THE PRELIMINARY INJUNCTION IN BUSINESS LITIGATION

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"Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law."[1]

"'There is no power, the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, and which is more dangerous in a doubtful case, than the issuing of an injunction.'"[2]

I.
INTRODUCTION

Perhaps the most potent remedy available in business litigation is a preliminary injunction. Business planning favors predictability. It can be devastating for management to be advised that a new employee cannot start work, a long-planned business acquisition must be delayed, or that certain technology may not be used. Conversely, a business that is subject to harm based upon the wrongful acts of a competitor or another can take immediate action, pending a trial, to prevent irreparable injury. Those wrongful actions can be stopped through the interim remedy of a preliminary injunction.

At a time when federal courts are often burdened with a sizeable criminal docket, when daily case management issues are almost universally referred to magistrate judges and when cases are sometimes diverted through court-sponsored alternative dispute resolution mechanisms, an application for a preliminary injunction, in the proper case, can serve as an appropriate device to present, in capsule form, the merits of the dispute directly to the district judge on an accelerated basis. An

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1. WILLIAM BLACKSTONE, 2 COMMENTARIES *61-62.

2. Citizens' Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303 (1878) (quoting Bonaparte v. Camden & Amboy R.R. Co., 3 F. Cas. 821, 827 (No. 1,617) (CC NJ)).

application for a preliminary injunction will require that the district judge become directly and fully involved in the merits of the controversy, usually well before the case , in the ordinary course, would be reached for a trial.

The prevailing standards for preliminary injunctive relief heavily favor the denial of such relief, with the party seeking an injunction being called upon to clearly meet its high burden of persuasion.[3] The bias against relief, however, is offset in part by the fact that the party seeking the injunction may have prepared the motion and gathered evidentiary support over the course of days, weeks and even months before filing,[4] while the party opposing the motion is given a relatively short time period to gather and present legal and factual opposition to the application. An assessment must be quickly made as to the best opposition grounds: Is the application supported by the law? Has the moving party set forth a sufficient factual basis for the relief sought? Are the material facts asserted true or in dispute?

Somewhat surprisingly, the substantive and procedural principles pertaining to a preliminary injunction in federal court are not as clear or settled as commonly thought. There are variations among the various Circuit Courts of Appeal as to the standard to be applied, how the elements of the standard are considered, the relative weight to be assigned to each element, and the inclination to grant relief beyond the maintenance of the status quo.

Furthermore, the actual procedures employed, such as the nature of the hearing to be conducted and the evidentiary requirements for the proofs considered, are also not clearly defined nor always administered uniformly. A district judge has considerable discretion as to how such applications are to be dealt with and how he or she views and weighs the proofs submitted.

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3. *See* Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir. 2004); McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306-07 (11th Cir. 1998).

4. Tom Doherty Assocs., Inc. v. Saban Entm't, 60 F.3d 27, 39-40 (2d Cir. 1995). Delay is a consideration if it indicates the moving party was aware of its rights and concluded that those rights were not violated or the nonmoving party took costly action during the period of delay that would be undone by the injunction. *Id.*

Even though there is an immediate right of appeal to the Court of Appeals if an injunction is granted or denied,[5] as a practical matter, it may take many months for such a review. In addition, the reviewing court may not be prone to disturb the factual findings of the district court as opposed to an error of law.[6]

In general terms, preliminary injunctive relief may be granted or denied based upon the district court's discretionary review of the equitable factors set forth in the so-called traditional "four-part test": (1) the moving party's likelihood of success on the merits; (2) the likelihood that the moving party will suffer irreparable harm if an injunction is denied; (3) the balancing of the relative hardships to the various parties resulting from the grant or denial of an injunction; and (4) the effect of the grant or denial of an injunction on the public interest, if any.[7]

Signficantly, the last two factors represent more recent additions to the standard.[8] Less than a century ago, one commentator observed that "the weight of authority is against allowing a balancing of injury as a means of determining the

5. 28 U.S.C. § 1292(a)(1) (2007).

6. The standard for review of a preliminary injunction is whether there is an abuse of discretion with legal conclusions subject to *de novo* review and findings of fact subject to review for clear error. *See* Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975). *See* Kos Pharm. v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004); Cobell, 391 F.3d at 256. If the district court proceedings did not include an evidentiary hearing or findings as to why a hearing was not conducted, a deferential standard may be inappropriate. *See* Fireman's Fund Ins. Co. v. Leslie & Elliott Co., 867 F.2d 150, 151 (2d Cir. 1989).

7. The district courts utilize the same factors in entertaining an application for a temporary restraining order under FED. R. CIV. P. 65(b). *See* Experience Works, Inc. v. Chao, 267 F. Supp. 2d 93, 96 (D.D.C. 2003). The standard for a permanent injunction is essentially the same as for a preliminary injunction. The differences are that a permanent injunction requires actual success on the merits and the inquiry as to the existence of irreparable harm always includes whether there is an adequate remedy at law. *See* Nat'l City Bank v. Turnbaugh, 367 F. Supp. 2d 805, 821 (D. Md. 2005), *aff'd*, 463 F.3d 325 (4th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3267 (U.S. Nov. 7, 2006) (No. 06-653).

8. JAMES W. EATON, HANDBOOK OF EQUITY JURISPRUDENCE, § 282 (1901). Eaton stated the "black letter" requirements for an injunction as follows: To warrant the issuance of an injunction, the complainant must show: (a) That he has no plain, adequate and complete remedy at law, (b) That an irreparable injury will result unless the relief is granted." *Id.*

propriety of issuing an injunction."[9] The basis for that view was that "[d]enying the injunction puts the hardship on the party in whose favor the legal right exists instead of on the wrong-doer."[10] Moreover, it was only during the last century that the public interest factor became a regular part of the standard.[11] Obviously, in actions involving only private interests, the public interest factor will be less important than the other three factors.[12]

A district court's review of an application for a preliminary injunction necessarily involves the balancing of competing interests. On the one hand, the preservation of the applicant's rights pending the opportunity for a full trial on the merits; on the other hand, the avoidance of inflicting harm unnecessarily on the opposing party who may prevail after a more thorough review of the evidence is completed at trial. As one commentator has aptly stated:

