Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments

Rhonda Wasserman
EQUITY RENEWED: PRELIMINARY INJUNCTIONS TO SECURE POTENTIAL MONEY JUDGMENTS

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Abstract: Whenever a plaintiff sues a defendant for money damages, she runs the risk that the defendant will attempt to render herself unable to satisfy the expected money judgment by hiding or dissipating assets. Although most states have statutes that authorize prejudgment attachment of the defendant's assets to prevent this result, the attachment statutes are poorly designed to reduce the plaintiff's risk. The attachment statutes are both under- and over-inclusive: they do not authorize the attachment of property located outside the state, thereby failing to prevent the dissipation of all of the defendant's property, yet they grant the plaintiff a lien in the attached property (a security interest to which she is not entitled) and authorize the attachment of property in the hands of innocent third parties on the plaintiff's word that the property is the defendant's.

Courts can reduce the risk of harm to plaintiffs more effectively without interfering with the rights of innocent third parties by granting preliminary injunctions to bar the dissipation of assets. Although courts typically have refrained from issuing preliminary equitable relief in actions in which the plaintiff's final remedy is at law, the reasons for this hesitancy do not obtain in this context. Neither precedent nor the "no adequate remedy at law" requirement for equitable relief should dissuade courts from using preliminary injunctions in cases in which the plaintiff can demonstrate that she is likely both to succeed on the merits of her claim and to be unable to collect on her expected money judgment if the defendant is not restrained.

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Interim relief is very much the creation of equity since, to be effective, it usually needs the equitable weapon of the injunction.¹

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.²

INTRODUCTION

Consider three cases. In case one, a riparian landowner commences an action seeking a permanent injunction to bar a chemical company from discharging dangerous chemicals into the stream that runs along her land. The landowner may also seek a preliminary injunction to maintain the status quo pendente lite.³ The court will grant the preliminary injunction on the theory that money would not compensate for the harm the landowner would suffer if the company were free to continue discharging the chemicals into the stream during the pendency of the action; because it would be irreparable, the harm should be avoided.⁴ The preliminary injunction, which would prohibit the company from engaging in the challenged conduct pending trial, would be of the same type as the final relief sought—equitable.

³. See, e.g., Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988) (directing district court to issue a preliminary injunction requiring the county department of education to reinstate plaintiff, a person with AIDS, to his classroom duties pending resolution of his claim for a permanent injunction seeking same relief); Roso-Lino Beverage Distrib., Inc. v. Coca-Cola Bottling Co., 749 F.2d 124 (2d Cir. 1984) (granting a preliminary injunction to enjoin defendants from terminating plaintiff as a Coca-Cola distributor pending arbitration of plaintiff's claim for wrongful termination); Public Interest Research Group v. CP Chem. Inc., 26 Env't Rep. Cas. (BNA) 2017 (D.N.J. 1987) (“not for publication” opinion granting preliminary injunction to enjoin defendants from discharging chemicals into river in violation of pollutant discharge permit).
⁴. See, e.g., Chalk, 840 F.2d at 709–10 (holding that the emotional and psychological harm plaintiff would suffer if removed from his position as classroom teacher and reassigned to an administrative position would be irreparable); Roso-Lino Beverage Distrib., 749 F.2d at 125–26 (holding that “the loss of Roso-Lino’s distributorship, an ongoing business representing many years of effort and the livelihood of its husband and wife owners, constitutes irreparable harm”); Public Interest Research Group, 26 Env't Rep. Cas. (BNA) at 2021 (holding that “threat to the health and well being of the citizenry” caused by unabated dumping of highly toxic substances “is certainly a sufficient showing of irreparable harm”). As a general rule, prospective harm to real estate is deemed irreparable. See Douglas Laycock, The Death of the Irreparable Injury Rule 38 (1991) (noting that “a wide range of wrongs relating to land are regularly held to inflict irreparable injury”).
In case two, a brother sues his sister, seeking the return of an antique painting she obtained from him under false pretenses. As in case one, if the brother states a claim for equitable replevin, he may be entitled to a preliminary equitable remedy that would require his sister to return the painting to him pendente lite, or at least bar her from disposing of the painting until his claim is resolved on the merits.

Here, the concern is that the property is irreplaceable, that the sister

5. See, e.g., In re IBP Confidential Business Documents Litig., 754 F.2d 787, 789 (8th Cir. 1985) (holding that documents containing “sensitive, confidential information about IBP’s internal operations and business strategies . . . constitute the kind of unique property recoverable in an action for equitable replevin’’); Cumbest v. Harris, 363 So. 2d 294, 296 (Miss. 1978) (holding that equity will require specific performance of a contract involving “peculiar, sentimental or unique” goods); Coven v. First Sav. & Loan Ass’n, 55 A.2d 244 (N.J. Ch. 1947) (awarding equitable replevin of plaintiff’s research files); Chabert v. Robert & Co., 76 N.Y.S.2d 400, 401 (App. Div. 1948) (holding that complaint stated a claim for equitable relief to compel return of “irreplaceable oil of unique quality”); HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 45 (2d ed. 1948); 1 JOHN N. POMEROY, EQUITY JURISPRUDENCE § 185 (5th ed. 1941); M. T. Van Hecke, Equitable Replevin, 33 N.C. L. REV. 57 (1954) (discussing situations in which “a plaintiff who needs the article in specie and who fears that the defendant will frustrate the sheriff’s efforts may regard equity as likely to be more successful through its in personam order that the defendant deliver the chattel to the plaintiff’’); see also U.C.C. § 2-502 (1987) (permitting a buyer, who has paid for goods identified to the contract, to recover the goods “from the seller if the seller becomes insolvent within ten days after receipt of the first installment of their price’’); U.C.C. § 2-716 (1987) (authorizing court to grant specific performance as a remedy for a buyer “where the goods are unique or in other proper circumstances’’); JOHN N. POMEROY & JOHN C. MANN, SPECIFIC PERFORMANCE OF CONTRACTS § 12, at 32 (3d ed. 1926) (stating that “where the chattels are . . . unique . . . so that others of a similar nature and equal value could not be procured by means of damages assessed according to legal rules . . . contracts concerning them will be specifically enforced in equity, and a delivery of them will be decreed, although they might be recovered in the common-law actions of detinue or replevin’’); cf. Gindin v. Silver, 243 A.2d 354 (Pa. 1968) (reversing equitable decree that ordered return of diamond ring; holding that replevin constituted an adequate remedy at law).

6. See, e.g., Kimberly & European Diamonds, Inc. v. Burbank, 684 F.2d 363 (6th Cir. 1982) (affirming summary judgment in favor of plaintiff, who alleged that diamond had been wrongfully converted by defendants, and noting that district court had granted a preliminary injunction enjoining the defendant in possession of the diamond from disposing of it and ordering him to deliver it to a receiver); Niagara Mohawk Power Corp. v. Graver Tank & Mfg. Co., 470 F. Supp. 1308, 1325 (N.D.N.Y. 1979) (holding that replevin was an inadequate remedy to recover materials fabricated for project because some of materials were located outside state and because replevin would permit defendant to reclaim chattels by posting bond; granting preliminary injunction requiring defendant to ship materials); Wilson v. Sandstrom, 317 So. 2d 732, 738 (Fla. 1975) (affirming grant of temporary mandatory injunction requiring kennel owners to produce racing greyhound dogs at the track; viewing dogs as “a unique product, not readily obtainable on the market’’); Steggles v. National Discount Corp., 39 N.W.2d 237, 239 (Mich. 1949) (holding that “the status quo could be best preserved by placing plaintiff in possession of the car which had been taken from him by the deceit and trickery of the finance company’’; affirming grant of preliminary injunction); Schweber v. Rallye Motors, Inc., 12 U.C.C. Rep. Serv. (Callaghan) 1154 (N.Y. Sup. Ct. 1973) (in action seeking specific performance of contract to sell Rolls Royce, granting preliminary injunction to enjoin defendant from selling or transferring the car pendente lite).
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may dispose of it prior to resolution of the brother's claim, and that the loss of the property could not be adequately compensated by money. Hence the harm would be irreparable. Again, equity will intervene, even prior to final judgment, to prevent irreparable harm.

In case three, a businessperson gave money to an attorney to hold as trustee or escrow agent. The businessperson now alleges misappropriation and seeks imposition of a constructive trust. As in cases one and two, the businessperson in this case may also be entitled to a preliminary equitable remedy, here an injunction to "freeze" the fund pending trial, thus assuring its availability at the conclusion of the trial. As in case two, the court will spare the businessperson the potential irreparable harm that would be caused by the attorney's disposal of the disputed property during the pendency of the action.

These three cases illustrate the general proposition that "equitable powers . . . are definitely available to secure future equitable remedies when the movant can demonstrate all the requirements for a preliminary injunction . . . . [O]nce a plaintiff establishes an equitable cause of action, the district court may use its full equitable powers to grant appropriate preliminary relief as well."9

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7. See, e.g., RESTATEMENT (SECOND) OF RESTITUTION, introductory note to Chapter on Remedies at 88 (Tentative Draft No. 1, 1983); DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.5 (1973) (noting that "we expect to see equity involved in claims against fiduciaries"); id. § 5.16 (stating that "[w]here money is taken from the owner by a conscious wrongdoer the owner may enforce either a constructive trust or an equitable lien on the fund"); Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 562 (5th Cir. 1987) (holding that FSLIC, as receiver for savings and loan association, had right to pursue equitable causes of action, including constructive trust, accounting and restitution, against officers and directors of S & L, who allegedly had defrauded it).

8. See, e.g., Deckert v. Independence Shares Corp., 311 U.S. 282 (1940) (holding that plaintiffs were entitled to a preliminary injunction to restrain defendants from transferring assets during the pendency of the action where plaintiffs stated a claim for final equitable relief and demonstrated a risk of dissipation of assets by defendants); Dixon, 835 F.2d at 566 (affirming district court order granting a preliminary injunction to enjoin defendants from disposing of property or assets in an action by FSLIC as receiver alleging fraud, gross mismanagement and self-dealing, and seeking both legal and equitable relief; limiting reach of preliminary injunction to those assets subject to equitable remedies); USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 97-98 (6th Cir. 1982) (holding that a promoter who uses funds obtained in breach of a fiduciary duty to acquire property holds that property as constructive trustee, and that the district court had authority to preliminarily enjoin the promoter from transferring assets outside the country to secure plaintiffs' equitable remedy); Heckmann v. Ahmanson, 214 Cal. Rptr. 177, 189 (Ct. App. 1985) (affirming grant of preliminary injunction to enjoin transfer of money as to which a constructive trust was sought in action alleging breach of fiduciary duty); Greenspan v. Mesirow, 485 N.E.2d 1196 (Ill. App. Ct. 1985) (holding that a preliminary injunction should have been granted in action by settlors and beneficiaries of trust against the trustees to preliminarily enjoin the trustees from using trust assets to pay their own litigation expenses).

Now consider a fourth case. A widower seeks advice from a stockbroker when deciding how to invest the insurance proceeds he received upon his wife's death. The broker, who has a financial interest in a new, high-risk venture, fails to mention this personal stake to the widower and grossly misrepresents the financial security of an investment in this new company. The broker convinces the widower to invest all of his money in the new venture. When the venture fails and the widower learns that he has been defrauded, he sues the broker for money damages to compensate him for the broker's past wrongful conduct. He fears that the broker has or is about to render herself judgment-proof by transferring all of her assets to a Swiss bank account in her husband's name, so the widower seeks a preliminary injunction to bar the broker from dissipating the assets pendente lite.

Like the businessperson in case three, the widower seeks to collect money from the defendant. Like the businessperson in case three, the widower may have reason to believe that the defendant, unless restrained, will attempt to render herself judgment-proof by transferring the assets outside the jurisdiction or to a third party. Like the plaintiff in all of the earlier cases, the widower seeks a preliminary equitable remedy to preserve the efficacy of his final remedy. But the widower will probably lose on his motion for a preliminary injunction. Why?

Unlike the remedies sought by the first three plaintiffs, the widower's final remedy, money damages, is undoubtedly "at law."10 Furthermore, a legal remedy—prejudgment attachment—exists to secure the plaintiff's damages remedy during the pendency of the action. Thus, courts invoke the adage that equity will not intervene where the plaintiff has an "adequate remedy at law" and deny plaintiffs in such cases any kind of preliminary equitable relief.11 As the Fifth Circuit has stated, "as a general rule, [a preliminary injunction to freeze
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assets] is not permissible to secure post-judgment legal relief in the form of damages.”

This Article takes issue with the law’s general preference for attachment over a preliminary injunction to secure a future damages remedy, and challenges the underlying principle that preliminary equitable relief should be available only to secure a permanent equitable remedy of the same type. It argues that a preliminary injunction to restrain the dissipation of assets should be available in cases like the widower’s in case four to the same extent that it is available to the businessperson in case three.

This Article is divided into five parts. Part I identifies the three kinds of harm a plaintiff may suffer, paying particular attention to the harm a plaintiff will suffer if she cannot collect immediately upon a money judgment, or what this Article calls tertiary harm. Part II describes prejudgment attachment, the legal remedy courts currently use in an effort to prevent tertiary harm. It demonstrates that prejudgment attachment was initially designed to obtain quasi-in-rem jurisdiction over an absent defendant, and only incidentally protected the plaintiff from tertiary harm. Part II then explains why modern-day attachment is a poor vehicle for preventing such harm. Part III offers


13. This Article does not address the availability of preliminary injunctive relief in actions in which injunctive relief is specifically authorized by statute. See Federal Deposit Ins. Corp. v. Antonio, 843 F.2d 1311 (10th Cir. 1988) (affirming grant of preliminary injunction pursuant to state RICO statute); Federal Trade Comm’n v. Southwest Sunsites, Inc., 665 F.2d 711, 718 (5th Cir. 1982) (holding that the Federal Trade Commission Act authorizes the district court to “exercise the full range of equitable remedies traditionally available to it,” including the issuance of “temporary, ancillary relief preventing dissipation of assets or funds that may constitute part of the relief eventually ordered in the case”); Commodity Futures Trading Comm’n v. Muller, 570 F.2d 1296, 1300 (5th Cir. 1978) (noting that Commodity Futures Trading Commission Act of 1974 authorizes temporary injunctive relief without a showing of irreparable harm or inadequacy of legal remedy; affirming grant of preliminary injunction to bar defendant “from further dissipating the funds he allegedly has already misappropriated . . . in order to preserve the status quo so that an ultimate decision for the Commission could be effective”); cf. Carol L. Dunne, Note, In re Fredeman Litigation: The Fifth Circuit Joins the Ninth—No Injunctive Relief for Private RICO Plaintiffs, 63 Tul. L. Rev. 421 (1988) (discussing Fifth Circuit’s opinion); Donald R. Lee, Note, The Availability of Equitable Relief in Civil Causes of Action in RICO, 59 Notre Dame L. Rev. 945, 957 n.67 (1984) (arguing that plaintiffs in civil RICO actions should be able to seek preliminary injunctive relief and “the full range of ultimate equity relief” under 18 U.S.C. § 1964). Nor does this article address in any detail the forfeiture provisions under RICO and the continuing criminal enterprise statute. See 18 U.S.C.A. §§ 1963(a), 1963(d) (West Supp. 1991) (authorizing pre-conviction restraining orders to preserve forfeitable property); 21 U.S.C.A. §§ 853(a), 853(e) (West Supp. 1991) (authorizing same in continuing criminal enterprise (CCE) drug-related prosecutions); infra notes 155 and 182.

14. See infra notes 26–28 and accompanying text.
the preliminary injunction as an alternative to prejudgment attachment, and establishes that a plaintiff seeking money damages as her final remedy may be able to satisfy the traditional requirements for a preliminary injunction. It also demonstrates the many advantages such injunctions have in preventing tertiary harm.

Part IV considers the reasons why many courts have refrained from granting such relief. Part IV first demonstrates that the Supreme Court precedent lower courts cite in concluding they lack authority to issue preliminary injunctions to freeze assets actually supports, rather than undermines, the availability of such relief in money damages cases. Part IV then defuses the argument that courts should not grant preliminary injunctions to freeze assets where an adequate remedy at law exists by demonstrating the futility of even requiring a showing of inadequacy. Part IV concludes by considering whether courts should refrain from issuing preliminary injunctions on the theory that doing so would permit plaintiffs to evade carefully crafted legislative policies and protections reflected in the attachment statutes. Finally, Part V presents and analyzes the American experience with preliminary injunctions to freeze assets in two discrete contexts as well as England’s recent experience with Mareva injunctions, preliminary injunctions that secure assets for the satisfaction of a potential money judgment.

I. THREE KINDS OF HARM

A plaintiff who sues to collect money damages potentially faces three kinds of harm: primary, secondary, and tertiary. Primary harm “includes all of the harm proximately caused by the defendant’s conduct that the plaintiff will suffer even if the ultimate relief she seeks is available immediately upon commencement of the suit.” Thus, if a plaintiff has an accident, incurs medical bills, and endures pain and suffering, the amount of her primary harm is the amount she would be


16. This schema classifies harm temporally: primary harm results from actions taken before commencement of the suit; secondary harm results from delay between commencement of the suit and entry of judgment; tertiary harm results from delay between entry of judgment and satisfaction. The actual harm suffered as primary harm, related secondary harm and related tertiary harm is identical. See infra notes 22 and 27 and accompanying text. Likewise, the actual harm suffered as unrelated secondary harm and unrelated tertiary harm is identical. For a more thorough discussion of the differences between primary and secondary harm, see Wasserman, supra note 10, at 627–30.

17. Id. at 628.
entitled to collect if she could recover the day she commenced her suit.\textsuperscript{18} Similarly, if a defendant breaches a contract for the sale of widgets and the plaintiff "covers" with more expensive replacement goods and suffers some consequential and incidental damages as well,\textsuperscript{19} the amount of the plaintiff’s primary harm is the amount she would be entitled to collect if she could recover immediately upon commencement of the action. Because the full amount of the plaintiff’s primary harm is determined upon impact or breach, it cannot be avoided or abated by equitable relief, and a remedy at law for damages should be adequate.\textsuperscript{20}

Secondary harm is "harm that results from delay in receiving relief for primary harm."\textsuperscript{21} Thus, if the personal injury plaintiff must wait years to obtain a money judgment for her primary harm and lacks the resources to seek appropriate medical care, her physical injuries may actually worsen while she awaits judgment. Or, if she diverts all available funds to pay for the medical care needed, she may incur late penalties on bills or lose her home. All of this additional delay-caused harm is secondary.\textsuperscript{22}

The contract claimant, too, may suffer secondary harm if she is delayed in obtaining judgment for the primary harm suffered: most obviously, she loses the interest on the amount owed (unless prejudgment interest is available).\textsuperscript{23} If she could have invested the amount of

\textsuperscript{18} Id.

\textsuperscript{19} See U.C.C. § 2-712 (1987) (permitting buyer to "cover" by purchasing goods in substitution for those due from the seller, and permitting recovery of difference between cost of cover and the contract price together with incidental or consequential damages, less expenses saved as a result of seller’s breach); U.C.C. § 2-715 (1987) (defining incidental and consequential damages).

\textsuperscript{20} Wasserman, supra note 10, at 628.

\textsuperscript{21} Id. at 629.

\textsuperscript{22} Id. at 629-30 (distinguishing between related secondary harm and unrelated secondary harm).

\textsuperscript{23} Traditionally, prejudgment interest was available only on liquidated claims or claims based on a formula from which the amount due could be ascertained, Dobbs, supra note 7, § 3.5; it was not allowed on nonpecuniary claims or unliquidated pecuniary claims. Id. Some states have modified the traditional rules by statute. See, e.g., CAL. CIV. CODE §§ 3287, 3291 (West 1970 & Supp. 1991) (allowing prejudgment interest in contract actions for unliquidated claims, and in personal injury actions if defendant rejects plaintiff’s settlement offer and plaintiff obtains a more favorable judgment); N.Y. CIV. PRAC. L. & R. § 5001 (McKinney 1963) (permitting prejudgment interest as of right in all contract and property damage actions brought at law); TEX. REV. CIV. STAT. ANN. art. 5069-1.05 (West 1987 & Supp. 1992) (requiring that “[j]udgments in wrongful death, personal injury, and property damage cases . . . include prejudgment interest”); UTAH CODE ANN. § 78-27-44 (1987) (allowing prejudgment interest in personal injury actions). See generally John C. Keir & Robin C. Keir, Opportunity Cost: A Measure of Prejudgment Interest, 39 BUS. LAW. 129 (1983); Kenneth Ross & Donna M. Goelz, The Availability of Prejudgment Interest in Tort Actions, 8 J. PROD. LIAB. 79 (1985); James D.
the judgment in her business and could have realized a higher rate of return on the money than the statutory rate of interest, then she suffers secondary harm even if she receives prejudgment interest. Furthermore, in cases in which the recovery is needed for living expenses, the contract claimant suffers the same kinds of secondary harm as the personal injury claimant.

Finally, a plaintiff who proceeds to trial and prevails may obtain a judgment in her favor but may not be able to collect on that judgment for some time, if ever. Any harm the plaintiff suffers as a result of her inability to collect immediately upon her judgment is tertiary harm. Like secondary harm suffered prior to entry of the judgment, tertiary harm may be related or unrelated to the kinds of harm the plaintiff suffers as her primary harm. Thus, a personal injury plaintiff who must wait months before collecting on her judgment may suffer from exacerbated physical injuries (related tertiary harm), or she may lose her home if she diverts all her income to pay for medical care (unrelated tertiary harm).

Tertiary harm can be caused by different factors, and can be more or less severe depending upon its duration. In discussing these alternatives, some additional terminology may prove helpful. For example,


"In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." Library of Congress v. Shaw, 478 U.S. 310, 314 (1986). Although the Court has since intimated, in a 5-4 decision, that the Eleventh Amendment does not provide the states with similar immunity from interest awards, Missouri v. Jenkins, 491 U.S. 274, 281 n.3 (1989) (dicta), at least one of the courts of appeals has questioned whether "the dispute in the Supreme Court over the reach of the Eleventh Amendment has been finally resolved." Reopell v. Massachusetts, 936 F.2d 12, 15 (1st Cir. 1991). The retirement of Justice Brennan, the author of the majority opinion in Jenkins, underscores the possibility that Jenkins' dicta will be rejected, and Shaw's reasoning will be extended to protect the states from awards of interest.

24. Even if the contract claimant could borrow the amount owed or assign her claim, she would still suffer some secondary harm in the form of transaction costs, the difference between the amount of prejudgment interest she eventually receives and the amount paid on the loan, the difference between the full value of the claim and the discounted amount she receives upon assignment, and the like. Cf. Wasserman, supra note 10, at 627 n.18.

25. For a discussion of the kinds of secondary harm a contract claimant might suffer and an explanation of why such harm is less likely to be irreparable than the personal injury plaintiff's secondary harm, see id. at 627 n.18, 629 n.21, 630 n.22, and 642 n.62.

26. Theoretically, tertiary harm is a subset of secondary harm, in that it is suffered as a result of the plaintiff's inability to collect immediately upon commencement of her action. For purposes of this Article, secondary harm will refer to the harm suffered as a result of delay between commencement of the action and entry of the judgment, and tertiary harm will refer to the harm suffered as a result of delay after entry of the judgment.

27. See supra note 22 and accompanying text.
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passive tertiary harm, which results from mere delay or inaction on the part of one or both parties in obtaining satisfaction of the judgment, may be distinguished from active tertiary harm, which results from actions the defendant takes to avoid the judgment, for example, by dissipating or hiding her assets.\(^2\) Similarly, temporary tertiary harm, which the plaintiff suffers if she is eventually able to collect on her judgment, may be distinguished from permanent tertiary harm, which she suffers if she can never collect. In some cases of permanent tertiary harm, the defendant never had assets to satisfy the plaintiff’s claim and the permanent harm is thus passive; in other cases, the defendant had assets but transferred them to others without sufficient consideration or otherwise dissipated them in an effort to avoid payment on the judgment. In this class of cases, the tertiary harm is both active and permanent.

Unlike primary harm, both secondary and tertiary harm can be avoided, at least some of the time, if the trial court grants preliminary relief.\(^2\) This Article advocates the use of preliminary injunctions to prevent active tertiary harm.\(^3\) In cases in which the defendant has

\(^2\) This terminology is a shorthand way of describing the conduct that gives rise to the harm. Whether the product of action or inaction, misfeasance or nonfeasance, the delay-related harm itself is identical. Cf. Wasserman, supra note 10, at 629 n.21 (distinguishing between quasi-primary secondary harm and true related secondary harm).

Taking an appeal may cause active tertiary harm because the appeal may delay plaintiff’s recovery on the judgment. See Gary Stein, Note, Expanding the Due Process Rights of Indigent Litigants: Will Texaco Trickle Down, 61 N.Y.U. L. Rev. 463, 500 (1986) (noting that “[a]ppeals represents one powerful tool in the judgment debtor’s arsenal of delaying tactics”) (cit ing PAUL D. CARRINGTON et al., JUSTICE ON APPEAL 134 (1976)). Under Rule 38 of the Federal Rules of Appellate Procedure, the court of appeals “may award just damages and single or double costs to the appellee” if it determines “that an appeal is frivolous.” FED. R. App. P. 38; see also infra note 31.

\(^2\) A previous work addresses the problem of secondary harm in the personal injury context, and advocates the use of mandatory preliminary injunctions to require defendants to pay some money to plaintiffs in advance of trial on the merits in cases in which plaintiffs can satisfy the traditional requirements for preliminary injunctive relief. Wasserman, supra note 10.

\(^3\) This Article is not advocating any preliminary equitable relief to prevent passive tertiary harm. Before issuance of the judgment, the court will have no way of knowing whether the defendant will promptly offer to satisfy the judgment, whether she will “lie low” and wait for the plaintiff to take action to enforce the judgment, or whether the plaintiff will do so expeditiously. Simply put, the court will not know whether the plaintiff will suffer passive tertiary harm, and therefore preliminary relief to avoid it would be speculative. Even if a court could foresee passive tertiary harm, the only preliminary equitable relief that it conceivably could issue to prevent it would be an injunction requiring the plaintiff to seek prompt enforcement of her judgment or an order requiring the defendant to pay the judgment expeditiously upon entry. But a court could not enjoin the plaintiff to grant relief to the plaintiff, and even if it could, the prospect of jailing her for failing to enforce her own judgment seems ludicrous. The prospect of jailing a defendant for failing to satisfy a judgment she lacks assets to satisfy smacks of imprisonment for debt, a remedy that offends public policy. See Wasserman, supra note 10, at 655 (citing Dan B. Dobbs, Should Security be Required as a Pre-Condition to Provisional Injunctive Relief?, 52 N.C. L. Rev.
assets at the commencement of the action and plaintiff can establish a
demonstrable risk that the defendant will dissipate those assets unless
restrained, a court can and should prevent the plaintiff’s active tertiary
harm by freezing that portion of the defendant’s assets necessary
to satisfy the plaintiff’s anticipated money judgment.\(^\text{31}\)

II. PREJUDGMENT ATTACHMENT AND ITS
LIMITATIONS IN PREVENTING TERTIARY HARM

A defendant intent upon rendering worthless a future money judg-
ment against her may attempt to rid herself of assets that could be
levied upon in execution. Assuming the defendant does not want to
lose complete control of the assets, she will not give them away.
Instead, she will want to make the assets unreachable for purposes of
satisfying the judgment, but within her control for her own purposes.
To this end, she may move assets outside the state or country;\(^\text{32}\)
transfer possession of the assets to a third party; grant an interest in the
assets to a third party; or conceal the assets within the state or coun-
try. All of these actions will cause the plaintiff active tertiary harm.

\(^{1091, 1109}\) (1974); Peter Linzer, On the Amorality of Contract Remedies—\(\text{2}\)Efficiency, Equity, and
the Second Restatement, 81 COLUM. L. REV. 111, 123 (1981)). Even if the defendant had assets
with which to satisfy the judgment, it would be troubling to jail her for mere inaction in failing to
offer those assets to satisfy the judgment.

31. This Article also argues that if, prior to a ruling on the plaintiff’s motion, the defendant
has already transferred assets beyond the reach of the court, the court may restrain the defendant
from dissipating those assets or actually require her to return the assets to the state in which the
court sits. See infra notes 177–81 and accompanying text.

The state and federal courts currently protect plaintiffs from active tertiary harm if the
defendant appeals from the judgment by requiring a supersedeas bond to stay execution. See
FED. R. APP. P. 8(b) (stating that “[r]elief available in the court of appeals under this rule [for a
stay of the judgment] may be conditioned upon the filing of a bond’’); Stein, supra note 28, at
468–69, 500–01 (citing authorities; noting that “[s]upersedeas bonds protect judgment creditors
... by eliminating the effect of dissipation of assets”). A supersedeas bond is “[a] bond required
of one who petitions to set aside a judgment or execution and from which the other party may be
made whole if the action is unsuccessful.” BLACK'S LAW DICTIONARY 1438 (6th ed. 1991). A
supersedeas bond and post-judgment interest should compensate the plaintiff for most of her
appeal-related tertiary harm if her financial need is not great. See infra notes 135 and 144 and
accompanying text.

32. See, e.g., Charles M. Bruce et al., Protection of Assets Trusts: Fallout From Litigation
Explosion, N.Y. L.J., Sept. 13, 1991, at 1 (discussing use of “a trust created under the laws of a
non-U.S. jurisdiction ... to protect assets against future creditors”; noting that in suits against
the settlor, “[i]t would be no pre-judgment lien ‘freezing’ the assets [i.e., attachment] because a
U.S. court order ordinarily could not reach the assets ... in the hands of a non-U.S.
custodian’’); Marcia Chambers, Little Guys Give Much Protection, THE NAT'L L. J., July 1, 1991,
at 13–14 (discussing decision by small Colorado law firm to place its assets in a Manx Trust,
formed under the laws of the Isle of Man, to protect them from creditors; the Isle of Man does
not enforce judgments of foreign countries).
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The prejudgment remedy most commonly used to prevent this tertiary harm is attachment. Part A describes the common features of the states’ prejudgment attachment statutes. Part B reviews the history of prejudgment attachment, and demonstrates that the remedy was not designed to prevent tertiary harm. Part C then establishes that prejudgment attachment is a poor vehicle for preventing tertiary harm because it causes the defendant unnecessary harm, fails to adequately protect the plaintiff, and has several negative collateral consequences, including harm to innocent third parties and increased satellite litigation.

33. Prejudgment attachment is a preventative, rather than a restorative, measure. If the defendant has already transferred her assets to a third party before issuance of the attachment order, the plaintiff will have to invoke fraudulent conveyance law to reach the property in the hands of the third-party transferee. See generally Uniform Fraudulent Conveyance Act §§ 4–7, 10, 7A U.L.A. 427 (1985 & Supp. 1991) (defining as fraudulent all conveyances by persons who are or will be thereby rendered insolvent, conveyances without fair consideration when the person making them is engaged in business and is left with “unreasonably small capital,” conveyances without fair consideration when the person making them intends to incur debts beyond her ability to pay as they mature, and conveyances made with actual intent to hinder, delay or defraud present or future creditors; providing that in an action by a creditor whose claim has not matured, the court may “restrain the defendant [transferee] from disposing of his property, appoint a receiver to take charge of the property, set aside the conveyance or annul the obligation, or make any order which the circumstances of the case may require”); Uniform Fraudulent Transfer Act, 7A U.L.A. 639 (1985 & Supp. 1991) (expanding the remedies available to creditors and harmonizing definitions with the Bankruptcy Code); Fed. R. Civ. P. 18(b) (permitting a plaintiff to “state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money”).

