# The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard

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"[A] motion to [the court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles."[1]

## I. INTRODUCTION

The motion for a preliminary injunction is a common tool in federal litigation practice. Such motions are regularly presented in a wide variety of civil actions, including antitrust,[2] civil rights,[3] constitutional law,[4] copyright,[5] employment,[6] environmental,[7] patent,[8] securities,[9] and trademark.[10]

The decision to seek a preliminary injunction raises a variety of

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1. United States v. Burr, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14692D) (statement of Chief Justice John Marshall).

2. *See* United States v. Microsoft Corp., 147 F.3d 935, 943 (D.C. Cir. 1998) (noting that irreparable injury is presumed when a government entity sues to enjoin violation of a statute).

3. *See* Neal v. Bd. of Trs. of Cal. State Univ., 198 F.3d 763, 772-73 (9th Cir. 1999) (vacating the district court's grant of preliminary injunction to plaintiffs challenging university's interpretation of Title IX).

4. *See* Miller v. French, 530 U.S. 327, 350 (2000) (reversing the circuit court's grant of preliminary injunction against enforcement of the stay provision of the Prison Litigation Reform Act).

5. *See* Ty, Inc. v. GMA Accessories, Inc., 132 F.3d, 1167, 1169 (7th Cir. 1997) (ordering preliminary injunction preventing the defendant from selling bean bag animals "Preston the Pig" and "Louie the Cow" pursuant to plaintiff's action under the Copyright Act as infringing its "Beanie Babies" line of stuffed animals).

6. *See* Sheet Metal Contractors Ass'n of N. N.J. v. Sheet Metal Workers' Int'l Ass'n, 157 F.3d 78, 86 (2d Cir. 1998) (reversing the district court's grant of a preliminary injunction under the All Writs Act prohibiting an international union from re-affiliating with a local union).

7. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 528 U.S. 167, 173 (2000) (noting that a district court may prescribe injunctive relief for violation of the Clean Water Act under 33 U.S.C. §§ 1365(a), (g)).

8. *See* Jack Guttman, Inc. v. KopyKake Enters., Inc., 302 F.3d 1352, 1363 (Fed. Cir. 2002) (vacating district court's denial of a preliminary injunction based on its finding that plaintiff was not likely to succeed on the merits because it improperly interpreted the terms in the patent specification, and remanding to the district court for consideration of all factors for preliminary injunction based on the proper meaning of the terms).

9. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 75 (1987) (noting that Dynamics moved for leave to amend its complaint and seek a preliminary injunction against CTS's use of the Indian Act).

10. *See* Promatek Indus., Ltd. v. Equitrac Corp., 300 F.3d 808, 814 (7th Cir. 2002) (affirming district court's grant of a preliminary injunction).

practical issues for the parties and complex litigation management issues for the court. A motion for a preliminary injunction can involve a large expenditure of time and money by the parties and extensive trial and opinion writing time by the court. These proceedings are often more complicated than a trial on the merits, because a motion for a preliminary injunction raises other discrete questions in addition to the merits. Issues such as the threat of irreparable harm, the balancing of hardships, a consideration of the public interest, and a bond requirement must all be researched, briefed, and decided in a motion for a preliminary injunction.[11] In addition to the procedural complexity, parties have to deal with the "dizzying" array of standards employed by the courts of appeals.[12]

The ultimate decision whether to grant or deny a motion for a preliminary injunction rests in the sound discretion of the district court.[13] Unfortunately, the problem facing parties and judges is that "confusion persists" regarding which standard should apply for granting or denying the preliminary injunction motion.[14] Because the standard is interpreted differently by the various courts of appeals, there is no uniformity in application. For example, several circuits apply a traditional four-part standard:

> (1) whether the plaintiff will probably succeed on the merits;
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> (2) whether irreparable harm to the plaintiff would result if the injunction is not granted;
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> (3) the balance of harms between the plaintiff and defendant if the injunction is allowed; and
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> (4) whether the injunction will have an impact on

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11. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013-28 (9th Cir. 2001).

12. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 526 (1978).

13. *See* Yakus v. United States, 321 U.S. 414, 440 (1944).

14. *See* Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 11 (7th Cir. 1992) (noting that the "confusion" in this case was demonstrated by the "contrasting spins both parties place upon the four-part preliminary injunction standard").

the public interest.[15]

However, not every circuit utilizing this standard requires proof of all four factors.[16] Additionally, the individual factors are often construed differently, and some circuits employ a different standard altogether. For example, some circuits implement a two-part balancing standard when deciding a motion for preliminary injunction, and one circuit uses a three-part sliding scale method.[17]

Because the Supreme Court has failed to articulate a clear standard, the courts continue to struggle to apply appropriate guidelines. This Article examines this wide-ranging problem and proposes a potentially workable solution for courts and practitioners.

Part II of this Article describes the traditional equitable relief of an injunction and examines the historical development of the preliminary injunction from the English Courts of Chancery to the Judiciary Act of 1789. Part III discusses the codification of preliminary injunctive relief in Rule 65 of the Federal Rules of Civil Procedure. Part IV analyzes the standards employed by the United States Supreme Court and the various standards employed by the courts of appeals. Part V examines the problems created by the absence of a clear, uniform standard and maintains that the Supreme Court should address this void. Finally, Part VI concludes by proposing a uniform standard or method of analysis.

## II. HISTORY OF PRELIMINARY INJUNCTIONS

### *A. What Is an Injunction?*

An injunction is a court order that commands the nonmovant to do or to abstain from doing a particular action.[18] The purpose of an

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15. Lea B. Vaughn, *A Need for Clarity: Toward a New Standard for Preliminary Injunction*, 68 OR. L. REV. 839, 839-40 (1989).

16. *See id*. at 840 (stating that variations of the traditional test have been created, such as a balancing test and an "alternatives" test).

17. For an in-depth discussion of the various standards employed by the circuit courts, see Part III, *infra*. *See also* Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. CHI. L. REV. 197 (2003) (discussing the conventional approach to deciding preliminary injunctions and the uncertainty in evaluating the harms each party will face).

18. ROBERT HENLEY EDEN, A TREATISE ON THE LAW OF INJUNCTIONS 337 (Jacob D. Wheeler ed., Gould, Banks & Co. 1839) (1822).

injunction is to preclude the occurrence of a threatened wrong or injury as well as to prevent future violations.[19] There are three basic types of injunctions issued by a federal court: (1) temporary restraining orders, (2) preliminary injunctions, and (3) permanent injunctions.[20] All three types of injunctive relief are similar in effect, because each requires a party either to do or to refrain from doing some act, and all are enforceable by contempt.[21]

The three types of injunctions vary in their duration and the procedure required to obtain them. A temporary restraining order typically is entered for a period not to exceed ten days and may be obtained on an ex parte basis.[22] Conversely, a preliminary injunction cannot be issued by the court without notice to the adverse party and is effective *pendente lite*.[23] A preliminary injunction is issued after an initial hearing and argument, but before there has been a final decision

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19. *See* United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (noting that an injunction "can be utilized even without a showing of past wrongs" as long as the moving party shows more than a mere possibility that a violation of that which is to be enjoined will occur).

20. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000). Playboy obtained a temporary restraining order enjoining the United States from enforcing section 505 of the Communications Decency Act. *Id*. at 809. A three-judge panel denied Playboy's motion for a preliminary injunction, finding that they had not shown a likelihood of success on the merits. *Id*. The district court then reversed the denial, finding the provision unconstitutional and preliminarily enjoining its enforcement. Playboy Entm't Group, Inc. v. United States, 30 F. Supp. 2d 702, 720 (D. Del. 1998). The Supreme Court affirmed on First Amendment grounds and permanently enjoined enforcement of the statute. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 827 (2000).

21. *See* Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 823-34 (1994) (finding that contempt fines of $52 million for violations of labor injunctions constituted criminal contempt so that a jury trial was required to impose such a penalty).

22. FED. R. CIV. P. 65(b). Although Rule 65(b) prescribes a 10-day expiration for a temporary restraining order ("TRO") without notice, no mention is made for an expiration date for the more common TRO with notice. As a practical matter most district judges import the same standard in the with-notice situation. By reason of FED. R. CIV. P. 6(a) this 10-day period is often extended to at least 14 days. Rule 65(b) also makes provision for one equivalent-length renewal. Therefore, a TRO can oftentimes be entered and extended for a period of at least 28 days.

23. *See* Wooley v. Maynard, 430 U.S. 705, 718 (1977) (distinguishing between "a preliminary injunction *pendente lite* and a permanent injunction" at the conclusion of a case).

on the merits of the case.[24] One purpose of a preliminary injunction is to preserve the relative positions of the parties until a full trial on the merits can be held.[25]

Unlike a temporary restraining order or a preliminary injunction, the purpose of a permanent injunction is not to preserve the status quo but to afford the successful plaintiff appropriate relief when faced with an irreparable injury that cannot be remedied by damages.[26] A permanent injunction will issue only after a full trial on the merits establishes the plaintiff's right to relief.[27] Once a final decision on the merits has been obtained, only a permanent injunction may be granted.[28] This Article focuses solely on the motion for a preliminary injunction.

### *B. Origins in English Courts of Chancery*

A preliminary injunction is an equitable remedy derived from the principles of the system of judicial remedies devised and administered by the English Court of Chancery at the time the United States divorced itself from England.[29] In England, equity developed as a separate system designed to provide plaintiffs with a remedy not available in common law courts.[30] To bring an action in the law courts, a plaintiff purchased a writ from the Chancellor.[31] Each time a new fact pattern emerged, the Chancellor would fashion a new writ.[32] In

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24. FED. R. CIV. P. 65(a).

25. *See* Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) ("Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.").

26. *See* Sampson v. Murray, 415 U.S. 61, 88 (1974) ("The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.").

27. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 243 (1964). The Supreme Court affirmed the permanent injunction enjoining the appellant from continuing to violate the Civil Rights Act of 1964. *Id*.

28. 13 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 65.05[3], at 65-19 (Matthew Bender 3d ed. 2002).

29. Grupo Mexicano de Desarrollo v. Alliance Bond Fund, 527 U.S. 308, 318 (1999).

30. Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 611 (1997).

31. *See id*. (explaining that the Chancellor would then present the writ to the law courts, which were responsible for hearing the case).

32. *See id*.

1258, the Chancellor was prohibited from issuing any new writs.[33] Plaintiffs bringing an action in the law courts molded their case to match an existing writ or were denied access to the courts.[34] If the plaintiff was unable to utilize one of the existing writs, he would petition the king to "do good and dispense justice."[35] The king would act through his Chancellor and often appeal to conscience for guidance.[36] Thus developed the courts of equity in England, with the Chancellor eventually becoming a judicial officer.[37]

The equitable remedy of the injunction historically has been hedged with limitations. The principal limitation is that an equitable remedy such as an injunction was available only when a legal remedy was deemed inadequate to satisfy the claim.[38] This "adequacy doctrine" came to the colonies with the early English settlers.[39] It eventually became a part of our federal law through the Judiciary Act of 1789 and was thereafter incorporated into the statutes and decisions of almost every American jurisdiction.[40]

It is widely agreed that the special standard for preliminary injunctive relief did not come into being until the latter part of the nineteenth century.[41] In 1867, William Kerr published his treatise on injunctions and asserted:

"A man who comes to the Court for an interlocutory

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33. *See id*. (relating that this prohibition was issued in the Provisions of Oxford).

