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Preliminary Injunctions: The Varying Standards

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PRELIMINARY INJUNCTIONS: THE VARYING STANDARDS

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I. INTRODUCTION

Since the first decision of any substance announced by the United States Supreme Court involved a request for a preliminary injunction,[1] the federal courts have struggled with the standards to be applied to such requests. While the English equity practice provided some guideposts in the 19th century,[2] the federal courts soon began developing their own criteria to govern motions for interlocutory[3] injunctions. In their quest for appropriate standards, the Supreme Court and the courts of appeals have not followed consistent paths through the maze of interlocutory relief. The federal appellate courts have not been especially attentive to Supreme Court decisions, and the High Court has not been especially attentive to the need for uniform criteria.

Before examining the applicable precedents, it is important to recall the purpose for such relief. Historically, the federal courts, following the lead of their British counterparts, have identified the preservation of the status quo as the object of interim relief.[4] That premise has two difficulties. First, the courts have struggled with determining what constitutes the status quo. Second, in many instances, the party moving for preliminary relief does not want the status quo

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1. Georgia v. Brailsford, 2 U.S. (2 Dall.) 402 (1792) (the caption in the official report misspelled the defendant's name as "Braislford"). The Court decided *Brailsford* six months before the celebrated case of Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

2. *See infra* notes 33-34 and accompanying text.

3. Over the years, the courts have used the words "preliminary," "temporary," "interlocutory," and "provisional" to describe interim injunctive relief. This article will use these words interchangeably.

4. *See, e.g.*, Parker v. Winnipiseogee Lake Cotton and Woolen Co., 67 U.S. (2 Bl.) 545 (1863); Irwin v. Dixion, 50 U.S. (9 How.) 10 (1850).

preserved. On the contrary, the movant wants the judge to order the opposing party to take mandatory action.

In recent years the courts have recognized the inherent problems in predicating interlocutory relief on maintaining the status quo. Consequently, they have shifted the focus to preserving the subject matter of the lawsuit so that the court will be able to grant effective relief when the suit is resolved on the merits. While preservation of the subject matter is the proper concern of interim relief, the American legal system operates on the assumption that individuals (natural and corporate) are free to act as they please until they have been adjudged liable for injury to another.

Interim relief is inconsistent with this basic premise because it restricts freedom of action without a final judgment of liability. Reconciling the need for interim relief with the restriction on freedom which it imposes is the proper focus of the search for appropriate criteria governing interlocutory injunctions. Through the years, the Supreme Court and the courts of appeals have explored a wide variety of responses to this tension. This article surveys the myriad criteria that the courts have developed, and urges the adoption of a model for interlocutory relief.

II. SUPREME COURT DECISIONS

The decisions of the Supreme Court regarding the standards for issuing preliminary injunctions could be described as inattentive. Although the Court has reviewed many orders granting or denying preliminary injunctions, it has not established hard and fast rules regarding their issuance. On the occasions when the court has addressed the criteria, it has done so casually and with little regard for the varying standards followed by the lower federal courts. Furthermore, the Court has not used its precedents regularly in developing standards. This casualness perhaps accounts for the reality that the lower federal courts barely give nodding recognition to the Supreme Court opinions regarding interlocutory injunctions. At best, the Supreme Court precedents serve as points of departure for federal appellate decisions which quickly move in other directions.

A. *The Formative Years*

The first case in the Supreme Court of any substance involved a preliminary injunction. In *Georgia v. Brailsford*,[5] Georgia invoked the

5. 2 U.S. (2 Dall.) 402 (1792).

original jurisdiction of the Supreme Court to enjoin temporarily the execution of a money judgment previously entered by the United States Circuit Court[6] for the District of Georgia. In that prior suit, Brailsford and others, who were British citizens, recovered the judgment based on a debt owed them by a citizen of Georgia.[7] In 1782 Georgia enacted a law which confiscated all debts owed to British citizens, making the State the beneficiary of such obligations.[8] During the pendency of the earlier suit between Brailsford and Spaulding, Georgia sought to intervene in the Circuit Court to assert its rights under the confiscation law.[9] When the federal judge denied the intervention motion,[10] Georgia instituted an original suit against Brailsford and others in the Supreme Court of the United States.[11]

To protect its asserted right to the money judgment pending a decision on the merits in the Supreme Court, Georgia moved for a temporary injunction to stay the proceedings in the Circuit Court and to restrain the marshal from paying over to the Brailsford plaintiffs any of the proceeds on the judgment.[12] In a 4-2 decision,[13] the Court granted the injunction pending disposition of the case on the merits.[14] Because each of the justices stated his views in seriatim opinions, it is difficult to articulate a holding in the case. Justices Blair and Iredell[15] apparently believed that Georgia had shown a colorable title to the debt and sufficient injury to justify the injunction.[16] Iredell was the only justice among the six to use the phrase "irreparable injury."[17] Chief Justice Jay and Justice Wilson agreed to the injunction so that the Court would have the opportunity to decide the case on the mer-

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6. From 1789 until 1911, two federal courts had trial responsibilities: the district court and the circuit court, which, except for one year between 1801 and 1802, did not have its own judges. H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 36-41 (2d ed. 1973).

7. *Id.* at 405.

8. *Id.* at 402-03.

9. *Id.* at 404.

10. *Id.*

11. *Id.* at 405.

12. *Id.*

13. In 1792, the Court had five associate justices and the Chief Justice.

14. *Brailsford*, 2 U.S. (2 Dall.) at 406-09.

15. Although Justice Iredell sat in the Circuit Court in the suit between Brailsford and Spaulding, he nonetheless rendered an opinion which he stated was "detached from every previous consideration of the merits of the cause." 2 U.S. (2 Dall.) at 406. Section 47 of Title 28 arguably forbids such a practice today: "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." 28 U.S.C. § 47 (1982).

16. *Brailsford*, 2 U.S. (2 Dall.) at 406-07.

17. *Id.* at 406.

its.[18] Justices Cushing and Johnson[19] dissented on the grounds that Georgia had an adequate remedy at law,[20] a defense to equity suits mandated by Section 16 of the Judiciary Act of 1789.[21]

At the next term of court, the defendants moved to dissolve the injunction on alternative grounds: (1) the State of Georgia had no remedy at all; and (2) even if it did, Section 16 barred the injunction because of the adequacy of the legal remedy.[22] With Justice Johnson not sitting, the Court denied the motion to dissolve.[23] In a three sentence opinion, Chief Justice Jay held that, even though the plaintiff had an adequate remedy at law, the injunction would continue because "the money ought to be kept [under court control] for the party to whom it belongs."[24] He did not identify any standards to govern the issuance of preliminary injunctions in this or any other case. The Court did condition the continuance of the injunction upon Georgia commencing its action at law before the next term of court.[25] The following year in 1794, the Supreme Court conducted a jury trial in *Georgia v. Brailsford*[26] on the plaintiff's claim under the Georgia confiscation law. When the jury returned a verdict for the defendants, the Court dissolved the injunction.[27]

After *Brailsford*, the Supreme Court said very little about the standards for preliminary injunctions[28] until 1882, when the Court

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18. *Id.* at 407-09.

19. *Id.* at 405, 408 (Cushing, J. & Johnson, J., dissenting). Many years later, lower federal courts, with or without citation, quoted or paraphrased Justice Johnson's statement in dissent: "In order to support a motion for an injunction, the bill should set forth a case of probable right, and a probable danger that the right would be defeated, without this special interposition of the court." *Id. E.g.*, Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980) (citing Crowther v. Seaborg, 415 F.2d 437, 439 (10th Cir. 1969)).

20. *Brailsford*, 2 U.S. (2 Dall.) at 405, 408.

21. Section 16 provided that "suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." 1 Stat. 73, 82 (1789). In 1948 when Congress revised the Judicial Code, it eliminated this provision. H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 729 (2d ed. 1973).

22. Georgia v. Brailsford, 2 U.S. (2 Dall.) 415 (1793).

23. *Id.* at 419. In his separate opinion, Justice Blair identified apprehension that Brailsford, a British subject, would take the money and run (to England) as the factor animating the issuance of the original injunction. 2 U.S. (2 Dall.) at 418.

24. 2 U.S. (2 Dall.) at 418-19.

25. *Id.* at 419.

26. 3 U.S. (3 Dall.) 1 (1794).

27. *Id.* at 5.

28. In several cases, the Court, without discussing applicable standards, approved the issuance of temporary injunctions, as in *Brailsford*, to preserve property until an action at law could settle the dispute on the merits. *See, e.g.*, King v. Hamilton, 29 U.S. (4 Pet.) 311 (1830); Parker v. The Judges of the Circuit Court of Maryland, 25 U.S. (12 Wheat.) 561 (1827); *cf.* Irwin v. Dixion, 50 U.S. (9 How.) 10 (1850), or to restrain execution of a

broke its 90 year silence. In *Russell v. Farley*,[29] the circuit court entered a preliminary injunction to restrain the defendant from transferring goods pending the resolution of a receivership petition.[30] The court required the plaintiff-receiver to post a security bond to protect the interests of the defendant.[31] After the defendant prevailed on the merits, the trial court dissolved the injunction, but declined to award damages under the bond.[32] In the course of resolving the bond issue, the Court in dictum commented on the criteria for issuing temporary injunctions. The Court noted that a federal court may order interim relief even if the movant's claim is legally in doubt. Where the movant's legal right is doubtful, she may still secure a temporary injunction by showing that she will suffer greater harm if the injunction is denied than the opposing party will suffer if it is granted. To support that legal proposition, the Court cited *Injunctions in Equity*, a popular treatise by William W. Kerr. Written by a British lawyer in 1871, the treatise largely examined English precedents, on which the Supreme Court relied in the 19th Century.[33]

Although the statement in *Russell* was dictum, it appears to reflect accurately then current standards for preliminary injunctions.[34] That is, if the movant could demonstrate a clear legal right, "plain and

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judgment at law pending resolution of an equitable defense. *E.g.*, Horsburg v. Baker, 26 U.S. (1 Pet.) 232 (1828). In Parker v. Winnipiseogee Lake Cotton and Woolen Co., 67 U.S.) (2 Bl.) 545, 552 (1863), a case involving a permanent or "perpetual" injunction, the Court stated in *dictum* that the party seeking preliminary relief to preserve property pending trial of a civil action at law would have to show "a strong *prima facie* case of right" and irreparable injury. The failure of the Court to identify precisely the criteria for granting injunctions in such cases has continued into the present. *See, e.g.*, United States v. First National City Bank, 379 U.S. 378 (1965); Deckert v. Independence Shares Corp., 311 U.S. 282 (1940). *But see* DeBeers Consolidated Mines, Ltd. v. United States, 325 U.S. 212 (1945) (no injunction if the property does not relate to the subject matter of the dispute).

29. 105 U.S. 433 (1882).

30. *Id.* at 434.

31. *Id.*

32. *Id.* at 436.

33. W. KERR, INJUNCTIONS IN EQUITY (1871). At least as early as 1792, the Supreme Court by rule stated that English equity practice would guide its proceedings. 2 U.S. (2 Dall.) 411-14. Fifty years later, Supreme Court Reporter Benjamin C. Howard reported that rule, in slightly different form, as having been promulgated on August 8, 1791, 42 U.S. (1 How.) xxxxiv (1842). Under the Federal Equity Rules in effect from 1822 to 1912, the Supreme Court directed the lower federal courts to employ the "practice of the High Court of Chancery in England" to fill gaps in the law governing federal equity jurisdiction. *See* Rule 33, 20 U.S. (7 Wheat.) v, xii (1822); Rule 90, 42 U.S. (1 How.) xxxix, lxix (1842). The equity rules of 1912 did not have a comparable rule. 226 U.S. 629 (1912). In several decisions, the Court absorbed the principles of the English Chancery into federal law. *E.g.*, Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 563-64 (1852); Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 222-23 (1818).

34. J. HIGH, LAW OF INJUNCTIONS § 13 (1873); C. BEACH, INJUNCTIONS § 20

free from doubt,"[35] the injunction would issue. In the alternative, if the legal right was in doubt, then the movant would have to show a balance of hardships in her favor.[36] The same treatise, however, also reflected a second alternative standard for preliminary relief: (1) a showing of a prima facie case; and (2) a showing of irreparable injury, that is, an injury which cannot be remedied with money damages.[37] Neither *Russell* nor other Supreme Court precedents in the 19th century reflected this second alternative test for issuance of preliminary injunctions.

B. *The Modern Variations*

The application of the second alternative test emerged definitively in the early part of the 20th century in the wake of *Ex parte Young*.[38] The *Young* decision restated the view that state officials could be sued to enjoin enforcement of state statutes without violating state sovereign immunity from suit in federal court embodied in the 11th amendment.[39] That decision animated a number of suits challenging state regulatory statutes as violating the Due Process and Equal Protection Clauses of the 14th amendment. In the wake of the *Young* decision, Congress enacted the three-judge court statute which sought to prevent a single federal judge from enjoining state regulatory statutes.[40] Because decisions granting or denying preliminary injunctions were appealable directly to the Supreme Court, the high tribunal had numerous opportunities to review the standards for interlocutory relief.

In the *Young* case, as well as in the decisions following it, the Supreme Court held that preliminary injunctions should not issue to restrain the enforcement of state statutes unless the case was "reasonably free from doubt" and only to prevent "great and irreparable injury."[41] Although it appeared by the early 1920's that the Court had

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(1894); *See generally* Leubsdorf, *The Standards for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

35. KERR, *supra* note 33, at 220. *See also* Phoenix R. Co. v. Geary, 239 U.S. 277 (1915) (to enjoin preliminarily the operation of a state statute, the plaintiff must show a clear constitutional violation).

36. KERR, *supra* note 33, at 221-22.

37. *Id.* at 208. *See generally* Leubsdorf, *supra* note 34, at 530-31.

38. 209 U.S. 123 (1908).

39. *Id.* at 159-60.

40. 36 Stat. 539, 557 (Section 17) (1910).

41. *Ex parte* Young, 209 U.S. at 166-67 (1908). *Accord*, Massachusetts State Grange v. Benton, 272 U.S. 525, 527 (1926) (citing Cavanaugh v. Looney, 248 U.S. 453 (1919)); *see* Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928). *See also* Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310 (1940) (The Court in *Mayo* appeared to adopt two different sets of criteria: one would allow a preliminary injunction if the movant showed

settled on these standards, it still exhibited some variation in their application. In 1923, for example, the Court, in a challenge to a state rate-making order, upheld a preliminary injunction because a balancing of the hardships favored the plaintiff and because the moving party had posted a sufficient bond.[42] Similarly, in *Lawrence v. St. Louis-San Francisco R. Co.*,[43] Justice Brandeis stressed the need for the person seeking a preliminary injunction to restrain state action to show a "danger of irreparable injury."[44] Without articulating in any orderly fashion the necessary elements for interlocutory relief, Justice Brandeis examined two other factors: (1) the nature of the legal issues raised by the moving party; and (2) the balancing of harm to the moving party as against injury to the opposing party.[45]

Two years after the *Lawrence* decision, the Court appeared to hold that the moving party need only show a balance of hardships in its favor to secure a preliminary injunction, a view consistent with *Russell v. Farley*[46] but inconsistent with the *Ex parte Young* line of cases. In *Rice & Adams Corp. v. Lathrop*,[47] the Court applied this much less stringent standard to a case of alleged patent infringement.[48] It may be that the Court was simply applying, sub silentio, two different sets of criteria depending on whether the case involved purely private interests or involved a challenge to state authority.[49] Within three weeks of the *Lathrop* decision, the Supreme Court had the opportunity to clarify the point.

In *Ohio Oil Co. v. Conway*,[50] the plaintiff sued to enjoin a state tax increase on oil production,[51] another case in the *Young* line seeking to

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irreparable injury and raised "serious questions" regarding the constitutionality of the challenged statute, while the other would require "a clear and persuasive showing of unconstitutionality and irreparable injury"). *Id.* at 318-19.

42. Prendergast v. New York Telephone Co., 262 U.S. 43 (1923). In 1934, Congress enacted the Johnson Act to prevent the federal courts from unduly interfering in state rate-making. 48 Stat. 775 (1934) (codified in 28 U.S.C. § 1342 (1982)).

43. 274 U.S. 588 (1927).

44. *Id.* at 592.

45. *Id.* at 592-96.

46. 105 U.S. 433 (1882). *See supra* notes 29-37 and accompanying text.

47. 278 U.S. 509 (1929).

48. *Id.* at 514.

49. The apparent tightening of standards for preliminary relief in cases involving government (state or federal) regulatory programs also resulted from and got entangled in the doctrine requiring exhaustion of administrative remedies. *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938); *see also* Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1, 20-23 (1974).

50. 279 U.S. 813 (1929) (per curiam).

51. *Id.* at 813-14. In 1937, Congress enacted the Tax Injunction Act to prevent the federal courts from unduly interfering in state tax collection. 50 Stat. 738 (1937), codified

restrain unconstitutional state action. In that case, the Court reversed the denial of preliminary relief by a three-judge district court and granted the injunction.[52] Without reference to any of its prior precedents, the Court adopted almost verbatim the criteria for interlocutory relief followed by the Eighth Circuit Court of Appeals.[53] To obtain a preliminary injunction, the Court in *Conway* held that the moving party must show: (1) that the questions in dispute (legal or factual) must be grave; (2) that, without the interim relief, she will suffer certain and irreparable injury; and (3) that, if the injunction is granted, the opposing party will suffer only "inconsiderable" injury.[54] The Court suggested that if the injury to the opposing party were more than "inconsiderable," the injunction could still issue if the moving party provided adequate indemnification with an injunction bond.[55]

But the decision in *Conway* in 1929 did not settle the matter. In succeeding years, the Court continued its meandering course through various tests and criteria which, singularly or in combination, could have formed the basis for a consistent standard for issuing preliminary injunctions. In 1939, for example, the Court emphasized, apparently for the first time, the need to evaluate the impact of a preliminary injunction on the public interest where the plaintiff seeks to enjoin an order of a federal agency.[56] That same year, in a case challenging the validity of a state statute, the Court identified three prerequisites for interlocutory relief: grave doubts as to the constitutionality of the

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in 28 U.S.C. § 1341 (1982). *See* Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503 (1981); *cf.* Fair Assessment In Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 102 S. Ct. 177 (1981).

52. *Conway*, 279 U.S. at 815.

53. *Id.* The Court relied entirely on Love v. Atchison, T. & S. F. Ry. Co., 185 F. 321, 331-32 (8th Cir. 1911), *cert. denied*, 220 U.S. 618 (1911). *Love*, in turn, relied in part on Georgia v. Brailsford, *supra* note 5 and accompanying text, which the Supreme Court has rarely cited in its subsequent decisions on preliminary relief.

54. 279 U.S. at 815. *Accord*, Public Service Comm'n of Wisconsin v. Wisconsin Telephone Co., 289 U.S. 67, 170-71 (1933) (applying the *Conway* criteria to state rate-making); Alabama v. United States, 279 U.S. 229, 231 (1929) (applying the *Conway* criteria to a suit to enjoin an order of the Interstate Commerce Commission). *See also* National Fire Ins. Co. of Hartford v. Thompson, 281 U.S. 331, 339 (1930) (dictum).

55. 279 U.S. at 815. In granting the preliminary injunction, the Court also required the plaintiff to pay the back taxes lawfully imposed and to post an adequate bond. *Id.* at 815. It also ordered the district court on remand to expedite the resolution of the case on the merits. *Id.* In other cases, the Court has approved the imposition of terms and conditions, other than a bond, in orders granting preliminary injunctions. *E.g.*, Brotherhood of Locomotive Engineers v. M-K-T R.R. Co., 363 U.S. 528, 534 (1960); Yakus v. United States, 321 U.S. 414, 441-42 (1944); Inland Steel Co. v. United States, 306 U.S. 153, 156-58 (1939); Russell v. Farley, 105 U.S. 433, 433 (1882).

56. Inland Steel Co. v. United States, 306 U.S. 153, 157 (1939). Two years earlier, the Court had noted the relevance of the public interest in granting or withholding *permanent* injunctive relief. Virginian Ry. Co. v. System Fed'n No. 40, 300 U.S. 515, 552 (1937).

statute, irreparable harm to the movant, and posting of a bond.[57] It did not discuss the balancing of hardships or the public interest factors noted in earlier cases.

The variations continued into the war years. In *Yakus v. United States*,[58] the Court noted in dictum that a district court could issue a preliminary injunction if the balance of hardships favored the moving party, and if the movant posted a bond sufficient to compensate the non-moving party for any harm resulting from the injunction should she prevail on the merits.[59] But in public interest cases, the Court observed, such bonds may have little utility, so courts of equity should carefully examine the public interest in deciding whether to grant or deny interim relief.[60] Thus, even if the movant establishes irreparable injury, the Court noted, a preliminary injunction is not a matter of right so the trial judge retains the discretion to deny such relief on other grounds.[61] Several years later when the federal government seized the steel mills during the Korean conflict, the Court ignored the public interest factor and other elements noted in earlier cases in affirming a grant of a preliminary injunction requiring the return of the mills to their owners.[62] In holding that the Government had acted unlawfully,[63] the Court simply noted that the plaintiffs had no adequate remedy at law.[64]

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57. Gibbs v. Buck, 307 U.S. 66, 71 (1939). *See also* Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310 (1940).

58. 321 U.S. 414 (1944).

59. *Id.* at 440.

60. *Id.*

61. *Id.*

62. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

63. *Id.* at 585-89. Contrary to the usual rule that an appellate court will not reach the merits of the controversy in reviewing the grant or denial of interlocutory relief, *e.g.*, Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 317 (1940), the Court did address the merits in *Sawyer*. Its singular focus on the plaintiffs' clear right to relief is reminiscent of the 19th century standard for preliminary injunctions. *See supra* note 34 and accompanying text. Furthermore, in several recent decisions, the Supreme Court, without explanation, similarly reached the merits of the controversy, even though the case arose on a motion for preliminary relief. *See, e.g.*, Brown v. Hotel & Restaurant Employees, Local 54, 104 S. Ct. 3179 (1984); Regan v. Wald, 104 S. Ct. 3026 (1984); Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984); Local No. 82 v. Crowley, 104 S. Ct. 2557 (1984); Hawaii Housing Authority v. Midkiff, 104 S. Ct. 2321 (1984); *see also* O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 781 (1980) (passing reference to preliminary injunction posture of case).

