Granting a Preliminary Injunction Freezing Assets Not Part of the Pending Litigation: Abuse of Discretion Or an Important Advance in Creditors' Rights?

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"If the Plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment

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> *of it: indeed it is a vain thing to imagine a right without a remedy: for want of right and want of remedy are reciprocal."*
>
> —Sir John Holt[1]

I. INTRODUCTION

A. A Remedy in Search of Stronger Precedent

This Comment examines the granting of a preliminary injunction as an essential remedy without which the plaintiff would have no remedy at all. Thus, in essence, this Comment addresses the need for a redefinition of assets "related to the pending litigation." Part II of this Comment examines U.S. Supreme Court precedent and the considerations necessary in balancing the potential harm to the plaintiff with the potential injury to the defendant. Part III explores the current split in the U.S. Circuit Courts of Appeals and concludes by highlighting Alliance Bond Fund v. Grupo Mexicano de Desarrollo, a recent Second Circuit case.[2] Part IV compares the U.K. approach, the "Mareva" injunction, with its American counterparts. Finally, this Comment concludes that by granting certiorari to Grupo Mexicano de Desarrollo, the U.S. Supreme Court can not only bring long awaited clarity to the U.S. Circuit Courts of Appeals, but also a long awaited remedy to those plaintiffs not squarely within the narrow boundaries of Rule 64 of the Federal Rules of Civil Procedure. The demands of a global economy and the ease and speed with which cross-border transactions occur require a procedural mechanism that is effective in a constantly expanding global environment. Rule 64 and Rule 65 of the Federal Rules of Civil Procedure should not be considered mutually exclusive. To do so denies not only a plaintiff's remedy, but also her right.

B. Remedial Measures: Preliminary Injunctions (Rule 65) and Prejudgment Attachments (Rule 64)

A preliminary injunction predicated on Rule 65, which is interlocutory in nature, has traditionally been defined as a remedial provision granted by "a court in equity" preserving the status quo

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1. Lord Denning, *Forward to the First Edition* of STEVEN GEE, MAREVA INJUNCTIONS AND ANTON PILLAR RELIEF, at xix (2d ed. 1990) (quoting Ashby v. White, 2 Lord Raymond 938 (1703)).

2. Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 537 (U.S. Nov. 30, 1998) (No. 98-231).

prior to a judgment on the merits.[3] In ascertaining whether a remedy is in equity or in law, "courts typically rely on history and the nature of the remedy, asking whether the relief would have been issued by the common law courts or the chancellor prior to the merger of law and equity."[4] Money judgments are considered the "quintessential legal remedy" because they rely on the "execution process for enforcement."[5] Alternatively, when the relief "issues in personam, backed by the [court's] contempt power," this remedy will be considered "equitable."[6]

While Rule 65[7] does not delineate specific standards that must be applied in granting this type of relief, the court has discretion "pursuant to traditional equitable principles and the substantive law applicable to the claim upon which the application for the injunction is based."[8] Under the "traditional four-factor test" there must be a finding sufficient to support the following: (1) irreparable injury, (2) likely success on the merits, (3) that the injury to the applicant will outweigh the potential injury to the adverse party, and (4) that the granting of a preliminary injunction will serve the public interest.[9] Some jurisdictions, however, use an "alternative test," which requires the plaintiff to prove: "(1) probable success on the merits and possibility of irreparable harm, or (2) serious questions on the merits and the balance of hardships tipping sharply in the applicant's favor."[10] While some circuits may apply the same test, there are significant differences with regard to the importance attached to any given factor such as likelihood of success on the merits, the balance of hardships, or irreparable injury.[11]

The provisional relief provided by Rule 65 is to be distinguished from the "Seizure of Property or Person" under Rule 64, which "attaches" the defendant's property and thus prevents the dissipation

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3. *See* FED. R. CIV. P. 65. Rule 65 sets forth the procedure by which a preliminary injunction may be granted: (1) Notice; (2) consolidation of hearing with trial on the merits; (3) temporary restraining order, notice, hearing, duration; (4) security; (5) form and scope of injunction or restraining order; and (6) employer and employee, interpleader, constitutional cases. *See id*.; *see also* Paul H. Dawes & William J. Meeske, *Provisional Remedies*, 1 BUS. & COM. LITIG. FED. CTS. § 13.2, at 780-81 (1998).

4. Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Damages*, 67 WASH. L. REV. 257, 262 n.10 (1992).

5. *Id*.

6. *Id*.

7. *See* FED. R. CIV. P. 65.

8. Dawes & Meeske, *supra* note 3, at 805.

9. *See id.* at 806.

10. *Id*. at 807.

11. *See id.* at 806-7.

of assets prior to a judgment on the merits.[12] Rule 64 provides in pertinent part:

> [A]ll remedies providing for the seizure of the person or property for the purpose of securing satisfaction of 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 . . . .
> (2) 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.[13]

The critical aspect of an attachment under Rule 64 is that state law controls the availability of such relief to a plaintiff so long as there is no violation of federal law.[14] However, this poses a severe constraint. Most importantly, the assets must be within the court's jurisdiction, and this remedy may not be available when the plaintiff merely seeks money damages.[15] Thus, a fast-moving defendant can remove or dissipate those assets held within the court's jurisdiction. Such an attachment remedy, therefore, will prove no remedy at all because of (1) its limited geographical reach and (2) its unavailability to those plaintiffs seeking money damages.[16] Criticism has focused on the geographical limitation, which has "hampered both state and federal courts in preserving defendants' assets to satisfy an expected future judgment."[17]

Finally, whether a plaintiff may be granted a preliminary injunction under Rule 65 has in some jurisdictions turned on the notion of whether the plaintiff is claiming an "equitable interest" in the precise specie of assets she seeks to enjoin.[18] Thus, some argue that when a plaintiff seeks money damages that remedy can only be predicated on Rule 64.[19] The argument concludes that the granting of a preliminary injunction under Rule 65, where the assets are not "part

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12. *See* FED. R. CIV. P. 64.
13. *See id.*
14. *See generally* Dawes & Meeske, *supra* note 3, § 13.5(c).
15. *See* Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d at 693 (citing N.Y. C.P.L.R. 6301, Practice Commentaries (McKinney 1980)). Under New York law, "a preliminary injunction is unavailable in an action for a sum of money only." *Id*. Furthermore, New York's attachment statute prevents attachment of assets not located within the state. *See id.*
16. *See* Wasserman, *supra* note 4, at 278-80, 333-34.
17. *Id.* at 278.
18. *See* discussion *infra* Part III; *see also* Brief of Defendants-Appellants at 8-9, Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688 (2d Cir. 1998) (No. 97-9610).
19. *See* discussion *infra* Part III.

of the pending litigation," amounts to abuse of discretion by the courts.[20] However, the strong majority rule is that a preliminary injunction is "available when a defendant is acting or threatening to act in a manner that would irreparably injure [the] plaintiff or render the judgment in the action ineffectual."[21]

The majority rule does not contemplate, however, those situations in which a defendant is in danger of insolvency and is dissipating or transferring assets, as these assets do not fall easily into a bright line definition of "part of the pending litigation."[22] In such a situation, assets become fungible as well as finite because all creditors look to the same "pool" to satisfy their claims against the defendant. By limiting a plaintiff's ability to satisfy her rightful claim against this pool of assets to attachment alone, the majority rule offers no remedy at all. Moreover, it signals a "blind-eye" to the defendant who dissipates and secretes assets in an effort to frustrate an eventual judgment on the merits.[23]

II. PRELIMINARY INJUNCTIONS AND U.S. SUPREME COURT PRECEDENT

A. Deckert v. Independence Shares

In *Deckert v. Independence Shares Corp.*,[24] the Supreme Court was presented with two issues: (1) whether the Securities Act of 1933 permitted purchasers of securities to bring a "suit in equity to rescind a fraudulent sale and secure restitution of the consideration paid" and (2) whether enforcement for restitution, when the vendor was now insolvent, could be granted over a third party who had that vendor's assets in its possession.[25] The plaintiffs, alleging fraudulent misrepresentation, had purchased Capital Savings Plan Certificates from Capital Savings Plan, Inc., which had since merged with Independence Shares Corporation (Independence).[26] Because of unfavorable publicity and the number of lawsuits that followed, the plaintiffs feared insolvency, and therefore, the potential threat of

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20. *See id.*

21. JOHN J. COUND ET AL., CIVIL PROCEDURE 1083 (7th ed. 1997).

22. *See* discussion *infra* Part III.

23. *See Deckert*, 311 U.S. at 289 n.3 (noting that "[i]n *Falk v. Hoffman*, 233 N.Y. 199, 202, 135 N.E. 243, 244, Judge Cardozo said: 'Equity will not be overnice in balancing the efficacy of one remedy against the efficacy of another, when action will baffle, and inaction may confirm, the purpose of the wrongdoer.'").

24. 311 U.S. 282 (1940).

25. *Id.* at 284 (citing Securities Act of 1933, ch.38 48 Stat. 74 (codified at 15 U.S.C. §§ 77a-77aa)).

26. *See id.*

creditor preferences.[27] They further alleged that the assets were in danger of "dissipation and depletion" and sought the appointment of a receiver for Independence and an injunction restraining the Pennsylvania Company for Insurances on Lives and Granting Annuities (Pennsylvania Co.), the entity which received plaintiffs' installment payments, from "transferring or disposing of any of the assets of the corporations or of the trust."[28]

The *Deckert* Court held that the Securities Act of 1933 did not restrict relief to a money judgment and that "[t]he power to make the right of recovery effective implied the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case."[29] The Court also noted that given the complicated relationship between the shareholders, Independence and Pennsylvania Co., it might indeed be difficult to obtain satisfaction in a claim against Independence.[30] The Court affirmed that the district court had power to consider the injunction and held that the injunction was

> a reasonable measure to preserve the status quo pending final determination . . . . It is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court; and that, upon appeal, an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion.[31]

Moreover, the Court stressed the importance of the danger of Independence's insolvency and the potential for dissipation and depletion of its assets.[32] Therefore, the Court concluded that any legal remedy against Independence, without recourse to the assets in the possession of Pennsylvania, would be "inadequate."[33]

In holding that the plaintiffs had established a cause for equitable relief, the Court concluded that the Securities Act of 1933 did not limit relief under its provisions for a money judgment.[34] Rather, the Court interpreted the intention of the Act to provide a "right which the litigant may enforce in designated courts by such legal or equitable actions or procedures as would normally be available to him."[35]

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27. *See id.* at 285.
28. *Id.*
29. *Id.* at 288.
30. *See id.* at 288-89.
31. *Id.* at 290 (internal quotation omitted).
32. *See id.*
33. *See id.*
34. *See id.* at 287.
35. *Id.* at 287-88.

