Expansive Equity Jurisprudence: A Court Divided

Richard H.W. Maloy*

I. INTRODUCTION

Article III, Section 1 of the federal Constitution vests the judicial power of the United States in "one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."[1] Section 2 of Article III extends the judicial power to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[2] Nowhere in the Constitution, however, is "Cases, in . . . Equity" defined. No statute enacted by Congress has defined what a "case in equity" is.

Section 11 of the Judiciary Act of 1789 merely provided that circuit courts would have "cognizance . . . of all suits of a civil nature at common law or in equity" in cases appropriately brought in those courts.[3] Neither Congress nor the courts have ever attempted to define an "equity case" or a "suit in equity." In *Atlas Life Insurance Co. v. W. I. Southern, Inc.*,[4] the Supreme Court came as close as any court in telling us what an "equity case" or a "suit in equity" is, when it said:

> The jurisdiction thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries. This clause of the statute does not define the jurisdiction of the district courts as federal courts, in the sense of their power or authority to hear and decide, but prescribes the body of doctrine which is to guide their decisions and enable them to determine whether in any given instance a suit of which a district court has jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity.[5]

---

* Visiting Professor of Law and Director, Summer in Spain Program, St. Thomas University School of Law, Miami, Florida. The author wishes to thank Judge Edward D. Re for his marvelous book on Remedies, and Cynthia Lynne, Esq., of Fort Lauderdale, Florida, for her invaluable assistance in the preparation of this article.

1. U.S. CONST. art. III, § 1, cl. 1.
2. *Id.*
3. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73; 28 U.S.C. § 41(1) (2000); *see also* Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U.S. 563, 568 (1939) (noting Congress's perpetuation of the Judiciary Act of 1789).
4. 306 U.S. 563 (1939).
5. *Id.* at 568.

Even so, it is clear that the 1939 Court was not even trying to define the terms "court of equity" or "equity case." At most it was explaining that the United States district courts—the trial level courts—are to determine whether a case is an appropriate one for the "exercise of the extraordinary powers of a court of equity."[6] With the 1937 adoption by the Federal Rules of Civil Procedure of the "one form of action to be known as 'civil action,'"[7] it can be said that there is no longer a distinction between "at law cases" and "equity cases."[8] All cases are now just "civil actions." These may concern legal substance, equitable substance, or both.

In 1987, Professor Stephen N. Subrin of Northeastern University School of Law wrote:

> In assessing the place of equity practice in the overall legal system, it is critical to realize the extent to which the common law system operated as a brake. One could not turn to equity if there was an adequate remedy at law. Equity grew interstitially, to fill in the gaps of substantive common law (such as the absence of law relating to trusts) and to provide a broader array of remedies—specific performance, injunctions, and accountings. Equity thus provided a "gloss" or "appendix" to the more structured common law. An expansive equity practice developed as a necessary companion to common law.[9]

It is curious that despite what these writings suggest about the role of equity, divergent opinions exist in today's Supreme Court as to the extent of equitable relief permitted by federal courts. One group of Justices thinks equitable relief is limited by that which the English Court of Chancery would have administered in the later part of the eighteenth century. Another group of Justices thinks equitable relief is unbound by such restrictions. The latter group holds what has been described as an "expansive" view of equity jurisprudence.

Were one to read the words of Justice Clarence Thomas in *Missouri v. Jenkins*,[10] and the words of Justice Antonin Scalia in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*[11] and *Great-West Life & Annuity Insurance Co. v. Knudson*,[12] one could reasonably conclude that, at least in the federal system, expansive equity, as Professor Subrin described it, has ceased to exist. In contrast, if one were to read the words of Justice David Souter in *Jenkins*, and the words of Justice Ruth Bader Ginsburg in *Grupo Mexicano* and

6. *Id.* at 585.

7. FED R. CIV. P. 2. Rule 2 followed New York's Field Code which merged law and equity actions into "civil actions" in 1848. 1848 N.Y. Laws 479.

8. *See* FED. R. CIV. P. 2 advisory committee's note 2. Note 2 of the Advisory Committee Notes to the 1937 modification of the Federal Rules of Civil Procedure states: "Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules." *Id.*

9. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 920 (1987) (footnotes omitted).

10. 515 U.S. 70 (1995); *see also infra* Section II.A.

11. 527 U.S. 308 (1999); *see also infra* Section II.B.

12. 534 U.S. 204 (2002); *see also infra* Section II.C.

Knudson, one could also reasonably conclude that expansive equity is alive and well.

This article examines these two opposing schools of thought. It begins by first discussing and analyzing *Jenkins*, *Grupo Mexicano* and *Knudson*. It then continues by reviewing selected excerpts from English equity cases, other Supreme Court decisions addressing equity, some pronouncements of lower federal courts, and lastly some state court observations about what constitutes an equitable remedy. It concludes with my own thoughts as to which of the Supreme Court Justices' arguments should prevail.

II. EQUITY IN THE COURT: OPPOSING VIEWPOINTS

A. Missouri v. Jenkins

In *Missouri v. Jenkins*, the Supreme Court held that a United States district court, in attempting to remove segregation from a school district, may not (1) order the creation of a comprehensive magnet school and capital improvement plan, or (2) order salary increases for teachers. The Court said that school district autonomy restricts a district court's purview. District courts may only issue such orders as to ensure local control and management of schools in compliance with the Constitution. The majority opinion, written by Chief Justice Rehnquist,[13] clearly limited district court remedies to those which would remedy a constitutional violation—nothing further.[14] Rehnquist explained the district court should have attempted to achieve a redistribution of students that would eliminate racially identifiable schools within the school district. Instead, its plan attracted non-minority students from outside the local school district—an inter-district goal. The Court found this inter-district result exceeded the scope of the intra-district violation identified by the district court.[15]

Justice Clarence Thomas wrote a concurring opinion in which he criticized *Brown v. Board of Education*,[16] critiqued the federal courts' equity jurisdiction, and discussed federalism and separation of powers. In his remarks concerning equity he assumed that the remedial authority of federal courts is inherent in the judicial power granted by Article III, Sections 1 and 2 of the Constitution, as there is no general equity power specifically granted by the Constitution or statutes. He concluded that "[a]s with any inherent judicial power, however,

13. The majority consisted of Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia, and Thomas.

14. *Jenkins*, 515 U.S. at 113-14.

15. *Id*. at 101-02. It has been observed that reaction to this case was initially "muted by the uproar over the voting rights cases decided during the same term." Scott D. Gerber, *Justice Clarence Thomas and The Jurisprudence of Race*, 25 S.U. L. REV. 43, 59 (1997).

16. 347 U.S. 483 (1954).

we ought to be reluctant to approve the aggressive or extravagant use, and instead, we should exercise it in a manner consistent with our history and traditions."[17] Since this was a case dealing with racial discrimination, Thomas concentrated on federal court use of equity powers in an effort to eradicate that wrong. "Motivated by our worthy desire to eradicate segregation . . . we have disregarded this principle and given the courts unprecedented authority to shape a remedy in equity."[18] He blamed the Supreme Court for encouraging the lower federal courts' "sweeping powers," "extraordinary remedial measures," "judicial overreaching," and "expansive powers."[19] He continued: "[i]n upholding these court-ordered measures we indicated that trial judges had virtually boundless discretion in crafting remedies once they had identified a constitutional violation."[20] Without envisioning the type of equitable relief that was to come in later years, Justice Thomas observed a spread of what he considered excessive expansion of the federal courts' equitable powers from school segregation cases to cases involving prisons, mental hospitals, and public housing.[21]

Justice Thomas argued "[s]uch extravagant uses of judicial power are at odds with the history and tradition of equity power and the Framers' design."[22] In support of his position that the Framers approached equity with suspicion,[23] he added:

> Hamilton sought to narrow the expansive Anti-Federalist reading of inherent judicial equity power by demonstrating that the defined nature of the English and colonial equity system—with its specified claims and remedies–would continue to exist under the federal judiciary. In line with the prevailing understanding of equity at the time, Hamilton described Art. III "equity" as a jurisdiction over certain types of cases rather than a broad remedial power. Hamilton merely repeated the well known principle that equity would be controlled no less by rules and practices than was the common law . . . . Indeed, it appears that the Framers continued to follow English equity practice well after the ratification. At the very least, given the Federalists' public explanation during the ratification of the federal equity power, we should exercise the power to impose equitable remedies only sparingly, subject to clear rules guiding its use.[24]

Justice Thomas concluded his assertions about equity in the federal system:

> It is perhaps not surprising that broad equitable powers have crept into our jurisprudence, for they vest judges with the discretion to escape the constraints

17. Missouri v. Jenkins, 515 U.S. 70, 124 (1995).
18. *Id*.
19. *Id*. at 125.
20. *Id*. at 124-25.
21. *Jenkins*, 515 U.S. at 126.
22. *Id.* at 126.
23. *Id.*
24. *Id*. at 130-31 (internal citations omitted).