64. *Youngstown*, 343 U.S. at 585. Since the Court has regularly equated irreparable injury with inadequacy of a remedy at law, its holding that the steel mill owners had no adequate legal remedy could be seen as implicitly establishing irreparable injury. *Id.* at 589.

C. *The Current Standards*

In recent days, the Supreme Court has not done much better in articulating consistent standards for the issuance of preliminary injunctions. Between 1973 and 1975, for example, the Court discussed the criteria for interlocutory relief in at least four different ways. In *Brown v. Chote*,[65] the Court identified a two-factor test: the moving party must show (1) the "possibilities" of success on the merits; and (2) the "possibility" of irreparable injury if the relief is denied.[66] The following year, the Court repeated the two factor test, but phrased it as a "likelihood of success on the merits," and a "likelihood of irreparable injury,"[67] not simply the "possibility." At its next term, the Court added a third factor to the test for preliminary relief, but did not apply it to the pending case. In addition to showing a likelihood of success on the merits and irreparable injury, the trial court must also "weigh carefully the interests on both sides."[68] In these three cases, the Court said nothing about the public interest.

But in the fourth case in this span of three years, the Supreme Court referred to the public interest factor which it earlier had mentioned as an element in evaluating the need for preliminary injunctions.[69] In *Sampson v. Murray*,[70] a probationary employee, who had been dismissed from her job with a federal agency, successfully secured preliminary relief from the district court pending a hearing before the Civil Service Commission.[71] The Court assumed the vitality of and apparently adopted the four-factor test that the Court of Appeals for the District of Columbia Circuit developed in *Virginia Petroleum Jobbers Ass'n v. FPC*[72]: (1) the moving party must make a strong showing of likely success on the merits; (2) the petitioner must demonstrate that, in the absence of the injunction, she will suffer irreparable injury; (3) the movant must show that other parties interested in the proceeding will not be substantially harmed by the injunction;

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65. 411 U.S. 452 (1973); *cf.* Withrow v. Larkin, 421 U.S. 35 (1975), where the court appeared to apply the same two factors (although it phrased one as a "high" probability of success on the merits).

66. *Brown*, 411 U.S. at 456.

67. Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 441 (1974).

68. Doran v. Salem Inn, Inc., 422 U.S. 922, 925 (1975).

69. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 441-42 (1944); Inland Steel Co. v. United States, 306 U.S. 153, 157 (1939); *cf.*, Virginian Ry. Co. v. System Fed'n No. 40, 300 U.S. 515, 552 (1937).

70. 415 U.S. 61 (1974).

71. *Id.* at 63.

72. *Id.* at 83-84 n.53.

and (4) the public interest must be evaluated.[73] Because the case involved a governmental personnel decision, the Court rejected the routine application of these four factors on a motion for a preliminary injunction, holding that such criteria, especially irreparable injury, must be applied more stringently.[74]

III. COURTS OF APPEALS DECISIONS

A. *Introduction*

The courts of appeals differ widely in their approaches to preliminary relief. While there is some cross-pollination between and among circuits, they essentially have developed their own criteria. Their decisions have largely been characterized by inconsistent articulation and application of standards. Currently the federal appellate courts use at least nine different tests, excluding variations, for interlocutory relief. Other than an en banc decision in the Eighth Circuit,[75] no federal appellate court has convened specifically to reconcile these differences. Furthermore, while the federal courts have developed various criteria based on their common law powers, they have also recognized special criteria for certain statutory and constitutional claims, creating additional confusion in the search for uniform standards.[76]

In addition the federal appellate courts have not been especially attentive to Supreme Court precedents involving interlocutory injunctions. To be sure, the courts of appeals will, on occasion, cite to and even rely on High Court decisions, at least in part.[77] Further, the varying standards in the lower federal courts cannot be explained sim-

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73. Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (1958) (per curiam). For a discussion of the current status of this precedent in the circuit of its origin, *see infra* note 84 and accompanying text.

74. *Sampson*, 415 U.S. at 88-92.

75. Dataphase Systems, Inc. v. C. L. Systems, Inc., 640 F.2d 109 (8th Cir. 1981) (en banc). *See also* Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380 (7th Cir. 1984), in which the court of appeals recognized that "the relevant case law is in disarray in both this and other circuits." *Id.* at 382. Despite this recognition, the Seventh Circuit declined to hear the case en banc. *Id.* at 380.

76. *See, e.g.*, Sampson v. Murray, 415 U.S. 61 (1974) (federal employment matters); V.N.A. of Greater Tift County, Inc. v. Heckler, 711 F.2d 1020 (11th Cir. 1983) (Medicare reimbursement payments), *cert. denied*, 104 S. Ct. 1908 (1984); Corbin v. Texaco, Inc., 690 F.2d 104 (6th Cir. 1982) (petroleum marketing practices); Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328 (5th Cir. 1981) (First Amendment claim); Middleton-Keirn v. Stone, 655 F.2d 609 (5th Cir. 1981) (employment discrimination); Atchison, T. & S.F. Ry. Co. v. Lennen, 640 F.2d 255 (10th Cir. 1981) (per curiam) (state taxation of railroads). In a subsequent article, the author plans to explore the special rules for preliminary relief applied in certain statutory and constitutional cases.

77. *See, infra* notes 108, 109, 117, 119, 166, 232, 300, 371.

ply as different readings of applicable Supreme Court opinions, although that element cannot be discounted altogether. Rather they seem to have developed because the intermediate appellate courts believe other factors are more appropriate for the issuance of temporary injunctions.

While there is widespread disagreement among the courts of appeals regarding the applicable criteria, they do agree on some matters. First, the courts generally adhere to the proposition that the purpose of a preliminary injunction is to preserve the status quo or the subject matter of the litigation so that the ability of the court to decide the case on the merits will not be diminished, impaired, eroded, or totally undermined. Second, they agree that a district court has wide discretion to issue interlocutory injunctions, which will not be overturned unless the appellant demonstrates abuse of that discretion. Third, most courts do not apply different standards depending on whether the movant seeks a prohibitory or a mandatory preliminary injunction, although occasionally a court will draw that distinction.[78] Fourth, the courts have frequently characterized the authority to issue preliminary injunctions as an extraordinary remedy that should be "sparingly exercised."[79]

B. *District of Columbia Circuit*[80]

The Supreme Court opinions regarding preliminary injunctions

78. *See, e.g.*, Wetzel v. Edwards, 635 F.2d 283 (4th Cir. 1980) (mandatory injunctions change, not preserve the status quo); *see also* Vaughn v. John C. Winston Co., 83 F.2d at 374 (10th Cir. 1936). *But see* Crowley v. Local No. 82 Furniture and Piano Moving, 679 F.2d 978 (1st Cir. 1982) (mandatory relief may be necessary to protect the status quo and prevent irreparable injury) *rev'd on other grounds*, 104 S. Ct. 255 (1985). The objection to mandatory relief has not hardened in the Fourth Circuit since it has authorized mandatory preliminary injunctions without reference to the apparent limitation in *Wetzel*. *See* Jones v. Board of Governors of the Univ. of North Carolina, 704 F.2d 713 (4th Cir. 1983); Federal Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495 (4th Cir. 1981). The distinction between mandatory and prohibitory relief is frequently more linguistic than substantive. Courts tend to avoid any such limitations through the use of the "double negative" order: "The defendant is hereby enjoined from failing or refusing to remove the tool shed which trespasses upon plaintiff's property," or "[t]he defendant is hereby enjoined from failing or refusing to sell its product to the plaintiff on the same terms and conditions as it sells that product to plaintiff's competitors." The subject of mandatory relief upon motion for preliminary injunction is sufficiently intriguing to merit separate treatment in a future article.

79. *Wetzel*, 635 F.2d at 286. *Accord*, Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency, 649 F.2d 71, 76 n.7 (1st Cir. 1981).

80. Congress created this court of appeals in 1893, although not expressly as a "circuit court of appeals." 27 Stat. 434 (1893). Subsequent acts of Congress and decisions of the Supreme Court recognized it as a circuit court. *E.g.*, "Historical and Revision Notes" following 28 U.S.C. § 41; Swift & Co. v. United States, 276 U.S. 311 (1928); FTC v.

have exerted almost no influence on the decisions of the District of Columbia Circuit. Indeed the impact seems to run the other way as the High Court has cited with approval the leading precedent in this circuit, *Virginia Petroleum Jobbers Ass'n v. FPC*.[81] Prior to that landmark decision, the court of appeals approved a three factor approach to interlocutory relief. In *Perry v. Perry*,[82] for example, the court held that the party moving for a preliminary injunction must satisfy three criteria: (1) probable success on the merits; (2) irreparable injury; and (3) balancing of relative harm to the parties depending on whether the injunction is granted or denied.[83] The court did not mention the public interest as a factor in the determination.

The court added the public interest factor in *Virginia Petroleum Jobbers Ass'n v. FPC*,[84] the leading case in the circuit which set the standards for granting preliminary injunctions. Decided in 1958, the panel decision, although per curiam, included two of the most renowned jurists in the country, Judges Bazelon and Burger (now the Chief Justice). In *Jobbers*, the Association sought to intervene in a proceeding before the Federal Power Commission.[85] When the Commission denied the motion, the Association sought injunctive relief in the district court to compel the FPC to permit intervention.[86] After the district court denied a temporary restraining order, the Association petitioned the appellate court for relief, including a stay of the proceedings before the FPC.[87]

In deciding the stay motion, the court of appeals articulated four factors to determine whether to grant the stay. The court held that the party seeking the stay must: (1) make a strong showing of likely success on the merits; (2) demonstrate irreparable injury in the sense that the asserted harm cannot be remedied through compensation or any other form of relief after a hearing on the merits; (3) prove that other parties interested in the proceedings will not be substantially harmed by the stay; and (4) show that the public interest will not be adversely affected.[88] The "public interest," the court observed, is an

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Klesner, 274 U.S. 145 (1927). In 1948 Congress formalized that status for all purposes when it revised the Judicial Code. 62 Stat. 869, 870 (1948).

81. *See* Sampson v. Murray, 415 U.S. 61 (1974) (citing Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958) (per curiam)).

82. 190 F.2d 601 (D.C. Cir. 1951).

83. *Id.* at 602.

84. 259 F.2d 921 (D.C. Cir. 1958) (per curiam).

85. *Id.* at 923.

86. *Id.*

87. *Id.*

88. *Id.* at 925.

important factor in cases involving "the administration of regulatory statutes designed to promote the public interest."[89]

Although the *Jobbers* decision arose in the context of an application for a stay in the appellate court, the court of appeals has applied the four factor analysis to motions for interlocutory injunctions as well as to stays.[90] Thus even though the court of appeals added the "public interest" factor in *Jobbers*, a case involving a federal regulatory agency, it has applied it to all other cases, including suits between private parties.[91] Indeed the court recently referred to the public interest factor as "a uniquely important consideration."[92] But, in all candor, the court recognized the overlap between factors (2) and (3), irreparable injury and harm to others, and the public interest factor. "Thus, consideration of the public interest requires us to replay the analysis of the two previous factors."[93] If that is so, one wonders why the court does not simply eliminate it from the criteria, and return to its pre-*Jobbers* three-factor analysis.[94]

Since 1958, the court of appeals has adhered to the *Jobbers* four-factor analysis in the wide range of cases coming before it.[95] It has, however, "refined" the test to give it more flexibility, a trend it noted in other circuits. In *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*,[96] the court held that the party moving for preliminary relief need not, in all cases, make a strong showing of likely success on the merits.[97] If the balance of equities (i.e., evaluating the other three factors) significantly favors the movant, then she need only present a "serious" or "substantial" question on the merits to obtain interim relief.[98]

In short, the court held in *Holiday Tours* that the stronger the

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89. *Id.*

90. *E.g.*, National Ass'n of Farmworkers Organizations v. Marshall, 628 F.2d 604 (D.C. Cir. 1980); Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

91. *E.g.*, Reynolds v. Sheet Metal Workers, Local 102, 702 F.2d 221 (D.C. Cir. 1981).

92. National Ass'n of Farmworkers Organizations v. Marshall, 628 F.2d 604, 616 (D.C. Cir. 1980).

93. *Id.*

94. *E.g.*, Perry v. Perry, 190 F.2d 601 (D.C. Cir. 1951).

95. "Over twenty years ago, this court articulated these four factors to be weighed by a court before granting a stay or a preliminary injunction . . . These factors have assisted analysis ever since, and we see no reason to depart from them now." National Ass'n of Farmworkers Organizations v. Marshall, 628 F.2d 604, 613 (D.C. Cir. 1980) (Judge Bazelon, who sat on the panel which decided *Jobbers*, also wrote for the court in *Marshall*).

96. 559 F.2d 841 (D.C. Cir. 1977).

97. *Id.* at 843.

98. *Id.* at 843-44. *Accord* West Virginia Ass'n of Community Health Centers v.

showing on the three "equity" factors the lesser need be the showing regarding likely success on the merits.[99] If the three equity factors "strongly favor" the movant, then she need not demonstrate "a mathematical probability" of success on the merits.[100] In later cases, the court has stated that the movant may obtain interlocutory relief even if it is not likely she will prevail on the merits so long as "a serious legal question" is raised and the equities strongly favor the injunction.[101]

In recent cases, the court of appeals has varied in its dedication to the criteria articulated in *Jobbers* and *Holiday Tours*. In some cases, the court has simply recited and applied the four factors set out in *Jobbers*, without any reference to the flexible standard announced in *Holiday Tours*.[102] In other cases, the court has noted the flexible criteria of *Holiday Tours*, but has applied the four *Jobbers* factors straight down the line.[103] In a third category, the court has articulated and applied the standards of *Jobbers* as refined by *Holiday Tours*.[104] Although the D.C. Circuit usually equates irreparable injury with inadequacy of "compensatory or other corrective relief,"[105] in at least one case the court appeared to consider the adequacy of the legal remedy apart from the irreparable injury factor of *Jobbers*, thus suggesting a fifth element.[106]

Heckler, 734 F.2d 1570 (D.C. Cir. 1984); National Ass'n of Farmworkers Organizations v. Marshall, 628 F.2d 604 (D.C. Cir. 1980).

99. *Holiday Tours*, 559 F.2d at 843-44.

100. *Id.* at 843. *Accord* West Virginia Ass'n of Community Health Centers v. Heckler, 734 F.2d 1570, 1578 n.10 (D.C. Cir. 1984).

101. National Ass'n of Farmworkers Organizations v. Marshall, 628 F.2d 604, 616 (D.C. Cir. 1980).

102. *E.g.*, Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 834 (D.C. Cir. 1984); White House Vigil for the ERA Committee v. Watt, 717 F.2d 568 (D.C. Cir. 1983); Reynolds v. Sheet Metal Workers, Local 102, 702 F.2d 221 (D.C. Cir. 1981); *see* N.A.A.C.P., Jefferson County Branch v. Donovan, 737 F.2d 67 (D.C. Cir. 1984) (the court recited the four factors without mention of the flexible standard, and reversed the grant of preliminary relief because the district judge never addressed them); FTC v. Weyerhauser Co., 665 F.2d 1072 (D.C. Cir. 1981).

103. *See, e.g.*, Ambach v. Bell, 686 F.2d 974 (D.C. Cir. 1982) (per curiam).

104. *E.g.*, McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982) (per curiam).

105. *Jobbers*, 259 F.2d at 925.

106. *See* Megapulse, Inc. v. Lewis, 672 F.2d 959, 970 (D.C. Cir. 1982).

C. *First Circuit*[107]

In one of its early cases,[108] the First Circuit, contrary to other courts of appeals, followed the decision of the Supreme Court in *Ohio Oil Co. v. Conway*.[109] In *Munoz v. Porto Rico Ry. Light & Power Co.*,[110] the court, relying on *Conway*, held that the plaintiff could secure preliminary relief if it raised serious questions going to the merits, and if the balance of hardships tipped toward the moving party. In addition the court stated that posting a bond would be a useful device to prevent injury if the harm to the nonmoving party were more than "inconsiderable."[111] By the late 1960's, however, the court had moved to a two factor analysis for interim relief: likelihood of success on the merits and immediate irreparable injury,[112] ignoring its earlier view expressed in *Munoz*.[113]

In the 1970's, the court expanded its test for preliminary relief by adding two other elements: (1) a balancing of the hardships to the parties;[114] and (2) a public interest factor.[115] Thus by the end of 1978,

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107. Congress created this court in 1891 when it established nine circuit courts of appeals. 26 Stat. 826 (1891) (commonly referred to as the Evarts Act or the Circuit Court of Appeals Act of 1891).

108. Munoz v. Porto Rico Ry. Light & Power Co., 83 F.2d 262 (1st Cir. 1936).

109. 279 U.S. 813 (1929) (per curiam). For discussion of this case, *see supra* note 50 and accompanying text. *See also* Celebrity, Inc. v. Trina, Inc., 264 F.2d 956 (1st Cir. 1959) (relying on *Conway* for the proposition that the moving party must show irreparable injury to secure a preliminary injunction); Hannan v. City of Haverhill, 120 F.2d 87, 90 (1st Cir. 1941) (same).

110. 83 F.2d 262 (1st Cir. 1936).

111. *Id.* at 269.

112. *See, e.g.*, Automatic Radio Mfg. Co. v. Ford Motor Co., 390 F.2d 113 (1st Cir. 1968), *cert. denied*, 391 U.S. 914 (1968). *Accord* Interco, Inc. v. First National Bank of Boston, 560 F.2d 480, 482 (1st Cir. 1977); Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969). In the *Automatic Radio* case, the court also suggested a sliding scale approach: a "strong" showing of probability of success might lessen the burden on the movant to demonstrate irreparable injury. *Id.* at 116. In a footnote, the court also referred offhandedly to the public interest. *Id.* at 116 n.4.

113. 83 F.2d 262 (1st Cir. 1936).

114. *See, e.g.*, SEC v. World Radio Mission, Inc., 544 F.2d 535, 541-42 (1st Cir. 1976); International Ass'n of Machinist & Aerospace Workers v. Northeast Airlines, Inc., 473 F.2d 549, 553-54 (1st Cir. 1972), *cert. denied*, 409 U.S. 845 (1972). In the *SEC* case, the court also suggested a sliding scale approach indicated in *Automatic Radio* without citing to it. 554 F.2d at 546. With regard to the balancing factor, the court has usually required only that the weighing of hardships favors the moving party. In at least one instance, however, it has declined to allow a preliminary injunction because the movant failed to show that the balance "tips sufficiently" in her direction. Burgess v. Affleck, 683 F.2d 596, 601 (1st Cir. 1982). Although the First Circuit had used a balancing test in earlier decisions, the court made no reference to them in these cases.

115. Grimard v. Carlston, 567 F.2d 1171 (1st Cir. 1978). Although the First Circuit in recent years has generally adhered to the four criteria approach for interlocutory relief, it has on occasion omitted any reference to the public interest factor. *E.g.*, Doe v. Brookline

the First Circuit had adopted a full blown four-factor test for interlocutory injunctions.[116] But the apparent adoption of the four-factor approach in 1978 did not result in consistent application of it. In 1979, the First Circuit applied a three-factor analysis, relying on a Supreme Court case decided in 1975.[117] Two years later the court restated and applied the four-factor approach in the leading case of *Planned Parenthood League of Massachusetts v. Bellotti*.[118] Within three months of *Bellotti*, however, the First Circuit reverted momentarily to its earlier two-factor analysis (irreparable injury and probable success on the merits).[119] But within two weeks it returned to the four-factor analysis of *Bellotti*.[120]

School Committee, 722 F.2d 910 (1st Cir. 1983); Rushia v. Town of Ashburnham, 701 F.2d 7 (1st Cir. 1983); Massachusetts Ass'n of Older Americans v. Sharp, 700 F.2d 749 (1st Cir. 1983). *See also* National Tank Truck Carriers, Inc. v. Burke, 608 F.2d 819 (1st Cir. 1979).

116. Levesque v. Maine, 587 F.2d 78, 80 (1st Cir. 1978).

117. National Tank Truck Carriers, Inc. v. Burke, 608 F.2d 819, 823-25 (1st Cir. 1979) (citing Doran v. Salem Inn, Inc., 422 U.S. 922 (1975)). *See also* Engine Specialities, Inc. v. Bombardier, Ltd., 454 F.2d 527 (1st Cir. 1972) without clearly articulating any standards, the court apparently applied three factors for interim relief: likelihood of success on the merits, irreparable harm, and balance of hardships. *Id.* at 530-31. While relying on *Doran* in *Burke*, the court of appeals ignored *Doran* the previous year when it announced the four-factor test discussed above, and in 1981, the court read *Doran* as imposing a two-factor analysis. Maceira v. Pagan, 649 F.2d 8, 15 (1st Cir. 1981). In 1983, however, it interpreted *Doran* again to require a three criteria approach. Rushia v. Town of Ashburnham, 701 F.2d 7, 9-10 (1st Cir. 1983).

118. 641 F.2d 1006 (1st Cir. 1981). In fact, the court quoted from a 1979 district court decision which purported to recite the four elements recognized in the First Circuit. *Id.* at 1009 (quoting Women's Community Health Ctr., Inc. v. Cohen, 477 F. Supp. 542, 544 (D. Me. 1979). The court did not seek to synthesize or rely on its own prior decisions, nor those of the Supreme Court. In addition, the court made no reference to its prior suggestions regarding the sliding scale approach.

119. Maceira v. Pagan, 649 F.2d 8 (1st Cir. 1981). Interestingly, in this case, the court cited the *Doran* opinion as supporting the two-factor approach, even though it had cited *Doran* two years earlier for the three-factor test in *National Tank Truck*. 649 F.2d at 15. *See also* Doe v. Brookline School Committee, 722 F.2d 910 (1st Cir. 1983) (two-factor analysis applied, although it may be linked to the statutory remedy involved in that case).

120. Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency, 649 F.2d 71, 74-76 (1st Cir. 1981). While generally requiring the moving party to satisfy each of the four elements, *id.*, the court has deviated, as the text indicates, from a strict application of that rule. In a recent case, it even waived proof on two of the four factors when the court ruled on the legal contentions of the parties, notwithstanding many prior statements to the contrary that the merits are not to be addressed on a motion for preliminary relief. Wald v. Regan, 708 F.2d 794, 801 (1st Cir. 1983), *rev'd on other grounds*, 104 S. Ct. 3026 (1984). In reversing the judgment of the First Circuit, the Supreme Court did not mention the unorthodox reaching of the merits on motion for an interlocutory injunction, perhaps because the Court itself has done that on occasion, *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), despite its warnings to the contrary. *E.g.*, Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316 (1940); *see also* University of Texas v. Camenisch, 451 U.S. 390 (1981). For other cases in which the Supreme Court reached the merits on a motion for a preliminary injunction see *supra* note 63. As noted in this

Although the court of appeals in *Bellotti* did not discuss any of its prior suggestions regarding the "sliding scale" modification of the four factor test, it did address that question three months later in *Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*.[121] After reaffirming the four elements of its newly restated standards for interim relief,[122] the court addressed the assertion that a sliding scale should be applied to that analysis.[123] Relying on the decision of the Fourth Circuit in the *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*,[124] the First Circuit held that the irreparable injury and probability factors bear an inverse relationship.[125] A greater showing on one reduces the showing necessary on the other. In *Massachusetts Coalition*, the court found that the plaintiff had shown only a "possible" injury, necessitating an examination of "likelihood of success" to determine if the showing was strong enough to compensate for the weaker showing on irreparable injury.[126]

Despite its earlier suggestions regarding the sliding scale approach[127] and despite its holding in *Massachusetts Coalition*, the First Circuit has rarely mentioned the concept since 1978.[128] Indeed in numerous cases, the court has, in reviewing applications for interim relief, made no reference at all to the sliding scale modification.[129]

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article, 19th Century English and American practice authorized the issuance of a temporary injunction if the moving party showed a "clear title or right." *See supra* note 34. *Wald* and *Sawyer* are reminiscent of that earlier doctrine, as is American Eutectic Welding Alloys Sales Co., v. Rodriguez, 480 F.2d 223 (1st Cir. 1973).

121. 649 F.2d 71, 74 (1st Cir. 1981). Although the court restated the four-factor analysis of *Bellotti*, it failed to cite that case, relying on earlier, less explicit precedents.

122. *Id.* at 74.

123. *Id.* at 75.

124. 550 F.2d 189 (4th Cir. 1977). For further discussion of *Blackwelder*, *see infra* note 205 and accompanying text.

125. *Massachusetts Coalition* at 75.

126. *Id.*

127. *See* cases *supra* note 114.

128. *See* Massachusetts Ass'n of Older Americans v. Sharp, 700 F.2d 749 (1st Cir. 1983) (mentions sliding scale, but does not apply it); Auburn News Co., v. Providence Journal Co., 659 F.2d 273 (1st Cir. 1981), *cert denied*, 455 U.S. 921 (1982) (passing reference to sliding scale).

129. *E.g.*, Tremblay v. Marsh, 750 F.2d 3, 5, 7 (1st Cir. 1984); Martinez v. Rhode Island Housing and Mortgage Finance Corp., 738 F.2d 21 (1st Cir. 1984); Kenworth of Boston, Inc. v. Paccar Financial Corp., 735 F.2d 622 (1st Cir. 1984); Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983); LaBeau v. Spirito, 703 F.2d 639 (1st Cir. 1983); San Francisco Real Estate Investors v. Real Estate Investment Trust of America, 701 F.2d 1000 (1st Cir. 1983); Rushia v. Town of Ashburnham, 701 F.2d 7 (1st Cir. 1983); Crowley v. Local No. 82 Furniture and Piano Moving, 679 F.2d 978 (1st Cir. 1982) *rev'd on other grounds*, 104 S. Ct. 2557 (1984); Burgess v. Affleck, 683 F.2d 596 (1st Cir. 1982); Massachusetts Ass'n for Retarded Citizens, Inc. v. King, 668 F.2d 602 (1st Cir. 1981); Town of Burlington v. Department of Education, 655 F.2d 428 (1st Cir. 1981). *See also* Lynch v.

Furthermore, in other cases, it has implicitly rejected the sliding scale analysis by affirming a denial of interim relief because the movant had failed to show either irreparable injury[130] or probable success on the merits,[131] or both.[132] Under the sliding scale approach of *Massachusetts Coalition*, a lesser showing on one of those two factors requires the movant to make a greater showing on the other. If in fact in these cases, the movant had not met the quantitative threshold to trigger the sliding scale, then the court has an obligation to make that quantitative analysis and tell us why the threshold has not been passed.

While the court has not delivered a death blow to the sliding scale concept it brought forth in *Massachusetts Coalition*, it has apparently rendered it moribund. In several cases, the court has noted that the likelihood of success factor is the "crucial"[133] element and "the critical question"[134] among the four criteria.[135] And in *dictum*, the court of appeals has noted that, even if the irreparable injury is "excruciatingly obvious," the movant must still show probability of success on the merits.[136] Giving greater weight to the likelihood factor means that no matter how strong the showing on irreparable injury, the movant

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Dukakis, 719 F.2d 504 (1st Cir. 1983) (no discussion of either the four criteria or the sliding scale variation).

130. *E.g.*, Rushia v. Town of Ashburnham, 701 F.2d 7, 10 (1st Cir. 1983) (affirmed denial of interlocutory injunction because movant failed to show irreparable injury); Town of Burlington v. Department of Education, 655 F.2d 428, 432 (1st Cir. 1981) (same); Levesque v. Maine, 587 F.2d 78 (1st Cir. 1978) (same); Interco, Inc. v. First Nat'l Bank of Boston, 560 F.2d 480, 486 (1st Cir. 1977) (same).

131. *E.g.*, Spath v. NCAA, 728 F.2d 25, 27 (1st Cir. 1984) (affirmed denial of interlocutory injunction because movant failed to show likelihood of ultimate success on the merits); McDonough v. Trustees of University System of New Hampshire, 704 F.2d 780, 784 (1st Cir. 1983) (same); LaBeau v. Spirito, 703 F.2d 639, 642-43 (1st Cir. 1983) (same); Burgess v. Affleck, 683 F.2d 596, 602 (1st Cir. 1982) (same); Massachusetts Ass'n for Retarded Citizens, Inc. v. King, 668 F.2d 602, 607-08 (1st Cir. 1981) (same); S.S. Kresge Co. v. United Factory Outlet, Inc., 598 F.2d 694, 695, 698 (1st Cir. 1979) (same); *see also* Tuxworth v. Froehlke, 449 F.2d 763, 764 (1st Cir. 1971). Indeed the court has stated that failure to demonstrate any one factor precludes the issuance of preliminary relief no matter what the showing on the other criteria. *See* Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency, 649 F.2d 71, 74 (1st Cir. 1981).

132. *E.g.*, Kenworth of Boston, Inc. v. Paccar Financial Corp., 735 F.2d 622 (1st Cir. 1984).

133. San Francisco Real Estate Investors v. Real Estate Investment Trust of America, 701 F.2d 1000, 1003 (1st Cir. 1983).

134. LeBeau v. Spirito, 703 F.2d 639, 643 (1st Cir. 1983).

135. *See also* Auburn News Co., v. Providence Journal Co., 659 F.2d 273, 277 (1st Cir. 1981) ("the probability-of-success component has loomed large in cases before this court"), *cert. denied*, 455 U.S. 921 (1982). *Accord* Massachusetts Ass'n of Older Americans v. Sharp, 700 F.2d 749 (1st Cir. 1983).

136. LeBeau v. Spirito, 703 F.2d 639, 642 (1st Cir. 1983) (quoting from Coalition for Basic Human Needs v. King, 654 F.2d 838, 841 (1st Cir. 1981) (per curiam)).

must still prove probability of success on the merits. But in other *dictim*, the court of appeals has intimated that the probability factor may not be as important if the harm to the moving party is "particularly severe and disproportionate,"[137] an approach that may partially resurrect the sliding scale formulation.

If the matter were not complicated enough, the court of appeals has injected other uncertainties into the resolution of motions for temporary injunctions. For example, it has treated the concept of inadequate remedy at law, which the Supreme Court has called the essence of injunctive relief in the federal courts,[138] in at least three different ways. First, it has equated inadequacy with irreparable injury.[139] That is, the moving party must show that her remedy at law is inadequate in order to demonstrate irreparable injury. Ordinarily, the legal remedy is adequate if the injury can be compensated through money damages. In this sense, adequate remedy at law and irreparable injury are mutually exclusive concepts: the presence of one means the absence of the other. Second, the court has treated the adequacy notion as an independent factor in the formula for interim relief.[140] In other words, the moving party must establish inadequacy of the legal remedy in addition to the four other criteria. Finally, in some cases, the court has simply ignored the question whether the moving party has shown that her legal remedy is not adequate.[141]

D. *Second Circuit*[142]

As with the other courts of appeals, the Second Circuit has not been especially deferential to the decisions of the Supreme Court in the area of preliminary injunctions.[143] Prior to 1953, the court of appeals

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137. Cintron-Garcia v. Romero-Barcelo, 671 F.2d 1, 4 n.2 (1st Cir. 1982) (per curiam).

138. *E.g.*, Sampson v. Murray, 415 U.S. 61, 84 (1974). The court has made the same statement regarding motions for permanent injunctions. *E.g.*, Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 57 (1975).

139. *E.g.*, Itek Corp. v. First National Bank of Boston, 730 F.2d 19, 22-23 (1st Cir. 1984); Levesque v. Maine, 587 F.2d 78, 180 (1st Cir. 1978); Interco, Inc. v. First Nat'l Bank of Boston, 560 F.2d 480, 484-86 (1st Cir. 1977); Keefe v. Geanakos, 418 F.2d 359, 363 (1st Cir. 1969).

140. *E.g.*, Auburn News Co. v. Providence Journal Co., 659 F.2d 273, 277 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982).

141. *E.g.*, San Francisco Real Estate Investors v. Real Estate Investment Trust of America, 701 F.2d 1000 (1st Cir. 1983); Rushia v. Town of Ashburnham, 701 F.2d 7 (1st Cir. 1983); Town of Burlington v. Department of Education, 655 F.2d 428 (1st Cir. 1981).

142. Congress created this court in 1891 when it established nine circuit courts of appeals. 26 Stat. 826 (1891) (commonly referred to as the Evarts Act or the Circuit Court of Appeals Act of 1891).

143. Indeed the Second Circuit opinions have probably generated more discussion

appeared to follow a two-pronged test for interlocutory relief. The moving party must show: (1) "reasonable certainty"[144] of success on the merits, or a clear title or right "free from reasonable doubt";[145] and (2) irreparable injury if the injunction is not granted.[146]

In 1953, the court of appeals decided two cases which altered the standards for issuing interlocutory relief in the circuit.[147] In *Hamilton Watch Co. v. Benrus Watch Co.*,[148] by far the more frequently cited of the two cases,[149] the plaintiff sued under Section 7 of the Clayton Act to prevent a corporate take-over through a purchase of shares.[150] The plaintiff sought to restrain the defendant preliminarily from voting shares already acquired.[151] The district court granted the injunction, but required the plaintiff to post a $10,000 bond.[152] On appeal, the Second Circuit affirmed the grant of the preliminary injunction.[153]

Relying primarily on precedents in the Sixth and Eighth Circuits,[154] the court announced two criteria for interim relief:

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and more law than those of the Supreme Court. This is not to say that the Second Circuit has been a more influential court in the development of preliminary injunction standards than any other federal tribunal. Although some of its decisions have been seminal, other federal court cases have generated interest. For example, the decision of the D.C. Circuit in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958) (per curiam) has had wide impact. *See supra* note 81 and accompanying text.

144. Hall Signal Co. v. General Ry. Signal Co., 153 F. 907, 908 (2d Cir. 1907).

145. Stevens v. Missouri, K. & T. Ry. Co., 106 F. 771, 774 (2d Cir. 1901).

146. *E.g.*, United States v. Adler's Creamery, 107 F.2d 987, 990 (2d Cir. 1939); Hall Signal Co. v. General Ry. Signal Co., 153 F. 907, 909 (2d Cir. 1907); Stevens v. Missouri, K. & T. Ry. Co., 106 F. 771, 774 (2d Cir. 1901); *cf.* Hadden v. Dooley, 74 F. 429 (2d Cir. 1896).

147. Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953); All American Airways v. Village of Cedarhurst, 201 F.2d 273 (2d Cir. 1953). Judges Charles Clark and Jerome Frank sat on both panels. For additional commentary on the standards for interim relief in the Second Circuit since *Hamilton Watch*, *see generally* Mulligan, *Foreword: Preliminary Injunction in the Second Circuit*, 43 BROOKLYN L. REV. 831 (1977).

148. 206 F.2d 738 (2d Cir. 1953).

149. *Hamilton Watch* literally has been cited hundreds of times in the lower federal courts.

150. *Hamilton Watch*, 206 F.2d at 739.

151. *Id.*

152. *Id.*

153. *Id.* at 743.

154. Although the dictum in Russell v. Farley, 105 U.S. 433 (1882) and 19th century English precedents, *see supra* notes 29-33 and accompanying text, support the holding in *Hamilton Watch*, the court never cited those authorities. It did cite Ohio Oil Co. v. Conway, 279 U.S. 813, 815 (1929) (per curiam), which has language parelleling these two factors. But *Conway* also imposed an irreparable injury requirement in granting interlocutory relief. *Id.* The Second Circuit never mentioned that aspect of *Conway*. In addition, the Supreme Court in *Conway* relied entirely on Love v. Atchison, Topeka, and Santa Fe Ry. Co., 185 F. 321 (8th Cir. 1911), an Eighth Circuit decision also cited by the Second Circuit in *Hamilton Watch*.

(1) whether the movant has raised questions, "serious, substantial, difficult and doubtful," which present "a fair ground" for further investigation and litigation;[155] and (2) whether "the balance of hardships tips decidedly" in favor of the moving party.[156] The court did not require the movant to show irreparable injury, as an independent element, even though prior case law[157] and the antitrust laws[158] appeared to require it.

The Second Circuit defined "irreparable injury" in a quantitative sense, balancing the amount of the movant's harm against the amount of harm to the opposing party.[159] Prior to *Hamilton Watch*, irreparable injury had been defined simply to mean whether the alleged injury is remediable at law, usually with money damages, not how it quantitatively measures against injury to the opposing party.[160] Within two weeks of the decision in *Hamilton Watch*, the Second Circuit, without reference to that decision, held that irreparable injury, defined in terms of the adequacy of the legal remedy, is an essential ingredient of an interlocutory injunction.[161]

For the next 16 years, the court of appeals employed one test or the other in reviewing the grant or denial of preliminary relief.[162] No discernible pattern emerged to counsel lawyers and judges on which test should be applied in what circumstance. In 1969, the court finally

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155. *Hamilton Watch*, 206 F.2d at 740.

156. *Id.* In balancing the hardships, the court stated, the trial judge is to measure the harm to the moving party if the injunction is denied against the harm to the opposing party if it is granted. *Id.* at 743.

157. *See* cases cited *supra* notes 143-45. In Lawrence v. St. Louis-San Francisco Ry. Co., 274 U.S. 588 (1927), the Supreme Court reversed a preliminary injunction because the district court failed to find any "danger of irreparable injury to plaintiff which is essential to justify issuance of a temporary injunction." *Id.* at 592.

158. Section 16 of the Clayton Act, 15 U.S.C. § 26 (West Supp. 1982), provides in relevant part, as it did in 1953, that "upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue."

159. 206 F.2d at 743. Factors such as the "character and extent of the emergency presented," "probable period of [the emergency's] duration," and "the court's tentative opinion on the substantive issues involved," may be considered. *Id.*

160. Donovan v. Penn. Co., 199 U.S. 279, 305 (1905) (quoting Chicago Gen. Ry. Co. v. C. B. & Q.R., 181 Ill. 605, 611 (1899)).

161. Foundry Services, Inc. v. Beneflux Corp., 206 F.2d 214, 216 (1953). In this case, the Second Circuit reverted to its earlier two-pronged test: likely to succeed on the merits and irreparable injury. *Id.* at 215-16.

162. *Compare* Societe Comptoir De L'Industrie Cotonniere Etablissements Boussac v. Alexander's Dept. Stores, Inc., 299 F.2d 33 (2d Cir. 1962) (applied the probable success on the merits and irreparable injury test) *with* Unicon Management Corp v. Koppers Co., 366 F.2d 199 (2d Cir. 1966) (applied the serious question and balance of hardships test).

recognized the two discrete lines of authority.[163] In reconciling them, it simply stated that the two tests should be viewed as alternative criteria for the grant or denial of interlocutory relief in every case where a party seeks it.[164] Seven years later, however, the court added irreparable injury to the *Hamilton Watch* branch of the alternative tests.[165] In a break from tradition, the court relied heavily on Supreme Court precedents which treated "irreparable injury" as the indispensable element of injunctive relief in the federal courts.[166]

Consequently, as of 1976, the Second Circuit articulated its test for interlocutory relief as alternative criteria: the moving party must show irreparable injury[167] and *either* a likelihood of success on the merits, or sufficiently serious questions (law or fact) going to the merits and a balance of hardships tipping decidedly toward the moving party.[168] Although some panels have used slightly different words,[169]

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163. Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir. 1969), *cert. denied*, 394 U.S. 999 (1969). *Accord* Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973); Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., 476 F.2d 687, 692-93 (2d Cir. 1973) (while restating the alternative tests, the court appeared to adopt a third: probability of success on the merits and balancing of the equities, which include harm to the opposing parties, and injury to the public interest); Robert W. Stark, Jr., Inc. v. New York Stock Exchange, Inc., 466 F.2d 743, 744 (2d Cir. 1972) (per curiam).

164. Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir. 1969), *cert. denied*, 394 U.S. 999 (1969).

165. Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356, 1359 (2d Cir. 1976). Because *Triebwasser* involved antitrust claims, requiring irreparable injury to secure interim relief does little more than recognize that the antitrust statutes command such a showing. 15 U.S.C. § 26. The court, however, has applied *Triebwasser* to non-antitrust cases. *E.g.*, Sadowsky v. City of New York, 732 F.2d 312, 316 (2d Cir. 1984) (action to enjoin New York City apartment conversion law); Selchow & Richter Co. v. McGraw-Hill Book Co., 580 F.2d 25 (2d Cir. 1978) (action to enjoin trademark infringement); New York v. Nuclear Regulatory Comm'n, 550 F.2d 745, 755 (2d Cir. 1977) (action to enjoin violation of federal environmental laws).

166. Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356, 1359 (2d Cir. 1976).

167. In Jackson Dairy, Inc. v. H.P. Hood & Sons, 596 F.2d 70 (2d Cir. 1979) (per curiam), the court reiterated the definition of irreparable harm set out in *Beneflux*: injury which is not adequately compensated by monetary damages. *Id.* at 72. *Accord* Sperry International Trade, Inc. v. Government of Israel, 670 F.2d 8, 12 (2d Cir. 1982). *Id.*

168. Jackson Dairy, Inc. v. H.P. Hood & Sons, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam).

169. For example, the court variously used the words "possible," *see* Jackson Dairy, Inc. v. H.P. Hood & Sons, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam) (citing Caulfield v. Board of Educ., 583 F.2d 605, 610 (2d Cir. 1978)); Selchow & Righter Co. v. McGraw-Hill Book Co., 580 F.2d 25, 27 (2d Cir. 1978) Sonesta Int'l Hotels Corp. v. Wilmington Assoc., 483 F.2d 247, 250 (2d Cir. 1973); Societe Comptoir De L'Industrie Cotonniere Etablissements Beussac v. Alexander's Dep't Stores, Inc., 299 F.2d 33, 35 (2d Cir. 1962)), "probable," and "not remote," *see Jackson*, 596 F.2d at 72 n.7 (citing New York v. Nuclear Regulatory Comm'n, 550 F.2d 745, 755 (2d Cir. 1977)) to describe the showing necessary

the court has adhered to this formulation.[170]

Notwithstanding the solidification of the alternative tests, the Second Circuit has, however, made a few additional adjustments to the criteria for preliminary relief. First, since irreparable injury is a necessary ingredient for either test, the court has indicated that judges should address this factor first.[171] If the moving party fails to make that threshold showing, then the court need not proceed any further. This approach has the advantage of saving judicial time. If, however, the court of appeals reverses on that factor, it must then either examine the other criteria without the benefit of the lower court's evaluation or remand for further consideration of the other elements.

Second, the court has broadened the definition of adequate remedy to include equitable as well as legal relief,[172] thus making it more difficult to show irreparable injury. Thus, even if the legal remedy is inadequate, the opposing party can still defeat the motion for interim relief by showing that the movant has an adequate equitable remedy after a hearing on the merits. Third, the court has stated that, although the "public interest" is not a factor in either of the alternative tests, trial judges may take it into account in granting or denying a preliminary injunction.[173] The court, however, has not provided further guidance as to when this factor should or should not enter into the calculation for interlocutory relief.

E. *Third Circuit*[174]

Like many of the other courts of appeals, the Third Circuit has

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on irreparable injury. In *Jackson* the court declined to attribute any significance to these linguistic differences, focusing instead on the essence of "irreparable injury": harm not adequately compensated by money damages. 596 F.2d at 72.

170. Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co., 749 F.2d 124, 125 (2d Cir. 1984) (per curiam); Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 260 (2d Cir. 1984); Sadowsky v. City of New York, 732 F.2d 312, 316 (2d Cir. 1984); Guinness & Sons, PLC v. Sterling Publishing Co., 732 F.2d 1095, 1099 (2d Cir. 1984); FMC Corp. v. Taiwan Tainan Giant Industrial Co., 730 F.2d 61, 63 (2d Cir. 1984) (per curiam); Bell & Howell: Mamiya Co. v. Masel Supply Co., 719 F.2d 42, 45 (2d Cir. 1983); Sperry International Trade, Inc. v. Government of Israel, 670 F.2d 8, 11 (2d Cir. 1982).

171. Guinness & Sons, PLC v. Sterling Publishing Co., 732 F.2d 1095, 1099 (2d Cir. 1984); Bell & Howell: Mamiya Co. v. Masel Supply Co., 719 F.2d 42, 45 (2d Cir. 1983).

172. Bell & Howell: Mamiya Co. v. Masel Supply Co., 719 F.2d 42 (2d Cir. 1983).

173. Standard & Poor's Corp. v. Commodity Exchange, Inc., 683 F.2d 704, 711-12 (2d Cir. 1982); *cf.* Eastern Air Lines, Inc. v. Civil Aeronautics Board, 261 F.2d 830 (2d Cir. 1958) (on motion for a stay of an administrative order, the court of appeals examined four factors, including the effect of the stay on the public interest). *Id.* at 830.