A court considering a motion for interlocutory relief faces a dilemma. If it does not grant prompt relief, the plaintiff may suffer a loss of his lawful rights that no later remedy can restore. But if the court does grant immediate relief, the defendant may sustain precisely the same loss of his rights.[13]

II.
A BRIEF HISTORY OF THE INJUNCTION

A. *Equity in England*

Equity jurisdiction arose in fourteenth and fifteenth century England as the "extraordinary justice administered by the King's Chancellor to enlarge, supplant or override the common law system where that system had become too narrow and

9. 5 JOHN NORTON POMEROY, JR., A TREATISE ON EQUITY JURISPRUDENCE, § 1944 (4th ed. 1919); but see WILLIAM F. WALSH, A TREATISE ON EQUITY, § 57 (1930) ("Where the injunction will do serious harm to the defendant by interrupting or modifying a business which may be found to be legal in every respect, while the injury to the plaintiff from the continuance of defendant's business will not be very serious the injunction will be denied.").

10. *Id.*

11. Yakus v. United States, 321 U.S. 414, 440 (1944).

12. *Id.* at 441.

13. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 541 (1978).

rigid in its scope."[14] A body of rules and equitable doctrines was developed to augment and aid the common law, based upon the application of conscience and Roman natural law.[15] Remedies provided by the law courts were then compensatory and not preventive – they did not usually include the power to prevent a threatened invasion of rights.[16] Equity jurisdiction was called upon to prevent wrongs that could not be compensated by damages and, in response, "it borrowed from the Roman procedure the important and most beneficial process of Injunctions."[17] The precursor to the injunction was the interdict of Roman Law, which was made by the praetor[18] and took

14. GOLDWIN SMITH, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 209 (1955); "By the fourteenth century the number of petitions increases and the King delegates the task to the Council—like today's cabinet, a small group of officials and advisers of the King. Then, starting in the latter part of the fourteenth century, the Council begins to delegate this to one of its members, the Chancellor. . .[T]he choice of the Chancellor lacked any *a priori* or theoretical basis. It just turned out that, given his other jobs and his prominence in the Council, the Chancellor was the natural choice. He was the. . .King's principal adviser in political matters. In addition, he had certain law-oriented duties. He was the keeper of the great seal of England, which was used to authenticate the common law writs. The writs issued from his department, the Chancery." OWEN M. FISS & DOUG RENDELMAN, INJUNCTIONS 61 (2d ed. 1984).

15. Equity has also been traced to Aristotle's *Nicomachean Ethics* and his theorem that "[e]quity offered a remedy were the law did injustice. . .The reason for this is that law is always a general statement, yet there are cases which it is not possible to cover in a general statement.'" PETER CHARLES HOFFER, THE LAW'S CONSCIENCE 8 (1990). *See also* FISS & RENDELMAN, *supra* note 14, at 104-05. According to the authors, the Aristotelian idea of equity founds its way into English jurisprudence through the works of Christopher St. Germain who "in turn derived it from the followers of St. Thomas Acquinas." *Id.*

16. In limited circumstances the law courts exercised analogous powers such as the writ of prohibition and estrepement to prevent waste. EATON, *supra* note 8, at 563.

17. JOHN NORTON POMEROY, AN INTRODUCTION TO MUNICIPAL LAW 133 (2d ed. 1886).

18. The praetors were Roman magistrates who administered the law and "issued annual edicts that were an important source of Roman Law." LESLIE ADKINS & ROY A. ADKINS, HANDBOOK TO LIFE IN ANCIENT ROME 42 (Oxford University Press 1998). *See also* CHARLES ANDREWS HUSTON, THE ENFORCEMENT OF DECREES IN EQUITY 40-41 (1915) (noting that the praetors developed specific relief as a remedy in the case of property disputes by giving "the losing defendant an alternative . . . either to restore the property in specie to the rightful owner, or failing that, to be condemned to pay the value of the property as fixed by that owner on oath . . .").

three different forms: (1) "prohibitory," by which the praetor forbade some action; (2) "restoratory," by which he directed that something, such as possession, be restored; and (3) "exhibitory," by which he directed that a person or thing be produced.[19]

Although the origins of the injunction in England go back as far as the fifteenth century, the now-recognized principles governing injunctions were developed for the most part in the eighteenth and nineteenth centuries.[20] As developed in England, the injunction was employed to forbid a "defendant, under heavy penalties, to do some threatened act, which would be contrary to the rules of equity, and would work irreparable mischief to the plaintiff. Thus, an injunction would be allowed to stop the prosecution of an inequitable suit in another court, or to restrain a fraudulent debtor from disposing his property."[21] The Court of Chancery was able to provide effective specific relief because its decrees were enforced in personam.[22]

B. *Equity in the United States*

English equity practice, including the writ of injunction, was transplanted to the American Colonies. As used by the American courts of equity, the writ of injunction was "a judicial process, whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ."[23] The object of an injunction was "generally preventative, and protective, rather than restorative; though it [was] by no means confined to the former."[24]

By the middle of the nineteenth century, the movement to combine legal and equitable remedies in a single action in a single court began in New York in 1848 with the adoption of the so-called "Field Code." As a result, various state codes of procedures and practice abolished the distinction between le-

19. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 158-61 (Arno Press 1972) (1836) (stating that interdicts were chiefly used in controversies respecting possession, or *quasi* possession).

20. WALSH, *supra* note 9, § 4, at 27.

21. *Id.* at 132-133.

22. WALSH, *supra* note 9, § 9, at 45.

23. *Id.* at 154.