Moreover, the Court emphasized that "[t]he power to enforce implies the power to make effective the right of recovery afforded by the Act."[36]

By stating that "recovery [of] the consideration paid may be maintained in equity, at least where there are circumstances making the legal remedy inadequate," the Court addressed assets specifically related to the allegations underlying the cause of action.[37] However, to interpret *Deckert* as specifically precluding the granting of a preliminary injunction freezing assets not part of the pending litigation would seem too broad a reading. The issue was simply not presented to the *Deckert* Court.[38]

B. DeBeers v. United States

In *DeBeers Consolidated Mines, Ltd. v. United States*,[39] the U.S. government alleged that DeBeers (among other corporations including Société Internationale Forestière et Minière du Congo) was engaged in "[a] conspiracy to restrain and monopolize the commerce of the United States with foreign nations in gem and industrial diamonds," in violation of sections 1 and 2 of the Sherman Act and section 73 of the Wilson Tariff Act.[40] The government filed for an injunction preventing the corporation from "withdrawing from the country any property located in the United States, and from selling, transferring or disposing of any property in the United States 'until such time as this Court shall have determined the issues of this case and defendant corporations shall have complied with its orders.'"[41] The government argued for the injunction on the basis of irreparable injury because the defendants' principal businesses were located in foreign countries.[42] Thus, assets within the United States could be quickly withdrawn, preventing the enforcement of any potential judgment.[43] However, DeBeers argued that the injunction was a "sequestration of property beyond the power of the court and an abuse of discretion in the circumstances."[44]

Under Rule 70 of the Federal Rules of Civil Procedure, which permits a writ of attachment or sequestration of property, an

36. *Id*. at 288.
37. *Id*. at 289.
38. *See* Wasserman, *supra* note 4, at 311.
39. 325 U.S. 212 (1945).
40. *Id.* at 215.
41. *Id.*
42. *See id.*
43. *See id.*
44. *Id*. at 216.

injunction could only be operative after a judgment was entered.[45] While Rule 64 would provide for attachment, under New York law an attachment "will not issue in an equity suit such as the instant one."[46] Thus, the power to grant such an injunction was derived from the Sherman Act and from Section 262 of the Judicial Code, which "empowers District Courts to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."[47]

Noting that the "name given to the process is not determinative," the Supreme Court defined the purpose of an injunction as that which would "provide security for performance of a future order which may be entered by the court."[48] The Court further stated that "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally."[49] However, the Court reasoned that the injunction dealt with "a matter lying wholly outside the issues in the suit" and involved "property which in no circumstances can be dealt with in any final injunction that may be entered."[50] Further, the Court warned that

> [t]o sustain the challenged order would create a precedent of sweeping effect. 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.[51]

Because the power to grant the injunction was predicated on section 4 of the Sherman Act and section 262 of the Judicial Code, the Court concluded that the district court had no jurisdiction to enter a money judgment.[52] The district court's only "power is to restrain the future continuance of actions or conduct intended to monopolize or restrain commerce."[53] Thus, "relief of the same character" and the nature of the injunction were inapposite. "Relief of the same character" could only be a restraint on specific conduct and could not

45. *See id.* at 218.
46. *Id.* at 218.
47. *Id.* at 218-19 (citing 28 U.S.C. § 262).
48. *Id.* at 219.
49. *Id.* at 220.
50. *Id.*
51. *Id.* at 222.
52. *Id.* at 219.
53. *Id.* at 219-20.

involve freezing all the company's assets for an unlimited duration.[54] Furthermore, the Court obviously was concerned with the possible "parade of horribles" that might follow such a broad and sweeping injunction because "there is nothing to prevent other and further seizures of property or money brought into the United States in connection with transactions unrelated to any supposed violation of the Anti-Trust laws."[55] Confronted with the sheer power and weight of the injunction granted to the government, the Court further discussed the potential injury to the defendant when such a remedy was based on a "mere statement of belief."[56] If such a precedent were established, the Court reasoned, "it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action."[57]

Some courts have interpreted *DeBeers* as precluding the granting of a preliminary injunction when the plaintiff seeks money damages and the assets are not specifically related to the underlying cause of action.[58] However, other jurisdictions have found this too broad a reading.[59] What was of concern to the *DeBeers* Court was the lack of relationship between the size and scope of the injunction sought by the government and the government's failure to satisfactorily address the issue of irreparable injury: hence, the emphasis on "mere statement of belief."[60] When a plaintiff can show irreparable injury together with a likelihood of succeeding on the merits, the question of an injunction which bears a specific relationship to the cause of action is simply not resolved under the facts presented in *DeBeers*. Rather, *DeBeers* represents an extreme example on one end of the spectrum that does not address the issue of whether a plaintiff may never be granted preliminary injunctive relief where she seeks money damages and where she can prove likely success on the merits and irreparable injury absent injunctive relief.[61] Moreover, the *DeBeers* Court distinguished *Deckert* by stating that "an interlocutory injunction was

54. *Id.* at 220. "A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally. The injunction in question is not of this character." *Id.*

55. *Id.* at 222.

56. *Id.*

57. *Id.*

58. *See* discussion *infra* Part III.

59. *See id.*

60. *See* DeBeers, 325 U.S. at 222.

61. *See* Wasserman, *supra* note 4, at 314.

granted with respect to a fund or property which would have been the subject of the provisions of any final decree in the cause."[62] Thus, there remains an open question regarding the appropriate interpretation of the phrase "would have been the subject of the final decree." When a plaintiff is faced with the possible insolvency of a defendant, any asset in the possession of the defendant becomes not only "subject to" but absolutely relevant to any judgment rendered on the merits.

C. United States v. First National City Bank

United States v. First National City Bank[63] involved tax assessments in the amount of $19 million brought by the Commissioner of Internal Revenue against Omar, S.A., a Uruguayan corporation.[64] At issue was the temporary injunction granted by the district court enjoining First National City Bank (now Citibank) from "transferring any property or rights to property of Omar now held by it or by any branch offices within or without the United States."[65] While First National City Bank argued that its Montevideo branch was a "separate entity," the Court found this argument unpersuasive.[66] Relying on 12 U.S.C. § 24, the Court determined that the bank was organized under federal statute.[67] Therefore, it had "practical control over its branches," and, as would be the case with its home office, any branch would be within the reach of an in personam order.[68]

Relying on *Deckert*, the Court held that the injunction was a "reasonable measure to preserve the status quo."[69] The Court further added that "[i]f such relief were beyond the authority of the District Court, foreign taxpayers facing jeopardy assessments might either transfer assets abroad or dissipate those in foreign accounts under control of American institutions before personal service on the foreign taxpayer could be made."[70] The Court found that "such a scheme was underfoot here."[71]

The Court distinguished *DeBeers* by stating that in *First National City Bank*, "there is . . . property which could be 'the subject

62. *DeBeers*, 325 U.S. at 220 n.11.
63. 379 U.S. 378 (1965).
64. *See id.* at 379.
65. *Id.* at 380.
66. *See id.* at 384.
67. *See id.*
68. *See id.*
69. *See id* at 385.
70. *Id.*
71. *Id.*

of the provisions of any final decree in the cause.'"[72] Furthermore, whether the remedy sought should be characterized as either "equity" or "legal" in nature was not discussed.[73] Rather, the Court concluded that "[o]nce personal jurisdiction of a party is obtained, the District Court has authority to order it to 'freeze' property under its control, whether the property be within or without the United States."[74] Thus, the Court specifically held that a preliminary injunction could be granted in order to secure a potential money judgment.[75]

D. The Harlan Dissent; United States v. First National City Bank

In his dissent, Justice Harlan raised the following issue:

> Granting that the District Court had the naked power to control the Montevideo account by bringing to bear coercive action on Citibank, ought the Court to have exercised it? Or to put the question in the statutory terms was the court's order 'appropriate' for the enforcement of the internal revenue laws?[76]

In addition, when there was no likelihood of obtaining personal jurisdiction over Omar (which the district court had over First National City Bank), Justice Harlan asked, "[W]hy should the court . . . tie up Omar's property all over the world for the avowed purpose of coercing Omar into paying its taxes? Use of judicial equity powers to coerce a party over whom the court has no jurisdiction or likelihood of obtaining jurisdiction is unheard of."[77]

Justice Harlan argued that the government had insufficient probability to believe that it would obtain personal jurisdiction over Omar and dismissed the government's argument as a "lame suggestion" that Omar would have made a general appearance in order to defend the suit.[78] On the contrary, Justice Harlan believed that "[i]n light of the fact that Omar had quite evidently purposefully withdrawn most of its property from the jurisdiction, including the property here in question, an appearance voluntarily putting this very property in jeopardy would have been most surprising."[79]

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72. *Id.*
73. *See id.*
74. *Id.* at 384 (citing New Jersey v. City of New York, 283 U.S. 473, 482 (1931)).
75. *See* Wasserman, *supra* note 4, at 318.
76. *First Nat'l City Bank*, 379 U.S. at 388 (Harlan, J., dissenting). Justice Goldberg joined Justice Harlan's dissent. *See id.* at 385.
77. *Id.* at 389.
78. *See id.* at 390.
79. *Id.* at 390-91 n.8.

Justice Harlan believed that there were two reasons why the continuation of the freeze over Omar's property was unjustifiable. The first was duration because the freeze had been in effect for over two years.[80] During this time, the contesting parties were the government and First National City Bank; at no time did the court have jurisdiction over Omar.[81] Justice Harlan obviously was appalled that prior to any final judgment of liability, a court could "take control" of property without jurisdiction and subject the defendant to a sixty percent decline in the Uruguayan peso because of a "so-called" temporary freeze order which in reality lasted two years.[82] Although warned of the possibility that Omar would remove property from the jurisdiction, Justice Harlan cited the government's failure "by reason of either neglect or inability" to acquire jurisdiction over Omar when that process was available to them.[83] While acknowledging that Omar did not present a totally sympathetic figure, Justice Harlan found "no justification for perpetuating a 'temporary' order which, without any jurisdiction basis, has tied up Omar's property for over two years."[84]

Second, Justice Harlan criticized the notion that the government had shown that the assets frozen would be subject to a final judgment.[85] Relying on international practice and the lack of recognition of foreign tax judgments by foreign courts, Justice Harlan stated, "[i]f the refusal to pay the court officer is proper under the Uruguayan law which governs the contract, there can be no breach which would give rise to a cause of action in New York."[86]

Justice Harlan compared the facts in *First National City Bank* with *DeBeers* by emphasizing the notion of remoteness, which refers to the connection between the assets frozen and the likelihood of the use of these assets in satisfying an ultimate judgment. Considering remoteness to be the "determinative point, whatever its cause," Justice Harlan considered that the facts in *First National City Bank* made for an even stronger case than did *DeBeers* against the granting of what he termed a "sequestration order."[87] Furthermore, Justice Harlan found that the facts in *First National City Bank* were not analogous to

80. *See id.* at 392.
81. *See id.*
82. *Id.*
83. *Id.* at 393.
84. *Id.* at 393-94. Justice Harland continued, "Alleged tax dodgers, as much as those charged with crime, are entitled to due process treatment." *Id*.
85. *See id.* at 394.
86. *First Nat'l City Bank*, 379 U.S. at 396.
87. *Id.* at 398-99.