174. Congress created this court in 1891 when it established nine circuit courts of appeals. 26 Stat. 826 (1891) (commonly referred to as the Evarts Act or the Circuit Court of Appeals Act of 1891).

not been faithful to a particular set of criteria for interim relief. The path through its precedents has been marked by shifts in standards and emphases. Its early decisions seemed to adopt a single factor: the moving party must demonstrate a clear case of entitlement to relief on the merits.[175] The Third Circuit shifted the focus from establishing a clear case of right to irreparable injury, suggesting that the clear case standard applied only when the moving party relied exclusively on *ex parte* affidavits.[176] To the irreparable injury criterion, it soon added a balancing of the harm to the movant if the injunction is denied against the harm to the opposing party if it is granted.[177] A few years later, the focus shifted again when the court articulated a two-pronged test comprised of irreparable injury and a reasonable probability of ultimate success on the merits.[178]

Apparently not satisfied with this test, the Third Circuit, without explanation, adopted a four-factor approach to interim relief in *Nelson v. Miller*.[179] To obtain a preliminary injunction, the moving party must meet the reasonable probability and irreparable injury tests of prior cases, plus she must also demonstrate that issuing the injunction will not harm other interested parties[180] or the public interest.[181]

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175. *E.g.*, Barker Painting Co. v. Brotherhood of Painters, Decorators, and Paperhangers of America, 15 F.2d 16, 18 (3d Cir. 1926); Van Camp Packing Co. v. Cruikshanks Bros. Co., 90 F. 814, 815 (3d Cir. 1898); Lare v. Harper & Row Bros., 86 F. 481, 483 (3d Cir. 1898); *see* New York Ambler Asbestos Mfg. Co. v. Asbestos Air-Cell Covering Co., 102 F. 890, 891 (3d Cir. 1900) (in a diversity case, the court applied "clear case" federal standard to request for preliminary injunction). The single test of clear case is reminiscent of the 19th century English cases. *See generally supra* note 33 and accompanying text.

176. Murray Hill Restaurant, Inc. v. Thirteen Twenty One Locust, 98 F.2d 578, 579 (3d Cir. 1938). *Accord* Sims v. Greene, 161 F.2d 87 (3d Cir. 1947); Warner Bros. Pictures, Inc. v. Gittone, 110 F.2d 292 (3d Cir. 1940) (per curiam).

177. *E.g.*, Joseph Bancroft & Sons Co. v. Shelley Knitting Mills Co., 268 F.2d 569, 574 (3d Cir. 1959), relying for these twin factors in part on Yakus v. United States, 321 U.S. 414 (1944). *See also* Volkswagenwerk Aktiengesellschaft v. Volks City, Inc., 348 F.2d 659, 660 (3d Cir. 1965) (relying on Ohio Oil Co. v. Conway, 279 U.S. 813 (1929) (per curiam), *supra* note 50, the court applied similar standards to a request for interlocutory relief). In Glasco v. Hills, 558 F.2d 179 (3d Cir. 1977), the court of appeals held that there was no inconsistency between the *Volks City* test and the four-factor approach it had adopted in Nelson v. Miller, 373 F.2d 474 (2d Cir. 1967). *Glasco*, 558 F.2d at 182 n.1.

178. *E.g.*, Industrial Electronics Corp. v. Cline, 330 F.2d 480, 482-83 (3d Cir. 1964) (in this diversity case, the court applied both federal and state standards for an interlocutory injunction). *Accord* Wyrough & Loser, Inc. v. Pelmor Laboratories, Inc., 376 F.2d 543, 547 (3d Cir. 1967); Ikirt v. Lee National Corp., 358 F.2d 726, 727 (3d Cir. 1966) (per curiam).

179. 373 F.2d 474, 477 (3d Cir.), *cert. denied*, 387 U.S. 924 (1967). *Accord* Winkelman v. New York Stock Exchange, 445 F.2d 786, 789 (3d Cir. 1971).

180. In some cases, the court has included harm to the non-moving party in the evaluation of this factor. *E.g.*, Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981) (en banc), *vacated on other grounds*, 458 U.S. 1119 (1982); The Continental Group, Inc. v. Amoco

Notwithstanding the holding in *Nelson*, two weeks later the court reverted to its earlier two criteria analysis.[182] Thereafter the Third Circuit alternated between the two-factor and the four-factor test for preliminary relief.[183]

In those decisions where the court of appeals has repeated its four-factor test, it has not applied them in a uniform fashion. To be sure, the court in every case has required a showing of a reasonable probability of eventual success in the litigation, and that the moving

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Chemicals Corp., 614 F.2d 351 (3d Cir. 1980) (applying federal criteria to request for interim relief in diversity case). In other instances, such harm has been excluded, raising the question whether injury to the non-moving party is to be considered at all in the Third Circuit formulation; *e.g.*, Eli Lilly and Co. v. Premo Pharmaceutical Laboratories, Inc., 630 F.2d 120 (3d Cir.), *cert. denied*, 449 U.S. 1014 (1980); Constructors Ass'ns of Western Pennsylvania v. Kreps, 573 F.2d 811 (3d Cir. 1978) (per curiam); Oburn v. Shapp, 521 F.2d 142 (3d Cir. 1975); Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 501 F.2d 917 (3d Cir. 1974); *see* Kennecott v. Smith, 637 F.2d 181 (3d Cir. 1980).

181. *Nelson*, 373 F.2d at 477 (quoting Crawford v. Davis, 249 F. Supp. 943 (E.D. Pa. 1966), *cert. denied*, 383 U.S. 921 (1966)).

182. Wyrough & Loser, Inc. v. Pelmor Laboratories, Inc., 376 F.2d 543, 548 (3d Cir. 1967).

183. For cases applying the two factor approach, *see* Moteles v. University of Pennsylvania, 730 F.2d 913 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 179 (1984); New Jersey-Philadelpha Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education, 654 F.2d 868 (3d Cir. 1981) (one of the few cases in the courts of appeals which relies on Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) for preliminary injunction standards); United States v. Pennsylvania, 533 F.2d 107 (3d Cir. 1976); Ronson Corp. v. Liquifin Aktiengesellschaft, 483 F.2d 846 (3d Cir. 1973) (per curiam), *cert. denied*, 419 U.S. 870 (1974); Croskey Street Concerned Citizens v. Romney, 459 F.2d 109 (3d Cir. 1972); A.L.K. Corp. v. Columbia Pictures Industries, Inc., 440 F.2d 761 (3d Cir. 1971) (applying federal criteria to request for interim relief in diversity case); National Land & Investment Co. v. Specter, 428 F.2d 91 (3d Cir. 1970); Wyrough & Loser, Inc. v. Pelmor Laboratories, Inc., 376 F.2d 543 (3d Cir. 1967).

For decisions invoking the four-factor analysis, *see* Allegheny County Sanitary Authority v. EPA, 732 F.2d 1167 (3d Cir. 1984); Freixenet, S.A. v. Admiral Wine & Liquor Co., 731 F.2d 148 (3d Cir. 1984); *In re* Arthur Treacher's Franchisee Litigation, 689 F.2d 1137 (3d Cir. 1982); Kershner v. Mazurkiewicz, 670 F.2d 440 (3d Cir. 1982) (en banc); Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981) (en banc), *vacated on other grounds*, 458 U.S. 1119 (1982); Kennecott v. Smith, 637 F.2d 181 (3d Cir. 1980); Eli Lilly and Co. v. Premo Pharmaceutical Laboratories, Inc., 630 F.2d 120 (3d Cir.), *cert. denied*, 449 U.S. 1014 (1980); The Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351 (3d Cir. 1980) (applying federal criteria to request for interim relief in diversity case); Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d 589 (3d Cir. 1979), *cert. denied*, 446 U.S. 956 (1980); Constructors Ass'ns of Western Pennsylvania v. Kreps, 573 F.2d 811 (3d Cir. 1978) (per curiam); System Operations v. Scientific Games Dev. Corp., 555 F.2d 1131 (3d Cir. 1977); Ammond v. McGahn, 532 F.2d 325 (3d Cir. 1976); A.O. Smith Corp. v. FTC, 530 F.2d 515 (3d Cir. 1976); Oburn v. Shapp, 521 F.2d 142 (3d Cir. 1975); Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 501 F.2d 917 (3d Cir. 1974); Pennsylvania *ex rel* Creamer v. U.S. Department of Agriculture, 469 F.2d 1387 (1972) (per curiam); *In re* Penn Central Transportation Co., 457 F.2d 381 (3d Cir. 1972); Winkelman v. New York Stock Exchange, 445 F.2d 786 (3d Cir. 1971).

party will suffer irreparable injury if the injunction is denied.[184] However, regarding the other two factors of injury to other interested parties and harm to the public interest, the court has taken at least three different approaches, ranging from a compulsory to an optional inquiry into them. It has said that these two factors "must,"[185] "should,"[186] or "may"[187] be considered in ruling on motions for interlocutory injunctions.

Furthermore, the court has suggested that, in applying the four factors, the trial judge may use a sliding scale approach: the moving party need not make as great a showing on the probability of success factor if she makes a stronger showing on the other three factors, and vice versa.[188] Despite that language in several cases, the court has

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184. The central importance of the two factors is demonstrated by noting that the court has, on many occasions, affirmed the denial of preliminary relief simply by agreeing that the moving party had failed to establish one or the other of these critical elements. For cases in which the moving party failed to show irreparable injury, *see, e.g.*, Kershner v. Mazurkiewicz, 670 F.2d 440 (3d Cir. 1982) (en banc); Ammond v. McGahn, 532 F.2d 325 (3d Cir. 1976); A.O. Smith Corp. v. FTC, 530 F.2d 515 (3d Cir. 1976); Pennsylvania *ex rel* Creamer v. U.S. Department of Agriculture, 469 F.2d 1387 (1972) (per curiam). For cases in which the moving party failed to show reasonable probability of eventual success, *see, e.g.*, Freixenet, S.A. v. Admiral Wine & Liquor Co., 731 F.2d 148 (3d Cir. 1984); System Operations v. Scientific Games Dev. Corp., 555 F.2d 1131 (3d Cir. 1977).

185. Allegheny County Sanitary Authority v. EPA, 732 F.2d 1167, 1177 (3d Cir. 1984); Freixenet, S.A. v. Admiral Wine & Liquor Co., 731 F.2d 148, 151 (3d Cir. 1984); Rennie v. Klein, 653 F.2d 836, 840-41 (3d Cir. 1981) (en banc), *vacated on other grounds*, 458 U.S. 1119 (1982); The Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 356-58 (3d Cir. 1980) (applying federal criteria to request for interim relief in diversity case); Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d 589, 600-01 (3d Cir. 1979), *cert. denied*, 446 U.S. 956 (1980); Constructors Ass'n of Western Pennsylvania v. Kreps, 573 F.2d 811, 814-15 (3d Cir. 1978) (the court employed both "must" and "should" to describe the obligation of the district court to examine the four factors); Ammond v. McGahn, 532 F.2d 325, 329 (3d Cir. 1976); A.O. Smith Corp. v. FTC, 530 F.2d 515, 525 (3d Cir. 1976); Pennsylvania *ex rel* Creamer v. U.S. Department of Agriculture, 469 F.2d 1387, 1388 n.2 (1972) (per curiam); *In re* Penn Central Transportation Co., 457 F.2d 381, 384-85 (3d Cir. 1972); Winkelman v. New York Stock Exchange, 445 F.2d 786, 789 (3d Cir. 1971); Nelson v. Miller, 373 F.2d 474, 477 (3d Cir. 1967), *cert. denied*, 387 U.S. 924 (1967).

186. Professional Plan Examiners of N.J., Inc. v. LeFante, 750 F.2d 282, 288 (3d Cir. 1984); *In re* Arthur Treacher's Franchisee Litigation, 689 F.2d 1137, 1143 (3d Cir. 1982); Eli Lilly and Co. v. Premo Pharmaceutical Laboratories, Inc., 630 F.2d 120, 136 (3d Cir. 1980), *cert. denied*, 449 U.S. 1014 (1980); Constructors Ass'n of Western Pennsylvania v. Kreps, 573 F.2d 811, 814-15 (3d Cir. 1978) (the court employed both "must" and "should" to describe the obligation of the district court to examine the four factors); System Operations v. Scientific Games Dev. Corp., 555 F.2d 1131, 1141 (3d Cir. 1977); Oburn v. Shapp, 521 F.2d 142, 143, 152 (3d Cir. 1975); Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 501 F.2d 917, 920 (3d Cir. 1974).

187. Kershner v. Mazurkiewicz, 670 F.2d 440, 443 (3d Cir. 1982) (en banc); Kennecott v. Smith, 637 F.2d 181, 187 (3d Cir. 1980).

188. *See, e.g.*, Eli Lilly and Co. v. Premo Pharmaceutical Laboratories, Inc., 630 F.2d 120, 136 (3d Cir.), *cert. denied*, 449 U.S. 1014 (1980); Constructors Ass'n of Western

held that the movant must still demonstrate a "reasonable probability" of ultimate success.[189] In this regard, the Third Circuit has expressly rejected the more generous standard of *Hamilton Watch*.[190] To confuse the matter still further, the court has not consistently included harm to the opposing party in its four-factor analysis.[191] Finally, in a recent appeal from the partial grant of a motion for preliminary injunction, the court put aside its usual deference to the discretion of the trial judge in such matters, and did not even discuss the four-factor test at all.[192] Instead the Third Circuit decided the case on the merits because of "an unusually complete factual and legal presentation from which to address the important constitutional issues at stake."[193]

F. *Fourth Circuit*[194]

Like other courts of appeals, the Fourth Circuit appears to have followed a fairly straightforward approach to interlocutory relief in its early days. If the moving party could establish a clear right to the property in dispute and could show that a temporary injunction was necessary to prevent injury to that right, then the interim relief would be granted.[195] In 1932, the court decided *Sinclair Refining Co. v. Midland Oil Co.*,[196] which one commentator marks as the fountainhead of the current standards in the Fourth Circuit.[197] In that case, Midland Oil sued to enjoin the foreclosure on certain assets because it defaulted

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Pennsylvania v. Kreps, 573 F.2d 811, 815 (3d Cir. 1978) (per curiam); Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 501 F.2d 917, 923 (1974).

189. *In re* Arthur Treacher's Franchisee Litigation, 689 F.2d 1137, 1147 (3d Cir. 1982).

190. Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953). For a discussion of this case, *see supra* notes 147-49 and accompanying text.

191. *See supra* note 188.

192. American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 290 (3d Cir. 1984).

193. *Id.* at 290. *See also* Hotel and Restaurant Employees, Local 54 v. Danziger, 709 F.2d 815, 831 (3d Cir. 1983) (after addressing the merits and finding for the plaintiff, the court held that a preliminary injunction should issue), *vacated and remanded sub nom.* Brown v. Hotel & Restaurant Employees, Local 54, 104 S. Ct. 3179 (1984) (the Supreme Court similarly addressed the merits of the case, ignoring that it arose on motion for temporary relief).

194. Congress created this court in 1891 when it established nine circuit courts of appeals. 26 Stat. 826 (1891) (commonly referred to as the Evarts Act or the Circuit Court of Appeals Act of 1891).

195. *E.g.*, Ritter v. Ulman, 78 F. 222, 224 (4th Cir. 1897); *see also* United States Gramophone Co. v. Seaman, 113 F. 745, 740 (4th Cir. 1902).

196. 55 F.2d 42 (4th Cir. 1932).

197. Note, *Civil Procedure—The Fourth Circuit's Liberal Approach to Preliminary Injunctions* 14 WAKE FOREST L. REV. 103 (1978).

on a loan from Sinclair.[198] In affirming the grant of an interlocutory injunction, the court appeared to announce a three-part test for such relief: the moving party must show a probable right, a probable danger, and a balancing of hardships favoring the movant.[199]

Although decisions deviating from *Sinclair Refining* dotted the legal landscape over the next 40 years,[200] the court of appeals reaffirmed the essential outlines of the decisions in *West Virginia Highlands Conservancy v. Island Creek Coal Co.*[201] In that case, however, the court made important refinements in the *Sinclair Refining* criteria. First, it defined "probable right" as requiring only that the moving party raise "substantial issues," or that the suit not be "frivolous litigation," or that the resolution of the disputed questions not be "immediately apparent."[202] Second, the court appeared to collapse the probable danger and balance of hardships elements into one factor: whether the injury to the moving party absent the injunction outweighs the harm to the opponent if the injunction is granted.[203] Third, the court added a "public interest"[204] factor to the formula for interim relief.

Six years after *Island Creek*, the Fourth Circuit made further adjustments in the *Sinclair Refining* analysis. In *Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co.*[205] the plaintiff sought treble damages and injunctive relief under the Clayton Act when the defendant terminated its dealership arrangement.[206] Pending resolution of its claims, the plaintiff moved for interlocutory relief to require the de-

198. *Sinclair Refining Co.*, 55 F.2d at 43.

199. *Id.* at 45. The "probable right and probable danger" language undoubtedly originated in Justice Johnson's dissenting opinion in Georgia v. Brailsford, 2 U.S. (2 Dall.) 402, 405 (1792), which the court did not mention.

200. *See, e.g.*, Singleton v. Anson County Board of Education, 387 F.2d 349 (4th Cir. 1967) (per curiam) (no discussion of criteria for interim relief other than to note that preliminary injunctions must preserve the status quo, not alter it, as the plaintiffs sought to do in this case); Meiselman v. Paramount Film Distributing Corp., 180 F.2d 94 (4th Cir. 1950) (while quoting the critical language from *Sinclair Refining*, the court seemed to inquire only whether the interlocutory injunction would preserve the status quo and prevent irreparable injury to the moving party).

201. 441 F.2d 232 (4th Cir. 1971).

202. *Id.* at 235.

203. *Id.*

204. *Id.* at 236. Although recognizing that this factor usually applies only where the plaintiff seeks to enjoin the enforcement of a law protecting the public interest, citing Yakus v. United States, 321 U.S. 414 (1944), the court nonetheless applied it to a private suit to enforce such a statute (in this case, the Wilderness Act of 1964). *Id.* In *Blackwelder, infra*, the court held that a private suit to enforce the antitrust laws advanced the public interest.

205. 550 F.2d 189 (4th Cir. 1977).

206. *Id.* at 192.

fendant to reinstate the dealership until the court decided the merits of the dispute.[207] Applying a four-factor standard derived from a Fourth Circuit case involving a motion to stay enforcement of an administrative order pending appeal,[208] the district judge denied the request for interim relief.[209]

Reversing the denial of the temporary injunction, the court of appeals refined still further the "balance-of-hardship"[210] test it had outlined over 40 years earlier in *Sinclair Refining*.[211] First, it rejected the application of the four-factor approach, employed for appellate stays, to motions for interlocutory injunctions.[212] Such motions to stay either administrative or judicial orders, the court noted, occur after a tribunal (administrative agency or district court) has made a determination on the merits.[213] In contrast, motions for interim relief arise before any decision has been made on the merits;[214] consequently, a different standard is appropriate. Second, while rejecting a straightforward application of the four-factor analysis, the court held that the trial judge should utilize those four elements, but not by evaluating them independently.[215] The four factors, the court noted, are "intertwined,"[216] and should not be examined in isolation from each other.

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207. *Id.*

208. Airport Commission of Forsyth County, North Carolina v. CAB, 296 F.2d 95 (4th Cir. 1961) (per curiam). The four factors are: (1) a strong showing that the movant is likely to prevail on the merits; (2) proof that the movant will suffer irreparable injury if the injunction is denied; (3) a demonstration that other parties would not be substantially harmed by the injunction; and (4) an evaluation of the public interest. *Id.* at 96.

209. *Blackwelder*, 550 F.2d at 193.

210. *Id.*

211. The court noted in passing that, although the opinion in *Sinclair Refining* did not mention Ohio Oil Co. v. Conway, 279 U.S. 813 (1929) (per curiam) (discussed *supra* note 50), it undoubtedly was based on that Supreme Court case. *Blackwelder*, 550 F.2d at 194. Perhaps this is a classic example of the tendency of courts of appeals to ignore Supreme Court opinions on preliminary injunctions. The Fourth Circuit decided *Sinclair Refining* within three years of *Conway*, without any reference to it, and 40 years later the court said in essence it meant to rely on it. It may be appropriate to observe that the *Blackwelder* court did not make any reference to more recent Supreme Court precedents on interim relief, such as Brown v. Chote, 411 U.S. 452 (1973) and Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), which articulated standards for interlocutory injunctions at variance with those announced in *Conway* and *Blackwelder*. Indeed *Brown* and *Doran* themselves never cited *Conway*.

212. *Blackwelder*, 550 F.2d at 193.

213. *Id.* at 193-94.

214. *Id.* at 194.

215. *Id.* at 196.

216. *Id.* The court has regularly used the term "flexible interplay" to describe the relationship among the four elements, *id.* at 196, borrowing the expression from the Second Circuit. Packard Instrument Co., Inc. v. ANS, Inc., 416 F.2d 943, 945 (2d Cir. 1969) (per curiam).

Third, in describing the interrelationship among the four factors, the court in *Blackwelder* held that the first step is to balance the respective injuries which the parties would suffer if the injunction were granted or denied.[217] It assimilated the concept of irreparable injury into this balancing process, defining it as the "*relative* quantum and quality"[218] of the movant's alleged injury. Fourth, if the balance of hardship tips toward the movant, she need not demonstrate a likelihood of success on the merits. In such instances, she need only raise "grave or serious questions"[219] of law or fact going to the merits of the dispute.[220]

Fifth, if, however, the injury to the movant absent the injunction is less compelling, then the probability of success factor plays a more important role.[221] In short, the nature of the movant's injuries and the substance of her claims have an inverse relationship. A greater or lesser showing on one requires a correspondingly greater or lesser showing on the other.[222] Of course, the court observed, any residual injury to the non-moving party may be prevented by requiring the moving party to post a sufficient bond.[223]

Since its decision in the *Blackwelder* case, the Fourth Circuit, unlike many of its sister circuits in applying their standards for preliminary relief, has been fairly consistent in applying the "balance-of-

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217. *Blackwelder*, 550 F.2d at 195.