34. *Id*.

35. Kennedy, *supra* note 30, at 611 (noting that as England's economy moved from agrarian to commercial, "the pace of economic development overtook the legal system's ability to provide new writs").

36. Kennedy, *supra* note 30, at 611.

37. Kennedy, *supra* note 30, at 612 (explaining that the Chancellor's department, the Chancery, eventually became a court for providing remedies that were not available in the common law courts).

38. 1 THOMAS CARL SPELLING, A TREATISE ON INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES § 4, at 4 (2d ed. 1901) (noting that although courts of law sometimes exercise analogous powers, purely injunctive relief is unique to courts of equity).

39. *Developments in the Law—Injunctions*, 78 HARV. L. REV. 996, 997 (1965).

40. *Id*.; *see also* Grupo Mexicano de Desarrollo v. Alliance Bond Fund, 527 U.S. 308, 318 (1999) (noting that the Judiciary Act of 1789 gave the federal courts jurisdiction over all equitable suits).

41. *See* Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 126 (2001).

> injunction is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition, until such question can be disposed of."[42]

However, this particular standard did not mention or specifically require a showing of irreparable harm on the part of the movant.[43] Nevertheless, in 1882 the Supreme Court reflected the then-current preliminary injunction standard when it cited Kerr's treatise in *Russell v. Farley*.[44] In dictum, the Supreme Court stated that when the movant's legal right is uncertain, a preliminary injunction can still be obtained if the movant can show that he will suffer greater harm than the nonmovant if the injunction is not granted.[45]

## IV. FEDERAL RULE OF CIVIL PROCEDURE 65

The courts of equity and law merged in 1937 with the passage of the Federal Rules of Civil Procedure.[46] Customarily, a preliminary injunction is requested in the complaint, but it may also be raised by motion or by an order to show cause.[47] Today, parties in federal court rely on Federal Rule of Civil Procedure 65 to bring forth a motion for a preliminary injunction. Federal Rule 65 addresses collateral requirements such as notice, duration, form, and security, but "leaves the threshold questions of whether and when a preliminary injunction should issue to the discretion of the courts in accordance with traditional principles of equity."[48] The Rule provides, in pertinent part:

> (a)(1) *Notice.* No preliminary injunction shall be

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42. Leubsdorf, *supra* note 12, at 536 (quoting W. KERR, A TREATISE ON THE LAW AND PRACTICES OF INJUNCTIONS IN EQUITY 11-12 (1867)).

43. Leubsdorf, *supra* note 12, at 536.

44. 105 U.S. 433, 439 (1881).

45. *Id*. at 441-42; *see also* Arthur D. Wolf, *Preliminary Injunctions: The Varying Standards*, 7 W. NEW ENG. L. REV. 173, 177 (1984).

46. FED. R. CIV. P. 2 (1937).

47. *See* Studebaker Corp. v. Gittlin, 360 F.2d 692, 694 (2d Cir. 1966).

48. Lee, *supra* note 41, at 110.

> issued without notice to the adverse party.
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> (a)(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.[49]

Rule 65(c) also mandates that a security bond be posted for any preliminary injunction "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."[50]

The circumstances in which a preliminary injunction may be granted are not prescribed by the federal rules. Thus, the ultimate decision to grant or deny a preliminary injunction falls entirely within the discretion of the court.[51] This judicial discretion has its roots in the practice in the English Courts of Chancery.

Rule 65 is primarily based on Equity Rule 73 and the Clayton Act.[52] It applies to all civil actions in the federal courts and changes very little of the practice of seeking and obtaining a preliminary injunction. Instead of codifying a particular standard, Rule 65 allows

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49. FED. R. CIV. P. 65(a).

50. FED. R. CIV. P. 65(c).

51. *See* Yakus v. United States, 321 U.S. 414, 440 (1944).

52. 11A WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2941, at 30-31 (2d ed. 1995). Equity Rule 73 provided, "No preliminary injunction shall be granted without notice to the opposite party." *Id*. at 30. The sections of the Clayton Act that overlapped with Rule 65 were repealed in 1948, based on the passage of the Federal Rules of Civil Procedure. *Id*. at 31.

the courts to follow the substantive guidelines used since the times of the English Courts of Chancery.[53] It does not alter the substantive prerequisites for obtaining a preliminary injunction stemming from the traditional principles of equity jurisdiction.[54] The committee establishing the rule clearly realized the potential for confusion inherent in preliminary injunctions when it decided not to deviate much from the longstanding practice in these matters.[55]

In practice, Rule 65 does not provide much guidance. Unlike Federal Rule of Civil Procedure 56, under which a litigant may proceed with a motion for summary judgment if the party can show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law,"[56] Rule 65 does not describe how to bring a motion for preliminary injunction or the standard by which to obtain relief. It sets out only the procedures for obtaining a temporary restraining order.[57]

Rule 65 does not set out a detailed procedure to follow. In fact, even though it mandates that notice and a hearing are necessary to obtain a preliminary injunction, the Rule does not articulate what kind of hearing is required.[58] In addition, Rule 65 does not contain guidelines for obtaining an injunction, nor does it confer subject-matter or personal jurisdiction on the court.[59] Thus, most of the issues regarding preliminary injunctions are not discussed in Rule 65, but are governed instead by traditional federal equity principles developed in the case law.[60]

Since its adoption Rule 65 has been amended four times, three of which related to preliminary injunctions.[61] In 1946, subdivision (c) was revamped to add a second paragraph, which authorized courts and

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53. *See* Grupo Mexicano de Desorrollo v. Alliance Bond Fund, 527 U.S. 308, 318 (1999) (holding that the district court lacked the authority to issue a preliminary injunction because the type of equitable remedy fashioned by the court did not exist at the time of the passage of the Judiciary Act of 1789).

54. *Id*.; *see* Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 382 n.26 (1949) ("[T]he fusion of law and equity by the Rules of Civil Procedure" did not affect "the substantive principles of [the] Courts of Chancery.").

55. 11A WRIGHT ET AL., *supra* note 52, § 2941, at 31.

56. FED. R. CIV. P. 56(c).

57. FED. R. CIV. P. 65(a), (b).

58. FED. R. CIV. P. 65(a); 11A WRIGHT ET AL., *supra* note 52, § 2941, at 34.

59. *See* 11A WRIGHT ET AL., *supra* note 52, § 2941, at 35.

60. 11A WRIGHT ET AL., *supra* note 52, § 2941, at 34.

61. 11A WRIGHT ET AL., *supra* note 52, § 2941, at 36-37. Three of the amendments are discussed in the text.

parties to determine liability of a surety on a bond.[62] Two years later, subdivision (e) was amended to provide a technical change so that the statutory references would comply with amendments to the Judicial Code.[63] This second change also broadened the applicability of subdivision (e) to any statute that dealt with injunctive orders in employer-employee suits.[64]

In 1966, more substantive amendments were added,[65] including subdivision (a)(2), which allows for the consolidation of a preliminary injunction proceeding with a trial on the merits.[66] Additionally, this amendment provides that evidence introduced at preliminary injunction hearings and normally admissible at trial becomes part of the record and need not be repeated at trial.[67] However, the accompanying Advisory Committee Note observed that the right to a jury trial is preserved and that in such a case the jury will hear all of the evidence necessary for it to render its verdict, even if some part of this evidence was heard by the presiding judge at the proceeding on the preliminary injunction motion.[68] That Committee Note further declared that the new subdivision "reflect[s] the substance of the best current practice and introduces no novel conception."[69]

Although Rule 65 is silent regarding when notice must be given, Rule 6(d) provides guidance.[70] According to Rule 6(d), notice should be served at least five days before a hearing is to take place.[71] Neither

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62. 11A WRIGHT ET AL., *supra* note 52, § 2941, at 36; FED. R. CIV. P. 65 advisory committee's note (1946 Amendment). The paragraph was added to ensure that courts would allow the parties to proceed in the same proceeding under Rule 65(c). *Id*. This ensures a result consistent with proceeding under Rule 73(f). *Id*.

63. FED. R. CIV. P. 65 advisory committee's note (1948 Amendment). The words "any statute of the United States" were substituted for reference to specific code sections in order to broaden the scope of subdivision (e). *Id*.

64. 11A WRIGHT ET AL., *supra* note 52, § 2941, at 36.

65. 11A WRIGHT ET AL., *supra* note 52, § 2941, at 36.

66. FED. R. CIV. P. 65 advisory committee's note (1966 Amendment).

67. *Id*. The committee noted that this amendment will avoid repetition of evidence at trial. *Id*. It also hoped that such a consolidation of the proceedings would tend to "expedite the final disposition of the action." *Id*. However, the committee noted that repetition is not altogether prohibited. *Id*.

68. *See* FED. R. CIV. P. 65 advisory committee's note (1966 Amendment) (noting the caution expressed in the last sentence of subdivision (a)(2)).

69. *Id*.

70. FED. R. CIV. P. 6(d).

71. *Id*. The section notes that a written motion is required at least five days

Rule 6(d) nor Rule 65 defines what type of notice is required. Courts have held that providing a copy of the motion and including the time and location of the hearing are sufficient to satisfy the notice requirement for a preliminary injunction hearing.[72] Additionally, affidavits contesting motions for preliminary injunctions are usually presented by both parties.[73] These must be submitted to the other party in enough time for that party to read the papers—at least one day before the hearing.[74]

If a court grants a motion for a preliminary injunction, it must enter findings of fact and conclusions of law pursuant to Rule 52(a).[75] The purpose for this requirement is two-fold. First, it provides the appellate court with an adequate record from which it can review the decision.[76] Second, it ensures that the trial court carefully reviews the evidence presented.[77] The requirements of Rule 52(a) work in concert with the requirement in Rule 65(d) that the preliminary injunction be "specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained."[78]

## IV. THERE IS NO UNIFORM STANDARD

Generally there are three purposes for granting a preliminary injunction: (1) maintaining the status quo, (2) preserving the court's ability to render a meaningful decision, and (3) minimizing the risk of

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before the hearing except in the case of a motion that may be heard ex parte. *Id*.; *see also* Anderson v. Davila, 125 F.3d 148, 156 (3d Cir. 1997) (noting that two weeks provided the defendants with a fair opportunity to prepare to explain their actions to the district court). *But see* Illinois v. Peters, 871 F.2d 1336, 1341 (7th Cir. 1989) (holding that notice twenty-four hours before the hearing satisfied Rule 65(a) when the party suffered no prejudice and there was enough time for the party to retain an attorney to appear at the hearing).

