Pre-Judgment Restraint of Assets for Claims of Damages: Should the United States Follow England's Lead

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Pre-Judgment Restraint of Assets for Claims of Damages: Should the United States Follow England’s Lead?

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As the movement of money has evolved from the physical transfer of notes in satchels to transfer by electronic transmission, economic, governmental, and legal groups interested in the proceeds of those transfers have sought to adapt to keep pace. Emblematic of the modern approach is the experience of the United States in the effort to stop drug trafficking. As traditional law enforcement mechanisms failed, the U.S. government turned to measures designed to assail the proceeds of the drug trafficker. Beginning in 1986, statutes forbidding money laundering have transformed traditional banking norms and empowered the government to closely monitor and control the flow of money.

Legal systems have also sought to adapt. Troubled by the ease of transfer of money and egregious situations involving the plundering of national treasuries, courts modified traditional legal theory to address the problems created by the explosion of liquidity. Courts have taken approaches that have implicated fundamental concepts regarding the right to property and the power of the courts to ensure the validity and potency of their jurisdiction. The struggle between these two imperatives is perhaps most vividly displayed in the context of the pre-judgment

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1 See Elinor Harris Solomon, Virtual Money 156-57 (1997).


3 See, e.g., litigation surrounding the ill-gotten gains of the Duvaliers, infra notes 42-55 and accompanying text, and the Marcoses, infra notes 329-37 and accompanying text.
restraint of assets.4

In Part I, this Comment analyzes the approach adopted by the English courts since 1975, an example that has not been lost on U.S. courts.5 Part II explores the tools available to U.S. courts in crafting interlocutory orders designed to preserve a source of funds for satisfaction of an eventual money judgment.6 Part III offers an appraisal of the state of the law in the United States circuit courts on this subject.7 Finally, Part IV discusses the U.S. Supreme Court's 1999 decision resolving, at least for now, the tension between property rights and pre-judgment restraint of assets.8

Part I: The English Example

Ever since a watershed opinion in 1975,9 English courts have aggressively expanded the applicability of pre-judgment interlocutory relief in domestic and international contexts.10 American legal commentators have generally approved this development and urged the adoption of similar measures by American courts.11 Furthermore, at least one U.S. circuit court has expressed admiration for the English courts' success in this field.12

Since 1873, the traditional division between law and equity in

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4 Restraint of assets often involves extraterritorial effects including forced repatriation of assets. See, e.g., Derby & Co. v. Weldon (Derby No. 6), [1990] 1 W.L.R. 1139, 1153 (C.A. 1990); In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1478-80 (9th Cir. 1994).

5 See infra notes 9-136 and accompanying text.

6 See infra notes 137-65 and accompanying text.

7 See infra notes 166-488 and accompanying text.

8 See infra notes 489-530 and accompanying text.


10 See infra notes 18-135 and accompanying text.


the English courts has been abolished; an English court sitting in
equity may award legal relief and a court of law may issue
injunctions.\textsuperscript{13} Traditional restraints on judicial power to issue
injunctions remained intact. The change "[d]id not confer an
arbitrary or an unregulated discretion" on the courts nor did it
"mean that the Court is to grant an injunction simply because it
thinks it convenient."\textsuperscript{14} Furthermore, it did not modify "[t]he very
first principle of injunction law . . . that prima facie you do not
obtain injunctions to restrain actionable wrongs for which
damages are the proper remedy."\textsuperscript{15} Nevertheless, since the
granting of injunctions operates in personam, and "[t]he person to
whom [the injunction is] addressed must be within the reach of the
Court or amenable to its jurisdiction . . . the Court will not suffer
any one within its reach to do what is contrary to its notions of
equity, merely because the act to be done may be, in point of
locality, beyond its jurisdiction."\textsuperscript{16} The only limitation on the
courts' ability to enjoin acts of an in personam defendant beyond
its jurisdiction would be when the injunction "can have no specific
operation without the intervention of a foreign Court, and which in
the country where the lands to be charged by it lie, would probably
be treated as a brutum fulmen."\textsuperscript{17} Against this historical backdrop,
since 1975, the English courts have expanded and refined the use
of injunctive relief to order the restraint and repatriation of assets
worldwide.

\textit{A. The Creation of the Mareva Injunction}

The genesis of the doctrine expanding the availability of pre-
judgment restraint appeared in a brief 1975 opinion issued by the
Court of Appeal.\textsuperscript{18} In \textit{Mareva Compania Naviera S.A. v.

\textsuperscript{13} See \textit{F.H. Lawson, Remedies of English Law} 194 (2d ed. 1980) (citing the
Supreme Court of Judicature Act, 1873, 36 & 37 Vict., ch. 66, § 24 (Eng.)).

\textsuperscript{14} \textit{William Williamson Kerr and James Melvin Paterson, Kerr on the Law

\textsuperscript{15} \textit{Id.} at 6 (citations omitted).

\textsuperscript{16} \textit{Id.} at 11 (citations omitted).

\textsuperscript{17} \textit{Kerr, supra} note 14, at 11. (Citations omitted.) Brutum fulmen is an empty
threat or judgment void on its face and without legal effect. \textit{See Black's Law

\textsuperscript{18} The English civil court system begins with County and Magistrates' Courts for
cases below a certain damages or complexity threshold. The next level, or High Court, is
International Bulkcarriers S.A.,\textsuperscript{19} shipowners sued the charterers of the vessel upon the latter’s repudiation of the charter, claiming $30,800 in unpaid fees and an unspecified amount in damages.\textsuperscript{20} The defendant charterers had a source of funds on deposit in a London bank sufficient to pay the unpaid fees but, for reasons they did not specify, the defendants failed to perform according to the terms of the charter.\textsuperscript{21} Fearing the charterers would transfer the funds on deposit in London before a final judgment, the plaintiffs sought ex parte injunctive relief to restrain the defendants from disposing of their assets or otherwise removing them from the jurisdiction.\textsuperscript{22} The trial court granted the injunction for a period of three days\textsuperscript{23} but refused to extend it past that time, and the plaintiffs appealed.\textsuperscript{24} The Court of Appeal heard the case the same day, before expiration of the injunction.\textsuperscript{25}

In a brief opinion, the length of which belies its profound subsequent impact, the three-judge panel determined the sought-for relief was appropriate on the facts of the case, finding authority for its action in statute, treatise, and case law.\textsuperscript{26} The Court focused principally upon Chapter 49, section 45 of the Judicature Act of divided between the Chancery Division responsible for tax, probate, bankruptcy, property, and corporate cases, the Family Division responsible for domestic cases, and the Queen’s Bench Division responsible for contract, tort, admiralty, and commercial cases. The Court of Appeal, Civil Division hears appeals from the High Court. Finally, the House of Lords may grant leave to hear appeals from the Court of Appeal. See Penny Darbyshire, Eddey on the English Legal System 268 (6th ed. 1996).


\textsuperscript{21} See id. at 510. The total amount available to the defendants was £174,000, on deposit in the Bank of Bilbao’s London branch, paid by the Indian High Commission pursuant to a sub-charter.

\textsuperscript{22} See id.

\textsuperscript{23} The plaintiffs issued their writ, \textit{i.e.}, filed their complaint, on June 20, 1975. The trial court granted an injunction until 5 PM on June 23, 1975. See id. at 509.

\textsuperscript{24} See id. The trial court refused the extension, relying upon Lister & Co. v. Stubbs, 45 Ch. D. 1 (C.A. 1890) (holding that a defendant is not required to give security before judgment). See id. at 510.

\textsuperscript{25} See id. at 509.

\textsuperscript{26} See id.
That law provided "The High Court may grant a mandamus or an injunction or appoint a receiver by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient." Lord Denning proposed a standard for the grant of an injunction restraining the disposition of assets: "If it appears that the debt is due and owing--and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment—the Court has jurisdiction . . . to prevent [the debtor from] disposing of those assets." Since the Court in *Mareva* held that "the shipowners may not get their charter hire at all," the injunction was proper. Lord Justice Roskill agreed on the basis that the debt was certainly due, the default was "plain and unexcused," and "the plaintiffs will suffer a grave injustice . . . [having to] wait a long time . . . for discharge [of the vessel] without remuneration while the defendants will be able to dissipate that £174,000." The third member of the panel, Lord Justice Ormrod, concurred. The court authorized the continuation of the injunction until trial or further order of the court. Notably, the injunctive relief was limited to "those

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27 See id. at 510 (citing Supreme Court of Judicature Act, 1925, 15 & 16 Geo. 5, ch. 49, § 45 (Eng.). See also 21 HALSBURY'S LAWS OF ENGLAND § 729 (3d ed. 1957); Beddow v. Beddow, 9 Ch.D. 89 (1878).

28 Supreme Court of Judicature Act, 1925, 15 & 16 Geo. 5, ch. 49, § 45 (Eng.).


30 Id. at 511.

31 Id. In finding the debt was now due, Lord Justice Roskill relied on the ex parte statements and submissions of the plaintiff that the charter was based on a daily rate of hire and no payment had been made since the first two half-monthly payments; the third payment, the only payment past due, had not been made for no apparent good reason; and, the vessel was currently on a voyage charter, i.e. was sub-chartered, to a third party. See id. Though Lord Justice Roskill later based his support of the injunction on these "rather narrow reasons," Id. at 512, the narrowness of application of a rule that grants a plaintiff's attachment request because the defendant has assets, has defaulted on a payment, and has effectively sub-leased a chattel is far from clear.

32 See id. at 512.

33 See id. The court's decision to indefinitely continue the injunction after an ex parte application and without any requirement of a hearing with the presence of the defendant illustrates a striking difference between English standards of due process and their American equivalents. Such an approach would be prohibited in America as an infringement of a defendant's due process rights. See Shawmut Bank v. Costello, 643 A.2d 194 (R.I. 1994) (holding Rhode Island's equity attachment statute that allowed attachment of property without the opportunity for a hearing or a requirement to show an
moneys which are now in the bank," namely, the funds paid by the Indian High Commission to the defendants for the voyage charter, and did not extend to any other assets of the defendants.  

B. The Development of the Doctrine

Despite Lord Justice Roskill’s admonition that “[t]his Court should not . . . on an ex parte interlocutory application be too ready to disturb the practice of the past save for good reasons,” the request for and use of Mareva injunctions spread rapidly in English courts. The decision of the Mareva court was subsequently codified by Parliament in the Supreme Court Act of 1981. Nevertheless, its application to a defendant’s assets outside of the United Kingdom was not recognized for some time. As late as 1984, commentators opined that the language of the Supreme Court Act limited the application of a Mareva injunction to assets physically within the jurisdiction of the court of issue. That same year, the English Court of Appeals unfettered the Mareva injunction from its domestic limitations and expanded its scope to include worldwide application through a redefinition of the jurisdictional basis of such relief.


The traditional limits on the Mareva injunction were first weakened in 1988 when the Court of Appeal granted a post-exigency violated the U.S. and Rhode Island Constitutions).

35 See id.
36 This remedy has proved advantageous to plaintiffs, as shown by the over 1000 applications for Mareva injunctions that were heard by English courts every month by 1984. See David W. Shenton, Attachments and Other Interim Court Remedies in Support of Arbitration: The English Courts, 1984 INT’L BUS. LAW. 101, 104.
37 Supreme Court Act, 1981, ch. 54, § 37(1), (3) (Eng.).
39 See, e.g., Shenton, supra note 35, at 104 (limiting application of Mareva injunctions).
judgment *Mareva* injunction on the worldwide assets of a defendant, tempered by a proviso intended to minimize the harm to third parties from such an extraordinary measure.\(^4\) This first crack in the facade of the traditional doctrine limiting *Mareva* injunctions to domestic assets was followed by the grant of a pre-judgment worldwide *Mareva* injunction in 1988. In *Republic of Haiti v. Duvalier*,\(^4\) the Haitian government sought the return of assets looted from the national treasury by its former president and his family, the Duvaliers.\(^4\) The main action was pending in France, but the Haitian government sought a *Mareva* injunction restraining the ability of defendants from dealing with assets worldwide and a corollary disclosure order.\(^4\) On June 3, 1988, the trial court initially ordered that the defendants be:

[R]estrained from dealing with assets which represented the proceeds of the payments complained of in the French action . . . restrained from removing from the jurisdiction or dealing with their assets within the jurisdiction save in so far as they exceed [US]$120 [million] in value . . . [and] to disclose [through their solicitors] to the plaintiff’s solicitors . . . the nature, location, and value of those defendant’s assets.\(^4\)

The defendant’s solicitors applied to the trial judge for discharge of the order and another made subsequently but were denied.\(^4\) The solicitors’ appeal to the Court of Appeal was

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\(^4\) See Babanaft Int’l Co. S.A. v. Bassatne, [1989] 1 All E.R. 433 (C.A. 1988). The order would not affect third parties “unless and to the extent that it is enforced by the courts of the states in which any of the defendant’s assets are located.” *Id.* at 447.


\(^4\) See *id.*

\(^4\) See *id.* at 206. *Mareva* injunctions are usually accompanied by a mandatory disclosure order, referred to as an *Anton Piller* order after the case in which such orders were first authorized, *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] Ch. 55 (C.A. 1976). The *Anton Piller* order allows opposing parties access to premises and preserves documents for use in litigation and has a worldwide effect. See George A. Bermann, *Provisional Relief in Transnational Litigation*, 35 COLUMBIA J. TRANSNAT’L L. 553, 580-82 (1997).

\(^4\) Duvalier, 1990 Q.B. at 208. Lord Justice Staughton noted, “[n]otice that not only was the order made in the absence of the defendants and without their knowledge it was also not to be communicated to them until after their solicitors had complied with that part relating to disclosure of information. In these respects it was in line with current English practice.” *Id.* at 208.

\(^4\) See *id.* at 209. The solicitors contended that the French claim was not a tracing, or equitable, claim; therefore, the English court could not order worldwide disclosure.
similarly denied.\textsuperscript{47} The defendants were finally informed of the proceedings and on June 22, 1988, applied to the trial court to set aside the proceedings for want of jurisdiction.\textsuperscript{48} Upon denial, the defendants appealed.\textsuperscript{49}

Lord Justice Staughton approved the court's jurisdiction.\textsuperscript{50} Though plaintiffs only applied for interim relief from the court with no underlying substantive claim, the statute\textsuperscript{51} allowed such relief ancillary to an action in another country that was a party to the Brussels Convention on Jurisdiction and Enforcement of Judgments.\textsuperscript{52} Furthermore, while he disagreed that the action in France was a tracing or proprietary claim as opposed to a claim for monetary judgment, Lord Justice Staughton nevertheless felt that the permissible scope of a \textit{Mareva} injunction included worldwide asset restraint in support of a claim for monetary judgment.\textsuperscript{53} The

\textit{See id.}

\textsuperscript{47} \textit{See id.}
\textsuperscript{48} \textit{See id.}
\textsuperscript{49} \textit{See id.}
\textsuperscript{50} \textit{See id. at 212.}
\textsuperscript{51} \textit{See id.} at 210 (citing Civil Jurisdiction and Judgments Act 1982, § 25 (Eng.)).
\textsuperscript{52} As presently enacted, Rules of the Supreme Court, Order 11 rule 8A provides:

(1) Service of an originating summons out of the jurisdiction claiming interim relief under section 25(1) of the Civil Jurisdiction and Judgments Act 1982 (as extended by Order in Council made under section 25(3)), is permissible with the leave of the Court.