218. *Id.* at 196 (emphasis in original). It did not discuss "irreparable injury" in the sense of an inadequate remedy at law. *See* Lawrence v. St. Louis-San Francisco Ry. Co., 274 U.S. 588 (1927). Indeed in some cases, the court discussed the respective injuries in monetary terms, *e.g.*, North Carolina State Ports Authority v. Dart Containerline Co., Ltd., 592 F.2d 749, 750-51 (4th Cir. 1979), which should preclude injunctive relief. In other cases, however, the court appeared to discuss irreparable injury in both senses: as a concept addressing quantitative injury and adequacy of the legal remedy. *E.g.*, Dan River, Inc. v. Icahn, 701 F.2d 278, 283-84 (4th Cir. 1983).

219. *Blackwelder*, 550 F.2d at 196.

220. Notwithstanding this aspect of the "hardships" test which requires less delving into the merits than the "probability of success" factor, the court of appeals, on several occasions, has entered deeply into the merits of the issues raised in the law suit in deciding whether the moving party had made the necessary showing. *E.g.*, South Carolina *ex rel.* Tendal v. Block, 717 F.2d 874 (4th Cir. 1983); Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983); Wetzel v. Edwards, 635 F.2d 283 (4th Cir. 1980); Maryland Undercoating Co., Inc. v. Payne, 603 F.2d 477 (4th Cir. 1979). In *Block*, the court actually decided the merits on an appeal from an order granting the preliminary injunction. *Block*, 717 F.2d at 195 n.3.

221. *Blackwelder*, 550 F.2d at 196.

222. If the balance is in equipoise, the court noted, the probability of success factor takes on added significance. *Blackwelder*, 550 F.2d at 195 n.3.

223. *Id.* at 196 (citing Ohio Oil Co. v. Conway, 279 U.S. 813, 815 (1929) (per curiam)); *see also* Russell v. Farley, 105 U.S. 433, 430 (1882). *See generally* Note, *Interlocutory Injunctions and the Injunction Bond*, 73 HARV. L. REV. 333 (1959).

hardship" test.[224] Subsequent cases, however, have suggested at least one additional refinement.[225] *Blackwelder* and other cases held that, if the moving party demonstrates that the balance of harms tips in its favor, then a preliminary injunction may issue if she raises serious questions of law or fact going to the merits. Under those decisions, a mere tipping of the hardships towards the movant is sufficient to invoke the easier showing regarding the substance of the movant's claims.

But on occasion, the court of appeals has imposed a greater burden on the moving party with regard to the quantitative showing on the balance of hardship evaluation. In these instances, it has required the movant to show that its injury without the injunction "greatly outweighs"[226] any harm to the opponent in order to invoke the lesser standard on the "probability of success" factor.[227] That is, it is not enough, the court has sometimes said, simply to prove that the balance of hardship favors the movant; it must do so "decidedly."[228] Finally, although the court has regularly insisted that the public interest must "always"[229] be addressed before granting or denying an interlocutory

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224. *E.g.*, South Carolina *ex rel.* Tendal v. Block, 717 F.2d 874 (4th Cir. 1983); Jones v. Board of Governors of the University of North Carolina, 704 F.2d 713 (4th Cir. 1983); Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983); Federal Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495 (4th Cir. 1981) (in this diversity case, the court declined to decide whether federal or state rules governed the granting of preliminary relief); Wetzel v. Edwards, 635 F.2d 283 (4th Cir. 1980); Telvest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1979) (in this diversity case, the court applied federal standards to the request for preliminary relief without any discussion of the choice of law question); North Carolina State Ports Authority v. Data Containerline Co., Ltd., 592 F.2d 749 (4th Cir. 1979); Johnson v. Bergland, 586 F.2d 993 (4th Cir. 1978).

225. 279 U.S. at 815. In granting the preliminary injunction, the Court also required the plaintiff to pay the back taxes lawfully imposed and to post an adequate bond. *Id.* at 815. It also ordered the district court on remand to expedite the resolution of the case on the merits. *Id.* In other cases, the Court has approved the imposition of terms and conditions, other than a bond, in orders granting preliminary injunctions. *E.g.*, Brotherhood of Locomotive Engineers v. M-K-T R.R. Co., 363 U.S. 528, 534 (1960); Yakus v. United States, 321 U.S. 414, 441-42 (1944); Inland Steel Co. v. United States, 306 U.S. 153, 156-58 (1939); Russell v. Farley, 105 U.S. 433, 433 (1882).

226. Telvest, Inc. v. Bradshaw, 618 F.2d 1029, 1032 (4th Cir. 1980).

227. *Id.* at 1032-33.

228. Jones v. Board of Governors of the University of North Carolina, 704 F.2d 713, 715 (4th Cir. 1983). *Accord* Federal Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495 (4th Cir. 1981) (in this diversity case, the court declined to decide whether federal or state interim relief standards apply since both sets of criteria are about the same); Maryland Undercoating Co., Inc. v. Payne, 603 F.2d 477 (4th Cir. 1979) (in this diversity case, the court applied federal standards to the request for preliminary relief without any discussion of the choice of law question).

229. Johnson v. Bergland, 586 F.2d 993, 995 (4th Cir. 1978) (the court did not discuss the public interest factor even though it said it must always be considered).

injunction, it has not always done so.[230]

G. *Fifth Circuit*[231]

While earlier cases[232] suggested other standards for issuing preliminary injunctions, in recent years the Fifth Circuit has articulated a four-factor analysis for interim relief. The leading precedent is *Canal Authority of State of Florida v. Callaway*,[233] although three cases decided a few years before contain the four elements.[234] In *Canal Authority*, Florida secured a temporary injunction to prevent the defendant Secretary of the Army from, in effect, abandoning a watershed project, which President Nixon had ordered stopped for environmental reasons.[235] After the district court denied the defendant's motion to modify the preliminary injunction, the Secretary appealed.[236]

In discussing the criteria for the issuance of temporary relief, the court of appeals identified four elements, each of which must be demonstrated by the moving party: (1) substantial likelihood of success on the merits; (2) "a substantial threat that the movant will suffer irreparable injury if the injunction is not granted"; (3) the threatened injury to the moving party if the injunction is denied outweighs the harm to the opposing party if it is granted;[237] and (4) the public inter-

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230. *E.g.*, Jones v. Board of Governors of the University of North Carolina, 704 F.2d 713 (4th Cir. 1983) (the court noted the public interest factor, but did not discuss it); Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983) (same); Maryland Undercoating Co., Inc. v. Payne, 603 F.2d 477 (4th Cir. 1979) (same); North Carolina State Ports Authority v. Data Containerline Co., Ltd., 592 F.2d 749 (4th Cir. 1979) (same). *See also* Federal Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495 (4th Cir. 1981) (court did not mention public interest factor). In some but not all of these cases, the court held that interlocutory injunctive relief was inappropriate. Thus it may be that judges are not required to address the public interest factor if the other conditions for interim relief are not satisfied.

231. Congress created this court in 1891 when it established nine circuit courts of appeals. 26 Stat. 826 (1891) (commonly referred to as the Evarts Act or the Circuit Court of Appeals Act of 1891).

232. *See, e.g.*, Community Natural Gas Co. v. City of Cisco, 65 F.2d 320, 321 (5th Cir. 1933) (a preliminary injunction will issue "to maintain the status quo or [if] it is clearly shown that irreparable injury is imminent"). In Calagaz v. DeFries, 303 F.2d 588, 589-90 (5th Cir. 1962) (per curiam) and City of Miami Beach v. Benhow Realty, 168 F.2d 378, 380 (5th Cir. 1948), the court of appeals followed the test outlined in Ohio Oil Co. v. Conway, 279 U.S. 813 (1929) (per curiam), which then faded into oblivion in the Fifth Circuit.

233. 489 F.2d 567 (5th Cir. 1974).

234. Blackshear Residents Organization v. Romney, 472 F.2d 1197 (5th Cir. 1973) (per curiam); Allison v. Froehlke, 470 F.2d 1123 (5th Cir. 1972); Bayless v. Martine, 430 F.2d 873 (5th Cir. 1970), *cert. denied*, 406 U.S. 930 (1972).

235. *Canal Authority*, 489 F.2d at 570.

236. *Id.* at 572.

237. In weighing the relative harm to the parties, the court may consider the impact

est will not be disserved by the granting of the injunction.[238] After firmly identifying these considerations and placing the burden of persuasion on the moving party, the court noted that factors (1) and (3) could be considered on a "sliding scale."[239] That is, the movant may make a lesser showing on the substantial likelihood element if she makes a stronger showing on the balancing of harms, and vice versa.

In the years following *Canal Authority*, the Fifth Circuit has reiterated the four-factor approach on many occasions.[240] While in nearly every subsequent case the court has discussed these four elements as the exclusive factors, in one case the Fifth Circuit held that the *Canal Authority* analysis does not exclude other considerations; the four elements merely represented "the minimal factors" which the trial judge must address before ordering preliminary relief.[241] Further, in another aberrational decision, the court held that the moving party need not make as strong a showing on the four factors if she seeks only to preserve property or the subject matter of the law suit pending a decision on the merits as compared to a preliminary injunction to require affirmative action.[242]

Regarding the "sliding scale" variation, the court has exhibited some inconsistencies in its application. First, it should be noted that the Fifth Circuit solidified the "sliding scale" analysis in *Texas v. Seatrain*,[243] but cautioned that the moving party must make some showing on the merits, even though it need not be substantial.[244] If the moving party has no chance of succeeding on the merits, the trial

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of requiring the moving party to post an injunction bond, which has the effect of protecting the opponent from permanent injury. Camenisch v. University of Texas, 616 F.2d 127, 130 (5th Cir. 1980), *rev'd on other grounds*, 451 U.S. 390 (1981); *see* Russell v. Farley, 105 U.S. 433 (1881); *see generally* Note, *Interlocutory Injunctions and the Injunction Bond*, 73 HARV. L. REV. 333 (1959). Arguably posting of a bond could protect the losing party from interim damage in most cases. The Fifth Circuit, however, has not made much of this aspect of *Camenisch*, although the Supreme Court made the same point in Ohio Oil Co. v. Conway, 279 U.S. 813, 815 (1929) (per curiam).

238. *Canal Authority*, 489 F.2d at 572.

239. *Id.* at 576. While the court briefly discussed the concept in *Canal Authority*, the phrase "sliding scale" first appeared in Siff v. State Democratic Executive Committee, 500 F.2d 1307, 1309 (5th Cir. 1974), decided six months after *Canal Authority*.

240. *E.g.*, Union Carbide Corp. v. UGI Corp., 731 F.2d 1186, 1190-91 (5th Cir. 1984); Apple Barrel Productions, Inc. v. Beard, 730 F.2d 384, 386 (5th Cir. 1984); City of Meridian v. Algernon Blair, Inc., 721 F.2d 525, 527 (5th Cir. 1983).

241. Florida Medical Ass'n, Inc. v. HEW, 601 F.2d 199, 203 n.2 (5th Cir. 1979).

242. Compact Van Equipment Co., v. Leggett & Platt, Inc., 566 F.2d 952, 954 (5th Cir. 1978) (lesser showing for "a protective preliminary injunction").

243. 518 F.2d 175, 180 (5th Cir. 1975).

244. *Id. Accord* Productos Carnic, S.A. v. Central American Beef and Seafood Trading Co., 621 F.2d 683, 686 (5th Cir. 1980) (need only show "some" likelihood of success on the merits).

judge cannot issue a preliminary injunction no matter how strong the showing on the hardship factor.[245]

Second, the court in *Seatrain* strongly suggested that the trial court should avoid inquiring too deeply into the merits, especially if primary jurisdiction and agency expertise are involved in the case.[246] However, it should be recalled that *Canal Authority* identified the first factor as a "substantial" likelihood of success, a standard which inevitably leads to a significant inquiry into the merits.[247] Thus there is some tension between *Seatrain* and *Canal Authority*. Several years later the court attempted to deal with that tension in reminding the district judges not to look into the merits of the controversy in determining whether to order preliminary relief.[248] At the same time, the Fifth Circuit noted that under *Canal Authority*, the "merits of the case are an important factor" and "deserve extensive discussion."[249]

Third, having failed to remove this tension in its precedents,[250] the subsequent Fifth Circuit decisions have followed a sinuous path. In several cases, the court has decided preliminary injunction cases without any reference to the sliding scale variation. In such instances, it has evaluated the movant's showing on probability of success without discussing the alternative analysis.[251] Indeed in some cases the court summarily affirmed the denial of a preliminary injunction having agreed that the moving party failed to demonstrate a substantial likelihood of success on the merits.[252] Moreover, in a few instances, it appears the appellate court actually decided the merits.[253] In other

245. *Seatrain*, 518 F.2d at 180.

246. *Id.*

247. *Canal Authority*, 489 F.2d at 572.

248. Piedmont Heights Civil Club, Inc. v. Moreland, 637 F.2d 430, 435 n.6 (5th Cir. 1981).

249. *Id.*

250. Some courts of appeals, such as the Eighth Circuit, have encouraged the use of a "sliding scale" analysis so that the district judges will not inquire too deeply into the merits. *See infra* text accompanying notes 348-69.

251. *E.g.*, Interox America v. PPG Industries, Inc. 736 F.2d 194 (5th Cir. 1984) (in this apparent diversity case, the court did not discuss the question whether federal or state standards for preliminary relief should apply); Union Carbide Corp. v. UGI Corp., 731 F.2d 1186 (5th Cir. 1984); City of Meridian v. Algernon Blair, Inc., 721 F.2d 525 (5th Cir. 1983); Commonwealth Life Ins. Co. v. Neal, 669 F.2d 300 (5th Cir. 1982); Foley v. Alabama State Bar, 648 F.2d 355 (5th Cir. 1981); City of Atlanta v. Metropolitan Atlanta Rap. Trans. Auth., 636 F.2d 1084 (5th Cir. 1981); Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184 (5th Cir. 1979); Vision Center v. Opticks, Inc., 596 F.2d 111 (5th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980).

252. Commonwealth Life Ins. Co. v. Neal, 669 F.2d 300, 308 (5th Cir. 1982); City of Atlanta v. Metropolitan Atlanta Rap. Trans. Auth., 636 F.2d 1084, 1094 (5th Cir. 1981).

253. *E.g.*, City of Meridian v. Algernon Blair, Inc., 721 F.2d 525, 527 (5th Cir. 1983); Van Arsdel v. Texas A & M University, 628 F.2d 344, 346 (5th Cir. 1980).

cases, the court of appeals has discussed or applied the sliding scale alternative.[254]

H. *Sixth Circuit*[255]

In the early cases,[256] the Sixth Circuit Court of Appeals adopted a three-pronged test for preliminary relief. For example, in *Blount v. Societe Anonyme Du Filtre Chamberland Systeme Pasteur*,[257] a leading early precedent, the court held that the moving party must show: (1) a clear title or right, or one reasonably free from doubt; (2) that the opponent's acts or threatened acts will seriously or irreparably harm the movant's rights; and (3) that the injury to the moving party will be "certain and great" if the injunction is denied, while the injury to the opponent will be "slight or inconsiderable" if the injunction is granted.[258]

With respect to the first factor, "clear title," the Sixth Circuit held that demonstrating a "probable right" would satisfy the element.[259] While the court noted that the English precedents required a lesser showing (*i.e.*, the plaintiff need only raise a "fair question" and show that the balance of "inconveniences" favors her),[260] the Sixth Circuit opted for the more stringent test.[261] The court quickly added the requirement of an injunction bond.[262] By 1922, the court had

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254. *E.g.*., Productos Carnic, S.A. v. Central American Beef and Seafood Trading Co., 621 F.2d 683, 686 (5th Cir. 1980); Florida Medical Ass'n, v. HEW, 601 F.2d 199, 202-03 (5th Cir. 1979). In Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 578 F.2d 1122, 1125 (5th Cir. 1978), the court held that, under the sliding scale analysis, a preliminary injunction may issue where one or more (not simply the probability or hardship factor) of the four elements are "very strongly established," even though the moving party has made a weaker showing on the remaining factor or factors. This case represents a unique variation on the sliding scale analysis.

255. Congress created this court in 1891 when it established nine circuit courts of appeals. 26 Stat. 826 (1891) (commonly referred to as the Evarts Act or the Circuit Court of Appeals Act of 1891).

256. *E.g.*, Blount v. Societe Anonyme Du Filtre Chamberland Systeme Pasteur, 53 F. 98 (5th Cir. 1892) (Judges Jackson and Taft, two future members of the Supreme Court, sat on the panel). *Accord* City of Grand Rapids v. Warren Bros. Co., 196 F. 892 (6th Cir. 1912).

257. 53 F. 98 (6th Cir. 1892).

258. *Id.* at 101.

259. *Id.* The court drew the "probable right" language from Justice Johnson's dissenting opinion in *Georgia v. Brailsford*, discussed *supra* note 5. *Id.*

260. *Id.* (quoting The Shrewsbury and Chester v. The Shrewsbury and Birmingham Ry. Co., 61 Eng. Rep. 159 (1851)).

261. *Id.* at 105.

262. *E.g.*, Grand Rapids v. Warren Bros. Co., 196 F. 892, 899 (6th Cir. 1912). *Accord* Fordson Coal Co. v. Maggard, 2 F.2d 708 (6th Cir. 1924); City of Louisville v. Louisville Home Telephone Co., 279 F. 949, 956 (6th Cir. 1922). Section 18 of the Clayton Act

modified and reduced the test so that a movant need only demonstrate: (1) a reasonable probability of success on the merits; (2) a balance of the equities favoring the movant (weighing the harm to each party if an injunction is granted or denied); and (3) irreparable injury.[263]

For the next 50 years, the Sixth Circuit generally followed the three-pronged test for the grant of interlocutory relief.[264] In 1972, without reference to its early pecedents, the Sixth Circuit reformulated the standards for interlocutory relief. In *North Avondale Neighborhood Ass'n v. Cincinnati Metropolitan Housing Authority*,[265] the plaintiffs sought to enjoin the construction of a housing project in a black residential area as violating the federal Fair Housing Act.[266] In affirming the denial of a preliminary injunction, the court of appeals outlined four factors to determine the propriety of interlocutory relief.

The trial judge, the court held, is to determine: (1) whether the movant has made a strong showing of probable success on the merits; (2) whether the moving party will suffer irreparable injury if the injunction is denied; (3) whether the issuance of the injunction will visit substantial harm on others; and (4) whether the injunction will serve the public interest.[267] In articulating these factors, the court relied on two decisions[268] addressing the criteria for stays of federal administrative agency orders pending appeal, without any discussion of why the standards for stays and preliminary relief should be the same. These criteria differed from earlier standards (not cited in the opinion) in two respects: (1) the movant must make a "strong" showing of likely success on the merits, not simply a "reasonable" probability of success;[269] and (2) the public interest is added as a factor.

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of 1914 appeared to require the posting of a bond as a condition for the issuance of a temporary restraining order or an interlocutory injunction. 38 Stat. 730, 738 (1914).

263. City of Louisville v. Louisville Home Telephone Co., 279 F. 949, 956 (6th Cir. 1922).

264. *E.g.*, Garlock, Inc. v. United Seal Inc., 404 F.2d 256 (6th Cir. 1968) (per curiam); Set-O-Type Co. v. American Multigraph Co., 55 F.2d 800 (6th Cir. 1932); Interstate Transit v. City of Detroit, Mich., 46 F.2d 42 (6th Cir. 1931).

265. 464 F.2d 486 (6th Cir. 1972) (per curiam).

266. *Id.* at 487.

267. *Id.* at 488.

268. *Id.* Hamlin Testing Laboratories, Inc. v. U.S. Atomic Energy Comm., 337 F.2d 221 (6th Cir. 1964); Virginia Petroleum Jobbers Ass'n v. Federal Power Comm., 259 F.2d 921 (D.C. Cir. 1958) (per curiam). In *Hamlin*, the Sixth Circuit relied entirely on *Jobbers*.

269. Five years later, in Mason County Medical Ass'n v. Knebel, 563 F.2d 256 (6th Cir. 1977), the court rejected, as "unfortunate terminology," language in other cases which permitted the movant to prevail simply by showing a "possibility of success on the merits." *Id.* at 261 n.4. The test, the court emphasized, is "a strong or substantial *likelihood* or *probability* of success." *Id.* (emphases in original). Five years after *Knebel*, the court appeared to regress, employing the phrase "a strong possibility of success on the merits."

Despite the general adherence by the Sixth Circuit first to the three-pronged and then the four-pronged tests, the court has deviated from these basic models. In 1954, for example, the court seemed to announce alternative criteria for the issuance of a preliminary injunction. In *American Federation of Musicians v. Stein*,[270] the plaintiff Stein sued to enjoin the Federation from keeping his name on an "unfair" list which the defendant circulated among musicians.[271] In affirming the grant of interim relief, the court, relying on the *Blount* case,[272] held that a party seeking a preliminary injunction need only raise questions that are grave and difficult (here jurisdictional issues) and show that balancing the harms favors the movant.[273] Although the court of appeals seemed to rely on *Stein* in a few subsequent cases,[274] the decision never generated a distinct line of authority as *Hamilton Watch*[275] did in the Second Circuit.

After reformulating the criteria for interim relief in *North Avondale*, the court returned to a *Stein*-type analysis without reference to *Stein*. In *Roth v. Bank of the Commonwealth*,[276] the plaintiffs secured a preliminary injunction to prevent the defendants from pursuing related litigation in other federal courts.[277] In affirming the order below, the Sixth Circuit reiterated the applicability of the four-pronged test,[278] but added the two-factor test of *Hamilton Watch*[279] as an alternative basis upon which to obtain interim relief.[280] Under *Hamilton Watch*, it may be recalled, the movant need only show she has raised serious questions going to the merits, and that the balance of hardships tips decidedly in her favor.[281] The court suggested that the two tests may in reality be a sliding scale in that the probability of

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Stotts v. Memphis Fire Dept., 679 F.2d 541, 560 (6th Cir. 1982), *rev'd on other grounds sub nom.* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984).

270. 213 F.2d 679 (6th Cir.), *cert. denied*, 348 U.S. 873 (1954).

271. *Id.* at 681.

272. Blount v. Societe Anonyme Du Filtre Chamberland Systeme Pasteur, 53 F. 98 (6th Cir. 1892).

273. *American Federation of Musicians*, 213 F.2d at 683. At one point in the opinion, the court phrases the balancing element as requiring the plaintiff to show substantial and irreparable injury as against inconsiderable harm to the opposing party. *Id.*

274. *See, e.g.*, Brandeis Machinery & Supply Corp. v. Barber-Greene Co., 503 F.2d 503 (6th Cir. 1974) (per curiam).

275. *See supra* note 147 and accompanying text.