Because the remedies available under fraudulent conveyance law require jurisdiction over the property at issue or personal jurisdiction over the transferee, the plaintiff may have difficulty pursuing her underlying claim against the transferor and her fraudulent conveyance claim against the transferee in the same forum. See generally Cosmopolitan Health Spa, Inc. v. Health Indus., Inc., 362 So. 2d 367 (Fla. Dist. Ct. App. 1978) (reversing trial court order, which denied defendant’s motion to dismiss for lack of personal jurisdiction in fraudulent conveyance action against third-party transferee); Poplar Grove State Bank v. Powers, 578 N.E.2d 588 (Ill. App. Ct. 1991) (holding that Illinois court lacked personal jurisdiction over Iowa-domiciled transferee in fraudulent conveyance action); Jahner v. Jacob, 252 N.W.2d 1 (N.D. 1977) (reversing judgment against third-party transferees in fraudulent conveyance action who were not subject to personal jurisdiction in North Dakota); Malis v. Zinman, 261 A.2d 875 (Pa. 1970) (holding that fraudulent conveyance action to set aside transfer of real property in Pennsylvania was an in rem action, and that Pennsylvania court had jurisdiction to proceed even if the transferor and the third party transferee were both domiciled in Massachusetts); 1 Garrard Glenn, Fraudulent Conveyances and Preferences § 92a, at 159 (2d ed. 1940) (noting that “the court will not entertain the suit unless the property is within the State and subject to its control”; “when . . . personal property is so located outside of the State, that it will not be within the court’s control, then the case is like that of land, and a suit attacking the fraudulent transfer will not be entertained”). Cf. infra part II.C.2 (describing the limited geographic reach of an attachment order).
A. Anatomy of a Prejudgment Attachment Statute

All states except Pennsylvania\(^{34}\) have enacted statutes authorizing prejudgment attachment, a remedy generally characterized as legal as opposed to equitable.\(^{35}\) Although the state statutes vary, they can be described collectively for present purposes.

The statutes permit a plaintiff, upon the filing of a bond,\(^{36}\) to obtain a prejudgment order for the attachment of the defendant’s property in a wide variety of circumstances, such as in cases in which the defendant is a nonresident of the state or a foreign corporation,\(^{37}\) the defendant threatens to remove property from the state with intent to hinder, defraud or delay creditors,\(^{38}\) and in contract cases for the payment of money in which the contract is unsecured or the security has become valueless.\(^{39}\) In all cases the plaintiff must establish the probable validity of her claim.\(^{40}\) The statutes typically permit the court to issue the attachment order on an ex parte basis.\(^{41}\) With a few exceptions (most

\(^{34}\) See infra note 78.

\(^{35}\) See supra note 10; see also, e.g., EBSCO Indus., Inc. v. Lilly, 840 F.2d 333, 334–35 (6th Cir.) (noting that “Ohio state courts have held that the attachment provisions provide a legal, as distinguished from an equitable, prejudgment remedy”), cert. denied, 488 U.S. 825 (1988); Allstate Sales & Leasing Co. v. Geis, 412 N.W.2d 30, 32 (Minn. App. 1987) (holding that plaintiff “did not show it lacked an adequate legal remedy in the attachment statute”).


\(^{37}\) See, e.g., ARIZ. REV. STAT. ANN. § 12-2402 (Supp. 1990); CAL. CIV. PROC. CODE § 484.090 (West Supp. 1991); D.C. CODE ANN. § 16-501(c) (1989) (plaintiff must aver that she has “a just right to recover what is claimed in [her] complaint”); FLA. STAT. ANN. § 76.24 (West 1987) (if defendant moves to dissolve the writ, plaintiff must prove “the grounds upon which the writ was issued and a reasonable probability that the final judgment in the underlying action will be rendered in his favor”); N.J. CIV. PRAC. R. 4:60-5(a) (court must find that there is “a probability that final judgment will be rendered in favor of the plaintiff”).
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commonly for wages and property exempt from execution), 42 virtually all of the defendant's real and personal property is subject to prejudgment attachment, whether tangible or not. 43 Even property in the hands of third-party garnishees may be subject to prejudgment attachment. 44 The prejudgment attachment order directs the sheriff to seize tangible property, and to attach constructively the rest of the defendant's property. 45 The statutes usually permit the defendant (or the garnishee) to post a bond to obtain the return of the attached property, and often permit the defendant to obtain its return without posting a bond upon a showing that the attachment order issued improperly. 46

B. The History of Prejudgment Attachment

1. Prejudgment Attachment in the Common Law Courts

The common law did not authorize a default judgment, 47 so if a defendant did not respond to the original writ, the court would issue a series of successive writs to coerce his appearance. 48 The least coercive writ, after the summons, was a writ of attachment against his property. 49 If the attachment did not produce the defendant's appearance, the court would issue writs of distringas or "distress infinite" for the seizure of additional property and for the profits of the defendant's


47. It was not until 1725 that a statute authorized the plaintiff "to enter a common appearance or file common bail for the defendant . . . and to proceed thereon, as if such defendant . . . had entered [sic] his, her or their appearance, or filed common bail" if the defendant did not "appear at the return of the process or within four days after such return." 12 Geo., ch. 29, § 1 (Eng.).


49. Id. at 75, 487 n.29; 3 WILLIAM BLACKSTONE, COMMENTARIES *280.
The attachment and early distresses seized only so much of the defendant's property as was reasonable or likely to compel his appearance. Succeeding distresses attached increasing amounts of property, until the defendant, in the words of Blackstone, was "gradually stripped of it all by repeated distresses." The sole purpose of the attachment or distress was to compel the defendant's appearance; it did not provide security for the plaintiff's claim. If the defendant appeared in the action after an attachment, his property was discharged. If the defendant did not appear, the seized property was forfeited to the Crown. Before 1769 or so, the attached property could not be used even to pay the plaintiff's costs. Even after 1769, however, it was not contemplated that the property could be used to satisfy the plaintiff's claim. Thus, the attachment remedy in the common law courts was not designed to prevent tertiary harm and did not accomplish that result.


51. Millar, supra note 48, at 487 n.29.

52. 3 Blackstone, supra note 49, at *281, quoted in Millar, supra note 48, at 487 n.29. As in the common law courts, the chancery employed a series of increasingly severe measures to compel the defendant's appearance, including a subpoena, an attachment, an attachment with proclamations, a commission of rebellion, a sergeant at arms, and finally, sequestration. 3 Blackstone, supra note 49, at *443–44; 9 William Holdsworth, A History of English Law 349–50 (3d ed. 1944); Millar, supra note 48, at 362.

53. Millar, supra note 48, at 481; Nathan Levy Jr., Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in the Light of the English Experience, 5 Conn. L. Rev. 399, 405 (1972–73) (noting that foreign attachment in early Law Merchant and by custom in the Mayor's Court and the Sheriff's Court of London developed "at least partly [in] response to the failure of the common law courts to provide plaintiffs' remedies which were as efficient"); William E. Mussman & Stefan A. Riesenfeld, Garnishment and Bankruptcy, 27 Minn. L. Rev. 1, 10 n.33 (1942) (noting that "[c]ommon law attachment in contrast to foreign attachment according to the customs of London did not permit any satisfaction of plaintiff out of the attached chattels but they were forfeited to the king").

54. Millar, supra note 48, at 75 (quoting Richard Boote, A Historical Treatise of an Action or Suit at Law 26 (4th ed. 1805)); Joseph H. Kofler & Allison Reppy, Handbook of Common Law Pleading 74 (1969); see also Hubbard v. Hamilton Bank, 48 Mass. (1 Met.) 340, 342 (1844) (noting that "[o]riginally, an attachment on mesne process seems to have been instituted merely for the purpose of compelling the appearance of the defendant in court to answer to the suit"); Penoyar v. Kelsey, 44 N.E. 788 (N.Y. 1896) (noting that original purpose of common law attachment "was to acquire jurisdiction of the defendant by compelling him to appear in court through the seizure of his property").

55. Penoyar, 44 N.E. 788; 3 Blackstone, supra note 49, at *280; Millar, supra note 48, at 487 n.29; Levy, supra note 53, at 423; Mussman & Riesenfeld, supra note 53, at 10 n.33.

56. 3 Blackstone, supra note 49, at *280 (citing 10 Geo. 3, ch. 50, §§ 3, 4 (1769)); Millar, supra note 48, at 487 n.29 (citing same).

57. Penoyar, 44 N.E. at 789 (noting that "'[t]he practice of attaching the effects of a defendant and holding them to satisfy a judgment, which the plaintiff may recover, when, perhaps, judgment may be for the defendant, is unknown to the common law'") (quoting Bond v. Ward, 7 Mass. 123, 128 (1810)); Millar, supra note 48, at 487 n.29.

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2. Foreign Attachment Under the Custom of London

Prejudgment attachment was used as a jurisdictional tool in the local courts as well. As early as 1287 under the early Law Merchant, and later under the Custom of London in the Lord Mayor's Court and the Sheriff’s Court, prejudgment attachment was available to obtain quasi-in-rem jurisdiction over the defendant. Designed specifically to force the defendant into court to defend his property, this early foreign attachment, like the attachment in the common law courts, was dissolved if the defendant appeared. Unlike common law attachment, however, the foreign attachment under the Custom of London permitted the plaintiff to satisfy her claim out of the attached property if the attachment did not accomplish its objective and coerce the defendant's appearance.

The phrase “foreign attachment” was not literally accurate, as the procedure was never limited to “foreign” defendants, and the “attachment” authorized was really a garnishment, or attachment of the debtor's property in the hands of a third party. Either the

58. Levy, supra note 53, at 405 (citing Howell v. Mules, Fair Court of St. Ives, A.D. 1287, 1 Select Cases Concerning the Law Merchant 28–29 (Selden Society 1908)); see also PLUCKNETT, supra note 50, at 392–93 (discussing the Statute of Merchants of 1285, which authorized the seizure of defendant's property and the sale of his chattels to satisfy mercantile debts).


61. Levy, supra note 53, at 423. Thus, under common law attachment, the property seized was forfeited to the Crown if the defendant failed to appear; under foreign attachment, the property seized was paid to the plaintiff in the event of default.

62. Id. at 408. According to Professor Levy, the word “foreign” meant “not civic.” Id. (citing The Mayor and Aldermen of London v. Cox, 2 L.R.–E.&.I. App. 239, 265 (H.L. 1867)). Professor Millar suggests that a foreigner was “one dwelling outside the city” of London. MILLAR, supra note 48, at 481.

63. Id. at 483; PULLING, supra note 60, at 187–88; Levy, supra note 53, at 408–09. Foreign attachment also included a procedure known as “sequestration,” pursuant to which goods belonging to the defendant, found in a warehouse or house with no attendant, could be attached. BOHUN, supra note 59, at 218; MILLAR, supra note 48, at 483; PULLING, supra note 60, at 192; Levy, supra note 53, at 418.

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defendant or the garnishee could dissolve the attachment by posting bail for the defendant's appearance. There is no evidence that this form of pretrial attachment was ever intended or used to secure a plaintiff's judgment against a defendant who in fact appeared but threatened to waste his assets. Thus, like the common law attachment, foreign attachment under the Custom of London was designed for purposes other than the prevention of tertiary harm.

3. The Transformation of Prejudgment Attachment in Early America

The colonists drew on both English traditions of attachment in setting up their own judicial systems. The colonists used "common attachment" to attach tangible property in the defendant's own possession to coerce his appearance without furnishing any security for the plaintiff's claim. They also adopted foreign attachment as early as the late 1600's to permit the prejudgment attachment of the defendant's property in the hands of third parties, or what the New England colonies called "trustee process." While both forms of prejudgment attachment were designed as jurisdictional tools, they were transformed by the colonies into rather blunt tools for preventing tertiary harm. In 1659, for example,

64. Millar, supra note 48, at 482; Levy, supra note 53, at 411.
65. Joseph J. Kalo, Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and In Personam Principles, 1978 DUKE L.J. 1147, 1159 (noting that 'if the defendant appeared the attachment was dissolved, which meant that a dishonest defendant could appear and then use the time between the entry of the judgment and the issuance of a writ of execution to dispose of the property that had been under attachment').
66. Millar, supra note 48, at 486.
67. Id. at 486-87; Kalo, supra note 65, at 1157-59.
68. Levy, supra note 53, at 401 (noting that foreign attachment "suited the needs of an expanding credit economy and of a people, averse to imprisonment for debt, who travelled at will among 'limitedly sovereign' states spread over a large territory"); see also Mills v. Findlay, 14 Ga. 230, 232 (1853) (noting that custom of London was "the foundation of all of our Attachment Laws"); Drake, supra note 59, at 1–3; Millar, supra note 48, at 485; Julius Goebel Jr., King's Law and Local Custom in Seventeenth Century New England, 31 COLUM. L. REV. 414, 417, 420–21 (1931) (stating that "at the outset of the seventeenth century local custom and local courts were still an immensely important part of the law administration in England," and noting that the colonists resorted to the customary law with which they had grown up when they developed a civil order in America).
69. Ownbey v. Morgan, 256 U.S. 94, 104 (1921) (noting that Delaware's attachment statute, like the attachment statutes of other states, "traces its origin to the Custom of London, under which a creditor might attach money or goods of the defendant either in plaintiff's own hands or in the custody of a third person, by proceedings in the mayor's court or in the sheriff's court"); Millar, supra note 48, at 486; Kalo, supra note 65, at 1181.
70. Millar, supra note 48, at 486-87.
71. See supra parts II.B.1–2.
the Massachusetts colony adopted a statute, which revolutionized the common attachment remedy. It provided that goods attached would not be released upon the defendant's appearance, but "shall stand engaged until the judgment or execution granted upon the said judgment be discharged." Another Massachusetts statute, enacted in 1701, provided that attached property should not be released until 30 days after the judgment was entered for plaintiff, "that he may take the same by execution, for satisfying of such judgment in whole or in part, so far as the value thereof can extend, if he think fit, unless the judgment be sooner or otherwise satisfied, any law, usage or custom to the contrary notwithstanding." All of the New England jurisdictions ultimately followed Massachusetts's lead in transforming common attachment from a means of compelling the defendant's appearance into a method of assuring the plaintiff's satisfaction.

Similarly, although trustee process, like the foreign attachment from which it derived, was originally restricted to cases against absent or absconding debtors, in 1795 Massachusetts made it available against debtor-defendants generally, and the other New England jurisdictions followed suit. This change, together with the transformation of common attachment, completed the metamorphosis of prejudgment attachment from a jurisdictional tool to a rather heavy-handed means of preventing tertiary harm.

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72. Colonial Laws of Massachusetts 144 (1887) and Charter & General Laws of the Colony and Province of Massachusetts Bay 192 (1814), quoted in MILLAR, supra note 48, at 488. According to the court in Hubbard v. Hamilton Bank, 48 Mass. (1 Met.) 340, 342-43 (1844), the provision was first enacted in a colonial ordinance of 1650 and was reenacted in 1659 (citing Anc. Chart. 51, 193). Professor Kalo also concludes that the statute was enacted in 1650. Kalo, supra note 65, at 1160.

73. Acts of 1701-02, c. 5, § 11, 1 Acts & Resolves of the Province of Massachusetts Bay (1869), quoted in MILLAR, supra note 48, at 488.

74. MILLAR, supra note 48, at 488; Owenby v. Morgan, 256 U.S. 94, 105 (1921) (noting that "it naturally came about that the American colonies and States, in adopting foreign attachment as a remedy for collecting debts due from non-resident or absconding debtors, in many instances made it a part of the procedure that if defendant desired to enter an appearance and contest plaintiff's demand he must first give substantial security, usually in the form of special bail").


76. MILLAR, supra note 48, at 489.

77. Attachment was used primarily in aid of debt collection, as 90 percent of all civil suits in the eighteenth century were debt cases. BRUCE H. MANN, NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT 12 (1987); see also Kalo, supra note 65, at 1150 (stating that "the most significant factor influencing the course of development of jurisdictional principles in colonial America was the problem of debt collection in an economy heavily dependent on credit"); Thomas D. Russell, Historical Study of Personal Injury Litigation: A Comment on Method, 1 GA. J. S. LEGAL HIST. 109, 117-19 (1991) (noting the paucity of tort actions, and the predominance of contract and debt actions, during the nineteenth century).
C. The Limited Utility of Prejudgment Attachment in Preventing Tertiary Harm

Conceivably, a remedy designed for one purpose might actually serve another purpose as well. Thus, that prejudgment attachment was not originally designed to prevent tertiary harm does not in itself compel the conclusion that attachment is ill-equipped to prevent tertiary harm. But the variance between its historical purpose and its current use at least raises the question of the efficacy of the remedy today. In fact, prejudgment attachment has proven to be a poor vehicle for preventing tertiary harm.

1. Subject Matter Restrictions on Attachment

Most obviously, prejudgment attachment fails to protect the plaintiff from tertiary harm if it is unavailable in the kind of case the plaintiff has commenced, or does not reach the only property the defendant has that would be available to satisfy the plaintiff’s judgment. For example, Pennsylvania has rescinded all of its statutory provisions for attachment, so the prejudgment remedy at law is not available in any action brought in federal or state court in Pennsylvania. Many states authorize attachment only in certain kinds of cases—in contract actions, for example. Other states vary the availability of the remedy


In 1976, the Third Circuit Court of Appeals held that Pennsylvania’s foreign attachment procedures, then codified at PA. R. Civ. P. 1251–79, were unconstitutional. See Jonnet v. Dollar Sav. Bank, 530 F.2d 1123 (3d Cir. 1976). Following Jonnet, the legislature concluded that:

[N]either foreign attachment nor fraudulent debtor’s attachment serve well their original functions of acquiring jurisdiction over the defendant and immobilizing property from which an eventual judgment might be satisfied. In light of the modern long-arm statute which has extended in personam jurisdiction over nonresident defendants to the broadest extent permissible under the Constitution and the incorporation of the minimum contacts required for in personam jurisdiction into the in rem and quasi-in-rem theories, there seems little need for the jurisdictional function of the remedies. In addition, the procedural complexities of fraudulent debtor’s attachment have rendered it almost useless and the potential for misuse of the writ when the grounds of fraud are not actually present make the second function of sequestering property dubious at best.

PA. R. Civ. P. 1251–79 explanatory comment 1989. This comment echoes the argument made here that the attachment remedy, initially designed to coerce the defendant’s appearance in court, is a poor vehicle for preventing tertiary harm.

79. See, e.g., ALASKA STAT. § 09.40.010 (1983) (authorizing attachment only in actions upon contracts or for collection of state tax or license fees); CAL. CIV. PROC. CODE §§ 483.010, 492.010 (West Supp. 1991) (authorizing attachment only in actions on claims for money based upon contract where the amount of the claim is a “fixed or readily ascertainable amount,” or in
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depending upon the residency status of the defendant (probably a vestige of the jurisdictional roots of attachment). Moreover, some states limit the kinds of property that may be subject to attachment. In these cases and others in which prejudgment attachment is unavailable, it does not protect the plaintiff from tertiary harm.

2. Limited Geographic Reach of Attachment

Like state statutes that authorize issuance of subpoenas and writs of execution upon judgments, state statutes that authorize the issuance of subpoenas and writs of execution for the recovery of money against nonresident defendants who are natural persons or foreign corporations or foreign partnerships not registered with the state; limiting availability of attachment against individuals to claims arising out of their business conduct; D.C. CODE ANN. § 16-501(a) (Michie 1989) (permitting attachment only in actions for recovery of specific personal property, a debt, or damages for breach of contract); HAW. REV. STAT. § 651-2 (1988) (permitting attachment only in actions “upon a contract, express or implied”); MONT. CODE ANN. § 27-18-101 (1991) (authorizing attachment only in actions upon contracts for the direct payment of money and actions upon a statutory stockholders’ liability); OR. R. CIV. P. 84A (authorizing attachment against resident defendants only in contract actions); WIS. STAT. ANN. § 811.03 (West 1977 & Supp. 1991) (authorizing prejudgment attachment in specified actions on contracts or judgments, and in tort actions only against nonresident defendants, foreign corporations, and defendants whose addresses are unknown and unascertainable).

80. See, e.g., ARK. CODE ANN. § 16-110-103 (Michie 1987) (authorizing attachment in actions for torts committed in the state only against nonresident defendants); N.D. CENT. CODE § 32-08.1-03 (Supp. 1991) (limiting cases in which attachment may issue against resident defendant, and authorizing attachment in tort actions only if defendant is a nonresident, a foreign corporation, or a person whose residence is unknown and unascertainable); OHIO REV. CODE ANN. § 2715.01 (Page Supp. 1990) (distinguishing between resident and nonresident defendants in authorizing attachment).

81. The most common (and sensible) limitation is the exemption from attachment of property that would be exempt from execution. See, e.g., ALASKA STAT. § 09.40.030 (1983); ME. REV. STAT. ANN. tit. 14, §§ 4151, 4222, 4451 (West 1980 & Supp. 1990); MASS. GEN. LAWS ANN. ch. 223, § 42 (West 1985); NEV. REV. STAT. § 31.020(h) (1987); N.D. CENT. CODE § 32-08.1-10 (Supp. 1991); TEx. CIV. PRAC. & REM. CODE ANN. § 61.041 (West 1986). Other limitations exist, however. See, e.g., USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 98-99 (6th Cir. 1982) (concluding that attachment and lis pendens under state law would not adequately protect plaintiffs because the statutes probably did not reach mineral properties severed from the earth).

82. See infra part IV.C for a discussion of limitations on the plaintiff’s ability to evade statutory limitations by seeking injunctive relief.


84. See, e.g., CAL. CIV. PROC. CODE §§ 699.510, 699.520 (West 1987) (writ of execution directs “levying officer in the county where the levy is to be made” to enforce money judgment); FLA. STAT. ANN. § 56.031 (West 1969) (execution directed to “the sheriffs of the state and shall
ance of writs of attachment limit the geographic reach of the judicial process. In many states, the attachment order directs the sheriff to attach only property found within the county in which she serves. Although many state statutes permit the issuance of several writs of attachment to sheriffs in several counties within the state, and some permit the sheriff of one county to attach property in another county if the defendant has moved it there after the attachment order issued, no state statute purports to authorize the attachment of property outside the territory of the state.

The limited territorial reach of the state attachment statutes has hampered both state and federal courts in preserving defendants’ assets to satisfy an expected future judgment. State courts have held that they cannot attach stock owned by a defendant unless the certificates are physically present within the state, that they cannot attach a bank account maintained by the defendant at a branch outside the state, that they cannot attach a debt owed to the defendant by a

be in full force throughout the state"); ILL. ANN. STAT. ch. 110, ¶ 12-106 (Smith-Hurd 1984) (judgment may be enforced “by the proper officer of any county, in this State”); N.Y. CIV. PRAC. L. & R. § 5230(b) (McKinney 1978) (execution issues “to the sheriffs of one or more counties of the state”); PA. R. CIV. P. 3103 (writ of execution “may be directed to the sheriff of any county within the Commonwealth”); see also Stiller v. Hardman, 324 F.2d 626, 628 (2d Cir. 1963) (noting that “[i]n the absence of a statute providing for the registration or summary enforcement of foreign judgment ... it is usually necessary to bring an action of debt on a foreign money judgment and to obtain a new judgment of the forum before execution will issue”).

85. See, e.g., IDAHO CODE § 8-504 (1990); ILL. ANN. STAT. ch. 110, ¶¶ 4-110, 4-112 (Smith-Hurd Supp. 1991); IND. CODE ANN. § 34-1-11-6 (Burns 1986); N.Y. CIV. PRAC. L. & R. § 6211 (McKinney 1980); TEX. R. CIV. P. 593, 597.

86. See, e.g., FLA. STAT. ANN. §§ 76.16, 76.17 (West 1987); IDAHO CODE § 8-504 (1990); IND. CODE ANN. § 34-1-11-7 (Burns 1986); MO. R. CIV. P. 85.06; MONT. CODE ANN. §§ 27-18-206 (1991); R.I. R. CIV. P. 4(j)(2).


88. See, e.g., Giroir v. Giroir, 536 So. 2d 830, 833 (La. Ct. App. 1988) (holding that “since ... the stock certificates ... were not in Louisiana when ... the writ issued, they were not subject to attachment”; attachment attempted to obtain quasi-in-rem jurisdiction over nonresident defendant); Johnson v. Wood, 189 A. 613, 618 (N.J. Cir. Ct. 1936) (holding that because stock certificates were located in New Hampshire, “there is not present in this state [New Jersey] any property of the defendant which can be attached”).

89. See, e.g., Land Mfg., Inc. v. Highland Park State Bank, 470 P.2d 782, 784 (Kan. 1970) (holding that where individual had a sum on deposit in Chase Manhattan Bank in New York, “the monies or credits were not located or attached in Kansas”); McCloskey v. Chase Manhattan Bank, 183 N.E.2d 227 (N.Y. 1962) (holding that “balances maintained by the individual [defendant] in the German branch [of Chase Manhattan Bank] were payable only in Germany at that branch and that the funds were not subject to attachment in New York”), cited in Gavilanes v. Matavosian, 475 N.Y.S.2d 987, 990 (N.Y. Civ. Ct. 1984); Therm-X-Chemical & Oil Corp. v. Extubank, 444 N.Y.S.2d 26, 27 (App. Div. 1981) (noting that “[t]he general rule in New York is
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garnishee under a contract negotiated outside the state,\textsuperscript{90} or, more generally, that they cannot attach property found outside the state,\textsuperscript{91} or garnish property held by the garnishee outside the state.\textsuperscript{92} Federal courts that have attempted to use state attachment remedies pursuant

\textsuperscript{90} Apollo Metals, Inc. v. Standard Mirror Co., 231 N.E.2d 655, 658 (Ill. 1967) (holding that "for the purpose of the execution of the writ [of attachment against a garnishee] there must be actual property in the possession of the garnishee within the jurisdiction of the court authorizing the writ"; "the contract debt which Apollo sought to attach came into being pursuant to negotiations held outside of Illinois"; "payment under the contract was to be made outside of Illinois"; holding that attaching creditor failed to meet burden of proving that debt was subject to attachment in Illinois; attachment for purposes of obtaining quasi-in-rem jurisdiction).

\textsuperscript{91} See, e.g., Saltzman v. Indemnity Ins. Co., 274 N.Y.S. 806, 807 (Sup. Ct. 1934) (German resident "had no property on which a levy could be made within this jurisdiction"); Stricklin v. Hodgen, 172 S.E. 770, 772 (S.C. 1934) (holding that "funds of the defendant . . . which the attachment sought to reach, had been forwarded by telegraphic transmission beyond the limits of this state, to a point in Florida, before the attempted execution of the attachment warrant"); vacating attachment); see also, e.g., Allstate Sales and Leasing Co. v. Geis, 412 N.W.2d 30, 32-33 (Minn. Ct. App. 1987) (noting that "[a] state court cannot attach assets located outside the state"); ABKCO Indus., Inc. v. Apple Films, Inc., 350 N.E.2d 899, 901 (N.Y. 1976) (noting that "tangible personal property obviously has a unique location and can only be attached where it is . . . [S]ome intangibles are deemed to have been embodied in formal paper writings . . . and in such instances attachment depends on the physical presence of the written instrument within the attaching jurisdiction."); Gavilanes v. Matavosian, 475 N.Y.S.2d 987, 989 (N.Y. Civ. Ct. 1984) (stating that "It is well established that a New York court can not attach property not within its jurisdiction"); Buckeye Pipe-Line Co. v. Fee, 57 N.E. 446, 448 (Ohio 1900) (stating that "[n]o question is or could be made that property without the state, can by virtue of a process of attachment, be seized by an Ohio officer, and, of course, such property could not be delivered into court"); Bruce et al., supra note 32 (discussing inability to attach assets placed in a trust created under foreign law); 7 C.J.S. Attachment § 65 (1980) ("the court cannot attach property which is not within the territorial limits of its jurisdiction").

\textsuperscript{92} See, e.g., Buckeye Pipe-Line, 57 N.E. at 448 (stating that "property which may be sequestered in the hands of a garnishee must be within the state in order that it may be taken . . . for it is in contemplation that the officer will seize the property in the possession of the garnishee"); see supra note 33 (discussing the jurisdictional principles that limit the availability of remedies under fraudulent conveyance law to set aside transfers after the fact).
to Federal Rule 64 of Civil Procedure\textsuperscript{93} also have noted that attachment applies only against property found within the state in which the federal court sits.\textsuperscript{94} Thus, in cases in which the defendant has property in several states, or has already moved her property outside the state in which the action is pending, the attachment remedy will be ineffectual. To take advantage of it, the plaintiff would have to initiate multiple proceedings in the several states in which the defendant had property.\textsuperscript{95}

\textsuperscript{93} See infra note 309.

\textsuperscript{94} See, e.g., EBSCO Indus., Inc. v. Lilly, 840 F.2d \textsuperscript{333}, 336 (6th Cir.) (finding that attachment remedy was inadequate because it could not reach assets located outside state), \textit{cert. denied}, 488 U.S. \textsuperscript{825} (1988); Federal Deposit Ins. Corp. v. Rodenberg, 622 F. Supp. \textsuperscript{286}, 288 (D. Md. 1985) (rejecting plaintiff’s argument that a federal court sitting in Maryland may “apply Maryland’s attachment procedures extraterritorially to accomplish the objectives of Rule 64”; interpreting Maryland’s attachment statute as authorizing attachment only within the territorial limits of the state); Fleming v. Gray Mfg. Co., \textsuperscript{352} F. Supp. \textsuperscript{724}, 726 (D. Conn. 1973) (holding that under Connecticut law, attachment of a security requires seizure); Lantz Int’l Corp. v. Industria Termotecnica Campana, \textsuperscript{358} F. Supp. \textsuperscript{510}, 514 (E.D. Pa. 1973) (noting that under Pennsylvania law, “the basis for the writ of foreign attachment is the presence of property of the defendant \textit{within the jurisdiction of the court}”) (emphasis added); Nederlandsche Handel-Maatschappij, N.V. v. Sentry Corp., \textsuperscript{163} F. Supp. \textsuperscript{800}, 803 (E.D. Pa. 1958) (holding that “the securities cannot be attached because they are without the geographical limits of this Court and therefore beyond the jurisdiction”); Westerman v. Gilbert, \textsuperscript{119} F. Supp. \textsuperscript{355}, 358–59 (D.R.I. 1953) (holding that defendant’s interest in shares of stock of a Rhode Island corporation was not subject to attachment in Rhode Island unless the certificates themselves were physically present in the state and actually seized).

Rule 64 could be amended to permit nationwide attachment in federal actions. But the problem of the limited geographic reach of attachment would continue to exist in state courts and in all actions in which the property is located abroad.