72. 11A WRIGHT ET AL., *supra* note 52, § 2949, at 214. The Supreme Court has stated that the notice requirement under Federal Rule of Civil Procedure 65(a) "implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers, 415 U.S. 423, 434 n.7 (1974).

73. FED. R. CIV. P. 6(d). Rule 6(d) is entitled "For Motions—Affidavits." *Id*.

74. *See id*. (noting that the court may permit the opposing affidavits to be served at "some other time").

75. *See* FED. R. CIV. P. 52(a).

76. 9 MOORE ET AL., *supra* note 28, § 52.02, at 52-12.

77. *Id*.

78. FED. R. CIV. P. 65(d). Subsection (d) of Rule 65 is entitled "Form and Scope of Injunction or Restraining Order." *Id*.

error.[79] A preliminary injunction also serves to protect the plaintiff from irreparable injury.[80] However, it is often stated that the primary purpose for granting a preliminary injunction motion is "to preserve the relative positions of the parties until a trial on the merits can be held."[81] There are no time limits placed on preliminary injunctions because they are in force pending a full trial on the merits. Because of the haste that is often necessary to preserve the relative positions of the parties and to protect the movant from irreparable injury, a preliminary injunction is often granted on the basis of less formal procedures than a trial on the merits.[82] In addition, the evidence on which the decision to grant or deny the motion is based is frequently much less complete than a trial record.[83] Thus, a party is not required to prove his case in full at a preliminary injunction proceeding.[84] The problem is that the Supreme Court has not adopted a clear standard; as a result, the standard for granting or denying the motion varies among the courts of appeals.

As previously stated, the ultimate decision to grant or to deny a preliminary injunction rests in the sound discretion of the district court.[85] However, not much is clear about the standard for the exercise of that discretion. Some courts have referred to preliminary injunctions as extraordinary and drastic remedies that should not be granted unless the plaintiff carries the burden of persuasion by a clear showing.[86] While courts may disagree on a uniform standard, possibly due to

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79. Vaughn, *supra* note 15, at 849.

80. *See* Brown v. Chote, 411 U.S. 452, 456 (1973).

81. *See* Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) (noting that this is a limited purpose).

82. *Id*.

83. *Id*.

84. *See id*. (noting that in light of these relaxed standards, it is generally inappropriate for the district court to render a decision on the merits at the preliminary injunction stage).

85. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (noting that courts should pay particular attention to the public consequences when exercising their "sound discretion"); *see also* Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) ("In shaping equity decrees, the trial court is vested with broad discretionary power . . . ."); Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944) (recognizing the district court's discretion to dismiss a complaint seeking injunctive relief).

86. 11A WRIGHT ET AL., *supra* note 52, § 2948, at 129; *see also* Sampson v. Murray, 415 U.S. 61, 91-92 (1974) (asserting that a government employee must make a showing of irreparable injury to override factors cutting against the general availability of preliminary injunctions).

varying degrees of risk and urgency of the injunction, most courts have agreed on the underlying factors that govern the decision whether to grant or deny a preliminary injunction.[87] It is the discord in applying those factors that generates an unclear standard.

Most courts consider, in one way or another, the following factors: (1) whether the plaintiff has an adequate remedy at law, (2) whether the plaintiff will suffer irreparable harm if the injunction is denied, (3) whether this harm will be greater than the harm the defendant will suffer if the injunction is granted, (4) whether the plaintiff has a reasonable likelihood of success on the merits, and (5) whether the injunction will protect or harm the public interest.[88] Some courts consider preserving the status quo as an additional factor.[89] This

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87. 11A WRIGHT ET AL., *supra* note 52, § 2948, at 131-33; Pottgen v. Mo. State High Sch. Activities Ass'n, 40 F.3d 926, 928 (8th Cir. 1994) ("When considering a motion for a preliminary injunction, a district court weighs the movant's probability of success on the merits, the threat of irreparable harm to the movant absent the injunction, the balance between this harm and the injury that the injunction's issuance would inflict on other interested parties, and the public interest."); Hughes Network Sys., Inc. v. InterDigital Communications Corp., 17 F.3d 691, 693 (4th Cir. 1994) (determining that whether to grant a preliminary injunction requires the consideration of the following four factors: "1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is not granted; 2) the likelihood of harm to the defendant if the preliminary injunction is granted; 3) the likelihood that plaintiff will succeed on the merits; and 4) the public interest"); Evergreen Presbyterian Ministries, Inc. v. Hood, 235 F.3d 908, 918 (5th Cir. 2000). The *Evergreen* court listed the four requirements that must be met:

> "'First, the movant must establish a substantial likelihood of success on the merits. Second, there must be a substantial threat of irreparable injury if the injunction is not granted. Third, the threatened injury to the plaintiff must outweigh the threatened injury to the defendant. Fourth, the granting of the preliminary injunction must not disserve the public interest.'"

*Id*. (quoting Harris County v. CarMax Auto Superstores, Inc., 177 F.3d 306, 312 (5th Cir. 1999) (quoting Cherokee Pump & Equip., Inc. v. Aurora Pump, 38 F.3d 246, 249 (5th Cir. 1994))).

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

89. *Id*. at 383; Chathas v. Local 134 IBEW, 233 F.3d 508, 513 (7th Cir. 2000) ("A preliminary injunction is intended to protect the status quo while the case proceeds, not to adjudicate the merits."); Eller Media Co. v. City of Cleveland, 161 F. Supp. 2d 796, 807 (N.D. Ohio 2001) ("'[T]he . . . purpose of a preliminary injunction is to preserve the status quo and prevent irreparable injury, not to provide an evidentiary basis for granting summary judgment.'") (quoting eMachines, Inc. v. Ready Access Memory, Inc., No. EDCV00-00374-VAPEEX, 2001 WL 456404, at *4 (C.D. Cal. Mar. 5, 2001)); State v. Panex Indus., Inc., 860 F. Supp. 977, 980

additional factor is often considered because courts note the purpose of a preliminary injunction is to freeze the relative positions of the parties until a trial on the merits can be held.[90]

Of the circuits using the traditional four-factor test, not all demand that each of the four factors be established.[91] For instance, some courts have adopted a sliding-scale approach and refer to the preliminary injunction standard as "balancing the harms."[92] The greater the chance that the plaintiff will prevail on the merits, the less the need for the balance of harm to weigh in the plaintiff's favor; conversely, if the merits are not strong, there is a greater need for the balance of harms to weigh in the plaintiff's favor.[93] Still other circuits have adopted an approach in which only two factors must be demonstrated to prevail.[94]

*A. Supreme Court Standards*

The Supreme Court has not yet articulated a consistent standard for granting or denying a preliminary injunction,[95] but only minimum

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(W.D.N.Y. 1994) ("Preservation of the *status quo pendente lite* is the purpose of a preliminary injunction.").

90. Ind. Civil Liberties Union v. O'Bannon, 259 F.3d 766, 770 (7th Cir. 2001) (noting that a "preliminary injunction is an extraordinary remedy intended to preserve the status quo until the merits of a case may be resolved").

91. *See supra* notes 15-17 and accompanying text.

92. Ciena Corp. v. Jarrard, 203 F.3d 312, 322-23 (4th Cir. 2000) (indicating that the four factors—likelihood of irreparable harm to the plaintiff, likelihood of harm to the defendant, likelihood of success on the merits, and the public interest—must all be considered by the court, but the balance of hardships should be considered first and may reduce the plaintiff's required showing of success on the merits).

93. *Id.*

94. *See* Random House, Inc. v. Rosetta Books LLC, 283 F.3d 490, 491 (2d Cir. 2002) (requiring a party seeking a preliminary injunction to show: "(1) irreparable harm in the absence of the injunction and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor"); Sammartano v. First Judicial Dist. Court *ex rel* County of Carson City, 303 F.3d 959, 965 (9th Cir. 2002) ("'Preliminary injunctive relief is available to a party who demonstrates either (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor.'") (quoting A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001)).

95. *See* Wolf, *supra* note 45, at 174 (describing the Supreme Court's decisions on the subject as "inattentive"); *see also* Leubsdorf, *supra* note 12, at 525 (noting that

standards below which lower courts may not fall. Even then, the issue is treated as subsidiary to the main issues in the case.[96] In *Brown v. Chote*[97] the Court provided two factors that a district court should consider and weigh in determining whether to issue a preliminary injunction: (1) the plaintiff's "possibilities of success on the merits," and (2) "the possibility that irreparable injury would have resulted, absent interlocutory relief."[98] A year later in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*,[99] the Court moved away from the balancing test and spoke of a two-factor test in which "the party seeking the injunction would bear the burden of demonstrating the various factors justifying preliminary injunctive relief, such as the likelihood of irreparable injury to it if an injunction is denied and its likelihood of success on the merits."[100] Not only did the Court move from a balancing test to a two-factor test, but its choice of terms describing the factors also changed from a "possibility" to a "likelihood" of irreparable injury or success on the merits. Then in the following year, in *Doran v. Salem Inn, Inc.*,[101] the Court observed that the "traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits."[102] In addition, the Court cautioned that a district court must "weigh carefully the interests of both sides" and apply a "stringent" standard in deciding whether a plaintiff is entitled to a preliminary injunction.[103]

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lower courts employ a "dizzying array" of standards); Susan H. Black, *A New Look at Preliminary Injunctions: Can Principles from the Past Offer Any Guidelines to Decisionmakers in the Future?*, 36 ALA. L. REV. 1, 49 (1984) (opining that the "proliferation of standards has resulted in the confusion that surrounds the whole area of injunctive relief").

96. *See* Wolf, *supra* note 45, at 174 (noting that 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").

97. 411 U.S. 452 (1973).

98. *Id*. at 456 (noting that the district court "properly addressed itself to two relevant factors").

99. 415 U.S. 423 (1974).

100. *Id*. at 441 (noting that the motion before the district court involved a temporary restraining order, but stating that, in certain circumstances, the court may proceed as if it were a preliminary injunction hearing).

101. 422 U.S. 922 (1975).

102. *Id*. at 931.

103. *Id*.

Twelve years later, in *Amoco Production Co. v. Village of Gambell, Alaska*,[104] the Court reviewed the well-established principles governing injunctions and stated that "the bases for injunctive relief are irreparable injury and inadequacy of legal remedies."[105] The lower court "must balance competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief."[106] The element of balancing the hardships represents an additional factor for courts to consider. The Court, in comparing the standards for a preliminary injunction with those of a permanent injunction, finds them to be "essentially the same . . . with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success."[107]

In cases involving governmental bodies or challenged legislation, the Court has also considered the effect of the preliminary injunction on the public interest.[108] This factor allows courts to take into account the interests of non-parties to the litigation when considering preliminary injunctive relief. In *Yakus v. United States*,[109] the Supreme Court recognized that where an injunction bond cannot compensate for a possible adverse impact on the public interest, a court may "in the public interest withhold relief until a final" decision on the merits.[110] The Court distinguished public interest cases from those in

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104. 480 U.S. 531 (1987).