> and dictates of the law and legal rules. But I believe that we must impose more precise standards and guidelines on the federal equity power, not only to restore predictability to the law, and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured.[25]

Justice Souter dissented from the judgment in *Jenkins*. His focus was that the plan devised by the district judge complied with rules previously constructed by the Supreme Court to combat racial segregation. With regard to the equity power of the federal courts he referenced the Court's opinion in *Hills v. Gautreaux*.[26] In that case, the Court "refuse[d] to constrain remedial equity powers."[27] In *Gautreaux*, the district court found HUD and the Chicago Housing Authority had maintained a racially segregated system of public housing in Chicago. The injunction against such practice ordered by the district court extended beyond Chicago's city limits to the surrounding metropolitan areas. The Supreme Court, there, unanimously affirmed the lower court's order.[28] Justice Souter described *Gautreaux* as seeming "to reflect equitable common sense."[29] Justice Ginsburg joined Justice Souter's "illuminating dissent."[30]

B. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.

Four years after *Jenkins*, the Supreme Court faced an entirely different question, but one that also raised the issue of equity power. In *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*,[31] the Court held, in a 5-4 decision, that a district court had no power to preliminarily enjoin a defendant from disposing of assets even where that defendant was preferring some creditors to others and where that preference risked loss of all assets available to satisfy the judgment likely to be entered against it in a breach of contract action.[32]

25. Missouri v. Jenkins, 515 U.S. 70, 133 (1995).

26. 425 U.S. 284 (1976).

27. *Jenkins*, 515 U.S. at 169 (Souter, J., dissenting).

28. *Id*. at 169-70 (Souter, J., dissenting). Souter made it clear that it was not the Supreme Court which extended the geographic scope of the injunction, but the trial court—as "a matter for the District Court in the exercise of its equitable discretion". *Id*. at 173 n.8.

29. *Id*. at 174.

30. *Jenkins*, 515 U.S. at 175.

31. 527 U.S. 308 (1999).

32. The majority consisted of Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia (the author of the majority opinion), and Thomas. The minority consisted of Justices Stephens, Souter, Ginsburg (the author of the dissenting opinion), and Breyer.

i. The Facts[33]

The petitioner, Grupo Mexicano de Desarrolo, S.A. (GMD) was a Mexican holding company. In February of 1994, in order to retire more than $100 million of high interest Mexican bank debt and obtain working capital, GMD offered and sold to the respondents $250 million worth of 8.25% notes due in 2001. Interest payments were to be due on the seventeenth day of February and August each year until 2001. The notes were *pari passu* with all of GMD's other debts, and were "unconditionally" and "irrevocably" guaranteed by three subsidiaries of GMD.[34] Neither the notes nor the guaranties, however, were secured. Alliance Bond Fund, Inc., and ten others were investment funds which purchased the notes.[35] Between 1990 and 1994, GMD was involved in the construction of toll roads as part of an intercity network in Mexico. The project was sponsored by the Mexican government, which granted concessions to entities that would build and operate the toll roads. GMD wore two hats in the project—it was an investor in the concessionaries, and it was a construction company hired to build some of the roads. GMD completed construction of the roads assigned to it, and began to operate them. Due to economic uncertainty, currency devaluations, and other factors, the revenues expected from the operation of the roads fell below expectations and GMD was unable to collect for its services as concessionaires. By 1997, GMD was in serious financial trouble. In addition to its debt on the notes, it owed approximately $450 million to other creditors.[36] In June of 1997, GMD admitted to the Securities and Exchange Commission (SEC) that its liabilities exceeded its current assets, and that there was "substantial doubt" it could continue as a going concern. GMD defaulted on the August 17, 1997, interest payment, and its subsidiaries/guarantors failed to come to its assistance. Concurrent with the default, the Mexican government decided to intervene. It issued a proclamation that it would issue government-guaranteed Toll Road Notes (Toll Road Notes) to GMD and other toll-road operators to reimburse them for unpaid construction. In return for the Toll Road Notes, the government would eventually take over the ownership and operation of the roads. In its financial statement for the third quarter of 1997, GMD stated that although it had not received the proceeds, it expected to receive $309 million in Toll Road Notes.

Between August and December 1997, matters grew worse. On August 27,

33. *See Grupo Mexicano*, 527 U.S. at 310-13, 333-42; Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 190 F.3d 16, 18-19 (2d Cir. 1999); Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688, 690-92 (2d Cir. 1998), *rev'd*, 527 U.S. 308 (1999) (citing case facts).

34. *See Alliance Bond Fund*, 143 F.3d at 691. Only three, however, were named as defendants in the case.

35. *Alliance Bond Fund*, 143 F.3d at 690.

36. *Id.* at 691. The five largest of which were the Mexican government, Mexican banks, Mexican financial institutions, trade creditors, and terminated employees who, pursuant to Mexican law, were owed severance pay upon being discharged from their employment.

1997, Reuters reported that GMD was renegotiating its $256 million debt to Mexican banks—it asked them for a discount of sixty-seven percent to match its losses in the toll-road investment. In September 1997, GMD issued a press release to the effect that during the first nine months of 1997 it had revenues of $119 million, but an expected loss of $802 million and a negative net worth of $214 million. It had already assigned $117 million of the expected government-issued Notes to settle a $100 million obligation to the Mexican government and $17 million to pay severance packages to terminated employees. Because GMD had not received the Toll Road Notes from the government, it placed certain of its assets in trust with the understanding that, once received, the notes would replace the assets. On December 11, the note holders, including the plaintiffs/respondents, accelerated the principal of $75 million on their notes.

On December 12, the plaintiffs filed an $80.9 million breach of contract action in the United States District Court for the Southern District of New York against GMD and its guarantors. In addition to judgment and damages, the plaintiffs sought a preliminary injunction to prevent GMD from any further transfer of its rights to the Toll Road Notes. The complaint alleged that "GMD is at risk of insolvency, if not insolvent already."[37] Further, the complaint asserted that GMD was dissipating its most significant asset (i.e. the Toll Road Notes) and preferring its Mexican creditors. Plaintiffs argued that "these actions would frustrate any judgment that [plaintiff] respondents could obtain."[38] The day the civil action was filed, the district judge issued a temporary restraining order preventing defendants, GMD, and its guarantors from transferring their rights to receive the Toll Road Notes. On December 18, 1997, as part of its defense, GMD filed an affidavit of its Senior Vice President revealing that GMD previously made an unrevealed assignment of $38 million of Toll Road Notes to Mexican banks. District Judge Martin held a hearing the following day on the plaintiffs' request for a preliminary injunction. The spirit of the hearing was amicable.[39] During a break in the hearing, a supplemental

37. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 312 (1999).