\textsuperscript{95} See, e.g., \textit{EBSCO}, \textsuperscript{840} F.2d at \textsuperscript{336} (finding attachment remedy inadequate because it could not reach assets located outside state, and plaintiff would have to initiate attachment proceedings in several states); Clark Equip. Co. v. Armstrong Equip. Co., \textsuperscript{431} F.2d \textsuperscript{54}, 57 (5th Cir. 1970) (upholding preliminary injunction to require defendant to assemble and make available to plaintiff collateral, which was located in five states; noting that “no one possessory action would provide an adequate remedy”), \textit{cert. denied}, \textsuperscript{402} U.S. \textsuperscript{909} (1971); Wilkerson v. Sullivan, \textsuperscript{727} F. Supp. \textsuperscript{925}, 936 (E.D. Pa. 1989) (stating that “a legal remedy is normally considered inadequate if it would result in a multiplicity of lawsuits”); Northeast Women’s Center, Inc. v. McMonagle, \textsuperscript{665} F. Supp. \textsuperscript{1147}, 1153 (E.D. Pa. 1987) (in granting permanent injunction, stating that “[t]he legal remedy is inadequate if the plaintiff’s injury is a continuing one, where the best available remedy at law would relegate the plaintiff to filing a separate claim for damages each time it is injured anew”); Howell Pipeline Co. v. Terra Resources, Inc., \textsuperscript{454} So. 2d \textsuperscript{1353}, 1357 (Ala. 1984) (affirming grant of preliminary injunction to enjoin defendant from failing to honor contract because in absence of injunction, plaintiff would have to sue monthly for damages); State \textit{ex rel. Missouri Highway and Transp. Comm’n v. Marcum Oil Co.}, \textsuperscript{697} S.W.2d \textsuperscript{580}, 581 (Mo. Ct. App. 1985) (stating that “where an injury committed by one against another is continuous or is being constantly repeated, so that plaintiff’s remedy at law requires the bringing of successive actions, that remedy is inadequate”).

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3. *Intrusiveness of Attachment*

The word attachment, which derives from the Latin term *attingo* and the French term *attacher*, meaning to take or touch, implies seizure.⁹⁶ In fact, virtually all of the state attachment statutes authorize the sheriff to physically seize the defendant's tangible property, whether found in the possession of the defendant or in the possession of a third party.⁹⁷ Most states permit the sheriff to sell the property—before the plaintiff’s claim against the defendant is finally heard on the merits—if the property attached is perishable, likely to depreciate significantly, or is expensive to keep.⁹⁸ Moreover, the sheriff may be authorized to use necessary force to attach the property.⁹⁹ Although the attachment of real property is constructive,¹⁰⁰ the attachment lien nevertheless encumbers the property, affects the defendant's credit rat-

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⁹⁶ *Buckeye Pipe-Line*, 57 N.E. at 448 (citing Hollister v. Goodale, 8 Conn. 332 (1831)).
⁹⁷ See, e.g., CAL. CIV. PROC. CODE §§ 482.080, 488.050, 488.090, 488.335 (West Supp. 1991) (court issuing writ of attachment may also issue an order directing defendant to transfer possession of the property attached to the levying officer; officer may take property into custody if plaintiff has paid officer sum to cover costs of taking and keeping property); D.C. CODE ANN. §§ 16-508, 16-509 (1989 replacement volume) (authorizing attachment of personal property by taking it into officer's possession and custody); FLA. STAT. ANN. §§ 76.13, 76.22 (West 1987) (writ of attachment commands sheriff “to attach and take into custody so much of the lands, tenements, goods, and chattels of the party against whose property the writ is issued as is sufficient to satisfy the debt demanded with costs”; officer attaching property retains custody of it); ILL. ANN. STAT. ch. 110, §§ 4-110, 4-119 (Smith-Hurd 1983 & Supp. 1991) (property “shall be . . . attached in the possession of the officer”; officer “shall take and retain the custody and possession of the property attached”); N.Y. CIV. PRAC. L. & R. §§ 6214(c), 6215 (McKinney 1980) (personal property or debt is attached by serving order of attachment on defendant or garnishee; person served transfers property into actual custody of sheriff or pays debts, upon maturity, to sheriff; levy by seizure, as opposed to service, is an alternative).
¹⁰⁰ See, e.g., ALASKA STAT. § 09.40.050 (1991) (peace officer files a certificate with recorder of the recording district in which the real property is situated and a lien in plaintiff's favor attaches to the property); COLO. R. CIV. P. 102(h) (real property is attached by filing copy of the writ with recorder of the county); FLA. STAT. ANN. § 76.16 (West 1987) (when real property is attached, written notice of levy is filed with clerk of the circuit court for the county in which the property is located).
ing and may even place her mortgage in technical default.\textsuperscript{101} Thus, attachment deprives the defendant of possession and use of her personal property as well as unencumbered title to her real estate. The severity of these deprivations has caused some commentators and courts to note that an attachment order dramatically changes the bargaining power between plaintiff and defendant, giving the plaintiff substantial leverage over the defendant.\textsuperscript{102}

4. \textit{Creation of Attachment Lien}

If the goal of the prejudgment remedy is to preserve the status quo—to prevent the defendant from hiding or transferring assets with fraudulent intent—but otherwise not to give the plaintiff any interest in defendant's property until final judgment, the attachment order is not well-tailored to meet this goal. An attachment order actually improves the plaintiff’s position in the event that the defendant’s assets are subject to competing claims, both within and outside the bankruptcy setting.\textsuperscript{103}

During the pendency of most tort cases and many contract cases, the plaintiff has no security interest in any of the defendant's property. As an unsecured creditor, she is subordinate to claimants who obtain a lien (by agreement, statute or judicial process) before she can enforce her judgment against the defendant’s property. In a bankruptcy proceeding, unless the unsecured creditor falls into one of the priority

\textsuperscript{101}. Connecticut v. Doehr, 111 S. Ct. 2105, 2113 (1991) (noting that “[a]ttachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause”).

\textsuperscript{102}. See, e.g., Doehr, 111 S. Ct. at 2118 (commenting on “the use of attachments as a tactical device to pressure an opponent to capitulate”); DAVID G. EPSTEIN, DEBTOR-CREDITOR LAW IN A NUTSHELL 24 (4th ed. 1991) (listing “leverage” as fourth advantage that attachment provides creditor; “[b]y directing the sheriff to levy on property essential to the defendant/debtor, the creditor greatly strengthens its bargaining position. Deprivation of property used daily or essential to a business may induce the debtor to pay even if the claim is of questionable validity.”); Barry L. Zaretsky, Attachment Without Seizure: A Proposal for a New Creditors’ Remedy, 1978 U. ILL. L.F. 819, 825, 837 (noting that “[a]ttachment also provides creditors with a strong leverage device for inducing debtors to settle . . . ”); Dean Gloster, Comment, Abuse of Process and Attachment: Toward a Balance of Power, 30 UCLA L. REV. 1218, 1218-19 (1983) (noting that “[t]he settlement leverage created by the seizure of a debtor’s assets allows for significant creditor abuse”).

\textsuperscript{103}. See Zaretsky, supra note 102, at 825 (identifying, as one of the benefits of prejudgment attachment, that a creditor may, “prior to judgment, . . . obtain absolute security for the satisfaction of an eventual judgment”).

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classes, she is the low person on the totem pole when the defendant's assets are distributed.

If, however, the plaintiff obtains a prejudgment attachment against a defendant, she acquires an attachment lien in the attached property. Her attachment lien gives her priority over unsecured creditors and claimants who obtain liens on the same property that were created or perfected later than the attachment. Because this attachment lien also constitutes a "judicial lien" in a bankruptcy proceeding, the plaintiff is treated as a secured creditor with a substantially

104. Section 507 of the Bankruptcy Code identifies certain expenses and claims that have priority, including administrative expenses of preserving the estate, unsecured claims for wages or contributions to employee benefit plans, and unsecured claims for certain taxes. 11 U.S.C. § 507 (1988).


106. Many states have statutory provisions that detail when the attachment lien attaches. See, e.g., CAL. CIV. PROC. CODE § 488.500 (West Supp. 1991) (the levy of writ of attachment creates an attachment lien); TEX. CIV. PRAC. & REM. CODE ANN. § 61.061 (West 1986) ("an executed writ of attachment creates a lien"); VA. CODE ANN. § 8.01-557 (Michie 1984) ("the plaintiff shall have a lien from the time of the levying of such attachment").

In early England, on the other hand, the foreign attachment "created no security interest such as [would] survive the bankruptcy of the defendant prior to execution under the Custom of London." Levy, supra note 53, at 412.

107. THOMAS S. CRANDALL et al., DEBTOR-CREDITOR LAW MANUAL ¶ 6.04[1][f] (1985) (noting that "[t]he property subject to the lien serves as security for the judgment . . . . From a priority standpoint, interests obtained by third parties subsequent to the acquisition of the attachment lien are usually subordinate to the attaching creditor's lien due to the standard priority rule of 'first in time, first in right.'"); 6 THEODORE EISENBERG et al., DEBTOR-CREDITOR LAW ¶ 26.02[D][2] (1990) (stating that "ordinarily, a prior valid lien, one that is 'first in time' regarding other liens, gives a prior legal right which is entitled to prior satisfaction out of the property affected"); MYERS, supra note 99, at 248 (stating that "attachment . . . becomes an attachment lien from the time of the levy of the writ and priority as between attachment liens and other liens or claims is determined by priority in time"). Under Article 9 of the Uniform Commercial Code, a creditor with an attachment lien has priority over a secured party if the lien arises prior to the perfection of the security interest. See U.C.C. § 9-301(1)(b); ARNOLD B. COHEN, BANKRUPTCY, SECURED TRANSACTIONS AND OTHER DEBTOR-CREDITOR MATTERS ¶¶ 21-601 n.9, 21-607.1 n.1, 21-608.21 (1981).

108. The term "judicial lien" is defined in the Bankruptcy Code as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(36) (Supp. 1991). A prejudgment attachment creates a judicial lien within the meaning of § 101. See, e.g., In re Coston, 65 B.R. 224, 226 (Bankr. D.N.M. 1986) (holding that "the lien acquired as a result of the attachment by the creditor is a judicial lien, as defined in § 101 . . . . "); In re Blondheim Modular Mfg., 65 B.R. 856, 865 (Bankr. D.N.H. 1986) (holding that creditor "had a valid and effective prejudgment attachment lien on the debtor's personal property . . . and . . . is thus a secured creditor in the instant bankruptcy proceeding . . . . "); In re McNeely, 51 B.R. 816, 819 (Bankr. D. Utah 1985) (noting that "the lien acquired by attachment is a vested interest of the attaching creditor, which affords specific security for the satisfaction of the debt" and that the term "judicial lien" in § 101 "encompasses a lien established by attachment or garnishment"); In re Eichorn, 11 B.R. 81, 82 (Bankr. D. Mass. 1981) (holding that an
improved position on the totem pole of claims when distributions are made in bankruptcy.\textsuperscript{109}

Because the attachment lien benefits the plaintiff vis-à-vis other creditors of the defendant and because these other creditors cannot obtain superior liens after the fact, they may feel constrained to protect themselves by forcing the debtor into involuntary bankruptcy.\textsuperscript{110} In fact, they have incentive to do so promptly, because they may be able to have the attachment lien avoided if they file the bankruptcy petition within 90 days of the levy on the attachment order.\textsuperscript{111} Thus, even if the plaintiff seeks an attachment order for the sole purpose of preventing dissipation, she may unwittingly alarm the defendant’s other creditors and ultimately, albeit indirectly, force the defendant into bankruptcy.

5. Direct Effect on Third Parties

An attachment order not only indirectly affects the rights and actions of third-party creditors as a practical matter, but it may directly affect the interests of other third parties by requiring them to

attachment is a “transfer,” which would “enable the creditor to be a secured creditor rather than an unsecured creditor . . . .”).

Because the attachment typically is obtained under state law, the creditor’s “secured” status in the bankruptcy proceeding depends initially on whether she has a valid attachment under state law. COHEN, supra note 107, at ¶ 21-100; GEORGE M. TREISTER et al., FUNDAMENTALS OF BANKRUPTCY LAW § 6.03 (2d ed. 1988).

109. See cases cited supra note 108; see also COHEN, supra note 107, ¶ 21-400, at 335; LEBOWITZ, supra note 105, at 18. In fact, if the amount of the plaintiff’s claim is less than the value of the property securing it, the plaintiff may even obtain interest on the claim (unless the lien can be avoided). 11 U.S.C. § 506(b) (1988 & Supp. 1991).

110. EPSTEIN, supra note 102, at 26; Zaretzky, supra note 102, at 835 (noting that “[t]hose creditors who cannot get priority will have incentive to force the debtor into involuntary bankruptcy, so that the trustee in bankruptcy can invalidate some or all of the prior liens and distribute the assets pro rata among creditors”). \textit{But see infra} note 171.

111. The trustee in bankruptcy’s authority to avoid transfers by the debtor on account of an antecedent debt made while the debtor was insolvent within 90 days of the filing of the petition (or within one year if the creditor was an insider), 11 U.S.C. § 547(b) (1988 & Supp. 1991), includes the authority to avoid attachment liens obtained during that period. \textit{See}, e.g., \textit{In re} Corporacion de Servicios Medico-Hospitalarios de Fajardo, 98 B.R. 639, 642 (Bankr. D.P.R. 1989) (holding that attachment of funds could be avoided in bankruptcy as a preferential transfer); \textit{In re} Coastal Fisheries, Inc., 57 B.R. 657 (Bankr. D. Mass. 1986) (holding that attachment of real estate could be avoided); \textit{In re} Eichorn, 11 B.R. 81 (Bankr. D. Mass. 1981) (same). Thus, even a plaintiff who has obtained an attachment under state law may lose her secured status in the bankruptcy. \textit{See generally} 2 DANIEL R. COWANS, COWANS BANKRUPTCY LAW AND PRACTICE §§ 10.7, 10.8 (1989) (outlining trustee’s power to avoid preferences under § 547); COHEN, supra note 107, ¶ 22-206.4 (same); Mussman & Riesenfeld, supra note 53 (arguing that party obtaining writ of garnishment should be able to retain priority over other creditors in bankruptcy proceeding if service of garnishment summons was made four months before the filing of the petition).
Preliminary Injunctions

participate in the litigation as third-party garnishees. Most state attachment statutes contain special provisions for attaching the defendant's property or credits in the hands of a third-party garnishee. Although these provisions vary, they typically recognize that the garnishee may deny that the property in her hands belongs to the defendant or that she owes the defendant a debt. Thus, the statutes adopt often detailed procedures for resolving these issues before compelling the garnishee to relinquish the property in question.

As a means of preventing active tertiary harm to the plaintiff, these garnishment provisions are overbroad and unduly cumbersome. They fail to distinguish between third parties who are in complicity with a defendant attempting to avoid a judgment and totally innocent third parties. Garnishment provisions thus permit a plaintiff to force an innocent third party into the lawsuit and require the third party to defend against a claim the defendant might not have brought against her. Although this effect on innocent third parties may be justified once the plaintiff has reduced her claim to judgment (at least then we can be sure of the merits of the plaintiff's claim against the defendant), before then it seems like a rather singleminded and harsh means of reducing the plaintiff's risk of tertiary harm at the expense of innocent third parties.

III. THE PRELIMINARY INJUNCTION AND ITS EFFICACY IN PREVENTING TERTIARY HARM

Given the many problems with prejudgment attachment as a means of preventing tertiary harm, courts should consider alternative reme-


113. See, e.g., Fla. Stat. Ann. §§ 77.04, 77.07 (West 1987) (requiring garnishee to answer the writ, and permitting garnishee to move to dissolve the writ; providing for trial of disputed issues of fact); Mo. Ann. Stat. §§ 525.130, 525.140, 525.180, 525.190 (Vernon Supp. 1991) (permitting discovery against garnishee; requiring garnishee to file answer; permitting plaintiff to except or deny the garnishee's answer; authorizing trial of disputed issues); N.C. Gen. Stat. §§ 1-440.23, 1-440.28, 1-440.29 (1983) (requiring garnishee to file answer; permitting garnishee to assert lien or other interest in property; authorizing trial of disputed issues); Ohio Rev. Code Ann. §§ 2715.09.1, 2715.13, 2715.29 (Anderson Supp. 1990) (requiring garnishee to file answer; permitting a “special examination” of the garnishee; requiring garnishee to answer questions under oath); Tex. R. Civ. P. Ann. R. 664a, 665, 666 (West 1991) (permitting garnishee to move to dissolve the writ; requiring that garnishee's answer be under oath; permitting discharge of garnishee).

This Article advocates the use of preliminary injunctions to bar the defendant from dissipating assets during the pendency of the action.

In deciding whether to grant preliminary injunctive relief in any context, courts typically require the plaintiff to satisfy four criteria: that she is likely to succeed on the merits of her claim; that she will suffer irreparable harm if preliminary relief is denied; that this harm outweighs the harm the defendant will suffer if the preliminary injunction is granted; and that the public interest will be furthered (or at least not harmed) by the grant of the preliminary injunction.115 As this section of the Article will demonstrate, a plaintiff who seeks money damages at trial may satisfy these criteria if the defendant has or is about to dissipate assets in an effort to frustrate a future money judgment. If, as Professors Wright and Miller have suggested, "the most compelling reason in favor of entering [a preliminary injunction] is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act,"116 then the case in favor of preliminary injunctions to enjoin the dissipation of assets is compelling indeed.117

A. Likelihood of Success on the Merits

A plaintiff seeking money damages as her final remedy should have no greater difficulty demonstrating a likelihood of success on the merits than a plaintiff who seeks the kind of ultimate relief that, under current jurisprudence, entitles her to a preliminary injunction freezing assets.118 Thus, while trial courts may (and should) decline to grant

115. DOBBS, supra note 7, at 108–09; Susan H. Black, A New Look at Preliminary Injunctions: Can Principles From the Past Offer Any Guidelines to Decisionmakers in the Future, 36 ALA. L. REV. 1, 26 (1984); Arthur D. Wolf, Preliminary Injunctions: the Varying Standards, 7 W. NEW ENG. L. REV. 173, 182 (1984). Often courts will balance the four factors, so that a stronger showing on one prong may compensate for a weaker showing on another. Black, supra, at 30; see also LAFCOCK, supra note 4, at 118–23 (discussing different formulations of the standard).

116. 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2947, at 424 (1973); accord Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986) (noting that "[i]n issuing a preliminary injunction, a court is primarily attempting to preserve the power to render a meaningful decision on the merits"); Placid Oil Co. v. United States Dept of the Interior, 491 F. Supp. 895, 903 (N.D. Tex. 1980) (noting that "a Federal District Court may issue a preliminary injunction . . . to preserve the Court's power to render a meaningful decision after a trial on the merits").

117. See, e.g., USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 99 (6th Cir. 1982) (noting that "[t]he harm that the district court sought to prevent by means of the injunction was the dissipation and concealment of defendants' assets that would render the litigation meaningless").

118. Accord Wasserman, supra note 10, at 636.
interim equitable relief to plaintiffs with weak claims, there is no a priori reason why a plaintiff seeking money damages should be unable to satisfy the “likelihood of success on the merits” requirement for preliminary injunctive relief.

B. Irreparable Harm

By necessity, courts make decisions regarding requests for preliminary injunctions and other interim relief on less than full information. Thus, when a plaintiff comes into court seeking interim relief and alleges that she will suffer harm during the pendency of the action, the court must inquire into both the likelihood that the harm will occur, and the nature of the harm the plaintiff will suffer.120

A plaintiff’s unsubstantiated allegation that a defendant is about to dissipate assets will be insufficient to justify issuance of a preliminary injunction. The plaintiff will have to offer some proof that a genuine risk of such dissipation exists.121 But it will be difficult, if not impossible, for the plaintiff to obtain direct evidence of fraudulent intent on the part of the defendant. Thus, courts will have to infer an intent to dissipate assets from other actions by or characteristics of the defendant.

In the case three class of cases referred to in the Introduction and in other cases in which courts have granted preliminary injunctions to freeze assets, the courts have based their finding of irreparable harm on evidence that the defendant was a foreigner with few ties to the United States,122 that the defendant refused to disclose the location of

119. For a thorough discussion of the irreparable injury rule, the argument that the rule does not control most cases in which specific relief is sought, and an explanation of the distinctive role the irreparable injury requirement plays in the context of preliminary injunctions, see Laycock, supra note 4, at 110–32; Douglas Laycock, The Death of the Irreparable Injury Rule, 103 Harv. L. Rev. 688, 728–32 (1990).

120. See, e.g., 11 Wright & Miller, supra note 116, § 2948 (stating that an applicant must demonstrate that she “is likely to suffer irreparable harm” and that she has no “adequate alternative remedy in the form of money damages or other relief”) (emphasis added).

121. Id. (stating that “[t]here must be a likelihood that irreparable harm will occur. Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant.”).

122. See, e.g., United States v. First Nat’l City Bank, 379 U.S. 378, 385 (1965) (upholding authority to issue preliminary injunction; “[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.”); USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 98 (6th Cir. 1982) (finding irreparable harm given “that defendant . . . has no ties to the United States except the property and assets held by the defendant companies, companies that he owns or controls”); International Controls Corp. v. Vesco, 490 F.2d 1334, 1354 (2d Cir. 1974) (enjoining removal of yacht from jurisdiction in light of fact that defendants were
her assets;\textsuperscript{123} that she had engaged in prior questionable or fraudulent dealings;\textsuperscript{124} that the assets in question were the product of wrongdoing;\textsuperscript{125} that the defendant was insolvent and threatened with multiple lawsuits;\textsuperscript{126} or that the defendant had actually announced a plan to sell or transfer assets and to distribute the proceeds to others without making adequate provision for the plaintiff and other creditors.\textsuperscript{127} In Eng-

\begin{quote}
"effectively immunized from execution because they both are beyond the reach of the court, enjoying the protection of the Bahamanian government").
\end{quote}

\textsuperscript{123} See, e.g., EBSCO Indus., Inc. v. Lilly, 840 F.2d 333, 336 (6th Cir.) (affirming grant of preliminary injunction on showing that "the defendant had taken specific steps to conceal assets and had refused to disclose what assets he has or where they are located"), cert. denied, 488 U.S. 825 (1988).

\textsuperscript{124} See, e.g., id. at 336 (affirming grant of preliminary injunction on showing that "the defendant had taken specific steps to conceal assets"); \textit{In re Feit & Drexler, Inc.,} 760 F.2d 406, 416 (2d Cir. 1985) (upholding preliminary injunction on basis of finding that defendant had engaged in numerous and substantial efforts to hide and secrete assets); \textit{USACO Coal,} 689 F.2d at 98 (finding risk of dissipation given defendant's "previous questionable dealings in matters connected to the present lawsuit"); Productos Carníc, S.A. v. Central Am. Beef & Seafood Trading Co., 621 F.2d 683, 686 (5th Cir. 1980) (finding irreparable harm given that defendant "once attempted to transfer the beef [in issue] to a fictitious trading company, that [defendant] may have altered documents while the beef was in San Salvador, and that [a] bank account in Ft. Lauderdale, Florida, was closed and over $300,000 withdrawn"); American Sav. Bank v. Cheshire Management Co., 693 F. Supp. 42, 49 (S.D.N.Y. 1988) (granting preliminary injunction given the likelihood that defendant had converted property in which plaintiff had an interest); Federal Deposit Ins. Corp. v. Antonio, 649 F. Supp. 1352, 1355 (D. Colo. 1986) (granting preliminary injunction in light of defendant's "apparently ... systematic effort to hide his assets in secret bank accounts," to obtain a sham divorce from his wife, and then to convey assets to her); Mishkin v. Kenney & Branisel, Inc., 609 F. Supp. 1254, 1256 (S.D.N.Y. 1985) (noting that defendants' "past fraudulent conduct and their current actions indicate an intent to defeat and defraud the rights of ... its creditors").

\textsuperscript{125} See, e.g., Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 562 (5th Cir. 1987) (affirming authority to fashion preliminary equitable remedy "where the evidence strongly indicates that the assets were ill-gotten gains at the expense of an interest of the public protected by law"); \textit{Antonio,} 649 F. Supp. at 1355 (granting preliminary injunction in light of defendant's "central role in the heist money scheme").

\textsuperscript{126} See, e.g., Deckert v. Independence Shares Corp., 311 U.S. 282, 290 (1940) (upholding preliminary injunction issued on basis of "allegations that [defendant] was insolvent and its assets in danger of dissipation or depletion"); Taxpayers Against Fraud v. Link Flight Simulation Corp., 722 F. Supp. 1248, 1255 (D. Md. 1989) (noting that "Singer is threatened by [many] lawsuits, preferences to creditors[,] . . . and its assets are in danger of dissipation and depletion"); \textit{American Sav. Bank,} 693 F. Supp. at 49 (granting preliminary injunction "[g]iven the company's troubled financial state" and its past questionable dealings); Fleet Nat'l Bank v. Rapid Processing Co., 643 F. Supp. 1065, 1066 (D. Mass. 1986) (granting preliminary injunction in light of plaintiffs' "claim that [defendants] are insolvent and their assets in danger of dissipation" and contested proof regarding the defendants' financial status); Atlantic Wool Combing Co. v. Fibre Corp., 306 F. Supp. 69, 71 (D.R.I. 1969) (granting preliminary injunction in light of proof "that the defendant is insolvent and that the plaintiff may be unable to recover damages from it if this Court should issue a final decree in its favor").

\textsuperscript{127} See, e.g., Fechter v. HMW Indus., Inc., 879 F.2d 1111, 1121 (3d Cir. 1989) (granting preliminary injunction in light of proof that assets in issue had already been "advanced" to the company's parent corporation, and that the parent could not "trace the funds to a single account
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land, where preliminary injunctions of this type are more readily available, courts consider evidence regarding the defendant’s character, often gleaned from facts about the defendant’s business, its domicile, the location of its known assets, and the circumstances in which the underlying dispute arose.

If, on the basis of such evidence, the court concludes that the defendant is likely to dissipate assets, it must then inquire into the nature of the harm the plaintiff will suffer as a result of this dissipation. If the harm would be compensable with money at the conclusion of the trial or could be prevented by a final remedy, the court need not “run the risk of making an erroneous decision based on less than full information at a preliminary hearing.” Only if the plaintiff’s injury would be “irreparable”—only if it is “of a peculiar nature, so that compensation in money cannot atone for it”—should the court run the risk of an erroneous interim decision and grant preliminary injunctive relief.

or demonstrate the continued existence of the surplus”); Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 52 (1st Cir. 1986) (affirming grant of preliminary injunction, given findings that defendant “was in the process of winding down after selling the bulk of its assets, that it had failed to provide adequate assurances to alleviate [plaintiff’s] concerns, and that it could at any time make itself judgment proof”); In re Uranium Antitrust Litig., 617 F.2d 1248, 1259 (7th Cir. 1980) (affirming preliminary injunction enjoining defendants against whom a default judgment had been rendered from transferring assets outside the country; one defendant already had “instructed its American subsidiaries to transfer their assets to Canada”); Taxpayers Against Fraud, 722 F. Supp. at 1255 (noting that “Singer’s current management has engaged in a calculated and drastic process of depletion of the corporation’s assets, and has evinced no intention to maintain the corporation as an ongoing business enterprise”); In re Poole, 15 B.R. 422, 433 (Bankr. N.D. Ohio 1981) (granting preliminary injunction on showing that principal asset was the subject of an option to purchase, and that if sold, the proceeds might be dissipated); Michael-Curry Cos. v. Knutson Shareholders Liquidating Trust, 423 N.W.2d 407, 409 (Minn. App. 1988) (reversing denial of preliminary injunction on showing that “[i]f the trustees distribute assets, pursuant to the express trust purpose of liquidation, any judgment against the Trust would be impossible to collect”).

See infra part V.B.

See infra notes 372–74 and accompanying text.

Wasserman, supra note 10, at 638 (citing John Leubsdorf, The Standard for Preliminary Injunctions, 91 HARV. L. REV. 525, 551–52 (1978)); accord Laycock, supra note 119, at 691–92 (stating that “denying relief at the preliminary stage protects defendant’s right to a full hearing, and a stringent variation of the irreparable injury rule lets the court openly balance the risks to each side”).


See Laycock, supra note 119, at 728–31 (noting that “[t]he court . . . awarding preliminary relief . . . must act without a full trial, sometimes with only sketchy motion papers
The question, then, is whether active tertiary harm, or the harm the plaintiff will suffer as a result of actions that will frustrate her ability to collect immediately on her judgment, would be compensable at the conclusion of the trial or whether it is irreparable. This Article will address the irreparability of permanent tertiary harm first, and then temporary tertiary harm.

Depending upon the peculiar facts of the cases, courts will have differing degrees of difficulty in determining, at the time the preliminary relief is sought, whether the threatened tertiary harm will be permanent or temporary. Assume, for example, that a defendant benignly announces an intention to seek a stay of any judgment against her pending appeal. In anticipation of both entry of a judgment and the defendant’s application for a stay pending appeal, the plaintiff theoretically could seek a preliminary injunction to enjoin the defendant from seeking a stay, which would cause her tertiary harm. Although this example is highly improbable, it illustrates the ease with which a court could characterize the anticipated tertiary harm as temporary: the plaintiff would suffer harm during the pendency of the appeal in that she would not be able to collect immediately on her judgment, but would probably be able to recover eventually (assuming her judgment is affirmed).

If, on the other hand, the defendant is about to transfer substantial assets to a third party without adequate consideration, the characterization of the harm will be less obvious. It will be difficult to tell at that time whether the defendant will retake possession of the assets at a later date, will acquire other assets subject to levy to satisfy the judgment and affidavits to guide its decision. . . . Acting without a full presentation from either side and without time for reflection, the court is more likely to err; thus, at the preliminary injunction stage, “the only injury that counts is injury that cannot be prevented after a more complete hearing at the next stage of the litigation”; even injury that would be considered “irreparable” if plaintiff were seeking permanent relief may not be deemed “severe enough to justify a preliminary injunction in light of the costs to defendants and the uncertain probability of success on the merits”).

133. See supra note 30.

134. In considering requests for stays of judgments pending appeal, appellate courts typically consider the harm the stay will cause to the appellee. See, e.g., United States v. Baylor Univ. Medical Ctr., 711 F.2d 38, 39 (5th Cir. 1983) (stating that in determining whether to stay a district court order pending appeal, the appellate court should consider “whether the granting of the stay would substantially harm the other parties”), cert. denied, 469 U.S. 1189 (1985); Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (stating that a court considering an application for a stay pending appeal should consider whether “the issuance of a stay [would] substantially harm other parties interested in the proceedings”).

135. Courts may condition the grant of the stay upon the posting of a supersedeas bond, which protects the plaintiff from tertiary harm. See supra note 31.
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...ment, or will remain judgment-proof for an indefinite period. Given that the nature and duration of the tertiary harm will be within the knowledge and control of the defendant, it would seem reasonable in these cases for a court to adopt a rebuttable presumption of permanent tertiary harm once the plaintiff establishes that the defendant is about to take action that threatens active, potentially permanent, tertiary harm.136 Such a presumption (and the proof it elicits from defendants) should aid courts in differentiating between permanent and temporary tertiary harm and enable them to consider the question of irreparability.