Deckert.[88] He distinguished the facts on the basis of several factors, including the lack of international issues presented, the fact that the *Deckert* Court had personal jurisdiction, and the fact that "remoteness" was not an issue in *Deckert*.[89]

Finally, Justice Harlan commented on the public interest concerns raised by the issuance of a preliminary injunction, particularly as they relate to third parties.[90] Although an "innocent stakeholder," First National City Bank was exposed to the possibility of "double liability if Uruguay did not recognize the United States' judgment, and multiple liability if Uruguay permitted actions for slander of credit."[91] Furthermore, while difficult to predict the precise outcome, there was a possibility that First National City Bank's foreign banking business would be harmed because foreign clients would fear possible sequestration of assets by the U.S. courts.[92]

In balancing the benefits and detriments of an injunction of this magnitude, Justice Harlan concluded that the order to freeze Omar's assets simply was not an appropriate mechanism to enforce internal revenue laws.[93] If "naked power" and "jurisdiction" are to be interpreted as synonymous (a proposition disagreed with by Justice Harlan), "the action of the District Court must be regarded as entailing an abuse of discretion of such magnitude and mischievous radiations in our general jurisprudence as to make the order a proper subject of review by this Court under its supervisory powers."[94]

III. PRELIMINARY INJUNCTIONS AND THE U.S. COURTS OF APPEALS

A. Majority View: Remedies in Equity When Remedies in Law Are Inadequate

In *Hoxworth v. Blinder, Robinson & Co.*,[95] a group of investors brought a class action suit against a securities firm, Blinder, Robinson & Co., and its president, Meyer Blinder, alleging securities fraud and civil RICO violations arising out of the purchase and sale of penny stocks.[96] The district court granted a preliminary injunction, which

88. *See id.* at 399.
89. *See id.*
90. *See id.* at 400.
91. *First Nat'l City Bank*, 379 U.S. at 401-02.
92. *See id.* at 402.
93. *See id.* at 410.
94. *Id.*
95. 903 F.2d 186 (3d Cir. 1990).
96. *See id.* at 186. During 1988, Blinder Robinson's net worth declined from $24 million to approximately $9.2 million, and its unsegregated cash fell from approximately $16 million to $4 million. *See id.* at 192. The company had been forced to close 27 of its 85 branch offices, and

compelled Meyer Blinder to repatriate approximately $11 million that had been transferred overseas during the course of litigation.[97] Part of the funds repatriated included $4 million that belonged to the parent company, Blinder International Enterprises, Inc., which was not a party to the litigation.[98] Furthermore, the defendants were prohibited from transferring funds outside the ordinary course of business and from making transfers outside the country without the prior approval of the district court.[99]

The Third Circuit held that the injunction was fatally flawed because the district court made no attempt to ensure that there was a reasonable relationship between the value of assets frozen (over $11 million) and the probable amount of plaintiffs' recovery.[100] Although the court acknowledged that the use of a preliminary injunction should be reserved for "extraordinary circumstances," it rejected the defendants' argument that such relief "can never be appropriate."[101]

Relying on *DeBeers*, the defendants claimed that "a federal court is powerless to protect a potential future damages remedy against a recalcitrant defendant with highly liquid assets, no matter how wrongful its conduct, how bad the injury it caused, or how brazen its attempt to evade judgment by secreting assets."[102] The defendants further argued that the remedy to which the plaintiffs were entitled should be characterized as "legal in nature, not equitable."[103] However, the court of appeals concluded that *DeBeers* should not be given such a broad interpretation.[104] Then, the court declined to characterize the remedy that the plaintiffs' sought as either equitable or legal in nature because it "conclude[d] that a district court may issue a preliminary injunction to protect even a damages remedy,

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its sales force had declined from approximately 1,800 brokers to 500. *See id.* at 192-93. In addition, Blinder, Robinson faced various "administrative proceedings" in about 24 jurisdictions. *Id.* at 193.

97. *See id.* at 189.

98. *See id.*

99. *See id.*

100. *See id.* at 199.

101. *Id.* at 189.

102. *Id.* at 194.

103. *Id.* at 194 n.13. The injunction was issued by the district court pursuant to FED. R. CIV. P. 65, which is construed with reference to "*federal* common law that has developed around the All Writs Act and similar provisions." *Id.* at 195 n.14 (emphasis in original). The court also noted its disagreement with the notion that Rule 65, as opposed to Rule 64, would govern only if the underlying action was characterized as equitable and not legal. "[This] . . . seems equivalent to saying that a preliminary injunction can never issue to protect a damages remedy. To that extent, we disagree." *Id.* at 195 n. 14.

104. *See id.* at 195.

assuming that the usual requirements for obtaining equitable relief are met."[105]

In determining whether a district court could grant a preliminary injunction to protect a damages remedy, it was fundamental for the *Hoxworth* court to bring "context" to the *DeBeers* opinion.[106] Simply put, *DeBeers* involved enjoining future antitrust violations for which the government, under the applicable statute, did not, indeed could not, seek a damages remedy.[107] Therefore, the *Hoxworth* court concluded that the *DeBeers* holding was narrow: The preliminary injunction in *DeBeers* was inappropriate not because the plaintiff was seeking money damages; but rather, it was inappropriate "*precisely because the plaintiff could not recover money damages*."[108] This, the court reasoned, is the fair interpretation of a "matter outside the issues in the suit."[109]

Noting that the facts in *Hoxworth* were more analogous to *Deckert* than *DeBeers*, the *Hoxworth* court determined that when a plaintiff seeks money damages and the value of the assets frozen are worth no more than the likely amount of a final judgment, the injunction, by definition, involves assets which could become subject to a final decree.[110] Thus, they are not a "matter wholly outside the issues in the suit."[111] Most importantly, the *Hoxworth* court emphasized the "legal" and "economic" "fungibility" of money.[112] By way of example, "if a debtor with $100,000 cash in its general coffers owes $10,000 to someone, *there is no meaningful distinction among which of those dollars is actually paid to satisfy the debt*."[113]

In analyzing *First National City Bank*, the *Hoxworth* court found further support for its interpretation of *DeBeers*.[114] The essence of *First National City Bank* was the ability of the government to recover money allegedly owed to it, not whether the relief the government sought could be characterized as either legal or equitable.[115] This

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105. *Id.* at 194 n.13.
106. *See id.* at 195.
107. *See id.*
108. *Id.* at 195 (emphasis added). In *DeBeers*, the government was seeking a "source of funds" that could be used to threaten a contempt sanction, without which the government would have no means of enforcing whatever injunction was granted. *Id.* (citing DeBeers Consol. Mines, Ltd. v. United States, 325 U.S. 212 (1945)).
109. *Id.* (quoting *DeBeers*, 325 U.S. at 220).
110. *Id.* at 196.
111. *See id.*
112. *Id.* at 195-96.
113. *Id.* (emphasis added).
114. *See id.* at 196.
115. *See id.* at 196-97.

legal-equitable characterization was not even addressed.[116] The court concluded that *DeBeers* merely stood for the premise that a preliminary injunction may not encumber a defendant's assets when "the final merits judgment sought by the plaintiffs cannot involve a transfer of money from defendant to plaintiffs."[117] In sum, "*DeBeers* is simply inapplicable to cases in which a litigant seeks money damages."[118]

Heeding the obvious warning of the *DeBeers* Court that a preliminary injunction should not be granted on a "mere statement of belief," the *Hoxworth* court emphasized that its interpretation of *DeBeers* did not imply the appropriateness of such a remedy for a "run-of-the-mill damages action."[119] Traditional requirements for obtaining equitable relief must be met, including the likelihood of success on the merits and the plaintiffs' inability to reach these assets without injunctive relief.[120] When it can be proven that a defendant has been "secreting" assets, this "involves more than just a 'mere statement' of irreparable injury."[121]

In a more recent case, *In re Estate of Ferdinand Marcos*,[122] the families of victims of torture, summary execution and disappearance brought an action for damages against Ferdinand Marcos, the former President of the Philippines, and his estate (Estate).[123] The Estate had been enjoined from "transferring or secreting" assets in an earlier action.[124] When the earlier case was settled, the plaintiffs in *Marcos* sought a continuation of the injunction, which was granted by the district court.[125]

Because the plaintiffs sought only money damages, the Estate contended that the district court had abused its discretion in granting injunctive relief.[126] However, the *Marcos* court reiterated its findings that there was authority "to issue a preliminary injunction in order to prevent a defendant from dissipating assets in order to preserve the possibility of equitable remedies."[127] Although noting that the U.S. Supreme Court had "not directly decided this issue," the court

116. *See id.* at 197.
117. *Id.*
118. *Id.*
119. *See id.*
120. *See id.*
121. *Id.*
122. 25 F.3d 1467 (9th Cir. 1994).
123. *Id.* at 1467.
124. *See id.* at 1469.
125. *See id.*
126. *See id.* at 1476.
127. *Id.* at 1477.

recognized that there was support for the notion that a preliminary injunction could be granted when dissipation of assets rendered a remedy inadequate.[128]

While the Estate sought to rely on *DeBeers*, the *Marcos* court, like the *Hoxworth* court, interpreted the *DeBeers* holding as narrow in scope.[129] The *Marcos* court also distinguished the injunction before it from the one at issue in *DeBeers*, which involved "a fund or property which could have been the subject of the provision of any final decree in the cause."[130] Furthermore, the court found additional support in *First National City Bank*, which upheld an injunction freezing assets to "protect an eventual money judgement."[131]

Thus, in *Marcos*, the Ninth Circuit joined the majority of circuits in concluding that a district court has the authority to issue a preliminary injunction where the plaintiff can establish that money damages will be an inadequate remedy due to the "impending insolvency of the defendant or that the defendant has engaged in a pattern of secreting or dissipating assets to avoid judgment."[132] The court determined that by restricting the use of preliminary injunctions to "extraordinary cases in which equitable relief is not sought," the "sweeping effect" of concern to the *DeBeers* Court would be avoided.[133] The injunction was affirmed based on the court of appeals' conclusion that there was a substantial threat that the defendants would transfer or conceal funds resulting in the denial of a remedy to the plaintiffs.[134]

In *United States v. Singer*,[135] the Fourth Circuit also affirmed the issuance of a preliminary injunction because of the defendant's

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128. *Id.*

129. *See id*. at 1478 (citing Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 195 (3d Cir. 1990). In its discussion of *DeBeers*, the *Marcos* court adopted the reasoning of the *Hoxworth* court. *See id.* The injunction in *DeBeers* was inappropriate not because the plaintiff was seeking money damages, but precisely because the plaintiff could not recover money damages. *See id*.