38. *Id.*

39. *Id.* at 334 (Ginsburg, J., dissenting). The Judge commenced the hearing saying "'we have got a case where there is no defense presented, why shouldn't I be able to provide [Alliance] with [injunctive] relief?' Why . . . should GMD be allowed 'to use the process of the court to delay entry of a final judgment as to which there is no defense? Why is that equitable?'" *Id.* at 342 (internal citations omitted). In a spirit of being fair, counsel for the plaintiffs asked the court to fashion relief that did not just benefit the plaintiffs, but the "whole class of creditors by creating an even playing field" among creditors. *Id.* at 341. Counsel further suggested that the district judge set up a trust in compliance with Mexican law in order to oversee distribution to creditors. The injunction finally entered by the district judge gave Alliance no security interest in GMD's assets, nor any preference to other creditors. It expressly reserved to GMD the option of commencing proceedings under Mexican or United States bankruptcy laws. The judge, moreover, recorded his readiness to modify the interim order if necessary to keep GMD in business. As Justice Ginsburg said in her dissent, "[t]he preliminary injunction thus constrained GMD only to the extent essential to the subsequent entry of an effective judgment." *Id.* at 334.

affidavit of the Senior GMD Vice President was produced. This revealed that rather than the assignment of $100 million to the Mexican government, as reported by Reuters, $137 million worth of Toll Road Notes were assigned to the government, and that instead of $17 million worth of such notes being assigned to severance packages, the actual amount was $30 million. In addition, an unreported $48 million worth of such notes was assigned to Mexican banks, and an unreported $42.5 million was assigned to other creditors. In sum, instead of there being an assignment of $117 million worth of Toll Road Notes, as reported by Reuters, there had been an assignment of $295.5 million of the $309 million which GMD expected to receive. GMD, moreover, planned on making other assignments, leaving only $5.5 million worth of such notes with which to pay the judgment, which was expected to be in plaintiffs favor and in excess of $80 million.[40]

On December 23, 1997, the district judge held a second hearing and entered an order containing several findings of fact. The Court found that (1) "GMD is at risk of insolvency, if not already insolvent"; (2) the Toll Road Notes were GMD's "only substantial asset"; (3) GMD planned to use the Toll Road Notes "to satisfy its Mexican creditors to the exclusion of [respondents] and other holders of the Notes"; (4) "[i]n light of [petitioners'] financial condition and dissipation of assets any judgment [respondents] obtain in this action will be frustrated"; (5) respondents had demonstrated irreparable injury; and (6) it was "almost certain" that respondents would succeed on the merits of their claim.[41]

The defendants sought no appellate review of these findings and did not cast any doubt upon them in the Supreme Court. The defendants, moreover, candidly conceded that had the district court declined to issue the preliminary injunction, GMD would have had no assets with which to satisfy the money judgment ultimately obtained.[42] The district court preliminarily enjoined GMD and its subsidiaries/guarantors "from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or affecting any [petitioners'] right to, interest in, title to or right to receive or retain, any of the [Toll Road Notes]. The court ordered the plaintiffs to post a $50,000 bond."[43] The defendants appealed the preliminary injunction, which is the subject of the Supreme Court decision about which this article is concerned.

On April 17, 1998, the district judge entered summary judgment for the plaintiffs in the amount of nearly $82.5 million, and dismissed defendants'

40. Justice Ginsburg, in her dissent, described the defendants' machinations as follows: "GMD was so rapidly disbursing its sole remaining asset that, absent provisional action by the district court Alliance would have been unable to collect on the money judgment for which it qualified". *Id.* at 333-34 (Ginsburg, J., dissenting).

41. *Grupo Mexicano*, 527 U.S. at 312.

42. *Id.* at 333 n.1 (Ginsburg, J., dissenting).

43. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 313 (1999).

counterclaims.[44] The court ordered the defendants to transfer or assign the Toll Road Notes to the plaintiffs, and converted the temporary injunction into a permanent one, pending assignment of the Toll Road Notes. Shortly thereafter, the Second Circuit affirmed the order for the preliminary injunction. The defendants appealed, questioning the validity of the transfer or assignment of the Toll Road Notes and the conversion of the temporary injunction into a permanent one. The Defendants did not question the money judgment. Their briefs argued only that the order requiring the transfer or assignment of the Notes was invalid. The circuit court considered the challenge to the conversion of the temporary injunction into a permanent one as abandoned.[45] At the time that the issue of the validity of the preliminary injunction (the subject matter of the first appeal to the Second Circuit) was being considered by the Supreme Court, the second appeal (the one concerning the order requiring the assignment or transfer of the Notes) was still pending in the Second Circuit. Oral argument was heard December 10, 1998, but a decision was not rendered by the Second Circuit until August 20, 1999, two months after the Supreme Court ruled on the validity of the preliminary injunction. When the Second Circuit made its ruling, that court was not certain that the order of assignment or transfer had complied with New York law. It remanded the cause to the district court for fact-finding on the question of whether the plaintiffs were entitled to either a re-entry of that order (presumably because it did comply with New York law), or some other (perhaps more appropriate) order.[46]

ii. The Second Circuit's Opinion on the Validity of the Preliminary Injunction

On May 6, 1998, the Second Circuit Court of Appeals affirmed the district judge in a unanimous opinion.[47] Section I of the opinion addressed the court's power to enjoin the defendant's use of assets unrelated to the underlying cause of action. GMD had argued that Federal Rule of Civil Procedure 65 was not available to the district judge because plaintiffs only sought a monetary remedy,[48] and that, in such a situation, an injunction should only be granted

44. *Id.* On that same day the plaintiffs filed a motion in the Second Circuit to dismiss the appeal from the temporary injunction. The Second Circuit denied that motion on May 4, 1998, and two days later (on May 6, 1998) affirmed the district court's entry of the preliminary injunction. *Id.*

45. Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 190 F.3d 16, 19 (2d Cir. 1999).

46. *Id.* at 26. By way of further mandate, the court ordered that its prior denial of GMD's cross-motion for an order granting leave to the district court to alter the permanent injunction against removal of certain assets from its purview was without prejudice to GMD's right to move in the district court for the entry of such an order. *Id*.

47. Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688 (2d Cir. 1998), *rev'd*, 527 U.S. 308 (1999).

48. *See id.* at 693 (discussing Federal Rules of Civil Procedure 64 and 65 and their application to case). Though the court did not question that assertion, it would seem that it was incorrect since the plaintiffs sought a damage award and injunctive relief. The fact that the latter remedy was to be entered preliminarily to the former remedy has significance only in the framework of time, not of the weight of remedies.

pursuant to Rule 64.

GMD asserted that Rule 64 was not an available means, because it says, in pertinent part: "all remedies providing for the seizure of the person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in an action are available under the circumstances and in the manner provided by the law of the state in which the district court is held."[49] It was established under N.Y. C.P.L.R. § 6301 that "a preliminary injunction is unavailable in an action for a sum of money only."[50] Additionally, GMD maintained that the New York attachment statute could not be used, since the Toll Road Notes were not located in New York. However, the district judge could have ordered the defendants to bring the Notes within the court's jurisdiction.[51]

The Second Circuit held that Rule 65 establishes a procedure for securing preliminary injunctive relief to preserve the status quo between parties pending determination of a case on its merits. It found the district court vested with full discretion to determine the granting and scope of such an injunction. The Second Circuit quoted the Supreme Court in *Hecht Co. v. Bowles*: "[a]n appeal to the equity jurisdiction conferred on the federal courts is an appeal to the sound discretion which guides the determinations of courts of equity."[52] This seemed to satisfy the appellate court that the trial judge had the power to enter the preliminary injunction in question.[53]

Also in section I of the opinion, the Second Circuit considered both Supreme Court and Second Circuit precedent.[54] In *De Beers Consolidated Mines, Ltd. v. United States*,[55] the United States sued certain foreign corporations to prevent them from violating antitrust law. It was an equity action.[56] The district court granted the government's request for an order restraining the defendants from selling, transferring, or disposing of any property in the United States "until such time as the court shall have determined the issues of the case and the defendant corporations shall have complied with its orders."[57] The Supreme Court described the purpose of the injunction as "to provide security for the performance of a future order which may be entered by the [trial] court."[58] The

49. *Id.* (quoting FED. R. CIV. P. 64).

50. *Id.*

51. *Alliance Bond Fund, Inc.*, 143 F.3d at 693. This observation fails to assert that GMD ever obtained possession of the Toll Road Notes.

52. *See* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (quoting Meredith v. City of Winter Haven, 320 U.S. 228, 235 (1943)).

53. Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688, 696 (2d Cir. 1998), *rev'd*, 527 U.S. 308 (1999).

54. *Id*. at 693.

55. 325 U.S. 212 (1945).

56. *Id*. at 218.

57. *Id*. at 215.

58. *Id*. at 219. The government initially took the position that the order was one of sequestration of property but later abandoned that position since sequestration can be effected only after final judgment, not at a preliminary stage of the case. *Id*. at 218.