Permanent tertiary harm is, by definition, irreparable: regardless of whether the plaintiff desperately needs the money for subsistence or not, no remedy, at law or equity, will ever compensate her for the permanent loss of her right to recover.137 Thus, in actions by the government to collect back taxes where the government feared the defendant would dissipate its assets unless restrained;138 in actions to enjoin governmental conduct, where later suits for money damages caused by such conduct would be barred by sovereign immunity;139 in an action


137. Accord Laycock, supra note 119, at 716 (noting that “[d]amages are no remedy at all if they cannot be collected, and most courts sensibly conclude that a damage judgment against an insolvent defendant is an inadequate remedy”); Rules of the Supreme Court 1965 (O.29, r.1), note 29/1/3 in 1 SUPREME COURT PRACTICE (1991) (Eng.) (stating that “damages will seldom be a sufficient remedy if the wrongdoer is unlikely to be able to pay them”).

138. United States v. Ross, 302 F.2d 831, 833–34 (2d Cir. 1962) (in action by government to collect back taxes, upholding district court order enjoining transfer of property and appointing receiver); United States v. Omar, S.A., 210 F. Supp. 773, 774–75 (S.D.N.Y. 1962) (in action by government to collect back taxes, the government claimed that “disposition of the . . . assets might make its lawful rights therein unenforceable and that it would be irreparably injured by removal of any such assets outside the power of the court”; holding that “[s]uch injury clearly authorizes the court to exercise its equitable power”, the court granted a preliminary injunction to enjoin garnishee banks and brokerage firms from transferring defendant’s property pendente lite), rev’d sub nom. United States v. First Nat’l City Bank, 321 F.2d 14 (2d Cir. 1963) and 325 F.2d 1020 (2d Cir. 1964) (en banc) (per curiam), rev’d, 379 U.S. 378 (1965). See infra part IV.A.3.

139. Ohio Oil Co. v. Conway, 279 U.S. 813, 815 (1929) (per curiam) (holding that plaintiff, who sought preliminary injunction to enjoin enforcement of tax statute, demonstrated irreparable harm where no remedy existed for plaintiff to recoup taxes paid if statute were later declared invalid); Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1527 (D.C. Cir. 1984) (en banc) (holding that a plaintiff who states a claim for money damages against the government but who may not be able to collect because of governmental immunity or who might receive inadequate compensation under the Tucker Act is entitled to injunctive relief; stating that “the gross inadequacy of money damages could justify injunctive relief when money alone would not constitute just compensation”), vacated mem., 471 U.S. 1113 (1985), on remand, 788 F.2d 762 (D.C. Cir. 1986) (per curiam); Placid Oil Co. v. United States Dep’t of the Interior, 491 F. Supp. 895, 906 (N.D. Tex. 1980) (noting that costs plaintiffs would have to incur to comply with
under ERISA against a profit-sharing plan that was in the process of distributing all its assets;\textsuperscript{140} in an action against a cooperative that, unless restrained, would distribute all its assets to its members;\textsuperscript{141} and in other actions in which the plaintiff established a genuine risk that the defendant would dissipate its assets in an effort to frustrate the judgment or otherwise would be unable to satisfy the plaintiff’s judgment,\textsuperscript{142} the courts have held that the permanent loss of money is

\textsuperscript{140} Foltz v. U.S. News & World Report, 760 F.2d 1300 (D.C. Cir. 1985). In an action by former employees against a profit-sharing plan and others, where the plan intended to distribute all its assets to current employees, the D.C. Circuit held that:

\begin{quote}
It is clear beyond cavil that any cause of action under ERISA against the Plan... would forever be lost. Irrevocable loss of a cause of action created by Congress for the remedial and humane purpose of protecting beneficiaries and participants of ERISA-covered plans could, in our judgment, well work irreparable injury warranting the fashioning of equitable relief under the well-settled standards articulated by this court. Id. at 1308.
\end{quote}

\textsuperscript{141} Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986) (in action by cooperative to enjoin sale by member of its assets to a private utility, noting that unless preliminary injunction issued to prevent sale, defendant would distribute proceeds of sale to its members and would have no assets with which to satisfy a money judgment; stating that “[d]ifficulty in collecting a damage judgment may support a claim of irreparable injury”); see also Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 52-53 (1st Cir. 1986) (concluding that plaintiff had established irreparable harm by demonstrating that defendant was “winding down” its affairs and distributing its assets, and that “no assurances were given that [defendant] would be able to pay a... judgment”); Michael-Curry Cos. v. Knutson Shareholders Liquidating Trust, 423 N.W.2d 407, 409-10 (Minn. Ct. App. 1988) (noting that “inability to satisfy a monetary judgment has been recognized as irreparable harm sufficient to justify injunctive relief” and that “difficulty in collecting a judgment is sufficient to establish irreparable injury”; reversing denial of preliminary injunction to enjoin trust from distributing its assets to beneficiaries where trust would have no remaining assets with which to satisfy any judgment plaintiff might obtain against it for indemnity).

\textsuperscript{142} Deckert v. Independence Shares Corp., 311 U.S. 282, 290 (1940) (in action in which defendant “was insolvent and its assets in danger of dissipation or depletion,” holding that the remedy against it, without preliminary relief to secure assets, would be “inadequate”); Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 206 (3d Cir. 1990) (concluding that “the unsatisfiability of a money judgment can constitute irreparable injury”); Fechter v. HMW Indus., Inc., 879 F.2d 1111, 1121 (3d Cir. 1989) (concluding that plaintiff employees, who sought to recover surplus benefits of terminated pension plan under ERISA, faced irreparable harm where employer’s parent company, to whom surplus had been advanced by employer, could not “trace the funds to a single account or demonstrate the continued existence of the surplus”); In re Felt & Drxler, Inc., 760 F.2d 406, 416 (2d Cir. 1985) (noting that “even where the ultimate relief sought is money damages, federal courts have found preliminary injunctions appropriate where it has been shown that the defendant ‘intended to frustrate any judgment on the merits’ by
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irreparable. Thus, in cases in which the plaintiff sues to collect money damages and can demonstrate that the defendant is about to dissipate her assets to frustrate the potential money judgment, the plaintiff’s active permanent tertiary harm should be considered irreparable.143

The irreparability of temporary tertiary harm is a more difficult question because it requires consideration of two variables: the time lag between judgment and satisfaction (a guesstimate ex ante), and the severity of the plaintiff’s need. Assuming that temporary tertiary

143. Not all courts have agreed. Some courts have taken the position that the adequacy of the money judgment sought is gauged not by the likelihood of its satisfiability, but by its mere availability. As long as a money judgment is theoretically available, no irreparable harm exists and no injunctive relief can issue. See, e.g., Enterprise Int’l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 474–75 (5th Cir. 1985) (reversing order that granted preliminary injunction to enjoin party from demanding payment on a letter of credit and to prohibit bank from honoring demand; notwithstanding the district court’s finding that “Ecuador is not an impartial forum and that [plaintiff] would ‘encounter significant resistance to a recovery of judgment against the Ecuadorian national oil company,’” concluding that plaintiff had an adequate remedy at law because it could sue in Ecuador to recover payments made on letter of credit); Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 86 (W.D.N.Y. 1982) (stating that “[i]t is questionable whether the sort of harm plaintiff points to—frustration of enforcement of a money judgment—can ever constitute irreparable harm for purposes of preliminary injunctive relief”; declining to preliminarily enjoin defendants in civil RICO action from dissipating assets); Oxford Int’l Bank & Trust, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 374 So. 2d 54, 56 (Fla. Dist. Ct. App. 1979) (rejecting plaintiff’s argument that “it had no adequate remedy at law because the monies allegedly owed to it could not from a practical standpoint be recovered unless the funds were impounded . . . . [T]his confuses the question of the ability to obtain a judgment with the question of the ability to satisfy a judgment.”); cert. dismissed, 383 So. 2d 1199 (Fla. 1980); Stewart v. Maing, 181 So. 370 (Fla. 1938), stating that:

[T]he inadequacy of a remedy at law to produce money is not the test of the applicability of the rule. All remedies, whether at law or in equity, frequently fail to do that; and to make that the test of equity jurisdiction would be substituting the result of a proceeding for the proceeding which is invoked to produce the result. The true test is, could a judgment be obtained in a proceeding at law, and not, would the judgment procure pecuniary compensation.

Id. at 374.

If the plaintiff can prove that the defendant is about to dissipate assets to render herself judgment-proof, it is difficult to see how the potential money judgment will be an adequate remedy for the plaintiff. The author believes the decisions cited above are incorrect to the extent they hold that a money judgment is an adequate remedy regardless of whether the defendant is engaged in conduct designed to render the judgment unenforceable.

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harm will be compensable by an award of post-judgment interest,\textsuperscript{144} if the time lag between judgment and satisfaction is expected to be short and the plaintiff's need is minimal, then post-judgment interest may well be sufficient and the harm should not be considered irreparable. The court should not enjoin the defendant from engaging in conduct on less than full information if failure to do so would result in only minimal harm to the plaintiff, which could be compensated for after the fact.

If, on the other hand, the time lag is expected to be substantial or the plaintiff's need is great, an award of post-judgment interest will not protect against temporary tertiary harm. Thus, even a wealthy plaintiff will suffer increasingly serious temporary tertiary harm as the time lag lengthens if she could obtain a higher rate of return on the money than the statutory rate of post-judgment interest.\textsuperscript{145} More important, if the plaintiff's health or well-being turns on her ability to collect immediately on the judgment—if delay translates into exacerbation of personal injuries, eviction, mortgage foreclosure, or other losses not readily compensable by money—actions that cause even a short delay in collection will result in irreparable tertiary harm. Because courts have deemed such harm irreparable on motions for preliminary injunctions in cases in which plaintiffs have sought permanent injunctions as their final remedy,\textsuperscript{147} courts should treat the identical harm as irreparable in actions for money damages when it arises as tertiary harm.


145. Even if the plaintiff could immediately assign her judgment to a collection agency, she would not receive the full value of the judgment and would suffer some uncompensable tertiary harm. See supra notes 24 and 26.

146. The nature of the plaintiff’s secondary and tertiary harms are likely to be similar. See supra notes 21-22, 26 and accompanying text.

147. See Wasserman, supra note 10, at 639–42 (citing cases to support the argument that threats to health and inability to meet one’s daily needs constitute irreparable harm).
Although the initial characterization of the threatened harm as temporary or permanent may be difficult, and the later effort to gauge the irreparability of temporary tertiary harm may be trying, these decisions should be no more difficult than the decisions courts routinely make in ruling on applications for preliminary injunctions in cases in which the plaintiff seeks permanent injunctive or other equitable relief. Thus, in the case three class of cases described in the Introduction, where a plaintiff brings an equitable action seeking to recover a specific fund of money in the hands of the defendant, courts must assess the likelihood that the defendant will irretrievably dispose of the assets unless restrained. If courts are able to make that assessment in the case three setting, they should be able to make similar assessments in the case four setting.\textsuperscript{148} The ultimate conclusion—that the inability to collect money threatens irreparable harm—should not turn on the nature of the final relief sought.

C. Balance of Hardships

Courts recognize that a preliminary injunction that directs the defendant to take action or restrains the defendant from taking action will most likely harm the defendant.\textsuperscript{149} Thus, courts must consider whether the risk of irreparable harm to the plaintiff if the preliminary injunction does not issue exceeds the risk of harm to the defendant if it does issue. If this “balance of hardships” tips in the plaintiff’s favor and the other requirements for preliminary injunctive relief are met, the court should issue the interim relief notwithstanding the effect it will have on the defendant.

\textsuperscript{148} Some courts have attempted to distinguish between the tertiary harm a plaintiff will suffer if the defendant dissipates her assets and the secondary harm a plaintiff will suffer if the defendant continues to engage in additional primary conduct, which results in the disposition of assets. See, e.g., Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 86 (W.D.N.Y. 1982) (stating that “[i]n the instant case the primary illegality involved has ceased and plaintiff seeks only to recover damages for the injury therefrom to itself”). In other words, they have concluded that a preliminary injunction may issue in the case three class of cases, in which the defendant is dissipating assets to which the plaintiff has an equitable claim, but not in the case four class of cases, in which the defendant is dissipating assets that she will need to satisfy the plaintiff’s money damages claim. In my view, where the conduct is identical (i.e., the defendant is dissipating assets) and the result will be the same (i.e., the plaintiff will not be able to collect on her judgment), the relief should be the same.

\textsuperscript{149} See, e.g., Tri-State Generation & Transmission Ass’n v. Shoshone River Power, Inc., 805 F.2d 351, 356–57 (10th Cir. 1986) (noting that plaintiff “must . . . show that the injury to it if the injunction does not issue outweighs the injury to [defendants] if it does”); Fleet Nat'l Bank v. Rapid Processing Co., 643 F. Supp. 1065, 1067 (D. Mass. 1986) (concluding that “plaintiffs have established that injury to the plaintiffs if the injunction is not granted outweighs any harm which granting injunctive relief would inflict on the defendants”).
A defendant who is restrained from transferring or disposing of assets loses the use of property that is concededly hers until judgment is rendered against her. To the extent a corporate defendant needs the assets to conduct or expand its business, the business may suffer during the pendency of the action. If an individual defendant needs the assets to cover daily living expenses or to pay attorneys’ fees, the harm will be even greater. But it is not this potentially boundless harm that gets balanced against the irreparable harm to the plaintiff; courts consider only the harm that remains after they act to lessen the impact of the injunction on the defendant.

Courts have two primary tools for reducing the risk of harm to the defendant. They can require plaintiffs seeking preliminary injunctions to post a bond “for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.” Although courts occasionally waive the bond requirement in actions brought by poor plaintiffs or public interest plaintiffs, they more typically require a bond to ensure that the defendant will be compensated for any loss suffered as result of an erroneously issued preliminary injunction.

Such compensation may come too late, however, if the defendant needs the assets for subsistence or attorneys’ fees. In these cases, courts can use a second method to prevent harm to the defendant by limiting the scope of the preliminary injunction that issues in the first place. Thus, rather than barring the defendant from making any transfers whatsoever, the court can preliminarily enjoin the defendant

150. See e.g., Connecticut v. Doehr, 111 S. Ct. 2105, 2113 (1991), discussed supra note 101; In re Feit & Drexler, Inc., 760 F.2d 406, 412 (2d Cir. 1985) (concluding that preliminary injunction, which prohibited defendant from transferring or disposing of any of her property, wherever located, caused “serious and irreparable consequences,” which merited immediate review on appeal); West v. Zurhorst, 425 F.2d 919, 920 (2d Cir. 1970) (noting that “[m]aintenance of a lien upon property is not a negligible deprivation”); Commodity Futures Trading Comm’n v. Morgan, Harris & Scott, Ltd., 484 F. Supp. 669, 678 (S.D.N.Y. 1979) (noting that “[f]or a corporate defendant, freezing assets might cause disruption of defendants’ business affairs and, accordingly, threatens the very assets to be available for victims of the illegal actions. For an individual defendant, freezing assets might cause serious personal hardship.”).


153. See, e.g., Dobbs, supra note 30, at 1093 (noting that “bonds are commonly required by statutes whenever a plaintiff seeks a provisional remedy, whether at law or equity”); Calderon, supra note 152, at 132 (noting that “in theory, in federal courts and virtually all state courts applicants for preliminary injunctions who have successfully established all the required elements for equitable relief will nevertheless be denied it if they do not post bonds”).
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only from making transfers outside the ordinary course of business.\textsuperscript{154} Or the court can freeze all assets except those needed for ordinary living expenses or attorneys' fees.\textsuperscript{155} Or it can modify or vacate the injunction if the defendant posts a bond to ensure satisfaction of the plaintiff's expected money judgment.\textsuperscript{156} Exercising this equitable dis-

\textsuperscript{154} See, e.g., Fechter v. HMW Indus., Inc., 879 F.2d 1111, 1115 (3d Cir. 1989) (noting that the district court preliminarily enjoined transfers, conveyances and sales of property "except as necessary in the ordinary course of business").

\textsuperscript{155} See, e.g., Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 565, 566 n.2 (5th Cir. 1987) (concluding that "some kind of an allowance must be made to permit each defendant to pay reasonable attorneys' fees if he is able to show that he cannot pay them from new or exempt assets" and commenting that "allowing a defendant to lose legitimate assets he currently and legitimately possesses [a house] potentially conflicts with the avowed rationale of preliminary injunctions, that is, to preserve the status quo"); Securities & Exch. Comm'n v. Scott, Gorman Muns., Inc., 407 F. Supp. 1383, 1388 (S.D.N.Y. 1975) (preliminarily enjoining defendants from transferring, liquidating or disposing of any personal assets "except for ordinary living expenses").

In the criminal context, federal forfeiture provisions authorize a district court, prior to conviction, to restrain defendants from dissipating assets in their possession allegedly "constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of [a] violation" of specified criminal provisions. See 21 U.S.C.A. §§ 853(a), 853(c) (West Supp. 1991) (authorizing pre-conviction restraining orders to preserve forfeitable property in continuing criminal enterprise (CCE) drug-related prosecutions); 18 U.S.C.A. §§ 1963(a), 1963(d) (West Supp. 1991) (authorizing same in racketeering prosecutions). The Supreme Court has interpreted the CCE forfeiture provisions as authorizing pre-conviction restraining orders even if the defendant needs the assets to pay attorneys' fees, and has upheld the constitutionality of such restraining orders against fifth and sixth amendment challenges. See United States v. Monsanto, 491 U.S. 600 (1989); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989). Relying on the "categorical" language of the forfeiture provisions, the \textit{Monsanto} Court rejected the argument that the provisions should be interpreted as authorizing a "district court to employ 'traditional principles of equity' before restraining a defendant's use of forfeitable assets" and to balance the hardships, including the hardship to the defendant if assets needed to retain an attorney were restrained. \textit{Monsanto}, 491 U.S. at 612–13; accord \textit{Caplin & Drysdale}, 491 U.S. at 622–23. \textit{But see id. at 636–43} (Blackmun, J., dissenting) (arguing that the constitutional issue could have been avoided if the Court had interpreted the forfeiture provisions as excluding assets needed to retain counsel).

This Supreme Court precedent does not undercut the suggestion that district courts issuing preliminary injunctions to freeze assets in civil cases should exclude assets needed by defendants to retain counsel. First, in criminal cases, where the right to counsel is of constitutional dimension, a defendant unable to pay an attorney will be provided a court-appointed attorney. Gideon v. Wainwright, 372 U.S. 335 (1963). In civil cases, on the other hand, a defendant who lacks resources to pay an attorney will go unrepresented (unless she is eligible for Legal Services assistance). Thus, the need to assure the defendant a meaningful opportunity to retain an attorney militates in favor of limiting the scope of preliminary injunctions in the civil context. Second, because the preliminary injunctions in civil cases are the product of equitable balancing and not statutory mandate, the court is not required by statute to freeze all property in the defendant's possession, but may craft an injunction that balances the hardships to both plaintiff and defendant. Third, in criminal cases, the assets subject to forfeiture are the product of alleged criminal wrongdoing; in civil cases, they are often the product of legitimate efforts by the defendant. Thus, the equities in the two situations are quite different.

\textsuperscript{156} See, e.g., Dixon, 835 F.2d at 566 (stating that "[i]f the defendants properly seek modifications, we have suggested the following limitations on the preliminary injunction: . . . the
cretion, courts can accommodate the defendant's basic needs without risking irreparable tertiary harm to the plaintiff. In weighing the balance of hardships, then, courts should balance against the plaintiff's tertiary harm only the residual, temporary harm to the defendant that remains after limiting the scope of the preliminary injunction and requiring the plaintiff to post a bond.

Where the court finds that the plaintiff's tertiary harm will be permanent, the balance of hardships will always tip in her favor. The risk that the plaintiff will obtain a judgment in a specified amount and never be able to collect on it means that she will lose the amount of the judgment plus interest for each year that she is unable to collect. The defendant may be restrained from using the amount of the judgment, but this loss will be both temporary and compensable: the defendant will regain the use of her funds at the conclusion of the action if she prevails on the merits, and will be compensated for her interim loss out of the injunction bond. Assuming that the court does not enjoin the defendant from using funds needed for subsistence, the balance of hardships will always tip in the plaintiff's favor when she faces a risk of permanent tertiary harm.

Where the plaintiff's tertiary harm is expected to be temporary, the balance of hardships will be less susceptible to general rules. Just as the court will have to consider the estimated time lag between judgment and satisfaction and the degree of the plaintiff's need in determining whether the plaintiff's harm will be "irreparable," the court will have to gauge the time lag and the defendant's need in determining the balance of hardships. In cases where the estimated time lag is short and the parties have relatively comparable needs, the court may conclude that the balance of hardships rests in or near equipoise, and should decline to grant the preliminary injunction. If, on the other hand, the time lag is expected to be great and the plaintiff is substantially needier than the defendant, the court should have little difficulty

defendants must have the opportunity to post bond for the entire amounts subject to the freeze"); Canal Auth. v. Callaway, 489 F.2d 567, 578 (5th Cir. 1974) (noting that "the district court has continuing jurisdiction over a preliminary injunction . . . In the exercise of that jurisdiction, the court is authorized to make any changes in the injunction that are equitable in light of subsequent changes in the facts or the law, or for any other good reason"); N.Y. CIV. PRAC. L. & R. § 6314 (McKinney 1980) (stating that "as a condition to granting an order vacating or modifying a preliminary injunction . . . , a court may require the defendant . . . to give an undertaking . . . that the defendant shall pay to the plaintiff any loss sustained by reason of the vacating or modifying order").

157. In these cases, the court may also conclude that the plaintiff's risk of harm is not irreparable. See supra note 144 and accompanying text.
concluding that the balance of hardships tips decidedly in the plaintiff’s favor.

Again, these will not be easy determinations. But the calculus is not very different from the one courts routinely use in deciding whether or not to preliminarily enjoin termination of a distributorship,158 to mandate temporary reinstatement of an employee,159 or otherwise to grant preliminary injunctive relief in actions in which permanent injunctive relief is sought. That the case four parties are fighting over money does not render the balance of hardships any more difficult to weigh; it may actually make it somewhat easier. Thus, in cases in which the plaintiff can establish a risk of permanent tertiary harm or can show that the expected delay between judgment and satisfaction is great and her financial situation is more precarious than the defendant’s, the balance of hardships should tip in her favor and the court should grant a preliminary injunction to freeze the defendant’s assets pending trial if the other requirements for such relief are met.

D. The Public Interest

“Sometimes an order granting or denying a preliminary injunction will have consequences beyond the immediate parties. If so, those interests—the ‘public interest’ if you will—must be reckoned into the weighing process . . . .”160 If a plaintiff obtains a preliminary injunction to freeze the defendant’s assets, the public interest is served in at least six ways. First and most obvious, the preliminary injunction protects the integrity of the judicial process. By reducing the likelihood that the plaintiff’s judgment will be rendered meaningless by the defendant’s efforts to make herself judgment-proof, the preliminary injunction protects the judicial process from fraud and other deceptive behavior. The absence of such a remedy may contribute to public cynicism about the efficacy of the system and enhance the risk that the system will squander its scarce resources trying cases that will never provide compensation to a meritorious plaintiff.

Second, a preliminary injunction to freeze assets reduces whatever incentive the defendant otherwise would have to delay the litigation. If prejudgment interest is not available or is inadequate and no interim relief issues, a defendant has every incentive to delay the litigation because she retains the full use of her property during the pendency of

159. Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988).
the litigation. A preliminary injunction to freeze assets reduces that incentive by limiting some of the uses to which the defendant may put her money. Although it may be less effective in this regard than an award of prejudgment interest or an attachment order, it does give the defendant some incentive to resolve the case expeditiously, thereby increasing judicial economy and efficiency.

Third, to the extent the preliminary injunction issues in lieu of an attachment, it may diminish the "leverage" that the plaintiff otherwise would have over the defendant. Put another way, although the preliminary injunction reduces the defendant's incentive for delay, in many circumstances it does not have as much coercive power as an attachment order. Because a defendant actually loses possession of, and concomitantly many uses of, her property if it is attached, a plaintiff who obtains an attachment order acquires substantially increased bargaining power vis-à-vis the defendant. So empowered, the plaintiff may be able to coerce the defendant into an unfair settlement—a settlement for more than the ordinary present value of the claim.

A preliminary injunction to freeze assets interferes less with the defendant's enjoyment of her property during the pendency of the action. Although such an injunction typically will enjoin the defendant from transferring, hypothecating, or selling her property—and therefore will deprive her of significant property interests—it will not deprive her of the possession and use of her personal property nor affect her title to real estate. Nor will it bar her from incurring ordinary living expenses, paying attorneys' fees, or making transfers in

161. See supra notes 97–101 and accompanying text.
162. See supra note 102 and accompanying text.
163. See supra note 102 and accompanying text; cf. Wasserman, supra note 10, at 624 n.8 and accompanying text.
164. Where the property in issue is a bank account, an attachment of the account and a preliminary injunction barring the defendant from drawing on the account would be equally intrusive.
165. See, e.g., The Tuyuti, [1984] 2 Lloyd's Rep. 51, 56 (Sheen, J.) (noting that there are "many fundamental differences between an injunction, which is an order directed to the owners and master of the ship not to take a ship out of the jurisdiction and an arrest by which the Admiralty Marshal takes custody of the ship"); Goster, supra note 102, at 1245–46 (noting that California offers an alternative to attachment, the temporary protective order, which "merely prohibits transfer of the asset and involves far less severe limitations on the debtor's ability to use the asset") (emphasis added); see also United States v. Musson, 812 F.2d 384, 387 (10th Cir. 1986) (concluding that a restraining order issued in a criminal case, which "prohibited transfers or dispositions of the subject property without notice and permission of the court . . . is far less intrusive than a physical seizure of the subject property").
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the ordinary course of business. Thus, a preliminary injunction that issues in lieu of an attachment order may minimize the reallocation of bargaining power and reduce the likelihood of a coerced or unfair settlement, thereby furthering the public interest in the just resolution of private disputes.

Fourth, a preliminary injunction to freeze assets reduces the likelihood that other creditors of the defendant will rush to file claims against her or even force her into involuntary bankruptcy. Again, this public benefit inures not so much from the issuance of the preliminary injunction per se, but from the forbearance in awarding attachment. If the only avenue the plaintiff has to prevent the defendant from dissipating assets is to obtain an attachment order, the plaintiff may well do so, thereby acquiring a lien on the property so attached. Other creditors of the defendant, who may now start to worry that all of the other creditors will likewise seek to attach property to obtain some kind of priority, will themselves feel constrained to file suit and attach property, or force the defendant into bankruptcy in an effort to defeat the prior claims of the attaching creditors.

The preliminary injunction acts in personam and bars the defendant from disposing of assets, but it does not bind the defendant's property in any way. The injunction does not give the plaintiff a security interest in the defendant's assets, and does not affect the priority of the plaintiff's claim against the defendant vis-à-vis the claims of other creditors. To the extent it affects these other creditors at all, it may

166. See, e.g., cases cited supra note 155; see also supra part III.C. These measures will not eliminate all of the "intrusiveness" of a preliminary injunction. For example, the mere involvement of a court in deciding what expenses constitute "ordinary living expenses" will interfere with the plaintiff's privacy and autonomy. See, e.g., In re McDaniel, 126 B.R. 782 (Bankr. D. Minn. 1991) (refusing to confirm debtors' proposed plan of reorganization because the proposed tithe to their church of $540 per month was not a "reasonably necessary" expense; suggesting that a reduced amount would be permitted); In re Packham, 126 B.R. 603, 608 (Bankr. D. Utah 1991) (concluding that "the tithe proposed by the debtors to the LDS [Latter Day Saints] Church is not reasonably necessary for the maintenance and support of the debtors or their dependents"). Furthermore, a preliminary injunction barring a defendant from selling a valuable piece of real estate in a falling market may be no less "coercive" than an attachment, but at least the court will have the flexibility to permit the defendant to sell the property if she agrees to pay the proceeds into court or post a bond to ensure satisfaction of the plaintiff's potential judgment. See supra note 156 and accompanying text.

167. See supra notes 103 and 106 and accompanying text.

168. See supra notes 110-11 and accompanying text.

169. See, e.g., Delaware Trust Co. v. Partial, 517 A.2d 259, 261 (Del. Ch. 1986) (noting that "issuance of the writ requested [injunction] would, presumably, not itself create a lien on the property subject to the order, as would a garnishment"); Derby & Co. v. Weldon, [1988] 2 W.L.R. 412, 419 (C.A.) (noting that it is not the purpose of the Mareva injunction "to place the plaintiff in the position of a secured creditor"); 3(1) HALSBURY'S LAWS OF ENGLAND § 329 (4th ed. reissue 1989) (noting that "the purpose of the [Mareva injunction] is not to improve the
actually help them by preventing the debtor from dissipating assets.\textsuperscript{170} Thus, to the extent that a preliminary injunction to restrain the dissipation of assets issues in lieu of an attachment order, it reduces the volume of litigation brought by other creditors and may actually spare the defendant from involuntary bankruptcy.\textsuperscript{171}

Fifth, a preliminary injunction to restrain assets is far less likely to affect the rights of innocent third parties who may be in possession of the defendant’s property than a garnishment in aid of prejudgment attachment. When courts employ prejudgment garnishment procedures, they often compel such persons to join the lawsuit to protect their property, and conduct separate hearings to determine the merits of the defendant’s claims against the garnishees.\textsuperscript{172} A preliminary injunction, on the other hand, restrains only defendants, their privies, and those in concert with them to defeat the plaintiff’s claim.\textsuperscript{173} Since no “innocent” persons are restrained, no additional hearings are needed to ensure protection of their rights. Thus, to the extent a preliminary injunction issues in lieu of prejudgment garnishment, it not

\textsuperscript{170} See Laycock, supra note 119, at 716–17 (distinguishing between preliminary orders that require insolvent defendants to perform contracts, which prefer the plaintiff over other creditors of the defendant, and preliminary injunctions that bar “an insolvent from inflicting harm for which he can never pay. An insolvent can obey an order not to commit a threatened tort, and such an injunction will not prefer plaintiff over other creditors.”).

\textsuperscript{171} This argument makes assumptions about how other creditors will respond if the first creditor obtains an attachment order as opposed to a preliminary injunction to freeze assets. These assumptions may be wrong. It is possible, for example, that once the first creditor attaches the defendant’s property and obtains a lien therein, the other creditors will realize the reduced likelihood that they will ever collect against the defendant and will not bother to file claims against her. Likewise, it is possible that if the first creditor obtains a preliminary injunction freezing the defendant’s assets in lieu of the attachment order, the other creditors will then realize that they may be able to collect against the defendant, but only if they beat the first creditor to judgment, so they will have incentives to bring their actions promptly. Although the author believes the assumptions made in the text are more probably correct, she concedes that the creditors’ behavior is an empirical question that is not resolved in this Article.

\textsuperscript{172} See supra notes 112–13 and accompanying text.