105. *Id*. at 542.

106. *Id*.

107. *Id*. at 546 n.12.

108. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312-13 (1982); *see also* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 496 (2001). In *Weinberger*, an action brought to enjoin the United States Navy from using a portion of land it owned, the Court held that "in exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger*, 456 U.S. at 312. The Court went on to state that "'the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.'" *Id*. at 312-13 (quoting Yakus v. United States, 321 U.S. 414, 440 (1944)). In *Oakland*, an action brought by the United States against a cooperative organized to distribute marijuana to qualified patients, the Court observed that for several hundred years courts of equity have had discretion to consider the "necessities of the public interest" when fashioning injunctive relief. *Oakland*, 532 U.S. at 496.

109. 321 U.S. 414 (1944).

110. *Id*. at 440.

which "only private interests are involved."[111] Where only private interests are involved, the district court exercises its discretion and "balances the conveniences of the parties and possible injuries to them according [to they extent] they may be affected by the granting or withholding of the injunction."[112] The Court has continued to assert that "public consequences" should be regarded in cases involving the government or other public interest concerns.[113] This public interest factor is significant because in certain cases the public interest can override the moving party's showing of irreparable harm.[114]

The Supreme Court has been inconsistent in its treatment of questions of law raised in connection with motions for a preliminary injunction. In *University of Texas v. Camenisch*,[115] the Court noted that because the "purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held," and because a party is "not required to prove his case in full" at the preliminary injunction stage, "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."[116] As a result, it is generally inappropriate for a court to enter a final judgment on the merits at the preliminary injunction stage.[117] If an expedited decision on the merits is called for, Rule 65(a)(2) permits a court to advance and consolidate the hearing with appropriate notice to the parties.[118] In some cases, the Court has made it clear that in ruling on the case in the preliminary injunction posture, it is intimating no view as to the ultimate merits of the case.[119]

On the other hand, the Supreme Court has not hesitated to finally decide issues of law on cases coming to it on motions for a preliminary injunction where it believes the record is adequate. In *McLucas v. DeChamplain*,[120] the Court dismissed a case on the merits in which the district court had preliminarily enjoined military

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111. *Id*. at 441.
112. *Id*. at 440.
113. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).
114. Vaughn, *supra* note 15, at 849.
115. 451 U.S. 390 (1981).
116. *Id*. at 395.
117. *Id*.
118. *Id*.
119. Doran v. Salem Inn, Inc., 422 U.S. 922, 934 (1975); Brown v. Chote, 411 U.S. 452, 457 (1973); Univ. of Tex. v. Camenisch, 451 U.S. 390, 399 (1981).
120. 421 U.S. 21 (1975).

authorities from going forward with a court-martial proceeding.[121] In *Walters v. National Association of Radiation Survivors*,[122] the Court reversed a nationwide preliminary injunction and held that a statute limiting the fee that may be paid to an attorney or agent who represents a veteran before the Veterans Administration seeking death or disability benefits does not violate the Due Process Clause or the plaintiffs' First Amendment rights.[123] Similarly, in *City of Indianapolis v. Edmond*,[124] the Supreme Court held that a drug interdiction checkpoint program violated the Fourth Amendment.[125] *Edmond* was before the Court following a district court class certification and denial of a motion for a preliminary injunction and a later reversal by the Seventh Circuit.[126] It can be quite disconcerting to parties to find out their case has been decided on the merits although they were proceeding under preliminary injunction standards. This confusion in the law should be clarified. There is little or no reason why questions of law should not be decided on the merits.

In other areas, the Supreme Court has been more clear and precise. It has consistently held that such equitable relief does not issue "strictly as a matter of right"[127] and that preliminary injunctions are within the sound discretion of the district court, even in the face of statutes that appear to alter the district court's power to offer such relief.[128] The standard of appellate review is "whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion."[129]

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121. *Id*. at 34.

122. 473 U.S. 305 (1985).

123. *Id*. at 335.

124. 531 U.S. 32 (2000).

125. *Id*. at 48.

126. *Id*. at 36.

127. Yakus v. United States, 321 U.S. 414, 440 (1944); Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

128. *See Weinberger*, 456 U.S. at 331 (finding that the Federal Water Pollution Control Act does not remove the district court's discretion in forming an equitable remedy, such as an injunction); *see also Yakus*, 321 U.S. at 440 (holding that the Emergency Price Control Act did not relieve the court of its injunctive powers); Hecht Co. v. Bowles, 321 U.S. 321, 328 (1944) (preserving the court's discretion even where the statute said an injunction "shall" be granted).

129. Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975).

In 1999, the Supreme Court did not take advantage of the opportunity to clarify the standard for granting preliminary injunctive relief when it decided *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc*.[130] In *Grupo Mexicano*, the Court addressed whether a district court had the authority to issue a preliminary injunction barring a defendant from assigning assets that would render it incapable of satisfying the plaintiff's claim.[131] In holding that the district court lacked that authority, the Supreme Court concluded that the equitable powers of federal courts to issue preliminary injunctions under Rule 65 are limited by the Judiciary Act of 1789.[132] The Court then analyzed whether the particular injunctive relief sought was available at the time the Judiciary Act was passed and decided that it was not.[133] In taking this historical approach, the Court did not apply traditional equitable principles to determine the propriety of the preliminary injunction.[134] The Court thus failed to articulate the appropriate standard for granting preliminary injunctive relief. As a result, the lower courts remain without a uniform standard.

### *B. Courts of Appeals Standards*

The standard of review for the district court's grant or denial of a preliminary injunction is abuse of discretion.[135] In reviewing a district court's finding for abuse of discretion, the Supreme Court typically refers to "the applicable standard" for granting a preliminary injunction, in reference to the standard used in a particular circuit.[136] Because the Supreme Court has not announced a uniform standard, the various courts of appeals have developed an assortment of varying

130. 527 U.S. 308 (1999).

131. *Id*. at 310.

132. *Id*. at 318.

133. *Id*. at 333.

134. *See id*. at 322 ("We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief.").

135. Thornburg v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 757 (1986), *overruled on other grounds by* Planned Parenthood v. Casey, 505 U.S. 833, 870 (1992).

136. *See* Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975) (noting that "the standard of appellate review is simply whether . . . in the light of the applicable standard" the relief "constituted an abuse of discretion"); *see also* Univ. of Tex. v. Camenisch, 451 U.S. 390, 392 (1981) (employing the Fifth Circuit test to determine whether the district court and Fifth Circuit properly granted an injunction).

standards. An examination of these standards illustrates the extent to which they differ.

In terms of the various approaches they have implemented, the circuits can be divided into distinct groups. The largest group utilizes some version of the traditional four-part test in determining the appropriateness of granting a preliminary injunction. This approach is implemented by the First,[137] Third,[138] Fourth,[139] Fifth,[140] Sixth,[141] Eighth,[142] Tenth,[143] Eleventh,[144] D.C.,[145] and Federal[146] Circuits. The second group employs a two-part test that focuses on a balancing of the different factors. Included in this group are the Second[147] and Ninth[148] Circuits. Finally, the Seventh Circuit uses a sliding-scale method in which a five-part test is implemented. Under this analysis, the better the prospect that the plaintiff will succeed on the merits, the less the balance of harm must weigh in the plaintiff's favor, and conversely, if the likelihood of success on the merits is weak, the more the balance of harms must weigh in the plaintiff's favor.[149] However, this final standard in many ways resembles the two-part test used by the Second and Ninth Circuits.

Within the different standards used, variations of the tests are exhibited. For example, the issue of success on the merits is generally one of the factors under all approaches. However, this issue is decided in many different ways, ranging among a "probability" of success, a "likelihood" of success, a "possibility" of success, "raising a serious

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137. *See* Acevedo-Garcia v. Vera-Monroig, 296 F.3d 13, 16 (1st Cir. 2002).

138. *See* Swartzwelder v. McNeilly, 297 F.3d 228, 234 (3d Cir. 2002).

139. *See* Safety-Kleen v. Wyche, 274 F.3d 846, 858-59 (4th Cir. 2001).

140. *See* Walgreen Co. v. Hood, 275 F.3d 475, 477 (5th Cir. 2001).

141. *See* County Sec. Agency v. Ohio Dep't of Commerce, 296 F.3d 477, 485 (6th Cir. 2002).

142. *See* Entergy, Ark., Inc. v. Nebraska, 210 F.3d 887, 898 (8th Cir. 2000).

143. *See* Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001).

144. *See* Palmer v. Braun, 287 F.3d 1325, 1329 (11th Cir. 2002).

145. *See* Al-Fayed v. Cent. Intelligence Agency, 254 F.3d 300, 304 (D.C. Cir. 2001).

146. *See* Jack Guttman, Inc. v. Kopykake Enters., Inc., 302 F.3d 1352, 1356 (Fed. Cir. 2002).

147. *See* Random House, Inc. v. Rosetta Books LLC, 283 F.3d 490, 491 (2d Cir. 2002).

148. *See* Sammartano v. First Judicial Dist. Court *ex rel* County of Carson City, 303 F.3d 959, 965 (9th Cir. 2002).

149. *See* Promatek Indus., Ltd. v. Equitrac, 300 F.3d 808, 811 (7th Cir. 2002).

question" going to the merits, and a "better than negligible" chance of success.[150]

This can greatly influence the outcome of the hearing, because a movant will obviously have an easier time proving a "better than negligible" chance of prevailing on the merits than a "probability" of success. These differences may lead a plaintiff to forum shop, seeking the most favorable standard for obtaining a preliminary injunction.

Although the inconsistency among the various circuits is wide-ranging, the courts do agree on three basic points: (1) the primary purpose of the preliminary injunction is to maintain the status quo so that the court can later grant adequate relief following a trial on the merits, (2) the district court has broad discretion in granting or denying a preliminary injunction, and (3) a preliminary injunction is considered an extraordinary remedy that should be used sparingly by the court.[151]

### *C. Traditional Four-Part Test*

As just explained, nine of the twelve circuits apply some version of the traditional four-part standard when deciding whether to grant a preliminary injunction. Within this group, some circuits use the four factors as considerations to be weighed by the court, while others treat them as elements that must be proven in order for the movant to succeed on the motion.

#### 1. Analysis Under the Balancing Approach

The First, Third, Fourth, Sixth, Eighth, Tenth, and D.C. Circuits all use some method of balancing the four traditional factors. Some circuits weigh all the factors, while others treat one or two of the factors as threshold issues and weigh the others. The circuits that use a threshold approach as to one or two of the factors are referred to as "hybrids" of the balancing and element circuits. The Eighth Circuit considers the four traditional factors—probability of success on the merits, threat of irreparable harm to the movant, balance between that harm and the injury that granting the injunction will inflict on the other interested parties, and whether the issuance of the injunction is in the public interest—but a party need not establish each factor.[152] While

150. *See infra* notes 197-201 and accompanying text.