24. *Id.* at 155.

gal and equitable actions, thus permitting legal and equitable causes of action and defenses to be combined in the same lawsuit.[25]

Before this merger of law and equity, "the decision to grant most injunctions turned on problems irrelevant to today's courts, notably those arising from the division of a single controversy between two courts."[26] For example, the most common type of injunction before the merger was an injunction staying proceedings at law.[27] Another type of injunction, which gave rise to issues most relevant to the modern preliminary injunction, was an injunction protecting rights at law. An inadequate remedy at law "sometimes induced a plaintiff to seek immediate relief [in equity court] in order, for example, to prevent patent infringement, to stop waste by a tenant, or to end a private nuisance."[28] In such situations, the equity court was required "to grapple with the relation between the plaintiff's probability of success on the merits and the appropriateness of interlocutory relief."[29] In addition, the requirement of irreparable injury arose because – when a legal right was being enforced – "equity had no ground for intervention unless the damage remedy was inadequate."[30] Before the merger of law and equity, however, the focus of whether to grant injunctive relief by the equity court was one of comity with the law court rather than the risks of premature adjudication.[31] Following the merger, the focus changed to avoiding unnecessary relief pending a full consideration of the merits.[32]

The preliminary injunction standard that developed by the end of the nineteenth century was geared to preserving the matter in dispute in status quo, pending a final hearing. Injunctive relief was granted in order to prevent a change of position during the course of the lawsuit that caused an irremediable injury to a party before its claims could be investi-

25. JOHN NORTON POMEROY, CODE REMEDIES: REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION, §§ 5-17 (4th ed. 1904).

26. Leubsdorf, *supra* note 13, at 531.

27. *Id.* at 537.

28. *Id.* at 529 (footnote omitted).

29. *Id.* at 530.

30. *Id.*

31. *Id.* at 532.

32. *Id.* at 534.

gated and adjudicated fully.[33] John Norton Pomeroy catalogued the variety of cases in which injunctive relief had been sought or granted in the nineteenth century. These included the more traditional injunctions against waste, nuisances, trespass, and violation of contracts as well as the more recently developed injunctions against corporations and their officers, injunctions against public officials, and injunctions protecting patents and trademarks.[34] The courts also granted relief in cases involving unfair competition, trade secrets and other business interests.[35]

III.
EQUITY JURISDICTION OF THE FEDERAL COURTS AND THE PRELIMINARY INJUNCTION

A. *Basis for Federal Jurisdiction*

Under Article III, Section 2 of the Constitution, the power of the federal courts extends "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made."[36] At the Convention of 1787, the motion to extend the judicial power to both law and equity was passed without debate and with only a single objection.[37] Equity jurisdiction was conferred upon federal courts in diversity cases by the Judiciary Act of 1789, which granted jurisdiction over "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and. . .the suit is between a citizen of the State where the suit is brought, and a citizen of another State."[38] Subsequent statutes providing for diversity jurisdiction continued this language. In 1948, Congress adopted the

33. JOHN NORTON POMEROY, JR., A TREATISE ON EQUITY JURISPRUDENCE, § 1685, at 3935 (4th ed. 1919).

34. *Id.* Vols. 4 and 5, Chapters XII through XXVIII.

35. WALSH, *supra* note 9, §§ 43-45.

36. *See* THE FEDERALIST No. 81 (Alexander Hamilton) (Clinton Rossiter ed., 1999), for an explanation of the inclusion of equity jurisdiction in the Constitution.

37. GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF AND PUBLIC POLICY 36 (1982).

38. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

shortened phrase "all civil actions," which recognized the merger of law and equity.[39]

The Supreme Court defined the scope of the equity jurisdiction of the federal courts as being in accordance "[with] such rules and principles as governed the action of the Court of Chancery in England which administered equity at the time of the emigration of our ancestors and down to the Constitution."[40] Through court rules in effect up to 1912, the Supreme Court provided that English equity practice would continue to serve as guidance for the law to be applied to federal equity jurisdiction.[41]

Since 1938, however, applications for injunctive relief in federal courts have been governed by Fed. R. Civ. P. 65. Notably, while the rule sets forth certain procedural requirements to prevent abuse of the remedy, "it does not set out a comprehensive or detailed procedural framework for seeking injunctive relief."[42] For example, although the rule provides for no-

39. Judicial Code and Judiciary Act, 28 U.S.C. § 1332 (2000) (historical & statutory notes); *See* Marshall v. Marshall, 126 S. Ct. 1735, 1745-46 (2006); Ankenbrandt v. Richards, 504 U.S. 689, 698-700 (1992).

40. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 460, 462 (1855).

41. Arthur D. Wolf, *Preliminary Injunctions: The Varying Standards*, 7 W. NEW ENG. L. REV. 173, 177 n.33 (1984-1985). Professor Wolf and other commentators have lamented Supreme Court's failure to provide uniform federal standards for preliminary injunctive relief. *See generally, id.*; Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495 (2003). *But see* Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH, & LEE L. REV. 109, 111 n.4 (2001) ("Such criticism is overstated . . . . And although the circuits sometimes differ in their articulation of the factors, the differences generally do not reflect substantive disagreement as to the proper areas of inquiry.").

42. CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 2941, at 34 (3d ed. 1995). Among other things, the rule also provides:

(1) that the trial may be "advanced and consolidated with the hearing of the application." [(a)(2)];

(2) a bond is to be posted by "the applicant, in such sum as the court deems proper, for the payment of such costs and damages as be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained" [(c)], and

(3) an injunction order "shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail. . .the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons

tice and a hearing, "it does not prescribe the type of hearing required, which means that general due process and fairness considerations control."[43] In diversity of citizenship cases involving state law issues, for which local law does not provide for equitable relief, the question arises as to whether an injunction may be issued under the federal court's equity power.[44] Federal courts have viewed Rule 65 as requiring that a federal standard govern requests for preliminary injunctions in diversity cases.[45]

B. *Supreme Court Decisions*

In some of its more recent decisions,[46] the Supreme Court has had the opportunity to comment on, as well as review, the standards applicable to the use of preliminary injunctive relief. In *University of Texas v. Camenisch*,[47] the Court had occasion to review the purposes of injunctive relief in the context of preserving the status quo:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a pre-

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in active concert or participation with them who receive actual notice of the order by personal service or otherwise."[(d)]

43. *Id.* The avoidance of addressing the standard for a preliminary injunction by the drafters of the rule was intentional. Lea B. Vaughn, *A Need for Clarity: Toward a New Standard for Preliminary Injunctions*, 68 OR. L. REV. 839, 845 n.18 (1989).