\textsuperscript{173} “Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, and their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” Fed. R. Civ. P. 65(d).
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only limits the effect on innocent third parties, but also reduces the complexity of the litigation.174

Finally, a preliminary injunction eliminates the need for duplicative actions in multiple states to protect the plaintiff from tertiary harm. Because the geographic scope of an attachment order is limited to the territory of the state,175 the plaintiff may have to initiate multiple proceedings in the several states in which the defendant has property to attach all of it.176 Unlike attachment, a preliminary injunction

174. Cf. David W. Shenton, Attachments and Other Interim Remedies in Support of Arbitration: The English Courts, 1984 INT'L BUS. LAW. 101, 104. Shenton notes that disobedience to the [Mareva] Order [discussed infra part V.B] involves a committal procedure for contempt of Court under which heavy sanctions, including imprisonment, fines and, in the case of corporations, sequestration of assets, can be imposed upon the contemnor for his disobedience. The procedure has the advantage that third parties within the jurisdiction, having been given notice of the terms of the Order can also be punished for contempt if they act in respect of the Defendant's assets in a manner inconsistent with the Injunction. As the third parties having notice of such Orders are almost invariably respectable corporations, such as banks, brokers or commercial undertakings, they find it more convenient to insure scrupulous observation of the Court's Orders regarding customer's assets in their custody, than to risk what may prove to be expensive legal procedures and possibly draconian punishments for ignoring Court Orders made against their customer.

175. See supra notes 85–94 and accompanying text.

176. See, e.g., EBSCO Indus., Inc. v. Lilly, 840 F.2d 333, 336 (6th Cir.) (finding attachment remedy inadequate because it could not reach assets located outside state and plaintiff would have to initiate attachment proceedings in several states), cert. denied, 488 U.S. 825 (1988); Clark Equip. Co. v. Armstrong Equip. Co., 431 F.2d 54, 57 (5th Cir. 1970) (upholding preliminary injunction to require defendant to assemble and make available to plaintiff collateral, which was located in five states; noting that "no one possessory action would provide an adequate remedy"), cert. denied, 402 U.S. 909 (1971); Wilkerson v. Sullivan, 727 F. Supp. 925, 936 (E.D. Pa. 1989) (stating that "a legal remedy is normally considered inadequate if it would result in a multiplicity of lawsuits"); Northeast Women's Ctr., Inc. v. McMonagle, 665 F. Supp. 1147, 1153 (E.D. Pa. 1987) (in granting permanent injunction, stating that "[t]he legal remedy is inadequate if the plaintiff's injury is a continuing one, where the best available remedy at law would relegate the plaintiff to filing a separate claim for damages each time it is injured anew"); Howell Pipeline Co. v. Terra Resources, Inc., 454 So. 2d 1353, 1357 (Ala. 1984) (affirming grant of preliminary injunction to enjoin defendant from failing to honor contract because in absence of injunction, plaintiff would have to sue monthly for damages); State ex rel. Missouri Highway & Transp. Comm'n v. Marcum Oil Co., 697 S.W.2d 580, 581 (Mo. Ct. App. 1985) (stating that "where an injury committed by one against another is continuous or is being constantly repeated, so that plaintiff's remedy at law requires the bringing of successive actions, that remedy is inadequate").
operates on the person. Both state and federal courts have held that they have authority to enjoin a person from taking, or to require a person to take, action outside the state or district so long as they have personal jurisdiction over the person. Thus, a court can preliminarily enjoin a defendant from dissipating, transferring or hypothecating assets beyond the territory of the court, and can require the

177. See, e.g., Pines v. Tomson, 206 Cal. Rptr. 866, 885 (Ct. App. 1984) (upholding permanent injunction that required defendants to accept advertising for Christian Yellow Pages from non-Christians, where injunction purported to apply to defendants' publications both inside and outside California; holding that "a court having jurisdiction of the parties may grant and enforce an injunction, although the subject matter affected is beyond its territorial jurisdiction, or require defendant to do or refrain from doing anything beyond its territorial jurisdiction which it could require . . . within the jurisdiction"); District Attorney v. McAuliffe, 493 N.Y.S.2d 406, 412 (Sup. Ct. 1985) (stating that in a forfeiture action, "the Court would have the power on a motion for preliminary injunction to issue a decree that restrains or orders the commission of acts or affects property outside the state, as a provisional remedy"); Mercury Records Prods. v. Economic Consultants, Inc., 283 N.W.2d 613, 622 (Wis. Ct. App. 1979) (upholding temporary injunction that prohibited defendants from advertising sale of pirated tapes, even outside the state; noting that "[w]here a state court has personal jurisdiction over the parties, it may order the parties to do or to refrain from doing a thing although the order may have an extraterritorial effect").

178. See, e.g., United States v. First Nat'l City Bank, 379 U.S. 378, 384 (1965) (holding that "once 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"); Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952) (holding that "the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction"); holding that district court has jurisdiction to enjoin trademark infringement consummated in a foreign country by a United States citizen); Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1529 (D.C. Cir. 1984) (en banc) (holding that "courts in equity do not hesitate to order the defendants, who are present before the court, to do or refrain from doing something directly involving foreign property"); reversing trial court order dismissing plaintiff's complaint, which sought injunctive relief against governmental taking of private property in Honduras), vacated mem., 471 U.S. 1113 (1985), on remand, 788 F.2d 762 (D.C. Cir. 1986) (per curiam).

179. See generally 11 WRIGHT & MILLER, supra note 116, § 2945 (noting that "there is no doubt that if the court has personal jurisdiction over the parties, it has the power to order each of them to act in any fashion or in any place"); Israel S. Gomborov, Note, Extra-Territorial Jurisdiction in Equity, 7 TEMP. L.Q. 468, 481 (1933). Gomborov concludes that

where . . . the rem is indirectly affected, and the purpose of the bill in equity is to compel the defendant, over whom the court has jurisdiction, to do or refrain from doing a certain act . . . , and the decree can be enforced by contempt proceedings, a court of equity . . . will have jurisdiction, no matter where the res may be situated.

See also Note, The Power of a Court of Equity to Order a Nonresident Defendant to Do a Positive Act in Another State, 35 HARV. L. REV. 610 (1922) (arguing that plaintiff, upon showing an "extreme" case, should be able to obtain an injunction requiring performance in another state, unless the decree would interfere with the sovereignty of the other state or would be impossible to enforce).

180. See, e.g., First Nat'l City Bank, 379 U.S. at 384 (holding that district court had authority to preliminarily enjoin bank from transferring any property or rights held for the account of defendant in its Montevideo branch); In re Feit & Drexler, Inc., 760 F.2d 406, 414 (2d Cir. 1985) (upholding preliminary injunction that required defendant to deliver her property, wherever
To the extent, then, that a single preliminary injunction issues in lieu of multiple attachment orders, it reduces the need for multiple proceedings in multiple states, thereby reducing judicial costs.

Taken together, these four requirements impose a stringent standard for preliminary injunctive relief. The standard will not be easily met, nor does this Article suggest that it should be. The preliminary injunction will restrain the defendant from dealing in her own property prior to a final judicial determination that she is liable to the plaintiff. Such relief is extraordinary, and should issue only in cases in which the plaintiff’s claim on the merits is strong, the risk of dissipation is real, the harm to the plaintiff is likely to be irreparable, and the risk to the defendant is likely to be less severe. In such cases, however, this Article does advocate the use of such injunctions because they can be better-tailored than a writ of attachment to reduce the risk of active tertiary harm to the plaintiff, without unnecessarily intruding on the rights of the defendant or the interests of innocent third parties.

located, to escrow agent and enjoined her from transferring or disposing of any of her property, wherever located); United States v. Ross, 302 F.2d 831, 834 (2d Cir. 1962) (upholding preliminary injunction directing defendant to turn over stock certificates, located in the Bahamas, to a receiver; stating that “[p]ersonal jurisdiction gave the court power to order [defendant] to transfer property whether that property was within or without the limits of the court’s territorial jurisdiction”).

181. See, e.g., Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 194, 208 (3d Cir. 1990) (reviewing preliminary injunction, which ordered defendant to “repatriate all funds he had transferred overseas”; vacating injunction as overbroad, but stating that “the district court is free to reimpose some sort of preliminary injunction”); Feit, 760 F.2d at 414 (concluding that district court had power to enter a mandatory preliminary injunction requiring the defendant to “deliver her property from outside the court’s territorial jurisdiction”); Inter-Regional Fin. Group, Inc. v. Hashemi, 562 F.2d 152 (2d Cir. 1977) (affirming grant of preliminary injunction, which required defendant to bring securities into state and to surrender them to clerk of court, so they could be attached); Fleming v. Gray Mfg. Co., 352 F. Supp. 724 (D. Conn. 1973) (granting a mandatory preliminary injunction to require the defendants to deposit with the court corporate securities located outside the state, so they could be attached). See generally 11 WRIGHT & MILLER, supra note 116, § 2948 at 465–66 (noting that “there are cases in which it is necessary to require the defendant to disturb the status quo by undoing acts completed before the injunction issues, or by acting affirmatively, in order to preserve the power of the court to render a meaningful decision”). Such an injunction will be most helpful in cases in which the defendant has already moved assets to a foreign country that would not enforce a United States judgment. See Bruce, et al., supra note 32; Chambers, supra note 32. If the assets already have been placed in the possession of third parties, it may be necessary to invoke fraudulent conveyance law to set aside these transfers and to join the transferees as parties to the action, or to commence separate actions against them if they are not subject to the jurisdiction of the court. See supra note 33.

182. The availability of pre-conviction forfeiture orders in the criminal context, see supra note 155, suggests that the relief proposed here is well within the mainstream of American judicial thought on prejudgment restraints. Although the policies underlying such restraints may be much stronger in the criminal context than in the civil one, see, e.g., Caplin & Drysdale,
IV. REASONS WHY COURTS HAVE REFRAINED FROM ISSUING PRELIMINARY INJUNCTIONS TO SECURE POTENTIAL MONEY JUDGMENTS

Many courts have hesitated or refused to grant preliminary injunctions to freeze a defendant’s assets in actions in which the plaintiff sought only money damages, even though she may have met the traditional requirements for preliminary injunctive relief. These courts have offered a variety of reasons to support their ultimate conclusion that a preliminary injunction should not issue to prevent tertiary harm.

Some courts have felt constrained by precedent to deny relief, relying upon one or both of two Supreme Court decisions, which considered the availability of a preliminary injunction to freeze a pool of assets. But, as subpart A will demonstrate, neither opinion directly addressed the question of whether a preliminary injunction may issue to secure assets with which a money judgment for damages could be paid and, therefore, neither opinion should dissuade courts from granting such relief. In fact, a third Supreme Court decision actually supports the issuance of preliminary injunctions to freeze assets.

Other courts that have refused to grant preliminary injunctions to freeze assets have invoked the principle that an equitable remedy—a preliminary injunction—should not issue when an adequate remedy at

Chartered v. United States, 491 U.S. 617, 629-30 (1989) (noting the government’s interests in “separating a criminal from his ill-gotten gains,” and in “lessen[ing] the economic power of organized crime and drug enterprises,” among others, the arguments against such restraints are also much stronger in the criminal setting, and notwithstanding these arguments, the relief is routinely granted and has been upheld as constitutional. See supra note 155. Thus, a criminal defendant may be compelled to forfeit assets prior to conviction notwithstanding the constitutionally required “beyond a reasonable doubt” standard of proof and the presumption of innocence, see In re Winship, 397 U.S. 358 (1970), and notwithstanding the enormous stigma associated with pre-conviction forfeiture under either RICO (which brands the defendant a racketeer) or CCE (which brands her a drug dealer).


184. See, e.g., Fredeman, 843 F.2d at 824-27 (relying on De Beers for the general rule “that 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 a potential money judgment”); L.G. Balfour Co., 703 F. Supp. at 521-32.


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law exists. Some of these courts have held that the potential money judgment itself will be an adequate remedy at law, even if the plaintiff has offered proof that the defendant is dissipating assets and the judgment will therefore be unenforceable. These cases fail to recognize, however, that the plaintiff in such cases may well face irreparable harm and that the money judgment will therefore not be an adequate remedy.

Still other courts have conceded that the money judgment itself may not be adequate, but nevertheless deny equitable relief because another legal remedy, prejudgment attachment, is considered adequate. This Article has already identified some of the inadequacies of attachment. But even if prejudgment attachment were adequate, courts should have the freedom to issue preliminary injunctive relief unless the reasons for preferring legal remedies over equitable remedies obtain in this context. As will be seen, they do not.

Finally, some courts maintain that prejudgment attachment is the exclusive means for preventing tertiary harm in money damages cases. These courts have refused to permit plaintiffs to evade the statutory requirements of attachment by seeking preliminary injunctive relief; they have denied relief even in cases in which attachment was unavailable, on the theory that the legislature had limited the circumstances in which the defendant could be deprived of property prior to judg-


188. See, e.g., Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 86 (W.D.N.Y. 1982) (stating that "[i]t is questionable whether the sort of harm plaintiff points to—frustration of enforcement of a money judgment—can ever constitute irreparable harm for purposes of preliminary injunctive relief"); Hiles, 498 So. 2d at 999 (stating that "[t]he possibility that a money judgment, once obtained, will not be collectible is irrelevant under the test of inadequacy of remedy at law"); Alkow Realty, 453 So. 2d at 514 (stating that "[t]he test of the inadequacy of a remedy at law is whether a judgment could be obtained, not whether, once obtained it will be collectible").

189. See supra note 143 and accompanying text.

190. See, e.g., Taunton Mun. Lighting Plant v. Department of Energy, 472 F. Supp. 1231, 1233 (D. Mass. 1979) (stating that plaintiff’s “proper course to preserve the fund is to seek attachment . . . . Thus it appears if any remedy is warranted, it would be one governed . . . by Rule 64."; Allstate Sales & Leasing Co. v. Geis, 412 N.W.2d 30, 33 (Minn. Ct. App. 1987) (stating that plaintiff “has the burden of showing the attachment statute would not have afforded it adequate relief, and it has not met that burden”); Fair Sky Inc. v. International Cable Ride Corp., 257 N.Y.S.2d 351, 353 (App. Div. 1965) (noting that “the defendant . . . is a foreign corporation and a transfer of the cable car business may leave it without assets in the State, but the plaintiff has already had the benefit of an attachment order . . . . An ‘attachment is the more appropriate remedy to prevent a removal or disposition of property.’ ”).
ment and that the courts should not undermine that legislative policy. Respect for legislative policy, however, does not mandate a blanket refusal to issue preliminary injunctions to freeze assets.

A. Supreme Court Precedent

I. Deckert v. Independence Shares Corporation

Within two years of the adoption of the Federal Rules of Civil Procedure, the Supreme Court decided Deckert v. Independence Shares Corporation. In that case, plaintiffs purchased securities known as “savings plan contract certificates” from Independence Shares Corporation, a trust and investment company. The certificates required the holders to make monthly installment payments for ten years to The Pennsylvania Company for Insurances on Lives and Granting Annuities, a banking corporation that served as the trustee for the installment investment plan. After deducting trustee fees and other charges, The Pennsylvania Company used the net installment payments to purchase Independence Trust Shares from Independence for the account of each certificate holder. The shares were interests in an installment investment trust for which The Pennsylvania Company was the trustee and Independence was the issuer, sponsor and depositor. A second set of trustee fees, commissions and other charges were deducted upon purchase of the shares. The prospectus used in con-

191. See, e.g., Dorfmann v. Boozer, 414 F.2d 1168, 1172 (D.C. Cir. 1969) (reversing grant of preliminary injunction, which required a credit union to pay into court funds on deposit in defendants’ name, which funds would then be released by the court to the plaintiff; noting that plaintiffs “now attempt . . . not only to get around the attachment statute, but actually to obtain relief (the use of the funds) which they could not get under that statute”); Baxter v. United Forest Prods. Co., 406 F.2d 1120, 1127 (8th Cir. 1969) (stating that “provisional remedies of attachment before judgment were not recognized at common law. They are statutory remedies in derogation of the common law and strict compliance with the statutory requirements is therefore necessary.”); Delaware Trust Co. v. Partial, 517 A.2d 259, 262 (Del. Ch. 1986) (noting that the plaintiff sought a preliminary injunction to restrain a bank from permitting the defendant to withdraw amounts held on deposit because under Delaware law, garnishment was not available against banks; holding that the “policy of the legislature with respect to the seizure or garnishment of funds held by Delaware banks . . . may [not] be ignored by the simple expedient of denominating the writ sought as one of injunction rather than one of garnishment”); Alkow Realty, 453 So. 2d at 515 (holding in an action at law that “either prejudgment attachment or garnishment, with attendant safeguards, may be available . . . under these circumstances; injunctive relief is not”) (emphasis added).

192. 311 U.S. 282 (1940).

193. Plaintiffs actually purchased the certificates from Capital Savings Plan, Inc., then the parent corporation of Independence. Deckert v. Independence Shares Corp., 27 F. Supp. 763, 764 (E.D. Pa.), rev’d, 108 F.2d 51 (3d Cir. 1939). In 1938, prior to commencement of the action, Capital was merged into Independence. Id. Capital and Independence both will be referred to as Independence.

connection with the sale of the savings plan contract certificates misstated these charges and made other material misrepresentations.\textsuperscript{195}

Plaintiffs brought a class action against Independence, its officers and directors, and The Pennsylvania Company in the United States District Court for the Eastern District of Pennsylvania, alleging that they bought the certificates from Independence in reliance on misrepresentations and fraudulent misstatements.\textsuperscript{196} Plaintiffs sought relief under section 12(2) of the Securities Act of 1933, which permits an aggrieved purchaser "to recover the consideration paid for [the] security with interest thereon, less the amount of any income received thereon, upon the tender of such security."\textsuperscript{197} Alleging that "Independence [was] insolvent and threatened with many law suits, that its business [was] virtually at a standstill because of unfavorable publicity, that preferences to creditors [were] probable, and that its assets [were] in danger of dissipation and depletion,"\textsuperscript{198} plaintiffs also sought the appointment of a receiver for Independence with authority to take possession of the trust assets held by The Pennsylvania Company.\textsuperscript{199} Federal jurisdiction was invoked under section 22(a) of the Securities Act\textsuperscript{200} and the court's "general equitable and receivership powers."\textsuperscript{201}

After rejecting defendants' motion to dismiss for lack of subject matter jurisdiction, the district court proceeded to consider Independence's motion to dismiss for lack of equity jurisdiction because plaintiffs "were unsecured simple contract creditors who had not reduced their claims to judgment and failed to realize upon execution process."\textsuperscript{202} Although conceding that "as a general rule unsecured simple contract creditors who have not obtained judgments upon their claims have not the status to appeal to equity for relief,"\textsuperscript{203} the district court concluded that the plaintiffs were the beneficiaries of a trust—cestuis

\begin{footnotes}
\item[195] Id. at 774-75.
\item[196] In addition to the parties discussed in the text, plaintiffs sued two affiliated companies, but the claims against them were dismissed prior to review by the Supreme Court. Deckert, 311 U.S. at 285.
\item[197] The Securities and Exchange Commission previously had commenced an action against Capital and Independence, alleging that the defendants had engaged in acts and practices that constituted violations of § 17(a) of the Securities Act of 1933 (currently codified at 15 U.S.C. § 77q (1988)). The SEC action was resolved by consent decree, which restrained the defendants from engaging in the practices complained of by the SEC. 27 F. Supp. at 767.
\item[198] Section 12(2) of the Securities Act of 1933 (currently codified at 15 U.S.C. § 77l (1988)).
\item[199] 311 U.S. at 285.
\item[200] Id.
\item[201] Section 22(a) of the Securities Act of 1933 (currently codified at 15 U.S.C. § 77t (1988)).
\item[202] 27 F. Supp. at 764.
\item[203] Id. at 769-70.
\end{footnotes}
que trustent—and therefore properly had sought relief in equity.\(^2\)\(^0\)\(^4\) The district court then noted that even though The Pennsylvania Company was not charged with misconduct, neglect or mismanagement, it was not itself an equity receiver responsible to the court, and therefore, such a receiver might have to be appointed to preserve and distribute the trust assets in The Pennsylvania Company’s hands.\(^2\)\(^0\)\(^5\) Finally, the district court appointed a special master to take testimony to determine whether or not Independence was solvent.\(^2\)\(^0\)\(^6\) Approximately two weeks after issuing its opinion, the district court enjoined The Pennsylvania Company from paying to Independence a sum of money owed to Independence or otherwise disposing of the sum during the pendency of the suit.\(^2\)\(^0\)\(^7\)

Both Independence and The Pennsylvania Company appealed to the United States Court of Appeals for the Third Circuit.\(^2\)\(^0\)\(^8\) Characterizing the relief sought under section 12(2) of the Securities Act as “a money judgment or . . . a money decree payable to the individual who has been defrauded”\(^2\)\(^0\)\(^9\)—that is, as legal rather than equitable relief—the Third Circuit held that the injunction against The Pennsylvania Company could “not be maintained.”\(^2\)\(^1\) In fact, because no cause of action had been stated against The Pennsylvania Company, the Third Circuit held that it was not a proper party to the suit.\(^2\)\(^1\)\(^1\) It also concluded that the district court erred in appointing a receiver for Independence on the ground that it was insolvent or its assets were being dissipated.\(^2\)\(^1\)\(^2\)

The Supreme Court unanimously reversed.\(^2\)\(^1\)\(^3\) While recognizing that “any suit to establish the civil liability imposed by the [Securities] Act must ultimately seek recovery of the consideration paid less income received or damages if the claimant no longer owns the secur-

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\(^2\)\(^0\) Id. at 770.
\(^2\)\(^0\)\(^5\) Id. at 777.
\(^2\)\(^0\)\(^6\) Id. at 776.
\(^2\)\(^0\)\(^7\) Independence Shares Corp. v. Deckert, 108 F.2d 51, 53 (3d Cir. 1939), rev’d, 311 U.S. 282 (1940). In its opinion, the Supreme Court noted that plaintiffs sought “an injunction restraining Pennsylvania from transferring or disposing of any of the assets of the corporations or of the trust.” 311 U.S. at 285.
\(^2\)\(^0\)\(^8\) “The Circuit Court of Appeals did not expressly consider whether the appeals were premature.” Deckert, 311 U.S. at 286.
\(^2\)\(^0\)\(^9\) 108 F.2d at 54.
\(^2\)\(^1\) Id.
\(^2\)\(^1\)\(^1\) Id.
\(^2\)\(^1\)\(^2\) Id. The court left open the possibility that plaintiffs “upon a proper showing might . . . obtain injunctive relief against Independence . . . in aid of the remedy supplied to them by Section 12(2) of the Act . . . .” Id. at 55.
\(^2\)\(^1\)\(^3\) Justice Douglas did not participate in the consideration or decision of the case.
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ity”—just money—the Court noted that the Act did not “purport to state the form of action or procedure the claimant is to employ.”\(^{214}\) In fact, the Court concluded that the judicial power “to enforce any liability or duty created” by the Act\(^{216}\) “impli[e]d the power to make effective the right of recovery afforded by the Act,”\(^{217}\) which itself implied “the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.”\(^{218}\) In concluding that the complaint stated a cause of action for equitable relief, the Court relied upon plaintiffs’ allegations of Independence’s insolvency, possible preferences to creditors, and other threats to defendants’ assets, as well as the proposition that “a suit to rescind a contract induced by fraud and to recover the consideration paid may be maintained in equity, at least where there are circumstances making the legal remedy inadequate . . . .”\(^{219}\)

Once the Court concluded that plaintiffs stated a claim entitling them to “some equitable relief,”\(^{220}\) it followed inexorably that the district court properly “consider[ed] whether injunctive relief should be given in aid of the recovery sought by the bill.”\(^{221}\) Because of the risks of insolvency and depletion or dissipation of assets, “the legal remedy against Independence, without recourse to the fund in the hands of Pennsylvania, would be inadequate.”\(^{222}\) Therefore, the preliminary injunction restraining the transfer of specified assets from The Pennsylvania Company to Independence was “a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill.”\(^{223}\)

Reduced to its essence, Deckert stands for the proposition that a preliminary equitable remedy will issue to protect a final equitable remedy of restitution or constructive trust. Thus, it speaks to the availability of a preliminary injunction only in cases in which plaintiffs have an equitable claim to assets in the hands of defendants; it simply

\(^{214}\) Independence Shares Corp. v. Deckert, 311 U.S. 282, 288 (1940).
\(^{215}\) Id.
\(^{216}\) Id. (quoting 15 U.S.C. § 77v (1936)) (emphasis in original).
\(^{217}\) Id.
\(^{218}\) Id.
\(^{219}\) Id. at 288–89.
\(^{220}\) Id. at 289.
\(^{221}\) Id. at 289; accord Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 561 (5th Cir. 1987) (holding that “an asset freeze by preliminary injunction is an appropriate method to assure the meaningful, final equitable relief sought”); Federal Trade Comm’n v. H.N. Singer, Inc., 668 F.2d 1107, 1112 (9th Cir. 1982) (holding that preliminary injunction to freeze assets would issue to protect final equitable remedy of rescission).
\(^{222}\) 311 U.S. at 290.
\(^{223}\) Id.
does not speak to the case of a plaintiff seeking money damages only as her final remedy.\textsuperscript{224} Courts finding that \textit{Deckert} either precludes preliminary injunctive relief in such cases or authorizes it read more into the opinion than it contains.

\textbf{2. De Beers Consolidated Mines, Ltd. v. United States}

Only five years after it decided \textit{Deckert}, the Supreme Court again grappled with the question of the availability of a preliminary injunction to freeze assets. In \textit{De Beers Consolidated Mines, Ltd. v. United States},\textsuperscript{225} the United States commenced an action against several foreign corporations and individuals, alleging that they had “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 the Sherman Act and the Wilson Tariff Act.\textsuperscript{226} The ultimate relief sought was a permanent injunction preventing and restraining future violations of federal law. Upon commencement of the action, the government sought a preliminary injunction to restrain the corporate defendants 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 [the trial court] shall have determined the issues of this case and defendant corporations shall have complied with its orders.’”\textsuperscript{227} The government was concerned that the defendants, whose principal places of business were abroad, would flout the court’s final order and would remove their assets from the United States so as to make a proceeding for civil contempt fines futile or impracticable; the government thus alleged irreparable injury.\textsuperscript{228} A temporary restraining order without notice was issued and served on several banks that held some of the defendants’ assets, and a preliminary injunction was “continued in force” after a hearing on affidavits and oral argument.\textsuperscript{229} The defendants applied directly to the Supreme Court for review under section 262 of the Judiciary Code.\textsuperscript{230}

\textsuperscript{224} At most, the Court may have implied that if the complaint had not stated a claim for final equitable relief, a preliminary injunction could not have issued. This implication is rejected in \textit{United States v. First Nat’l City Bank}, 379 U.S. 378 (1965) (discussed \textit{infra} in part IV.A.3).
\textsuperscript{225} 325 U.S. 212 (1945).
\textsuperscript{226} \textit{Id.} at 215.
\textsuperscript{227} \textit{Id.} (quoting the government’s motion).
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} \textit{Id.} at 216.
\textsuperscript{230} Section 262 authorized the Supreme Court and the district courts to issue writs of scire facias, and authorized the Supreme Court, the courts of appeals, and the district courts to issue "all writs not specifically provided for by statute, which may be necessary for the exercise of their
In holding that it had jurisdiction under section 262 to review the issuance of the preliminary injunction, the Supreme Court made some preliminary comments about the nature of the temporary and final relief sought by the United States: "[T]he order in question was not made to grant interlocutory relief such as could be afforded by any final injunction, but [was] one respecting a matter lying wholly outside the issues in the case . . . ." Because the nature of the preliminary equitable relief granted was different than the final equitable relief sought, an appeal from a final injunction prohibiting anticompetitive activity would not provide an occasion for review of the propriety of the preliminary injunction freezing defendants' domestic assets. Thus, review under section 262 was the only avenue for determining whether the district court "ha[d] . . . power to do what it purport[ed] to do."


231. Only five justices believed that review by the Supreme Court was appropriate in the circumstances of the case. The majority opinion stated:

If the preliminary injunction here granted, unless set aside, will stand throughout the course of the trial and for an indefinite period after its termination, and if the order was beyond the powers conferred upon the court, it is plain . . . that the petitions present an appropriate case for the exercise of our jurisdiction under § 262.

325 U.S. at 217. In a strongly-worded dissent, Justice Douglas concluded that the Court did not have jurisdiction to entertain the appeal from this interlocutory order, and that to do so would "open the flood gates . . . ." Id. at 225 (Douglas, J., dissenting).

232. Id. at 217.

233. Id.

234. The Supreme Court noted that no applicable federal statute authorized attachment, and that under the law of the state in which the district court sat, New York, an attachment could issue only "in an action seeking a money judgment" and not "in an equity suit such as the instant one." Id. at 218. For a discussion of Rule 64, see infra part IV.B.2.e.

235. The Court stated:

Although the Government based its motion upon the theory that the entry of the requested injunction would amount to a sequestration of the defendants' assets, and so argued in the court below, it has abandoned that position, because Rule 70 . . . , which permits the issue of a writ of attachment or sequestration against the property of a disobedient party to compel satisfaction of a judgment, is operative only after a judgment is entered.

325 U.S. at 218.

236. 15 U.S.C. § 4 (1940) (granting the district courts "jurisdiction to prevent and restrain violations" of the title; authorizing the United States Attorneys to "institute proceedings in equity to prevent and restrain such violations"; authorizing the courts, prior to final decree, to "make such temporary restraining order or prohibition as shall be deemed just in the premises").
Because the Court found that neither of those sections granted any "new or different power than those traditionally exercised by courts of equity," the Court was remitted to an examination of traditional equity practice.

In concluding that traditional equity practice would not countenance the preliminary injunction entered by the district court, the Supreme Court noted that the courts lacked power under the relevant federal laws to enter a money judgment; the only remedy authorized was an injunction against "future continuance of actions or conduct intended to monopolize or restrain commerce." Because the court had power to enter a permanent injunction, it also had power to enter a preliminary injunction "of the same character" as that which might have been granted finally. Thus, a preliminary injunction restraining violations of the Acts during the pendency of the action would have been authorized. But the preliminary injunction at issue did no such thing. 

And in case these prospects were not frightening enough, the Court continued down the slippery slope: "[I]t 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

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238. 325 U.S. at 219. In discussing § 4 of the Sherman Act, the Court noted that the jurisdiction it granted "to prevent and restrain violations" of the Act had "to be exercised according to the general principles which govern the granting of equitable relief." Id. at 218–19. Likewise, § 262 of the Judicial Code required an "inquiry as to what is the usage, and what are the principles of equity applicable in such a case." Id. at 219.

239. Id. at 219–20.

240. Id. at 220 (emphasis added).

241. Id.

242. Id. at 222.
in such a law action."\textsuperscript{243} No citation was necessary for the ultimate conclusion that "no relief of this character has been thought justified in the long history of equity jurisprudence."\textsuperscript{244}

Although some courts have read \textit{De Beers} as barring the use of preliminary injunctions to freeze assets in all money damages cases,\textsuperscript{245} the Third Circuit's more limited reading of \textit{De Beers}'s holding is fairer: it "simply held that a defendant's money may not be encumbered by a preliminary injunction when the final merits judgment sought by plaintiffs cannot involve a transfer of money from defendants to plaintiffs. In short, \textit{De Beers} is simply inapplicable to cases in which a litigant seeks money damages."\textsuperscript{246} Although \textit{De Beers}'s dicta also may be read as counseling against all preliminary injunctions to freeze assets, again a more careful parsing suggests otherwise:

[T]he government’s evidence [of irreparable injury] consisted only of one conclusory affidavit submitted by the government accusing De Beers of secreting assets—in other words, "a mere statement of belief that the defendant can easily make away with or transport his money or goods."