Court observed that "a preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally."[59] In *De Beers*, the only relief which might have been granted finally was a restraint against ongoing actions or conduct intended to monopolize or restrain commerce.[60] Unlike in *Grupo Mexicano*, no money judgment was at stake in this litigation.[61]

The government attempted to substantiate its requested restraining order on multiple grounds, including analogy to a *ne exeat* writ and argument that any attachment to the defendants' property could be relieved by posting of a bond. However, the court rejected these foundations in favor of the conclusion that this was a purely equitable action, which was not to be distinguished from any other equity action. Refusing to affirm the injunction, the Court warned that if injunctive relief is too freely granted:

> Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence.[62]

The government's objective in seeking the injunction was to provide security—through the defendants' wallets—that a future court order would be adhered to.[63]

The Court in *Deckert v. Independence Shares Corp*.[64] upheld a preliminary injunction preventing defendants from transferring assets pre-judgment, and distinguished *De Beers*, saying that "[i]t was a suit in which the injunction prevented the transfer of a fund or property which would have been the subject of the provision of any final decree."[65] The plaintiff in *Deckert* sought an order enjoining defendants from disposing of any assets pending the outcome of the

59. *De Beers Consolidated Mines*, 325 U.S. at 219-20.

60. *Id*. at 219-20.

61. De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212, 218 (1945).

62. *Id.* at 222-23. The Second Circuit, in its opinion in *Alliance Bond Fund, Inc*., heeded the Supreme Court's warning in *De Beers*: "We are confident, however, that this 'parade of horribles' will not come to pass. The defendant's rights are adequately protected because the traditional requirements for obtaining equitable relief must be met before a district court may issue an injunction." Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688, 696 (2d Cir. 1998), *rev'd*, 527 U.S. 308 (1999).

63. If such a preliminary order was not intended to prevent future action or conduct violative of antitrust acts, it is difficult to envision one that would accomplish such an objective.

64. 311 U.S. 282 (1940).

65. *Id*.

suit for fraudulent misrepresentation.[66] The plaintiffs alleged that the defendant was "insolvent and threatened with many lawsuits, that its business is virtually at a standstill because of unfavorable publicity, that preferences to creditors are probable, and that its assets are in danger of dissipation and depletion."[67] Upholding the injunction, the Supreme Court observed

> [T]he injunction was a reasonable measure to preserve the status quo pending the final determination of the questions raised by the bill . . . As already stated, there were allegations that [defendant] was insolvent and its assets in danger of dissipation or depletion. This being so, the legal remedy against [defendant] without recourse to the fund in the hands of [a third party] would be inadequate.[68]

The injunction granted in *Deckert*, similar to the injunction requested but denied in *De Beers*, acted as security. By ordering that assets in the defendant's "wallet" remain available to satisfy future orders, the court worked to ensure a final judgment for the plaintiffs would not be meaningless. In *De Beers*, the Court rejected such an action, perhaps because four of the nine Justices in attendance did not believe that the Court had the power to hear the case.[69]

In *United States v. First National City Bank*,[70] the Court upheld a preliminary injunction freezing assets in a suit seeking payment of back taxes. Although statutory authority gave power to grant the injunction, the Court affirmed in part based on principles of equity jurisprudence. "[O]nce personal jurisdiction of a party is obtained, the District Court has authority to order it to 'freeze' property under its control."[71] In dissent, Justices Harlan and Goldberg characterized the majority opinion as reflective of an "expansive view of the jurisdiction of a federal court to tie up foreign owned and situated property"—a view with which they could not agree.[72] In addition to the Supreme Court opinions discussed above, the Second Circuit, in *Grupo Mexicano*, also reviewed circuit court precedent.[73]

In *Republic of the Philippines*, the Second Circuit made the unremarkable announcement that a federal court may enjoin the transfer of assets that constitute the subject matter of the dispute.[74] It was utterly silent on whether a district court may enjoin a transfer of unrelated assets.[75] In *In re Feit &*

66. *Id.* at 285.

67. *Id.*

68. *Deckert*, 311 U.S. at 290.

69. De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212, 223 (1945) (Powell, J., dissenting).

70. 379 U.S. 378 (1965).

71. *Id.* at 384 (citation omitted).

72. *Id*. at 385.

73. *See generally* Hilao v. Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994); Republic of Phillipines v. Marcos, 806 F.2d 344 (2d Cir. 1986); In re Feit & Drexler, Inc., 760 F.2d 406 (2d Cir. 1985).

74. *Republic of Philippines*, 806 F.2d at 354-55.

75. Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688, 695 (2d Cir. 1998)

Drexler, Inc., the Second Circuit reviewed a district court order that the defendant turn over all property capable of delivery to an escrow agent.[76] The district court relied on Rule 64, while ignoring Rule 65.[77] The Second Circuit bypassed the issue of whether Rule 64 or Rule 65 should have been used, and upheld the turn-over order under both New York state law and the Second Circuit test. This ruling was consistent with the holding of *Deckert* that in cases for money damages, a preliminary injunction may be appropriate to ensure a future judgment is effective.[78]

In *Estate of Marcos*, the Ninth Circuit asserted its reliance on the majority rule regarding preliminary injunctions:

> We join the majority of circuits in concluding that a district court has authority to issue a preliminary injunction where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant or that defendant has engaged in a pattern of secreting or dissipating assets to avoid judgment.[79]

However, the Ninth Circuit also expressed its adherence to the Supreme Court's warning in *De Beers*: "This holding is thus restricted to only *extraordinary* cases in which equitable relief is not sought. Our conclusion thus avoids the concern in *De Beers* of the 'sweeping effect' that a plaintiff in any action requesting damages can apply for an injunction to sequester his or her opponent's assets."[80]

In the second section of the Second Circuit's opinion in *Grupo Mexicano*, the court considered GMD's argument that the district judge erred in granting the plaintiff's request for an injunction because there was no finding that the defendants intended to frustrate the plaintiffs' right to receive the Toll Road Notes.[81] The court disagreed, upholding the preliminary injunction as it met the necessary prerequisites. The court noted the requirements for a preliminary injunction:

> (1) absent injunctive relief, [plaintiff] will suffer an irreparable injury; and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships tips in favor of the moving party.[82]

The court addressed the first element, irreparable harm. Some case law holds that one method of establishing irreparable harm is to show that the

(discussing decision in *Republic of Phillipines*), *rev'd*, 527 U.S. 308 (1999).

76. *See In re Feit & Drexler, Inc.*, 760 F.2d at 408.

77. *See id.* at 410.

78. *See Alliance Bond Fund*, 143 F.3d at 695-96.

79. Hilao v. Estate of Marcos, 25 F.3d 1467, 1480 (9th Cir. 1994).

80. *Id.*

81. Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688, 696 (2d Cir. 1998), *rev'd*, 527 U.S. 308 (1999).

82. *See, e.g., id.*

defendant intended to frustrate the collection of an eventual judgment.[83] "Normally, in order to be classified as irreparable, the threatened harm must be a kind of injury for which a money judgment cannot compensate."[84] An additional meaning of "irreparability" of harm is a plaintiff's inability to satisfy its judgment. In *Grupo Mexicano*, the defendants' inability to satisfy the judgment was apparent, as was the defendants' flagrant plan to make preferential payments to their Mexican creditors rather than paying the plaintiffs.

However, the Second Circuit in *Chemical Bank v, Haseotes*,[85] held that a legitimate attempt to reduce one's debt by paying creditors does not establish irreparable harm, even when that procedure renders the defendant judgment-proof.[86] The debtor's behavior in *Haseotes*, however, is a far cry from the only partially revealed plan of preferring Mexican creditors to the plaintiffs in this case.[87] In *Grupo Mexicano*, the district judge found that GMD planned to use the Toll Road Notes "to satisfy its Mexican creditors to the exclusion of [respondents] and other holders of the notes."[88] This finding was adequately supported by evidence supplied by a GMD official. Once the Mexican creditors were paid, there would be only $5.5 million with which to satisfy the plaintiffs' more than $80 million judgment.[89] Contrary to the legitimate business judgment endorsed in *Haseotes*, the defendants' duplicity was revealed in *Grupo Mexicano*. The court relied on the discrepancy between GMD's initial disclosure that it had transferred $117 million of Toll Road Notes, and the discovery that in fact it had transferred between $214 million and $238 million.[90] The court likened these undisclosed transfers to those found to constitute irreparable damage in *Pashaian v. Eccelston Properties, Ltd.*[91] That case was brought by a judgment creditor to set aside transfers to various assets because of fraud. The court also compared the defendants' actions to the fraud revealed in *In re Feit & Drexler*,[92] in which the defendant lied under oath about the purchase of bonds and the maintenance of Swiss bank accounts.[93]

83. *Id.*

84. *Id.* at 697 (citing Borey v. Nat'l Union Fire Ins. Co., 934 F.2d 30, 34 (2d Cir. 1991).

