted back at you.

You wish you had a judicial statement that preliminary injunctions aren't intended to create irreparable harm but to prevent it. That would provide nice dictum—well-balanced and on point. But you couldn't find such a statement, reasonable though it

may be.

Your client has a very strong equity—it will go out of business if the court preliminarily enjoins its sale of specialty foods. But this threat to the business goes to the balancing of the equities, not to success on the merits or to the anchor tenant's irreparable harm.

Your best course is to accentuate your client's strength. Get past the dictum that the likelihood of success on the merits and irreparable harm are the dominant elements. In your case, they aren't. Balancing the equities is dominant because destruction of your client's business would be dispositive. You needn't find a judicial statement to this effect for your position to be credible.

You may wish to acknowledge the traditional dictum by saying, "Usually the likelihood of success on the merits and irreparable harm are the dominant elements in a preliminary injunctive context, but not where the injunction would destroy the subject matter of the suit." Whether to acknowledge and distinguish the traditional dictum is a judgment call.

On the one hand, you needn't apologize for dictum that doesn't apply, but on the other hand, you may do well to defuse it if the reader may wonder why you didn't.

Whatever your decision, argue that the dominant element in your case is the balancing of the equities because a preliminary injunction would destroy your client's business. You are on solid ground because your position has equitable weight and makes sense. A preliminary injunction that destroys a business is really a permanent injunction, which arguably shouldn't be granted without discovery and a trial.

From your perspective, the absence of dicta to that effect is merely a fortuity.

As for the nice turn of phrase you couldn't find—that preliminary injunctions aren't meant to create irreparable harm but to prevent it—again, just say it. You may ask, "Who am I to say what preliminary injunctions are meant to do? I didn't write a treatise on injunctions. I'm not a Chancery court judge."

If what you say has the ring of truth, you don't have to be anyone special to say it. That's the beauty of persuasion. You don't need a silver tongue, gray hair or gravitas to persuade—just an idea.

Puzzler

How would you tighten and sharpen the following sentence?

> Both a TRO and preliminary injunction are required to maintain the status quo and a level playing field, as otherwise, the lack of a preliminary injunction in and of itself will permit a change such that the underlying equities of this matter may be moved away from plaintiff, so that its loss of the TRO and preliminary injunction may well result in its loss of the underlying permanent injunction against defendant's stealing plaintiff's business.

You probably get the point of this sentence: If the court does not grant an injunction now, plaintiff will have trouble obtaining an injunction later because the defendant will have become entrenched. But the sentence is slow-starting and verbose.

Use the "If" construction rather than "as otherwise" for better flow and a tighter connection between the desired action and the consequences of non action.

"Level playing field" can be dropped as unnecessary and imprecise, and "defendant will build equity" can replace the ponderous sequence, "the lack of a preliminary injunction in and of itself will permit a change such that the underlying equities of this matter may be moved away from plaintiff."

"Plaintiff may ultimately be denied injunctive relief" can replace the much longer and less pointed "so that its loss of the TRO and preliminary injunction may well result in its loss of the underlying permanent injunction."

Finally, "defendant is stealing" is more forceful than "injunction against defendant's stealing."

The revised version:

> If the status quo is not maintained by a TRO and preliminary injunction, defendant will build equity, and plaintiff may ultimately be denied injunctive relief even though defendant is stealing his business.

Alternate opening:

> If the court does not grant a TRO and preliminary injunction to maintain the status quo, defendant will build equity ■