276. 583 F.2d 527 (6th Cir. 1978), *cert. dismissed*, 422 U.S. 925 (1979).

277. *Id.* at 529.

278. *Id.* at 537-38.

279. *See supra* note 147 and accompanying text.

280. *Roth*, 583 F.2d at 536-37.

281. *Hamilton Watch*, 206 F.2d at 101.

success has an inverse relationship to the balance of hardships.[282] It also suggested that the easier test of *Hamilton Watch* is appropriate in cases like *Roth* which seek only to enjoin other federal courts from proceeding.[283]

Again, as with *Stein*, the *Roth* case did not generate much of an independent line of authority. In 1982, when a district court allowed a preliminary injunction without a showing of irreparable injury (which both *Stein* and *Hamilton Watch* allow), the court of appeals reversed the decision. In *Friendship Materials, Inc. v. Michigan Buick, Inc.*,[284] the court held that proof of irreparable injury is an indispensable element to secure interlocutory relief, citing several Supreme Court cases.[285] In reconciling the four-factor analysis with *Roth*, the court stated that irreparable injury is built into the balance of hardships aspect of *Roth* and that its alternative test approach merely underscores the flexible nature of the criteria for preliminary relief.[286] In other words, the court held, *Roth* simply allows a moving party to make a lesser showing on the probability of success factor if she makes a greater showing on the balance of hardships criterion, and vice versa. In this sense, the Sixth Circuit approach is similar to that currently followed in the Fifth Circuit.[287]

The Sixth Circuit has made no reference to *Roth* or *Friendship* in many subsequent cases, but has simply recited the four criteria set out in *North Avondale*.[288] The district courts in the circuit have also tended to ignore the "alternative" test for preliminary relief.[289] Moreover, in *Warner v. Central Trust Co.*,[290] the court of appeals expressly stated that it had not adopted any "alternative" test as such, again

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282. *Roth*, 583 F.2d at 537-38.

283. *Id.* at 536-37.

284. 679 F.2d 100 (6th Cir. 1982).

285. *Id.* at 102-03.

286. *Id.* at 104.

287. *See supra* note 239 and accompanying text.

288. *See, e.g.*, Roe by Doe v. Ashtabula County Mental Health Board, 726 F.2d 270, 271 (6th Cir. 1984); American Motors Sales Corp. v. Runke, 708 F.2d 202, 205 (6th Cir. 1983); Usaco Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 98 (6th Cir. 1982); Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 564-65 (6th Cir. 1982).

289. *See* Bossert v. Springfield Group, Inc., 579 F. Supp. 56 (S.D. Ohio 1984); Turner v. Heckler, 573 F. Supp. 867 (S.D. Ohio 1983); Cobb v. Green, 574 F. Supp. 256 (W.D. Mich. 1983); Nintendo of America, Inc. v. Elcon Industries, Inc., 564 F. Supp. 937 (E.D. Mich. 1982); Project Vote! v. Ohio Bureau of Employment Services, 578 F. Supp. 7 (S.D. Ohio 1982); Putrus v. Montgomery, 555 F. Supp. 452 (E.D. Mich. 1982). *But see* Hart v. Ferris State College, 557 F. Supp. 1379, 1382 (W.D. Mich. 1983) (discusses "alternative" test of *Friendship*).

290. 715 F.2d 1121 (6th Cir. 1983).

without making any reference to or discussion of the *Stein* decision.[291] The court stressed the language in *Friendship* which focused on the flexible nature of the criteria for preliminary relief.[292] Finally, in a recent case, the court suggested that, apart from their flexibility, the four factors should not be viewed as comprehensive.[293]

I. *Seventh Circuit*[294]

In its early cases, the Seventh Circuit principally followed the lead of the Eighth Circuit in formulating the standards for the issuance of preliminary injunctions. It held that the moving party must satisfy two criteria: (1) the questions of law or fact to be decided in the case are grave and difficult; and (2) the movant will suffer great or irreparable harm if the injunction is denied while the opponent will suffer negligibly if it is granted.[295] Even if the harm to the opposing party is more than insignificant, the injunction may still issue if a bond can protect the opponent's interests.[296]

This two-part test soon evolved into a three-pronged standard: (1) reasonable likelihood of success on the merits; (2) inadequate legal remedy and irreparable injury;[297] and (3) the balance of hardships tilts

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291. *Id.* at 1123. It is also difficult to reconcile this statement in *Warner* with the holding in Frisch's Restaurants, Inc. v. Elby's Big Boy of Steubenville, Inc., 670 F.2d 642 (6th Cir.), *cert. denied*, 459 U.S. 916 (1982). In this trademark infringement case, the Sixth Circuit expressly adopted the two-pronged alternative test current in the Second Circuit. *Id.* at 651. *See* discussion, *supra* note 147 and accompanying text. Like *Stein* and *Roth* before it, however, the *Frisch's* decision has not generated any line of authority in the Sixth Circuit, other than a few district court trademark cases. In his next article, the author will examine the standards for preliminary relief in cases involving certain statutory and constitutional claims. Perhaps the *Frisch's* opinion should be numbered among those precedents, although nothing in the decision so indicates.

292. *Warner*, 715 F.2d at 1123.

293. Tate v. Frey, 735 F.2d 986, 990 (6th Cir. 1984) (per curiam).

294. Congress created this court in 1891 when it established nine circuit courts of appeals. 26 Stat. 826 (1891) (commonly referred to as the Evarts Act or the Circuit Court of Appeals Act of 1891).

295. *See, e.g.*, Doeskin Products, Inc. v. United Paper Co., 195 F.2d 356, 358-59 (7th Cir. 1952); Missouri-Kansas-Texas R. Co. v. Brotherhood of Ry. & S.S. Clerks, 188 F.2d 302, 306 (7th Cir. 1951); Selchow & Richter Co. v. Western Printing and Lithographing Co., 112 F.2d 430, 431-32 (7th Cir. 1940) (in *Selchow*, the court relied on Ohio Oil Co. v. Conway, 279 U.S. 813 (1929) (per curiam), which in turn had relied exclusively on the *Love* decision in the Eighth Circuit).

296. *See, e.g.*, Doeskin Products, Inc. v. United Paper Co., 195 F.2d 356, 358 (7th Cir. 1952).

297. In Nuclear-Chicago Corp. v. Nuclear Data, Inc., 465 F.2d 428 (7th Cir. 1972), the court, discussing irreparable injury, stated "the traditional rule that a defendant's ability to compensate plaintiff in money damages precludes issuance of a preliminary injunction." *Id.* at 430.

towards the moving party.[298] On at least two occasions, separated by 30 years, the court suggested that the district courts could employ the alternative test applied in other circuits for interim relief: (1) the movant has raised serious questions which present a fair ground for litigation; and (2) a balance of hardships which tips decidedly towards the movant.[299] Within seven months of the last suggestion, however, the court of appeals rejected this alternative standard because it did not require any showing of irreparable injury, which the court held was an indispensable element for interlocutory relief.[300]

In 1976, the court of appeals decided *Fox Valley Harvestore, Inc. v. A.O. Smith Harvestore Products, Inc.*,[301] a leading precedent in the circuit. In this case, the plaintiffs challenged, on various state and federal grounds, the defendant's termination of its dealership franchise.[302] In affirming the denial of an interlocutory injunction, the court outlined the factors to be evaluated in determining the propriety of a request for interim relief. It recited the three-pronged standard discussed above,[303] and then added a fourth factor: that "the granting of a preliminary injunction will not disserve the public interest."[304] The court offered no explanation for the addition of this fourth element other than a citation to a Fifth Circuit decision so holding.[305] The court has reaffirmed *Fox Valley* in subsequent cases.[306]

It should be noted that in *Fox Valley* the Seventh Circuit rejected

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298. *See, e.g.*, Milsen Co. v. Southland Corp., 454 F.2d 363, 367 (7th Cir. 1971); Nuclear-Chicago Corp. v. Nuclear Data, Inc., 465 F.2d 428, 430 (7th Cir. 1972); *see* Tele-Controls, Inc. v. Ford Industries, Inc., 388 F.2d 48, 50 (7th Cir. 1967). In Burns v. Elrod, 509 F.2d 1133 (7th Cir. 1975), *aff'd on other grounds*, 427 U.S. 347 (1976) (plurality decision), the Court evaluated only factors (1) and (2) in reversing the district judge's denial of a preliminary injunction. *Id.* at 1136.

299. Milsen Co. v. Southland Corp., 454 F.2d 363, 366 n.3 (7th Cir. 1971); Mytinger & Casselberry, Inc. v. Numanna Laboratories Corp., 215 F.2d 382, 385 (7th Cir. 1954) (although a diversity case, the court applied federal standards to the motion for interim relief).

300. Nuclear-Chicago Corp. v. Nuclear Data, Inc., 465 F.2d 428 (7th Cir. 1972). The court relied on Lawrence v. St. Louis-San Francisco Ry. Co., 274 U.S. 588 (1927), for the proposition that irreparable injury is the *sine qua non* of injunctive relief in the federal courts. *Id.* at 429 n.1.

301. 545 F.2d 1096 (7th Cir. 1976).

302. *Id.* at 1097.

303. *Id.*

304. *Id.*

305. *Id.* For a discussion of the Fifth Circuit criteria, see text accompanying notes 237-54.

306. Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 976 (1984); Wesley-Jessen Div. of Scheving Corp. v. Bausch & Lomb, Inc., 698 F.2d 862 (7th Cir. 1983); Machlett Laboratories, Inc., v. Techny Industries, Inc., 665 F.2d 795 (7th Cir. 1981).

the plaintiff's argument that a showing of irreparable injury and a demonstration that the hardships favor the injunction precludes the need to demonstrate a likelihood of success on the merits.[307] In rejecting that assertion, the court indicated that the movant's burden of showing likely success could be lessened (but not eliminated altogether) if she made a strong showing of injury absent the interim relief.[308] That is, the relationship between probability of success on the merits and a balance of hardships is inversely proportional: a greater showing on one factor lessens the showing needed on the other.

The court of appeals confirmed this "sliding scale" approach in *Omega Satellite Products Co. v. City of Indianapolis*.[309] Indeed the court went so far as to say that the movant could secure a preliminary injunction with a strong showing on the hardship factor even if the opposing party has a better chance of prevailing on the merits.[310] The court appeared to return to the three-pronged standard for obtaining interim relief antedating the *Fox Valley* decision,[311] without mentioning this decision. Unlike *Fox Valley*, the moving party under the tripartite standard need not make any showing regarding the "public interest."

In recent days, however, the Seventh Circuit has returned to the four-part test for interim relief articulated in *Fox Valley*.[312] In some of

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307. *Fox Valley*, 545 F.2d at 1097-98.

308. *Id.* at 1098.

309. 694 F.2d 119, 123 (7th Cir. 1982). *Accord*, Vogel v. American Society of Appraisers, 744 F.2d 598, 600 (7th Cir. 1984); General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588, 590 (7th Cir. 1984) (although Judge Posner acknowledged the four-part test announced in earlier Seventh Circuit cases, he nonetheless applied his own variation articulated in the *Omega* case); Hyatt Corp. v. Hyatt Legal Services, 736 F.2d 1153 (7th Cir. 1984); Jones v. Franzen, 697 F.2d 801, 804 (7th Cir. 1983) (Judge Posner authored the opinions in *Omega*, *Jones*, *General Leaseways*, and *Vogel*). In a very recent case, Judge Posner, recognizing that "the relevant case law is in disarray in both this and other circuits," sought to deal with these inconsistencies. Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 382 (7th Cir. 1984). He concluded, however, that "it is not possible to reconcile all the precedents, or even just all the ones in this circuit." *Id.* at 385.

310. *Omega*, 694 F.2d at 123.

311. *Id.*

312. Libertarian Party of Indiana v. Packard, 741 F.2d 981, 984-85 (7th Cir. 1984); Hyatt Corp. v. Hyatt Legal Services, 736 F.2d 1153 (7th Cir. 1984); Godinez v. Lane, 733 F.2d 1250, 1257 (7th Cir. 1984); Hillhaven Corp. v. Wisconsin Department of Health & Social Services, 733 F.2d 1224, 1225-26 (7th Cir. 1984) (per curiam); SEC v. Sutter, 732 F.2d 1294, 1301 (7th Cir. 1984); Technical Publishing Co. v. Lebhar-Friedman, Inc., 729 F.2d 1136, 1138 (7th Cir. 1984); Shaffer v. Globe Protection, Inc., 721 F.2d 1121, 1123 (7th Cir. 1983); Alexander v. Chicago Park District, 709 F.2d 463, 469-70 (7th Cir. 1983); Signode Corp. v. Weld-Loc Systems, Inc., 700 F.2d 1108, 1111 (7th Cir. 1983). *See generally*, Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 382-85 (7th Cir. 1984) (attempt to harmonize existing case law in the Seventh Circuit).

these recent decisions, the court has eroded the "sliding scale" approach by identifying the "reasonable likelihood" factor as "the threshold requirement."[313] In such cases, the court first addressed the likely to succeed factor.[314] Having found that the movant had not met its burden on that point,[315] it declined to review the other three elements of the test.[316] Under the sliding scale approach of *Omega*, the court is obligated to address both the "reasonable likelihood" factor *and* the balance of hardships element since they bear an inverse relationship for purposes of interim relief.[317]

J. *Eighth Circuit*[318]

The early decisions of the Eighth Circuit have played a significant role in the development of the modern standards for preliminary relief. For example, the Supreme Court relied entirely on *Love v. Atchison, T. & S.F. Ry. Co.*[319] in *Ohio Oil Co. v. Conway*,[320] and other circuits have equally cited Eighth Circuit decisions.[321] In *City of Newton v. Levis*,[322] the court identified two elements for interlocutory relief: (1) the movant must raise questions of law or fact which are "grave and difficult;"[323] and (2) the injury to the moving party will be "immediate, certain, and great"[324] if the injunction is denied, while the harm to the

313. Alexander v. Chicago Park District, 709 F.2d 463, 467 (7th Cir. 1983). *Accord*, Hillhaven Corp. v. Wisconsin Department of Health & Social Services, 733 F.2d 1224, 1226 (7th Cir. 1984) (per curiam); Technical Publishing Co. v. Lebhar-Friedman, Inc., 729 F.2d 1136 (7th Cir. 1984). *See* O'Brien v. Town of Caledonia, 748 F.2d 403, 406 (7th Cir. 1984) (reciting and applying the four factors without any reference to the sliding scale approach or the abuse of discretion standard on appeal).

314. Alexander v. Chicago Park District, 709 F.2d 463, 465 (7th Cir. 1983).

315. *Id.* at 469.

316. *Id.* at 469-70.

317. *Omega*, 694 F.2d at 123.

318. Congress created this court in 1891 when it established nine circuit courts of appeals. 26 Stat. 826 (1891) (commonly referred to as the Evarts Act or the Circuit Court of Appeals Act of 1891).

319. Love v. Atchison, T. & S.F. Ry. Co., 185 F. 321 (8th Cir.), *cert. denied*, 220 U.S. 618 (1911).

320. 279 U.S. 813, 815 (1929) (per curiam). In discussing standards for preliminary injunctions, the Court used language which it drew almost verbatim from the *Love* decision.

321. *See, e.g.*, Missouri-Kansas-Texas Ry. Co. v. Brotherhood of Ry. & S.S. Clerks, 188 F.2d 302, 305 (7th Cir. 1951).

322. 79 F. 715 (8th Cir. 1897).

323. *Id.* at 718. The court also used the phrase "serious or doubtful" to describe the quality of the questions presented for decision. *Id.*

324. *Id.* The court also employed the words "irreparable," and "irremediable" to describe the nature of the injury to be proved. *Id.*

opposing party will be "comparatively small and insignificant"[325] if the injunction is granted.[326] The court also noted that any potential harm to parties because of the injunction could be prevented with a bond.[327]

As in other circuits, the early cases are no longer followed. In 1973 when the Eighth Circuit decided *Minnesota Bearing Co. v. White Motor Corp.*,[328] a leading modern precedent, the court did not refer to any of its earlier decisions regarding preliminary injunctions. In that antitrust suit, the plaintiff challenged the defendant's termination of a distributorship agreement and setting of resale prices.[329] Affirming the denial of a preliminary injunction, the court of appeals held that the moving party must show: (1) "substantial probability of success" on the merits; and (2) "irreparable injury" if the injunction is not granted.[330] Furthermore, the court stated that the trial judge may consider whether the injunction will substantially injure other interested parties, and inflict harm on the public interest.[331]

Over the next five years, the court of appeals read *Minnesota Bearing* in two ways. One line of cases focused exclusively on the two principal factors: substantial probability of success and irreparable injury.[332] The other line relied primarily on those two factors, but noted that the court may take account of two optional factors: harm to other interested parties and to the public interest.[333] In 1978, the court complicated the matter in *Fennell v. Butler*.[334] In that suit to enjoin an ordinance to regulate massage parlors, the court of appeals,

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325. *Id.* The court also used the phrase "no substantial loss or injury" and "inconsiderable" to describe the quantity of the harm to the opponent. *Id.*

326. *Accord* Chicago, B. & Q. R. Co. v. Chicago Great Western R. Co., 190 F.2d 361, 363 (8th Cir. 1951) (per curiam); Pratt v. Stout, 85 F.2d 172, 177 (8th Cir. 1936); Love v. Atchison, T & S.F. Ry. Co., 185 F. 321, 331-32 (8th Cir. 1911); Allison v. Corson, 88 F. 581, 584 (8th Cir. 1898).

327. *Levis*, 79 F. at 718.

328. 470 F.2d 1323 (8th Cir. 1973).

329. *Id.* at 1325.

330. *Id.* at 1326.

331. *Id.*

332. *E.g.*, Regents of the Univ. of Minnesota v. NCAA, 560 F.2d 352, 365 (8th Cir. 1977), *cert. dismissed*, 434 U.S. 978 (1977); American Train Dispatchers Assoc. v. Burlington Northern, Inc., 552 F.2d 749, 755 (8th Cir. 1977); Missouri Portland Cement Co. v. H.K. Porter Co., 535 F.2d 388, 392 (8th Cir. 1976); Nebraska Dep't of Roads v. Tiemann, 510 F.2d 466, 447 (8th Cir. 1975); Wounded Knee Legal Defense/Offense Comm. v. FBI, 507 F.2d 1281, 1287 (8th Cir. 1974).

333. *E.g.*, Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action, 558 F.2d 861, 866 (8th Cir. 1977); Chicago Stadium Corp. v. Scallen, 530 F.2d 204, 206-07 (8th Cir. 1976); American Home Investment Co. v. Bedel, 525 F.2d 1022, 1025 (8th Cir. 1975).

334. 570 F.2d 263 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978).

in vacating a denial of preliminary relief, set forth the two factors emphasized in *Minnesota Bearing*,[335] without any mention of the two "optional" factors. Then the court adopted an alternative test based on decisions in the Second[336] and Ninth[337] Circuits. Under this standard, the moving party need only show that its suit involves serious questions going to the merits, and a balance of hardships "decidedly" favoring the movant.[338]

The appellate decisions following the *Fennell* opinion largely reflected the alternative tests for preliminary relief which it announced.[339] In 1981, the court of appeals convened en banc "to clarify" the criteria for interim relief because "in recent years some misunderstanding of the standard has developed."[340] In *Dataphase Systems, Inc. v. C.L. Systems, Inc.*,[341] the plaintiff, a new entrant into the field of computerized library circulation systems, accused the defendant of committing antitrust violations and business torts.[342] The district court granted the plaintiff's request for a preliminary injunction to restrain the defendant from disparaging its goods.[343] It applied the less stringent of the alternative tests approved in *Fennell*:[344] serious questions going to the merits and a balance of hardships in the

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335. *Id.* at 264.

336. *See supra* notes 142-73 and accompanying text.

337. *See infra* notes 370-402 and accompanying text.

338. *Fennell*, 570 F.2d at 264. At the time of the *Fennell* decision, the Second Circuit had already modified this two-part test by adding a third factor: irreparable injury. *See* Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356, 1358 (2d Cir. 1976). Other than in Frejlach v. Butler, 573 F.2d 1026, 1027 (8th Cir. 1978), the Second Circuit modification was not followed in subsequent cases. *See, e.g.*, Rittmiller v. Blex Oil, Inc., 624 F.2d 857, 860 (8th Cir. 1980); Chromalloy American Corp. v. Sun Chemical Corp., 611 F.2d 240, 244 (8th Cir. 1979); Bio-Medicus, Inc. v. Shareholders Comm. in Opposition, 608 F.2d 1155, 1162 (8th Cir. 1979).

339. *E.g.*, Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Public Welfare, 602 F.2d 150, 152 (8th Cir. 1979); Young v. Harris, 599 F.2d 870, 875-76 (8th Cir. 1979), *cert. denied*, 444 U.S. 993 (1979); Campbell "66" Express, Inc. v. Rundel, 597 F.2d 125, 127 (8th Cir. 1979); Modern Controls, Inc. v. Andreakis, 578 F.2d 1264, 1264 n.4 (8th Cir. 1978).

340. Dataphase Systems, Inc. v. C.L. Systems, Inc., 640 F.2d 109, 112 (8th Cir. 1981) (en banc). For additional commentary on this decision, *see generally* Note, *Civil Procedure: Dataphase Systems, Inc. v. C.L. Systems, Inc.: Preliminary Injunctions*, 15 CREIGHTON L. REV. 830 (1982). The reference to "recent years" once again ignores the earlier precedents dating back to 1897 which anticipated the "alternative test" discussed in *Fennell*, although the Court in *Dataphase* did casually cite to a few of its earlier opinions. *Dataphase*, 640 F.2d at 113-14.

341. 640 F.2d 109 (8th Cir. 1981) (en banc).

342. *Id.* at 111.

343. *Id.*

344. *See supra* note 338 and accompanying text.

plaintiff's favor.[345] It made no finding regarding irreparable injury or likelihood of success.