44. WRIGHT & MILLER, *supra* note 42, § 2943, at 75.

45. *See, e.g.*, Sys. Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1141 (3d Cir. 1977). The issue as to whether federal equity principles versus state law principles should apply in a diversity case was recently raised in *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*, 527 U.S. 308, 327-28 (1999), but the Supreme Court did not reach the issue because it was not raised below.

46. Commentators have observed that "fast-paced injunctive litigation will usually have spent its force before it reaches the [Supreme] Court." FISS & RENDELMAN, *supra* note 14, at 445.

47. 451 U.S. 390 (1981).

> liminary-injunction hearing and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.[48]

Moreover, the Court has clearly directed that "traditional" standards be applied to applications for preliminary injunctive relief. In *Weinberger v. Romero-Barcelo*,[49] the Supreme Court reversed the First Circuit which, without following recognized standards governing equitable relief, had directed the district court to order the Navy to cease the discharge of ordnance into waters of an island off the coast of Puerto Rico, pursuant to the Federal Water Pollution Control Act ("FWDCA"). The district court had found that, while the Navy was in technical violation of the act, its violations were not causing any "'appreciable harm' to the environment" and that enjoining the conduct would cause grievous and possible irreparable harm not only to the Navy, but also to the national interest. On appeal, the First Circuit reversed the district court concluding that it had an absolute statutory obligation to stop any discharge of pollutants pending compliance with the permitting requirements of the act.

While acknowledging Congress' statutory power to alter equity jurisdiction, the Supreme Court nevertheless found that no such alteration of the district court's traditional equitable discretion had been inserted in the Act. The Court described the purposes of an injunction as follows:

> It goes without saying that an injunction is an equitable remedy. It 'is not a remedy which issues as of course,' or 'to restrain an act the injurious consequences of which are merely trifling.' An injunction should issue only where the intervention of a court of equity 'is essential in order effectually to protect property rights against injuries otherwise irremediable.' The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.

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48. *Id.* at 394-95 (citation omitted).

49. 456 U.S. 305 (1982).

> Where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims. In such cases, the court 'balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.' 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and mould each decree to the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.'
>
> In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction. Thus, the Court has noted that '[t]he award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff,' and that 'where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.'[50]

In *Amoco Production Co. v. Gambell*,[51] the Court had the opportunity to apply its decision in *Weinberger v. Romero-Barcelo* in reversing a preliminary injunction granted by the Ninth Circuit Court of Appeals that did not require that irreparable harm be shown. In *Amoco*, the Ninth Circuit had ruled that irreparable damage should be presumed when the federal agency, with jurisdiction over lands covered by the Alaska Lands Conservation Act, failed to evaluate the environmental impact of the granting of oil and gas leases on lands subject to the act.

In rejecting a presumption of irreparable harm, the Supreme Court pointedly stated:

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50. *Id.* at 311-13 (citations omitted).
51. 480 U.S. 531 (1987).

> This presumption is contrary to traditional equitable principles and has no basis in [the act]. Moreover, the environment can be fully protected without this presumption. Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment. Here, however, injury to subsistence resources from exploration was not at all probable. And on the other side of the balance of harms was the fact that the oil company petitioners had committed approximately $70 million to exploration. . .which they would have lost without chance of recovery had exploration been enjoined.[52]

In *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*,[53] the Supreme Court recently circumscribed modern federal equity jurisdiction by holding that a district court has no authority to issue a preliminary injunction restraining a debtor's assets in order to protect an anticipated money judgment since such relief was not traditionally granted by equity. In *Grupo Mexicano*, suit was brought by the holders of certain unsecured notes issued by a Mexican holding company. With the notes in default, the noteholders claimed that the Mexican company was at risk of becoming insolvent (if it was not already insolvent), and that Mexican creditors were being preferred to their detriment. Besides seeking breach of contract damages, the noteholders sought and obtained a preliminary injunction in the district court against the Mexican company and four of its subsidiaries, restraining the transfer of certain assets in anticipation of a final judgment enforcing the collection of the notes.

In Justice Scalia's majority opinion, the Court reviewed the authority under which a federal court may grant injunctive relief. Noting that under the Judiciary Act of 1789 federal courts were conferred with jurisdiction over "'all suits. . . in equity,'" the Court found that it had long held that the juris-

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52. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 544-45 (1987) (citation omitted).

53. 527 U.S. 308 (1999).

diction conferred was the "'authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.'"[54]

Rejecting the argument that the preliminary injunction issued was analogous to an equitable "creditor's bill," the Court found that a creditor's bill could only be brought by a creditor who had already established the debt by obtaining a judgment. "The rule requiring a judgment was a product, not just of the procedural requirement that remedies at law had to be exhausted before equitable remedies could be pursued, but also of the substantive rule that a general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor's use of that property."[55] While acknowledging that equity embodies flexibility, the Court found that:

In the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief. To accord a type of relief that has never been available before – and especially (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent – is to invoke a "default rule,". . . not of flexibility but of omnipotence. When there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than we both to perceive them and to design the appropriate remedy.[56]

The Court also determined that the rule preventing a general creditor from interfering with the debtor's use of his property was unchanged by the merger of law and equity since the merger "did not alter substantive rights."[57]

In a dissenting opinion, Justice Ginsburg disagreed with the majority's restrictive view of federal equity jurisdiction. She found that "district courts enjoy the 'historic federal judicial discretion to preserve the situation. . .'" and that the district court issued the preliminary injunction based upon well

54. *Id.* at 318 (citations omitted).
55. *Id.* at 319-20.
56. *Id.* at 322.
57. *Id.*

supported findings that there was an inadequate remedy at law, that the plaintiff would be "'frustrated' in its ability to recover a judgment absent interim injunctive relief, and was 'almost certain' to prevail on the merits."[58] Justice Ginsburg criticized the majority for relying on "an unjustifiably static conception of equity jurisdiction. . . we have never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor."[59] Noting the adaptable and flexible "character" of federal equitable power, she observed that the Court has previously "upheld diverse injunctions that would have been beyond the contemplation of the 18th-century Chancellor."[60]

In the context of reviewing the grant of a permanent injunction, the Supreme Court most recently invoked the "the four-factor test historically employed by courts of equity" in *EBay Inc. v. MercExchange, L.L.C.*[61] In modifying the practice of the Court of Appeals for the Federal Circuit by which permanent injunctions were "automatically" entered in patent cases where there was a determination of a patent's validity and its infringement, the Court held that a federal court – in deciding whether to enter a permanent injunction in a patent case – must always determine if the elements of the test are satisfied. The Court restated the traditional four-part test as follows:

A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[62]

In rejecting that a patent owner had an automatic right to an injunction by virtue of its right to exclusivity, the Court em-

58. *Id.* at 335-36.