(2) An application for the grant of leave under paragraph (1) must be supported by an affidavit stating—

(a) the grounds on which the application is made;

(b) that in the deponent's belief the plaintiff has a good claim to interim relief;

(c) in what place or country the defendant is, or probably may be, found.


\textsuperscript{53} \textit{See Duvalier}, 1990 Q.B. at 214 (citing Ashtiani v. Kashi, 1987 Q.B. 888 (Eng. C.A. 1987)).

[T]he powers of the court are wider . . . if a . . . claim is what is called a tracing [i.e. proprietary] claim . . . . A proprietary claim is one by which the plaintiff seeks the return of chattels or land which are his property, or claims that a specified debt is owed by a third party to him and not to the defendant . . . . A plaintiff who seeks to enforce a claim of that kind will more readily be afforded
fact that such had not been heretofore granted was properly viewed as a "limitation as arising from settled practice, rather than from any restriction on the powers of the court." He cautioned that granting a pre-judgment worldwide Mareva would be appropriate only in "rare--if not very rare" cases.

2. Derby & Company, Ltd. v. Weldon (Derby No. 1)

*Derby & Co., Ltd. v. Weldon* arose after CML, a London commodity dealer which specialized in the international cocoa trade, found itself holding over £35 million in bad debt from an insolvent Hong Kong business group, of which only £1,485,148 had been recovered in the insolvency proceedings. Plaintiffs, members of a U.S. banking group, which owned CML, sued multiple defendants alleging breach of contract, misrepresentation, deceit, conspiracy to defraud, and fraudulent breach of fiduciary duty. The plaintiffs claimed damages of £35,580,424 from loans made by CML's two executive directors, Weldon and Jay, to the Hong Kong business group in order to allow the Hong Kong group to repay them for debts owed personally to Weldon and Jay.

Plaintiffs applied for a worldwide Mareva injunction against

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54 *Id.* at 213-14.
55 *Id.* at 215.
56 *Id.* The Lord Justice did not elaborate on what would constitute a rare case, but the facts of the instant case and their likely effect on the decision of the Court of Appeal should be appreciated. The Duvaliers were very unsympathetic defendants who had engaged in a pattern of conduct intended to secret their assets. *See id.* at 207.
57 The litigation in this case was very complex. Initiated in June 1987, the case wound its way back and forth between the Chancery Division and the Civil Court of Appeal on a variety of issues, though the Mareva injunctions question was the most problematic in occupying judicial resources. Fourteen decisions at the trial and appellate levels are available through LEXIS-NEXIS. The three opinions with which this Comment is concerned are all Court of Appeal decisions. This Comment will refer to them as *Derby No. 1*, 1990 Ch. 48 (C.A. 1988); *Derby Nos. 3 and 4*, 1990 Ch. 65 (C.A. 1988); and, *Derby No. 6*, [1990] 1 W.L.R. 1139 (C.A. 1990).
58 *See Derby No. 1*, 1990 Ch. at 53.
59 *See id.* at 50, 53. The defendants consisted of the two executive directors of CML, Weldon and Jay, and two companies the men controlled, Milco, a Panamanian company, and CML Holding SA, a Luxembourgeois company. *See id.* at 50.
60 *See id.* at 53.
the first and second defendants, but the trial court refused.\textsuperscript{60} Though the judge found the plaintiffs had satisfied the requirements for a \textit{Mareva} injunction, he relied upon precedent that restricted the use of a \textit{Mareva} injunction to assets within the jurisdiction.\textsuperscript{61} The Court of Appeal disagreed, relying heavily on the proceedings of another panel of that court that was contemporaneously hearing the appeal in \textit{Duvalier}.\textsuperscript{62}

Recognizing the use of the \textit{Mareva} injunction as a developing area of law, and cognizant of the oppressive nature of the remedy, the court established three requirements for issue of a worldwide \textit{Mareva} injunction: (1) plaintiff has a good, arguable case; (2) a real risk exists that defendant will dissipate assets; and, (3) defendant has insufficient English assets to satisfy a potential settlement.\textsuperscript{63}

Defendants in the case argued that no \textit{Mareva} injunction should issue absent “evidence of previous malpractice or nefarious intent” by defendants to avoid the jurisdiction of the court.\textsuperscript{64} The court rejected this contention, emphasizing the early stage of the litigation.\textsuperscript{65} The justices seemed to believe that the facts of the case implied the necessary intent of the defendants such that the \textit{Mareva} injunction was warranted, but they made no formal findings of fact to support that conclusion.\textsuperscript{66} One justice concluded, “defendants are clearly sophisticated operators who have amply demonstrated their ability to render assets untraceable and a determination not to reveal them,” without citing any facts upon which he relied in coming to that conclusion.\textsuperscript{67} Another cited the trial judge’s decision that in the absence of specific evidence of deceit, the honesty of the two individual defendants must be assumed.\textsuperscript{68} Lord Justice Nicholls rejected the pertinence of the

\textsuperscript{60} \textit{See id.} at 54.

\textsuperscript{61} \textit{See id.} (citing Ashtiani v. Kashi, 1987 Q.B. 888 (C.A. 1987)).

\textsuperscript{62} \textit{See id.} Lord Justice May acknowledged that “we are hearing this appeal almost simultaneously with the delivery of the judgment in the \textit{Duvalier} case.” \textit{See id.}

\textsuperscript{63} \textit{See id.} at 57.

\textsuperscript{64} \textit{Id.} at 55.

\textsuperscript{65} \textit{See id.}

\textsuperscript{66} \textit{See id.}

\textsuperscript{67} \textit{Id.} at 57.

\textsuperscript{68} \textit{See id.} at 61.
inquiry: "[I]f by what he said the judge meant that a restraint order in respect of overseas assets should not be made in the absence of proof of dishonesty on the part of the defendants even though the action is only at a very interlocutory stage, then I should feel bound to part company from him."69

The proceeding at the trial court occupied five weeks, a fact much lamented by the Court of Appeal.70 Evidently, the issue that commanded such attention was whether plaintiffs had a proprietary claim for an accounting of profits, as they contended, or whether their claim was simply for money judgment, as defendants argued.71 In the Court of Appeal's view, issues crucial to a determination of appropriate remedies in a U.S. case, such as the nature of the claim of relief, required adjudication of "point[s] of law" and "fine questions of fact" inappropriate for a pre-trial hearing.72

The court concluded that a worldwide Mareva injunction was appropriate in this and similar cases, provided it was accompanied by certain safeguards necessary to protect defendants from a multiplicity of proceedings or a misuse of information gathered pursuant to an ancillary disclosure order and to protect third parties.73 The court modified the proviso adopted in the Babanaft case to accomplish these goals.74

3. Derby & Company, Ltd. v. Weldon (Derby Nos. 3 and 4)

As the Derby litigation continued, more questions were raised concerning the permissible parameters of the Mareva injunction. While Derby No. 1 established the propriety of a worldwide Mareva injunction, the defendants in that proceeding had assets in England that were unquestionably subject to the jurisdiction of the court.75 The question there had been whether foreign assets could

69 Id.
70 See id. at 64.
71 See id. at 63.
72 Id.
73 See id. at 58-61.
74 See id. at 59-60. The court modified the proviso to require the plaintiffs to seek leave of the English court before making any application to a foreign jurisdiction. See id. at 59.
75 See supra notes 55-73 and accompanying text.
be restrained by the English court, not whether the court had power over the defendants. When the plaintiffs applied for a worldwide *Mareva* injunction against and appointment of a receiver for the third and fourth defendants, a Panamanian company and a Luxembourgian holding company, the trial court was faced with a request for a worldwide restraint on the assets of defendants who were neither resident in the jurisdiction nor had assets present in the jurisdiction. If granted, the injunction would exemplify an extraordinary exercise of power. Nevertheless, the trial court granted the plaintiff’s request as to the Luxembourgian company, relying on the enforceability of the judgment under the European Judgments Convention. Since Panama was not a signatory to that or a similar convention, the trial court refused to grant the relief as to the Panamanian company on the grounds that “nothing brings the law into greater disrepute than the making of orders which cannot be enforced.”

Defendants argued that the decisions in *Babanaft*, *Duvalier*, and *Derby No. 1*, all made within the preceding year, were an “impermissible extension of the Mareva jurisdiction and of the recognized practice, which had become established over the past 13 years.” Accordingly, the trial judge should not have granted the application for a *Mareva* injunction and a receiver against the Luxembourgeois company. Plaintiffs cross-appealed the decision to refuse the relief sought against the Panamanian company.

The court evidently appreciated the force of the defendants’ argument as it felt compelled to reject it at length. While the court recognized that the *Mareva* injunction was a radical

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76 See *Derby No. 1*, 1990 Ch. 48 (C.A. 1988).
78 See id. at 75.
79 See *Brussels Convention*, *supra* note 52.
80 *Derby Nos. 3 and 4*, 1990 Ch. at 80.
81 See *supra* notes 40-74 and accompanying text.
82 *Derby Nos. 3 and 4*, 1990 Ch. at 90.
83 See id. at 75.
84 See id.
85 See id. at 87-94.
departure from the long-established jurisprudence, it asserted the propriety of such relief for several reasons. First, the court discovered a statutory basis for the principles espoused by Mareva in addition to the admittedly amorphous authority in the Supreme Court of Judicature Act of 1925 and its progeny. The Matrimonial Causes Act of 1973, predating the Mareva decision by two years, allowed a court to grant interlocutory orders at its discretion upon application of a party if the "other party . . . is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property." In a 1985 case, the Court of Appeal had employed the Act to restrain a defendant from disposing of real property in Spain.

Second, the court relied on standard statutory construction:

[Where Parliament has invested the court with a discretion which has to be exercised in an almost inexhaustible variety of delicate and difficult circumstances, and . . . has not . . . define[d] or specif[ied] any cases or classes of cases for its application, this court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised.]

Therefore, though the Mareva injunction had been initially confined to cases in which the defendant was not resident in the jurisdiction but had property in the jurisdiction, and the injunction only restrained removal of property from the jurisdiction, these limitations had been systematically relaxed by subsequent cases.

In short, the doctrine was adapting and developing quickly as "[t]he transfer of funds from one jurisdiction to another [grew] ever more speedy and the methods of transfer more sophisticated." Therefore, to state that the doctrine had "already

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86 See id. at 88.
87 See id. at 76. Lord Donaldson placed the 1925 Act as the successor to the Supreme Court of Judicature Act, 1873, 36 & 37 Vict., ch. 66, § 24 (Eng.). See id.; see supra notes 27-28 and accompanying text for discussion of the 1925 Act.
88 Id. at 89 (quoting the Matrimonial Causes Act, 1973, § 37(2) (Eng.)).
91 See id. at 89-90.
92 Id. at 92.
become ossified” would be premature.\textsuperscript{93}

Third, the nature of the \textit{Mareva} is not in rem; rather, it is in personam.\textsuperscript{94} “[A] \textit{Mareva} injunction does not have any in rem effect on the assets themselves or the defendant’s title to them.”\textsuperscript{95} As a result, the court felt,

the time has come to state unequivocally that in an appropriate case the court has power to grant an interlocutory injunction even on a worldwide basis against any person who is properly before the court, so as to prevent that person by the transfer of his property frustrating a future judgment of the court.\textsuperscript{96}

The court did not resolve the difference between a claim in equity vice law; indeed, it appears the court rejected any difference between the two in the \textit{Mareva} context.\textsuperscript{97} While classifying the \textit{Mareva} injunction as an equitable remedy,\textsuperscript{98} the court approved the grant of the injunction in \textit{Duvalier} where the Court of Appeal viewed the claim as one for money judgment.\textsuperscript{99}

Upon that legal basis, the court had no difficulty rejecting the defendants’ appeal and granting the plaintiffs’ cross-appeal. The defendants had undermined their case through some startling stipulations into which they had entered for purposes of this appeal.\textsuperscript{100} In effect, the stipulations proved every element of Lord Denning’s criteria: the defendants were controlled by the

\textsuperscript{93} \textit{Id}..

\textsuperscript{94} \textit{See id}. at 96. American jurisprudence would not classify the nature of the \textit{Mareva} in \textit{Derby Nos. 3 and 4} as either in personam or in rem. In personam jurisdiction is defined as “[p]ower which a court has over the person himself in contrast to the court’s power over the defendant’s interest in property (quasi in rem) or power over the property itself (in rem).” \textit{BLACK’S LAW DICTIONARY} 791 (6th ed. 1990). Likewise, a \textit{Mareva} affecting assets within the jurisdiction as in the \textit{Mareva} case itself is more appropriately viewed as quasi in rem. Since \textit{Shaffer v. Heitner}, 433 U.S. 186 (1977), quasi in rem jurisdiction requires the same minimum contacts analysis as in personam jurisdiction for a non-resident defendant. \textit{See Bermann, supra} note 43, at 560-62.

\textsuperscript{95} \textit{Derby Nos. 3 & 4}, 1990 Ch. at 83.


\textsuperscript{97} \textit{See id}. at 93 (quoting 21 \textit{HALSBURY’S LAWS OF ENGLAND} § 729 (3d ed. 1957)).

\textsuperscript{98} \textit{See id}. at 96.

\textsuperscript{99} \textit{See supra} note 52 and accompanying text.

\textsuperscript{100} \textit{Derby Nos. 3 & 4}, 1990 Ch. at 76.
individual defendants, Weldon and Jay; the defendant companies "might be likely to dissipate their assets;" and the plaintiffs might recover as much as £25 million at trial. On these facts, and with the wide discretion with which they found themselves to be armed, the court found the Mareva injunction and appointment of a receiver appropriate for both defendants. The problem of enforceability vis à vis the Panamanian company was resolved on the basis that the court assumed the company would obey the court's orders; if it did not, it would be barred from defending the suit. A receiver was appropriate for similar reasons, since the assets of the Panamanian company might well be located in a country signatory to the Brussels Convention. Finally, to minimize the adverse consequences to third parties of the court's in personam injunction affecting the defendants' property overseas, the court tinkered with the Babanaft proviso issued by the trial court.

4. Derby & Company, Ltd. v. Weldon (Derby No. 6)

Though not the last opinion in the dispute between Derby & Co. and Weldon, Derby No. 6 is the last that addressed the issues of the scope and propriety of the Mareva injunction in international litigation. By the time of Derby No. 6, the number of defendants had risen to eleven. Numbers five through eleven were a menagerie of Swiss lawyers, Liechtensteiner trustees, and Panamanian shell trust companies that held assets under the direction of the former two groups. At this point in the case, the receiver appointed by the court in prior orders held certain assets

101 Id.
102 See id. at 98.
103 See id. at 81.
104 See id. at 86.
105 See id. at 87. The order would not affect third parties unless it was recognized by the jurisdiction in which the assets were located, or the third party was subject to in personam jurisdiction of the English courts and had been notified of the order and could assist in its execution. See id. Considering the liberality of English worldwide service of process and jurisdictional rules, the protection offered third parties by this modification is problematic. See infra notes 112-13, 131-32 and accompanying text.
107 See id. at 1145.
108 See id.
on deposit in Switzerland and elsewhere jointly with a Swiss lawyer and a Liechtensteiner trustee. Plaintiffs sought an order requiring all assets held by all the defendants to be held solely in the name of the receiver, any assets in Switzerland to be transferred out of that country, and any assets held elsewhere not to be returned to Switzerland upon maturity. Defendants sought repatriation to Switzerland on the basis that such a transfer would more accurately reflect the status quo of the assets at the onset of litigation.