Against this background, the passage from \textit{De Beers} . . . can be understood more sensibly. \textit{De Beers} was concerned that not just "any action for personal judgment" should result, "on a mere statement" by a plaintiff, in burdensome encumbrances imposed on the assets of a defendant as yet found liable to no one. A case in which recovery is especially likely is not just "any action," however, and a case in which asset secretion has been proven involves more than just "a mere statement" of irreparable injury.\textsuperscript{247}

\begin{footnotesize}
\begin{enumerate}
This was simply dicta, superfluous to the Court's holding . . . . Secondly, this passage, particularly the fourth sentence, read in the context of the Court's decision as a whole, refers to situations such as the one there presented where the principal relief sought is a permanent injunction restraining conduct and the motion for preliminary injunction seeks to restrain property to secure compliance with that principal relief. Finally, the last two sentences set forth a generalized "parade of horribles" which does not account for cases founded on fraud where there is a realistic threat of insolvency, as in \textit{Deckert} . . . .
\textit{Id.} at 1254.
\item \textsuperscript{244} 325 U.S. at 223.
\item \textsuperscript{245} \textit{See, e.g., In re Fredeman Litig.}, 843 F.2d 821, 824 (5th Cir. 1988) (citing \textit{De Beers} for the "general federal rule of equity" that "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 a potential money judgment"); Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 560 (5th Cir. 1987) (citing \textit{De Beers} for the "general rule" that "such an injunction is not permissible to secure post-judgment legal relief in the form of damages").
\item \textsuperscript{246} Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 197 (3d Cir. 1990).
\item \textsuperscript{247} \textit{Id.} (citation omitted).
\end{enumerate}
\end{footnotesize}
Thus, neither the holding nor the dicta of De Beers, properly read, precludes the availability of preliminary injunctive relief to freeze assets in cases in which the plaintiff seeks money damages and in which she can demonstrate a genuine risk of irreparable injury.

3. United States v. First National City Bank

A third case, decided by the Supreme Court in 1965, actually casts more light on the availability of preliminary injunctive relief in money damages cases than either Deckert or De Beers, but oddly is cited less frequently. In United States v. First National City Bank,248 the Court reviewed a preliminary injunction granted by the district court in an action by the United States against Omar, S.A., a Uruguayan corporation, for taxes due.249 The government had sought a preliminary injunction against several banks and brokerage firms to restrain them from “selling, transferring, pledging, encumbering, disposing of or distributing any property or rights to property of defendant taxpayer Omar, S.A.”250 The government claimed that Omar’s “principal assets” were in the hands of the banks and brokerage firms, and that “disposition of the . . . assets might make its lawful rights therein unenforceable and that it would be irreparably injured by removal of any such assets outside the power of the court.”251 By affidavit, the government demonstrated that Omar had, in fact, been liquidating its accounts in the United States and transferring the proceeds abroad.252

Concluding that it had “power, under Rule 65 of the Federal Rules of Civil Procedure, to grant a preliminary injunction . . . to prevent irreparable injury pending the determination of an action,”253 and finding that the government “will be needlessly injured if recovery is prevented by further removal of defendant’s assets from the jurisdiction of the court,”254 the district court then considered the bank’s argument that the court lacked power to affect property held outside the country. Noting that an “injunction does not operate in rem,”255 the district court concluded that it could compel parties over whom it had personal jurisdiction to perform “acts with respect to property

249. Id. at 379–80.
251. Id.
252. Id.
253. Id. at 774–75.
254. Id. at 775.
255. Id.
located within or without its jurisdiction."\textsuperscript{256} On the basis of the foregoing, the district court granted the preliminary injunction enjoining the banks and brokerage firms from transferring or distributing any of Omar’s property.\textsuperscript{257}

The First National City Bank of New York appealed and the Second Circuit reversed.\textsuperscript{258} The “crucial factor”\textsuperscript{259} was jurisdiction over Omar, the taxpayer: because the district court lacked in personam jurisdiction over Omar, it had to acquire quasi-in-rem jurisdiction by attaching its property, or the bank’s debt to it. But under New York law, “accounts in a foreign branch bank are not subject to attachment or execution by the process of a New York court served in New York on a main office, branch or agency of the bank.”\textsuperscript{260} Thus, because the court lacked even quasi-in-rem jurisdiction over Omar, the “injunction issued by the district court was beyond its jurisdiction as to deposits held abroad that are collectible only outside the United States.”\textsuperscript{261} The Second Circuit sitting en banc agreed with the panel.\textsuperscript{262}

This time the government appealed, and the Supreme Court reversed. Noting the recent passage of a New York long-arm statute, which afforded personal jurisdiction over non-domiciliaries who transacted business in the state, the Court concluded that Omar could be served thereunder and that, accordingly, the temporary injunction would be judged “as of now and in light of the present remedy” that the long-arm statute provided.\textsuperscript{263}

Whether or not the Montevideo branch of the bank was a “separate entity” for purposes of attachment under New York law was no longer germane because it was “not a separate entity in the sense that it [was] insulated from [the main branch’s] managerial prerogatives.”\textsuperscript{264} An in personam order against the main branch in New York could reach the branch bank’s affairs. Thus, the Court concluded:

once personal jurisdiction of a party [the bank] 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 . . . . The

\begin{itemize}
\item \textsuperscript{256} Id.
\item \textsuperscript{257} Id. at 776.
\item \textsuperscript{258} United States v. First Nat’l City Bank, 321 F.2d 14 (2d Cir. 1963), \textit{adhered to en banc}, 325 F.2d 1020 (2d Cir. 1964) (per curiam), \textit{rev’d}, 379 U.S. 378 (1965).
\item \textsuperscript{259} Id. at 23.
\item \textsuperscript{260} Id. at 19.
\item \textsuperscript{261} Id. at 24.
\item \textsuperscript{262} 325 F.2d 1020 (2d Cir. 1964) (en banc) (per curiam).
\item \textsuperscript{263} United States v. First Nat’l City Bank, 379 U.S. 378, 382–83 (1965).
\item \textsuperscript{264} Id. at 384.
\end{itemize}
temporary injunction issued by the District Court seems to us to be emi-

tently appropriate to prevent further dissipation of assets.\footnote{265}{Id. at 384–85.}

In the last paragraph of the opinion, almost as an afterthought, the

Court distinguished \textit{De Beers} and analogized \textit{Deckert}:

Unlike \textit{De Beers} . . . , there is here property which would be ‘the subject

of the provisions of any final decree in the cause’ \cite{De Beers}. We

conclude that this temporary injunction is ‘a reasonable measure to pre-
serve the status quo’ \cite{Deckert} pending service of process on

Omar and an adjudication of the merits.\footnote{266}{Id. at 385.}

Thus, the Court specifically upheld a preliminary injunction to freeze

assets to secure a future money judgment.\footnote{267}{Id. at 385.}

Read together, these cases confirm the availability of a preliminary

injunction to freeze assets that may be the subject of an equitable
decree at the conclusion of the litigation (\textit{Deckert}) and strongly sug-

gest the availability of such an injunction to freeze assets that may be

levied upon to satisfy a future money judgment (\textit{First National}).\footnote{268}{Id.

at 380 (quoting 26 U.S.C. § 7402(a)).}

Not even \textit{De Beers} undermines the argument in favor of such relief.

But if the precedent supports the issuance of the preliminary injunc-
tions advocated here, why have the courts been so leery about granting

them?

\textbf{B. The “No Adequate Remedy at Law” Requirement}

Courts often begin discussions regarding the availability of a prelimi-

nary injunction by noting that equitable relief is unavailable if an ade-

quate remedy at law exists.\footnote{269}{See, e.g., EBSCO Indus., Inc. v. Lilly, 840


Indus., Inc., 749 F.2d 380, 386 (7th Cir. 1984); Itek Corp. v. First Nat’l Bank of Boston,

730 F.2d 19, 22 (1st Cir. 1984); Barbucut v. Lysandrou, 559 So. 2d 648, 650 (Fla. Dist. Ct. App. 1990).}

As this section of the Article will demonstrate, not only do the historical and revisionist rationales for

the “no adequate remedy at law” requirement fail to justify a blanket preference for prejudgment attachment over preliminary injunction,
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but the continued adherence to the rule without good cause has detrimental effects on judicial economy and efficiency.

1. Historical Rationale

The "no adequate remedy at law" requirement was adopted by the Chancellor not because he believed that the damages remedy at law was inherently superior to equitable relief, but because he wanted to reduce the tension that plagued the relationship between the Chancery and the common law courts during the seventeenth century. By voluntarily refraining from assuming jurisdiction over cases that could be handled adequately by the law courts, the Chancellor acted to neutralize the friction between the two systems. With the merger of law and equity into a unitary system, this historical reason for preferring legal remedies to equitable ones disappeared. Thus, unless other reasons justify judicial restraint in granting equitable relief, courts should not hesitate to grant preliminary injunctions to freeze assets even if prejudgment attachment is considered adequate.

2. Revisionist Rationales

Even with the merger of law and equity, courts continue to prefer legal remedies over equitable ones, and offer modern reasons to support the "no adequate remedy at law" requirement. None of these revisionist rationales justifies the judiciary's general preference for prejudgment attachment over preliminary injunctions to freeze assets.

a. Due Process Concerns

Courts refrain from granting preliminary injunctive relief out of fear that they may cause the defendant harm by enjoining her conduct without the benefit of a fully developed record. This fear is legitimate. But, if anything, it counsels in favor of preliminary injunctions to freeze assets over prejudgment attachment orders. Over the course of the last twenty years, the Supreme Court has struck down as violative of due process several state statutes that authorized prejudgment attachment, garnishment, or replevin. These statutes were held

270. 3 BLACKSTONE, supra note 49, at *442; F. W. MAITLAND, EQUITY: A COURSE OF LECTURES 6-7 (2d ed. 1936); E. Allan Farnsworth, Legal Remedies for Breach of Contract, 70 COLUM. L. REV. 1145, 1154 (1970).

271. See FED. R. CIV. P. 1 (stating that "these rules govern the procedure in ... all suits of a civil nature whether cognizable as cases at law or in equity").

272. See supra notes 130-32 and accompanying text; Wasserman, supra note 10, at 660-63.

unconstitutional because they permitted the seizure of the defendant's property without prior notice to the defendant,\textsuperscript{274} without any judicial involvement,\textsuperscript{275} without any evidentiary showing on the merits of the plaintiff's claim,\textsuperscript{276} and without a sufficient showing of exigent circumstances.\textsuperscript{277}

These problems are largely avoided in the preliminary injunction context. A judge, not a clerk, hears the request for a preliminary injunction or a temporary restraining order.\textsuperscript{278} To obtain a preliminary injunction, the plaintiff must establish, by affidavit or oral testimony, the likelihood of the success of her claim on the merits; merely conclusory statements will not do.\textsuperscript{279} Moreover, the plaintiff must

\begin{itemize}
\item See Doehr, 111 S. Ct. at 2109 (prejudgment attachment authorized "without affording prior notice or the opportunity for a prior hearing"); North Georgia Finishing, 419 U.S. at 606 (account impounded "without notice or opportunity for an early hearing"); Fuentes, 407 U.S. at 75 (defendant "is provided no prior notice and allowed no opportunity whatever to challenge the issuance of the writ"); Sniadach, 395 U.S. at 338 ("notice and an opportunity to be heard are not given before the in rem seizure of the wages").
\item See North Georgia Finishing, 419 U.S. at 606 (writ of garnishment "issued by a court clerk . . . without participation by a judicial officer"); Fuentes, 407 U.S. at 74 (noting that "court clerk" is authorized "to issue the writ summarily"); Sniadach, 395 U.S. at 338–39 (noting that "the clerk of the court issues the summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby the wages are frozen").
\item See Doehr, 111 S. Ct. at 2114 ("statute demands inquiry into the sufficiency of the complaint, or, still less, the plaintiff's good-faith belief that the complaint is sufficient"); North Georgia Finishing, 419 U.S. at 607 (writ of garnishment issues "on the affidavit of the creditor or his attorney, and the latter need not have personal knowledge of the facts . . . . The affidavit . . . need contain only conclusory allegations."); Fuentes, 407 U.S. at 74 (noting that applicant need only recite "in conclusory fashion that he is 'lawfully entitled to the possession' of the property").
\item See Doehr, 111 S. Ct. at 2115 (stating that "there was no showing that [defendant] was about to transfer or encumber his real estate"); North Georgia Finishing, 419 U.S. at 612 (noting that garnishment statute required only an "unrevealing assertion of apprehension of loss") (Powell, J., concurring in judgment); Fuentes, 407 U.S. at 93 (noting that replevin statutes did not require "a showing of immediate danger that a debtor will destroy or conceal disputed goods"); Sniadach, 395 U.S. at 339 (stating that "no situation requiring special protection to a state or creditor interest is presented by the facts").
\item FED. R. CIV. P. 65(b).
\item See, e.g., Hoxworth v. Blinder, Robinson, & Co., 903 F.2d 186, 191 (3d Cir. 1990) (noting that district court "conducted a four-day evidentiary hearing on the preliminary injunction motion" and based its conclusion regarding likelihood of success on merits on the evidence adduced at the hearing); Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 558 (5th Cir. 1987) (noting that district court had based its findings in support of preliminary injunction "on extensive evidence in the form of affidavits, several thousand pages of documents, business records of earnings, sworn statements, admissions of defendants and their answers to the complaint, and defendants' apparent efforts to block discovery"); In re DeLorean Motor Co., 755
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demonstrate that she will suffer irreparable harm in the absence of preliminary relief; the mere desire to obtain security for her judgment is insufficient.\textsuperscript{280} Once she has met these requirements for preliminary injunctive relief, she must post a bond.\textsuperscript{281}

The most serious process problem, of course, is that a temporary restraining order may issue without any prior notice to the defendant.\textsuperscript{282} Two responses to this problem can be made, one flip, one not. The flip answer is that a temporary restraining order is no more violative of the defendant's due process rights than an ex parte attachment order, both of which temporarily deprive the defendant of the use of her property without prior notice. Thus, the due process concerns, although legitimate, do not justify a blanket preference for attachment over injunctive relief because they underlie both prejudgment remedies.

The more compelling answer is that courts will grant temporary restraining orders without notice only if "it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition."\textsuperscript{283} Moreover, the temporary restraining order will expire by its own terms within a specified period of time not to exceed ten

\textsuperscript{280} See, e.g., Sampson v. Murray, 415 U.S. 61, 88 (1974) (questioning district court finding of irreparable harm where "the record . . . indicates that no witnesses were heard on the issue of irreparable injury, that respondent's complaint was not verified, and that the affidavit she submitted . . . did not touch in any way upon considerations relevant to irreparable injury"); Hoxworth, 903 F.2d 186, 205 (stating that "establishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a "clear showing of immediate irreparable injury""); reviewing evidence to support district court's finding of irreparable harm (citations omitted); In re Marriage of Schmidt, 455 N.E.2d 123, 126 (Ill. App. Ct. 1983) (concluding that "the allegations that respondent could hide his interests and that petitioner believe[d] that he would dissipate his assets [were] mere conclusions"; suggesting that a verified petition made only upon information and belief was insufficient to support a preliminary injunction); Bisca v. Bisca, 437 N.Y.S.2d 258, 262 (Sup. Ct. 1981) (declining to grant preliminary injunction when "there seems here to be no substantial evidence that defendant . . . is about to make transfers which would impair plaintiff's ability to obtain proper relief").

\textsuperscript{281} See supra notes 151–52 and accompanying text.

\textsuperscript{282} See, e.g., Fed. R. Civ. P. 65(b) (authorizing temporary restraining order "without written or oral notice to the adverse party or that party's attorney" in limited circumstances).

\textsuperscript{283} Id.
and the defendant may appear and move to dissolve the restraining order expeditiously. Although the Supreme Court has recently reaffirmed that even a temporary deprivation of property is within the purview of the due process clause, it likewise noted that "a properly supported claim [of fraudulent transfer or dissipation of assets] would be an exigent circumstance permitting postponing any notice or hearing until after the attachment is effected." Thus, a properly supported application for a temporary restraining order, replete with evidence of irreparable tertiary harm, should pass due process muster, and certainly should create no greater problems in this regard than prejudgment attachment. Due process concerns, then, do not justify the continued preference of prejudgment attachment over preliminary injunctions to freeze assets.

b. **Right to Jury Trial**

Another modern rationale for preferring legal remedies over equitable ones is that a jury will decide claims seeking the former, while a judge will hear those seeking the latter. Judicial respect for the right to a jury trial—a right of constitutional dimension—counsels in favor of legal remedies over equitable ones.

Again, this revisionist rationale for the "no adequate remedy at law" requirement fails to obtain in the context of preliminary injunctions to freeze assets. A judge (or clerk) rather than a jury will hear the request for a prejudgment attachment as well as the preliminary injunction, so respect for the right to a jury trial can play no role in

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284. Id.
285. Id.
286. Connecticut v. Doehr, 111 S. Ct. 2105, 2115 (1991) (stating that "the Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause.") (quoting Fuentes v. Shevin, 407 U.S. 67, 86 (1972)).
288. Wasserman, supra note 10, at 658.
289. The Seventh Amendment preserves the right to a jury trial "[i]n Suits at common law." U.S. Const. amend. VII.
290. See, e.g., CAL. CIV. PROC. CODE § 484.090 (a) (West Supp. 1991) ("the court . . . shall issue a right to attach order"); CONN. GEN. STAT. ANN. § 52-278e (West 1991) ("the court or a judge . . . may allow the prejudgment remedy to be issued by an attorney without hearing"); FLA. STAT. ANN. § 76.03 (West 1987) ("attachments shall be issued by a judge of the court"); ILL. STAT. ANN. ch. 100, ¶ 4-104 (Smith-Hurd 1983) ("the court . . . shall enter an order for attachment").
deciding between prejudgment attachment and preliminary injunction. Moreover, the ultimate merits of the plaintiff's claim against the defendant will be resolved by a jury even if a preliminary injunction issues, and the findings made at the preliminary injunction stage will not bind this jury. Thus, as the Supreme Court has stated, the right to a jury trial "does not . . . interfere with the District Court's power to grant temporary relief pending a final adjudication on the merits," and therefore should not influence the choice between a prejudgment attachment and preliminary injunction.

c. Intrusiveness of Injunctions

Courts typically view equitable remedies as more intrusive than legal remedies both because the former may command the defendant to engage in affirmative conduct, and because they are enforceable by contempt proceedings, which threaten imprisonment. These rationales for preferring legal remedies fail in the context of preliminary relief to prevent tertiary harm because preliminary injunctions to freeze assets are not very intrusive, and because the legal remedy, attachment, is far more intrusive.

The preliminary injunction to freeze assets will typically be a prohibitory injunction rather than a mandatory one; it will bar the

291. Wasserman, supra note 10, at 659 (citing Friends For All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 831–32 (D.C. Cir. 1984)).

292. Id. at 659 n.137 (citing University of Tex. v. Camenisch, 451 U.S. 390, 395 (1981); Technical Publishing Co. v. Lebhar-Friedman, Inc., 729 F.2d 1136, 1139 (7th Cir. 1984); 11 WRIGHT & MILLER, supra note 116, § 2943).


294. Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 905 (1st Cir. 1988) (noting, in dicta, "the law's typical reluctance to force private citizens to act"), cert. denied, 488 U.S. 1043 (1989); Lumley v. Wagner, 42 Eng. Rep. 687, 693 (1852) (stating that "beyond all doubt this Court could not interfere to enforce the specific performance of the whole of this contract," which bound defendant to sing at plaintiff's theatre for three months).

295. See Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 600 n.5 (1984) (Blackmun, J., dissenting) (noting that "[a]n enjoined party is required to obey an injunction issued by a federal court . . . even if the injunction turns out . . . to have been erroneous, and failure to obey such an injunction is punishable by contempt"); Califano v. Yamasaki, 442 U.S. 682, 705 (1979) (stating that the Secretary of Health, Education and Welfare's duty to comply with injunctions is enforceable by contempt); Laycock, supra note 119, at 698–99 (noting that courts "will not enforce money judgments with the contempt power" because of "our aversion to imprisonment for debt; the adequacy of the legal remedy is irrelevant"); Doug Rendleman, The Inadequate Remedy at Law Prerequisite for an Injunction, 33 U. Fla. L. Rev. 346, 357 (1981) (noting that "resort to coercive imprisonment may amount to incarceration for a civil debt"); cf. In re Feit & Drexler, Inc., 760 F.2d 406, 414 (2d Cir. 1985) (noting that defendant had been cited for civil contempt and imprisoned to coerce compliance with a preliminary injunction that required her to deliver all of her deliverable property to her attorney as escrow agent).

296. See supra part II.C.3.
defendant from dissipating her assets. To the extent it requires the
defendant to undertake any affirmative action at all—it may order the
defendant to return to the state property already removed—the pre-
liminary injunction to freeze assets will not require the defendant to
engage in any conduct that could be perceived as offensive or repug-
nant. Thus, while the preliminary injunction will act in personam, it
will not place “substantively unacceptable limitations on [the defend-
ant’s] personal freedom.”

Although a defendant who violates a preliminary injunction may be
held in contempt and subject to imprisonment, the sanction will not be
available merely for failing to satisfy the final money judgment; it will
not be akin to imprisonment for debt. Rather, the defendant will be
sanctioned for violating a court order that barred her from dissipating
assets the court had already determined were not needed for subsis-
tence. Weighing the intrusiveness of imprisonment in these circum-
stances, which would be felt only by defendants who intentionally
flouted preliminary injunctions to freeze assets, against the inevitable
intrusiveness of attachment, which would be felt by all defendants
deprived of the possession and use of their property, it is difficult to see
why the legal remedy should be automatically preferred.

d. Administrability

Especially when considering the availability of structural injunc-
tions, courts hesitate to grant equitable relief because they fear that
they will be overwhelmed by administrative tasks and oversight
responsibilities. These concerns have no place in the choice
between preliminary injunctions to freeze assets and attachment
orders, however. In both situations, the court will have to consider
first whether preliminary relief should issue at all, and, if so, what
property of the defendant’s will be attached or frozen. In the
attachment setting, the judicial machinery will then have to be
deployed to seize the goods and safely keep them. In the prelimi-

298. See supra note 155 and accompanying text.
299. See supra part II.C.3.
300. Wasserman, supra note 10, at 656 (citing cases and 11 WRIGHT & MILLER, supra note
116, § 2944 (noting “the belief that awards of equitable remedies potentially are more
burdensome on the courts than damage remedies because of difficulties in drafting, administering
and enforcing them”)).
301. The availability of preliminary injunctive relief to freeze assets should not increase the
demand for interim relief, as the showing required to obtain an injunction will be more rigorous
than that presently required to obtain an attachment order. See supra parts I.A and III.
302. See supra notes 97–98 and accompanying text.
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In the ordinary injunction context, on the other hand, no judicial effort will be required to implement the injunction.

Of course, judicial resources may be needed to enforce the injunction, but they should not be great. The plaintiff will have every incentive to police the defendant’s behavior and to report noncompliance to the court. The plaintiff may actually reduce the likelihood of violation by notifying banks and securities firms with which the defendant has accounts that an injunction has been entered against the defendant. Although the Federal Rules of Civil Procedure do not appear to authorize the plaintiff to discover “facts about a defendant’s financial status . . . prior to judgment with execution unsatisfied,” arguably such matters are “relevant to the subject matter involved in the pending action” once the court has issued a preliminary injunction against dissipation of assets. Even if such discovery is not technically authorized by the rules, the court should have authority under the All Writs Act to order discovery (to be taken by the plaintiff) reasonably tailored to ensure compliance with the preliminary injunction.

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303. This procedure has enhanced compliance with Mareva injunctions issued in England. See supra note 174.

304. Fed. R. Civ. P. 26 advisory committee notes to 1970 amendments. Compare Ranney-Brown Distribus., Inc. v. E.T. Barwick Indus., Inc., 75 F.R.D. 3, 5 (S.D. Ohio 1977) (stating that “ordinarily, Rule 26 will not permit the discovery of facts concerning a defendant’s financial status, or ability to satisfy a judgment, since such matters are not relevant, and cannot lead to the discovery of admissible evidence”) and Gangemi v. Moor, 268 F. Supp. 19, 21-22 (D. Del. 1967) (denying discovery of defendant’s assets prior to judgment) with Miller v. Doctor’s Gen. Hospital, 76 F.R.D. 136, 140 (W.D. Okla. 1977) (stating that “where punitive damages are claimed, it has been generally held that the Defendant’s financial condition is relevant to the subject matter of the action and is thus a proper subject of pretrial discovery”) and Holliman v. Redman Development Corp., 61 F.R.D. 488, 490-91 (D.S.C. 1973) (holding that a defendant’s pecuniary condition is relevant on the issue of punitive damages). Cf. Fed. R. Civ. P. 69(a) (stating that “in aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held”).


306. See 28 U.S.C. § 1651(a) (1988) (providing that federal courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law”); Kemp v. Peterson, 940 F.2d 110, 113 (4th Cir. 1991) (affirming district court order that required defendants to submit biweekly or monthly reports itemizing their business and personal expenses so the magistrate could monitor their compliance with a preliminary injunction freezing their assets; stating that “a court is authorized to issue all orders necessary to enforce orders it has previously issued in the exercise of its jurisdiction”); Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 557 (5th Cir. 1987) (upholding preliminary injunction that required “the defendants . . . to maintain itemized monthly accountings of their expenditures”); New York v. Shore Realty Corp., 763 F.2d 49, 53 (2d Cir. 1985) (upholding district court order granting discovery in aid of a permanent injunction, regardless of whether such discovery was authorized by Fed. R. Civ. P. 69; relying on § 1651 for the proposition that “the District Court had ample authority to issue all orders necessary for the enforcement of its [injunction]”); see also infra notes 393–96 and accompanying text (discussing the availability of discovery in...
discovery is permitted, the plaintiff will be well-situated to police compliance with the injunction.

In the event the plaintiff alleges that the defendant has violated the preliminary injunction, the court will have to hold a contempt hearing and may have to impose sanctions. But these burdens, which will be borne only in instances of noncompliance, probably do not outweigh the burdens routinely borne in attachment proceedings, which require the seizure and maintenance of the defendant's property in all cases. Thus, administrability concerns do not justify a blanket preference of prejudgment attachment over preliminary injunctions to freeze assets.

e. Jurisdiction and Federalism

The "no adequate remedy at law" requirement "is often invoked to serve its original purpose of allocating jurisdiction among decisionmakers."\textsuperscript{307} Within the state system, where the choice is between attachment under state statute and a preliminary injunction governed by state equitable principles, jurisdictional concerns should not matter so long as the courts are careful not to use equity to evade legislatively crafted limitations on the attachment remedy.\textsuperscript{308}

In the federal system, on the other hand, the choice is between attachment under state law pursuant to Rule 64\textsuperscript{309} and preliminary injunctive relief governed by federal equitable principles pursuant to Rule 65.\textsuperscript{310} Here, jurisdictional/federalism issues can crop up, but are masked by the "no adequate remedy at law" requirement.

\textsuperscript{307} Laycock, supra note 119, at 732.

\textsuperscript{308} See supra part II.C.1 and infra part IV.C.

\textsuperscript{309} Rule 64 (which has not been amended since it was originally adopted in 1938, 11 WRIGHT \& MILLER, supra note 116, § 2941; 7 JAMES WM. MOORE \& Jo DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 64.01[1] (1991)) provides that

at the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought.

\textsuperscript{310} Prior to the adoption of the Federal Rules of Civil Procedure, equity jurisdiction in the federal courts was drawn from English equity procedure and was governed by the federal courts' own Equity Rules. See 2 MOORE \& LUCAS, supra note 309, ¶ 2.03; 11 WRIGHT \& MILLER, supra note 116, § 2941; Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. PA. L. REV. 909, 931 (1987). The Supreme Court promulgated the first set of federal equity rules in 1822, and a second set in 1843.
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The issue should not be whether legal or equitable remedies are preferable, but rather, whether state or federal law should govern the availability of preliminary relief in federal court. Professors Wright and Miller conclude that:

[A federal] plaintiff should be able to obtain a temporary restraining order or a preliminary injunction to preserve the status quo even though he is suing to enforce a state right and those devices are not provided for by the forum's law or are available only upon a different showing than is required under Rule 65.\textsuperscript{311}

Professors Moore and Lucas, on the other hand, suggest that under \textit{Erie}:

[T]he parties [in a diversity case] are entitled to the same substantial treatment they would get in the same court. If, for example, the Delaware state court will not give the coercive relief of an injunction but will award damages then the plaintiff in the federal court across the street is entitled only to damages, and the defendant should not be subjected to an injunction.\textsuperscript{312}

Resolution of this question requires consideration of the "relations between state and federal courts," not of "relations between law and

\textsuperscript{2} \textit{Moore & Lucas}, supra note 309, ¶ 2.03 (citing \textit{Wheat} v (1822) and \textit{17 Pet. ixi} (1842)). The citation to \textit{17 Pet.} is incorrect, as the second set of equity rules were published at 42 U.S. (1 How.) ixi (1843).


\textsuperscript{311} 11 Wright & Miller, supra note 116, § 2943 at 390-91 (relying on Hanna v. Plumer, 380 U.S. 460 (1965), and the proposition that "the application of the federal rule to requests for preliminary injunctions or temporary restraining orders would not impair state interests in any substantial way").

\textsuperscript{312} 2 Moore & Lucas, supra note 309, ¶ 2.09; accord \textit{7 Moore & Lucas, supra note 309, ¶ 64.04[3]}, at 64-21, ¶ 65.18[1], at 65-170.

In all events, a preliminary injunction to freeze assets in a diversity action is not a "remedy providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action," and therefore is not within the purview of Rule 64. \textit{7 Moore & Lucas, supra note 309, ¶ 64.04[3]}, at 64-19 to 64-21 (concluding that "the equitable injunctive remedy is not a 'corresponding' or 'equivalent' remedy within the intendment of Rule 64"; noting that the "statutory predecessor of Rule 64 dealt only with provisional remedies available in actions at law"); \textit{id. ¶ 65.02}[2] (stating that "Rule 64 does not deal with the equitable remedy of injunction. Therefore, state law is not applicable to the equitable injunctive remedy by virtue of Rule 64."). \textit{But see In re Feit & Drexler, Inc., 760 F.2d 406, 415 n.2 (2d Cir. 1985) (raising the possibility that a preliminary injunction to freeze assets could be construed as a "remedy providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action," in which case the federal court arguably should apply the state law standard for determining whether or not such an injunction is available in the circumstances of the case).}
equity.”\textsuperscript{313} The “no adequate remedy at law” requirement has no place in this inquiry, and only confuses the proper question regarding the equitable powers of federal courts in diversity cases.\textsuperscript{314}

3. Judicial Economy and Efficiency

Given the number of published opinions that consider the issue, it appears that courts take the “no adequate remedy at law” requirement seriously and therefore spend enormous amounts of time considering whether they even have authority in money damages actions to issue preliminary injunctions to freeze assets.\textsuperscript{315} In many of these cases, the plaintiff can make a strong showing that some interim relief is needed to prevent active tertiary harm. In cases where an attachment order is the most likely alternative, a defendant’s opposition to preliminary injunctive relief is understandable only to delay the grant of relief, to force the plaintiff to expend additional resources to obtain necessary relief, or to obfuscate the issue sufficiently to avoid the grant of relief altogether. In cases where the plaintiff can make a strong showing on all four requirements for preliminary injunctive relief, it is difficult to understand “why we have a rule that encourages the parties to litigate”\textsuperscript{316} the question of authority to issue equitable relief.