In vacating the injunction, the court of appeals purported "to reaffirm that there is a single 'test' or list of considerations to be used in every case" where an interlocutory injunction is sought.[346] In effect the court rejected the holding in *Fennell* and subsequent cases that alternative criteria are available to evaluate interim relief. In reconciling the dual sets of standards, the Eighth Circuit adopted a four-factor analysis with a sliding scale. In deciding motions for interlocutory injunctions, the trial court is to consider: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest."[347]

With regard to the sliding scale variation, the court of appeals held that the moving party is not required to "prove a mathematical probability of success at trial."[348] This factor is to be weighed against the other three factors. If these other factors (the "equities") tip "decidedly" in the movant's favor,[349] then she need not show a probability of success on the merits.[350] She need only raise "questions so serious and difficult as to call for more deliberate investigation."[351] It appears that the court adopted the sliding scale approach, in part, to discourage the trial judges from delving too deeply into the merits on motions for preliminary injunctions, "an early stage" of the litigation.[352] In his concurring opinion, Judge Ross frankly recognized that the court was supplanting the two *Fennell* alternatives with a new "third test," which concededly includes elements of the other two.[353]

In the aftermath of the *Dataphase* decision, the court of appeals has not hewed to a consistent path although its goal in *Dataphase* was "to achieve a clear verbal formulation."[354] The subsequent decisions have tracked several patterns. One category is composed of decisions in which the court has adhered fairly closely to the *Dataphase* analysis. In those cases, it has dutifully recited the four factors identified in the

345. *Dataphase*, 640 F.2d at 111.
346. *Id.* at 112.
347. *Id.* at 114.
348. *Id.* at 113.
349. *Id.*
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.* at 115 (Ross, J., concurring).
354. *Id.* at 114.

opinion and applied the probability element with the requisite degree of flexibility.[355]

But the decisions of the Eighth Circuit have not, by any means, adhered strictly to every precept set out in *Dataphase*. In some instances, the court has affirmed lower court judgments by examining rather thoroughly some or all of the issues to be decided after a hearing on the merits.[356] This appears contrary to the language in *Dataphase*, discouraging such forays into the merits.[357] Indeed in a recent case, the Eighth Circuit referred to the probability of success factor as "the flaw in the traditional test"[358] because it allows (and indeed may require) the trial judge to determine, at a premature stage in the litigation, who will win on the merits.[359] On motions for interim relief, the court observed, trial judges "should avoid deciding with any degree of certainty who will succeed or not succeed."[360]

A third pattern to emerge is that the court of appeals has tended to examine one or more, but not all, of the *Dataphase* factors. This approach seems contrary to *Dataphase* which stressed: "In balancing the equities no single factor is determinative."[361] In *Purex Corp. v. Local 618*,[362] for example, the court affirmed the denial of preliminary relief after concluding that the moving party was not likely to succeed on the merits.[363] Similarly, in *Roberts v. Van Buren Public Schools*,[364]

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355. *E.g.*, N.I.S. Corp. v. Swindle, 724 F.2d 707, 710 (8th Cir. 1984); Medtronic, Inc. v. Gibbons, 684 F.2d 565, 567 (8th Cir. 1982); Tuepker v. Farmers Home Admin., 684 F.2d 550, 552 (8th Cir. 1982); Sperry Corp. v. City of Minneapolis, 680 F.2d 1234, 1237 (8th Cir. 1982); Walker v. Lockhart, 678 F.2d 68, 70 (8th Cir. 1982); Jensen v. Dole, 677 F.2d 678, 680 (8th Cir. 1982); Medtronic, Inc. v. Catalyst Research Corp., 664 F.2d 660, 663 (8th Cir. 1981); ABA Distributors, Inc. v. Adolph Coors Co., 661 F.2d 712, 714 (8th Cir. 1981); Monahan v. Nebraska, 645 F.2d 592, 598 (8th Cir. 1981). *See* McDonell v. Hunter, 746 F.2d 785, 787 (8th Cir. 1984) (recitation of the four factors without mentioning the flexible element); Tyler v. Black, 744 F.2d 610, 611 n.2 (8th Cir. 1984) (same).

356. *E.g.*, Roberts v. Van Buren Public Schools, 731 F.2d 523 (8th Cir. 1984); Ferry-Morse Seed Co. v. Food Corn, Inc., 729 F.2d 589 (8th Cir. 1984); Purex Corp. v. Local 618, 705 F.2d 274 (8th Cir. 1983); Higbee v. Starr, 698 F.2d 945 (8th Cir. 1983); Chua Drua Cha v. Noat, 696 F.2d 594 (8th Cir. 1982); South Eastern Human Dev. Corp. v. Schweiker, 687 F.2d 1150 (8th Cir. 1982). The extended discussion of "state action" in *Higbee* is especially instructive since the concept of state action under the Fourteenth Amendment has troubled the Supreme Court at least since Shelley v. Kraemer, 334 U.S. 1 (1948), and has generated mountains of analyses.

357. *Dataphase*, 640 F.2d at 113.

358. O'Connor v. Peru State College, 728 F.2d 1001, 1002 (8th Cir. 1984).

359. *Id.*

360. *Id. See also* Merrill Lynch, Pierce, Fenner & Smith v. Hovey, 726 F.2d 1286 (8th Cir. 1984).

361. *Dataphase*, 640 F.2d at 113. *See also* Tuepker v. Farmers Home Admin., 684 F.2d 550 (8th Cir. 1982), stating, "No single factor is determinative." *Id.* at 552.

362. 705 F.2d 274 (8th Cir. 1983).

363. *Id.* at 277.

the Eighth Circuit held that failure to establish irreparable injury alone is sufficient ground to deny the inerlocutory injunction,[365] which is contrary to the *Dataphase* directive that "no single factor is determinative."[366] Finally, in *O'Connor v. Peru State College*,[367] the court declined to discuss the probability of success factor at all since the balance of equities did not favor the moving party.[368] Under *Dataphase*, it appears that a very strong showing of probable success on the merits can overcome a lesser showing on the other three factors.[369]

K. *Ninth Circuit* [370]

Relying in large measure on the "lost" Supreme Court precedent in *Georgia v. Brailsford*,[371] the Ninth Circuit early stated a two-part test for preliminary relief. For such a motion to be granted, the moving party must show: (1) a probable right or a prima facie case on the merits; and (2) a probable danger or irreparable injury if the injunction is not granted.[372] Over the years, the test has evolved into the current, "traditional" criteria: (1) whether the moving party will suffer irreparable injury if the interim relief is denied; and (2) whether the moving party can demonstrate probable success on the merits.[373]

In 1972, the court of appeals suggested that the alternative test for interlocutory relief, adopted by the Second Circuit in *Hamilton Watch*,[374] would be available for litigants in the Ninth Circuit.[375] In

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364. 731 F.2d 523 (8th Cir. 1984). *Accord* Harris v. United States, 745 F.2d 535, 536 (8th Cir. 1984) (per curiam); Tenant Affairs Board v. Pierce, 693 F.2d 797 (8th Cir. 1982).

365. *Roberts*, 731 F.2d at 526.

366. *Supra* note 360.

367. 728 F.2d 1001 (8th Cir. 1984).

368. *Id.* at 1003.

369. Concededly, in such instances, "the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits." *Dataphase*, 640 F.2d at 113. *Dataphase* would seem to afford the movant the chance to meet that burden, while *O'Connor* appears to deny that opportunity.

370. Congress created this court in 1891 when it established nine circuit courts of appeals. 26 Stat. 826 (1891) (commonly referred to as the Evarts Act or the Circuit Court of Appeals Act of 1891).

371. 2 U.S. (2 Dall.) 402 (1792); 2 U.S. (2 Dall.) 415 (1793); 3 U.S. (3 Dall.) 1 (1794).

372. *E.g.*, Southern Pac. Co. v. Earl, 82 F. 690, 691-92 (9th Cir. 1897); Jensen v. Norton, 64 F. 662, 664 (9th Cir. 1894).

373. *E.g.*, Mayview Corp. v. Rodstein, 480 F.2d 714, 716 (9th Cir. 1973).

374. Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 743 (2d Cir. 1953).

375. Costandi v. AAMCO Automatic Transmissions, Inc., 456 F.2d 941, 943 (9th Cir. 1972) (per curiam). The court did not refer to Burton v. Matanuska Valley Lines, 244 F.2d 647 (9th Cir. 1957), where the court applied the criteria of Ohio Oil Co. v. Conway,

Hamilton Watch, the Second Circuit held that preliminary relief could be granted if the moving party raises serious questions going to the merits and if the hardships tip decidedly for the movant.[376] In *Costandi v. AAMCO Automatic Transmissions, Inc.*,[377] the court affirmed a grant of an interlocutory injunction because the balance of hardships tipped toward the movant.[378] In addition the court noted that, in light of *Hamilton Watch*, the moving party need not show a likelihood of success on the merits.[379]

In 1975, the Ninth Circuit made it plain that it had adopted the two-pronged alternative test in *Costandi*. In *Wm. Inglis & Sons Baking Co. v. ITT Continental Baking Co.*,[380] the court recited the "alternative" test drawn from the Second Circuit precedents. The moving party may secure interim relief by showing either (1) probable success on the merits and possible irreparable injury; *or* (2) that she has raised serious questions about her claims and the balance of hardships tips sharply in her favor.[381] Furthermore, in *Inglis*, the court of appeals recited what it has called the "traditional" test for interlocutory injunctions. To obtain such relief, the moving party bears the burden of demonstrating: (1) irreparable injury; (2) probability of success on the merits; (3) balancing of harms to both parties; and (4) the injunction will serve the public interest.[382] The court in *Inglis* did not make clear whether both the "traditional" test and the two-pronged "alternative" test would exist side-by-side. If so, then the litigant would, in effect, have three tests from which to choose.

In 1978, the Ninth Circuit seemed to abandon its multi-track approach to interlocutory relief. In *Benda v. Grand Lodge*,[383] the court recognized that its past precedents had applied both prongs of the alternative test as independent standards for preliminary relief.[384] But it also noted that recent decisions in other circuits had analyzed them as

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supra note 50, which could be read as the precursor of the alternative test of *Hamilton Watch*.

376. *See supra* note 148 and accompanying text.

377. 456 F.2d 941 (9th Cir. 1972) (per curiam).

378. *Id.* at 943. The trial judge also imposed a $300,000 injunction bond on the successful movant, the defendant.

379. *Id.* The court did not expressly use the "serious question" language of *Hamilton Watch*, although the case may be read to adopt it implicitly.

380. 526 F.2d 86 (9th Cir. 1975).

381. *Id.* at 88.

382. *Id.* at 87. In essence, the court added two other considerations to the two-pronged, "traditional" test it had applied at least since 1894. *See* Jensen v. Norton, 64 F. 662 (9th Cir. 1894).

383. 584 F.2d 308 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979).

384. *Id.* at 314-15.

"merely extremes of a single continuum,"[385] and not as two distinct and separate standards for evaluating interim relief. In merging the tests, the court focused on two considerations: the strength of the moving party's claims, and the nature of the potential injury to the respective parties depending on whether the injunction is granted or denied.[386] It made no reference to the "public interest" factor which had appeared in some formulations of the "traditional" test. More important, it made no reference to the "traditional"[387] test at all, suggesting strongly that it was now dead.

In merging the two-prongs of the "alternative" test, the court stated that the two key elements bear an inverse relationship to each other.[388] If the balance of hardships tips decidedly towards the moving party, then she need not make a strong showing regarding the strength of her claims.[389] If, on the other hand, the balance simply tips towards the movant, then a much stronger showing on the strength of her claims is necessary.[390] However, no matter how severe the injury may be to the moving party if the injunction is denied, the "irreducible minimum" on the other factor is a "fair chance of success on the merits" or the "questions must be serious enough to require litigation."[391] If the movant has no chance of succeeding on the merits, the injunction cannot be granted under any circumstances.[392] Since, as the court stated, "the critical element . . . is the relative hardship to the parties,"[393] presumably the balance must always tip to some degree towards the movant.

Within four months of the merger affected in *Benda*, the Court of Appeals appeared to return, at least momentarily, to the multi-track system. In *City of Anaheim v. Kleppe*,[394] the court noted that it had adopted a "continuum" approach in *Benda* and had stated the "traditional" test in *Sierra Club*.[395] Then the court applied both the tradi-

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385. *Id.* at 315.

386. *Id.* at 315-18.

387. In truth, its past precedents had described the "traditional" test in at least three ways. *See, e.g.*, Southern Pac. Co. v. Earl, 82 F. 690 (9th Cir. 1897) (two factors); Sierra Club v. Hathaway, 579 F.2d 1162 (9th Cir. 1978) (three factors); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86 (9th Cir. 1975) (four factors).

388. *Benda*, 584 F.2d at 315.

389. *Id.*

390. *Id.*

391. *Id.* at 315.

392. *Id.*

393. *Id.*

394. 590 F.2d 285 (9th Cir. 1978).

395. *Id.* at 288 n.4. *See* Sierra Club v. Hathaway, 579 F.2d 1162 (9th Cir. 1978). The court set out the traditional test as embracing three parts: (1) a strong likelihood of

tional and the "continuum" tests, concluding that the movant was not entitled to a preliminary injunction under either.[396] Since *Kleppe*, the court has not adhered to any consistent pattern. In some cases, the court has been faithful to its holding in *Benda*, discussing and applying the continuum approach without reference to the traditional test.[397] In other instances, it has followed *Kleppe*, applying both the traditional test and the *Benda* continuum.[398]

In a third category of cases, it has followed *Inglis*, applying the traditional test and the two-pronged alternative test.[399] In a fourth category of decisions, the court has simply applied the two-pronged alternative test without any reference to the traditional test or the *Benda* continuum.[400] To complicate the matter still further, the court in some recent cases has not mentioned the *Benda* continuum at all,[401] and has introduced the "public interest" factor into the two-pronged alternative test.[402] The continued confusion and inconsistency in the Ninth Circuit are well illustrated by two cases decided within five days of each other in November, 1984. In those appeals, two separate panels applied two different tests for preliminary relief.[403]

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success on the merits; (2) a balance of irreparable harm favoring the movant; and (3) the injunction must serve the public interest. *Sierra Club*, 579 F.2d at 1167.

396. *Kleppe*, 590 F.2d at 288 n.4.

397. *E.g.*, Goldie's Bookstore, Inc. v. Superior Court of Cal., 739 F.2d 466. 470 (9th Cir. 1984); Lopez v. Heckler, 725 F.2d 1489, 1498 (9th Cir. 1984); Beltran v. Myers, 677 F.2d 1317, 1320 (9th Cir. 1982).

398. *E.g.*, Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 502-04 (9th Cir. 1980) (uses three-factor traditional test); Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1200-03 (9th Cir. 1980) (uses four-factor traditional test).

399. *E.g.*, American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 965 (9th Cir. 1983). *See* Lydo Enterprises, Inc. v. City of Las Vegas, 745 F.2d 1211, 1212-13 (9th Cir. 1984) (recitation of the traditional test and the two-pronged alternative, but applying only one branch of the latter).

400. *E.g.*, Students of Cal. School for the Blind v. Honig, 736 F.2d 538, 542 (9th Cir. 1984); Apple Computer, Inc. v. Formula Int'l Inc., 725 F.2d 521, 523 (9th Cir. 1984); Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 753 (9th Cir. 1982). *See* Lynch v. Rank, 747 F.2d 528, 534 n.9 (9th Cir. 1984).

401. *E.g.*, Students of Cal. School for the Blind v. Honig, 736 F.2d 538 (9th Cir. 1984); Flynt Distributing Co. v. Harvey, 734 F.2d 1389 (9th Cir. 1984); Apple Computer, Inc. v. Formula Int'l Inc., 725 F.2d 521 (9th Cir. 1984).

402. *E.g.*, Students of Cal. School for the Blind v. Honig, 736 F.2d 538, 542 (9th Cir. 1984); Lopez v. Heckler, 725 F.2d 1489, 1498 (9th Cir. 1984); American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 965 (9th Cir. 1983). *But see* Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 753 (9th Cir. 1982) (no mention of public interest factor while applying the alternative test).

403. *Compare* Regents of the Univ. of Cal. v. ABC, Inc., 747 F.2d 511, 515 (9th Cir. 1984) (applying the "traditional" three-part test of *Sierra Club*) *with* Lynch v. Rank, 747 F.2d 528, 534 n.9 (9th Cir. 1984) (applying the two-pronged alternative test).

L. *Tenth Circuit*[404]

The Tenth Circuit Court of Appeals has not followed a consistent path in applying the governing standards for the issuance of preliminary injunctions. In early cases,[405] it appeared to follow the criteria adopted by the Eighth Circuit in the *Love* case:[406] (1) the questions presented in the suit are grave and difficult; and (2) the harm to the moving party is great and irreparable if the injunction is denied, while the harm to the opponent would be inconsiderable if the injunction is granted. An injunction bond may be used to protect the opposing party from injury which is more than "inconsiderable." On other occasions, the court has applied a different two-part test: (1) a prima facie showing of reasonable probability of success on the merits; and (2) irreparable injury if the injunction is denied (apparently without any balancing of hardships to the opposing party).[407]

The two lines of authority appeared to converge in *Continental Oil Co. v. Frontier Refining Co.*[408] In that case, Frontier Refining sued to enjoin Continental Oil from violating the antitrust laws and for treble damages.[409] Affirming the grant of interlocutory relief, the Tenth Circuit stated that a party seeking such an order must show *either*: (1) a prima facie case of reasonable probability of ultimate success, and possible irreparable injury if the injunction is denied;[410] *or* (2) a balance of hardships tipping decidedly in the movant's favor, and the presence of serious questions going to the merits of the contro-

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404. Congress created the Tenth Circuit in 1929 when it split the Eighth Circuit into two circuits. 45 Stat. 1346 (1929).

405. *E.g.*, Morton Salt Co. v. City of South Hutchinson, 159 F.2d 897, 899-900 (10th Cir. 1947); *see* Allen W. Hinkel Dry Goods Co. v. Wichison Indus. Gas Co., 64 F.2d 881, 884 (10th Cir. 1933); *cf.* Goodpastor v. Oklahoma Gas & Elec. Co., 291 F.2d 276 (10th Cir. 1961); Utah Power & Light Co. v. Pfost, 52 F.2d 226 (D. Idaho 1931) (three-judge court).

406. Love v. Atchison, T. & S.F. Ry. Co., 185 F. 321, 331-32 (8th Cir.), *cert. denied*, 220 U.S. 618 (1911). The Supreme Court cited *Love* with approval in Ohio Oil Co. v. Conway, 279 U.S. 813, 815 (1929) (per curiam), discussed *supra* note 50 and accompanying text.

407. *E.g.*, Crowther v. Seaborg, 415 F.2d 437, 439 (10th Cir. 1969) (the court uses "probable right" and "probable danger" language reminiscent of Justice Johnson's dissenting opinion in Georgia v. Brailsford, 2 U.S. (2 Dall.) 402, 405 (1792)); *accord* Armstrong v. Maple Leaf Apartments, Ltd., 508 F.2d 518, 524-25 (10th Cir. 1974); Automated Marketing Systems, Inc. v. Martin, 467 F.2d 1181, 1183 (10th Cir. 1972). In Penn v. San Juan Hospital, Inc., 528 F.2d 1181 (10th Cir. 1975), the court stated that the movant's showing of her right to relief on the merits must be "clear and unequivocal," placing a heavier burden on the moving party than earlier cases would indicate. *Id.* at 1185.

408. 338 F.2d 780 (10th Cir. 1964) (per curiam).

409. *Id.* at 781.

410. *Id.*

versy.[411] The decision in *Continental Oil* did not resolve the matter, however, as the court of appeals has not adhered uniformly to the alternative test formulation. In several subsequent cases, it has recited or applied only one branch of the *Continental Oil* standards.[412]

With the law in need of clarity, the court of appeals in 1980 decided *Lundgrin v. Claytor*.[413] In that case, the plaintiff sought to enjoin the Secretary of the Navy from ordering him to active duty until he completed his residency.[414] In discussing the standards for interlocutory relief, the court first noted the two factors stated in *Seaborg*:[415] substantial likelihood of success on the merits[416] and irreparable injury.[417] This test, the court noted, had often been expanded to include two other factors: a balance of harms favoring the moving party and the public interest.[418] The Tenth Circuit then held that, if the moving party satisfies the three factors other than the substantial likelihood element, she could take advantage of the more liberal criterion announced in *Continental Oil*.[419]

In other words, once the movant has satisfied the irreparable injury, balance of hardships, and public interest considerations, then the burden of showing substantial likelihood is lowered. In such instances, the moving party need only show the dispute involves serious questions that are "fair ground for litigation."[420] In applying these criteria to the facts before it, however, the court seemed to depart from these articulated standards. While agreeing with the district court that the moving party had failed to show a probability of success on

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411. *Id.* at 781-82.

412. *See supra* note 351.

413. 619 F.2d 61 (10th Cir. 1980).

414. *Id.* at 61-62.

415. *Id.* at 63. *See supra* note 351.

416. In fact *Seaborg* had used the phrase "reasonable probability," not substantial likelihood.

417. 619 F.2d at 63. Although earlier cases had spoken of "possible" irreparable injury, the court in *Lundgrin* insisted that the test was whether the moving party "will suffer" irreparable harm. *Id.* at 63.

418. *Id.* For this expansion, the court cited cases in the Fifth and Ninth Circuits, and two leading treatises on civil procedure. It did not, however, cite its own precedent, Associated Securities Corp. v. SEC, 283 F.2d 773 (10th Cir. 1960), in which it applied a similar four factor test on a motion to stay an administrative order pending appeal. *Id.* at 774-75.

419. *Lundgrin*, 619 F.2d at 63. When *Continental Oil* stated an alternative, two-pronged test for preliminary relief, it did so independently of the probable success requirement. In assimilating part of the test into the four-factor standard, the court of appeals in *Lundgrin* ignored the independent nature of the *Continental Oil* alternative test.

420. *Lundgrin*, 619 F.2d at 63.

the merits,[421] the court never applied the more liberal "fair ground" standard. If the moving party has satisfied the other three factors, it may secure interim relief simply by raising serious questions that are fair ground for litigation.[422] In applying facts to law, the court ignored the legal principles it had just set down in the case.

In decisions subsequent to *Lundgrin*, the Tenth Circuit has not adhered to it consistently. In some cases, the court has followed the analytical framework set out in *Lundgrin*.[423] In other instances, it has reverted to the old two-factor approach to interlocutory relief: irreparable injury and substantial likelihood of success on the merits.[424] In still other decisions, the Tenth Circuit has apparently applied the four-factor test of *Lundgrin* without the liberalizing interpretation of the substantial likelihood of success factor.[425] And in a fourth class of cases, the court appears to have followed the *Lundgrin* analysis without mention of the public interest factor.[426]

M. *Eleventh Circuit*[427]

In the first case to come before the newly created Eleventh Circuit, the court, sitting en banc, held that all the prior opinions of the former Fifth Circuit, handed down by close of business on September 30, 1981, would be binding precedents in the new court of appeals.[428] Consequently, in the cases involving preliminary injunctions, the court has regularly relied on the earlier Fifth Circuit precedents, such as *Canal Authority of State of Florida v. Callaway*.[429] *Canal Authority* established a four part standard: (1) a substantial[430] likelihood the

421. *Id.* at 65.