Several wrinkles complicated matters. First, Swiss criminal law prohibited the receiver, an accountant in Zurich, from exercising any authority granted him by the English court. Nevertheless, the receiver would not be subject to criminal liability for actions related to assets held outside of Switzerland or for the transfer of assets outside of Switzerland provided the assets remained jointly controlled by the receiver and the Swiss lawyer or Liechtensteiner trustee. Second, the fifth to eleventh defendants were served with process outside of England pursuant to Rules of the Supreme Court Order 11. These defendants protested the jurisdiction of the English court, since any judgment rendered in that forum would likely not be enforced by the Swiss courts.

The court reiterated the development of the Mareva doctrine since 1975, especially in light of prior decisions in Derby itself. Simply stated,

[t]he jurisdiction of the court to grant a Mareva injunction

109 See id. at 1145-46.
110 See id.
111 See id. at 1141-42.
112 See id. at 1142.
113 See id. at 1147.
114 See id.
115 See id. Under Order 11, Rule 5 is entitled “Service of writ or notice of writ abroad: general.” Rule 6 is entitled “Service of writ abroad through foreign governments, judicial authorities and British consuls.” Rules of the Supreme Court, S.I. 1965, No. 1776.
116 See id. Switzerland is not a party to the Brussels Convention. See Brussels Convention, supra note 51.
against a person depends not on territorial jurisdiction of the
English court over assets within its jurisdiction, but on the
unlimited jurisdiction of the English court in personam against
any person, whether an individual or a corporation, who is,
under English procedure, properly made a party to proceedings
pending before the English court.117

According to the court, it undoubtedly had the power to make
an order requiring the transfer of assets from one jurisdiction to
another.118 The court viewed such an approach as consonant with
English law regarding the appointment of receivers by English
courts for the foreign assets of English companies as well as the
English courts’ de facto recognition of a foreign court to make
orders in personam against those subject to its jurisdiction.119

Acknowledging that the plaintiffs might be inconvenienced by
the need to relitigate the case in Switzerland before they might be
able to reach those assets, Lord Justice Staughton120 did not believe
that exigency mandated ordering the assets transferred.121 In his
opinion, Lord Staughton lamented the development of the Mareva
injunction coincident with his endorsement of it.122 Seeing the
development as a series of steps, from Mareva itself through Babanaft, Duvalier, and prior decisions in Derby, he pointed to the
consequences of that evolution: increased demand on judicial
resources, increased restraints on defendants before any
determination of liability, and increased interference with
transactions and property overseas.123 Furthermore, routine use of
foreign service of process coupled with orders for repatriation or
transfer of assets to England “would in [Lord Justice Staughton’s]

117 Id. at 1149. England has no constitutional due process clause to limit
jurisdiction conferred by procedural service of process rules. See William Tetley, Q.C.,
Arrest, Attachment, and Related Maritime Law Procedures, 73 Tul. L. Rev. 1895, 1916
(1999) (“There is no general requirement in the United Kingdom for a post-seizure
hearing following the arrest [of a vessel], as there now is in the United States because of
the U.S. Constitutional principle of “due process.”).

118 See id. at 1153.

119 See id. at 1150. An English court would not exercise its powers in support of a
foreign receiver absent a treaty obligation. See id.

120 Lord Staughton sat on the panel that decided Duvalier. See supra note 52 and
accompanying text.

121 See Derby No. 6, [1990] 1 W.L.R. at 1155.

122 See id. at 1153.

123 See id.
view justifiably be regarded as unacceptable chauvinism by the international community."\textsuperscript{124} Only in cases where "the actual proceed of fraud are on board a ship on the high seas flying no national flag and subject to no country's local jurisdiction...[o]r in a country which has no effective system of law, or one which can only be regarded as uncivilised" should the court's discretion to order the transfer of assets be exercised.\textsuperscript{125} Lord Staughton concluded that "the Swiss rule as to the enforcement of foreign judgments, although different from our own rule, is one which can reasonably be adopted by a civilised system of law."\textsuperscript{126}

Faced with the likely intransigence of the defendants to placing assets in Switzerland in the sole control of the receiver, the reluctance of the Swiss courts to order the same, and the risk of criminal penalty for the receiver in the undertaking, the court determined that, in its discretion and under the circumstances, the Swiss assets would remain in their present location and state of ownership.\textsuperscript{127} Assets outside of Switzerland would likewise remain in place, but ownership thereof would be in the name of the receiver alone.\textsuperscript{128}

\textbf{C. The Current State of English Law}

As it stands, English courts are ready and willing to issue \textit{Mareva} injunctions. Provided the plaintiff can show a good, arguable case and a risk that the defendant will dispose of assets in an effort to defeat an eventual judgment, the \textit{Mareva} injunction will issue.\textsuperscript{129} No proof of nefarious intent on the part of the defendant is necessary, and the \textit{Mareva} injunction will invariably be issued ex parte in the interest of expediency.\textsuperscript{130} Despite the admonitions of the courts that a \textit{Mareva} injunction is an extraordinary remedy, practice belies the rarity of such relief.\textsuperscript{131}
Furthermore, since Duvalier and Derby, worldwide Mareva injunctions are available on much the same terms. The only restraint on the courts' ability to indulge a plaintiff is the requirement that it have personal jurisdiction over the defendant. With the provisions of the Rules of the Supreme Court allowing worldwide service of process, the courts' have a large personal jurisdiction net. Additionally, since Derby Nos. 3 and 4 approved the use of a Mareva injunction over a defendant without assets in the jurisdiction, the law permits worldwide service of process on a defendant followed by a Mareva injunction and ancillary discovery orders on the defendant's assets irrespective of jurisdiction. This was exactly the result in Derby No. 6 for the Swiss and Liechtensteiner defendants.

Part II: Legal Bases of the Pre-Judgment Restraint of Assets in U.S. Courts

Courts in the United States may rely upon four separate bases of interlocutory relief when restraining a defendant's assets before entering a final judgment. The four bases are the All Writs Act, authorization within a specific statute, Rule 64 of the Federal Rules of Civil Procedure, and the inherent equitable power of the courts. While the methods overlap to some extent, courts have traditionally respected a division between them. The recent approaches of the Circuit Courts to the use of interlocutory relief to secure a fund for satisfaction of a potential money judgment is
discussed at length in Part III of this Comment.\footnote{See infra notes 166-488 and accompanying text.}

\textbf{A. The All Writs Act}

Section 1651 of Title 28 states: "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."\footnote{28 U.S.C. § 1651 (1994).} The "usages and principles of law" clause limits the statutory obligation of courts to issue writs.\footnote{Id.} The statute originally provided a more detailed description of the powers of the court, but was modified in 1948 after the enactment of the Federal Rules of Civil Procedure\footnote{For example, references to writs of 	extit{scire facias} were deleted. See \textit{id}.} and in accordance with the Supreme Court's construction of the statute.\footnote{"The revised section is expressive of the construction recently placed upon such section by the Supreme Court in \textit{U.S. Alkali Export Assn. v. U.S.}, 325 U.S. 196 [1945], and \textit{De Beers Consol. Mines v. U.S.}, 325 U.S. 212 [1945]." \textit{Id. See also, infra} notes 169-186 and accompanying text.} Nevertheless, many circuits have concluded that the All Writs Act gives courts the power to issue pre-judgment orders of restraint.\footnote{See, e.g., \textit{Hoxworth v. Blinder, Robinson & Co., Inc.}, 903 F.2d 186 (3d Cir. 1990).} On the other hand, some circuits have narrowly construed the Act to apply only to writs in aid of jurisdiction.\footnote{See, e.g., \textit{Mitsubishi Int’l Corp. v. Cardinal Textile Sales, Inc.}, 14 F.3d 1507, 1517 n.17 (11th Cir. 1994) (stating, “Conduct not shown to be detrimental to the court’s jurisdiction or exercise thereof cannot be enjoined under the Act.”); \textit{ITT Community Dev. Corp. v. Barton}, 569 F.2d 1351, 1359-60 (5th Cir. 1978).} Regardless of the approach taken, the Federal Rules provide the procedural system to regulate how that power may be exercised.

\textbf{B. Authorization within a Specific Statute}

Federal law often provides authority for courts to issue pre-judgment orders restraining actions by a defendant in violation of federal law.\footnote{See, e.g., Sherman Anti-Trust Act, 15 U.S.C. § 4 (1994). The text of that section states: The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the}
power of the court to the restraint of actions by a defendant, rather than any restraint of a defendant's assets to preserve a source of funds to satisfy any final judgment.\textsuperscript{151} This narrow scope limits the usefulness of such authority to a plaintiff. Instead, a plaintiff must rely on the All Writs Act\textsuperscript{152} as the source for the courts' power of injunctive relief to preserve a source of funds pending a final judgment.\textsuperscript{153}

\textit{C. Rule 64}

On its face, Rule 64 appears to squarely address and set the limits of any interlocutory relief for the purpose of preserving a source of funds in contemplation of satisfaction of a money judgment. It states:

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.\textsuperscript{154}

The effect given to state law in furnishing the requirements for relief under the rule "quite commonly . . . permits the use of

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\textsuperscript{151} See id.

\textsuperscript{152} See supra notes 144-49 and accompanying text.

\textsuperscript{153} Rule 65 recognizes a statute may authorize interlocutory relief. See FED. R. CIV. P. 65. See also, 11A WRIGHT ET AL., supra note 141, at § 2933.

\textsuperscript{154} FED. R. CIV. P. 64.
provisional remedies only in actions of the kind that historically were at law rather than in equity. This limitation, like other state provisions about the circumstances and manner in which provisional remedies can be used, must be honored. The extent to which that admonition is respected is discussed later in this Comment.

D. The Inherent Equitable Power of the Courts Administered through Rule 65

Rule 65 does not authorize the granting of injunctive relief; rather, it establishes procedural rules for use by the court in ruling on such a motion. The grant or denial of such relief is at the discretion of the trial court, "exercised in conformity with historic federal equity practice." Accordingly, "the substantive prerequisites for obtaining an equitable as well as the general availability of injunctive relief are not altered by the rule and depend on traditional principles of equity jurisdiction." In general, a party seeking a preliminary injunction must show that no adequate legal remedy exists and the plaintiff will suffer irreparable harm if the injunction is not granted. In what amounts to a balancing test, the court weighs this harm with several other factors: plaintiff's likelihood of succeeding on the merits; whether the potential harm to plaintiff from denial of the request for an injunction will be greater than the harm to the defendant from the granting thereof; whether the injunction will not harm the public interest; and, whether the injunction serves to maintain the status quo pending the final judgment.

A court will also consider the extraterritorial effect of the

155 11A WRIGHT ET AL., supra note 141, § 2932.
156 See infra notes 234-488 and accompanying text.
157 See 11A WRIGHT ET AL., supra note 141, § 2941.
158 Id. § 2947. Since the merger of law and equity, injunctive relief is also available in claims at law, albeit in accordance with equitable principles. See id. § 2941.
159 Id.
160 See supra note 137.
161 See 11A WRIGHT ET AL., supra note 141, § 2941.
162 See id. § 2948; Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 382-83 (7th Cir. 1984).
injunction. The traditional reluctance of courts to issue injunctions affecting land situated in another jurisdiction has not been extended to personalty since the situs court has less of an interest in the latter than the former. Similarly, negative injunctions, that is, those that forbid rather than direct an act, are viewed more favorably as being less intrusive on the sovereignty of the other jurisdiction.

Part III: The Approach Taken by American Courts

A. Foundational Supreme Court Decisions

As discussed in Part II, American law has maintained the distinction between injunctive relief and attachment depending on the type of claim presented and the relief requested. The seminal case for this subject is the 1945 Supreme Court decision in *De Beers Consolidated Mines v. United States*. Of only slightly less importance are two other Supreme Court cases: The 1940 decision, cited in *De Beers*, of *Deckert v. Independence Shares Corporation*, and the 1965 decision *United States v. First National City Bank*. Regardless of how a lower court approached the problem, *De Beers, Deckert*, and *First National* had to be considered either as support for or distinguishable from the facts of the case at issue. In all of the cases discussed herein in which the grant or denial of pre-judgment restraint was at issue, the specific facts were crucial to the court’s balance of the relevant factors and the subsequent outcome.

1. *De Beers Consolidated Mines v. United States*

In *De Beers*, the United States brought suit against multiple corporations and their shareholders engaged in the business of

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163 See 11A WRIGHT ET AL., supra note 141, § 2945.
164 See id.
165 See id. An example of a negative injunction is an asset freeze order restraining a defendant from disposing of assets. By contrast, a repatriation order is an example of a positive injunction. See id.
166 See supra notes 157-65 and accompanying text.
167 325 U.S. 212 (1945).
168 311 U.S. 282 (1940).
producing gem and industrial diamonds and exporting them to the United States. The Government alleged violations of the Sherman Anti-Trust Act and the Wilson Tariff Act, claiming that the defendants had conspired "to restrain and monopolize the commerce of the United States with foreign nations." The suit was in equity, as the Government sought to prevent future monopolizing conduct by the defendants. The Government obtained a preliminary injunction from the trial court freezing the defendants' property and bank accounts in the United States. After a hearing, the trial court held that the injunction was appropriate under the Sherman Act and the All Writs Act, whereupon the defendants appealed.

The Government had initially contended that the injunction was valid as a sequestration of assets under Rule 70, but it abandoned that argument as untenable since Rule 70 only applies to compel satisfaction of a judgment. The Government further acknowledged that Rule 64 afforded no relief because the applicable law of the case permitted attachment of defendants' assets only in a suit seeking monetary damages.

The Court analyzed the nature of the injunction, noting that "the name given to the process is not determinative," and concluded that the trial court's decision implied a list of factors.

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170 See De Beers, 325 U.S. at 214-15. Two cases were consolidated on certiorari. The first, No. 1189, named De Beers and two other South African corporations as defendants; the second, No. 1190, named as the lead defendant the Societe Internationale Forestiere et Miniere du Congo and also joined five other corporations and seven individuals as defendants. See id.


174 See id. at 219-20.

175 See id. at 215-16.

176 See id. at 216.

177 Rule 70 provides in part, "If a judgment directs a party . . . to perform [a] specific act and the party fails to comply . . . [o]n application of the [other] party, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party." FED. R. CIV. P. 70.

178 See De Beers, 325 U.S. at 218.

179 See id. N.Y. law was the law of the case. See id.

180 Id. at 219.
These included jurisdiction over the defendants, a valid cause of action, possible success for plaintiff on the merits, the chance the defendants might not comply with the final judgment, subsequent proceedings for contempt and a resulting fine, refusal by the defendants to pay the fine, and a dearth of any funds to execute upon unless funds are frozen in anticipation of that event. Consequently, the Court classified the injunction "as a method of providing security for compliance with other process which conceivably may be issued for satisfaction of a money judgment for contempt" and therefore not "intermediate relief of the same character as that which may be granted finally." It distinguished cases "in which an interlocutory injunction was granted with respect to a fund or property which would have been the subject of the provisions of any final decree in the cause." The Court rejected the Government's attempt to analogize an injunction seeking to restrain a corporate defendant from removing property with a writ ne exeat issued against an individual defendant, holding that such a writ would be equally inappropriate in a suit in which the individual defendant owed no debt nor was under any duty to account to plaintiff for moneys received. In a quotation that has become de rigueur on this subject, the Court emphasized its displeasure with the injunction granted in the principal case.