85. 13 F.3d 569 (2d Cir. 1994).

86. *Id.* at 573.

87. *See id.* The *Haseotes* court did not discuss the effect of a payment in parity to all creditors on the outcome of the case. Though intriguing, it probably would have been obiter dictum.

88. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 312 (1999); *see also supra* note 42 and accompanying text.

89. *See supra* note 40 and accompanying text (indicating GMD's inability to satisfy judgment).

90. *See supra* notes 40-41 and accompanying text (documenting GMD's behavior toward creditors and assignment of Toll Road Notes).

91. 88 F.3d 77 (2d Cir. 1996).

92. 760 F.2d 406 (2d Cir. 1985).

93. *See id*. at 409-10; *see also Pashaian*, 88 F.3d at 87.

iii. The Supreme Court's Majority Opinion

Part I of the majority's opinion summarized the facts already discussed.[94] Part II established that the defendants' failure to challenge the district court's conversion of the preliminary injunction into a permanent one did not render their appeal as to the preliminary injunction moot.[95] Part III began by suggesting the Judiciary Act of 1789 only conferred on federal courts those equity powers possessed by the English Court of Chancery at the time the United States declared independence.[96]

Part III of the opinion also addressed an argument raised by the United States, as *amicus curiae*. The United States, not the plaintiffs, argued that the preliminary injunction in *Grupo Mexicano* was similar to a creditors' bill. Justice Scalia noted the court would not address this argument as it wasn't raised by the parties. However, he observed that in the case of creditors, a judgment establishing the debt to be paid was necessary before a court of equity would interfere with the debtor's use of his property.[97] In short order, Justice Scalia highlighted the central dispute in the case: the extent to which equity powers could be used. He said that Justice Ginsburg's view that "the grand aims of equity" gives courts a general power to grant relief whenever legal remedies are not "practical or efficient" (short of violating a statute), "must be rejected."[98] Scalia acknowledged the inherent flexibility of equitable relief but insisted it must be confined by the "boundaries of [its] traditional" applications.[99] In Justice Scalia's opinion Congress, and not the courts, is the appropriate branch of government to invoke "a wrenching departure from past practice."[100]

> Despite Justice Ginsburg's allusion to "increasing complexities of modern business relations," . . . there is absolutely nothing new about debtors' trying to avoid paying their debts, or seeking to favor some creditors over others . . . . The law of fraudulent conveyance and bankruptcy was developed to prevent such conduct; an equitable power to restrict a debtor's use of his unencumbered property before judgment was not.[101]

94. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 310-13 (1999).

95. *Id*. at 313-18. Part II of the majority opinion was agreed to unanimously. *See id*. at 335 n.2.

96. *Id*. at 318.

97. *See id*. at 321.

98. *Groupo Mexicano de Desarrolo*, 527 U.S. at 321 (referring to Blackstone's reliance upon precedent as a restraint upon the expansion of equity jurisprudence). Justice Scalia apparently paid no heed to Professor Pomeroy's criticism of Blackstone in his (Pomeroy's) treatise on equity, in which he said that Blackstone "presents an erroneous theory of the office of precedents inequity." *See* Bowen v. Hockley, 71 F.2d 781, 786 (4th Cir. 1934) (quoting JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 60 (Bancroft & Whitney Company, 4th ed. 1918)).

99. *See Groupo Mexicano de Desarrolo*, 527 U.S. at 322 (stating rule by district court "not one of flexibility but of omnipotence").

100. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 322 (1999).

101. *Id*. at 337 (Ginsburg, J., concurring in part and dissenting in part). Was Justice Scalia suggesting that

The majority rejected the plaintiffs' contention that the merger of law and equity altered the traditional rule that a general creditor—one not possessing a judgment against the debtor—was not able to interfere with the debtor's property.[102]

The majority went on in Part III to distinguish *Deckert* and *First National City Bank*, and to affirm *De Beers*. In *Deckert*, the Court pointed out that the plaintiffs sought equitable relief (rescission and restitution), hence a preliminary injunction was proper. In *First National City Bank*, the court acquired its equity powers from a statute rather than the Judiciary Act of 1789, as was claimed by the respondents in *Grupo Mexicano*. Courts of Equity will go much further in giving and withholding relief in the public interest than when only private interests are involved. Even though the Court in *First National City Bank* did not rely on it, the creditor there (the government) possessed an equitable lien, which the *respondents Groupo Mexicano* do not have. Discussing *De Beers*, Justice Scalia observed that the preliminary injunction was voided because it was beyond the scope of relief plaintiffs requested of the court.

The final section of Part III discussed *Mareva* injunctions. These receive their name from the 1975 *Mareva* decision by the English Court of Appeal.[103] In overturning eighty-five-year-old authority, *Mareva* granted a creditor's request for a preliminary order enjoining debtor from transferring his property.[104] The majority did not resolve the dispute as to whether the modern *Mareva* decision was based on statute or inherent equitable powers. Justice Scalia concluded Part III, "We think it incompatible with our traditionally cautious approach to equity powers, which leaves any substantial expansion of past practice to Congress, to decree the elimination of this significant protection for debtors."[105]

In the final section of the opinion, Justice Scalia listed six benefits which the United States' amicus brief asserts would be realized by the Court's adoption of

creditors must resort to the rather complex Section 303 of the Bankruptcy Code, and drive debtors into bankruptcy before they may invoke the powers of a court of equity such as the Bankruptcy Court?

102. *Grupo Mexicano de Desarrollo*, 527 U.S. at 322. Justice Scalia refers to *Ader v. Fenton*, holding "it is only by these liens that a creditor has any vested or specific interests in the property of his debtor." *Id.* at 323 n.6 (citing Ader v. Fenton, 65 U.S. 407, 411-12 (1860)). The statement would seem to overlook the fact that the plaintiffs in *Grupo Mexicano* were not seeking to sell the debtor's property and to satisfy the judgment, but instead seeking to prevent the debtor from manipulating the property in order to render satisfaction of the judgment impossible.

103. *See* Mareva Compania Naviera, S.A. v. Int'l Bulk Carriers, S.A., [1975] 2 Lloyd's Rep. 509 (overturning eighty-five-year-old authority from Lister & Co. v. Stubbs, [1890] 45 Ch.D. 1 (CA)).

104. *But see* Nippon Yusen Kaisha v. Karageorgis, [1975] 2 Lloyd's Rep. 137, 138. *Nippon* was the first case permitting such an injunction. It was in that case that Lord Denning exclaimed "the time has come when we should revise our practice"—sage counsel that apparently was not accepted by our Supreme Court. *See generally* Grupo Mexicano de Desarollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999). Though by its own admission, the use of the procedure has expanded rapidly. *See id.* at 331.