59. *Id.* at 336.

60. *Id.* at 337.

61. 126 S. Ct. 1837, 1839 (2006).

62. *Id.* See *supra* note 6 and accompanying text as to the differences in the preliminary and permanent injunction standards. *See also* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991) for a comprehensive discussion of the issues pertaining to permanent injunctions. Professor Laycock argues that a plaintiff should always have a choice between specific relief and damages on final hearing.

phasized that "the creation of a right is distinct from the provision of remedies for violations of that right."[63] The Court left the analysis of the elements for an injunction to the district court's discretion and did not provide any further guidance as to how the elements should be examined.

C. *The Preliminary Injunction Standard in the Courts of Appeal*

As previously noted, the injunction standard adopted in the various circuits is not uniform.[64] As Seventh Circuit Judge Richard A. Posner observed a number of years ago:

> Each party is able to cite numerous decisions in support of its view of the proper standard, simply because the relevant case law is in disarray in both this and other circuits. Many of our cases say that to get a preliminary injunction a plaintiff must show each of four things: that he has no adequate remedy at law or will suffer irreparable harm if the injunction is denied; that this harm will be greater than the harm the defendant will suffer if the injunction is granted; that the plaintiff has a reasonable likelihood of success on the merits; and that the injunction will not harm the public interest.[65]

Additionally, Judge Posner noted that what is traditionally described as a four-factor test "actually involves five factors, unless 'no adequate remedy at law' and 'irreparable injury' mean the same thing. In ordinary equity parlance, they do not."[66] The Seventh Circuit employs a sliding scale approach implementing these five factors. Under this approach, the more

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63. *eBay*, 126 S.Ct. at 1840.

64. *See* United States v. Howland, 17 U.S. 108, 115 (1819).

65. Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 382-83 (7th Cir. 1984).

66. *Id.* at 383. With the merger of law and equity, the distinction is sometimes harder to draw. At the preliminary injunction stage, the focus is usually on the likely irreparable harm to be suffered during the interim period before trial, as opposed to whether there is an adequate remedy at law. *Id.* at 386; *See supra* note 6 and accompanying text. An adequate remedy at law is one that is complete and "as practical and efficient to the ends of justice" as the equitable remedy. Usaco Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 99 (6th Cir. 1982). For example, losses that are found to be not readily measurable are usually found to be irreparable. *See* Standard & Poor's Corp. v. Commodity Exch., Inc., 683 F.2d 704, 711-12 (2d Cir. 1982).

likely the movant is to succeed on the merits, the less the balance of harms must weigh in the movant's favor.

Virtually all of the Courts of Appeal employ varying forms of the so-called four-part test. In the First Circuit, the sine qua non of the test is the first element, the likelihood of success on the merits.[67] Each of the four factors is balanced in the Third Circuit to determine whether an injunction should issue.[68] The Fourth Circuit requires the movant to establish each of the factors, but the balancing of harms factor is emphasized; thus, a lesser showing of likelihood of success is required "when the balance of hardships weighs strongly in favor of the [movant], and vice versa."[69] In the Fifth Circuit, the applicant for a preliminary injunction must satisfy each of the factors.[70] The Sixth Circuit views the four factors as "factors to be balanced, not prerequisites that must be met" since no single factor is determinative.[71] In the Eighth Circuit, although the court "balance[s] these [four factors] when deciding whether to issue an injunction," an injunction will not issue "if there is no chance of success on the merits" or if there is no "threat of irreparable harm."[72] The Tenth Circuit views the irreparable harm factor as being the most important prerequisite.[73] In the Eleventh Circuit, each of the four factors must be established.[74] In the Federal Circuit, the four-factor test is applied, with an injunction being denied unless the movant first estab-

67. Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112, 115 (1st Cir. 2006) (quoting Weaver v. Henderson, 984 F.2d 11, 12 (1st Cir. 1993).

68. *See* BP Chems. v. Formosa Chem. & Fibre, 229 F.3d 254, 263 (3d Cir. 2000); Cont'l Group, Inc. v. Amoco Chem. Corp., 614 F.2d 351, 356-57 (3d Cir. 1980).

69. *In re* Microsoft Corp. Antitrust Litig., 333 F.3d 517, 526 (4th Cir. 2003).

70. *See* Lake Charles Diesel, Inc. v. Gen. Motors Corp., 328 F.3d 192, 195-96 (5th Cir. 2003).

71. Six Clinics Holding Corp. v. Cafcomp Systems Inc., 119 F.3d 393, 400 (6th Cir. 1997).

72. Mid-America Real Estate Co. v. Iowa Realty Co., 406 F.3d 969, 972 (8th Cir. 2006).

73. Wyandotte Nation v. Sebelius, 443 F.3d 1247, 1254-55 (10th Cir. 2006); *See* Dominion Video v. Echostar Satellite Corp., 356 F.3d 1256, 1260 (10th Cir. 2004) (quoting Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 907 (2d. Cir 1990)).