Judicial resources are expended not only on the primary question of whether courts have authority to issue preliminary injunctions in money damages cases, but also by appellate courts on the secondary question of appealability. Again, based on the number of published opinions that address the issue, appellate courts apparently spend substantial amounts of time first characterizing the relief in issue as an attachment or a preliminary injunction,\textsuperscript{317} and then, depending upon

\textsuperscript{313} Laycock, supra note 119, at 736.

\textsuperscript{314} A sixth revisionist rationale for the “no adequate remedy at law requirement” will be addressed separately in part IV.C. because it has been specifically relied upon by courts that have denied preliminary injunctions to freeze assets.

\textsuperscript{315} See, e.g., supra notes 187, 188, and 190 (citing cases).

\textsuperscript{316} Laycock, supra note 119, at 723.

\textsuperscript{317} See, e.g., General Motors Corp. v. Gibson Chem. & Oil Corp., 786 F.2d 105, 108 (2d Cir. 1986) (declining to decide whether an order confirming an ex parte order authorizing the seizure of goods, which allegedly infringed plaintiff’s trademark, was “equivalent” to a preliminary injunction or an order of attachment because there was no showing that the order might have a “serious, perhaps irreparable, consequence” and could be “effectually challenged” only by immediate appeal; holding that seizure order was not reviewable under collateral order doctrine); Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 45–47 (1st Cir. 1986) (characterizing an order, which enjoined defendant from disposing of or encumbering $4 million of its assets and directing it to set aside that amount in an interest-bearing account, as a preliminary injunction appealable under § 1292(a)(1) because it created a “significant constraint,” it had been treated by district court and parties as an injunction, and it ordered defendant to refrain from certain conduct and to affirmatively take certain conduct); In re Feit & Drexler, Inc., 760 F.2d 406, 412
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the classification, deciding whether or not an interlocutory appeal may be taken from the grant, denial, or vacatur of the order.318 It is unfor-

(2d Cir. 1985) (characterizing an order, which continued prior orders that "prohibited a party from transferring or disposing of any of her property, wherever located, and which ordered her to deliver all of her deliverable property, wherever located, to her attorney in New York as escrow agent," as an appealable preliminary injunction); Inter-Regional Fin. Group, Inc. v. Hashemi, 562 F.2d 152, 154 (2d Cir. 1977) (holding that district court order, which required defendant to bring stock certificates into the state from their locations in other states so that they could be attached, was an injunction and therefore appealable), cert. denied, 434 U.S. 1046 (1978); Rosenfeldt v. Comprehensive Accounting Serv. Corp., 514 F.2d 607, 610–11 (7th Cir. 1975) (holding that portions of district court order, which restrained counterclaim-defendants from soliciting and collecting fees from specified clients and required them to deliver accounts to counterclaim-plaintiff, were "the "functional equivalents" of a writ of attachment or replevin, and therefore were not appealable; but portion that restrained counterclaim-defendants from instituting an action in bankruptcy court was an appealable preliminary injunction); United States v. Estate of Pearce, 498 F.2d 847, 850 (3d Cir. 1974) (Gibbons, J., dissenting) (concluding that denial of motion to quash prejudgment sequestration was appealable under § 1292(a)(1) because "it is functionally identical with an injunction against transfer or the appointment of a pendente lite receiver").

318. Although both state and federal appellate courts have routinely permitted parties to appeal from the grants, denials or vacaturs of preliminary injunctions that enjoin parties from dissipating assets, see, e.g., Illinois ex rel. Hartigan v. Peters, 861 F.2d 164 (7th Cir. 1988); Felt, 760 F.2d at 411–12; Etridge v. TSI Group, Inc., 548 A.2d 813, 817 (Md. Ct. Spec. App. 1988); Federal Nat'l Mortgage Ass'n v. O'Donnell, 446 So. 2d 395, 399 (La. Ct. App. 1984), some federal courts have first grappled with the question whether the movant must establish that deferring appellate review would cause irreparable injury. See, eg., Holmes v. Fisher, 854 F.2d 229, 231 (7th Cir. 1988); Gibson, 786 F.2d at 108.

Federal courts have generally held that district court orders denying a prejudgment attachment (or vacating an attachment) are appealable as final "collateral orders" within the meaning of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), see, e.g., Interpool Ltd. v. Char Yigh Marine (Panama) S.A., 890 F.2d 1453 (9th Cir. 1989); American Oil Co. v. McMullin, 433 F.2d 1091, 1096 (10th Cir. 1970); Chilean Line, Inc. v. United States, 344 F.2d 757, 759 (2d Cir. 1965); see also 11 WRIGHT & MILLER, supra note 116, § 2936, but that district court orders granting an attachment (or refusing to vacate one) are not appealable. See, e.g., Perpetual Am. Bank v. Terrestrial Sys., Inc., 811 F.2d 504, 505–06 (9th Cir. 1987) (per curiam); Inter-Regional Fin. Group, Inc. v. Hashemi, 562 F.2d 152, 154 (2d Cir. 1977), cert. denied, 434 U.S. 1046 (1978); W.T. Grant Co. v. Haines, 531 F.2d 671, 678 (2d Cir. 1976); see also 11 WRIGHT & MILLER, supra note 116, § 2936.

State court rulings on the appealability of attachment orders are even more difficult to categorize. See M.L. Schellenger, Annotation, Appealability, Prior to Final Judgment, of Order Discharging or Vacating Attachment or Refusing to Do So, 19 A.L.R.2d 640 (1951 & Later Case Service 1982 & Supp. 1991) (reviewing and attempting to categorize state court decisions regarding appealability of orders regarding prejudgment attachment). Some states permit an immediate appeal from the grant, denial, confirmation or vacatur of an attachment order, either by characterizing such judicial action as "final," see, e.g., CONN. GEN. STAT. ANN. § 52-278i (West Supp. 1991), or by authorizing an appeal irrespective of finality. See, e.g., N.M. STAT. ANN. § 42-9-34 (Michie 1978); N.Y. CIV. PRAC. L. & R. § 5701(a)(2)(i) (McKinney 1978); OHIO REV. CODE ANN. § 2715.46 (Anderson Supp. 1990); PA. R. APP. P. 311(a)(2). Other states, in deciding questions of appealability, distinguish between orders granting or confirming or refusing to vacate attachments, on the one hand, and orders denying or vacating attachments, on the other. See, e.g., CAL. CIV. PROC. CODE § 904.1(e) (West Supp. 1991); IOWA CODE ANN. § 639.65 (West 1950); International Typographical Union Negotiated Pension Plan v. Ad Composers, Inc., 191 Cal. Rptr. 227, 228 n.1 (Cal Ct. App. 1983); Hamilton v. Hanks, 309 So.

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tunate that the confusion regarding the availability of preliminary injunctions to freeze assets has forced both trial and appellate courts to “squander[ ] on jurisdictional matters time needed to decide the case on the merits.”

When a plaintiff seeking interim relief from active tertiary harm can satisfy all of the requirements for preliminary injunctive relief and the reasons for preferring legal remedies over equitable ones fail to obtain, this expenditure of scarce judicial resources on “jurisdictional matters” is difficult to justify.

C. Exclusivity and Evasion

“Litigants sometimes appeal to a court’s general equity powers to evade more particular rules of law.” In fact, several courts have denied preliminary injunctions to freeze assets because they concluded that the plaintiff was seeking injunctive relief in an effort to circumvent particular statutory requirements contained in the prejudgment attachment statute, or because the plaintiff was attempting to evade the statute altogether by seeking relief that was not authorized thereby. Concluding that the attachment statute offers exclusive relief from tertiary harm, some courts have declined to grant preliminary injunctions to freeze assets.

In some states, concern that the legislature intended attachment to be an exclusive remedy will be easily allayed by reference to other statutes enacted by the same legislature, which permit courts to grant preliminary injunctions to prevent the dissipation of assets. Where

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319. Holmes v. Fisher, 854 F.2d 229, 231 (7th Cir. 1988) (refusing to read into § 1292(a)(1) a requirement that appellant show that denial of immediate review would cause irreparable injury when the order under review unambiguously denied an injunction). If trial courts were free to issue preliminary injunctions to freeze assets without regard to the adequacy of the legal remedy, they might be more willing to characterize the relief they grant as a preliminary injunction. If they were, appellate courts would waste less time on the preliminary question of appealability since the availability of an interlocutory appeal from the grant or denial of a preliminary injunction is relatively well-established. See supra note 318.

320. Laycock, supra note 119, at 752. Laycock argues, and this author agrees that “the real question in these cases is whether the more particular law controls,” not “whether the less particular theory is legal or equitable.” Id. at 752, 754.

321. See, e.g., supra note 191 (citing cases).

322. See, e.g., ARIZ. REV. STAT. ANN. § 12-1801 (1982) (authorizing injunction “when, pending litigation, it appears that a party ... threatens or is about to do some act ... in violation of the rights of the applicant, which would tend to render the judgment ineffectual”); CAL. CIV. PROC. CODE §§ 486.030, 486.050, 486.070 (1979) (permitting court to grant a temporary protective order in lieu of writ of attachment if it “would be in the interest of justice and equity to the parties”; such order may prohibit transfer by defendant only of her property in the state
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express statutory authority exists for the grant of a preliminary injunction to prevent active tertiary harm, courts err in concluding that attachment is the exclusive prejudgment remedy.

Nevertheless, concerns about evasion of legislatively enacted policy may justify the denial of preliminary injunctive relief in particular cases. If, for example, a plaintiff seeks a preliminary injunction to freeze assets rather than attachment in an effort to enjoin the defendant’s use of her wages (which would be exempt from attachment), a court could legitimately decline to “undermine[] a policy that the court or legislature is committed to preserving,” and refuse to grant the preliminary injunction. In enacting the wage exemption, the legislature intended to shield some of the defendant’s assets from prejudgment orders, and courts should honor that legislative policy.

Likewise, if a plaintiff seeks a preliminary injunction under a rule that permits the court to waive the bond requirement, and if the attachment statute requires a bond in an amount equal to twice the value of the property attached, a court might legitimately refrain from granting the injunction (or at least from waiving the bond requirement). In enacting the double bond requirement for attachment, the legislature intended to protect defendants from any harm they might suffer as a result of an erroneous attachment and perhaps to deter plaintiffs from seeking prejudgment attachment. To permit the plaintiff to obtain protection from tertiary harm without complying with any bond requirement would undermine this legislative policy.

If, on the other hand, a plaintiff seeks to freeze property that the defendant has already taken overseas with the intent to defraud creditors, prejudgment attachment will be ineffective because it cannot reach property outside the state. In providing that the sheriff can

subject to levy on writ of attachment); IDAHO R. CIV. P. 65(e)(4) (preliminary injunction may be granted “[w]hen it appears, by affidavit, that the defendant during the pendency of the action, threatens, or is about to remove, or to dispose of his property with intent to defraud the plaintiff”); MINN. STAT. ANN. §§ 570.026, 571.932 (West 1988 & Supp. 1991) (if court finds that plaintiff has made requisite showing for attachment or garnishment but declines to issue order because harm to defendant might outweigh harm to plaintiff without attachment, or for other reason, court may restrain defendant from selling, disposing, or otherwise encumbering the property); N.D. CENT. CODE § 32-06-02 (1976) (authorizing temporary injunction “[w]hen, during the pendency of an action, it shall appear by affidavit that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud his creditors”).

323. Laycock, supra note 119, at 754.
324. See, e.g., Allstate Sales & Leasing Co. v. Geis, 412 N.W.2d 30, 33 (Minn. App. 1987) (“By obtaining injunctive relief rather than proceeding under the [attachment] statute, Allstate was able, in effect, to attach appellants’ assets without making the showing required by the statute or affording appellants the statute’s protections. Such injunctive relief frustrates the intent of the legislature.”).
attach only property within the county or state, the legislature most probably was cognizant of the limited authority of the sheriff and the enforcement difficulties that would result if the statute purported to authorize extraterritorial attachment. It is less likely that the legislature intended to shield property fraudulently taken overseas from any prejudgment remedy. In such a case, then, the plaintiff's invocation of equity would "fill[ ] a gap or correct[ ] an injustice that the court is empowered to correct . . . . This is indeed a traditional function of substantive equity." \(^{325}\) Thus, even though attachment could not reach the assets removed from the state, a mandatory preliminary injunction to require the defendant to bring the assets back would not undercut any state policy or circumvent any procedural protection. It would, however, provide the plaintiff with protection against active tertiary harm that would not be available using the prejudgment attachment remedy. On these facts, the preliminary injunction probably should issue.

Concerns about evasion or circumvention of legislative policy will not justify an automatic preference in all cases for the legal remedy, prejudgment attachment. Courts will have to "focus directly on the . . . substantive policies" \(^{326}\) embodied in the attachment statutes, and ask whether issuance of a preliminary injunction in lieu of an attachment order would undercut those policies. Only in cases where the risk of evasion is real should courts refuse to grant preliminary injunctions out of respect for the attachment statutes.

V. USE OF PRELIMINARY INJUNCTIONS TO SECURE MONEY JUDGMENTS IN OTHER CONTEXTS

The use of preliminary injunctions to avoid tertiary harm is not unprecedented. In cases in which the plaintiff's underlying claim is an equitable one—where she asserts a preexisting interest in the property subject to dispute, for example—American courts have routinely issued preliminary injunctions to freeze the assets to secure a future equitable decree. \(^{327}\) Likewise, courts in matrimonial litigation have issued preliminary injunctions to prevent a spouse from dissipating assets during the pendency of a divorce proceeding. Finally, even in actions at law for money damages only, courts in England are authorized to issue preliminary injunctions called *Mareva* injunctions, which

\(^{325}\) Laycock, *supra* note 119, at 754.

\(^{326}\) Id.

\(^{327}\) See *supra* note 8.
Preliminary Injunctions bar the dissipation of assets pending trial. These three classes of cases demonstrate the efficacy of preliminary injunctions to freeze assets.

A. The American Experience With Preliminary Injunctions to Freeze Assets

1. Preliminary Injunctions in Equitable Actions Seeking the Return of Money

Courts have often issued preliminary injunctions to freeze assets in actions in which the plaintiff stated a claim for final equitable relief and alleged irreparable tertiary harm. In declining to issue a preliminary injunction to freeze assets in a case in which the plaintiff sought a remedy at law, money damages, the Fifth Circuit Court of Appeals distinguished the equity cases:

The cases cited by the plaintiffs and the district court upholding preliminary injunctions freezing assets fall into categories none of which is applicable here. First, as the Court stated in De Beers, an injunction may issue to protect assets that are the subject of the dispute or to enjoin conduct that might be enjoined under a final order.

* * *

In a number of other cases, most of which the district court cited, this court and others have upheld preliminary injunctions to preserve the particular assets in dispute in actions that were essentially in rem.

328. See supra note 8.

329. In re Fredeman Litig., 843 F.2d 821, 827 (5th Cir. 1988) (citing Productos Carnic, S.A. v. Central Am. Beef & Seafood Trading Co., 621 F.2d 683, 686 (5th Cir. 1980) (affirming grant of preliminary injunction to enjoin movement of goods even if plaintiff’s ultimate remedy were limited to damages for breach of contract because unless goods could be levied upon, money judgment would be unenforceable; but holding that plaintiff had remedies other than damages available, including replevin); USACO Coal Co. v. Carbozn Energy, Inc., 689 F.2d 94, 97-98 (6th Cir. 1982) (upholding preliminary injunction that froze defendant's assets because it secured plaintiffs' claim for restitution and a constructive trust, not treble damages under RICO; citing Deckert for the proposition that “the power of the district court to preserve a fund or property which may be the subject of a final decree is well established”); see also, e.g., Republic of Philippines v. Marcos, 862 F.2d 1355, 1361, 1364 (9th Cir. 1988) (en banc), cert. denied, 490 U.S. 1035 (1989); Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 562 (5th Cir. 1987); Republic of Philippines v. Marcos, 806 F.2d 344, 355-56 (2d Cir. 1986); In re De Lorean Motor Co., 755 F.2d 1223, 1227 (6th Cir. 1985); Federal Trade Comm’n v. H.N. Singer, Inc., 668 F.2d 1107, 1112 (9th Cir. 1982); Taxpayers Against Fraud v. Link Flight Simulation Corp., 722 F. Supp. 1248, 1255 (D. Md. 1989); Korn v. Ambassador Homes, Inc., 546 So. 2d 756, 757 (Fla. Dist. Ct. App. 1989) (per curiam); Levitt v. Maryland Deposit Ins. Fund Corp., 505 A.2d 140, 147 (Md. App. 1986).

330. Fredeman, 843 F.2d at 827 (citing Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560 (5th Cir. 1981) (an admiralty action, modifying and affirming preliminary injunction that enjoined individuals from interfering with plaintiff’s search and salvage operations of 1622 Spanish sailing vessel); Meis v. Sanitas Serv. Corp., 511 F.2d 655, 658 (5th Cir. 1975) (an action to rescind a corporate merger agreement allegedly induced by
Although issuance of a preliminary injunction in these cases secures the final equitable relief sought—restitution, rescission or constructive trust—often the plaintiffs in these equitable actions seek nothing more than the return of a fund of money. Although a plaintiff’s claim to money that was originally hers is theoretically different from a claim to money as damages only, the harm the plaintiff suffers in the two actions as a practical matter is identical if the defendant dissipates the fund: she suffers irreparable tertiary harm because she can never collect on her judgment or enforce her decree. Thus, the interim equitable measures used to prevent tertiary harm to the plaintiff seeking final equitable relief should serve as models for the preliminary injunctions to freeze assets in money damages cases advocated here.

2. Preliminary Injunctions in Divorce Actions

Courts in matrimonial actions have commonly issued preliminary injunctions to freeze assets, and thus prevent spouses from transferring or encumbering their property during the pendency of the divorce litigation. Although many states authorize such preliminary relief by misrepresentations, affirming grant of preliminary injunction that enjoined defendant purchaser from “removing any of the assets, books and records from the corporation which belonged to it immediately prior to the merger . . . [and] in any way handling corporate assets except as may be reasonably necessary in the ordinary course of business and in accordance with good corporate business practices”); Foltz v. U.S. News & World Rep., 760 F.2d 1300, 1309 (D.C. Cir. 1985) (directing the district court to reconsider request for preliminary injunction to restrain profit-sharing plan from distributing all its assets pending litigation of claim against plan; stating that “an equitable remedy designed to freeze the status quo, as opposed to creating a pool of resources from which members of the plaintiff class could draw prior to a determination of liability and the extent . . . of damages, would be entirely in keeping with the principles that undergird equity jurisprudence”), on remand, 613 F. Supp. 634 (D.D.C. 1985) (granting preliminary injunction against distribution of plan assets in an amount equal to the amount plaintiffs realistically could recover from the plan plus 6% prejudgment interest); Tri-State Generation & Transmission Ass’n v. Shoshone River Power, Inc., 805 F.2d 351 (10th Cir. 1986) (reversing denial of preliminary injunction to enjoin sale by member cooperative of its assets in action for permanent injunction barring sale)); see also People v. Superior Court, 264 Cal. Rptr. 28, 29 (Cal. Ct. App. 1989) (directing trial court to reconsider request for preliminary injunction to enjoin defense attorneys from disposing of monies paid to them by clients with “drug money”; noting that “the forfeiture action is not a suit for money damages, but an action for the return of property which, in this case, happens to be money”).

331. 2 Homer H. Clark, The Law of Domestic Relations in the United States § 15.6 (2d ed. 1987); Joanne Ross Wilder et al., Pennsylvania Family Law Practice and Procedure Handbook § 12-2 (2d ed. 1989) (noting that “the court may issue injunctions and may attach property to prevent the disposition, alienation or encumbrance of property in order to defeat equitable distribution, alimony pendente lite, alimony, child and spousal support or similar award”). Courts in matrimonial actions also have authority to make awards of temporary alimony, 2 Clark, supra, § 17.2, which, like preliminary injunctions that enjoin conduct, “prevent additional primary conduct that threatens secondary harm (i.e., cutting off support of the dependent spouse).” Wasserman, supra note 10, at 668.
courts have granted it without statutory authority, invoking "the inherent power of equity courts to give whatever incidental relief may be necessary to make their decrees effective." To obtain such preliminary relief, the dependent spouse must demonstrate that the supporting spouse intends to transfer the property and that the transfer would prejudice the dependent spouse's claim to the property either because the dependent spouse "had an interest in the property as such, or because it would disable the [supporting spouse] from making payments for alimony or support." Thus, even where the dependent spouse does not claim a property interest in the assets, he or she may obtain a preliminary injunction to enjoin the supporting spouse from dissipating assets if they would be needed to satisfy the pending claim for alimony or support. To the extent, then, that claims for alimony and money damages are ano-

332. 2 CLARK, supra note 331, § 15.6, at 92 n.2; see, e.g., CAL. CIV. CODE § 4359 (West Supp. 1991) (authorizing issuance of ex parte orders to restrain transfer, encumbrance, hypothecation, concealment or disposition of property except in usual course of business or for necessities of life, and to require party to account for all extraordinary expenditures); ILL. ANN. STAT. ch. 40, § 501(2) (Smith-Hurd Supp. 1991) (authorizing issuance of temporary restraining order or preliminary injunction only if motion is "accompanied by affidavit showing a factual basis" for the relief sought); N.Y. DOM. REL. LAW § 234 (McKinney 1986) (interpreted as permitting court to restrain a party from hiding or disposing of assets during the litigation of matrimonial litigation; party seeking relief need not seek preliminary injunction per se, but must demonstrate that party to be restrained has done, or is threatening to do, an act that would prejudice movant's equitable distribution claim); UNIFORM MARRIAGE AND DIVORCE ACT § 304, 9A U.L.A. 201 (1987) (authorizing issuance of temporary injunction to restrain transfer, encumbrance, concealment or disposition of property except in usual course of business or for necessities of life and to require notification of any proposed extraordinary expenditures).

333. 2 CLARK, supra note 331, § 15.6 at 92-93 (citing National Automobile & Casualty Ins. Co. v. Queck, 405 P.2d 905 (Ariz. Ct. App. 1965); McRae v. McRae, 52 So. 2d 908 (Fla. 1951); Klaiber v. Klaiber, 75 N.E.2d 353 (Ill. 1947); see also Pennington v. Fourth Nat'l Bank, 243 U.S. 269 (1917) (upholding preliminary injunction enjoining bank from paying out balance in account to husband pending determination of wife's suit for alimony; quasi-in-rem jurisdiction obtained by attaching defendant's property via preliminary injunction against bank).

334. 2 CLARK, supra note 331, § 15.6, at 94 (footnotes omitted); see also WILDER et al., supra note 331, § 12-3, at 117 (stating that "the standard for the grant or denial of requests for equitable relief under the [Pennsylvania] Divorce Code follows the law respecting equitable relief generally").

335. See, e.g., Sandstrom v. Sandstrom, 565 So. 2d 914, 914 (Fla. Dist. Ct. App. 1990) (per curiam) (stating that "wife may 'seek to enjoin the husband's removal, concealment or fraudulent conveyance of his assets which may be part of her alimony award in the plan of equitable distribution'"); Lupo v. Lupo, 366 So. 2d 932, 934 (La. Ct. App. 1978) (affirming grant of preliminary injunction that barred husband from alienating property even though there was "a dispute as to the separate or community nature of a portion of these funds"); Hempel v. Hempel, 30 N.W.2d 594, 599 (Minn. 1948) (stating that "in a divorce case, the court may issue a temporary injunction restraining the husband from disposing of his property and income during the pendency of the case, where it appears that contemplated transfers thereof would defeat the wife's claim to alimony"); Petrus v. Petrus, 199 N.E.2d 579, 581 (Ohio 1964) (stating that court has "full power and authority in domestic relations cases to preserve the status quo... until such
gous,\(^{336}\) the preliminary injunctions to freeze assets that issue in divorce cases provide additional support for preliminary injunctions to freeze assets in money damages cases.

B. *The English Experience with Mareva Injunctions*\(^{337}\)

Like American courts, English courts hesitated to grant any form of preliminary equitable relief in actions in which the plaintiff sought a money judgment as her final remedy.\(^{338}\) In fact, no legal restraint whatsoever existed to inhibit concealment or dissipation of assets or time as the court can dispose of the alimony or support problems or a division of property") (emphasis added).

In states that “permit the courts in divorce cases to divide all the property owned by either spouse, regardless of when or how acquired,” 2 CLARK, *supra* note 331, § 16.1, this issue will not arise. *See also* UNIFORM MARITAL PROP. ACT § 4(b), 9A U.L.A. 108 (1987) (stating that “all property of spouses is presumed to be marital property”).

336. The claims are analogous in that each seeks a transfer of money from one party to another without the transferee alleging any pre-existing interest in the money sought to be transferred. To the extent that “alimony can also serve as compensation to the [spouse] for faithful service during marriage,” 2 CLARK, *supra* note 331, § 17.5, at 255, a claim for alimony is analogous to a claim seeking money damages for breach of contract.


*Mareva* injunctions have been granted in most common law jurisdictions that follow English law, including Australia, Canada, New Zealand, Malaysia, Hong Kong and Singapore. OUGH, *supra*, §§ 8.0-8.6, at 93–94.

338. HETHERINGTON, *supra* note 337, at 3 (“before 1975 the courts would not grant an injunction to restrain a defendant from disposing of his assets pendente lite merely because the plaintiff feared that by the time he obtained judgment the defendant would have no assets against which execution could be levied”); Nippon Yusen Kaisha v. Karageorgis, [1975] 3 All Eng. Rep. 282, 283 (C.A.) (noting that “[i]t has never been the practice of the English courts to seize assets of a defendant in advance of judgment, or to restrain the disposal of them”); see, e.g., Mills v. Northern Ry. of Buenos Ayres, 5 L.R.-Ch. 621, 628 (Ch. App. 1870) (Eng.) (noting that “[i]t is wholly unprecedented for a mere creditor to say, ‘... I may keep the assets in a proper state of security for the payment of my debt whenever the time arrives for its payment’ “); Newton v. Newton, 11 P.D. 11, 13 (1885) (Eng.) (in matrimonial action, denying wife’s application for a preliminary injunction to enjoin husband from removing his property from the country; holding that “it is not competent for a Court, merely quia timet, to restrain a respondent from dealing with his property”); Lister & Co. v. Stubbs, 45 Ch. D. 1, 13 (C.A. 1890) (Eng.) (declining to grant interlocutory injunction to restrain defendant from dealing with the real estate purchased with monies allegedly received as kickbacks for placing orders on behalf of plaintiffs’ business; injunction declined because the monies sought by plaintiffs as their final remedy never belonged to them; Cotton, L.J., stating that “I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree”).
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other methods of “judgment evasion” between 1881, when foreign attachment fell into disuse, and 1975, when the Court of Appeal decided *Mareva Compania Naviera S.A. v. Int’l Bulkcarriers S.A.* and revolutionized English practice.

In *Mareva*, plaintiff shipowners let their vessel, *Mareva*, to foreign defendants on a time charter for $3850 per day payable half-

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340. Prior to 1867, attachment was available even in cases in which the plaintiff’s claim against the defendant did not arise in London and the garnishee was only transiently present there. In such cases, the plaintiff and the garnishee could collude to deprive the defendant of his property without notice. PULLING, *supra* note 60, at 192; Levy, *supra* note 53, at 420. To reduce this risk of fraud, the House of Lords limited the availability of foreign attachment to cases in which the defendant accrued the debt in London, the garnishee resided in London, and the defendant received prior notice and an opportunity to contest the debt. MILLAR, *supra* note 48, at 484; Levy, *supra* note 53, at 422 (citing *The Mayor and Aldermen of the City of London v. Cox*, L.R. 2 E.&I. App. 239 (H.L. 1867)). Shortly thereafter, in an 1881 decision, the House of Lords held that garnishment did not lie against a corporation. Because only a payment under compulsion discharged the garnishee vis-a-vis the defendant and because a corporation’s “body” could not be arrested pursuant to a *capias ad satisfaciendum*, any payment a corporate garnishee made would have been deemed voluntary. Thus, foreign attachment could not lie against corporate garnishees because they could not be protected against multiple claims. MILLAR, *supra* note 48, at 485 (citing *The Mayor and Aldermen of the City of London v. The Shareholders of the London Joint Stock Bank*, 6 App. Cas. 393 (H.L. 1881)); Levy, *supra* note 53, at 414 (citing same). Given these restrictions on the use of foreign attachment, the procedure fell into disuse in or about 1881. 25 HALSBURY’S LAWS OF ENGLAND 572 n.(r) (3d ed. 1958);

341. [1980] 1 All E.R. 213 (C.A. 1975). The *Mareva* case actually was the second case in which the Court of Appeal granted a preliminary injunction to freeze assets to which plaintiff had no pre-existing claim. The first case was *Nippon Yusen Kaisha v. Karageorgis*, [1975] 1 W.L.R. 1093, 1094 (C.A.) (continuing a preliminary injunction, which had been granted ex parte two days earlier, to enjoin defendants “from disposing or removing any of their assets which are in this jurisdiction outside it”). In concluding that such an injunction was appropriate on the facts of the case, the *Nippon* Court found that plaintiff had established “a strong prima facie case” and that “[i]f an injunction is not granted, these moneys [defendants’ accounts with a London bank] may be removed out of the jurisdiction and [plaintiffs] will have the greatest difficulty in recovering anything.” Id. at 1095. Like the *Mareva* Court, see infra text accompanying note 346, the *Nippon* Court invoked authority under section 45 of the Supreme Court of Judicature (Consolidation) Act.

342. One exception to this blanket statement exists. Just as American courts issue preliminary injunctions to freeze assets more freely in matrimonial litigation than in other kinds of cases, *supra* part V.A.2, the English courts were authorized to “grant injunctions to stop transactions intended to prevent or reduce financial relief in matrimonial proceedings” before *Mareva* was decided. Derby & Co. v. Weldon, [1989] 2 W.L.R. 412, 431 (C.A.) (citing Matrimonial Causes Act 1973, § 37(2), 27 HALSBURY’S STATUTES 751 (4th ed. 1987)) (Neill, L.J.).

343. A time charter is

da specific and express contract by which the owner lets a vessel or some particular part thereof to another person for a specified time or use; the owner continues to operate the vessel, contracting to render services by his master and crew to carry goods loaded on the vessel, and the master and crew remain servants of the owner.

monthly in advance. Defendants paid the first two installments, but failed to make the third when due. While the vessel was still on its voyage to India, plaintiffs commenced suit to collect the unpaid hire ($30,800) and damages for repudiation, an action the court characterized as one at law for debt. Concerned, however, that "there [was] a grave danger that [defendants'] moneys in the bank in London [would] disappear," plaintiffs sought a preliminary injunction "to restrain the disposal of those moneys."

Relying on section 45 of the Supreme Court of Judicature (Consolidation) Act 1925, which provided that "an injunction may be granted . . . by an interlocutory order of the court in all cases in which it shall appear to the court to be just and convenient," the Court of Appeal concluded that it had unlimited power to grant injunctive relief "where it would be right or just to do so," so long as the plaintiff had some underlying legal or equitable right. It held: "If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him from disposing of those assets."