105. *Grupo Mexicano*, 527 U.S. at 329.

a rule allowing a preliminary injunction before entry of a final judgment. These included:

> simplicity and uniformity of procedure; preservation of the court's ability to render a judgment that will prove enforceable; prevention of inequitable conduct on the part of defendants; avoiding disparities between defendants that have assets within the jurisdiction (which would be subject to pre-judgment attachment "at law") and those that do not; avoiding the necessity for plaintiffs to locate a forum in which the defendant has substantial assets; and in an age of easy global mobility of capital, preserving the attractiveness of the United States as a center for financial transactions.[106]

Against this wide array of possible benefits in permitting preliminary injunctions, such as that at issue in *Grupo Mexicano*, the Court countered with only two benefits to denying such equitable relief: "the historical principle that before judgment (or its equivalent) an unsecured creditor has no rights at law or in equity in the property of his debtor . . . and the remedy sought, here, could render Federal Rule of Civil Procedure 64 which authorizes use state pre-judgment remedies a virtual irrelevance."[107]

Justice Scalia closed the majority opinion with the following words: "Because such a remedy was historically unavailable from a court of equity, we hold that the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages."[108]

iv. Justice Ginsburg's Dissent

Justice Ginsburg began by making it clear that it was not a "run-of-the-mill" collection action at issue in this case.[109] The district court issued the preliminary injunction only after plaintiffs:

> [h]ad satisfied all conditions precedent to its breach of contract claim; and that [defendants] had no plausible defense on the merits . . . . [Defendant] GMD was in fact satisfying Mexican creditors to the exclusion of [plaintiffs] Alliance. [U]nchallenged evidence indicated that GMD was so rapidly disbursing its sole remaining asset that, absent provisional action by the District Court, [plaintiffs] Alliance would have been unable to collect on the money judgment for which it qualified.[110]

In fact, Justice Ginsburg wrote that had the district court been able to set up

106. *Id.* at 330.

107. *Id.* It was at this point in the opinion that Justice Scalia rhetorically asks: why add by "judicial fiat a new and powerful weapon to the creditor's arsenal?" *Id.* at 331. Does this sound like the sentiments expressed by one of Justices of the so-called conservative wing of the Supreme Court?

108. *Id.* at 333.

109. *Id.* at 333-35 (Ginsburg, J., dissenting).

110. Grupo Mexicano de Desarollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 333-34 (1999) (internal citations omitted).

a "pie-powder court,"[111] without the usual time delay between pleadings and trial, a final judgment with accompanying permanent injunction could have been entered and avoided the need for a preliminary one. This was not a case in which the trial judge ran rough shod over the defendant GMD. The purpose of the injunction was "to preserve the relative position of the parties until a trial on the merits [could] be held."[112]

Justice Ginsburg reiterated that the injunction gave the plaintiffs neither a security interest in the assets, nor preferential treatment relative to GMD's other creditors.[113] Instead, the injunction afforded GMD the option of commencing proceedings under Mexican or United States bankruptcy laws. As Justice Ginsburg expressed it, "[t]he preliminary injunction thus constrained GMD only to the extent essential to the subsequent entry of an effective judgment."[114]

In Part II of her dissent, Justice Ginsburg explored equity jurisprudence at length.[115] She explored the meaning of the wording of the Judiciary Act of 1789, which gave the lower federal courts jurisdiction over "all suits . . . in equity."[116] The legislature did not intend to confer on district courts just a set of rules, but rather "authority to administer . . . the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."[117] These principles could be invoked when equity, alone, could furnish relief.[118] That relief encompassed not just the power to grant final relief in a case, but to preserve a situation (i.e. the status quo), pending the outcome of the case.[119] Justice Ginsburg made it clear that "we have never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor . . . . [W]e have valued the adaptable character of the

111. A "pie-powder" court, apparently first referred to in American jurisprudence by Chief Justice Shaw in *Parks v. City of Boston*, 32 Mass. 198, 208 (1834), was a migratory court established in England during the nineteenth century to sit in fairs for the purpose of almost instantly deciding controversies between buyers and sellers. *See* NVF Co. v. Sharon Steel Corp., 294 F. Supp. 1091, 1093 n.2 (W.D. Pa. 1969); Miller v. Trustees of Jefferson College, 13 Miss. (5 S. & M.) 651, *3 (1846).

112. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 334 (1999) (Ginsburg, J., dissenting).

113. *Id.*

114. *Id*.

115. *Id.* at 335-39.

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

117. Atlas Life Insurance Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939) (cited as authority). In this case, the Court said that the Judiciary Act did not confer on the district courts a set of rules, but "principles of the system of judicial remedies." *Id.*

118. Watson v. Sutherland, 72 U.S. (5 Wall.) 74, 79 (1867) (cited as authority); *see also infra* notes 177-184 and accompanying text (discussing case at bar).

119. *See* 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2943 (2d ed. 1995). "From the beginning we have defined the scope of federal equity in relation to the principles of equity existing at the separation of this country from England." Payne v. Hook, 74 U.S. (7 Wall.) 425, 439 (1869); *see also* Gordon v. Washington, 295 U.S. 30, 36 (1935).

federal equitable power."[120] "Flexibility, rather than rigidity, has distinguished federal equity jurisprudence."[121] "Equity must evolve over time."[122] Equity

> possesses an inherent capacity of expansion so as to keep abreast of each succeeding generation and age . . . . [I]t must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them.[123]

Justice Ginsburg also discussed relevant Supreme Court precedent. She was not overly concerned with *Deckert*, *First National City Bank*, or *De Beers*, noting that "these cases involved factual and legal circumstances markedly different from those presented in this case and thus do not rule out or in the provisional remedy at issue here."[124] In footnote four, she referred to cases dealing with the desegregation mandate of *Brown v. Board of Education*.[125] She characterized that injunction as less "heavy-handed" than prejudgment attachment, which deprives a defendant of its use and possession of property.[126]

The dissent observed that while courts of equity did not traditionally issue such preliminary injunctions, that does not indicate they lacked the authority to do so. "Chancery may have refused to issue injunctions of this sort simply because they were not needed to secure a just result in an age of slow moving capital and comparably immobile wealth."[127] When justice was divided

120. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 336 (1999) (Ginsburg, J., dissenting) (citing Seymour v. Freer, 75 U.S. 202, 218 (1869)).

121. *Id.* (citing Hecht Co., v. Bowles, 321 U.S. 321, 429 (1944), as authority).

122. *Id.* (citing Union Pac. Ry. Co. v. Chicago R.I. & P. Ry. Co., 163 U.S. 564, 601 (1896)).

123. *Grupo Mexicano*, 527 U.S. at 337 (Ginsburg, J., dissenting) (citing Union Pac. R. Co. v. Chicago R.I. & R.R. Co., 163 U.S. 564, 601 (1896) (internal citations omitted)). Chief Justice Fuller, in *Union Pac. Ry. Co.*, noted:

> As has been well said, equity has contrived its remedies "so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated;" and "has always preserved the elements of flexibility and expansiveness, so that new ones my be invented, or old ones modified, in order to meet the requirements of every case and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed."

Id. at 601 (quoting JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 111 (Bancroft & Whitney Company, 4th ed. 1918)).

124. *Grupo Mexicano*, 527 U.S. at 336 n.3. (Ginsburg, J., dissenting). It is interesting that Justice Ginsburg called the preliminary injunction here a "provisional remedy," for that is exactly what it was. The term usually encompasses attachments, garnishment writs, and replevin writs governed by statute, but can include preliminary injunctions. *See* Huntington Nat'l Bank v. Lewis, No. 05AP1213, 2006 WL 1230670, at *2 (Ohio Ct. App. May 9, 2006).

125. 347 U.S. 483 (1954). This included supervision of local school administration. *See* Freeman v. Pitts, 503 U.S. 467, 491-92 (1992). She referred to the Court's enforcing antitrust law by the superintending of intricate programs of corporate dissolution and divestiture. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 337 n.4 (1999) (Ginsburg, J., dissenting).

126. *See id*. at 338.

127. *Id.*

between law and equity, the Chancellor may have turned away cases the law courts could deal with adequately simply to reduce the inevitable tension the divided system created.[128]

> The facts of this case so plainly show, for creditors situated as Alliance, the remedy at law is worthless absent the provisional relief in equity's arsenal . . . . [T]he nearly instantaneous transfer of assets abroad, suggests that defendants may succeed in avoiding meritorious claims in ways unimaginable before the merger of law and equity.[129]

Regarding the "preliminary asset-freeze injunctions"—the so-called *Mareva* injunctions—she said that the "better reasoned and more recent decisions ground *Mareva* in equity's traditional power to remedy the 'abuse' of legal process by defendants and the 'injustice' that would result from defendants 'making themselves judgment-proof' by disposing of their assets during the pendency of litigation."[130] Justice Ginsburg stressed that without the injunction, the defendants' concerted efforts would render a judgment for plaintiffs worthless.[131]

In Part III of the dissent, Justice Ginsburg referred to the warning of *De Beers*, which the Second Circuit referred to as the "parade of horribles."[132] She was assured that with the protection of requiring the moving party to show a likelihood of success on the merits and irreparable damage to the plaintiff in the absence of an injunction,[133] the "asset-freeze order" would rank as an extraordinary remedy.[134] Federal Rule of Civil Procedure 65(c) permits a court to "'match the scope of the injunction to the most probable size of the likely judgment,' thereby sparing the defendant from undue hardship."[135]

Justice Ginsburg continued by pointing out that Congress can, and has, curtailed the courts' exercise of their powers of equity, but has never addressed preliminary injunctions. "The relevant question, therefore, is whether, absent congressional direction, the general equitable powers of the federal courts permit relief of the kind fashioned by the District Court."[136] She concluded her

128. *See id.*

129. *Grupo Mexicano*, 527 U.S. at 338-39.