74. *See* Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1210 (11th Cir. 2003).

lishes "'likelihood of success on the merits and irreparable harm.'"[75] Lastly, the District of Columbia Circuit adopts no preference and simply balances the four factors noting that "[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak."[76]

Rather than use the traditional four-part test, both the Second Circuit and the Ninth Circuit have created unique approaches to preliminary injunctive relief. The Second Circuit requires the party seeking a preliminary injunction to demonstrate, under the so-called reformulated *Sonesta* test,[77] "irreparable harm absent injunctive relief," and either (1) a likelihood of success on the merits, or (2) "a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in [movant's] favor."[78] If employing the "likelihood of success" alternative, the plaintiff need only make a showing that the probability of his prevailing is greater than fifty percent.[79]

The Ninth Circuit employs a variety of tests, including the four-prong test,[80] the Second Circuit test,[81] and a sliding scale which requires the party to demonstrate either: "(1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor."[82] Under the latter

75. PHG Techs., v. St. John Co., 469 F.3d 1361, 1365 (Fed. Cir. 2006) (quoting Amazon.com, Inc. v. Barnesandnoble.com, Inc., 239 F.2d 1343 (Fed. Cir. 2001)).

76. CityFed Fin. v. Office of Thrift Supervison, 58 F.3d 738, 747 (D.C. Cir. 1995).

77. Sonesta Int'l Hotels Corp. v. Wellington Assocs., 483 F.2d 247, 250 (2d Cir. 1973).

78. Louis Vuitton Malletier v. Dooney & Burke Inc., 454 F.3d 109, 113-14 (2d Cir. 2006). *See also* Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (clarifying that irreparable harm was required under either alternative).

79. Sec. & Exch. Comm'n v. Unifund SAL, 910 F.2d 1028, 1039 (2d Cir. 1990).

80. *See, e.g.*, United States v. Odessa Union Warehouse Co-op., 833 F.2d 172, 174 (9th Cir. 1987).

81. *See* E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 990 (9th Cir. 2006).

82. LGS Architects, Inc. v. Concordia Homes of Nev., 434 F.3d 1150, 1155 (9th Cir. 2006) (quoting A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001).

test, as the probability of success decreases, a greater showing of irreparable harm is required.[83]

The differences in these formulations escape precise quantification. Nonetheless, the cases requiring that each factor be established separately undoubtedly impose a greater burden on the applicant than those which employ a sliding scale or a balancing of factors. Moreover, a question is raised as to whether justice is served by allowing a lesser showing of probability of success to be overcome by a stronger showing of irreparable harm or a stronger showing that the balance of harms weighs in the applicant's favor. This could permit the anomalous result of granting an injunction to a party who is unlikely to win at trial.[84]

The present discussion concerning the standards for preliminary injunctive relief should, illustrate that, apart from a lack of uniformity, the standards articulated are not precise rules and they are subject to case-by-case decision making — "a procedure that emphasizes the salience of particulars and hampers judges in discerning the systemic effects of the interpretive approaches they adopt."[85] In such decision-making, the courts employ discretion by using a set of prerequisites "stated in open-ended terms," which cut across all substantive areas.[86]

IV.
STATUS QUO V. MANDATORY INJUNCTIONS

Federal courts have not viewed the preservation of the status quo as a separate test for the granting of a preliminary injunction. Instead, it is viewed as the goal of preliminary injunctive relief. The status quo is generally defined as the "'last peaceable, noncontested status of the parties.'"[87] The prevalent description of the primary purpose for preliminary injunctive relief is that it seeks to preserve the merits of the con-

83. *Id.*

84. Denlow, *supra* note 41, at 538.

85. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 3 (2006).

86. FISS & RENDLEMAN, *supra* note 15 at 106-08 (the authors list and describe seven different ways in which discretion appears in injunctive litigation).

87. Kos Pharm. v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004) (quoting Opticians Ass'n of Am. v. Indep. Opticians of Am., 920 F.2d 187, 197 (3d Cir. 1990)).

troversy so that, on final hearing, the court can render a meaningful determination of the dispute.[88]

This emphasis on "preserving the status quo as a main goal of preliminary relief did not emerge until late in the nineteenth century."[89] Previously, "[t]he cases concentrated on the availability of injunctive relief, not whether it should be preliminary or final."[90] "Thus, although the equity courts in the nineteenth century had begun to speak in terms of the status quo, they had not elevated the phrase to any sort of test or standard of any doctrinal significance. At most, the phrase was used to describe the usual effect of preliminary injunctive relief. Injunctions preserving the 'status quo' may have tended to be the same injunctions that avoided the plaintiff's irreparable injury at little or no inconvenience to the defendant, but the status quo itself played no doctrinal role."[91]

The Courts of Appeal have taken varying views on whether an additional showing is required for relief that alters the status quo.[92] In general terms, a prohibitory injunction restrains a party from further action, while a mandatory injunction orders a party to take action.[93] A preliminary injunction is typically prohibitory in that it seeks to maintain the status quo until trial. A mandatory injunction may alter the status quo by commanding a positive act and granting relief of the type usually obtained at final hearing.[94] "[I]f a preliminary injunction will make it difficult or impossible to render a meaningful remedy to a defendant who prevails on the merits at trial, then the plaintiff should have to meet the higher standard of substantial, or clear showing of, likelihood of success to obtain preliminary relief."[95] Some Circuits have said that

88. Ortho Pharm. Corp. v. Amgen, Inc., 882 F.2d 806, 813-14 (3d Cir. 1989).

89. Leubsdorf, *supra* note 13, at 534.

90. *Id.* at 528.

91. Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 47, 133 (2001).

92. *Id.* at 814.

93. *See* Meghrig v. KFC Western, Inc., 516 U.S. 479, 484 (1996).

94. Tom Doherty Assocs., Inc. v. Saban Entm't, 60 F.3d 27, 34-35 (2d Cir. 1995).

95. *Id.* at 35.

mandatory relief is disfavored and warranted only where there are extraordinary circumstances.[96]

One commentator has criticized those Circuits that employ a heightened standard for mandatory injunctions since "[t]he notion of a heightened standard of proof is the misguided product of recent twentieth-century opinions;·it finds no support in early decisions in English Chancery or even in this country."[97] That viewpoint, however, does not take into consideration that preliminary injunctions can be entered based upon abbreviated, less formal procedures (see below). Based upon interests of due process and fairness, it does not seem unreasonable to use a heightened standard to minimize the risk of harm caused by an improvidently granted mandatory injunction.

V.
NATURE OF HEARING REQUIRED

"The notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition."[98] The next issue is the type of proof that is admissible in support of or in opposition to an application for a preliminary injunction. Because it is an expedited procedure, with any relief being temporary and subject to revision, the district courts are more lenient. In general, the district courts do not strictly apply the Federal Rules of Evidence on an application for a preliminary injunction.