130. *See id*. The court noted that in distinguishing *Deckert*, the *DeBeers* Court "[gave] good reason to construe the dicta narrowly." *Id*. (citing DeBeers Consol. Mines, Ltd. v. United States, 325 U.S. 212 (1945)). In *Deckert*, the Supreme Court held that "[an] injunction was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill, and concluded that the legal remedy against the defendant would be inadequate due to the allegations that the defendant was insolvent and the danger of dissipation of assets." *Id*. (quoting *DeBeers*, 325 U.S. at 290).

131. *Id.*

132. *Id*. at 1478-80. In deciding *Estate of Marcos*, the Ninth Circuit adopted the reasoning endorsed by the First, Third, Fourth, Eighth, Tenth, and District of Columbia Circuits. The Fifth and Eleventh Circuits, however, continue to hold to the contrary.

133. *See id.*

134. *See id.*

135. 889 F.2d 1327 (4th Cir. 1989).

possible insolvency and the potential for the dissipation of assets.[136] Citing the actions of the defendant,[137] the *Singer* court concluded that given the unique circumstances, the government could show irreparable injury because it was likely that no assets would be left to satisfy a potential judgement.[138] Relying on both *Deckert* and *First National City Bank*, the court dismissed Singer's argument that the government's sole remedy should be predicated on bankruptcy or attachment proceedings under state law.[139] The Fourth Circuit concluded that the district court did not abuse its discretion in finding that the harms asserted by Singer were inadequately demonstrated and amounted to merely "speculative concerns."[140] Moreover, the injunction was appropriate because it sought "to minimize those changes which will most profoundly affect one of the parties in an adverse manner if they occur before the merits of the question or questions in issue are decided."[141]

At issue in *Reebok International, Inc. v. Marnatech Enterprises, Inc.* was the granting of a preliminary injunction under the Lanham Act based on the defendant's alleged sale of footwear bearing counterfeits of Reebok's trademark.[142] Relying on *Singer*, the Ninth Circuit acknowledged that while a district court has the power to grant a preliminary injunction to "preserve the status quo by equitable means," that power exists only as an "ancillary relief necessary to accomplish complete justice."[143]

The defendant, however, claimed that the freezing of his assets was not "ancillary relief" and, thus, under *DeBeers*, the district court abused its power.[144] The court did not find this argument persuasive because the *DeBeers* holding was "readily distinguishable" from the facts in this case.[145] In *DeBeers*, the government was limited by the specific remedies provided by statute—the cessation of the prohibited

136. *See id.* at 1331. The company was a defendant in action by the government under the False Claims Act. *See id.* at 1327.

137. *See id*. at 1331. After the successful completion of a leveraged buyout, Singer's assets dropped from $1.58 billion to less than $450 million after the takeover (as of December 31,1987). Moreover, its equity fell from $445 million to $80 million and its current liabilities exceeded its current assets. *See id*.

138. *See id.*

139. *See id.* at 1330 n.15.

140. *See id*. at 1334. "The district court found that the 'public is clearly served by addressing fraud in government contracting and preserving the government's ability to recoup monies fraudulently paid.'" *Id*. at 1334 n.25.

141. *Id.* at 1335.

142. *See* Reebok Int'l, Ltd. v. Marnatech Enter., Inc., 970 F.2d 552 (9th Cir. 1992).

143. *Id.* at 560 (citing United States v. Singer, 889 F.2d 1327 (4th Cir. 1989)).

144. *See id.*

145. *See id.*

conduct.[146] The district court was only empowered to enjoin the continued violation of the law, thus making the injunction impermissible because it "dealt with a matter lying wholly outside the issues in the suit."[147] However, the court noted, "the present case is a far cry from the situation in *DeBeers*," as the Lanham Act provides for both the award of defendant's profits as well as money damages.[148] Thus, the court concluded that *DeBeers* was simply inapplicable.[149] Moreover, the *Reebok* court noted that such a remedy "was authorized by the district court's inherent equitable powers" and that it was an "equitable provisional remedy designed to secure the availability of Reebok's equitable right to an accounting of the [defendant's] profits."[150]

In *Airlines Reporting Corp. v. Barry*,[151] the plaintiff (ARC), a clearinghouse for airline tickets, brought an action against various travel agents, alleging a scheme to defraud it of airline ticket proceeds.[152] The defendants allegedly lacked financial resources and had criminal backgrounds.[153] Among the allegations by the plaintiffs were the issuance of tickets to the defendants themselves without making payment, failure to remit proceeds and the theft of blank ticket stock.[154] In order to preserve their only potential means of recovery, the plaintiffs were granted a preliminary injunction, which prohibited the defendants from using the blank airline ticket stock in any way.[155]

In affirming the injunction, the Eighth Circuit concurred with the Seventh Circuit's two-pronged test to determine whether a plaintiff has sufficiently demonstrated the inadequacy of relief, absent an injunction.[156] The two factors are the defendant's solvency or insolvency and the magnitude of the eventual damages.[157] Because the plaintiffs demonstrated that the defendants would be unable to satisfy an award absent injunctive relief, the court affirmed,

146. *See id.*
147. *Id.* at 560.
148. *Id.*
149. *See id.* at 561.
150. *Id.*
151. 825 F.2d 1220 (8th Cir. 1987).
152. *See id.*
153. *See id.* at 1226.
154. *See id.* at 1222.
155. *See id.*
156. *See id.* at 1227.
157. *See id.*

concluding that ARC was entitled to a preliminary injunction to "protect its remedy."[158]

At issue in *Teradyne v. Mostek Corp.*,[159] a breach of contract action seeking approximately $3.5 million in damages, was the applicability of a preliminary injunction requiring Mostek to set aside funds pending the outcome of arbitration.[160] The district court held that there would be irreparable harm to Teradyne without injunctive relief because Mostek was in the process of selling most of its assets, thus having the potential to make itself "judgment proof."[161] Relying on *Deckert*, the First Circuit reasoned that a preliminary injunction was appropriate when a defendant is or was likely to be insolvent at the time of judgment.[162] Although Mostek received funds for the sale of its assets in excess of Teradyne's claim, these assets were also being used to pay off other creditor claims in what was described as an "orderly liquidation process."[163] However, there appeared to be a number of claims against these assets, and Mostek gave no assurances that it would be able to satisfy a judgment.[164] In the court's judgment, Mostek was unable to show any evidence of "concrete harm;" and thus, the court held that the balance of hardship tipped "in Teradyne's favor."[165]

B. Minority View: Abuse of Discretion

Only a minority of circuits agree with the proposition that a preliminary injunction is unavailable to a plaintiff seeking money damages.[166] In *Rosen v. Cascade International, Inc.*,[167] a group of investors in a cosmetics company brought this action based on alleged securities fraud.[168] Allegedly false public statements and illegal trading by corporate officers formed the basis of the action.[169] While the district court granted the plaintiff's motion for a preliminary injunction freezing defendant's assets,[170] the Eleventh Circuit reversed

158. *See id.*
159. 797 F.2d 43, 44-45 (1st Cir. 1986).
160. *See id.* at 44-45.
161. *See id.* at 52.
162. *See id.*
163. *See id.* at 53.
164. *Id.*
165. *Id.* at 52.
166. *See* United States v. Cohen, 152 F. 3d 321 (4th Cir. 1998); Home-Stake Prod. Co. v. Talon Petroleum, C.A. 907 F. 2d 1012 (10th Cir. 1990).
167. 21 F.3d 1520 (11th Cir. 1994).
168. *See id.* at 1522.
169. *See id.*
170. *See id.*

because it concluded that no lawful authority existed to freeze the assets prior to a determination on the merits.[171] The court further held that because the plaintiffs' claims were legal and not equitable in nature, the request for "just and proper relief could not be used to sustain the district court's preliminary injunction."[172] While the plaintiffs argued that the district court had equitable authority even though the relief sought was money damages, the court held that this argument was fundamentally flawed.[173] The court reasoned that because money damages were not within the purview of "equitable jurisprudence," a court may not "reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy potential money judgment."[174] Relying on *DeBeers*, the court held that the type of injunctive relief requested was expressly barred because "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."[175]

Under the circumstances in *Rosen*, the court characterized the remedy sought as one of "writ of attachment" and therefore governed by Rule 64.[176] According to the court, plaintiffs "in law" in Florida have an "adequate [and] exclusive prejudgment remedy for the sequestration of assets under the attachment statute."[177] The court concluded that the prospect of "uncollectibility" of a potential judgment due to a defendant's dissipation of assets did not entitle a plaintiff to equitable relief.[178] Furthermore, the court believed that the appropriate "test of the inadequacy of a remedy at law is whether a judgment could be obtained, not whether, once obtained it will be collectible."[179]

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171. *See id.*

172. *Id.* at 1526. The court noted the November 1991 re-titling of the defendant's homes in Pennsylvania and Florida in his wife's name. *See id.* at 1525 n.9. In dismissing this fact as a basis for granting a preliminary injunction, the court concluded that the plaintiffs had "numerous remedies" in law if these conveyances were deemed fraudulent. *Id.* Thus, the court of appeals determined that the assets were not technically "out of reach" of the plaintiffs. *Id.*

173. *Id.* at 1526.

174. *Id.* at 1527 (citing Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc., 14 F.3d 1507, 1521 (11th Cir. 1994)).

175. *Id.* at 1529.

176. *See id.* at 1530.

177. *Id.* at 1531.

178. *See id.* at 1531.

179. *Id.* (citing St. Lawrence Co. v. Alkow Realty, Inc., 453 So. 2d 514, 514-515 (Fla. 4th Dist. Ct. App. 1984)).