151. Wolf, *supra* note 45, at 184.

152. United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1178-79 (8th Cir. 1998) (asserting that no single factor is determinative).

affirming the denial of a preliminary injunction, the court in *United Industries v. Clorox*[153] laid out the Eighth Circuit's standard for preliminary injunctions when it said: "No single factor in itself is dispositive; rather, each factor must be considered to determine whether the balance of equities weighs toward granting the injunction."[154] The court began by analyzing whether the moving party could show a likelihood of success on the merits and noted:

> At the early stage of a preliminary injunction motion, the speculative nature of this particular inquiry militates against any wooden or mathematical application of the test. Instead, "a court should flexibly weigh the case's particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined."[155]

This test at first appears to be a very flexible in which the moving party need only have a strong showing on one or two of the factors, but a closer look reveals some confusion. After the court found that Clorox had not demonstrated a likelihood of success on the merits, it analyzed whether Clorox could show a threat of irreparable harm and noted that "failure to demonstrate the threat of irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction."[156] This statement appears to contradict the broader rule that no single factor is outcome-determinative, and it suggests that the irreparable harm factor may be a threshold that a moving party must pass before the remaining three are balanced. However, that suggestion was not implemented in *Clorox*. There, the court said that the balance of harms and the public interest, the third and fourth factors, were insufficient to tip the balance of equities when Clorox could not show that it was likely to succeed on the merits.[157] Thus, the court discussed

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153. 140 F.3d 1175 (8th Cir. 1998).

154. *Id*. at 1179.

155. *Id*. at 1179 (quoting Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc., 815 F.2d 500, 503 (8th Cir. 1987) (quoting Dataphase Sys., Inc. v. C.L. Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981))) (citation omitted).

156. *Id*. at 1183.

157. *Id*. at 1184. The Eighth Circuit denied another preliminary injunction on the

all factors rather than denying the preliminary injunction outright after having found no irreparable injury. In sum, the Eighth Circuit balances the four factors to determine whether equity requires a preliminary injunction. No factor alone will tip the balance, except in a case in which there is no threat of irreparable harm.

The District of Columbia Circuit also balances the four traditional factors when deciding a preliminary injunction motion, as demonstrated in *Al-Fayed v. Central Intelligence Agency*.[158] Regrettably, within the D.C. Circuit, there is confusion as to how the factors are to be balanced against each other. For example, in establishing that the four factors must be weighed against each other, the *Al-Fayed* court cites an earlier D.C. Circuit case, *Serono Laboratories v. Shalala*.[159] The *Serono* court had weighed the factors against each other using a sliding scale—a method that will be discussed later.[160] The *Al-Fayed* court made no mention of implementing a sliding scale.

In *Serono*, the court reversed the district court's grant of a preliminary injunction after discussing all four factors.[161] The court said this of the four considerations: "These factors interrelate on a sliding scale and must be balanced against each other. 'If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.'"[162] The *Serono* case was initiated as a challenge to the FDA's approval of a generic form of a drug by the manufacturer of the name brand version of the drug.[163] As in *Clorox*, the court began by analyzing whether the movant had a substantial likelihood of success.[164] After discussing the validity of the FDA's interpretation of the statute governing generic drug approval, the court concluded that the FDA's interpretation was reasonable and that the plaintiff, Serono, was unlikely to succeed on the merits.[165]

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same grounds in *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 603 (8th Cir. 1999).

158. 254 F.3d 300, 303 (D.C. Cir. 2001).

159. *Id*. (citing Serono Labs., Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998)).

160. Serono Labs., Inc. v. Shalala, 158 F.3d 1313, 1318 (D.C. Cir. 1998).

161. *Id*. at 1327.

162. *Id*. at 1318 (quoting CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995)).

163. *Id*. at 1315.

164. *Id*. at 1318.

165. *Serono Labs.*, 158 F.3d at 1326.

The court went on to discuss the other factors briefly, but prefaced this discussion by stating, "[O]ur conclusion that Serono is not likely to succeed on the merits effectively decides the preliminary injunction issue. Here, the other preliminary injunction factors—injury to Serono, injury to Ferring [the defendant-intervenor], and the public interest—either are a wash or are inextricably linked to the merits."[166] Thus, the court found that the irreparable injury suffered by Serono was equally matched by the injury the defendant Ferring would suffer if the injunction were granted, and it cited authority indicating that the best approach in such an instance is to focus on the outcome on the merits of the case.[167]

The court's analysis of the final factor, the public interest, again was intertwined with the merits of the case. The purpose of the statute at issue in *Serono* was to provide competition in the drug industry by creating an avenue for the approval of generic drugs.[168] Thus, if the FDA properly approved the drug, the public purpose of providing generic drugs was met. On the other hand, if the drug did not meet proper safety standards then the public interest weighed in favor of the injunction.[169] Based on the record, the court found that there were no safety concerns and that the FDA approval was proper; thus, the injunction was not proper.[170] This case provides an example of an analysis of the factors in which one factor weighs so heavily in favor of denying an injunction that it outweighs all others.

The outcome in *Serono* is similar to an outcome in the First Circuit, which expressly states that although all four factors are considered, "[t]he sine qua non of this four part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiousity."[171] Although the outcome in a particular case may be the same in the First and D.C. Circuits, the test is different because the D.C. Circuit will weigh all factors, but the First Circuit appears to use

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166. *Id*.

167. *Id*. (citing Del. & Hudson Ry. Co. v. United Transp. Union, 450 F.2d 603, 620 (D.C. Cir. 1971)).

168. *Id*.

169. *Id*.

170. *Serono Labs.*, 158 F.3d at 1327.

171. New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002).

the first factor as a threshold the plaintiff must cross before the court considers the remaining factors.

Although the Third Circuit also considers the four factors under the traditional test, its analysis of those factors is inconsistent. The circuit has contemporaneously applied two different tests to determine whether to grant a preliminary injunction. Under one test the court considers or balances the four traditional factors.[172] In other cases, the court has articulated a second test requiring the moving party to show "both a likelihood of success on the merits and a probability of irreparable harm. Additionally, the district court should consider the effect of the issuance of a preliminary injunction on other interested persons and the public interest."[173]

This second test is a hybrid of the test used by the circuits requiring a showing of all factors as elements and the balancing test used by the Eighth and D.C. Circuits. It is not a pure balancing in which the court considers the four factors, but one in which the movant must show the first two traditional factors and the court balances the other two.

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172. Gerardi v. Pelullo, 16 F.3d 1363, 1373 (3d Cir. 1994). The *Gerardi* court held: "In our review we recognize that in deciding whether to issue a preliminary injunction, a district court[] must carefully weigh four factors . . . ." *Id*. It then went on to name the four traditional factors to be weighed. *Id*. This test was again articulated much later in *Swartzwelder v. McNeilly*, 297 F.3d 228, 234 (3d Cir. 2002), and *Silver Leaf, LLC v. Tasty Fries, Inc.*, No. 02-2767, 2002 WL 31424691, at *2 (3d Cir. Oct. 30, 2002). In *Silver Leaf* the court stated, "We begin with the well-established framework guiding the issuance of a preliminary injunction. Four factors must be balanced when determining whether a preliminary injunction is warranted . . . ." *Silver Leaf*, 2002 WL 31424691, at *2. The court then went on to list the four factors to be considered. *Id*.

173. Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 90-91 (3d Cir. 1992) (quoting Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1175 (3d Cir. 1990) (citations omitted)); *see also* State of New Jersey, Dep't of Envtl. Prot. & Energy v. Long Island Power Auth., 30 F.3d 403, 423 (3d Cir. 1994); Adams v. Freedom Forge Corp., 204 F.3d 475, 484 (3d Cir. 2000). In *Adams* the court stated:

> In order to obtain a preliminary injunction, plaintiffs must show both (1) that they are likely to experience irreparable harm without an injunction and (2) that they are reasonably likely to succeed on the merits. A court may not grant this kind of injunctive relief without satisfying these requirements, regardless of what the equities seem to require. If relevant, the court should also examine the likelihood of irreparable harm to the nonmoving party and whether the injunction serves the public interest.

*Adams*, 204 F.3d at 484 (citations omitted).

The Tenth Circuit's test also uses a hybrid of the balancing test and the stricter elemental test. In an ordinary case the movant must establish all four traditional factors,[174] similar to the Eleventh Circuit approach discussed below. However, an exception is granted. If the party seeking the injunction can establish the last three factors (irreparable harm, potential injury to the movant outweighs the injury to the nonmovant, and issuance of the preliminary injunction will not adversely affect the public interest), then he needs to show only "that there are 'questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'"[175] This second option is a more lenient standard that does not require the moving party to show that it has a substantial likelihood of prevailing on the merits.[176] In three specific cases, however, the exception will not be applied; these are instances in which preliminary injunctions are disfavored by the courts.[177] The three types of preliminary injunctions disfavored by the Tenth Circuit are (1) those affording the movant substantially all of the relief he might recover on a full trial on the merits, (2) those disturbing the status quo, and (3) those that are mandatory as opposed to prohibitory injunctions.[178] For instance, in *Prairie Band of Potawatomi Indians v. Pierce*,[179] the moving party was granted a preliminary injunction by the district court under the more lenient standard.[180] The defendant appealed, arguing that this was a case in which a preliminary injunction would grant the moving party substantially all of the relief sought and would alter the status quo (situations in which preliminary injunctions are disfavored by the courts); thus, the plaintiff should be required to meet the higher elemental standard to obtain the injunction.[181] The court rejected the first argument as waived, but stated in dicta that it would have rejected the argument. The court also

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174. Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1246 (10th Cir. 2001).

175. *Id*. at 1246-47 (quoting Federal Lands Legal Consortium v. United States, 195 F.3d 1190, 1194 (10th Cir. 1999)) (omission in original).

176. *Id*.

177. *Id*. at 1247 n.4.

178. *Id*.

179. 253 F.3d 1234 (10th Cir. 2001).

180. *Id*. at 1247-48.

181. *Id*.

rejected the status quo argument and affirmed the preliminary injunction, discussing all factors but applying the lower standard.[182]

This Tenth Circuit test represents a hybrid of the two tests because it uses a stricter element approach unless the movant can show the last three factors. The presence of these final three factors outweighs any requirement to demonstrate a substantial likelihood of success on the merits.

In addition to the circuits already discussed, the Fourth and Sixth Circuits also treat the traditional test as a number of factors to be considered, weighed, or balanced by the courts as opposed to elements that must be met.[183] The discussion exhibits that despite the similarities in the factors to be considered, there are significant differences in the method of analysis, all exacerbating the difficulty and confusion surrounding this area of law.