To sustain the challenged order would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction

181 See id.
182 Id. at 220.
183 Id. (citing Deckert v. Independence Shares Corp., 311 U.S. 282 (1942)).
184 A writ ne exeat is designed "to prevent the frustration of a plaintiff's equitable claims by ensuring the continued physical presence of the defendant within the court's jurisdiction." BLACK'S LAW DICTIONARY 1031 (6th ed. 1990).
185 See De Beers, 325 U.S. at 221-22.
sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence.\textsuperscript{186}

The Court reversed the grant of the injunction.\textsuperscript{187}

2. Deckert v. Independence Shares Corporation

Cited in De Beers,\textsuperscript{188} Deckert v. Independence Shares Corporation\textsuperscript{189} involved a suit in equity under the Securities Act of 1933\textsuperscript{190} "to rescind a fraudulent sale . . . secure restitution of the consideration paid . . . [and] enforce the right to restitution against a third party" because of the defendant's insolvency.\textsuperscript{191} The trial court granted an injunction restraining the third party from disposing of securities issued by the principal defendant.\textsuperscript{192} Upon appeal, the Third Circuit reversed the grant of the injunction.\textsuperscript{193}

In a short unanimous opinion, the Court agreed that the Securities Act allowed suits for other than money damages, and stressed that "the bill states a cause for equitable relief . . . . The principle objects of the suit are rescission . . . and restitution . . . . [Both] may be maintained in equity, at least where there are circumstances making the legal remedy inadequate."\textsuperscript{194} Allegations that the defendant "was insolvent and its assets in danger of dissipation or depletion . . . [indicated that] the legal remedy . . . would be inadequate."\textsuperscript{195} Since the complaint alleged

\textsuperscript{186} Id. at 222-23.

\textsuperscript{187} See id. at 223. Four Justices dissented on the grounds that the Court did not have the power to hear an appeal from an interlocutory order in an anti-trust case. See id. (Douglas, J., dissenting) (citing United States v. California Cooperative Canneries, 279 U.S. 553 (1929)). The facts of the principal case where not so extraordinary as to allow review under the All Writs Act since there was no hardship imposed on the defendants beyond the inconvenience of posting a bond. See id. at 224-25 (Douglas, J., dissenting).

\textsuperscript{188} See supra note 183 and accompanying text.

\textsuperscript{189} 311 U.S. 282 (1940).


\textsuperscript{191} Deckert, 311 U.S. at 284.

\textsuperscript{192} See id. at 285-86.

\textsuperscript{193} See id. at 286. The Third Circuit had also ordered plaintiffs to amend their complaint to state a cause of action at law. See id.

\textsuperscript{194} Id. at 288-89.

\textsuperscript{195} Id. at 290.
circumstances that would, if proven, entitle plaintiffs to equitable relief, and in view of the narrowness of the injunction and the requirement of security for any losses suffered by the defendant, the Court viewed the injunction as "a reasonable measure to preserve the status quo pending final determination." "

3. United States v. First National City Bank

In a fascinating case that implicates the role of banking institutions in disputes between depositors and creditors, the enforceability of the orders of U.S. courts in other countries, and the equitable or legal foundation required for pre-judgment restraint of assets, the Court split in a 7-2 vote with a vigorous dissent by Justice Harlan. The U.S. Internal Revenue Service obtained an injunction that froze the assets of an Uruguayan corporation, Omar, on deposit with the Montevideo branch of First National City Bank (Citibank). To complicate the procedural matters, Omar had never been served with process and was not, therefore, a party to the suit.

Justice Douglas, in a short opinion for the Court, held that the National Bank Act gave the trial court power to issue injunctions pursuant to enforcement of tax laws. Despite the lack of service of process on Omar, Justice Douglas held that Omar would be subject to the jurisdiction of the Federal court in New York under New York law. The lack of service on Omar was not fatal to the issue of the injunction since the court's order was directed at Citibank over whom jurisdiction was unchallenged. He likewise

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196 Though termed narrow by the Court, the amount restrained consisted of $38,258.85 while the amount in controversy was less than $3,000. See id. at 286.

197 Id. at 289-90.


199 See id. at 379-80. Omar had been assessed with a $19 million deficiency and had been issued with notices of levy and imposition of a federal tax lien against its assets. See id. at 379.

200 See id. The IRS had begun to investigate Omar in 1959 and filed the complaint in the suit in October, 1962. In November, 1964, the IRS had yet to obtain service on Omar. See id. at 385-86 (Harlan, J., dissenting).


202 See id. at 380.

203 See id. at 381 (citing N.Y. C.P.L.R. 7B (McKinney 1990)).

204 See id. at 383 n.5.
gave short shrift to the contention that the Montevideo branch of Citibank was a separate entity and therefore not subject to the jurisdiction of the district court. In light of the significant public interest involved, Justice Douglas approved of the injunction as "eminently appropriate to prevent further dissipation of assets." Affidavits filed by the IRS claimed dissipation, but the only apparent basis in the opinion for claiming an effort to dissipate assets was Omar's removal of the funds from the United States to Uruguay. Nevertheless, Justice Douglas distinguished these facts from De Beers on the grounds that the assets restrained "would be 'the subject of the provisions of any final decree in the cause'" and relied on Deckert for the conclusion that the injunction was necessary to preserve the status quo.

In a dissenting opinion four times the length of Justice Douglas's opinion for the Court, Justice Harlan fervently decried the Court's ruling. After criticizing the Government's failure to serve Omar, he cautioned against the breadth of the exercise of power the Court had sanctioned. He noted that although jurisdiction over Citibank empowered the district court to enter the injunction, "jurisdiction is not synonymous with naked power." Although the district court had power to act as it did, Justice Harlan argued that the exercise of that power might nevertheless be improper. The restraints on that power flowed from policy

205 See id. at 384.
206 See id. at 383. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." Id. (quoting Virginian R. Co. v. System Federation, 300 U.S. 515, 552 (1937)).
207 Id. at 385 (citing United States v. Morris & Essex R.R. Co., 135 F.2d 711, 713-14 (2d Cir. 1943)).
208 See id.
209 Id. (quoting De Beers Consol. Mines v. United States, 325 U.S. 212 (1945)).
210 See id. (quoting Deckert v. Independence Shares Corp., 311 U.S. 282, 290 (1940)).
211 See id. (Harlan, J., dissenting).
212 See id. (Harlan, J., dissenting).
213 Id. at 387-88 (Harlan, J., dissenting) (internal quotation marks omitted).
214 See id. at 388 (Harlan, J., dissenting) (quoting Amey v. Colebrook Guaranty Sav. Bank, 92 F.2d 62, 63 (2d Cir. 1937)).
considerations.\textsuperscript{215} Foremost among these policy considerations was one “basic to traditional notions of equity that to justify the issuance of a protective temporary injunction there must exist a substantial probability that jurisdiction, judgment, and enforcement will be obtained with respect to the person sought to be affected.”\textsuperscript{216} In the instant case, Omar was not subject to the jurisdiction of the lower court at the time the injunction was issued.\textsuperscript{217} To declare that the injunction would now be a proper exercise of jurisdiction flew in the face of principles of equity for two reasons.\textsuperscript{218} First, Omar’s assets had been temporarily frozen for over two years by a court without jurisdiction over it and without affording Omar any opportunity to contest the injunction.\textsuperscript{219} This action deprived Omar of due process, “[a]nd the hand of equity should be stayed long before it reaches constitutional limits.”\textsuperscript{220} Secondly, the funds now frozen were unassailable by the United States.\textsuperscript{221} The Uruguayan courts would not recognize a U.S. court order,\textsuperscript{222} Citibank would be under no obligation under Uruguayan law to pay the funds over to the United States,\textsuperscript{223} and Citibank would be exposed to liability

\textsuperscript{215} See id. (Harlan, J., dissenting).

\textsuperscript{216} Id. at 390 (Harlan, J., dissenting).

\textsuperscript{217} See id. (Harlan, J., dissenting). The Court in its opinion had evaluated the injunction as of the date of the hearing before it and ruled that New York law now allowed service of process on foreign residents by mail. See id. at 381. Though the law allowing such service was not in effect at the time suit was brought, the Court interpreted New York law as allowing application of the new service rules to pending litigation. See id. at 382 (citing Simonsen v. International Bank, 200 N.E.2d 427, 432 (N.Y. 1964)).

\textsuperscript{218} See id. at 392 (Harlan, J., dissenting).

\textsuperscript{219} See id. (Harlan, J., dissenting).

\textsuperscript{220} Id. at 394 (Harlan, J., dissenting).

\textsuperscript{221} See id. (Harlan, J., dissenting).

\textsuperscript{222} See id. at 402-03 (Harlan, J., dissenting) (citing Codigo de Procedimiento Civil (Couture, 1952) (Uruguay)).

\textsuperscript{223} See id. at 394-95 (Harlan, J., dissenting). The Government had argued that it could access the funds by serving Omar by mail in Uruguay and obtaining a default judgment ordering transfer of the funds to New York. Upon Omar’s refusal to comply, the Government would apply for appointment under Rule 70 and make demand on the Montevideo branch for payment. If refused, Omar, by the Government, would sue in New York for breach of contract and the Government would then garnish the award. See id. at 395-96 (Harlan, J., dissenting).
in Uruguay for violations of Uruguayan law if it did so.\textsuperscript{224}

Justice Harlan evaluated \textit{De Beers} and determined it was "indistinguishable from the present case and should control this litigation."\textsuperscript{225} The essential element in \textit{De Beers}, he argued, was the remoteness of the pre-judgment relief requested from the ultimate disposition of the case.\textsuperscript{226} It was that remoteness that compelled the Court to vacate the freeze order.\textsuperscript{227}

An order [in \textit{De Beers}] to stop their alleged monopolistic practices would have been as little likely to meet with voluntary compliance as an order to Omar to pay $19,300,000 . . . . Clearly the Court's point in emphasizing the scope of the order which could issue in the first instance was that the possibility of an ultimate levy was too remote in practical terms to justify freezing the property from the outset of the litigation. Remoteness is the determinative point, whatever its cause, and in terms of remoteness the case before us argues even stronger than \textit{De Beers} against the issuance of what amounts to an interim sequestration order.\textsuperscript{228}

Justice Harlan also reconciled \textit{Deckert} as a case that had no international implications, no personal jurisdiction issues, no question of the court's power to enforce an order against assets, no problem of remoteness, and assets in issue which were subject to attachment in a state court proceeding.\textsuperscript{229} He concluded that the Court with but a "slender reed" had ignored its own precedent and "powerful equitable considerations" to approve the use of "naked power" and "an abuse of discretion of such magnitude and mischievous radiations in our general jurisprudence."\textsuperscript{230}

As discussed later in this Comment, the decisions of the Court in \textit{De Beers}, \textit{Deckert}, and \textit{First National} have been all things to all people.\textsuperscript{231} The Court was divided on the meaning of \textit{De Beers}, as is demonstrated by the opinions in \textit{First National}.\textsuperscript{232}

\textsuperscript{224} See id. at 402-03 (Harlan, J., dissenting).
\textsuperscript{225} Id. at 397 (Harlan, J., dissenting).
\textsuperscript{226} See id. at 398 (Harlan, J., dissenting).
\textsuperscript{227} See id. (Harlan, J., dissenting).
\textsuperscript{228} Id. at 398-99 (Harlan, J., dissenting).
\textsuperscript{229} See id. at 399 (Harlan, J., dissenting).
\textsuperscript{230} Id. at 410 (Harlan, J., dissenting).
\textsuperscript{231} See infra notes 236-477 and accompanying text.
\textsuperscript{232} See First National, 379 U.S. 378.
ambiguity in interpretation is reflected and magnified in lower court decisions on the issue of the pre-judgment restraint of assets.  

B. The State of the Law in the Circuit Courts of Appeal: The Pro-Mareva Camp

The majority of the circuits have embraced, though with variation in the strength and forthrightness thereof, the use of equitable remedies to secure a source of assets to satisfy a potential money judgment. This majority consists of the First, Second, Third, Seventh, Eighth, Ninth, Tenth, and District of Columbia circuits. These circuits have tended to take a narrow view of De Beers and to rely more heavily on the majority in First National. Otherwise stated, these circuits have expanded the general equitable power of the courts across the traditional border into the area of legal remedies.

1. The Second Circuit

The Second Circuit’s decision in Alliance Bond Fund, Inc. v. Grupo Mexican de Desarrollo, S.A. marks the most profound present embrace of the use of a Mareva-type injunction by a U.S. Circuit Court of Appeals. Decided in May 1998 but reversed by the Supreme Court in June 1999, the Second Circuit’s decision in Alliance Bond stands as the high water mark for the Mareva injunction on this side of the Atlantic.

The litigation arose as a consequence of the economic turmoil in Mexico during the mid-1990s. Defendants were a holding company and its subsidiaries engaged in the toll road construction

\[\text{See infra notes 237-368 and accompanying text.}\]

\[\text{See infra notes 237-368 and accompanying text.}\]


\[\text{See id.}\]

\[\text{143 F.3d 688 (2d Cir. 1998), rev’d, 119 S. Ct. 1961 (1999).}\]

\[\text{The court commented, “We are also impressed by England’s successful twenty-year history of issuing ‘Mareva injunctions’ under circumstances substantially similar to those present on appeal.” Id. at 696.}\]

\[\text{See id. at 690.}\]
Plaintiffs had made unsecured loans totaling approximately $75 million to finance the defendants’ operations. With the economic downturn, defendants were unable to meet their debt obligations. The Mexican government responded to the crisis and advanced $309 million in Toll Road Notes to the defendants in exchange for eventual ownership and operation of the constructed toll roads, but the defendants had total liabilities far in excess of the amount guaranteed by the Mexican government. In addition, the defendants were favoring Mexican creditors of equal priority as plaintiffs, which left the plaintiffs facing the prospect of recouping only $5.5 million of their $75 million investment. Plaintiffs filed for a preliminary injunction under Rule 65, and after two hearings, the trial court granted the injunction “restraining [defendants] from dissipating, transferring, conveying, or otherwise encumbering the [plaintiffs’] right to receive or benefit from the issuance of the Toll Road Notes.”