In re Fredeman Litigation v Channel Fueling Service, Inc.[180] involved defendants in an antitrust and RICO treble damages action.[181] While the district court had entered a preliminary injunction prohibiting the defendants from transferring or removing their assets without the court's knowledge,[182] the Fifth Circuit vacated the injunction.[183] Relying on *DeBeers*, the court determined that the plaintiff's argument "proceeded from a faulty premise."[184] The court of appeals focused its reasoning on the *DeBeers*' Court's interpretation of "remoteness," which it determined to be the specific lack of connection between the assets or property frozen and the underlying cause of action.[185] Thus, the court concluded that a defendant's assets "unrelated to the underlying litigation" could not be subject to an injunction so that such assets "may be preserved to satisfy a potential money judgment."[186]

The district court concluded that the plaintiffs had shown likely success on the merits and irreparable harm without injunctive relief.[187] There was sufficient evidence showing that the "companies and their officers had paid bonuses to employees based on the amount of fuel they had secretly withheld and had covered up these practices with various accounting devices and false invoices."[188] The district court also concluded that the defendants had secreted assets in the past and thus were likely to do so in the future.[189]

The Fifth Circuit held that a preliminary injunction predicated under Rule 65 could not be justified to "simply aid the plaintiff in the enforcement of any judgment he might obtain."[190] Rather, the remedy sought was in the nature of attachment available under Rule 64. However, the court specifically acknowledged that this remedy would be unavailing to the plaintiffs under Texas law. [191]

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180. 843 F.2d 821 (5th Cir. 1988).

181. *See id.* at 821. The plaintiffs alleged that defendants systematically had charged them for more fuel than had been delivered. *See id.* at 822. Prior to this action, criminal charges against the Fredeman brothers had been brought under RICO and other statutes. *See id*.

182. *See id.*

183. *See id.*

184. *Id*. at 824.

185. *See id.* at 826.

186. *See id.* at 824.

187. *See id.*

188. *Id*. at 823.

189. *Id.* at 823-24.

190. *Id*. at 826.

191. *See id.*

C. Alliance Bond Fund v. Grupo Mexican de Desarrollo

Grupo Mexicano de Desarrollo, S.A. (GMD) is a Mexican construction company that participated in the Mexican government's toll road concession program from 1990 to 1994.[192] In order to refinance $100 million in high interest Mexican bank debt as well as to fund ongoing operations, GMD offered and sold $250 million seven-year notes (8.25% due in 2001) to institutional investors in February 1994.[193] The company chose to issue these notes in U.S. dollars rather than Mexican pesos, thereby obtaining the benefit of a much lower interest rate than comparable Mexican peso denominated debt. The notes were guaranteed by five GMD subsidiaries (later named as co-defendants) and were ranked *pari passu* with all present and future unsecured and unsubordinated debt of the company.[194] Relying on all these assurances, the plaintiffs, Alliance Bond Fund, Inc. and ten other United States investment funds (the Investor Group), purchased $75 million of the notes.[195]

Three years later, in its June 1997 annual report filed with the Securities and Exchange Commission (SEC), GMD acknowledged that it was experiencing serious financial difficulty.[196] GMD failed to make the August 1997 interest payment and the guarantors likewise failed to meet their obligations under the terms and conditions of the notes.[197] Consequently, the Investor Group caused acceleration of the principal.[198] However, shortly thereafter, the Mexican government announced its Toll Road Rescue Program. The Mexican government would issue Toll Road Notes to GMD and other toll road operators to reimburse them for "unpaid construction receivables and expenses."[199] In its Third Quarter 1997 financial statement, GMD stated that it expected to receive approximately $309 million of these Toll Road Notes.[200]

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192. *See* Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688, 690 (2d Cir. 1998).

193. *See id.* at 690-91. While the notes were a 144-A transaction, GMD also participated in a global offering of its shares in an initial public offering (IPO) in December 1993. The shares were listed on the New York Stock Exchange (NYSE) with the symbol GMD.B (series B) and GMD (series L). The shares were officially halted on July 23, 1998 when regular trading was suspended. According to the NYSE, the shares remain officially halted and they are currently communicating with the company regarding the release of their year-end 1998 statement. *See id.*

194. *See Alliance Bond Fund*, 143 F.3d at 691.

195. *See id.*

196. *See id.*

197. *See id.*

198. *See id.*

199. *Id.*

200. *See id.*

However, in addition to the funds owed to the holders of the notes, GMD now had obligations totaling approximately $450 million to other creditors, among them several Mexican banks, the Mexican government (taxes), other Mexican financial institutions and terminated employees.[201] While attempting to negotiate with the Investor Group as well as other creditors, GMD issued a press release stating that as of the first nine months of 1997, the company had a negative net worth of $214 million.[202] Furthermore, GMD also disclosed that it had assigned approximately $117 million of the Toll Road Notes to several Mexican creditors: the Mexican government ($100 million) and terminated employees ($17 million).[203]

Alleging default, the Investor Group promptly commenced action in December 1997 seeking damages and a preliminary injunction restraining GMD from assigning the Toll Road Notes.[204] One day prior to the hearing on the motion for a preliminary injunction, GMD disclosed that an additional $38 million in Toll Road Notes had already been assigned.[205] The next day, a supplemental affidavit revealed the following: (1) $137 million had been assigned to the Mexican government; (2) $30 million had been assigned to terminated employees; (3) $48 million had been assigned to Mexican banks; (4) $42.5 million had been assigned to other Mexican creditors.[206] After allowing for other assignments the company had planned to make, approximately $5.5 million in Toll Road Notes had been allocated to the Investor Group.[207] Thus, the Investor Group was left with nothing more than a mere pittance of its original investment.[208]

Under Rule 65, the district court quickly granted a preliminary injunction "restraining GMD and the Guarantors from dissipating, transferring, conveying, or otherwise encumbering the Investor's right

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201. *See id.*

202. *See id.*

203. *See id.* Although the Toll Road Notes had not yet been issued, GMD had apparently placed assets in "trust" for these creditors pending the actual issuance of the Notes. *See id.*

204. *See id.*

205. *See id.* at 692.

206. *See id.*

207. *See id.* According to the most recent 6-K statement filed with the SEC on November 6, 1998, GMD's liability as of September, 1998 not only included $250 million (the principal amount in default), but also $33.6 million in interest payments now in arrears.

208. On December 12, 1997, plaintiffs sued to recover $80.2 million, representing principal and accrued interest on the defaulted notes. *See* Brief of Plaintiffs-Appellees at 1, Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688 (2d Cir. 1998) (No. 97-9610). Thus, this $5.5 million allocation leaves the Investor Group with a discount to the face value of their claim of approximately ninety-three percent.

to receive or benefit from the issuance of the Toll Road Notes."[209] It was determined that the Investor Group almost certainly would win on the merits and without injunctive relief would face irreparable injury. As indicated by the district court, "GMD's financial condition and its dissipation of assets would frustrate any judgment recovered."[210]

The Second Circuit affirmed the judgment of the district court in May 1998 and held as a matter of first impression that the district court had authority to issue a preliminary injunction preventing dissipation of assets not directly involved in the pending litigation. Moreover, the Court of Appeals supported the lower court's finding that the Investor Group would suffer irreparable injury without injunctive relief because of GMD's actions in creating an improper hierarchy of creditors.[211]

In analyzing whether the district court had power to enjoin unrelated assets, the court compared Rule 64 and Rule 65.[212] GMD argued that Rule 64 was the only procedural mechanism available to the plaintiffs.[213] In addition, GMD also contended that Rule 65 was inapplicable because the Investor Group sought money damages and not equitable relief.[214] Relying on a narrow interpretation of *DeBeers*, the defendant claimed that the Toll Road Notes were unrelated to the notes purchased by the Investor Group; and therefore, the injunction was an abuse of discretion by the district court.[215] However, the Second Circuit held that the two Rules were "complementary, not mutually exclusive."[216]

The purpose of a preliminary injunction as provided by Rule 65 is to preserve the status quo pending a final determination on the merits.[217] Thus, the court of appeals stated that a district court is

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209. *See Alliance Bond Fund*, 143 F.3d at 692. In GMD's year-end 1997 20-F statement filed with the SEC on July 14, 1998, the company states that the preliminary injunction "does not affect irrevocable assignments of receivables for the benefit of creditors previously made by GMD." GRUPO MEXICANO DE DESARROLLO, S.A., 1997 ANNUAL REPORT 3 (1998).

210. *Alliance Bond Fund*, 143 F.3d at 692.

211. *See id.* at 698.

212. *See id.* at 692.

213. *See id.*

214. *See id.*

215. *See* Reply Brief of Defendants-Appellants at 9, Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688 (2d Cir. 1998) (No. 97-9610). The defendants argued that the plaintiffs were holders of general obligation notes, not GMD's toll road construction projects. *See id.* Thus, GMD contends that the Toll Road Notes are in no way "traceable" to the notes held by the Investor Group. *See id*.

216. *Alliance Bond Fund*, 143 F.3d at 692.

217. *See id.* (citing Arthur Guiness & Sons, PLC v. Sterling Publishing Co., 732 F.2d 1095, 1099 (2d Cir. 1984)).

vested with full discretion to determine "whether to grant the injunction and its scope."[218] However, in recognition of the potential for abuse and the potential hardship created by the granting of injunctive relief, the court noted that its application outside of the district court's jurisdiction be "exercised with great reluctance."[219]

Under New York law, an attachment under Rule 64 is unavailable where the plaintiffs seeks only money damages.[220] It is further inapplicable because the Toll Road Notes (a Mexican government obligation) were not physically in New York State.[221] However, as the court of appeals emphasized, this did not render the court "powerless."[222] If a court has personal jurisdiction over the defendant,[223] it has "power to restrain assets or to command that assets be brought within its jurisdiction; whether or not performance is required outside of New York State."[224]

The circuit court also rejected as "too sweeping" GMD's assertion that *DeBeers* barred the use of a preliminary injunction where the assets were not part of the pending litigation.[225] Because there was no possibility of a money judgment based on Sherman Act violations, it was, therefore, not possible for the district court to freeze

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218. *Id.* (citing Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944)). At issue in *Hecht* was an injunction ordered to restrain the defendant from violating the Emergency Price Control Act of 1942. *See Hecht*, 321 U.S. at 322. In reversing, the Supreme Court noted that "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case." *Id.* at 329.

219. *See Alliance Bond Fund*, 143 F.3d at 693 (citing Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 647 (2d Cir. 1956)). *Vanity Fair* involved the extraterritorial application of the Lanham Act and the International Convention for the Protection of Industrial Property. *Vanity Fair Mills, Inc.*, 234 F.2d at 636.