### 2. Analysis in Circuits Treating the Four Factors as Elements

In contrast to the seemingly flexible standards described above, the Eleventh, Fifth, and Federal Circuits have more rigid requirements. For instance, in *Horton v. City of St. Augustine*,[184] the Eleventh Circuit, considering the same four traditional factors, reversed a preliminary injunction after noting, "It is well established in this circuit that '[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the "burden of persuasion"' as to all four elements."[185] The plaintiff challenged the constitutionality of a local city ordinance banning street performances within a specified area of the city,[186] and he was granted a preliminary injunction by the district court.[187] The Eleventh Circuit began by analyzing whether the movant was likely to succeed on the merits and

182. *Id*. at 1253-57.

183. *See* Ciena Corp. v. Jarrard, 203 F.3d 312, 322 (4th Cir. 2000); Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, 274 F.3d 377, 400 (6th Cir. 2001).

184. 272 F.3d 1318 (11th Cir. 2001).

185. *Id*. at 1326 (quoting Siegel v. Lepore, 234 F.3d 1163, 1176 (11th Cir. 2000)) (alteration in original). The Fifth and Tenth Circuits also require that all four elements be shown by the moving party. Walgreen Co. v. Hood, 275 F.3d 475, 477 (5th Cir. 2001); Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001).

186. *Horton*, 272 F.3d at 1322.

187. *Id*. at 1323.

determined, contrary to the district court, that he was not.[188] The court then reversed and denied the preliminary injunction without the need to analyze the other factors, because the plaintiff had failed to show one essential element.[189]

The Fifth Circuit's analysis in *Walgreen Co. v. Hood*[190] is similar to the Eleventh Circuit's analysis. In *Walgreen*, a pharmacy chain brought an action against the state alleging that its reimbursement of chain pharmacies for Medicaid prescriptions was less than that paid to independent pharmacies, violating the Social Security Act.[191] Both the district court and the Fifth Circuit found that the pharmacy was not an intended beneficiary of the Act and thus had no cause of action and was unlikely to succeed on the merits.[192] Having decided that the plaintiff had no likelihood of success, the court ended its inquiry and denied the preliminary injunction.[193] No other factors were considered.[194] The outcome of these cases may have been the same in circuits such as the First, where the likelihood of success on the merits was treated as a threshold test; however, it may have been different in the circuits that analyzed and balanced all four of the factors.

For instance, had the plaintiff in *Horton* challenged the same street performer ordinance in St. Louis, Missouri (in the Eighth Circuit) instead of St. Augustine, Florida (in the Eleventh Circuit), he might have received the injunction he was seeking. The Eighth Circuit would have considered whether Horton would suffer irreparable injury by being restrained in exercising his freedom of speech. The court would also have considered the public interest involved in the exercise of free speech, a fundamental constitutional right. Consideration of the balance of harms might also have led the Eighth Circuit to grant the injunction because the harm to Horton's First Amendment rights could

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188. *Id*. at 1334.

189. *Id*.

190. 275 F.3d 475 (5th Cir. 2001).

191. *Id*. at 476-77.

192. *Id*. at 478.

193. *Id*. While the Fifth Circuit, here, used the lack of a likelihood of success to deny a preliminary injunction, the Federal Circuit has used it differently. Although the Federal Circuit also uses an elemental approach, requiring a party to show all four elements, a "clear showing of likely success on the merits entitles a patentee to a rebuttable presumption of irreparable harm." Jack Guttman, Inc. v. Kopykake Enters., Inc., 302 F.3d 1352, 1356 n(Fed. Cir. 2002).

194. *Id*. at 477-78.

outweigh the city's interest in eliminating traffic and congestion in the area. Thus, the Eighth Circuit might have been more likely to grant a preliminary injunction after analyzing all four factors, whereas the Eleventh Circuit denied it after analyzing only one factor. These cases illustrate that the manner in which a court analyzes the factors may produce varying results on a given case.

### 3. Other Differences in Analysis Among the Circuits Using the Traditional Test

In addition to the ways the circuits weigh the factors, they have different standards for considering individual factors. For instance, when analyzing the second factor, irreparable harm, the Fifth Circuit requires the movant to prove that there is a "substantial threat" that the party will suffer irreparable harm if the injunction is not granted, a component that is required only in the Fifth and Eleventh Circuits.[195] In contrast, the Sixth Circuit requires only that the court consider "whether the plaintiff *may suffer* irreparable harm absent the injunction."[196]

A more blatant example of disparity includes the many different ways in which the circuits in this group evaluate the first element, success on the merits. Four circuits in this group require that the movant demonstrate a "substantial likelihood" of success on the merits.[197] Two circuits require a showing of a mere "likelihood" of success on the merits.[198] The final three circuits in this group require one of the following: a "probability,"[199] a "reasonable probability,"[200] or a "strong showing"[201] of success on the merits.

Another disparity in this group is a bit more subtle. Normally the third factor of the traditional four-part test requires a court to balance the harms between the plaintiff and defendant if the injunction

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195. *See Walgreen*, 275 F.3d at 477; Palmer v. Braun, 287 F.3d 1325, 1329 (11th Cir. 2002).

196. Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, 274 F.3d 377, 400 (6th Cir. 2001) (emphasis added).

197. *See Walgreen*, 275 F.3d at 477; Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001); *Palmer*, 287 F.3d at 1329; Al-Fayed v. Cent. Intelligence Agency, 254 F.3d 300, 303 (D.C. Cir. 2001).

198. *See* Safety-Kleen v. Wyche, 274 F.3d 846, 858-59 (4th Cir. 2001); County Sec. Agency v. Ohio Dep't of Commerce, 296 F.3d 477, 485 (6th Cir. 2002).

199. *See* Entergy, Ark., Inc. v. Nebraska, 210 F.3d 887, 898 (8th Cir. 2000).

200. *See* Swartzwelder v. McNeilly, 297 F.3d 228, 234 (3d Cir. 2002).

201. *See* Acevedo-Garcia v. Vera-Monroig, 296 F.3d 13, 16 n.3 (1st Cir. 2002).

is allowed.[202] Versions of this approach are embraced by the Third, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits, all of which state that a district court should balance the threat of irreparable harm to the moving party against the harm to another party, typically the non-moving party.[203] It must also be noted that within this third factor, two circuits require the district court to consider whether the injunction substantially injures the opposing party, as opposed to merely causing harm.[204] However, the potential harm is not always measured against the opposing party. For example, the Sixth Circuit requires courts to consider whether the injunction will cause substantial harm to others.[205] Whom the term includes was not defined by the Sixth Circuit,[206] but that Circuit is not alone in its approach. Three additional circuits in this group balance harms against "others" or "other interested parties" as well.[207]

Not only is there inconsistency among the various circuits, but there is also often conflict within an individual circuit as to the appropriate standard to apply. After initially adopting a two-part test most often associated with the Second and Ninth Circuits, the Eighth Circuit subsequently adopted its current four-part test when it decided *Dataphase Systems, Inc. v. C L Systems, Inc.*[208] In doing so, the en banc *Dataphase* court acknowledged the confusion of the different tests being applied, but stated that "no matter what the verbal formulation, the relevant factors for consideration remain the same."[209] Although most commentators and practitioners would likely disagree with that

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202. *See Entergy*, 210 F.3d at 898.

203. *See Swartzwelder*, 297 F.3d at 234; County Sec. Agency v. Ohio Dep't of Commerce, 296 F.3d 477, 485 (6th Cir. 2002); Palmer v. Braun, 287 F.3d 1325, 1329 (11th Cir. 2002); Walgreen Co. v. Hood, 275 F.3d 475, 477 (5th Cir. 2001); Safety-Kleen v. Wyche, 274 F.3d 846, 858-59 (4th Cir. 2001); Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001); *Entergy*, 210 F.3d at 898.

204. *See County Sec. Agency*, 296 F.3d at 485; *Al-Fayed*, 254 F.3d at 303.

205. *See County Sec. Agency*, 296 F.3d at 485 (explaining that a district court errs in granting a preliminary injunction if "others" will be substantially harmed by the injunction).

206. *See id*.

207. *See* Acevedo-Garcia v. Vera-Monroig, 296 F.3d 13, 16 n.3 (1st Cir. 2002); *Entergy*, 210 F.3d at 898; Al-Fayed v. Cent. Intelligence Agency, 254 F.3d 300, 303 (D.C. Cir. 2001).

208. 640 F.2d 109 (8th Cir. 1981) (en banc).

209. *Id*. at 113.

generalization,[210] the courts within the Eighth Circuit continue to follow the four-part test or "*Dataphase* factors."[211]

The Third Circuit's application of two different standards at the same time also illustrates the confusion of the test for a preliminary injunction. Although most cases apply the test balancing all four factors, the threshold showing test has been used throughout the same time period.[212]

The Eighth Circuit's *Dataphase* decision is a good example of what a court of appeals should do when it sees that there is a conflict within a circuit. Upon realizing a conflict as to the standard, the court should convene en banc and establish one standard for the entire circuit. In the absence of a clear direction from the Supreme Court, each circuit should ensure that its standard is clear.

### *D. Two-Part and Three-Part Tests*

Another variation on the standard for preliminary injunctions is used by courts within the Second and Ninth Circuits, where three- and two-part alternatives or balancing tests are implemented to determine whether to grant the motion.[213] In 1979, the Second Circuit in *Jackson Dairy, Inc. v. H.P. Hood & Sons*[214] set out the standard that it still utilizes today, which requires an alternative showing of: (1) irreparable harm; and (2) either a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for

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210. *See* Leubsdorf, *supra* note 12, at 525 (noting that the diverse standards "rest on no coherent theory about the purpose of preliminary relief" and establish differing goals in different jurisdictions); Vaughn, *supra* note 15, at 840-41 (explaining that commentators agree that the lack of uniformity in preliminary injunction standards has led to "confusion" and "havoc" in litigation).

211. Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc., 182 F.3d 598, 601 (8th Cir. 1999).

212. *See* notes 173-74 and accompanying text.

213. *See* Random House, Inc. v. Rosetta Books LLC, 283 F.3d 490, 491 (2d Cir. 2002) (noting that the moving party must establish "either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor"); Sammartano v. First Judicial Dist. Court *ex rel* County of Carson City, 303 F.3d 959, 965 (9th Cir. 2002) ("'Preliminary injunctive relief is available to a party who demonstrates either (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor.'") (quoting A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001)).