130. *Id.* at 339 (quoting Mareva Compania Naviera S.A. v. International Bulk Carriers S.A., [1975] 2 Lloyd's Rep. 509).

131. *See id.* at 338-41 (Ginsburg, J., concurring).

132. *See* De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212, 222-23 (1945).

133. *See* Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 340 (1999) (Ginsburg, J., dissenting) (citing Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975)).

134. An extraordinary remedy is one available in limited circumstances for a limited purpose. *See* Morris v. Congdon, No. 17336, 2006 WL 721757, at *2 (Conn. Mar. 28, 2006).

135. *Grupo Mexicano*, 527 U.S. at 340-41 (Ginsburg, J., dissenting) (quoting Hoxworth v. Binder, Robinson & Co., 903 F.2d 186, 199 (3d Cir. 1990)). In the instant case, the short time span between the preliminary injunction and the final judgment (less than four months) showed that the temporary restraint on GMD "did not linger beyond the time necessary for a fair and final adjudication in a busy, but efficient court." *Id.* at 341.

136. *Id.* at 342.

dissent by artfully expressing what, with the addition of one Justice's vote would have been the holding of the Court:

> [T]he default rule in the grand aims of equity. Where, as here, legal remedies are not "practical and efficient," the federal courts must rely on their "flexible jurisdiction in equity . . . to protect all rights and do justice to all concerned." No countervailing precedent or principle holds the federal courts powerless to prevent a defendant from dissipating assets, to the destruction of a plaintiff's claim, during the course of judicial proceedings.[137]

C. Great-West Life & Annuity Ins. Co. v. Knudson[138]

In *Knudson*, both Justices Scalia and Ginsburg asserted their complete satisfaction with their respective opinions on equity in *Grupo Mexicano*.[139] The *Knudson* case involved an interpretation of an ERISA provision authorizing enforcement of the reimbursement provision in an ERISA plan.[140] Section 503(a)(3) authorizes action "[b]y a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates . . . the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of the plan."[141]

Knudson involved an interpretation of this provision and efforts to exercise the right to enforce reimbursement. An automobile accident in California rendered Janette Knudson a paraplegic. At the time of the accident, Ms. Knudson's then husband was enrolled in his employer sponsored Health and Welfare Plan (plan). The plan covered Ms. Knudson's $411,157 in medical expenses. The plan also provided that it would have the right to recover from a beneficiary any payments paid by the plan that were later recovered by the beneficiary from a third party (the reimbursement provision). Under the plan, Great-West Life & Annuity Insurance Company paid all but $75,000 of Ms. Knudson's medical expenses.

Ms. Knudson and her husband later settled with Hyundai Motor Co., the manufacturer of the vehicle involved in Ms. Knudson's accident, for $650,000. The state court that approved the settlement allocated that sum in the following amounts: $256,745 to a special needs trust to provide for Janette's future medical care, $373,426 to attorney's fees and costs, $5,000 to reimburse the California Medicaid Program, and the balance of $13,828 to Great-West for reimbursement under the plan.

Great-West did not cash the check. It took the position that the company was entitled to reimbursement from the Knudsons in the amount of $411,157.

137. *Id*. (internal citations omitted)
138. 534 U.S. 204, (2002).
139. *See id*. at 217, 233.
140. *See* 29 U.S.C. § 1132(a)(3) (2000).
141. 29 U.S.C. § 1132(a)(3) (2000).

Great-West argued this represented the total amount paid by the plan which the Knudsons later recovered from third parties in the settlement. Great-West filed suit in a California federal court to enforce the reimbursement provision.

Great-West took the position that that Ms. Knudson's failure to reimburse the plan completely violated its terms and therefore was actionable under § 503(a)(3)(A). Furthermore, since Great-West sought restitution, which was "equitable relief," the remedies sought were actionable under § 502(a)(3)(B). The district judge granted summary judgment in favor of the Knudsons, and the Ninth Circuit Court of Appeals affirmed. The Supreme Court, in a 5-4 split decision upheld the Ninth Circuit.

With reference to § 502(a)(3)(A), Justice Scalia considered the plaintiff's "quest as simply one to impose a legal liability for a contractual obligation to pay money—relief that was not typically available in equity."[142] Moreover, "an injunction to compel the payment of money past due under a contract or specific performance of a past due monetary obligation also [was] not typically available in equity."[143] With reference to § 502(a)(3)(B), Justice Scalia wrote that the plaintiff was not entitled to equitable relief under ERISA simply because it was seeking restitution. He concluded this was not an equity case. "[I]n the days of the divided bench restitution was available in certain cases at law and certain cases in equity."[144] In other words, restitution can be both an equitable remedy and a legal remedy. In this case, the majority concluded it was legal, not equitable in nature.

> Thus "restitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equitable case" and whether it is legal or equitable depends on "the basis for [the plaintiff's] claim" and the nature of the underlying remedies sought. [F]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession . . . .[145]

"Here the funds to which petitioners claim an entitlement under the Plan's reimbursement provision—the proceeds from the settlement of respondents' tort action—are not in respondents' possession."[146] When the statute referred to injunctions and "other equitable relief," Justice Scalia opined that Congress required the courts to give a specific meaning to "equitable relief" and "advert to the differences between law and equity to which the statute refers . . . ."[147]

Justice Ginsburg's dissent took umbrage with the majority's reliance on the

142. *Knudson*, 534 U.S. at 210.
143. *Id*. at 211.
144. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 212 (2002).
145. *Id*. at 205.
146. *Id.* at 214.
147. *Id.* at 217.

law as it was during "the days of the divided bench."[148] She said that the "rarified rules underlying the rigid and time-bound conception of the term 'equity' were hardly at the fingertips of those who enacted § 502(a)(3)."[149] "By 1974, when ERISA became law, 'the days of the divided bench' were a fading memory, for that era had ended nearly 40 years earlier with the advent of the Federal Rules of Civil Procedure."[150] She referred to the majority's approach to solving the problem before the Court as "fanciful."[151]

Justice Ginsburg observed that although the Court recognized it need not resolve the issue, its opinion contemplated that a constructive trust claim would have succeeded in equity had Great-West sued the trustees of the special needs trust which possessed the funds, rather than suing the Knudsons.[152] The relief Great-West sought, however, is identical to the relief it would have sought had it sued the trustees. After the trust had been approved, Great-West tried to join the trust in its action, but the district court would not permit the action. If Great-West had appealed the denial of this joinder motion or had the district court permitted the joinder, the majority presumably would have reversed the ultimate ruling of the district court and not "left in limbo the meaning of the plan's reimbursement provisions."[153] Then, "the Court's decision rests on Great-West's failure to appeal an interlocutory issue made moot by the district court's final judgment, an issue that to all involved must have seemed utterly inconsequential post judgment day."[154] The dissenting opinion continued observing that in enacting ERISA, Congress likely sought "'to establish a uniform administrative scheme' and to ensure that plan provisions would be enforced in federal court, free of 'the threat of conflicting or inconsistent State and local regulation' . . . . The majority's construction frustrates these goals."[155]

Justice Ginsburg next considered *Mertens v. Hewitt Associates*,[156] a Supreme Court decision entered just two months before Justice Ginsburg became a member of the Court. In *Mertens*, a five-member majority held that § 503(a)(3) of ERISA did not authorize suits for money damages against non-fiduciaries who knowingly participate in a fiduciary's breach of its duties.[157] Justice

148. *Knudson*, 534 U.S. at 212. Justices Stevens, Souter, and Breyer joined in the dissent.