The defendants appealed the grant of the injunction on the grounds that Rule 64, and not Rule 65, controlled the decision on the motion, thereby presenting an issue of first impression for the Second Circuit: Does a district court have the authority under Rule 65 to freeze assets not directly involved in the litigation? After reviewing Supreme Court precedents, including *De Beers*, its own precedent, and that of other U.S. Circuits, the court approved the use of Rule 65 to effect the relief ordered by the

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240 See id.
241 See id. at 691.
242 See id.
243 See id.
244 See id. at 692. Defendants submitted an affidavit to the court opposing the motion for a preliminary injunction which stated that between $214 million and $258 million of the Toll Road Notes had already been assigned to Mexican creditors, including $137 million back to the Mexican government. After further planned assignments, only $5.5 million would remain for plaintiffs. See id.
245 Id.
246 See id.
247 See id. at 693. The Toll Road Notes were not issued as guarantees to plaintiff and thus were not related to the defendants default on repayment of plaintiffs’ loans. All parties agreed that the plaintiff had no recourse under Rule 64 and New York’s attachment statute. See id.
District Court.\textsuperscript{248} The defendants argued that \textit{De Beers} “bar[red] the use of preliminary injunctions to freeze unrelated assets in any case seeking only monetary relief,” but the court found this interpretation “too sweeping.”\textsuperscript{249} Rather, the court found that \textit{De Beers} stood for the proposition that a defendant’s assets may not be restrained when equitable relief alone is sought in the action.\textsuperscript{250} In support of this interpretation, the Second Circuit looked to \textit{Deckert} and \textit{First National} as endorsements of “the district court’s exercise of the general equitable power to ensure the preservation of an adequate remedy.”\textsuperscript{251} This represents an expansive interpretation of the Supreme Court’s decisions in both cases which had been restricted to the district courts’ statutory power under the Securities Act\textsuperscript{252} and the Internal Revenue Code,\textsuperscript{253} respectively.\textsuperscript{254}

In support of its interpretation, the court approved similar holdings in other circuits that together “settled in equity jurisprudence that a preliminary injunction is available to protect the plaintiff’s right to recover monetary damages when there is a threat that the defendant will become insolvent or dissipate assets.”\textsuperscript{255} The Second Circuit further declared that they thereby:

join[ed] the majority of circuits in concluding that a district court has authority to issue a preliminary injunction where the

\begin{itemize}
  \item \textsuperscript{248} See id. at 697-98. The court’s identification of the source of the district court’s power to enter the injunction is unclear. Under the heading “Power of the District Court to Issue the Injunction,” the court says immediately, “[t]his Court has approved the use of Rule 65 to freeze assets when those assets are the subject matter in dispute.” \textit{Id.} at 693. Rule 65 provides procedural rules for issuance of injunctions; the power to issue an injunction must be found elsewhere. \textit{See supra} notes 157-65 and accompanying text. The court’s subsequent discussion approves the “general equitable power” of the courts to enter preliminary injunctions, but no reference to the All Writs Act is made. 143 F.3d at 695.
  \item \textsuperscript{249} \textit{Id.} at 693-94.
  \item \textsuperscript{250} See \textit{id.} at 694.
  \item \textsuperscript{251} \textit{Id.} at 695.
  \item \textsuperscript{252} See \textit{supra} note 190 and accompanying text.
  \item \textsuperscript{253} See \textit{supra} note 200-01 and accompanying text.
  \item \textsuperscript{254} See \textit{Alliance Bond}, 143 F.3d at 694.
  \item \textsuperscript{255} \textit{Id.} at 695 (citing \textit{Hoxworth v. Blinder, Robinson & Co.}, 903 F.2d 186 (3d Cir. 1990)); \textit{Teradyne, Inc. v. Mostek Corp.}, 797 F.2d 43 (1st Cir. 1986); \textit{In re Estate of Marcos}, 25 F.3d 1467 (9th Cir. 1994)).
\end{itemize}
plaintiffs can establish that money damages will be an inadequate remedy due to pending insolvency of the defendant or that defendant has engaged in a pattern of secreting or dissipating assets to avoid judgment.256

The court shrugged off the concern that such a position would inaugurate exactly the assault on traditional equitable principals warned against in De Beers by responding that “[t]he defendant’s rights are adequately protected [because] traditional requirements for obtaining equitable relief must be met before a district court may issue an injunction.”257

Later in the opinion the court undermined any comfort this last statement may have provided to the defendants. First, the court proscribed any requirement that the plaintiff “establish that the enjoined party harbored the intent to frustrate the recovery of an eventual judgment” as “an addition to the traditional requirements.”258 Such a showing is merely one way to show irreparable harm but is not the exclusive means.259 Secondly, and in spite of its own recent precedent,260 the court stated that “the district court may properly find that the threatened injury would be irreparable if, in the absence of an injunction, the movant would be unable to collect such a judgment.”261 Through this construction, the court effectively shifts the burden of persuasion of the legitimacy of the defendant’s actions from the plaintiff seeking the injunction to the defendant contesting it.262

256 Id. at 696 (quoting In re Estate of Marcos, 25 F.3d 1467, 1480 (9th Cir. 1994)).
257 Id. at 696.
258 Id.
259 See id. at 697.
261 Alliance Bond, 143 F.3d at 697.
262 See id. In Haseotes, the court determined that the defendants were legitimately seeking to reduce debt and pay off creditors. See Haseotes, 13 F.3d 569. In Alliance Bond, the district court felt the defendants were improperly establishing a priority among creditors by assigning the Toll Road Notes. See Alliance Bond, 143 F.3d at 692. In light of the court’s statement in Alliance Bond that the movant need not show any intent to frustrate recovery, see supra note 258 and accompanying text, the implication is that the defendant must show the legitimacy of its actions regardless of the plaintiff’s proof.
2. The First Circuit

In *Teradyne, Inc. v. Mostek Corporation* the First Circuit adjudicated an appeal from a district court’s grant of a preliminary injunction that restrained the disposition of $4 million in assets on a $3.5 million breach of contract claim against the defendant, a corporation in the process of liquidation. Following *Deckert*, the court approved the use of a preliminary injunction to freeze the status quo and protect damages remedies in cases where defendants are likely to be insolvent. According to the court, it was not an abuse of discretion to grant the injunction, since the traditional requirements for an injunction had been satisfied.

3. The Third Circuit

In *Hoxworth v. Blinder, Robinson & Company, Inc.*, the Third Circuit likewise upheld what it termed “an extremely broad preliminary injunction designed to protect a potential future damages remedy.” In a class action for securities fraud and RICO violations, plaintiffs sought and obtained an injunction freezing an indeterminate amount in assets and ordering one of the defendants to repatriate $11 million in assets transferred overseas during the litigation, including $4 million belonging to a non-party corporation of which he was president. Defendants, relying on *De Beers*, argued that the district court was without the power to grant an injunction designed solely to protect a future damages

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263 797 F.2d 43 (1st Cir. 1986).
264 See id. at 44-45.
265 See id. at 52 (citing *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940)).
266 See id. at 51-52. The requirements for an injunction advanced by the court were: (1) irreparable injury to plaintiff absent the injunction; (2) prospective harm to plaintiff outweighs harm of injunction to defendant; (3) plaintiff has likelihood of success on the merits; and, (4) no adverse effect on the public interest from the injunction. See id. On the facts of the instant case, the court determined that (4), above, was not implicated. See id. at 52.
267 903 F.2d 186 (3d Cir. 1990).
268 Id. at 189.
270 See *Hoxworth*, 903 F.2d at 189.
remedy.

The court disagreed, distinguishing *De Beers* and following *Deckert* and *First National*. The *De Beers* proscription against enjoining use of an asset, which is not the source of any potential final judgment, was inappropriate because the plaintiff in *Hoxworth* had a claim for money damages. Since money is fungible, it was immaterial which exact source of the defendant's funds was restrained. Furthermore, distinctions between legal and equitable claims were not important since *Deckert* and *First National* did not rely upon any such classification. In light of the latter two cases, the court concluded that "*De Beers* is simply inapplicable to cases in which a litigant seeks money damages." What *De Beers* does require, in the Third Circuit's view, is that the case at bar be more than just "any action" and include more than a "mere statement" of secretion of assets. If the plaintiff can meet these threshold requirements by showing likelihood of success on the merits and irreparable absent the injunction, then "*De Beers* does not preclude a preliminary injunction."

Having established the district court's power to issue the injunction, the court then applied a traditional test to determine whether the plaintiff had met the requirements for the injunction. After analyzing the plaintiffs' claims, the court determined there was evidence from which the trial judge could have determined they would likely succeed on the merits. On the issue of irreparable harm, and in light of its earlier interpretation of *De Beers*, the court rejected defendants' contention that the potential

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271 See id. at 194.
272 See id. at 195.
273 See id. at 195-96.
274 See id.
275 See id. at 196-97.
276 Id. at 197.
277 Id. (quoting *De Beers Consol. Mines v. United States*. 325 U.S. 212, 222 (1945)).
278 Id.
279 See id. "These include, in this context, a showing that plaintiffs are likely to become entitled to the encumbered funds upon final judgment and a showing that without the preliminary injunction, plaintiffs will probably be unable to recover those funds." Id.
280 See id. at 205.
inability to collect a money judgment could not constitute an irreparable injury as a matter of law. The facts supported a finding of irreparable harm regarding the corporate defendant, but the court had doubts regarding the potential harm caused by the individual defendant. Beyond the fact that he had transferred funds to the Hong Kong branch of a U.S. bank, the district court did not state the basis of its determination that the individual defendant was dissipating assets. Consequently, the court held that transfer was an insufficient basis for finding irreparable injury, since the mere fact the funds were now in Hong Kong did not amount to a possibility that a final judgment would not be satisfied. The court remanded to the court below the responsibility of identifying the basis for the finding.

Remand was necessary because the scope of the injunction was unsupported either by any findings by the district judge concerning the likely size of plaintiffs' recovery or by the record. Nor had the district court ascertained the value of the assets restrained; the injunction issued "encumbers, to one degree or another, all the assets" of the defendants as well as the non-party corporation. The preliminary injunction was also vacated for its failure to require posting of a bond by plaintiffs in accordance with Rule 65(c). The court viewed the requirement of a posted bond as an important safeguard against rash applications for similar types of relief.

281 See id. (citing Deckert v. Independence Shares Corp., 311 U.S. 282, 290 (1940); United Steelworkers v. Fort Pitt Steel Casting, 598 F.2d 1273, 1280 (3d Cir. 1979); Teradyne, Inc. v. Mostek Corp., 797 F.2d 43 (1st Cir. 1986); Foltz v. U.S. News & World Report, 760 F.2d 1300, 1307-09 (D.C. Cir., 1985); In re Feit & Drexler, Inc., 760 F.2d 406, 416 (2d Cir. 1985); Roland Mach. Co. v. Dresser Indus., 749 F.2d 380, 386 (7th Cir. 1984)).

282 See id. at 206-07.

283 See id. at 206.

284 See id. at 206-07.

285 See id.

286 See id. at 198.

287 Id. at 199.

288 See id. at 209-10. "[T]he instances in which a bond may not be required are so rare that the requirement is almost mandatory." Id. at 210 (quoting Frank's GMC Truck Ctr., Inc. v. General Motors Corp., 847 F.2d 100, 103 (3d Cir. 1988)).

289 See id. at 210 (quoting Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 804 (3d Cir. 1989)).
4. The Seventh Circuit

In an opinion by Judge Posner, the Seventh Circuit in *Roland Machinery Company v. Dresser Industries, Inc.*\(^{290}\) established a test to analyze the criteria that would allow a plaintiff to obtain equitable relief in support of a claim for money damages.\(^{291}\) The case arose between a distributor and supplier of construction equipment when the plaintiff-distributor entered into an agreement with a rival supplier and the defendant-supplier exercised its right to terminate the distributorship agreement without cause.\(^{292}\) Claiming a breach of the Clayton Act,\(^{293}\) plaintiff sued and sought a preliminary injunction enjoining the defendant from cutting off the supply of its equipment.\(^{294}\)

The court concluded that, for a preliminary injunction on a damages claim, the traditional equitable prerequisites of an inadequate remedy at law and irreparable injury merge.\(^{295}\) No harm is irreparable if money damages will make good the wrong; therefore, to be irreparable, the money damages remedy must be somehow inadequate.\(^{296}\) The court determined that a legal remedy might be inadequate without being "wholly ineffectual."\(^{297}\) Inadequacy could occur any of four ways: (1) damages come too late to save the plaintiff's business; (2) the plaintiff will be unable to shoulder the costs of litigation because his business is destroyed in the interim; (3) the ultimate award is unsatisfied because of the defendant's insolvency; or, (4) the nature or extent of plaintiff's damages may not be susceptible to quantification.\(^{298}\) After analyzing the other requirements for an injunction,\(^{299}\) the court concluded that the plaintiff had not offered proof of the likelihood of success on the merits and reversed the court below on the grant

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\(^{290}\) 749 F.2d 380 (7th Cir. 1984), as amended on denial of rehearing and rehearing en banc.

\(^{291}\) See *id.*

\(^{292}\) See *id.* at 381-82.


\(^{294}\) See *Roland*, 749 F.2d at 382.

\(^{295}\) See *id.* at 386.

\(^{296}\) See *id.*

\(^{297}\) Id.

\(^{298}\) See *id.*

\(^{299}\) See *supra* note 162 and accompanying text.
of the injunction.\footnote{See Roland, 749 F.2d at 396. Judge Swygert dissented on the grounds that the majority failed to respect the discretion of the trial judge and the record did not support reversal on a standard of abuse of discretion. See id. at 404 (Swygert, J., dissenting).}

The court’s inclusion of the potential insolvency of the defendant as supporting a preliminary injunction put the Seventh Circuit in the pro-\textit{Mareva} camp.\footnote{See Roland, 749 F.3d 380.} Despite the dissimilarity of \textit{Roland} with cases squarely addressing asset restraint, the language in \textit{Roland} leads to the presumption that the lack of any equitable claim is no bar to the availability of a pre-judgment restraint of defendant’s assets provided the plaintiff can satisfy the other requirements for an injunction.\footnote{See id.}

\section*{5. The Eighth Circuit}

The Eight Circuit has embraced the precedent relied upon by \textit{Alliance Bond}, but the facts the circuit addressed make characterization of its position on this subject difficult. In its decision in \textit{Airlines Reporting Corporation v. Barry},\footnote{825 F.2d 1220 (8th Cir. 1986).} it approved the use of a preliminary injunction that restrained the defendants from disposing of property at issue.\footnote{See id. at 1222. The injunction did not restrain any assets of the defendants other than the disputed tickets. See id. In addition to freezing missing airline tickets, the court enjoined defendants from instituting any other court actions, working for any organization affiliated with plaintiff, or participating in any scheme to further defraud plaintiff. See id.} Plaintiff claimed defendants had defrauded it out of the proceeds of airline ticket sales.\footnote{See id.} The remedy sought was both legal for compensatory and punitive damages and equitable for the return of missing tickets.\footnote{See id.} The court rather perfunctorily rejected defendants’ claim that the district court did not have the power to issue the injunction, relying on \textit{Deckert}, \textit{Teradyne}, and \textit{Roland}, among other cases,\footnote{See id. at 1227 (citing Deckert v. Independence Shares Corp., 311 U.S. 282, 290 (1940); Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 52 (1st Cir. 1986); Roland Machinery Co. v. Dresser Indus., 749 F.2d 380 (7th Cir. 1984); Productos Carnic, S.A. v. Central American Beef and Seafood Trading Co., 621 F.2d 683, 686 (5th Cir. 1980)).} on the grounds that since plaintiff had “demonstrated a clear
probability that defendants will not be able to satisfy an award of adequate damages . . . [plaintiff] is entitled to a preliminary injunction to protect its remedy. This statement approving the use of an injunction to protect an award of damages seems to indicate approval by the Eighth Circuit of the Second Circuit's approach in *Alliance Bond*.