214. 596 F.2d 70 (2d Cir. 1979).

litigation, in addition to a balance of hardships that tips decidedly toward the movant.[215] The court in *Jackson Dairy* stated, "[T]he nature and extent of the threat of irreparable injury required for relief in any given case will vary according to the likelihood of success on the merits; the weaker the case on the merits, the stronger must be the showing of threat of irreparable injury."[216] The *Jackson Dairy* three-part test, which in some ways resembles the sliding scale method discussed later, continues to be employed, although some courts in the Second Circuit also give weight to the public interest.[217] The *Jackson Dairy* standard still applies, however, as evidenced by the recent Second Circuit decision in *Random House, Inc. v. Rosetta Books LLC*.[218]

The Ninth Circuit has adopted a two-part standard to decide whether to grant a preliminary injunction, as explained in *Sammartano v. First Judicial District Court ex rel County of Carson City*.[219] The *Sammartano* court concluded that preliminary injunctive relief is available to the moving party if it demonstrates either: "'(1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor.'"[220]

While the Second and Ninth Circuit tests appear to be similar at first glance, a closer look reveals the same conflicts that were demonstrated within the circuits using the traditional four-part approach. The two circuits require the moving party to establish different factors to succeed on the motion. The Second Circuit calls for a showing of irreparable harm if the injunction is not granted and either a likelihood of success on the merits or a showing of sufficiently serious questions going to the merits and a balance of hardships in the movant's favor.[221] The Ninth Circuit is different because it requires the movant to show a combination of probable success on the merits and

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215. *Id*. at 72.

216. *Id*. at 74 (Mansfield, J., concurring).

217. *See* Brenntag Int'l Chems., Inc. v. Bank of India, 175 F.3d 245, 249 (2d Cir. 1999); *see also* Blum v. Schlegel, 18 F.3d 1005, 1010 (2d Cir. 1994).

218. 283 F.3d 490, 491 (2d Cir. 2002).

219. 303 F.3d 959, 965 (9th Cir. 2002).

220. *Id*. at 965 (quoting A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001)).

221. *See Random House*, 283 F.3d at 491.

the possibility of irreparable harm, or a showing that serious questions were raised and that the balance of hardships weigh in its favor.[222] Therefore, in the Ninth Circuit a movant can prevail by demonstrating success on two alternative balancing tests, one involving probable success on the merits and the possibility of irreparable harm and the other involving a weighing of serious questions raised on the merits and the balance of hardships. Under these circumstances, it is possible that a party can obtain a preliminary injunction by making out a strong showing on only two of the four traditional factors, without regard to the other two factors. There is a heavier burden on the movant in the Second Circuit because it must address three of the traditional factors.

### *E. Seventh Circuit Sliding Scale Method*

The Court of Appeals for the Seventh Circuit applies a preliminary injunction standard that is similar to that in the Second and Ninth Circuits, but it adds a third, arguably a fourth, and possibly a fifth, factor in its determination. In the mid-1980s, Judge Richard Posner commented in *Roland Machinery Co. v. Dresser Industries, Inc.*,[223] that the standard for granting a preliminary injunction, as well as the standard of review of such a grant, was "in disarray in both this and other circuits."[224] Judge Posner analyzed the Seventh Circuit's authority to determine what the correct standard was and how it should be applied, and he concluded that a five-part test should be used.[225] Under this method the movant must show (1) that he has no adequate remedy at law, (2) that he will suffer irreparable harm, (3) the harm the nonmovant will suffer by the issuance of the injunction—harm that cannot be remedied by the nonmovant prevailing or be fully compensated by the bond, (4) the likelihood of the movant's success on the merits, and (5) if the movant does show some likelihood of success, the less he is required to show that the balance of harms weigh in his favor, and vice versa.[226] Furthermore, Judge Posner suggested that the preliminary injunction will have an impact beyond the immediate parties.[227] In these cases, the public interest must be "reckoned into"

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222. *See Sammartano*, 303 F.3d at 965.

223. 749 F.2d 380 (7th Cir. 1984).

224. *See id*. at 382 (listing and expounding upon the various statements of the standard found in Seventh Circuit precedents).

225. *Id*. at 383.

226. *Id*. at 386-87.

227. *Id*. at 388.

the balance of harms.[228] Judge Posner also set out a formula to determine if a preliminary injunction was properly granted.[229] Today the Seventh Circuit still applies the standard originally described by Judge Posner in *Roland*, requiring the district courts to weigh the factors using a sliding scale.[230]

Unfortunately, even within the Seventh Circuit there is division in the application of the preliminary injunction standard. *Jones v. InfoCure Corporation*,[231] a recent Seventh Circuit case, made no mention of the sliding scale test. Although it required the movant to demonstrate the primary factors that previous cases had mandated, the *Jones* court ignored the sliding scale method.[232] The test was articulated differently from *Roland*, but its substance was the same. The court said,

> In considering a motion for a preliminary injunction, a district court evaluates whether the moving party has shown (1) a reasonable likelihood of success on the merits of the underlying claim; (2) no adequate remedy at law; and (3) irreparable harm if the injunction is not granted. If an evaluation of these three points indicates that an injunction might be proper, the court then weighs the potential harms to the parties and takes into account public interest considerations.[233]

In another case, the Seventh Circuit again ignored the sliding scale test and held that "in order to prevail, the plaintiff must satisfy each element of this five-part test."[234] The five-part test includes (1) a reasonable likelihood of success, (2) no adequate remedy at law, (3)

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228. *Roland*, 749 F.2d at 388.

229. *Id*. at 388.

230. *See* Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 12 (7th Cir. 1992) (describing its approach as "the 'sliding scale' approach: the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side"); Promatek Indus. Ltd. v. Equitrac, Corp., 300 F.3d 808, 811 (7th Cir. 2002) (describing the "sliding-scale approach").

231. 310 F.3d 529 (7th Cir. 2002).

232. *See id*. at 534.

233. *Id*. (citation omitted).

234. Rust Env't & Infrastructure, Inc. v. Teunissen, 131 F.3d 1210, 1213 (7th Cir. 1997).

irreparable harm, (4) irreparable harm to the movant outweighs the harm to the non-movant, and (5) the public interest will not be harmed.[235] In addition, the court cited *Roland* for authority that the plaintiff had to show each individual factor,[236] seeming to ignore authority after *Roland* indicating that the court uses a sliding scale approach. While it is true that the Seventh Circuit typically uses the five-part sliding scale method, in light of the previous examples there is no guarantee that a consistent standard will be applied in the Seventh Circuit when deciding motions for preliminary injunctions.

## V. PROBLEMS CREATED BY LACK OF A UNIFORM STANDARD

### *A. Inconsistent Judgments*

An examination of a typical trademark case demonstrates the problems parties and trial courts face in attempting to decipher and apply standards for a preliminary injunction motion. In *Eli Lilly & Co. v. Natural Answers, Inc*.,[237] the Seventh Circuit affirmed a preliminary injunction entered against the defendant to stop the use of the name "HERBROZAC" in connection with the sale of its herbal dietary supplement.[238] Just one month later, in *Barbecue Marx, Inc. v. 551 Ogden, Inc*.,[239] a different Seventh Circuit panel reversed the trial court's grant of a preliminary injunction that enjoined the defendant from using the name "BONE DADDY" in connection with a forthcoming barbecue restaurant because it was too closely related to the plaintiff's "SMOKE DADDY" restaurant.[240]

In *Eli Lilly* the court observed the standard for deciding a motion for preliminary injunction was "well-established and need not be restated at length."[241] In order to succeed in *Eli Lilly*, the plaintiff was required to establish "a likelihood of success on the merits."[242] Conversely, in *Barbecue Marx* the plaintiff was required to show only

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235. *Id*. Although the court appears to be modifying the test, some may argue that the sliding scale is an expansion of the fourth factor.

236. *Id*.

237. 233 F.3d 456 (7th Cir. 2000).

238. *Id*. at 469.

239. 235 F.3d 1041 (7th Cir. 2000).

240. *See id*. Note that one judge was common to both the *Eli Lilly* and *Barbecue Marx* panels.

241. *Eli Lilly*, 233 F.3d at 461.

242. *Id*.

"a greater than negligible chance of prevailing on the merits"[243] to meet the reasonable likelihood of success standard. In both cases the court applied a seven-factor Lanham Act test to assess the likelihood of consumer confusion, and both opinions spent little time on the issue of balance of harms or the public interest.[244] However, it is unmistakable that "a likelihood of success on the merits" standard and "a greater than negligible chance of prevailing on the merits" standard are not the same, thereby creating widespread confusion and potentially leading to inconsistent results depending on the panel. This confusion is multiplied when one looks at the variety of standards that exist among the circuits.

### *B. Inequitable Decisions*

One of the district court's most substantial powers is the ability to issue a preliminary injunction without fully considering the merits of a case.[245] It is doubtful that the additional time or money to prepare the last-discussed Seventh Circuit cases for a trial on the merits would have been significantly more than what was spent on the preliminary injunction, given that the court was required to consider and apply all seven Lanham Act factors. Under these circumstances, proceeding directly to a trial on the merits is preferable and should be encouraged by the district court.

It is difficult to understand why a party who is seeking the "very serious remedy" of an injunction should be held to a significantly lower standard on the merits than the party would have to establish at a trial on the merits. Why should a party with "a greater than negligible chance of prevailing on the merits," say 25%, be able to obtain injunctive relief when a party who makes out a 25% case loses at trial? The threat of irreparable harm is usually no different at a trial on the merits than it is at a preliminary injunction. What sense does it make to permit preliminary injunctive relief when permanent injunctive relief would clearly not be allowed? A party should be required to make out at least a 50% chance of winning before a preliminary injunction is granted. Otherwise, parties with weak cases will be encouraged to seek

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243. *Barbecue Marx*, 235 F.3d at 1043.

244. *Id*. at 1043-44; *Eli Lilly*, 233 F.3d at 461.

245. *The Supreme Court, 1998 Term—Leading Cases*, 113 HARV. L. REV. 316, 316 (1999).

preliminary injunctive relief in cases where permanent relief may not be possible. Once a preliminary injunction is obtained, the case may be over for all practical purposes, because many parties cannot afford two rounds of trials and appeals or because the event which prompts the litigation may be over before a second hearing for a trial on the merits can be held.

Furthermore, a low standard, such as raising a "serious question" or demonstrating "a greater than negligible chance of prevailing on the merits," encourages additional litigation because neither the winning nor the losing side on the motion for a preliminary injunction is able to predict the likely outcome of the litigation on the merits. If a party must show at least a 50% chance of prevailing, then the decision on the preliminary injunction helps the parties evaluate their positions. Requiring a higher standard is particularly important in those cases in which full-blown evidentiary hearings are conducted because the proofs are generally substantially similar between a full-blown preliminary injunction hearing and a trial on the merits.

It is difficult for attorneys to counsel their clients and predict the way a judge may rule when the legal principles on which the court must base its discretion are unclear, ambiguous, and rife with contradiction. The most the attorney can predict is that the judge will apply the principles of the circuit in which the case is pending. However, the problem remains. There is no uniform standard, and the application of the principles varies from circuit to circuit and within some circuits.

### *C. The Supreme Court Should Articulate a Uniform Standard*

Parties and judges would benefit greatly from the Supreme Court's articulation of a clear standard to be applied in deciding preliminary injunction motions. The failure to adopt such a standard has led to confusion by the courts and possible forum shopping by parties. The standard should define the elements necessary for obtaining a preliminary injunction and provide guidance as to how those standards should apply while providing trial courts with necessary discretion.