220. *See Alliance Bond Fund*, 143 F.3d at 693 (citing N.Y. C.P.L.R. 6301, Practice Commentaries (McKinney 1980)).

221. *See id*. (citing National Broadway Bank v. Sampson, 179 N.Y. 213, 222 (1904); 12 Carmody-Wait 2d § 76.2, 31-2 (1997)).

222. *See id.* at 693.

223. *See* GRUPO MEXICANO DE DESARROLLO, S.A., OFFERING CIRCULAR 87 (1994) [hereinafter OFFERING CIRCULAR]. The circular state:

> The Notes, the Guarantee and the Fiscal Agency Agreement will be governed by, and construed in accordance with, the laws of the State of New York without regard to the principles of conflicts of law thereof. The Issuer and each Guarantor has submitted to the nonexclusive jurisdiction of the Federal courts of the United States for the Southern District of New York, the courts of the State of New York in the Borough of Manhattan, the City of New York and the courts of its corporate domicile, for purposes of all legal actions and proceedings instituted in connection with the Notes and the Guarantee.

Id.

224. *See Alliance Bond Fund*, 143 F.3d at 693 (citing Gresov v. Shattuck Denn Mining Corp., 215 N.Y.S.2d 98, 100 (N.Y. Sup. Ct. 1961); N.Y. JUR.2D *Equity* § 14 (1986 & Supp. 1997)).

225. *See id.* at 693-94.

the assets involved.[226] On the other hand, the assets in *Deckert* would have been the subject of a final judgment; and therefore, an injunction prevented their transfer or dissipation.[227] Thus, the Second Circuit concluded that a defendant's assets could not be enjoined if a final judgment did not involve a "transfer of money from defendants to plaintiffs."[228] Rather than controlling, *DeBeers* is simply not applicable where the plaintiff seeks money damages.[229] Furthermore, this limitation comports with *Deckert* where the plaintiffs were threatened by the possible insolvency of the defendant and the likely preference to other creditors.[230] The granting of a preliminary injunction under these circumstances, therefore, is reasonable in order to preserve the status quo pending final determination of the merits.[231] Relying on *First National City Bank*, the *Alliance* court determined that although the underlying basis for the injunction was statutory, the Supreme Court's holding was actually much more inclusive.[232] The court interpreted *First National City Bank* as specifically upholding a preliminary injunction precisely to ensure "the enforcement of an eventual money judgement."[233] The court noted that *First National City Bank* described the injunction as "eminently appropriate to prevent further dissipation of assets" and in distinguishing *DeBeers*, the Supreme Court stated that there was "property that could be the subject of a final judgement on the merits."[234] Thus, the *Alliance* court concluded that both *Deckert* and *First National City Bank* "endorse the district court's exercise of general equitable power to ensure the preservation of an adequate remedy."[235]

While acknowledging that the U.S. Supreme Court "has not squarely decided this question,"[236] the Second Circuit joined the majority of the circuits which hold that a preliminary injunction may be granted where a plaintiff can establish that money damages will be an inadequate remedy due to impending insolvency or where the defendant has engaged in a pattern of secreting or dissipating assets.[237] Heeding the warning in *DeBeers*, the court emphasized that

226. *See id.* at 694.
227. *See id.*
228. *See id.*
229. *See Alliance Bond Fund*, 143 F.3d at 694.
230. *See id.*
231. *See id.*
232. *See id.*
233. *Id.* at 695.
234. *Alliance Bond Fund*, 143 F.3d at 694-95.
235. *Id.* at 695 (citing United States v. Singer, 889 F.2d 1327, 1330 (4th Cir. 1989)).
236. *Id.* at 693.
237. *See id.* at 696.

this type of injunctive relief should not be "freely granted."[238] However, the court also noted that the "parade of horribles" suggested by *DeBeers* was not a foregone conclusion.[239] In the opinion of the court, a defendant's rights are adequately protected because of the requirements a plaintiff must meet before a district court may grant a preliminary injunction.[240] Under Rule 65, a plaintiff must establish the following requirements: "(1) absent injunctive relief, it will suffer irreparable injury; and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships tips in favor of the movant."[241]

The *Alliance* court concurred with the district court's finding that the Investor Group would be irreparably harmed because of GMD's precarious financial condition and dissipation of assets, thus frustrating the plaintiffs' ability to obtain a judgment.[242] Irreparable injury, however, cannot be sustained solely on the basis of a "judgment proof" defendant, nor in a circumstance where a defendant legitimately seeks to work with creditors to reduce debt.[243] Based on the facts in this case, however, the court of appeals reiterated the district court's finding that GMD was not only improperly establishing a priority of creditors but was also "duplicitous" in its dealings with the Investor Group.[244] Contrary to a "legitimate business justification," the district court found that GMD had stated its plans to use the Toll Road Notes to satisfy Mexican creditors to the exclusion of the Investor Group and other holders of the notes.[245] Consequently, the judgment of the district court was affirmed.

On November 30, 1998, the Supreme Court granted certiorari to *Grupo Mexicano de Desarrollo*.[246] By granting certiorari, the issue of whether and under what circumstances a plaintiff can seek injunctive

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238. *See id.*

239. *See Alliance Bond Fund*, 143 F.3d at 696.

240. *See id.*

241. *Id.* (citing Blum v. Schlegel, 18 F.3d 1005, 1010 (2d Cir. 1994)).

242. *See id.* at 697-98.

243. *See id.* at 697.

244. *See Alliance Bond Fund*, 143 F.3d at 697; *see also* Reply Brief of Defendants-Appellants at 9-10, Alliance Bond Fund v. Grupo Mexicano de Desarrollo, 143 F.3d 688 (2d Cir. 1998) (No. 97-9610). In response to the plaintiffs' contention that the assignment of the Toll Road Notes was in violation of the Negative Pledge Covenant, GMD asserts that its ability to use assets to pay off creditors is not limited by this covenant. *See* Reply Brief of Defendants-Appellants, *supra*, at 9. Moreover, GMD asserts that the only remedy a plaintiff can obtain for such a violation is an acceleration of the notes, not an injunction. *See id*. at 9-10.

245. *See Alliance Bond Fund*, 143 F.3d at 697.

246. *See* Alliance Bond Fund v. Grupo Mexicano de Desarrollo, 119 S. Ct. 537 (U.S. Nov. 30, 1998).

relief when the plaintiff seeks only money damages is "squarely" before the Supreme Court. While both Petitioners and Respondents raised supplemental arguments[247] not discussed in the Second Circuit opinion, the heart of the matter and the focus during oral argument (held on March 31, 1999) was whether or not a district court has the power to grant such injunctive relief.

Not surprisingly, Petitioners contended that a district court does not. Falling within the minority view that an injunction under Rule 65 may only be issued when a precise specie of asset is the subject of the plaintiff's underlying claim, Petitioners contended that the inherent powers of the district court provide no basis for an "Alliance" injunction.[248] Petitioners further argued that district courts should not be permitted to exercise such "asserted inherent power" as this provides a mechanism to subvert the more stringent requirements provided for under Rule 64.[249]

Respondents, however, asserted that GMD failed to distinguish between equitable power and inherent power.[250] Federal courts were vested with equity jurisdiction beginning with the Judiciary Act of 1789. Thus, "federal courts should not be reluctant to exercise equity power."[251] Respondents further claimed (analogizing to the Mareva[252] injunction) that this type of injunctive relief was necessary not only to preserve the status quo, but also to protect the "courts' power to do justice in commercial disputes involving assets that are increasingly intangible, impermanent, and instantly transferable."[253] Dismissing Petitioners' argument that the Mareva injunction "is a creature of statute" as without merit, Respondents maintain that the "power to issue Mareva injunctions flows from the same uncodified equity

247. *See* Brief for Petitioners at 28, Alliance Bond Fund v. Grupo Mexicano de Desarrollo, 143 F.3d 688 (2nd Cir. 1998), *cert. granted*, 119 S. Ct. 537 (U.S. Nov. 30, 1998) (No. 98-231) (arguing that under Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), the district court should have relied on New York law in determining whether a preliminary injunction could issue); *see also* Brief for the Respondents at 12, Alliance Bond Fund v. Grupo Mexicano de Desarrollo, 143 F.3d 688 (2nd Cir. 1998), *cert. granted*, 119 S. Ct. 537 (U.S. Nov. 30, 1998) (No. 98-231), (arguing that the interlocutory appeal had been rendered moot by the conversion of the preliminary injunction into a permanent injunction).

248. *See* Petitioners' Brief at 14, *Alliance Bond Fund* (No. 98-231).

249. *See id*. at 20. (Petitioners also note that Rule 65 establishes the "procedural proof requirements" but does not, in itself, provide the authority to issue preliminary injunctive relief.) *Id.* at 18 n.9.

250. *See* Respondents' Brief at 32, *Alliance Bond Fund* (No. 98-231) (discussing the First Judiciary Act of 1789 and the derivation of "suits in equity"). *Id*. at 33 n.16.

251. *Id*. at 34.

252. *See* discussion *infra* Part IV.

253. Respondents' Brief at 34, *Alliance Bond Fund* (No. 98-231).

jurisprudence that Congress bequeathed to the federal courts."[254] However, this raised the question of whether or not this was an issue more appropriately placed in the hands of the legislature. Furthermore, if the scope of injunctive relief under Rule 64 were to be expanded (to encompass assets held outside the jurisdiction, for example), is it not more appropriately a question for the state legislature rather than the courts? However, although the distinction between "equity" and "in law" has "historical force," there is today no functional justification for their separation given the merger of law and equity.[255]

While acknowledging that there was no fraud indicated under the facts in this case, at oral argument some discussion did ensue regarding available remedies to a plaintiff under similar circumstances if such an injunction were not granted. However, there was also an acknowledgment of the speed with which assets can be transferred and the needs presented by a global economy and global capital markets. In this regard, the Securities Industry Association and the Emerging Markets Traders Association persuasively argue that if the Court should decide that the "equitable powers of a federal district judge do not … exceed the powers of a medieval Chancellor, the consequences would be most unfortunate for today's global marketplace and United States participants in it."[256] The power to issue such injunctive relief in order to prevent dissipation or secreting of assets is an "important underpinning of the legal regime in which the international capital markets operate."[257] What should be emphasized is the lack of effectiveness of an attachment under Rule 64 when assets are not within the boundaries of the state as well as the lack of effectiveness of the protection against creditor discrimination provided by U.S. bankruptcy laws if the assets are located in foreign countries.[258] Furthermore, protection through contract can also be unavailing as demonstrated by the negative pledge clause in this instance where U.S. investors were ranked *pari passu* with unsecured

254. *Id*. at 36.