6. The Ninth Circuit

As late as 1982, the Ninth Circuit had opposed the use of Rule 65 for any claim not equitable in nature. In the 1990s, however, a pair of decisions put the Ninth Circuit squarely in the pro-*Mareva* camp.

The first occurred in *Reebok International, Ltd. v. Marnatech Enterprises, Inc.* In that case, Reebok sued Marnatech and others under the Lanham Act for selling counterfeit Reebok shoes in Mexican border towns. Reebok first obtained a temporary restraining order and then a preliminary injunction enjoining future copyright violations and freezing defendants' assets. After refuting defendants' argument that the district court lacked jurisdiction over them under the Lanham Act, the court addressed the district court's power to freeze assets under the same Act.

The court was unclear whether the Lanham Act authorized the restraint of assets ordered by the district court. The Act did allow for a recovery of defendant's profits and damages, and a

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308 *Id.*

309 *See* Federal Trade Comm'n v. H.N. Singer, Inc., 688 F.2d 1107, 1112 (9th Cir. 1982).

310 *See* In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994); *Reebok International, Ltd. v. Marnatech Enterprises, Inc.*, 970 F.2d 552 (9th Cir. 1992).

311 970 F.2d 552 (9th Cir. 1992).


313 *See* Reebok, 970 F.2d at 554.

314 *See* id.

315 *See* *id.* at 554-58. The district court had determined that attachment under Rule 64 was unavailable to Reebok from the language of California's attachment statute. *See* Reebok Int'l Ltd. v. Marnatech Enterprises, Inc., 737 F.Supp. 1521, 1526 (S.D.Cal. 1989) (quoting CAL. CIV. PROC. CODE § 483.010 (West 1979)).

316 *See* Reebok, 970 F.2d at 558-59.
pre-judgment restraint might be necessary to preserve those remedies. The court did not find it necessary to decide the scope of the authority in the Lanham Act, however, because they viewed the district court's injunction as "authorized by [its] inherent equitable power to issue provisional remedies ancillary to its authority to provide final equitable relief." The injunction was necessary to preserve the district court's ability to order an accounting of the defendants' profits and subsequent return of those profits illegally obtained, which are remedies expressly authorized by the Act. Therefore, the injunction was ancillary to the district court's authority to provide final relief.

That classification of the injunction as ancillary undermined defendants' argument that De Beers prohibited the injunction. As the court pointed out, De Beers reversed the lower court on the grant of the injunction because it was not ancillary to any final relief. Furthermore, in line with the instruction in De Beers that "a preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally," the court found the injunction granted below to have been "an equitable provisional remedy designed to secure the availability of Reebok's equitable right to an accounting of [defendants'] profits." The majority noted in a footnote that the district court's injunction restrained all of defendants' assets and not merely those that might represent fraudulent profits. The

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317 See id. at 559 (quoting 15 U.S.C. §§ 1116-17).
318 Id. The court noted that Rule 64 is not the exclusive authority for asset restraint. Furthermore, attachment is not necessarily the same as restraining transfer of assets. See id. at n.10.
319 See id. at 559-60.
320 See id. at 560.
321 See id.
322 See id.
323 See id.
324 Id. at 561 (quoting De Beers Consol. Mines v. United States, 325 U.S. 212, 220 (1945)).
325 See id. at 560 n.11. The majority stated that freezing assets that would not be the subject of final relief "may not be within the equitable power of the district court." Id. (citing De Beers Consol. Mines v. United States, 325 U.S. 212, 220 (1945)) (emphasis added). The majority did not feel compelled to decide anything further on this issue since the scope of the freeze had not been raised on appeal. See id.
concurrency approved the result, but included a caveat:

This is a prejudgment freeze of everything the appellants own - it is sweeping, general, and very broad. It is the kind of order that could drive an opponent to the wall regardless of the ultimate merits of the action. It is a frightening example of the reach of the court’s injunctive power, and that in a case where an attachment would not lie and an insubstantial bond was required. 326

The concurrence went on to emphasize that because the defendants had not appealed the scope of the injunction but merely the power of the district court to enter it, the court’s decision should be limited to that question; whether the district court had the power under the Lanham Act to issue the injunction. 327

While Reebok expanded the use of preliminary injunctions to restrain assets, the court had been careful to emphasize the equitable nature of the claim and the final relief sought. 328 It would take another case before the Ninth Circuit would unequivocally embrace the use of injunctions to secure a source of funds for a strictly legal claim of money damages. That case is In re Estate of Ferdinand Marcos, Human Rights Litigation, 329 a class action lawsuit brought by families of alleged victims of torture, summary execution, or disappearance. 330 Only money damages were sought by the plaintiffs. 331

Interpreting the triumvirate of De Beers, Deckert, and First National, the court decided that a preliminary injunction was appropriate in a case where money damages would be inadequate because of the defendant’s pending insolvency or pattern of dissipation of assets. 332 It viewed the expansive language in De

326 Id. at 563 (Fernandez, J., concurring).
327 See id. at 564 (Fernandez, J., concurring).
328 See Reebok, 970 F.2d 552.
329 25 F.3d 1467 (9th Cir. 1994). The case was a consolidation of numerous cases filed after the Marcoses fled from the Philippines to Hawaii in 1986. See id. at 1469. An asset freeze had been in place on the Marcoses’ assets as the result of a suit brought by the Philippine Government claiming the return of money taken from the country, but that injunction was dissolved upon settlement. See id. (citing Republic of Philippines v. Marcos, 862 F.2d 1355 (9th Cir. 1988)).
330 See id. at 1468.
331 See id. at 1476.
332 See id. at 1480.
Beers as limited its citation to Deckert and its subsequent interpretation in First National. The court noted that in so doing it thereby joined the majority of circuits. Furthermore, the facts of the instant case supported the injunction: plaintiffs had prevailed on the merits while the appeal from the interlocutory order was pending; defendants had been twice found by federal courts to be in the act of secreting assets; and defendants would not be harmed by the restraint since the estate of Ferdinand Marcos could not be distributed until all claims had been resolved. The court likewise cited the district court's reliance as justification for the injunction that many of the defendant's assets were on deposit in banks in Switzerland and Hong Kong. Neither court discussed any implications of the extraterritorial reach of the injunction. It is open to conjecture whether the injunction would have been upheld in a case with a less egregious fact pattern. With the weight of persuasive authority on the side of the court's holding, perhaps the particular facts were simply redundant to the ultimate decision.

7. The Tenth Circuit

The Tenth Circuit's most recent decision on the issue of pre-judgment restraint in Tri-State Generation and Transmission Association, Inc. v. Shoshone River Power, Inc. is somewhat unusual because the court was faced with an appeal denying a preliminary injunction. The procedural posture of the appeal is

333 See id. at 1477-78 (citations omitted).
334 See id. at 1478-80 (citing United States ex rel. Taxpayers Against Fraud v. Singer Co., 889 F.2d 1327 (4th Cir. 1989); Airlines Reporting Corp. v. Barry, 825 F.2d 1220 (8th Cir. 1987); Teradyne, Inc. v. Mostek Corp., 797 F.2d 43 (1st Cir. 1986); Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc., 805 F.2d 351 (10th Cir. 1986); Foltz v. U.S. News & World Report, 760 F.2d 1300 (D.C.Cir. 1985); Green v. Drexler, 760 F.2d 406 (2d Cir. 1985); Roland Mach. Co. v. Dresser Indus., 749 F.2d 380 (7th Cir. 1984)).
336 See In re Estate of Marcos, 25 F.3d at 1479.
337 See id.
338 805 F.2d 351 (10th Cir. 1986).
339 See id.
significant because it required the party seeking the injunction to overcome the abuse of discretion standard that appellate courts apply when reviewing interlocutory orders. Nevertheless, the abuse of discretion standard did not suffice to avoid the injunction.

Defendant was a distributive electric utility in Wyoming. It had a requirements contract to buy power from plaintiff, a conglomerate of generation and transmission cooperatives. When cheaper power became available from another supplier, defendant sought to sell its assets to the low-cost supplier and distribute the proceeds to its members. Plaintiff sought a preliminary injunction, which was initially granted, enjoining the sale on the grounds the sale would breach the requirements contract. After further evidence was presented, the district court dissolved the injunction, reasoning that damages would be adequate to compensate plaintiff for any breach.

On the issue of irreparable injury, the circuit court determined that two bases existed for finding irreparable injury. First, under Wyoming law, it was unclear whether plaintiff could recover damages against the low-cost supplier after the sale due to an indemnification agreement between the low-cost supplier and the defendant. The court concluded that "difficulty in collecting a damage judgment may support a claim of irreparable injury. If [plaintiff] cannot collect a money judgment, then failure to enter the preliminary injunction would irreparably harm it." Second, the court was concerned that the other cooperatives within the plaintiff’s group would likewise capitalize on the chance to liquidate their assets and acquire cheaper electricity.
The court relied most heavily upon this equitable basis. In the court’s view, the prospect of the plaintiff’s inability to survive the litigation and the threat to other similarly situated cooperatives predominated over the damages issue. Thus, the court’s holding did not rely upon the independent authority of the district court to employ a preliminary injunction restraining assets to secure a future damages award. Therefore, this case falls short of a strong embrace of the propriety of Mareva-type relief. The court’s language approving an injunction to protect a damages remedy is mere dicta.

8. The District of Columbia Circuit

The final case to be discussed in support of the Alliance Bond approach is Foltz v. U.S. News & World Report. Foltz involved a class action suit under the Employee Retirement Income Security Act in which former employees sought an injunction preventing distributions from a pension plan they claimed would disproportionately benefit current employees to the detriment of the class. The proposed distribution was instigated by the lucrative sale of the company to a real estate developer. The district court denied the relief on the basis that the requested injunction went beyond a restraint of assets about to be removed from the jurisdiction or dissipated.

The circuit court remained within the paradigm of distinguishing between legal and equitable remedies. By shifting the emphasis of the injunction away from securing a pool of assets for satisfaction of an eventual judgment to preserving the demise of the Rural Electrification Administration system if such self-interested behavior were allowed. See id.

351 See id. at 356-58.
352 See id.
353 See id.
354 760 F.2d 1300 (D.C. Cir. 1985).
356 See Foltz, 760 F.2d at 1301-02.
357 See id at 1301.
358 See id. at 1305 (citing USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94 (6th Cir. 1982); Lynch Corp. v. Omaha Nat’l Bank, 666 F.2d 1208 (8th Cir. 1981)) (other citations omitted).
359 See id. at 1309.
status quo pending the outcome of the litigation, the court indulged in a sleight of hand to recast the issue as an essentially equitable one. In this fashion, the injunction would be “an equitable remedy designed to freeze the status quo, as opposed to creating a pool of resources from which members of the plaintiff class could draw prior to a determination of liability [or] damages.” The genuineness of this distinction is belied by further discussion in the opinion, as the court later instructed the lower court that a factor in a possible injunction is the amount of damages plaintiffs would likely recover and implied that any excess amount in the pension plan could be distributed.

The court did not reverse the lower court but did remand the issue with instructions for further consideration in light of its decision. The opinion seems to be a tightrope act, trying to afford relief, which the court feels is unavailable but justified. This decision predates all the other cases discussed in this Comment with the exception of *Roland* and *USACO*, perhaps that accounts to some extent for the reticence of the District of Columbia Circuit to embrace the *Mareva*-type remedy.

9. Summary of the Pro-Mareva Camp

The pro-*Mareva* camp has embraced the general equitable power of the courts as a means of ensuring the enforceability of a future damages remedy. The approach taken by these Circuits has come to resemble that of the English *Mareva* injunction. In this approach, the equitable power of the court is employed not as a substitute for an inadequate legal remedy, but as an adjunct to

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360 See id.
361 Id.
362 See id. “The affording of such remedial relief would not run afoul of the well-settled principle of equity that monetary relief is not to be awarded in a money damages case prior to a determination of both liability and the extent of damages.” Id. (citation omitted).
363 See id.
364 See supra notes 290-302 and accompanying text; infra notes 442-57 and accompanying text.
365 See supra notes 234-364 and accompanying text.
ensure the adequacy of a future legal remedy. This shift in focus is an expansive view of the traditional principles of equity.

C. State of the Law: The Anti-Mareva Camp

In minority opposition to the circuits analyzed in the preceding section, a handful of circuits have held the line against the intrusion of equitable interlocutory relief to secure future legal remedies. As with the majority, depth of commitment to holding the line varies among the circuits composing the minority, with the Eleventh and Fifth circuits most firmly committed, followed by the Fourth and Sixth circuits. This section concludes with a Fourth Circuit case that suggests one method of resolving this area of law.

1. The Eleventh Circuit

Much as the Second Circuit leads the van for the pro-Mareva jurisdictions, the Eleventh Circuit occupies the same role for the opposition. In two cases decided in 1994, the Eleventh Circuit staked out the parameters of the argument against the adoption of the "nuclear weapon of law" embraced by many of its sister circuits.

The first case of the pair was Mitsubishi International Corporation v. Cardinal Textile Sales, Inc. The plaintiff, Mitsubishi, had been the victim of an elaborate fraud perpetrated by two of its employees with the assistance of several outside companies. The employees sent purchase orders for carpet yarn and other textiles to a supplier for eventual resale to two textile brokerage companies. Through a system of fictitious bills of

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367 See id. In Alliance Bond, for example, the injunction was used to prevent dissipation that threatens the future legal remedy, not as a replacement for that future legal remedy. See id.

368 See 11A WRIGHT ET AL., supra note 141, § 2947.

369 See infra notes 372-488 and accompanying text.

370 See id.

371 See infra notes 471-88 and accompanying text.


373 14 F.3d 1507 (11th Cir. 1994).

374 See id. at 1511.

375 See id.
lading and purchase orders, Mitsubishi paid for yarn that was never delivered while extending credit to the brokers for yarn never bought. By the time the circular transactions were discovered, Mitsubishi had provided in financing or paid millions of dollars for fraudulent yarn sales.

Mitsubishi sought legal and equitable relief including damages for fraud and conversion and the imposition of a constructive trust, an accounting, and the appointment of a receiver. The district court granted a temporary restraining order [hereinafter TRO] that was enlarged in scope several times until it ultimately imposed a constructive trust on defendants through a freeze of a significant portion of their assets, an equitable accounting of funds received from Mitsubishi, appointment of a receiver, and expedited discovery. When the district court modified the TRO to allow defendants to pay legal fees out of the restrained assets and precluded Mitsubishi from seeking future disgorgement of the fees, Mitsubishi appealed.