The Supreme Court should permit the final decision of countenancing questions of law raised during a preliminary injunction proceeding. Currently the Supreme Court holds that questions of law

considered in preliminary injunctions are tentative,[246] but no reason appears for that holding.[247] Where legal issues predominate, there appears to be little reason why legal issues cannot be finally decided. In any event, procedures should be clarified to enable parties and judges to know whether questions of law can be decided.

In addition, the Supreme Court should clarify the relationship between the threat of irreparable harm and the likelihood of success on the merits. Are these tests to be quantified? If so, how does the quantification take place? For example, must a party demonstrate at least a 50% chance of succeeding on the merits in all cases, or can a party with a 25% chance of prevailing on the merits still obtain injunctive relief in the face of a 90% chance of irreparable harm? These issues have serious implications for lawyers in formulating litigation strategies for their clients and for judges in facing the adjudication of these issues.

## VI. A WORKABLE SOLUTION: PROMOTING AN EXPEDITED TRIAL ON THE MERITS AND DEVELOPING UNIFORM STANDARDS

### *A. Promoting an Expedited Trial on the Merits*

The complex nature of the preliminary injunction motion and the opinion writing that accompanies the hearing provides parties and the court with substantial factors to consider before proceeding with the motion. Therefore, the motion for a preliminary injunction should be considered a last resort. A court should encourage parties to proceed to a trial on the merits and avoid the preliminary injunction motion whenever possible. Thus, it may be productive for a court to attempt to work out some form of agreed standstill order with an understanding to expedite discovery and the ultimate trial on the merits. Often the matters litigated in the preliminary injunction hearing will be identical to those raised at a trial on the merits. If the court conducts a full-

246. Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.").

247. The Supreme Court is inconsistent in applying this standard. Sometimes the Court decides the legal issue on the merits, while at other times it applies the preliminary injunction standard. For further discussion, see *supra* notes 115-26 and accompanying text.

blown evidentiary hearing and must go through the exercise of preparing findings of fact and conclusions of law, it is a waste of judicial resources to repeat this exercise at a later date. Therefore, in most situations it would be more efficient to consolidate the trial on the merits with the motion for a preliminary injunction under Rule 65(a)(2).[248] Whenever possible, the court should raise this possibility with the parties.

The parties also have a number of factors to consider before seeking a preliminary injunction. A motion for a preliminary injunction entitles a party to priority on the court's calendar and also gives the plaintiff an element of surprise. In addition, depending upon the circuit in which a party is litigating, it may be easier to obtain a preliminary injunction than it is to obtain final relief. An early victory on such a motion may prove decisive because the defendant may not be able to afford multiple rounds of litigation after the energy and expense devoted to the preliminary injunction proceeding. Should the plaintiff lose the motion, the denial can be immediately appealed.

There are many risks associated with the plaintiff's decision to move for preliminary injunctive relief. For example, a plaintiff who obtains a preliminary injunction must post a bond to secure the defendant for any wrongful damages it suffers as a result of the injunction.[249] Because the amount of the bond is within the discretion of the trial judge, it may not be possible to forecast accurately the amount of the bond. If a plaintiff obtains a preliminary injunction but is unable to post a bond, the proceeding may be rendered moot. Another risk is that there is always the possibility that a party may have to incur the expense of two trials and two appeals—one for the preliminary injunction and the second for a trial on the merits—a problem for a plaintiff or defendant with limited resources. Also, the ultimate disposition of the case may be delayed in the event of an appeal of the preliminary injunction ruling, because it is not unusual for

248. D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 160-61 (2d Cir. 2002) (maintaining that the movant was not prejudiced when the district court consolidated the preliminary injunction hearing with a trial on the merits); Barden Detroit Casino, L.L.C. v. City of Detroit, 230 F.3d 848, 853 (6th Cir. 2000) (noting that the preliminary injunction hearing and the trial on the merits proceeded without objection); Am. Train Dispatchers Dep't of the Int'l Bhd. of Locomotive Eng'rs v. Fort Smith R.R. Co., 121 F.3d 267, 270 (7th Cir. 1997) (stating that the case involved only one legal issue and was ripe for final determination).

249. FED. R. CIV. P. 65(c).

the parties to await a ruling on the appeal from the injunction ruling before proceeding with a trial on the merits.

The defendant also has a number of factors to consider, the first of which is whether to oppose the motion. Much of the analysis mirrors that of the plaintiff. However, the defendant retains options as to how hard to resist the motion for a preliminary injunction. In a jurisdiction where the threshold is low, the defendant may consider allowing some form of injunctive relief in exchange for a large bond and an early date for a trial on the merits. The bond may create leverage against the plaintiff if the plaintiff faces a possibility of losing on the merits.

If time is of the essence, the parties should seriously consider persuading the court to allow an expedited trial on the merits. Going to a trial on the merits will eliminate the need for parties to argue two cases and present the evidence twice. In addition, if the nonmovant will suffer risks such as loss of business reputation or the inadequacy of the posted bond during the time a preliminary injunction is in force, he may benefit from an expedited trial on the merits.

To help counsel best determine whether to proceed with the preliminary injunction motion or with an expedited trial on the merits, the court should ask the parties questions such as these:

1. What is the urgency that requires a prompt hearing?

2. Can complete relief be provided if the case proceeds to an expedited trial on the merits?

3. Will the plaintiff be able to post an injunction bond?

4. Can a standstill agreement be worked out between the parties, with or without a bond?

5. How long will it take the parties to be ready for a trial on the merits?

6. How long will it take the parties to be ready for a preliminary injunction hearing?

7. Can the parties afford the possibility of two rounds of discovery, two trials, and two appeals?

8. Will there be a jury demand?

9. Does it make sense to bifurcate liability from the damages remedy?

10. How much time will a trial on the merits take compared to a hearing on the preliminary injunction?[250]

These questions help the court and the parties evaluate the true nature of the case, and often the parties will agree that an expedited trial is the better course.[251]

### *B. Continuing with the Preliminary Injunction Hearing: The Appropriate Standard To Apply*

If a litigant chooses to proceed with the preliminary injunction motion, courts must apply a standard that is consistent and fair, but also heightened. The moving party should first and foremost be required to explain to the court why a hearing on the preliminary injunction, as opposed to proceeding to a trial on the merits, is necessary. Basically, the litigant must illustrate what aspect of the particular case requires the injunction to be granted immediately instead of proceeding to a trial on the merits. Second, the party must be able to show some irreparable harm or why there is no adequate remedy without the preliminary injunction. Both of these requirements get to the heart of a preliminary injunction. The purpose of the preliminary injunction is to prevent a situation that will become irremediable due to the time it takes to prepare for trial. Thus, if there is no immediacy (required by the first element) and no irreparable harm (required by the second element), the parties and the court will be better served with a trial on the merits instead of a duplicitous hearing on the preliminary injunction followed

250. Morton Denlow, *Preliminary Injunctions: Look Before You Leap*, 28 LITIG., Summer 2002, at 8, 12.

251. *Id*.

by a trial on the merits. If, for example, a party in a trademark case seeks a preliminary injunction to stop another party from using its logo on a shipment of balloons it intends to sell, and the time difference between deciding a motion for preliminary injunction and a decision on the merits is two months, the moving party must explain why the injury occurring within the two-month period is irremediable. An appropriate case for a preliminary injunction would be one in which the infringer is selling hazardous balloons that may result in serious injury or death in the interim period. An inappropriate case for a preliminary injunction would be one in which the infringer is selling a good, quality product that nevertheless infringes on the patent. In this regard, the court should expedite discovery and explore creative interim solutions, such as the posting of a bond by a defendant or a standstill agreement, to permit the parties to devote their efforts to preparing for a trial on the merits.

The initial inquiry for the court should be: What is the critical component of the case that requires the grant of the injunction between the time the preliminary injunction can be decided and the time an actual trial on the merits can take place that cannot be satisfied by simply proceeding to a trial on the merits? Unless the critical component is just that—an irreparable harm that cannot be remedied following a trial on the merits—the court should not proceed with the preliminary injunction hearing. In any event, courts should actively discourage preliminary injunction motions and encourage parties to proceed expeditiously to trial on crucial issues.

If the moving party is able to demonstrate the primary necessity for a preliminary injunction, it should then be required to demonstrate at least a 50% chance of success on the merits. This necessary condition will dissuade parties with weak cases from seeking preliminary injunctive relief when permanent relief would not ordinarily be available if the parties proceeded to trial on the merits. A court must then evaluate the harm to the non-moving party if the injunction is granted. The court should balance this harm against the showing of harm to the movant. A preliminary injunction should not be entered unless the harm to the movant is greater than the harm to the nonmoving party taking into account possible bonds by either side.

Based upon these considerations, neither a sliding scale method nor a two-part, three-part, or four-part balancing test should be adopted by any court deciding a motion for preliminary injunction. A sliding

scale approach would allow a party with less than a 50% chance of winning on the merits to succeed on the motion, so long as there is a very strong showing of irreparable harm. This manipulates the judicial process because it is unlikely that the movant will win at trial. It wastes valuable and limited court time. For similar reasons, the multi-part balancing test should not be adopted, because in some circumstances it would allow a movant to succeed on the motion without demonstrating a strong likelihood of success on the merits of the case.

Accordingly, the standard for granting a motion for preliminary injunction should include the following factors, all of which must be proven:

> (1) Whether the moving party can demonstrate that it will suffer an irreparable harm for which there is no adequate remedy if the court proceeds to an expedited trial on the merits instead of a hearing on the preliminary injunction motion.
>
> (2) Whether the moving party has at least a 50% chance of success on the merits.
>
> (3) Whether the alleged harm to the moving party in not entering a preliminary injunction outweighs the alleged harm to the non-moving party in entering the preliminary injunction.

The public interest should not be a factor in cases between private parties unless the case involves significant public consequences. The public interest should be considered only where public entities are involved. In such a case, a preliminary injunctions should not be granted where it would violate the public interest.

This heightened standard will benefit both litigants and the courts. Parties will be encouraged to proceed directly to a trial on the merits. Plaintiffs who proceed with a motion for a preliminary injunctions will be held to a high standard which will assist parties in evaluating their ultimate chances on the merits. Courts will be able to rule consistently on an already complicated issue by having clear standards and the necessary discretion to do justice.

## VII. CONCLUSION

A preliminary injunction represents an important form of relief in a variety of cases. Unfortunately, in the absence of a definitive Supreme Court decision, the standards applied by the circuit courts of appeals are not consistent. The result is confusion for lawyers and judges and an unpredictable application by the courts. The best route for parties and the courts is to avoid the preliminary injunction hearing and to proceed with an expedited trial on the merits. Because parties apprised of the complications and costs of a preliminary injunction hearing usually decide not to incur the additional expense and delay created by the motion, district courts should inform litigants of the pros and cons associated with the motion, seek to develop an agreed interim solution, and promote the benefits of an expedited trial on the merits. In addition, the Supreme Court should adopt a uniform standard that courts and parties can apply throughout the country. This is long overdue.