422. *Id.* at 63.

423. *E.g.*, Otero Savings & Loan Ass'n v. Federal Reserve Bank, 665 F.2d 275, 278 (10th Cir. 1981).

424. *E.g.*, Mesa Petroleum Co. v. Cities Service Co., 715 F.2d 1425, 1432-33 (10th Cir. 1983); *see* Atchison, T & S.F. Ry. Co. v. Lennen, 640 F.2d 255, 259 (10th Cir. 1981) (per curiam) (holding that where a statutory claim for relief is asserted, irreparable injury will be presumed once the movant demonstrates that the statute has been or will be violated).

425. *E.g.*, Vance v. Utah, 744 F.2d 750, 752 (10th Cir. 1984); GTE Corp. v. Williams, 731 F.2d 676, 678 (10th Cir. 1984).

426. *E.g.*, Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1375 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982).

427. Congress created the Eleventh Circuit in 1980 when it split the Fifth Circuit into two circuits, effective October 1, 1981. 94 Stat. 1994 (1980).

428. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

429. 489 F.2d 567 (5th Cir. 1974) (*see supra* note 233 and accompanying text). *See, e.g.*, Harris Corp. v. National Iranian Radio and Television, 691 F.2d 1344, 1353-54 (11th Cir. 1982); West Point-Pepperell, Inc. v. Donovan, 689 F.2d 950, 956 (11th Cir. 1982).

430. The court of appeals has stated that the use of the word "substantial" does not

moving party will prevail on the merits; (2) a substantial threat that she will suffer irreparable injury[431] if the injunction is denied; (3) the harm to the movant outweighs any harm to the opposing party; and (4) the injunction, if granted, will not disserve the public interest.[432]

The court of appeals has followed the four-factor approach probably more rigidly than the other circuits which have adopted this methodology.[433] Indeed it has applied the criteria to the point where, if the moving party has not established one of the four elements, the court will not review the showing on the other three.[434] Because the court has insisted that the moving party demonstrate each of the four factors,[435] it has implicitly rejected any "sliding scale" notion where a greater showing on one factor may offset a lesser showing on another.[436]

Consequently, its discussion of the "substantial likelihood" factor has carried the Eleventh Circuit very deeply into the merits of the case,[437] a reason advanced in other circuits for adopting the sliding scale approach. Under that approach, a lesser showing on the likelihood of success factor is not fatal to interim relief if the moving party can make a greater showing on one or more of the other factors. If the movant makes a lesser showing on the likelihood factor, the courts need not intrude significantly, at such an early stage of the litigation, into the claims to be resolved at final hearing. In this respect the new

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add anything to the quantum of proof needed to show "likelihood of success on the merits." Shatel Corp. v. Mao Ta Lumber and Yacht Corp., 697 F.2d 1352, 1355-56 n.2 (11th Cir. 1983).

431. As in other circuits, the court has stated that "irreparable injury" means not only that the moving party has no adequate damage remedy, Johnson v. United States Dep't of Agriculture, 734 F.2d 774, 789 (11th Cir. 1984); Cate v. Oldham, 707 F.2d 1176, 1189 (11th Cir. 1983); Shatel Corp. v. Mao Ta Lumber and Yacht Corp., 697 F.2d 1352, 1357 (11th Cir. 1983), but also that she does not have an adequate remedy of any sort. United States v. Jefferson County, 720 F.2d 1511, 1520 (11th Cir. 1983); United States v. Lambert, 695 F.2d 536, 539 (11th Cir. 1983).

432. *Donovan*, *supra* note 76, at 956. *See generally supra* note 232.

433. *E.g.*, Johnson v. United States Dep't of Agriculture, 734 F.2d 774, 781 (11th Cir. 1984); National Wildlife Fed'n v. Marsh, 721 F.2d 767, 786 (11th Cir. 1983); Cate v. Oldham, 707 F.2d 1176, 1185 (11th Cir. 1983); Shatel Corp. v. Mao Ta Lumber and Yacht Corp., 697 F.2d 1352, 1354-55 (11th Cir. 1983).

434. *E.g.*, United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983); United States v. Lambert, 695 F.2d 536, 540 (11th Cir. 1983).

435. *E.g.*, National Wildlife Fed'n v. Marsh, 721 F.2d 767, 786 (11th Cir. 1983); Cate v. Oldham, 707 F.2d 1176, 1185 (11th Cir. 1983).

436. *See* discussion of sliding scale approach, *supra* notes 239-54 and accompanying text.

437. *E.g.*, Johnson v. United States Dep't of Agriculture, 734 F.2d 774, 782-84 (11th Cir. 1984); National Wildlife Fed'n v. Marsh, 721 F.2d 767, 767 (11th Cir. 1983); Harris Corp. v. National Iranian Radio and Television, 691 F.2d 1344, 1354 (11th Cir. 1982).

Eleventh Circuit has departed from the path pursued by its parent, the old Fifth Circuit.[438]

IV. A Model for Interlocutory Relief

A. *Introduction*

This article will conclude with a suggested model addressing the deficiencies of current standards for issuance of interlocutory relief and proposing more sound criteria.[439] As noted in the introduction, the proper focus should be whether the denial of interim relief will seriously erode or totally undermine the capacity of the court to formulate an effective remedy after a hearing on the merits. Concentrating on that question, courts and litigants need not engage in lengthy and tedious arguments over what constitutes the status quo and how, if at all, it should be preserved. Consequently, the central concern should focus on the potential for irreversible harm which the nonmoving party may visit upon the movant if the injunction is denied. While this rationale may appear to be more protective of the authority of the court than the interests of the litigants, in fact, both of those concerns merge in adjudicating the request for interim relief.

Because preserving the subject matter of the litigation is the focus of inquiry, the development of meaningful criteria to govern disposition of motions for interlocutory injunctions should reflect that objective. Over the years, English and American courts have identified several factors which have been used in various combinations to grant or deny such relief. These factors will be examined to determine whether they provide an adequate basis for a model. Among the many elements employed over the past 100 years, the relevant factors identified by courts and commentators can be distilled into four: (1) the strength of the moving party's claims; (2) the harm the parties will suffer if the relief is granted or denied; (3) the adequacy of the remedy, after a judgment on the merits, to compensate the ultimate winner for the harm endured because the interim relief was granted or denied; and (4) the impact the grant or denial of interim relief will have on persons who are not parties to the suit.

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438. *See supra* note 436.

439. The reader may also wish to examine the helpful models discussed in two other articles on the subject: Castles, *Interlocutory Injunctions in Flux: A Plea for Uniformity*, 34 BUS. LAW. 1359 (1979), and Leubsdorf, *Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978). There is some harmony, although not congruity, among the three models.

B. *Injury to the Parties*

Since the focus is preserving the subject matter of the dispute until final judgment, the principal concern should be the potential of the non-moving party, unrestrained by injunction during litigation, to harm irretrievably the movant's rights or interests. Most courts have used the phrase "irreparable injury" to describe the nature and quantity of such harm. For example, where one spouse has asked doctors to remove life support systems from an ailing spouse, a suit by their children to enjoin preliminarily the removal should succeed since the action of the doctors will destroy the subject matter of the dispute. Or if a candidate for public office is challenging an election procedure which prevents her from timely filing the proper papers, suspending the procedure or the deadline would properly be the object of interim relief. Finally, if the non-moving party intends to transfer unique property beyond the reach of the court's process, temporary injunctive relief would be appropriate.

Having identified the injury which the non-moving party may visit on the moving party absent the injunction, the court must then consider its capacity or ability to remedy that harm after final judgment if the injunction is denied. Traditionally, this inquiry would center on the adequacy of the legal remedy, which meant compensation through money damages. But since the merger of law and equity and the development of other protective devices, the examination into the remedial powers of the court should be more expansive than simply asking whether the moving party's interim injury can be remedied with a money judgment. Indeed the federal courts have already begun to define an adequate remedy at final judgment as including relief available in law or equity, in state or federal court, or before an administrative agency.

Furthermore, the range of remedial devices to protect the moving party from potential injury should encompass conditional denials of preliminary relief. A judge may deny the request for a temporary injunction, for example, on condition that the non-moving party post a bond, or take other action which will protect the subject matter of the suit without interim injunctive relief. In selected cases, the federal courts have included creative provisions in orders denying temporary injunctions, the effect of which is to protect the moving party from injury pending final resolution of the dispute.

Up to this point, the assumption has been that only the moving party would be adversely affected by the judge's decision on the request for a temporary injunction. But suppose the *grant* of interim

relief would injure the non-moving party beyond some negligible or inconsiderable degree. In such instances, should the court issue the injunction notwithstanding the harm which may result to the opposing party? There are at least three possible responses to this circumstance. First, the court could simply deny the injunction once the non-moving party showed some threshold level of harm. This is not a satisfactory approach since it gives too little weight to the injury of the moving party, which may be enormous compared to the harm of the opposing party.

Second, the relative injuries to the respective parties by the grant or denial of the injunction could be weighed, and appropriate action taken, depending on which way the balance tipped. If the balance tips toward the moving party, the injunction would be granted. If it tips toward the opposing party, the injunction would be denied. This "all or nothing" approach is too simplistic to provide a meaningful formula for interlocutory relief. Third, the courts could impose, as they now do, a requirement on the movant to demonstrate some level of strength to his claims for relief. The next section of the article examines this point.

Fourth, the courts could, as many have in the past, impose conditions on the moving party in exchange for the injunction. Posting bond, for example, is the most popular of the current devices used to protect the non-movant from potential harm pending final resolution of the dispute. Other creative solutions may also be available, such as ordering recoupment in public benefits cases. Since many public welfare statutes currently provide for such recoupment, the court could use the statutory remedy as the basis for protecting the defendant's interests. Further, the court could impose conditions upon the non-moving party by ordering a conditional *denial* of interim relief. This fourth response appears to be the most satisfactory solution to the problem, considering the substantial difficulties which inhere in the other three proposals.

C. *Strength of Movant's Claim*

Assuming the interlocutory injunction is necessary to preserve the subject matter of the lawsuit for final resolution, the question then arises whether the strength of the moving party's claim should be taken into account under any circumstances. On one level, it could be argued that no inquiry should be made into the merits on a motion for interlocutory relief. If the freedom of action granted to the non-moving party would effectively render meaningless any relief the moving

party would secure upon final judgment, the restrictions imposed through injunction are necessary to preserve the subject matter of the litigation, irrespective of the strength of the movant's claims. Nineteenth century English and American precedents permitted interim relief based solely on the balance of hardships, and the grant of security to protect the rights of the non-moving party.[440]

But if that is the case, the moving party could arguably obtain a preliminary injunction even if her claim is frivolous. The fear of a moving party securing interlocutory relief based on a totally meritless claim has probably animated the imposition of the criterion relating to the strength of the movant's claim. This factor has been phrased variously: a probability, a likelihood, or a possibility of success on the merits, or serious questions going to the merits. Even a preliminary inquiry into the merits presents immediate, practical difficulties. If the trial court must inquire into the claims of the moving party, it will inevitably address the merits of the dispute at least to some degree.

Even though the standard may be phrased in terms of probability or likelihood of success on the merits (including the sliding scale variation), it may still take the court deeply into the substance of the controversy. Judges are understandably reluctant to go down that path, in part, because the preliminary injunction hearing and the preparation for it are ordinarily abbreviated. For this reason, some federal courts have opted for the less intrusive "alternative test": whether the moving party has raised serious questions going to the merits. Despite these reservations, however, the federal appellate courts have frequently addressed with some detail the merits of the controversy under the guise of reviewing a grant or denial of interlocutory relief.

The impulse to avoid an early decision relating to the merits is grounded in several reasons. First, the speed with which hearings on preliminary injunctions are conducted precludes the parties from developing an adequate record for decision. If factual or legal issues, or both, are contested, the abbreviated, truncated, and expedited hearing, which is the hallmark of preliminary relief, is an inadequate mechanism for making even preliminary judgments about the merits. If the strength of the movant's claim is to be fairly addressed, more time is necessary to develop a record than is usually available on motion for a temporary injunction.

Second, once the court enters the merits of the case, even if it is

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440. *See supra* notes 33-34 and accompanying text. *See also* Comment, *Probability of Ultimate Success Held Unnecessary for Grant of Interlocutory Injunction*, 71 COLUM. L. REV. 165 (1971).

only to determine "a probable outcome," the tendency is to explore the merits in much greater depth than anticipated. Numerous decisions of courts of appeals, for example, while professing to explore only the likelihood of success, have actually delved into the merits in a very profound way.[441] In many cases, it is difficult to see how the trial judge on remand could decide the merits any other way than as "probably" determined by the appellate court.

Third, an early decision on the strength of the movant's claim may send the wrong message to the parties regarding the vitality of the suit. This is especially true if the courts, trial or appellate, gratuitously venture deeply into the merits of the cause. Such premature and improper assessments of the merits may precipitate unnecessary concessions by the losing party, and lead to settlements which otherwise would not occur. While few would oppose non-litigated resolution of controversies, it hardly serves the interests of justice to dispose of cases on records which are factually and legally incomplete. Such dispositions may be the inevitable product of even low level and very preliminary evaluations of the strength of the movant's case.

Fourth, entering into a discussion of the merits at an early stage of the litigation also places an additional burden on the federal courts of appeals. Since the grant or denial of a preliminary injunction is appealable as of right under 28 U.S.C. § 1292(a)(1), the appellate courts have a steady diet of appeals seeking review of such orders. Examining the strength of the movant's claims is frequently the most time-consuming part of the appellate process, from the standpoint both of the litigants and the court. The parties, of course, often have an avid interest in addressing the merits at great length in their briefs and oral arguments. Once the parties have pursued that course, it is difficult for the appellate court to resist the temptation to examine the merits equally in depth in the decision on the appeal from a grant or denial of interlocutory relief.

Fifth, to avoid these difficulties, some courts, as noted earlier, have lowered the threshold showing necessary with respect to the strength of the movant's claim.[442] The reduced standard is usually phrased in terms of whether the movant has raised "serious questions" going to the merits of the suit.[443] While this criterion arguably prevents the judges from entering into lengthy and frequently dispositive discussions of the merits, it is doubtful whether it serves the purpose of

441. *See supra* notes 120, 193, 220, 253 and 356.

442. *See supra* notes 348-53 and accompanying text.

443. *Id.*

weeding out frivolous claims. A good lawyer can make even the most meritless claim appear, at least at first blush, to raise serious questions of law or fact. When opposing lawyers have little time to investigate either the factual or legal frivolity of a suit, a low threshold hardly eliminates the claim devoid of merit.

Finally, it may be argued that the party against whom the frivolous claim is asserted has no recourse when the lack of merit is revealed after discovery and further proceedings leading toward a judgment on the merits. As noted above, the losing, non-moving party will have the protection of a bond or other terms which the judge may impose as conditions for issuing the preliminary injunction. In addition, the federal rules provide numerous procedural protections to the litigant who believes an ill-founded claim has been made against him. These protections include motions for judgment on the pleadings, for summary judgment, and for an expedited hearing on the merits. In appropriate cases, the party opposing the injunction may also move to dismiss for lack of subject matter jurisdiction if the claim is totally frivolous or utterly devoid of any merit.[444]

Furthermore, Rule 11 of the federal rules provides additional safeguards to protect the party victimized by an interlocutory injunction based on a frivolous claim.[445] Under the 1983 amendments to the rule, the court may impose sanctions, including attorney fees and other expenses of litigation, upon a party that files a "pleading, motion, or other paper" without first making a "reasonable inquiry" into its factual or legal basis, or "for any improper purpose, such as to harass or to cause unnecessary delay. . . ."[446] This protection may be especially important where a motion for a temporary injunction seeks to stall a corporate takeover to buy time for management.

D. *Combining Interim and Final Relief*

It may be that some cases are ready for disposition on the merits at the time of the preliminary injunction hearing. Some older precedents appear to permit interim relief based solely upon a showing of a clear right or title.[447] Thus a temporary injunction might be secured if the movant could make that showing in the brief period of time in which motions for such relief are ordinarily prepared for and exhibited to the court. These actions may include suits where the facts are un-

444. *See, e.g.*, Hagans v. Lavine, 415 U.S. 528, 537 (1974).
445. FED. R. CIV. P. 11.
446. *Id.*
447. See *supra* note 35 and accompanying text.

contested or where the parties are otherwise agreeable to presenting their full cases on short notice. If that is the situation, the simple solution is to move under Rule 65(a)(2) to consolidate the hearing on the motion for interim relief with a trial on the merits. Either the parties or the court may initiate such consolidation, which may be ordered before or after the hearing begins.

E. *Interests of Non-Parties*

Before summarizing the model offered here, one other matter should be addressed. On various occasions, the Supreme Court and the courts of appeals have included the "public interest" or the interests of non-parties, or both, as factors to be evaluated on motion for interim relief.[448] Few of these courts, however, have been consistent in requiring consideration of those concerns, nor have they fully explained why public interest or harm to others should be examined on any particular occasion. Furthermore, this public interest or the harm to others factor is rarely determinative in granting or denying interim relief, although the Supreme Court has stated that it could be decisive. In the vast majority of cases, however, it is simply a "make weight" for granting or denying the interlocutory injunction.

More fundamentally, however, evaluating harm to the public interest generally or to other non-litigants seems unavailing, too amorphous, and usually unproductive. For example, in an antitrust suit where the plaintiff seeks preliminary relief, it would appear that the public interest is as much served by the grant as by the denial of the injunction. If it is granted, the order may assist the enforcement of the antitrust statutes. If it is denied, the interests of the nation in a vigorous and healthy system of free enterprise may be advanced. In either case, the "public interest" may benefit. Therefore the public interest or harm to others factor should be eliminated from consideration, except in two instances: class actions and suits involving governmental parties.

In these two categories of cases, the named parties are obligated to represent the interests of unnamed or absent persons whose injuries should be considered as if they were active litigants. In such instances, it is appropriate to align their interests with named parties. In class action suits, the question then arises whether the moving party must secure class certification before obtaining class-wide preliminary relief. If class certification can be accomplished simultaneously with the hearing for the interlocutory injunction, it should be done. But many

448. *See supra* notes 69, 88, 238 and 304.

times that will prove difficult or impossible for the same reasons that the merits or the strength of the movant's claims should not be addressed prematurely. In such instances, the moving party may secure preliminary relief for the "class" upon a proper showing of injury to the unnamed parties.

With regard to suits where the government is a party, the problem is more complicated. If the government (local, state, or federal) is a party seeking to enforce claims (usually, but not always, as a plaintiff), then the evaluation of the harm to the government can be undertaken in the same manner as in a class action suit. For example, if the Secretary of Labor brought suit to enforce the Occupational Safety and Health Act, the Secretary's injury would be equated with the harm to the workers adversely affected by the alleged violation. When the government is placed in the role of opposing or resisting claims (usually as a defendant), the injury may be more difficult to assess, but it still can be done. First, in many instances, the injury can be quantified. For example, granting preliminary relief to restore social security benefits will cost the government money. That is a measurable amount of injury. Second, where the injury cannot be quantified, the court should try to evaluate the nature of the intangible, yet real injury to the "governmental interest." But the court should avoid abstract assessments based on the "public interest."

F. *Summary of the Model*

In summation, a five step approach is recommended to govern the disposition of motions for preliminary relief. The district judge should: (1) determine whether the non-moving party intends or is likely to take action which will injure the moving party; (2) if so, determine whether that injury is of such a nature that the court cannot provide an adequate remedy after a trial on the merits of the case; (3) if irremediable injury is likely, determine whether the issuance of interim relief will cause the non-moving party more than negligible harm; (4) if so, consider whether protective devices (*e.g.*, bonds or other terms and conditions) are available which, if imposed on either or both parties, will reduce to a negligible level the anticipated harm without the need for preliminary relief; and (5) if not, issue the injunction, requiring the moving party to post a bond or to take other steps to protect the non-moving party while the injunction is in force. Finally, if the case is ready for final disposition at the time of the request for interlocutory relief, the court should consolidate the preliminary

hearing with the trial on the merits and dispose of the entire case in one step.

The solution put forward here is closely related to the notion of interim relief articulated and applied in some 19th century English and American decisions on temporary injunctions.[449] Furthermore, except for eliminating any evaluation of the strength of the movant's claims, the model suggested here is similar to the standards discussed by the Supreme Court in *Ohio Oil Co. v. Conway*[450] and *Mayo v. Lakeland Highlands Canning Co.*,[451] decisions which concededly do not number among the most well known precedents in the history of the Court. Nonetheless those precedents, upon which this model is based, deserve serious scrutiny and reconsideration.

V. CONCLUSION

The survey undertaken in this article shows that the Supreme Court and the courts of appeals have not articulated or applied consistent criteria for preliminary injunctive relief. Their decisions have described a sinuous path through primary standards, alternative tests, and sliding scale variations. Part of the difficulty may be because the Supreme Court has not taken a firm hand in resolving conflicts between and among the circuits on critical issues involving interlocutory injunctions. In addition while the courts of appeals make reference to each others' opinions, they have not demonstrated a desire to achieve uniformity in their approaches to interim relief. In some cases, the non-uniformity is intra-circuit as well as inter-circuit. As the Court of Appeals for the Seventh Circuit recently observed, "the relevant case law is in disarray in both this and other circuits."[452]

Because there are so many currently applicable tests and variations, a moving party asserting the same facts and legal principles in different circuits could easily secure different results on motions for preliminary relief. While non-uniformity of decisions may serve a creative purpose in the short run, over time it tends to breed disrespect for and discontent of the law and advance the perception that judicial decisionmaking is largely arbitrary. Furthermore from a practical perspective, non-uniformity, especially of the intra-circuit variety, tends to undermine the goal of predictability which is vital for lawyer

449. See *supra* notes 33-34 and accompanying text.

450. *See* discussion and citation, *supra* note 50.

451. 309 U.S. 310 (1940).

452. Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 382 (7th Cir. 1984).

and client in ordering their affairs to conform with established legal norms. If the principles are uncertain, both counseling and compliance become chancy at best.