255. Brief for The United States as Amicus Curiae Supporting Respondents at 13, Alliance Bond Fund v. Grupo Mexicano de Desarrollo, 143 F.3d 688 (2nd Cir. 1998), *cert. granted*, 119 S. Ct. 537 (U.S. Nov. 30, 1998) (No.98-231).

256. Brief of Amici Curiae, the Securities Industry Association and the Emerging Markets Traders Association in Support of Respondents at 4, Alliance Bond Fund v. Grupo Mexicano de Desarrollo, 143 F.3d 688 (2nd Cir. 1998), *cert. granted*, 119 S. Ct. 537 (U.S. Nov. 30, 1998) (No. 98-231).

257. *Id*. at 7.

258. *See id.*

"home country creditors."[259] Such contractual provisions prove "completely unavailing against any financially beleaguered foreign issuer which, out of dishonesty or by virtue of local political and economic pressures, decides systematically to favor local creditors. When the problem of discrimination in favor of the debtor's home-country creditors arises, it can be dealt with effectively only by the sort of injunctive relief that the District Court granted."[260] Should the Court deny injunctive relief of this nature, the risk posed is the conclusion by some investors that "overseas investment is imprudent."[261] As a consequence, "[t]his will foreseeably curtail—and in some cases altogether deny—access to the United States capital markets by foreign issuers on reasonable economic terms."[262]

Finally, should Petitioners prevail, this obviously has implications for the opinion reached in *Marcos.* In granting injunctive relief, it was critical to the Ninth Circuit that the defendant be shown to be dissipating or secreting assets and that the use of such injunctions be limited to "extraordinary cases." As even Petitioners had to concede, if *Alliance* were overturned, *Marcos*, (sharing many similarities with *Alliance*) would as well. How concerned the Court may be about the potential demise of *Marcos* can only be a matter of speculation at this point. Posing the question, however, may signal a cautionary tone in the face of any proclivity to reverse *Alliance*.

IV. THE MAREVA INJUNCTION: THE U.K. APPROACH

A. *Introduction*

> *"If it appears that [a] debt is due and owing – and there is a danger that a debtor may dispose of his assets so as to defeat it before judgment – the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets."*[263]

The Mareva injunction[264] derives its name from the 1975 case, *Mareva Compania Naviera v. International Bulkcarriers*.[265] The

259. *See id.*
260. *Id*. at 7-8.
261. *See id.* at 8.
262. *Id*. at 8.
263. RICHARD N. OUGH & WILLIAM FENLEY, THE MAREVA INJUNCTION AND ANTON PILLAR ORDER 9 (2d ed. 1993) (quoting Mareva Compania Naviera, S.A. v. International Bulkcarriers SA, [1980] 1 All E.R. 213 (Eng. C.A. 1975).
264. *Id*. at 10. The statutory basis for the granting of a Mareva injunction is section 37 of the Supreme Court Act of 1981 which provides:

37. Powers of High Court with respect to injunctions and receivers

shipowners of the Mareva had let the vessel on a time charter-party for a trip to the Far East and back.[266] The vessel then was sub-chartered to the President of India with a cargo of fertilizer consigned to India and loaded at Bordeaux on May 29, 1975.[267] Payment was made by the Indian High Commission through the Bank of Bilbao in London to the credit of the time charterers.[268] However, the time charterers failed to make the third payment and the shipowners claimed the defendant's conduct as a repudiation of the charter.[269] Because the shipowners feared that the defendants would remove these funds from the bank in London, the plaintiffs applied for an injunction preventing any possible transfer of these funds.[270]

The English Court of Appeals granted the injunction, relying on section 45 of the Judicature (Consolidation) Act 1925, which states: "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient."[271] In qualifying the "wide interpretation" of this section, Lord Denning added, "[t]he Court will not grant an injunction to protect a person who has no legal or equitable right whatever."[272] But, subject to that qualification, "the statute gives a wide general power to the Courts."[273] This power is supported further by Halsbury's Laws of England, which state that "now, therefore, whenever a right, which can be asserted either in law or in equity, does exist, then, whatever the previous practice may have been, the Court is enabled by virtue of this provision, in a proper case,

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(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

(3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction. Supreme Court Act, 1981, ch. 54. § 37 (Eng.).

265. *See Mareva*, [1980] 1 All E.R. at 213. *Mareva* was actually one of two landmark cases decided in 1975. *See also* Nippon Yusen Kaisha v. Karageorgis [1975] 1 W.L.R. 1093 (Eng. C.A.).

266. *See Mareva*, [1980] 1 All E.R. at 213.

267. *See id.*

268. *See id.* at 213-14.

269. *See id.* at 214.

270. *See id.*

271. *Mareva*, [1980] All E.R. at 214.

272. *Id.*

273. *Id.*

to grant an injunction to protect that right."[274] Lord Denning equated this principle to a creditor who has a "right to be paid and a debt owing to him," although that right had not yet been established by final judgment.[275] As there was clearly a danger that the defendants, who controlled the bank account in London, would remove these funds, Lord Denning considered this a proper instance to grant an injunction restraining the dissipation of these funds pending trial on the merits.[276]

B. Fundamental Principles and the Nature of the Relief

While the number of requests for Mareva injunctions has increased significantly since its introduction in 1975, the injunction will not be granted unless the court is satisfied that: "(1) the plaintiff has a good arguable case against the defendant; (2) there is a real risk that judgment will go unsatisfied by reason of the disposal by the defendant of his assets, unless he is restrained by court order from disposing of them; and (3) it would be just and convenient in all the circumstances of the case to grant the relief sought."[277]

While some commentators have described the powers of the Mareva injunction as a "nuclear weapon," it is also important to note what the injunction will not grant the plaintiff.[278] This type of injunctive relief, in personam in nature, will not, for example, grant the plaintiff any priority interest in the assets frozen.[279] Therefore, when a plaintiff is faced with an insolvent or bankrupt defendant, the plaintiff will rank *pari passu* with other creditors.[280] However, the true effectiveness of the Mareva injunction lies in its ability to prevent a defendant from engaging in conduct such as transferring, secreting or otherwise disposing of assets that would render any final judgment ineffective.[281]

Even though third parties are not themselves subject to the injunction, they are not permitted to "aid and abet a breach of its terms."[282] Thus, banks would not be permitted to transfer funds or make other payments that would be in violation of the order.[283] This

274. *Id.* at 214-15 (citing 24 HALBURY'S LAWS OF ENGLAND para. 918 (4th ed. 1992)).
275. *See id.* at 215.
276. *See id.*
277. *Gee*, *supra* note 1, at 10-11.
278. *See id.* at 11.
279. *See id.*
280. *See id.*
281. *See id.* at 10.
282. *See id.*
283. *See id.*

places the third party at risk because he may be subject to contempt charges even though he has no knowledge of the injunction.[284]

Generally, the Mareva injunction will prohibit the defendant from "removing from the jurisdiction, disposing of, charging, encumbering, or otherwise dealing with howsoever," specified assets that are included in the injunction.[285] "Dealing" may be enumerated in the order, as well as other terms including "assignments," although it is generally understood that "disposing" would include not only "sales" but also "assignments."[286]

Mareva injunctions granted with unlimited scope are rarely justified; specified limits are more in keeping with the general principle of preserving sufficient assets to protect a plaintiff's potential judgment.[287] Orders may include general assets, or they may refer to specific property.[288] In addition, Mareva injunctions may be accompanied by ancillary orders, which ensure the effectiveness of relief granted by the injunction.[289] Ancillary orders may include "Anton Pillar" orders, which require the defendant to submit to a search of his premises by the defendant's representatives in order to identify and remove for safe keeping, assets, evidence, documents, etc., that are specified in the order.[290] Other ancillary orders may include disclosure of assets and restraining the defendant from leaving the jurisdiction.[291]

The application for a Mareva injunction is made *ex parte*, without the defendant's knowledge.[292] The policy underlying this procedure is that the order itself would be rendered ineffective if the defendant had knowledge of it and disposed or transferred assets prior to the granting of the injunction.[293] However, because of the substantial prejudice to the defendant that exists, the plaintiff is under a strict duty to disclose any and all matters with the "utmost degree of good faith."[294] In addition, as part of the application for the injunction, the plaintiff must give the court "an undertaking to abide by any order of the court as to damages."[295] The court may require

284. *See id.*
285. *Id.* at 29.
286. *See id.*
287. *See id.* at 30.
288. *See id.* at 31.
289. *See id.* at 31.
290. *See id.* at 149.
291. *See id.* at 31.
292. *See id.* at 71.
293. *See id.*
294. *Id.* at 79-80.
295. *Id.* at 98.

some form of security in order to ensure that damages can be awarded against the plaintiff should losses arise as a result of the issuance of the injunction.[296]

C. The Emergence of the Babanaft Proviso and the Worldwide Mareva Injunction

Three important cases, all heard during the summer of 1988,[297] had a significant impact on the evolution of the Mareva injunction because they not only involved very substantial monetary claims but also the conduct of parties in foreign jurisdictions.[298] The term "Babanaft Proviso," which is included in a Mareva injunction, derives its name from *Babanaft International v. Bassatne*.[299] In this case, the plaintiff, who was the receiver of Babanaft, alleged that while the defendants had been shareholders and directors of Babanaft, they had used the company merely as a vehicle to shield them from personal liability.[300] Thus, on the basis of corporate veil-piercing, the receiver alleged that the defendants became jointly and severally liable to Babanaft with respect to any judgment owed.[301] The issue addressed by the Chancery Division was whether a Mareva injunction ought to be granted freezing a defendant's foreign assets so that "notice can be given by the plaintiffs to all and sundry abroad."[302] The issuance of an injunction in this case led to the plaintiff's solicitors notifying approximately forty-seven entities in various countries of the terms of the injunction.[303] In holding that an unqualified injunction freezing assets outside the court's jurisdiction would amount to an "exorbitant assertion of extraterritorial jurisdiction," the chancery court commented on the practical considerations involved with injunctions freezing foreign assets.[304] Although Mareva injunctions are "orders made in personam against the defendants, they also have an in rem effect on third parties."[305] The court thus refined the injunction with a qualification, or a "proviso," that the order would not affect third