The party seeking the injunction bears the burdens of production and persuasion.[99] The evidence offered must be credible.[100] Affidavits and other materials – which might otherwise be deemed hearsay –are often received in preliminary injunction hearings. However, it seems clear that the proofs, nevertheless, must have some indicia of reliability. Proofs based only on information and belief are not sufficient to support or oppose a preliminary injunction. Clearly, "informa-

96. Taylor v. Freeman, 34 F.3d 266, 270 n.2 (4th Cir. 1994); *See also In re* Microsoft Corp. Antitrust Litig., 333 F.3d 517, 525 (4th Cir. 2003).

97. Lee, *supra* note 90, at 166.

98. Granny Goose Foods, Inc. v. Bhd. of Teamsters Local 70, 415 U.S. 423, 432 n.7 (U.S. 1974).

99. Qualls v. Rumsfeld, 357 F. Supp. 2d 274, 281 (D.D.C. 2005).

100. *Id.* at 281.

tion and belief" allegations should not form the basis of injunctive relief under Federal Rule 65.[101] "[D]istrict courts have shown appropriate reluctance to issue [preliminary injunction] orders where the moving party substantiates his side of a factual dispute on information and belief."[102] How far the standards of proof are relaxed may depend on the exigencies of the situation. The court, however, should consider "only facts presented by affidavit or testimony and cannot consider facts provable under the modern liberal interpretation of the complaint but which have not been proved."[103]

Whether Rule 65 requires a district court to hear testimony, rather than relying on affidavits and other hearsay proofs, in determining whether to grant a preliminary injunction "reflect[s] a tension between the need for speedy action and the desire for certainty and complete fairness."[104] There are three basic scenarios. In cases where the facts are not in dispute, the holding of an evidentiary hearing is not ordinarily required; instead, oral argument of the attorneys is all that is necessary.[105] In cases where the facts are not seriously disputed, but instead there is an issue regarding the inferences to be drawn from the facts, an evidentiary hearing "should be held whenever practicable."[106] Finally, in cases "where everything turns on what happened and that is in sharp dispute; in such instances, the inappropriateness of proceeding on affidavits attains its maximum and, even if the plaintiff's need is great, it will normally be possible for the judge within the allot-

101. *See* Marshall Durbin Farms, Inc. v. Nat'l Farmers Org., Inc., 446 F.2d 353, 356-57 (5th Cir. 1971).

102. *Id. See also* Touchston v. McDermott, 120 F. Supp. 2d 1055, 1059 (M.D. Fla.) ("'[W]hen the primary evidence introduced is an affidavit made on information and belief rather than on personal knowledge, it generally is considered insufficient to support a motion for preliminary injunction.'") (quoting WRIGHT & MILLER ET AL., *supra* note 42, § 2949 (alteration in original)).

103. Societe Comptoir de l'Industrie Cotonniere v. Alexander's Dep't Stores, Inc., 190 F. Supp. 594, 601 (S.D.N.Y. 1961).

104. Sec. & Exch. Comm'n v. Frank, 388 F.2d 486, 490 (2d Cir. 1968).

105. *See id.*; McDonald's Corp. v. Robertson, 147 F. 3d 1301, 1311-12 (11th Cir. 1998).

106. *Frank*, 388 F.2d at 490.

ted time to conduct a hearing that will illuminate the factual issues. . .".[107]

Ordinarily a "'preliminary injunction cannot be issued when there are disputed issues of fact.'"[108] When the party sought to be enjoined fully and specifically denies all charges against him under oath or where central factual issues are clearly in dispute, an evidentiary hearing is required to resolve the fact disputes.[109] This is because oral testimony is required to resolve conflicting affidavits "since only by hearing the witnesses and observing their demeanor on the stand can the trier of fact determine the veracity of the allegations made by the respective parties."[110] The credibility of the parties' proofs is necessarily assessed through the presentation of oral testimony.[111] Without such testimony, when disputed material

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107. *Id.* at 491; *But see* Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1326 (9th Cir. 1994) (stating that it is not abuse of discretion to refuse oral testimony where the parties had full opportunity to submit written testimony and argue the matter and the court accepted the applicant's proofs as true but insufficient to grant an injunction).

108. Gruntal & Co. v. Steinberg, 843 F. Supp. 1, 16 (D.N.J. 1994) (citation omitted). *See also* Charles Simkin & Sons, Inc. v. Massiah, 289 F.2d 26, 29 (3d Cir. 1961).

109. *See* Sims v. Greene, 161 F.2d 87, 88 (3d Cir. 1947).

110. *Id.*

111. *See, e.g.*, Indus. Elecs. Corp. v. Cline, 330 F.2d 480, 483 (3d Cir. 1964); Warner Bros. Pictures v. Gittone, 110 F.2d 292, 293 (3rd Cir. 1940); Murray Hill Rest., Inc. v. Thirteen Twenty One Locust, Inc., 98 F.2d 578, 579 (3d Cir. 1938). *See also* Williams v. Curtiss-Wright Corp., 681 F.2d 161, 163 (3d Cir. 1982) (per curiam) (stating in dicta that a hearing would have been required if the district court had relied on disputed facts to make its decision); Prof'l Plan Exam'rs of N.J., Inc. v. Lefante, 750 F.2d 282, 288 (3d Cir. 1984) (same); Forts v. Ward, 566 F.2d 849, 851 (2d Cir. 1977) ("Normally, an evidentiary hearing is required to decide credibility issues."); Visual Scis., Inc. v. Integrated Commc'ns, Inc., 660 F.2d 56, 58 (2d Cir. 1981) (stating the rule that there must be hearing where essential facts are disputed); Sec. & Exch. Comm'n v. G. Weeks Sec., Inc., 678 F.2d 649, 651 (6th Cir. 1982) (emphasizing importance of hearing requirement "where the facts are disputed"); Medeco Sec. Locks, Inc. v. Swiderek, 680 F.2d 37, 38 (7th Cir. 1981) (stating the rule); All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc., 887 F.2d 1535, 1538 (11th Cir. 1989) ("Where the injunction turns on the resolution of bitterly disputed facts . . . an evidentiary hearing is normally required to decide credibility issues."). *See* United States v. Morin, 172 F. App'x. 418 (3d Cir. 2006) (reversing summarily where the court below failed to conduct an evidentiary hearing to resolve factual issues); Kos Pharm. v. Andrx Corp., 369 F.3d 700, 719 n.16 (3d Cir. 2004) ("[I]t may be improper to resolve a preliminary injunction motion on a paper record alone; where

facts are present, a judge would merely be showing a preference for "one piece of paper [over] another."[112] A decision on an application for a preliminary injunction based upon documents alone, without holding an evidentiary hearing, is an abuse of discretion.[113]