The Court of Appeal deemed the instant case a proper one for the assertion of the power, even on an ex parte application, because defendants could, at any time, withdraw their funds from the London bank and remove them outside of the country, thereby undercutting plaintiffs' ability to collect the money owed them. Thus, the court granted "an injunction to restrain the charterers [and their agents and servants] from disposing of these moneys now in the bank in London until the trial or judgment in this action."

345. *Id.* at 214.
346. 15 & 16 Geo. 5, ch. 49, § 45(1). This provision was reenacted with modifications as section 37(1) of the Supreme Court Act 1981, 11 Halsbury's Statutes 792 (4th ed. 1985). Compare 28 U.S.C. § 1651(a) (authorizing the Supreme Court and "all courts established by Congress . . . [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to usages and principles of law").
348. *Id.* at 215.
349. *Id.*
350. *Id.* In colloquy with counsel for plaintiffs, Lord Denning, Master of the Roll, agreed to extend the injunction to bar "defendants, their agents or servants or otherwise from disposing of the assets or moving them out of the jurisdiction." [1980] 1 All E.R. 213 (C.A. 1975), [1975] 2 Lloyd's Rep. 509, 512 (C.A.) (Colloquy found only in Lloyd's Reports).
351. *Mareva*, [1980] 1 All E.R. at 215. Writing separately, Lord Justice Roskill agreed that the preliminary injunction should issue in the particular circumstances of the case, but did not endorse a general departure from past practice, which "consistently refused" such relief. *Id.*
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ognized and approved of the Mareva injunction in 1981 with the enactment of the Supreme Court Act.\textsuperscript{352}

Referred to as everything from the “greatest piece of judicial law reform” of Lord Denning’s time\textsuperscript{353} to “the nuclear weapon[ ] of the law,”\textsuperscript{354} the Mareva injunction’s effect on English practice has been remarkable. Since 1975, the English courts have awarded Mareva injunctions to freeze assets in an ever-increasing set of circumstances both within and beyond the commercial setting\textsuperscript{355} to an ever-expanding number of plaintiffs.\textsuperscript{356} As the demand for Mareva injunctions has grown, the Court of Appeal has defined more precisely the circumstances in which such injunctions may issue. For present purposes, seven refinements in the law governing Mareva injunctions are worthy of discussion.

First, although English courts initially granted Mareva injunctions only against foreign defendants on the theory that only they were likely to transfer their assets outside the country,\textsuperscript{357} by 1980 the courts

\hspace{1cm} \textsuperscript{352} The Supreme Court Act 1981 § 37(3), 11 Halsbury’s Statutes 792 (4th ed. 1985), authorizes the High Court to:

\hspace{1cm} 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 . . . in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

\hspace{1cm} Parliament extended the power to issue such injunctions to the county court in the County Courts Act 1984 § 38, 11 Halsbury’s Statutes 441 (4th ed. 1985).

\hspace{1cm} Order 29, Part I of the Rules of the Supreme Court authorizes the issuance of interlocutory injunctions and orders for the interim preservation of property. Rules of the Supreme Court 1965 (O.29, r.1), in 1 The Supreme Court Practice 497–524 (1991).

\hspace{1cm} 353. Alfred T. Denning, The Due Process of Law 134 (1980), quoted in Marion Hetherington, History and Development of the Mareva Jurisdiction in the United Kingdom and Australasia, in Hetherington, supra note 337, at 2.

\hspace{1cm} 354. Ough, supra note 337, at vii.

\hspace{1cm} 355. By 1982, the Mareva injunction was being “employed generally against foreign and domestic defendants alike and in respect of matrimonial, personal injuries and Fatal Injuries Act cases as well as in commercial matters like the shipping cases where it originated.” Hetherington, supra note 353, at 2; accord Z Ltd. v. A-Z and AA-LL, [1982] 1 Q.B. 558, 584.

\hspace{1cm} 356. Shenton, supra note 174, at 104 (noting that “there are now [i.e., 1984] a steady flow of such applications to our Courts which have been estimated to exceed one thousand per month”); Hetherington, supra note 353, at 2 (noting that “by early 1979 the Mareva injunction had become a commonplace . . . remedy, with applications being made in the Commercial Court at the rate of about 20 per month”); Ninemia Maritime Corp. v. Trave Schiffahrtsgesellschaft m.b.H. & Co KG (The Niedersachsen), [1984] 1 All E.R. 398, 401 (Q.B.D. 1983) (recognizing “a rapid and sustained increase in the number of applications for Mareva relief”), appeal dismissed, [1984] 1 All E.R. 413 (C.A. 1983). Professor Juenger has commented that forum-shoppers find the Mareva injunction an “especially attractive” feature of English law. Freidrich K. Juenger, Forum Shopping, Domestic and International, 63 Tul. L. Rev. 553, 565 (1989).

\hspace{1cm} 357. Devlin, supra note 1, at 1589 n.65; Hetherington, supra note 353, at 5 n.40. See Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), [1978] 1 Q.B. 644, 659 (C.A. 1977) (distinguishing cases “where a defendant is out of the jurisdiction

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had extended the reach of the remedy to domestic defendants as well.\textsuperscript{358} Parliament confirmed the broader reach in the Supreme Court Act 1981, which granted the High Court the power to issue \textit{Mareva} injunctions "in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction."\textsuperscript{359} Like a preliminary injunction available in the United States, then, the \textit{Mareva} injunction may issue against both residents and non-residents who are subject to the court's jurisdiction.

Second, the Court of Appeal has clarified the strength of the claim that the plaintiff must establish to obtain a \textit{Mareva} injunction. Originally the courts reserved the \textit{Mareva} injunction for cases "founded on a debt which was undisputed or indisputable,"\textsuperscript{360} in which summary judgment under Rules of the Supreme Court Order 14\textsuperscript{361} would have been appropriate.\textsuperscript{362} As early as 1977, however, the Court of Appeal

\begin{footnotesize}
358.\textsuperscript{363} Hetherington, supra note 353, at 2 n.13; see, e.g., Chartered Bank v. Daklouche [1980] 1 W.L.R. 107, 113 (C.A. 1979) (affirming grant of a \textit{Mareva} injunction against a defendant who was personally served in England and had a home there, but who was a Lebanese citizen and "said that she intended to live here permanently") (Denning, M.R.); Barclay-Johnson v. Yull, [1980] 1 W.L.R. 1259, 1265 (Ch. D.) (holding that "it is no bar to the grant of a \textit{Mareva} injunction that the defendant is not a foreigner, or is not foreign-based, in any sense of those terms") (Megarry, V.-C.); Rahman (Prince Abdul) Bin Turki Al Sudairy v. Abu-Taha, [1980] 1 W.L.R. 1268, 1273 (C.A.) (holding that "a \textit{Mareva} injunction can be granted against a man even though he is based in this country if the circumstances are such that there is a danger . . . that the plaintiff, if he gets judgment, will not be able to get it satisfied") (Denning, M.R.).


361. Order 14 of the Rules of the Supreme Court authorizes summary judgment if the defendant "has no defence to a claim . . . or to a particular part of such a claim, or has no defence to such claim or part except as to the amount of any damages claimed." Rules of the Supreme Court 1965 (O.14, r.1), in 1 \textit{THE SUPREME COURT PRACTICE} 140 (1991). \textit{See generally id.} at 140–71.

362. Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), [1978] 1 Q.B. 644, 661 (C.A. 1977) (noting that the earlier cases in which \textit{Mareva} injunctions had been granted "were ones in which summary judgment would have been given under Order 14"); Third Chandris Shipping Corp. v. Unimarine S.A., [1979] 1 Q.B. 645, 649 (noting that early \textit{Mareva} cases involved a creditor with "a claim against a foreign debtor which was not disputed or was not capable of serious dispute") (Mustill, J.), \textit{appeal dismissed}, [1979] 1 Q.B. 655 (C.A.).

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held that a *Mareva* injunction could issue to secure the assets of defendants in an action in which summary judgment was not appropriate so long as “the plaintiff can show that he has a ‘good arguable case.’” Lord Denning, Master of the Roll, seemed willing to ease even this requirement in a 1979 case, but the Court of Appeal later reiterated that it must “appear[ ] likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum.”

Although this statement of the standard might appear to bar *Mareva* injunctions in contract claims for unliquidated damages and tort actions, it has not been so employed. In such cases, the Court of Appeal has resorted to the “good arguable case” standard. Thus, the requisite showing on the merits to obtain a *Mareva* injunction is comparable to our “likelihood of success on the merits” criterion.

Third, the plaintiff must demonstrate that she will suffer harm if the *Mareva* injunction is not granted. Originally, the courts reasoned that the sole purpose of the *Mareva* injunction was to insure that assets


Lord Denning justified the borrowing because, like extraterritorial service, the *Mareva* injunction “is appropriate when defendants are out of the jurisdiction.” *Id.* He also noted that the “good arguable case” test was “also in conformity with the test as to the granting of injunctions whenever it is just and convenient as laid down by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*” *Id.* (citing *American Cyanamid Co. v. Ethicon Ltd.*, [1975] App. Cas. 396 (appeal taken from Eng. C.A.) (holding that in considering whether an interlocutory injunction should issue, court must conclude that the plaintiff's “claim is not frivolous or vexatious; in other words, that there is a serious question to be tried”) (Lord Diplock)).

364. *Third Chandris*, [1979] 1 Q.B. at 668 (suggesting that the plaintiff need only “give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant”) (Denning, M.R.).

365. Z Ltd. v. A-Z and AA-LL, [1982] 1 Q.B. 558, 585 (C.A. 1981) (Kerr, L.J.); see also *The Niedersachsen*, [1984] 1 All Eng. Rep. at 401 (reaffirming that “a 'good arguable case' is no doubt the minimum which the plaintiff must show in order to cross what the judge rightly described as the 'threshold' for the exercise of the jurisdiction”) (Kerr, L.J.); Hetherington, *supra* note 353, at 5 n.39.


367. See *supra* part III.A.
were not removed from England, so "[i]f the assets are likely to remain in the jurisdiction, then the plaintiff, like all others with claims against the defendant, must run the risk . . . that the defendant may dissipate his assets." The Court of Appeal later rejected this reasoning, however, and has since stated that "the Mareva injunction extends to cases where there is a danger that the assets will be dissipated in this country as well as by removal out of the jurisdiction." Thus, just as the American plaintiff must demonstrate a risk of irreparable harm, the English plaintiff seeking a Mareva injunction must establish that "there are . . . reasons to believe that the defendant . . . may well take steps designed to ensure that [his assets] are no longer available or traceable when judgment is given against him."

368. Barclay-Johnson v. Yuill, [1980] 1 W.L.R. 1259, 1264 (Ch. D.) (stating that "the heart and core of the Mareva injunction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in the action") (Megarry, V.-C.) (emphasis added); Third Chandris, [1979] 1 Q.B. at 669 (stating that "[t]he plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied") (Denning, M.R.) (emphasis added); A.J. Bekhor & Co. v. Bilton, [1981] 1 Q.B. 923, 941 (C.A.) (noting that "the foundation of the jurisdiction is the need to prevent judgments of the court from being rendered ineffective by the removal of the defendant's assets from the jurisdiction") (Ackner, L.J.).


370. Z Ltd. v. A-Z and AA-LL, [1982] 1 Q.B. 558, 571 (C.A. 1981); see also id. at 584 (concurring that it is "logical to extend the scope of this jurisdiction whenever there is a risk of a judgment which plaintiff seems likely to obtain being defeated in this way") (Kerr, L.J.); Ninemia Maritime Corp. v. Trave Schiffahrtsgesellschaft m.b.H. & Co. K.G. (The Niedersachsen), [1984] 1 All E.R. 398, 419 (Q.B.D. 1983) (stating that "Mareva injunctions can, and nowadays frequently are, also granted where there is a danger of dissipation of assets within this country") (Kerr, L.J.) appeal dismissed, [1984] 1 All E.R. 413 (C.A. 1983); Rules of the Supreme Court 1965 (O.29, r.1), note 29/1/20, in 1 THE SUPREME COURT PRACTICE 506 (1991). In concluding that the Mareva injunction should be available to restrain domestic dissipation of assets, Lord Denning stated that the language in the Supreme Court Act 1981, which authorized the High Court to grant interlocutory injunctions "restraining a party . . . from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction," should be given "a wide meaning. They are not to be construed as ejusdem generis with 'removing from the jurisdiction.'" Z Ltd., [1982] 1 Q.B. at 571 (quoting Supreme Court Act 1981, 15 & 16 Geo. 5, ch. 49, § 37(3)); see also Rahman (Prince Abdul) Bin Turki Al Sudairy v. Abu-Taha, [1980] 1 W.L.R. 1268, 1273 (C.A.) (holding that "a Mareva injunction can be granted . . . if the circumstances are such that there is a danger of [the defendant's] absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied") (Denning, M.R.) (emphasis added); Kirby v. Banks (C.A. 1980) (Transcript No. 624 of 1980 unreported opinion), cited in Z Ltd., [1982] 1 Q.B. at 571 (granting a Mareva injunction even though the "defendant was within the jurisdiction and the danger was only that "he would dispose of £60,000—within the jurisdiction—in such a way as to be beyond the reach of the plaintiffs").

371. Z Ltd., [1982] 1 Q.B. at 585; see also The Niedersachsen, [1984] 1 All E.R. at 419 (stating that "the test is whether . . . the court concludes, on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiff would remain unsatisfied").
The plaintiff can make a prima facie showing of this risk "by showing that the asset is present and that it is movable, and by drawing some inference from the fact that the defendant is abroad (or, if within the jurisdiction, will not divulge his whereabouts)."372 One commentator has suggested that "inferential evidence of the defendant's 'good character' or 'bad character' may play a material part in the determination of whether to grant the injunction."373 And a judge has suggested that inferences regarding risk of default may be drawn from facts "about the defendant's business . . ., including . . . its size, origins, business domicile, the location of its known assets and the circumstances in which the dispute has arisen."374

Fourth, the Court of Appeal has acknowledged the need "to provide certain safeguards for a defendant or other person who might suffer hardship if subjected to an order in the unadorned form which was in use at the outset."375 Thus, it has limited the amount to be restrained by the injunction,376 allowed the defendant to draw on separate accounts for reasonable living expenses and attorneys' fees,377 consid-

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373. OUGH, supra note 337, at 72 (footnotes omitted). In Third Chandris, the Court of Appeals stated:

The mere fact that the defendant is abroad is not by itself sufficient. No one would wish any reputable foreign company to be plagued with a Mareva injunction simply because it has agreed to London arbitration. But there are some foreign companies whose structure invites comment. We often see in this court a corporation which is registered in a country where the company law is so loose that nothing is known about it—where it does no work and has no officers and no assets. Nothing can be found out about the membership, or its control, or its assets, or the charges on them. Judgment cannot be enforced against it. There is no reciprocal enforcement of judgments . . . . In such cases, the very fact of incorporation there gives some ground for believing there is a risk that, if judgment or award is obtained, it may go unsatisfied.

Third Chandris Shipping Corp. v. Unimarine S.A., [1979] 1 Q.B. 645, 669 (C.A.) (Denning, M.R.) (emphasis added); see also Chambers, supra note 32, at 13 (discussing offshore trusts created under the laws of the Isle of Man, an island in the Irish Sea, which does not enforce judgments of foreign countries); Bruce, et al., supra note 32, at 1 (same).

374. Third Chandris, 1 Q.B. at 672 (L.J.).
376. Z Ltd. v. A-Z and AA-LL, [1982] 1 Q.B. 558, 576 (C.A.) (noting that "[n]owadays it has become usual to insert the maximum amount to be restrained. The maximum amount is the sum claimed by the plaintiff from the defendant.") (Denning, M.R.); id. at 589 (preferring "maximum sum" orders, which "only freeze the defendant's assets up to the level of the plaintiff's prima facie justifiable claim," to blanket injunctions) (Kerr, L.J.); Rules of the Supreme Court 1965, O.72, A.27, in 1 THE SUPREME COURT PRACTICE 1195-96 (1991); OUGH, supra note 337, at 15.
377. See, e.g., Derby & Co. v. Weldon, [1989] 2 W.L.R. 412, 419 (C.A.) (noting that "it is not [the Mareva injunction's] purpose to prevent a defendant carrying on business in the ordinary way or, if an individual, living his life normally pending the determination of the dispute, nor to impede him in any way in defending himself against the claim") (Donaldson of Lymington, M.R.); S.C.F. Finance Co. v. Masri, [1985] 1 W.L.R. 876, 880 (C.A.) (stating that "[i]t is now
ered the defendant's needs in operating a business,\textsuperscript{378} required the plaintiff to give an undertaking to protect the defendant from damages and third parties from any expenses reasonably incurred in complying with the \textit{Mareva} injunction,\textsuperscript{379} and confirmed that the injunction is not designed to improve the plaintiff's position in the event of the defendant's insolvency or otherwise to give the plaintiff a lien.\textsuperscript{380} These protections, like those urged in the "Balance of Hardships" section of this

\textsuperscript{378} See, e.g., Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), [1978] 1 Q.B. 644, 662 (C.A.) (stating that "[c]are should be taken before an injunction is granted over assets which will bring the defendant's trade or business to a standstill or will inflict on him great loss") (Denning, M.R.); The Rena K., [1979] 1 Q.B. 377, 410 (noting that the "one apparently strong point against granting an injunction" was that the defendant's principal asset, a ship, "was a trading asset, and that, if the shipowners were compelled by an injunction to keep her here, they would lose the benefit of trading her") (Brandon, J.); Barclay-Johnson v. Yuill, [1980] 1 W.L.R. 1259, 1266 (Ch. D.) (stating that if the \textit{Mareva} injunction "is likely to affect the defendant seriously, I think that he is entitled to have this put into the scales against the grant of the injunction... [I]f he is trading here and the injunction would 'freeze' his bank account, the injury may be grave. I think that he should be able to rely on the \textit{Lister} principle except so far as it cannot be fairly reconciled with the needs of the \textit{Mareva} doctrine") (Megarry, V.-C.); Dellborg v. Corix Properties (C.A. 1980) (LEXIS, Enggen library, Cases file) (noting the "particular[ly] important[ce] that [defendant] should not be inhibited from making profits" by selling the properties it was incorporated to develop) (Lawton, L.J.); see also OUGH, supra note 337, at 14–15.

\textsuperscript{379} See, e.g., Searose Ltd. v. Seatrain UK Ltd., [1981] 1 W.L.R. 894, 896 (Q.B.D.) (requiring plaintiff to give an undertaking to the effect "that a bank to whom notice of an injunction is given can, before taking steps to ascertain whether the defendants have an account at any particular branch, obtain an undertaking from the plaintiffs' solicitors to pay their reasonable costs incurred in so doing") (Robert Goff, J.); Z \textit{Ltd.}, [1982] 1 Q.B. at 577 (noting that "[t]he plaintiff... should normally give an undertaking in damages to the defendant, and also an undertaking to a bank"; giving judge discretion to require a bond or other security for the undertaking) (Denning, M.R.); Rules of the Supreme Court 1965, O.29, r.1, note 29/1/22, in 1 \textit{THE SUPREME COURT PRACTICE} 507–10 (1991); OUGH, supra note 337, at 14–15.

\textsuperscript{380} See, e.g., A.J. Bekhor & Co. v. Bilton, [1981] 1 Q.B. 923, 942 (C.A.) (noting that "the purpose of the \textit{Mareva} jurisdiction was not to improve the position of claimants in an insolvency, but simply to prevent the injustice of a defendant removing his assets from the jurisdiction") (Ackner, L.J.); Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A., [1981] 1 Q.B. 65, 72 (Robert Goff, J.); Cretanor Maritime Co. v. Irish Marine Management Ltd., [1978] 1 W.L.R. 966, 974 (C.A.) (distinguishing the \textit{Mareva} injunction from prejudgment attachment, which "means a seizure of assets... normally with a view to their being... held as... security") (Buckley, L.J.).
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Article, are designed to reduce the risk of harm to the defendant and other innocent parties without exposing the plaintiff to active tertiary harm.

Fifth, consistent with the early view that the *Mareva* injunction was designed only to ensure that assets within England were not removed therefrom, English courts initially refrained from restraining assets outside the territory of England. With the increasing recognition that the injunction is intended, more broadly, to bar a defendant from frustrating subsequent orders of the court or the plaintiff’s potential judgment, the Court of Appeal has acknowledged that restraining the defendant from disposing of foreign assets may be necessary. Thus, just as a preliminary injunction issued by an American court can restrain a defendant from disposing of assets outside the state,

381. See supra part III.C.

382. In reviewing ex parte grants of *Mareva* injunctions, the English courts actually may pay greater deference to the defendant’s potential harm than American courts typically do in “balancing the hardships.” In *The Niedersachsen*, for example, the Court of Appeal stated in passing that:

if, or to the extent that, the grant of a *Mareva* injunction inflicts hardship on the defendants, their legitimate interests must prevail over those of the plaintiffs, who seek to obtain security for a claim which may appear to be well-founded but which still remains to be established at the trial.

[1984] 1 All E.R. 398, 422 (Q.B.D. 1983) (Kerr, L.J.), appeal dismissed, [1984] 1 All E.R. 413 (C.A. 1983). This statement seems to suggest that any substantial showing of harm by the defendant, whether or not outweighed by potential harm to the plaintiff, would bar the issuance or affirmance of a *Mareva* injunction.

383. See supra note 368.

384. Shenton, supra note 174, at 104. Shenton notes that:

so far, the Courts have only been willing to grant *Mareva* injunctions in respect of assets actually within the jurisdiction of the Court, irrespective of whether the Defendant is within or without the jurisdiction. Logically, the Court should be able to restrain a respondent within the jurisdiction from disposing of assets outside the jurisdiction.

See, e.g., Third Chandris Shipping Corp. v. Unimarine S.A., [1979] 1 Q.B. 645, 668 (C.A.) (requiring that “[t]he plaintiff should give some grounds for believing that the defendant has assets here”) (Denning, M.R.).

385. See supra note 370 and accompanying text.

386. Derby & Co. v. Weldon, [1989] 2 W.L.R. 412, 422 (C.A. 1988) (stating that “no court should permit a defendant to take action designed to frustrate subsequent orders of the court. If for the achievement of this purpose it is necessary to make orders concerning foreign assets, such orders should be made, subject, of course, to ordinary principles of international law.”) (Donaldson of Lymington, M.R.); id. at 435 (stating “unequivocally that in an appropriate case the court has power to grant an interlocutory injunction even on a worldwide basis against any person who is properly before the court, so as to prevent that person by the transfer of his property frustrating a future judgment of the court”) (Neill, L.J.); Babanaft Int’l Co. S.A. v. Bassatine, [1989] 2 W.L.R. 232, 242 (C.A.) (stating that “in appropriate cases, though these may well be rare, there is nothing to preclude our Courts from granting *Mareva* type injunctions against defendants which extend to their assets outside the jurisdiction.”) (Kerr, L.J.).

387. See supra notes 180–81 and accompanying text.
so can a *Mareva* injunction bar an English defendant from disposing of assets outside the country.\(^{388}\)

Sixth, the English courts have always recognized that to be effective, the *Mareva* injunction must issue ex parte,\(^{389}\) and that to be fair to the defendant, the court must hold a prompt inter partes hearing upon the defendant’s request.\(^{390}\) The Supreme Court Rules codify this practice, specifically authorizing ex parte applications for *Mareva* injunctions.\(^{391}\) One commentator has noted that:

> heavy pressure is . . . put on the applicant’s advisers at the ex parte stage to put such information before the Court as is likely to produce an Order in the form in which it would be likely to be after the inter partes hearing, alternatively to use all efforts to agree on a form of Order with

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\(^{388}\) In part, this conclusion obtains because the *Mareva* injunction operates in personam against the defendant rather than in rem against the assets themselves. *See, e.g.*, The Tuyuti, [1984] 2 All E.R. 546, [1984] 2 Lloyd's L.R. 51, 56 (C.A.) (noting that “there are . . . many fundamental differences between an injunction, which is an order directed to the owners and master of the ship not to take a ship out of the jurisdiction and an arrest by which the Admiralty Marshall takes custody of the ship”) (Sheen, J.), opinion found only in Lloyd’s Reports; Orwell Steel (Erection and Fabrication) Ltd. v. Asphalt and Tarmac (U.K.) Ltd., [1984] 1 W.L.R. 1097, 1100 (Q.B.D.) (noting that “the *Mareva* injunction acts in personam on the defendant and does not give the plaintiff any rights over the goods of the defendant nor involve any attachment of them”) (Farquharson, J.); Derby & Co. v. Weldon, [1989] 2 W.L.R. 412, 425, [1989] 1 All Eng. Rep. 1002, 1011 (C.A. 1988) (stating that “[a] *Mareva* injunction operates solely in personam”) (Donaldson of Lymington, M.R.). *But see* Z Ltd. v. A-Z and AA-LL, [1982] 1 Q.B. 558, 573 (C.A.) (stating that a *Mareva* injunction “is a method of attaching the asset itself. It operates in rem . . . just as the process of foreign attachment used to do in the City of London, and still does in the United States of America”) (Denning, M.R.).

If all of the defendant’s assets are located outside the country, the plaintiff will have to bring a second action in the country in which the property is located to enforce the English judgment, assuming that country honors foreign judgments. *Cf.* Bruce et al., *supra* note 32; Chambers, *supra* note 32.

\(^{389}\) *See, e.g.*, Third Chandris Shipping Corp. v. Unimarine S.A., [1979] 1 Q.B. 645, 669 (C.A.) (setting forth guidelines for ex parte *Mareva* proceedings, and noting that “speed is of the essence. Ex parte is of the essence”) (Denning, M.R.); Z Ltd., [1982] 1 Q.B. at 577 (C.A.) (noting that “[w]hen granting a *Mareva* injunction ex parte, the court may sometimes think it right only to grant it for a few days”) (Denning, M.R.); Rules of the Supreme Court 1965, O.29, r.1, note 29/1/21, in 1 THE SUPREME COURT PRACTICE 506-07 (1991) (acknowledging that “to be efficacious, [the *Mareva* injunction] must be swift and secret, in the sense that the injunction must always be granted *ex parte*, without notice to the defendant”).

\(^{390}\) Dormeuil Freres S.A. v. Nicolian Int'l (Textiles) Ltd., [1988] 1 W.L.R. 1362, 1370 (Ch. D.) (stating that “[w]hen the motion comes before the court inter partes, the court can then on the evidence before it from both sides decide what is the correct form of the *Mareva* relief to grant until trial”); Z Ltd., [1982] 1 Q.B. at 577 (noting that after an ex parte *Mareva* injunction issues, “the defendant and the bank or other innocent third party . . . should be given the earliest possible opportunity to be heard”) (Denning, M.R.).

\(^{391}\) Rules of the Supreme Court 1965 (O.29, r.1), in 1 THE SUPREME COURT PRACTICE *supra* note 370, at 497.
the Respondent's solicitors which can be signed by the Judge without a second hearing. 392

Finally, the English courts have recognized the difficulty plaintiffs may have in knowing "how much, if anything, is in any of [the defendant's bank accounts]; nor does each of the defendant's bankers know what is in the other accounts. Without information about the state of each account it is difficult, if not impossible, to operate the Mareva jurisdiction properly." 393 In light of these difficulties, the courts have concluded they have power to order discovery "in order to ensure that the Mareva jurisdiction is properly exercised and thereby to secure its objective... the prevention of abuse." 394 They have ordered discovery not only against the defendant, 395 but also against third party bankers with knowledge of the whereabouts of the defendant's assets. 396

The British experience with Mareva injunctions confirms both the utility of such preliminary injunctions to freeze assets and the risks they pose to defendants and third parties if issued without restraint or precaution. The Mareva experience highlights methods for reducing these risks: courts can limit the scope of preliminary injunctions to permit defendants to pay attorneys' fees, incur ordinary living expenses, and make transfers in the ordinary course of business; courts

392. Shenton, supra note 174, at 104.
394. Id. at 960; accord Bankers Trust Co. v. Shapira, [1980] 1 W.L.R. 1274 (C.A.) (permitting discovery against defendant bank in which individual defendants had deposited moneys they had obtained by forgery from plaintiff bank) (Denning, M.R.); A.J. Bekhor & Co. v. Bilton, [1981] 1 Q.B. 923, 943–44 (C.A.) (concluding that court has "power to make an order for discovery in 'aid' of a Mareva injunction"; to "police" the Mareva injunction, "plaintiffs could have applied for an order for the cross-examination of the defendant on his affidavit, or the court itself could have made such an order") (Ackner, L.J.); id. at 949 (stating that "it may be necessary to order discovery to make the injunction effective and I would hold that the court has the power to make such ancillary orders as are necessary to secure that the injunctive relief given to the plaintiff is effective") (Denning, M.R.). See generally Eric Gertner, Prejudgment Remedies: A Need for Rationalization, 19 OSGOODE HALL L.J. 503, 533–35 (1981) (discussing the availability of discovery to ensure the effectiveness of a Mareva injunction); OUGH, supra note 337, at 43–44.
396. See, e.g., Bankers Trust Co. v. Shapira, [1980] 1 W.L.R. 1274, 1282 (C.A.) (ordering discovery against a bank named as a nominal defendant, which faced no personal liability; adding that discovery against a bank should "only be done when there is a good ground for thinking the money in the bank is the plaintiff's money—as, for instance when, the customer has got the money by fraud—or other wrongdoing, and paid it into his account at the bank") (Denning, M.R.). But see A.J. Bekhor & Co. v. Bilton, [1981] 1 Q.B. 923, 937–38 (C.A.) (declining to limit authority to order discovery in aid of Mareva jurisdiction to actions "in which the plaintiff seeks to trace property which in equity belongs to him") (Ackner, L.J.).
can require the plaintiff to post a bond out of which the defendant's losses will be paid if the injunction issued erroneously and a third party's expenses in complying with the injunction will be reimbursed; and courts can require the plaintiff to make a strong showing on the merits of her claim and the risk of harm she will suffer if the defendant is not restrained.

CONCLUSION

There is little doubt that some defendants, once sued (or even before), will attempt to transfer, hide or dissipate their assets in an effort to frustrate the potential judgment to be rendered against them. There is little doubt that such conduct causes harm to the plaintiff—active tertiary harm—because she will not be able to collect promptly on her judgment, if ever. And there is little doubt that courts can prevent this active tertiary harm. There is doubt, however, as to the means courts may employ to prevent this harm.

If the plaintiff's suit is for money damages, some courts have concluded that the money judgment itself is an adequate remedy, thereby obviating the need for any preliminary injunctive relief, or that attachment is the only permissible prejudgment remedy for preventing active tertiary harm. The money judgment and the attachment remedy are not adequate, however, in that they fail to reach all of the defendant's assets, and intrude unnecessarily on the defendant's freedom and the rights and interests of third parties. Furthermore, as long as the plaintiff can demonstrate irreparable harm, the judicial preference for legal remedies over equitable ones serves no useful purpose in this context. Therefore, courts should use preliminary injunctions to freeze assets in cases where the risk of irreparable tertiary harm to the plaintiff exceeds the risk of harm to the defendant and the plaintiff establishes a likelihood of success on the merits.