296. *See id.*
297. *See* Babanaft Int'l Co., S.A. v. Bassatne, [1990] 1 Ch. 13 (Eng. C.A. 1988); Republic of Haiti v. Duvalier, [1990] 1 Q.B. 202 (Eng. C.A. 1988); Derby & Co., Ltd. v. Weldon (Nos. 3 & 4), [1990] 1 Ch. 65, (Eng. C.A. 1988).
298. *See* OUGH, *supra* note 255, at 36-37.
299. *See Babanaft*, [1990] 1 Ch. 13.
300. *See id.* at 22.
301. *See id.*
302. *Id.* at 17.
303. *See id.* at 25.
304. *See Babanaft*, [1990] 1 Ch. at 35.
305. *Id.* at 25.

parties "unless and to the extent that it is enforced by the Courts of the States in which any of the defendants' assets are located."[306]

The "Babanaft Proviso" was subsequently refined by Lord *Donaldson in Derby & Co. Ltd. v. Weldon (Nos. 3 & 4).* That decision provided the following:

> [I]n so far as this order purports to have any extraterritorial effect, no person shall be affected thereby or concerned with the terms thereof until it shall be declared enforceable or be enforced by a foreign court and then it shall only affect them to the extent of such declaration or enforcement unless there are: (a) a person to whom this order is addressed or an officer of or an agent appointed by a power of attorney of such a person or (b) persons who are subject to the jurisdiction of this court and (i) have been given written notice of this order at their residence or place of business within the jurisdiction, and (ii) are able to prevent acts or omissions outside the jurisdiction of this court which assist in the breach of the terms of this order.[307]

Derby involved damages for breach of contract, negligence, breach of fiduciary duty, deceit and conspiracy to defraud in connection with dealings in the cocoa market.[308] As stated by Lord Donaldson, "[t]he complexity of the issues involved in this action is only matched by the size of the sums in dispute."[309] Emphasizing the important policy considerations which form the foundation of a Mareva injunction, Lord Donaldson stated that "no court should permit a defendant to take action designed to frustrate subsequent orders of the court."[310] However, it was also important to recognize that a defendant must be able to defend himself against the action and conduct his business pending determination on the merits.[311] Furthermore, there must be some recognition of the effect of a Mareva injunction on third parties; and thus, there is a very "practical" need for such a "proviso."[312]

In France in July 1986, the plaintiffs began the action underlying *Republic of Haiti v. Duvalier*, in which the plaintiffs sought recovery of approximately $120 million allegedly embezzled while the former President of Haiti was in power.[313] In June 1988, plaintiffs obtained a worldwide Mareva injunction which included ordering the defendants' solicitors to disclose assets known to them as well as

306. *Id.* at 37.
307. Derby & Co., Ltd. v. Weldon (Nos. 3 & 4), [1990] 1 Ch. 65, 84 (Eng. C.A. 1988).
308. *See id.* at 68.
309. *Id.* at 75.
310. *Id.* at 76.
311. *See id.*
312. *See Derby*, [1990] 1 Ch. at 82-83.
313. *See* Republic of Haiti v. Duvalier, [1990] 1 Q.B. 202 (Eng. C.A. 1988).

prohibiting them from disclosing the making of the order.[314] The court denied the defendants' appeal to dismiss the injunction for lack of jurisdiction, noting the "plain and admitted" intention of the defendants to remove assets beyond the "reach of courts of law" and the significant amount of the potential judgment involved.[315] While acknowledging that the injunction granted was "most unusual" and should "very rarely be granted," this case was not usual.[316] What was determinative "is the plain and admitted intention of the defendants to move their assets out of the reach of the courts of law, coupled with the resources they have obtained and the skill they have hitherto shown in doing that."[317]

In an important 1992 case, *Polly Peck International PLC v. Nadir (No. 2)*,[318] the administrators of Polly Peck alleged breach of fiduciary duties against the Central Bank in Cyprus.[319] A number of actions had been brought following the collapse of Polly Peck, which was a publicly traded holding company with significant trading interests concentrated in Northern Cyprus and Turkey.[320] In this case, the plaintiffs contended that the Central Bank either had actual knowledge that funds were being improperly diverted or that the circumstances put the Bank on notice that this was so.[321] A Mareva injunction was granted with respect to the Central Bank's assets within the jurisdiction, limited to approximately thirty-nine million Pounds Sterling.[322]

In considering the Bank's appeal, the court highlighted three matters of importance: (1) the nature and strength of the case against the Central Bank, (2) the potential for injury to the Central Bank if the injunction were continued, and (3) the potential for injury to the plaintiffs if the injunction were discharged.[323] The court noted the impropriety of granting a Mareva injunction without a "fair arguable case for liability."[324] Furthermore, such an injunction also was dependent on weighing the consequences to both the defendant and the plaintiff.[325]

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314. *See id.* at 208.
315. *Id.* at 216.
316. *Id.*
317. *Id.*
318. [1992] 4 All E.R. 769 (Eng. C.A.).
319. *See id.*
320. *See id.*
321. *See id.* at 773-74.
322. *See id.* at 774.
323. *See id.* at 775.
324. *Id.*
325. *See id.*

The court stated that as a general principle, a Mareva injunction should not interfere with the ordinary course of business of a defendant.[326] Thus, granting this type of relief against a bank poses severe problems.[327] About sixty percent of the Bank's deposits were held in London and were subject to the injunction.[328] Furthermore, there was a sufficient finding that the Bank's foreign currency liquidity had been seriously affected.[329] The court was also concerned about the Bank's net asset position, which they believed would make them particularly vulnerable to a "run of withdrawals caused by a loss of confidence."[330] Thus, the court held that in weighing the balance of hardships for both parties, the Mareva injunction freezing the assets of the Central Bank should be discharged.[331] Not only was the case against the Central Bank considered largely speculative; but more importantly, the court was concerned with the very real and legitimate problems which interfered with the Bank's ability to function.[332] Thus, the court concluded that "to impose a Mareva injunction that will . . . protect a cause of action that is no more than speculative is not simply wrong in principle but positively unfair."[333]

V. CONCLUSION

Many reasons exist for the traditional hesitancy of courts to grant a preliminary injunction freezing a defendant's assets.[334] Some courts perceive an alternative remedy in law when the plaintiff's claim is perceived in equity even when it is clear that such an "attachment" will either be unavailable or ineffective.[335] In addition, U.S. Supreme Court precedent, particularly *DeBeers*, is interpreted as specifically precluding injunctive relief when assets are not "part of the pending litigation."

In a world of increasing emphasis on international trade, cross border transactions and global capital markets, it has become essential to collapse the parameters defining Rule 64 and Rule 65. There are many "infamous" defendants who have engaged in conduct designed

326. *See id.* at 782.
327. *See id.*
328. *See id.* at 783.
329. *See id.*
330. *Id.*
331. *See id.* at 784.
332. *See id.*
333. *Id.*
334. *See* Wasserman, *supra* note 4, at 306.
335. *See* discussion *supra* Part III.

to dissipate, secrete and frustrate the judgment of the courts.[336] It is also equally important not to lose sight of the "little" plaintiff whose potential injury can be devastating if an effective remedy is denied.[337] The necessary resources may not exist to institute a multiplicity of in rem proceedings in all states where property is located.[338]

By granting certiorari to Grupo Mexican de Desarrollo, S.A., the U.S. Supreme Court can bring clarity to both plaintiffs and defendants by defining the specific set of parameters when a preliminary injunction may be granted. The *Alliance* court set forth a very narrow holding that would allow a preliminary injunction only when (1) money damages would be inadequate relief due to impending insolvency and (2) the defendants have engaged in a pattern of secreting and dissipating assets.[339] This is not a broad gateway targeting multinational companies for potential litigation.

The district court had personal jurisdiction over the defendant, GMD's financial position was and continues to be precarious, and there was more than sufficient evidence that the company had created an improper hierarchy of creditors at the expense of the Investor Group.[340] Access to the global capital markets is not a right; it is a privilege. If GMD had issued these notes in its home market, denominated in Mexico pesos, the company would have been on firmer ground in claiming that the plaintiffs should look to Mexican insolvency laws for relief, or alternatively, to seek enforcement of whatever judgment is awarded in Mexico.[341] However, this is not the case by virtue of the governing law clause contained in the offering circular.[342] Therefore, it seems particularly bold for the company to rely on an attachment remedy under Rule 64 that, if granted, would render whatever judgment the Investor Group received totally useless.

To prohibit the granting of a preliminary injunction under the facts in this case would lead to an inevitable inference of condoning the behavior of a defendant who secrets and dissipates assets. Furthermore, there is a broader concern, involving all future issuers that come to the global capital markets. If investors do not believe that an adequate remedy is available when an issuer becomes

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336. *See* discussion *supra* Parts III, IV.

337. *See* Wasserman, *supra* note 4, at 262.

338. *See id.* at 280.

339. *See* Alliance Bond Fund v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688, 696 (2d Cir. 1998).

340. *See id.* at 697.

341. *See* Reply Brief of Defendants-Appellants at 3, 5, Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688 (2d Cir. 1998) (No. 97-9610).

342. *See* OFFERING CIRCULAR, *supra* note 214, at 87.

insolvent and attempts to frustrate the judgment of the courts, the demand for these issues will greatly decline, raising the overall risk premium that must be borne by future issuers. This risk premium will also negatively impact global trade and permeate cross border transactions.

Whether a plaintiff's claim can be characterized as legal or equitable in nature is of little import when that same plaintiff is confronted with an insolvent defendant who secrets and dissipates assets with the intent of becoming "judgment proof." Whatever assets remain rise in significance and become the only remaining vehicle to satisfy a legitimate claim. It is not hard to imagine a transaction that begins as "legal in nature" but evolves into "equity" when the defendant becomes insolvent. The *Hoxworth* court is correct: "Legally as well as economically, money is fungible—if a debtor with $100,000 cash in its general coffers owes $10,000 to someone, there is no meaningful distinction among which of those dollars is actually paid to satisfy the debt."[343]

In *Alliance*, the Second Circuit noted the "successful twenty-year history" of granting Mareva injunctions in factual scenarios similar to *Alliance*.[344] Rather than focusing on the type of remedy sought and whether it could be characterized as "legal" or "equitable," the fundamental purpose of the injunction is to protect a plaintiff's right by ensuring an effective remedy.[345] While the U.K. approach has been both bold and innovative, it is also impressive in the sense that the rights and potential harm to both parties are significantly considered. There is no question that freezing a defendant's assets is a powerful device. However, under circumstances in which that same defendant is secreting, transferring or otherwise dissipating assets in an effort to frustrate an eventual judgment on the merits, freezing assets is not only justified, it is essential. For in the end, it is necessary to acknowledge the reciprocity that exists between a right and a remedy.

343. Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186, 195-96 (3d Cir. 1990).
344. *See Alliance Bond Fund*, 143 F.3d at 696.
345. *See* discussion *infra* Part IV.