The court pierced the allegations in the complaint and concluded that the equitable relief sought and granted by the district court in the TRO was properly viewed as an action to collect a debt. Equitable relief was simply not appropriate in the case because an adequate legal remedy was available, namely,

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376 See id. at 1511-12.
377 See id.
378 See id. at 1512.
379 The TRO was extended by consent of the parties to allow time to prepare for the preliminary injunction hearing. See id. at 1513.
380 See id. at 1513.
381 See id. at 1514. The court recognized that a TRO is not appealable under 28 U.S.C. § 1292. See id. at 1515. The principle that the appellate court should construe the effect rather than the label of the interlocutory order led the court to conclude that the TRO issued by the district court "had the effect of a preliminary injunction because it did not merely preserve the status quo but instead granted affirmative relief." Id. at 1515 n.14. In that light, the district court's refusal of Mitsubishi's request to deny modification of the orders, after a full hearing, was properly viewed as a denial of a request for a preliminary injunction and therefore immediately appealable. See id. at 1516-17.
382 See id. at 1519-20. "[T]he remedy Mitsubishi should have sought is the recovery of money for breach of a promise to pay or for an account stated (and not the imposition of a constructive trust)." Id.
damages, and Georgia law precluded the remedy of a constructive trust for a failure to keep a promise in a commercial contractual relationship.

With the availability of a legal remedy for the payment of liquidated damages for breach of promises to pay and unliquidated damages for injury from fraud, the court took a dim view of the nature of the TRO:

The temporary restraining order . . . was akin to a prejudgment writ of attachment, presented in the form of an injunction against the defendants . . . . When faced with motions appearing to call for an attachment but labeled something else, federal courts again look past the terminology to the actual nature of the relief requested . . . . As is the case when we evaluate our jurisdiction, we will call a duck a duck when characterizing district court rulings in this context.

Since the order was one for an attachment rather than a preliminary injunction, Rule 64 rather than Rule 65 applied. In order to be entitled to an attachment, Mitsubishi must have satisfied the requirements of Rule 64. Though not addressed at the trial court nor argued on appeal, the court determined that the Georgia attachment statute did not authorize such an action on the facts of the case.

Citing De Beers and In re Fredeman Litigation, the court fired a broadside shot at the circuits that had approved the use of preliminary injunctions to effect an attachment, stating its belief that "such decisions are premised upon erroneous readings of De Beers and federal procedural rules, as well as upon incorrect applications of basic equity jurisprudence." In conclusion, the court echoed the admonition in De Beers of the "sweeping effect"

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383 See id. at 1518-19.
384 See id. at 1519 (citing Bank of Dade v. Reeves, 354 S.E.2d 131 (Ga. 1987)).
385 See id. at 1520.
386 Id. at 1520-21 (citations omitted).
387 See id. at 1521-22.
388 See id. at 1521.
389 See id. at 1522.
390 Id. at 1522 n.24 (citing Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186 (3d Cir. 1990)).
391 Id. at 1522 n.24.
of such use of preliminary injunctions. The majority’s opinion elicited a spirited dissent. In the dissent’s view, the majority had misconstrued Georgia law. While a constructive trust is not available if an adequate remedy at law exists, in the instant case the legal remedy was inadequate because of the threat of dissipation and the higher priority a constructive trust holder enjoys compared to a judgment creditor. In short, “the majority is wrong” on the availability of a constructive trust.

From that determination, the dissent reached the obvious conclusion. Mitsubishi’s claim was properly equitable for a constructive trust and an accounting. Therefore, “what the majority insists on calling an unauthorized writ of attachment is in fact a permissible preliminary injunction.” The grant of a preliminary injunction to freeze assets and preserve the status quo was well-established in the Eleventh Circuit. Two months later, the court had the opportunity to address the question again and arrived at the same result. The facts of Rosen v. Cascade International are somewhat analogous to

Id. at 1522-23 (quoting De Beers Consol. Mines v. United States, 325 U.S. 212, 222-23 (1945)).

The dissent concurred in part that the court did have jurisdiction to hear the appeal. See id. at 1523 (Carnes, J., concurring in part and dissenting in part).

See id. at 1523-25 (Carnes, J., concurring in part and dissenting in part).

See id. (Carnes, J., concurring in part and dissenting in part).

See id. at 1525 (Carnes, J., concurring in part and dissenting in part).

See id. (Carnes, J., concurring in part and dissenting in part).

See id. (Carnes, J., concurring in part and dissenting in part).

See id. at 1525-26 (Carnes, J., concurring in part and dissenting in part) (citations omitted).

Id. at 1526 (Carnes, J., concurring in part and dissenting in part).

The similarity of reasoning is not surprising since Chief Judge Tjoflat wrote the opinion in both cases. See id. at 1510; Rosen v. Cascade Int’l, Inc., 21 F.3d 1520 (11th Cir. 1994). The other members of the panel were Carnes and Johnson in Mitsubishi, 14 F.3d at 1510, and Dubina and Roney in Rosen, 21 F.3d at 1522.

21 F.3d 1520 (11th Cir. 1994).
The plaintiff's claim arose through fraudulent misrepresentations, although in *Rosen* these misrepresentations occurred in the context of securities transactions. *Cascade*, a manufacturer of cosmetic and skin care products, had filed false statements with the Securities Exchange Commission and had issued seven million shares of stock without accounting for the issue in annual reports. After discovery of the discrepancy, trading in the company's stock was suspended, the company declared bankruptcy, and numerous lawsuits were filed by shareholders. The suits were ultimately consolidated into a class action in the Southern District of Florida.

Upon application by the plaintiff class, the district court granted a TRO freezing all of the assets of one of the defendants. After a hearing, the TRO was extended as a preliminary injunction. The district court construed *De Beers* as authorizing an injunction to protect a future damages remedy.

The circuit court disagreed. After pointing out that the only remedy sought was for money damages, the court launched into a review of the jurisprudential dichotomy between legal and equitable relief. Drawing heavily on its recent analysis of the issue in *Mitsubishi* and reemphasizing its reading of *De Beers*, the court concluded unequivocally, "We repeat: preliminary injunctive relief freezing a defendant’s assets in order to establish a fund with which to satisfy a potential judgment for money damages is simply not an appropriate exercise of a federal district court’s authority."

In arriving at this conclusion, Chief Judge Tjoflat presented a compelling counter to the reliance of other circuits on

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404 See id.
405 See id. at 1522.
406 See id. at 1522-23.
407 See id. at 1523-24.
408 See id. at 1524.
409 See id. at 1522, 1525. This defendant was Lawrence Moses, a Pennsylvania dentist who was an outside member of Cascade’s board of directors. See id.
410 See id. at 1525. Plaintiff class deposited a $100,000 bond. See id.
411 See id. at 1525-26.
412 See id. at 1526.
413 See id. at 1527.
414 Id. at 1530.
First National as a limitation of the broad language in De Beers.\textsuperscript{415} The claim in First National was in the nature of a foreclosure, not a suit for money damages; the injunction freezing the bank accounts of the tax debtor went to the very assets that had previously been made subject to the tax lien giving rise to the foreclosure.\textsuperscript{416}

Continuing the analysis used in Mitsubishi, the court identified the relief granted below as equivalent to a writ of attachment and applied Rule 64 and Florida’s attachment statute to determine that attachment was not authorized.\textsuperscript{417} Additionally, Florida law did not allow use of an injunction when the attachment statute failed to provide relief.\textsuperscript{418} The court vacated the injunction and remanded the case to the district court.\textsuperscript{419} There was no dissent.\textsuperscript{420}

2. The Fifth Circuit

The Fifth Circuit reemphasized the historical bounds of equity in a plaintiff’s attempts to restrain assets in the case of In re Fredeman Litigation,\textsuperscript{421} decided in 1988, the same year the English Court of Appeal decided Duvalier and Derby No. I.\textsuperscript{422}

Fredeman involved a civil RICO suit against corporations and their former officers and directors accused of systematic overcharging of customers for vessel refueling and anti-trust violations.\textsuperscript{423} After a previous injunction on defendants’ assets was lifted upon conclusion of a companion criminal case,\textsuperscript{424} plaintiffs sought and obtained a preliminary injunction that restrained

\textsuperscript{415} See id. at 1529-30 n.19; see, e.g., Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186 (3d Cir. 1990).

\textsuperscript{416} See Rosen, 21 F.3d at 1530 (citing United States v. First Nat’l City Bank, 379 U.S. 378, 385 (1965)).

\textsuperscript{417} See id. at 1530-31.

\textsuperscript{418} See id. at 1531 (citations omitted).

\textsuperscript{419} See id. at 1531.

\textsuperscript{420} See id.

\textsuperscript{421} 843 F.2d 821 (5th Cir. 1988).

\textsuperscript{422} For a discussion of the English cases, see supra notes 41-74 and accompanying text.

\textsuperscript{423} See Fredeman, 843 F.2d at 822.

\textsuperscript{424} The defendants involved in the appeal in the instant case all had been either acquitted in a companion criminal case of RICO charges or had had the criminal RICO charges against them dismissed. See id. at 822-23.
enumerated assets. The district court did not base its power to
grant the injunction upon the RICO statute, but on its “inherent
power to protect--through equity--the future utility of a potential
judgment for damages.” The defendants appealed solely on the
issue of whether the district court had such an equitable power and
not on any factual justification for a preliminary injunction. The
court reviewed the district court’s decision subject to the standard
of independent review.

The court restated the traditional rule of equity that a court
could not freeze a defendant’s assets to preserve a fund to satisfy a
potential money judgment. Relying on De Beers and two of its
own decisions, the court rejected plaintiffs’ right to an injunction
in which their only claim was for treble damages. In this light,
the preliminary injunction granted below was an attachment
governed by Rule 64 and Texas law. Since the defendants were
available for personal service in Texas and the plaintiffs’ claims
were unliquidated, the plaintiffs had no recourse through the Texas
attachment statute.

The court rejected as irrelevant the plaintiffs’ claims that
defendants would attempt to frustrate any ultimate judgment or
plaintiffs’ likelihood of success at trial. The court felt that the
question of remoteness advanced in De Beers was concerned with
the proximity of the assets sought to be enjoined with the
underlying claim and the number of contingencies between the

\[\text{425 See id. at 823. Assets restrained included effectively all of the assets of the defendants other than tangible personal property and $3,000 in cash. See id.}\]
\[\text{427 Fredeman, 843 F.2d at 824.}\]
\[\text{428 See id.}\]
\[\text{429 See id.}\]
\[\text{430 See id.}\]
\[\text{431 See id. at 825. (citing Federal Savings & Loan Ins. Corp. v. Dixon, 835 F.2d 554 (5th Cir. 1987), and ITT Comm. Dev. Corp. v. Barton, 569 F.2d 1351 (5th Cir. 1978)).}\]
\[\text{432 See id. at 824-25.}\]
\[\text{433 See id. at 826.}\]
\[\text{434 See id. (citing TEX. CIV. PRAC. & REM. CODE § 61.005 (Vernon’s 1987)) (other citations omitted).}\]
\[\text{435 See id.}\]
two. The requirement against remoteness must be satisfied as a threshold question even if the traditional requirements for an injunction are met. The court reconciled decisions of other circuits with its own appraisal of De Beers. The court also distinguished cases where the defendant was about to become insolvent and the orders preserved specific assets or were ancillary to some other equitable relief. The court further analyzed any basis for the injunction under the RICO statute and Texas statutory provisions, but concluded that neither basis applied. With no authority for the district court's exercise of power, the court vacated the injunction.

3. The Sixth Circuit

The Sixth Circuit's decision in USACO Coal Company v. Carbomin Energy, Inc. offered solace to both sides of the struggle. On one hand, it subscribes to a reading of De Beers consistent with the anti-Mareva camp and the basis of its holding respects the traditional principles of equity espoused by the Fifth and Eleventh Circuits. On the other hand, the opinion anticipates the pro-Mareva trend of later cases among other circuits.

At issue in the case was a broad injunction restraining a
The underlying claims were for violations of RICO, breach of fiduciary duty, common law fraud, and breach of contract, an equitable and legal mix. Defendants claimed the injunction was improper as an impermissible sequestration of assets under Rule 64. The court disagreed, holding that the basis for the injunction was the "substantial likelihood that plaintiffs would ultimately prevail on a claim for restitution based on the allegation of a breach of fiduciary duty." That equitable claim permitted the imposition of a constructive trust on any benefit derived from the breach of the fiduciary duty. As such, the district court's decision did not run afoul of De Beers because "[t]he injunction . . . preserves assets for which the defendants may be accountable under a constructive trust." The court took pains to clarify that "[t]he injunction was not issued in order to secure a RICO treble damages award."

Having established that the district court had the power to issue the injunction, the court went on to ascertain whether the traditional requirements for an injunction were met in this case. In discussing the issue of irreparable harm, the court used language supporting the pro-Mareva circuits. The court found that Kentucky's attachment and lis pendens statutes would be inadequate to provide protection from the dissipation or concealment of assets which was considered likely by the district court. This finding implies that the probable dissipation or concealment of assets constitutes an adequate basis for irreparable harm; if a state's attachment statute offers inadequate protection

446 See id. at 96.
447 See id. at 95-96.
448 See id. at 96.
449 Id.
450 See id. at 97.
451 Id.
452 Id.
453 See id. at 98.
454 See id. at 99.
455 See id. The court continued, "[b]ecause neither statute answers the court's concern that defendants may successfully conceal their assets and remove them from this country, we cannot say that the failure to require the plaintiffs to pursue legal remedies was an abuse of discretion." Id.
therefrom, possible dissipation or concealment renders the legal remedy inadequate. Though the court arrived at this point after answering the threshold question of whether the district court had the power to issue the injunction, as dictated by Fredeman, the language itself supports an inference more favorable to the pro-Mareva camp. In toto, however, the Sixth Circuit’s adherence to the traditional equitable remedy of restitution as the basis for the injunction, and not any desire to preserve a future damages remedy, appears to be advocating a view hostile to that espoused by the pro-Mareva circuits.

4. The Fourth Circuit

The Fourth Circuit’s example is particularly enlightening. Within the past ten years, the court has interpreted De Beers twice, in 1989 in United States ex rel Taxpayers Against Fraud v. Singer Company, and in August 1998 in United States v. Cohen. The position of the court changed significantly from the first to the second decision.