VI.
THE CONSEQUENCES OF THE COURT'S DECISION ON PRELIMINARY INJUNCTIVE RELIEF

Notwithstanding some of the confusion with the applicable standard, the requirements for injunctive relief generally create a factual and legal burden that most business litigants cannot satisfy or may not wish to test. In a close case, a litigant may not wish to pursue an injunction for strategic reasons. For example, a failed application for injunctive relief may provide the adversary with a snapshot of the weaknesses in the movant's case enabling the adversary to strengthen its challenge to the proofs at trial. Moreover, even though the district court's findings of fact and conclusions of law are not binding at trial,[114] the denial of the application may boost the adversary's will to fight and increase the movant's willingness to settle its claims.

In contrast, if the injunction application is successful, apart from receiving the benefits of the injunction, the prevailing party's litigation position may be perceived to have been strengthened by the court's affirmation that it likely has merit. In addition, because of the intensity of effort and the costs associated with opposing injunctive relief, the losing party may

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the motion turns on a disputed factual issue, an evidentiary hearing is ordinarily required."); Elliott v. Keisewetter, 98 F.3d 47, 53 (3d Cir. 1996) ("[A] district court *cannot* issue a preliminary injunction that depends upon the resolution of disputed issues of fact unless the court first holds an evidentiary hearing.") (emphasis added); Prof'l Plan Exam'rs, 750 F.2d at 288; Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990) ("[A] decision may be based on affidavits and other documentary evidence if the facts are undisputed and the relevant factual issues are resolved.") (citing Williams, 681 F.2d at 163).

112. Sims, 161 F.2d at 88.

113. Cobell v. Norton, 391 F.3d 251, 261 (D.C. Cir. 2004). *See* Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1212 (11th Cir. 2003).

114. Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981).

decide it cannot afford the continued expense of litigation and, instead, choose to explore settlement.

While the effects of the granting of preliminary injunctive relief on the dynamics of American business litigation are mostly within the realm of the anecdotal, perhaps the experience with interlocutory injunctions in England may provide some guidance: "'Nearly always. . . these cases do not go to trial. The parties accept the *prima facie* view of the court or settle the case. At any rate, in 99 cases out of 100, it goes no further."[115]

However, a sophisticated litigant in the United States may realize that whatever the court's decision, it was arrived at through an expedited and abbreviated procedure and a conscientious court may well see things differently after hearing all of the proofs at trial. In addition, given that the grant or denial of a preliminary injunction is immediately appealable, the litigants have the opportunity to obtain a ruling from the Court of Appeals, one that may alter the way the district court views the case.

It has been suggested[116] that in the interest of expedition and saving costs, parties should persuade the court to order the consolidation of the hearing of the preliminary injunction with the trial as the court is permitted to do under Rule 65(a)(2).[117] However, it is likely that a party would prefer not to run the risk of a final adverse ruling after proceeding with discovery and trial on an expedited basis.

VII.
CONCLUSION

While the Supreme Court has not yet addressed the differing standards employed by the various Circuit Courts of Appeal, a review of its pertinent decisions reveals the Court would likely find that under federal equity jurisdiction a pre-

115. DAVID BEAN, INJUNCTIONS 24 (8th ed. 2004) (quoting Fellowes & Son v. Fisher [1976] QB 122, 129).

116. Denlow, *supra* note 41, at 535-536.

117. With regard to consolidation, the Rule provides, "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." FED. R. CIV. P. 65(a)(2).

liminary injunction can be entered properly only if the moving party establishes a likelihood of success, irreparable harm, a balancing of harms in its favor and, if relevant, that the relief sought is consistent with the public interest. Clearly, the Court has signaled that it will not permit any of those factors either to be presumed or dispensed with.

However, the Court has taken an unduly restrictive view of federal equity jurisdiction by limiting equitable relief only to that which was available at the time the United States separated from England. Indeed, the modern notion of a preliminary injunction, focused on the preservation of the status quo, was developed subsequently. The "traditional" four-part test also was developed after the separation.

While a litigant needs to be conversant with the standard prevailing in the jurisdiction where its case is pending, some general guidelines can be gleaned from the case law. As a threshold matter, the district court needs to be apprised why immediate action is necessary and what rights or interests stand to be altered in the event preliminary relief is not granted. The party seeking the injunction should marshal its proofs in the most convincing and compelling fashion. That party should especially emphasize those facts which demonstrate its likelihood of success and the resulting irreparable harm in the absence of an injunction. Particularly in light of the decision in *Grupo Mexicano,* the moving party should also find authorities, which establish that the rights it seeks to protect are rights that were traditionally protected by equity, and thus subject to an equitable remedy.

The party opposing the injunction needs to focus on those factors that it believes have not been established by the movant. Moreover, when possible, it should dispute the material facts asserted in support of the injunction. It is important to emphasize with particularity those material facts that are in dispute and to apprise the court that, if it is otherwise inclined to grant the application, an evidentiary hearing is necessary.[118]

Perhaps the lack of hard and fast precepts with regard to preliminary injunctive relief can be reconciled by recalling that equity was created precisely to fill the gaps in the law with remedies that are highly flexible and adaptable.

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118. There is authority in the Second Circuit that if a party shows it is content to rely on affidavits it may have waived the right to an evidentiary hearing. *See* Drywall Tapers Local 1974 v. Local 530, 954 F.2d 69, 77 (2d Cir. 1992).