In Taxpayers Against Fraud, the court heard an appeal by the principal defendant, Singer, from an injunction, designed to prevent any liquidation or distribution of assets that required judicial review of all transactions other than those in the normal course of business. Singer had recently been the subject of a leveraged buyout but faced a separate complaint seeking $77 million under the False Claims Act. The plaintiff alleged that Singer, along with other defendants, had defrauded the government in a series of defense contracts through a price-padding scheme. When Singer began to divest assets as a result of the buyout by two brokerage houses, plaintiff sought the

456 See discussion at supra notes 423-41 and accompanying text.
457 See USACO, 689 F.2d at 96.
458 889 F.2d 1327 (4th Cir. 1989).
459 152 F.3d 321 (4th Cir. 1998).
460 See Taxpayers Against Fraud, 889 F.2d at 1328. Defendant also appealed from an order denying permission for specific distributions. See id.
461 31 U.S.C. § 3729 (1994). This amount could be trebled in the final judgement. See id.; Taxpayers Against Fraud, 889 F.2d at 1328.
462 See id. at 1329.
injunction.\footnote{See id.}

The district court considered the triumvirate of \textit{De Beers}, \textit{Deckert}, and \textit{First National} in ruling on the motion for a preliminary injunction.\footnote{See \textit{id.} at 1330.} It determined that \textit{De Beers} was distinguishable while the latter two cases controlled.\footnote{See \textit{id.}} The Fourth Circuit never addressed the applicability of \textit{De Beers} or \textit{First National}, but did analyze \textit{Deckert}.\footnote{See \textit{id.}} The court considered Singer’s argument that only bankruptcy or attachment proceedings should be available to the plaintiff.\footnote{See \textit{id.}. The court noted that “[p]reliminary injunctions are permitted in situations such as the one presented here where the plaintiff alleged that the principal defendant was ‘insolvent and threatened with many law suits, that its business [was] virtually at a standstill because of unfavorable publicity, that preferences to creditors [were] probable, and that its assets [were] in danger of dissipation and depletion.”’ \textit{Id.} (quoting \textit{Deckert} v. \textit{Independence Shares Corp.}, 311 U.S. 282, 285 (1940)) (citing \textit{Teradyne, Inc. v. Mostek Corp.}, 797 F.2d 43 (1st Cir. 1986); \textit{Roland Mach. Co. v. Dresser Indus.}, 749 F.2d 380 (7th Cir. 1984); \textit{Mutual Benefit Life Ins. Co. v. Atlas Financial Corp.}, 454 F.2d 278 (3d Cir. 1972)).} The court found that the threats of insolvency and danger of depletion of assets were adequately supported in the record.\footnote{See \textit{id.} at 1330-31.} The court concluded that the plaintiff had satisfied the traditional requirements for an injunction.\footnote{See \textit{id.} at 1331-36 (citations omitted).}

With this backdrop indicating a predilection for the restricted interpretation of \textit{De Beers}, the court’s recent holding in \textit{Cohen} is surprising. As in \textit{Taxpayers Against Fraud}, the Government sought monetary penalties for violations of federal law.\footnote{See United States v. \textit{Cohen}, 152 F.3d 321 (4th Cir. 1998).} The Government sued Cohen and four business associates under the Financial Institution Reform, Recovery, and Enforcement Act of 1989,\footnote{See 12 U.S.C. § 1833a.} alleging twenty-five violations of federal banking law.\footnote{See \textit{id.} at 1833a.} The district court entered a TRO freezing Cohen’s assets from the date the complaint was filed, which matured into a preliminary
injunction after a hearing. The injunction exempted living expenses, legal fees, and ordinary business expenses from its scope. The district court identified five sources for its authority to grant the injunction without specifically relying on any single one: its inherent equitable power; principles of supplemental jurisdiction; Rule 65; the All Writs Act; and federal banking law.

The court addressed each possible source in turn, beginning with the inherent equitable power of the district court, which implicated *De Beers.* In two paragraphs, the court noted the cautionary language of *De Beers* and the split in authority among its sister circuits. It then concluded “that the case at hand is not significantly different from *De Beers.* Accordingly, the district court erred in relying upon its inherent equitable powers to enter a pre-judgment injunction freezing Cohen’s assets.” The court made no factual findings to support its analogy and indulged in no analysis. Perhaps the court did not wish to join the fray, instead preferring a position unassailable by either side by virtue of its ambiguousness.

With similar brevity, the court evaluated the other possible sources of the district court’s authority to enter the injunction. Supplemental jurisdiction gives a district court the power to address state law claims that share a common nucleus of fact, but does not confer any additional injunctive power. Rule 65 is even less availing as it merely “regulates the issuance of injunctions otherwise authorized.” The court recognized that the All Writs Act authorizes the issuance of injunctions beyond those necessary for jurisdiction, but it “is not relevant to an order freezing assets

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473 See id.
474 See id. at 323 and n.2.
476 See id.
477 See id. The court noted that the Fifth, Sixth, and Eleventh Circuits followed *De Beers,* while “the First, Third, and Ninth Circuits found distinctions between it and the case with which they were confronted.” Id.
478 Id.
479 See id.
480 See id. at 324-25.
481 See id.
482 Id. at 325.
unless such order is in aid of an injunction which had been otherwise issued. Consequently, the All Writs Act is inapplicable as a source of authority in the present case. 483 Nevertheless, the plaintiff prevailed on its final claim. The court held that federal banking law “explicitly empowered district courts to enter injunctions to freeze the assets of a person guilty of banking law violations.” 484

The district court did not consider Rule 64 as a source of authority. 485 In fact, “Rule 64 speaks to provisional remedies prior to judgment’ which is the precise relief sought in the present case.” 486 Furthermore, Virginia’s attachment statute went farther than federal banking law in allowing attachment if a defendant is “‘converting, is about to convert, or has converted his property of whatever kind, or some part thereof, into money, securities or evidences of debt with intent to hinder, delay, or defraud his creditors.” 487 Having established two bases for the district court’s authority, the court nevertheless remanded for factual findings to support the injunction, as none had been provided. 488

Cohen’s position on the All Writs Act and attachment has much in common with those of the Fifth and Eleventh Circuits, but its ambivalence on De Beers prevents Cohen from assuming the role of foil to Alliance Bond. Nevertheless, the Fourth Circuit’s extensive treatment of the applicable state attachment statute points to an appropriate resolution of the tension between a plaintiff’s anxiety from a potentially worthless judgment and a defendant’s right to use, enjoy, and alienate his property until the rights of the parties have been otherwise adjudicated.

483 Id.
484 Id. “If a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of a banking law violation . . . or property which is traceable to such violation, the Attorney General may commence a civil action in any Federal court to enjoin such alienation or disposition of property.” 18 U.S.C. § 1345(a)(2)(A) (1994).
485 See id.
486 Id. (quoting 11A WRIGHT ET AL., supra note 141, § 2931).
487 Id. (quoting VA. CODE 8.01-534(A)(4)(5)(6), 534(B)).
488 See id. at 326. “[T]he factual basis for the injunction or attachment order, whatever the same may be called, must be set forth with particularity in accordance with Rule 65.” Id. Whether the court meant that an attachment order under Rule 64 required compliance with Rule 65 seems doubtful.
Part IV: Recent Developments and Conclusion

The question of pre-judgment restraint implicates longstanding principles of Anglo-American law and equity jurisprudence. As Part I demonstrated, England has embarked, first by judicial interpretation, then by statutory codification of previous judicial decisions, along the path of granting greater authority and discretion to courts to accord pre-judgment restraint. Part III proposed that the majority of American circuit courts of appeal have either embraced the same approach or indicated approval for its underpinnings. Only a few circuits seem to be resisting the allure of wider use of interlocutory restraints.

Two preliminary questions must be answered before determining whether Mareva is suitable for transportation across the Atlantic. The first looks to the transferability in general of English methods of practice; the second explores the proper role of the judiciary in creation of novel remedies. While Anglo-American jurisprudence shares a common foundation, it does not necessarily follow that legal theories or methods of practice should be identical. This has been clear since the 1760’s, when Americans determined that writs of assistance, a measure of long-standing validity in England, were inappropriate in America. The Fourth Amendment prohibits such writs in the United States. Furthermore, American standards of due process are much different than their English counterparts.

Additionally, the United States has preserved the remedy of attachment under Rule 64 for which no English counterpart

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489 See supra notes 9-136 and accompanying text.
490 See supra notes 166-489 and accompanying text.
491 See supra notes 370-489 and accompanying text.
493 See Brower v. County of Inyo, 489 U.S. 593, 596 (1989) (stating “[t]he writs of assistance . . . were the principal grievance against which the Fourth Amendment was directed.”). The Anton Piller order has much in common with the writ of assistance. See supra note 43 and accompanying text. The symbiotic relationship between Marevas and Anton Piller orders should raise doubts about the propriety of both in American jurisprudence.
494 An American minimum contacts analysis would have precluded personal jurisdiction over the Swiss and Lichtensteiner defendants in Derby No. 6. See supra notes 106-28 and accompanying text.
exists. While a plaintiff in an English court arguably has no alternative to a *Mareva* injunction, an American plaintiff has greater legal options. This distinction goes to the heart of the second question. Attachment statutes are available to preserve a source of funds in anticipation of a future money judgment. In each state, the legislators have spoken to the terms and conditions upon which an attachment may issue. Some states have created the availability of attachment in a suit in equity. The Rhode Island statute demonstrates that legislatures have the ability and opportunity to define the parameters of pre-judgment attachment. If they so choose, legislatures can expand the availability of such attachments.

A theme running through the cases approving *Mareva*-type injunctions is the potential irreparable harm to the plaintiff

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495 See *Derby Nos. 3 and 4*, 1990 Ch. 65, 88 (1988).


498 See id. Of course, any such statute must abide by constitutional considerations. See supra note 33.
threatened by the dissipation of assets by the defendant. However, that argument disregards fraudulent conveyance law and other remedies available to a judgment creditor. While a pre-judgment restraint may be more convenient for the plaintiff, convenience is but a "slender reed" for the exercise of such "naked power." The distinction between a legal and equitable claim is dispositive of the availability of pre-judgment restraint. A majority of the Supreme Court seized upon this threshold question when it reviewed the Second Circuit’s decision in Alliance Bond.

A. The Supreme Court’s Reversal in Alliance Bond

The divisive nature of the argument over the availability of pre-judgment restraint, apparent by the split in the Circuit Courts of Appeal, is manifested in the Supreme Court’s June 1999 reversal by a 5 to 4 margin of the Second Circuit’s decision in Alliance Bond. Justice Scalia, writing for the majority, rejected the expansion of interlocutory relief past the limits of traditional equity jurisprudence. The Court determined that the authority of the federal district courts to issue preliminary injunctions was limited to that conferred by the Judiciary Act of 1789. The authority thereby conferred consisted of “the principles of the system of judicial remedies which had been devised and was being administered by the English Court of


502 See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 119 S.Ct. 1961 (1999). The Court unanimously agreed that it had jurisdiction to hear the appeal from the grant of a preliminary injunction; the appeal had not become moot upon merger of the preliminary injunction into a permanent injunction upon a judgment on the merits since the enjoined party’s claim against the injunction bond for a wrongful injunction survived the judgment on the merits. See id. at 1965-68.

503 Justice Scalia was joined by Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Thomas. See id. at 1964.

504 See id. at 1969. “We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief.” Id.

505 See id. at 1968 (citing Judiciary Act of 1789, 1 Stat. 78).
Chancery at the time of the separation of the two countries.”\textsuperscript{506} Under that system, “a judgment establishing the debt was necessary before a court of equity would interfere with the debtor’s use of his property.”\textsuperscript{507} Without a judgment, a creditor had no substantive rights to the property of the debtor.\textsuperscript{508} The merger of law and equity did not change requirement for a judgment.\textsuperscript{509}

The Court found Deckert and First National to be “entirely consistent with the view that the preliminary injunction in this case was beyond the equitable authority of the District Court.”\textsuperscript{510} Deckert involved a claim for equitable relief.\textsuperscript{511} First National was distinguishable from the case at bar in that it “involved not the Court’s general equitable powers under the Judiciary Act of 1789, but its powers under the [tax lien statute],” implicated a public rather than a private interest, and “the creditor (the Government) asserted an equitable lien on the property.”\textsuperscript{512} Furthermore, De Beers “strongly suggest[s]” the limits of a pro-Mareva reading of Deckert and First National.\textsuperscript{513}

The Court expressed concern that allowing the use of Mareva-type relief “could render Federal Rule of Civil Procedure 64, which authorizes use of state prejudgment remedies, a virtual irrelevance. Why go through the trouble of complying with local attachment statutes when this all-purpose prejudgment injunction

\textsuperscript{506} Id. (quoting Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939)).
\textsuperscript{507} Id. at 1969.
\textsuperscript{508} See id. at 1968.

The [general] rule [regarding creditor’s bills] requiring a judgment was a product, not just of the procedural requirement that remedies at law had to be exhausted before equitable remedies could be pursued, but also of the substantive rule that a general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor’s use of that property.

\textsuperscript{509} See id. at 1970.
\textsuperscript{510} Id. at 1971.
\textsuperscript{511} See id.
\textsuperscript{512} Id. at 1971-72.
\textsuperscript{513} Id. at 1972.
is available?"514 Such relief "could radically alter the balance between debtor's and creditor's rights which has been developed over centuries through many laws—including those relating to bankruptcy, fraudulent conveyances, and preferences."515 In the Court's view, it is for Congress to redefine the balance between the substantive rights of debtors and creditors.516

Justice Ginsburg's dissent517 decried the Court's reliance "on an unjustifiably static conception of equity jurisdiction."518 In her view, while the type of injunction ordered by the District Court was not one of "the specific practices and remedies of the pre-Revolutionary Chancellor," the order was nevertheless consistent with the principles governing injunctive relief.519 Federal equity jurisprudence must be "adaptable" and "dynamic."520 Without such dynamism, courts will be unable "to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed."521 Traditional limits notwithstanding, modern conditions, such as "increasingly sophisticated foreign-haven judgment proofing strategies, coupled with technology that permits the nearly instantaneous transfer of assets abroad," demand injunctive relief to preserve an appropriate remedy.522 In this regard, Justice Ginsburg approved of the development of the Mareva in English courts.523

Abuse of such a tool by overreaching creditors would be avoided by the traditional requirements for injunctive relief, especially the showing of irreparable injury.524 The required bond

514 Id. at 1974.
515 Id.
516 See id. at 1975.
517 Justice Ginsburg was joined by Justices Stevens, Souter, and Breyer. See id.
518 Id. at 1976 (Ginsburg, J., dissenting)
519 Id. (Ginsburg, J., dissenting).
520 Id. at 1976, 1977 (Ginsburg, J., dissenting).
522 Id. at 1977 (Ginsburg, J., dissenting).
523 See id. at 1978 (Ginsburg, J., dissenting).
524 See id. (Ginsburg, J., dissenting).
and tailoring of the scope of the injunction would "ensure a remedy for a wrongfully enjoined defendants" and "spar[e] the defendant from undue hardship."  

For Justice Ginsburg, Alliance Bond represents the "paradigmatic" example of the proper employment "of a preliminary freeze order designed to stop the dissipation of assets that would render a court's judgment worthless." She concluded, "absent congressional direction . . . I would find the default rule in the grand aims of equity . . . the federal courts must rely on their 'flexible jurisdiction in equity . . . to protect all rights and do justice to all concerned.'

B. Conclusion

As mandated by the Supreme Court, American courts must return to the "traditional principles of equity jurisdiction." De Beers, Deckert, and First National, now clarified by Alliance Bond, dictate that an equitable remedy requires an equitable cause of action. If equitable relief is sought, injunctions may issue; if legal damages are sought, attachment is the only possibility. In their discretion, courts have room to be imaginative within that paradigm; disregarding that paradigm is a mischievous and grand abuse of discretion. The expansive use of equitable relief to secure future damages remedies through judicial imperialism is an infringement of a defendant's substantive rights and an affront to American principles of equity and fair-play. Whether the ultimate outcome in Alliance Bond will conclusively repel the Mareva invasion is open to debate. The hydraulic pressure of those claiming a source of funds against those seeking to retain that source will doubtless seek release elsewhere, either through Congress or a new "nuclear weapon of law."

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525 Id. (Ginsburg, J., dissenting).
526 Id. at 1978-79 (Ginsburg, J., dissenting).
527 Id. at 1979 (Ginsburg, J., dissenting) (quoting Providence Rubber Co. v. Goodyear, 76 U.S. (9 Wall.) 805 (1870)).
528 See id. at 1969; 11A WRIGHT ET AL., supra note 141, § 2941.
529 See First National, 379 U.S. at 410 (Harlan, J., dissenting).
530 See ROSE, supra note 372.