149. *Id*. at 224 (Ginsburg, J., dissenting).

150. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 224-25 (2002).

151. Justice Ginsburg said that it was "fanciful to attribute to Members of the ninety-third Congress familiarity with those needless and obsolete distinctions." *Id*. at 225.

152. *Id*.

153. *Id.* at 227.

154. *Knudson*, 534 U.S. at 227.

155. *Id.*

156. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 227-28 (2002) (citing Mertens v. Hewitt Associates, 508 U.S. 248 (1993)).

157. Mertens v. Hewitt Associates, 508 U.S. 248, 262 (1993). The dissent (which included Justices White, Rehnquist, Stevens, and O'Connor) said "it is entirely reasonable in my view to construe § 502(a)(3)'s reference to 'appropriate equitable relief' to encompass what was equity's routine remedy for such breaches—a

Ginsburg approved of some points mentioned by Justice Scalia in the *Mertens* majority. Scalia stated "[t]he term 'equitable relief' can assuredly mean . . . whatever relief a court of equity is empowered to provide the particular case at issue. But . . . 'equitable relief' can also refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."[158] Justice Ginsburg agreed with this statement, but pointed out that the Court in *Mertens* said that equitable relief can refer to those categories of relief that were "typically available in equity"—not to those that were exclusively available in equity.[159] Scalia continued: "As memories of the divided bench, and familiarity with its technical refinements recede further into the past, the former meaning becomes perhaps, increasingly unlikely."[160] Ginsburg agreed.[161]

However, Justice Ginsburg criticized the position taken by the majority in *Knudson*, arguing that Title VII's "equitable relief" provision had nothing to do with its decision.[162] Justice Ginsburg also noted that the majority in *Mertens* used Title VII's equitable relief as the "touchstone" for its ruling.[163] Justice Ginsburg concluded her dissent in *Knudson* by noting that the majority's rationale is at odds with Congress's goals for ERISA. She also pointed out that the majority's decision needlessly obscured and complicated § 503(a)(3).[164]

---

compensatory monetary award calculated to make the victims whole, a remedy that was available against both fiduciaries and participating non-fiduciaries." *Id*. at 266 (White, J., dissenting).

158. *Id.* at 256.

159. *Knudson*, 534 U.S. at 234.

160. *Mertens*, 508 U.S. at 256-57.

161. Great-West Life and Annuity Ins. Co. v. Knudson, 534 U.S. 204, 231 (2002). There was a statement made in the majority opinion in *Mertens* to which Justice Ginsburg made no reference. Justice Scalia acknowledged that a court of equity in enforcing a trust could award monetary damages. *See Mertens*, 508 U.S. at 239-50. He quickly encapsulated that admission, however, with the following words:

> In the context of the present statute, we think there can be no doubt. Since all relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to "equitable relief" in the sense of "whatever relief a common-law court of equity could provide in such a case" would limit the relief not at all. We will not read the statute to render the modifier superfluous.

Id. At 258.

162. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 230 (2002).

163. *Id.* at 230.

164. *Id*. at 234.

> Today's decision needlessly obscures the meaning and complicates the application of § 503(a)(3). The Court's interpretation of that provision embroils federal courts in "recondite controversies better left to legal historians," and yields results that are demonstrably at odds with Congress' goals in enacting ERISA. Because in my view Congress cannot plausibly be said to have "carefully crafted" such confusion . . . I dissent.

Id.

III. ENGLISH COURT PRONOUNCEMENTS ON EXPANSIVE EQUITY

Any endeavor to define "cases in equity" must look to the roots and history of the English Chancery courts. As noted above, Justice Scalia has advanced an approach that limits the Court's equity power by this history and tradition. Below are a series of excerpted statements about equity from a sample of English courts.

Lord Portarlington v. Soulby[165]

The early English courts of Chancery have for many years exercised their equity powers to control the litigation at hand. In this case, a party was enjoined from bringing an action in another jurisdiction.[166]

Boulting v. Association of Cinematograph, Television and Allied Technicians[167]

"[A]ll rules of equity [are] flexible, in the sense that [they] develop to meet the changing situations and conditions of the time."[168]

Mareva Compania Naviera, S.A. v. Int'l Bulkcarriers, S.A.[169]

> If it appears that the debt is due and owing—and there is a danger that the debtor may dispose of his assets so as to defeat it before a judgment—the court has jurisdiction in a proper case to grant an interlocutory injunction so as to prevent him disposing of those assets.[170]

Pettkus v. Becker[171]

"The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice."[172]

Medforth v. Blake[173]

"Principles of equity we were all taught were introduced by Lord Chancellors and their deputies . . . in order to provide relief from the inflexibility of common law rules."[174]

165. [1834] [1824-1834] All ER Rep. 610 (Ch.).
166. *Id.*
167. [1963] 2 Q.B. 606, 636 (A.C.).
168. *Id.*
169. [1975] 2 Lloyd's Rep. 509 (A.C.).
170. *Id*. at 510.
171. [1980] 2 S.C.R. 834.
172. *Id.* at 847.
173. [1999] [2000] Ch. 86 (A.C.).
174. *Id.* at 110.

IV. OTHER UNITED STATES SUPREME COURT PRONOUNCEMENTS ON EXPANSIVE EQUITY

Georgia v. Brailsford[175]

"The court considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary."[176]

Watson v. Sutherland[177]

Watson & Co., having recovered a judgment in an "at law" action in the Circuit Court for the District of Maryland against Wroth & Fullerton, as judgment debtor caused writs of *fieri facias* to be issued.[178] Pursuant to these writs, the entire stock in trade of a retail dry goods store in Baltimore in possession of one Sutherland, a recently arrived immigrant from Ireland, was levied upon. Sutherland, claiming that the goods were his and not the property of Wroth & Fullerton, filed a bill in equity to enjoin the further prosecution of the writs. He alleged that if the writs were prosecuted to completion, the damage to him would be irreparable, and he would not be compensated in damages if the injunction were not issued. He further alleged that the goods were purchased by him in the current season from Watson & Fullerton, but that he had not fully paid for them, and that his only means of payment was through sale in his retail dry goods business. Having the goods taken from him pursuant to the levy, or even a delay in his ability to sell them would render him insolvent and his prospects in life "blasted." Watson & Co. answered the bill in equity by alleging that the property levied upon was, in fact, that of the judgment debtor, Wroth & Fullerton, and that the purported sale by it to Sutherland was a fraud. Trial of the cause revealed that the Legislature of Maryland had suspended executions on judgments from May 10, 1861, to November 1, 1862.[179] During that time judgments amounting to between $30,000 to $40,000 had been entered against Wroth & Fullerton, but even before the moratorium, in March of 1861, Wroth & Fullerton had suspended payment to Watson & Co. and sold much of their goods, including the sale to Sutherland on October 27, 1861, keeping the proceeds of all sales to themselves. Watson & Co. argued that the preliminary injunction was

175. 2 U.S. 402 (1792).

176. *Id*. at 414.

177. 72 U.S. 74 (1867). Justice Ginsburg included a quotation from this case in her *Grupo Mexicano* dissent. *See* Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 335 (1999) (Ginsburg, J. dissenting and concurring). The Majority did not mention this case.

178. *Watson*, 72 U.S. at 78.

179. *See id*. at 75-76.

unnecessary because even if the goods were Sutherland's property, he could obtain the same type of goods at open market, and recover any damage against Watson & Co. in an action at law. The trial judge, however, entered a temporary injunction against further prosecution of the writs of *fieri facias*, which was made permanent after trial of the cause.

Justice Davis, writing for a unanimous Supreme Court in 1867, found that Sutherland indeed could have had his remedy at law by recovering any damages he might have sustained in an action at law against Watson & Co. That alternative remedy, however, would not have been "plain and adequate"[180] nor would it have been "as practical and efficient to the ends of justice and the prompt administration, as the remedy in equity."[181] He explained that in an action at law, if Watson & Co. had the property levied upon in good faith, and Sutherland sued and prevailed, the only recoverable damages would be the value of the property wrongfully sold. If the property had not been sold under the levy, Sutherland's damage claim would be restricted to its loss in value, if any. There would be no recovery of damages for the loss of his prospects in life.[182]

> To prevent a consequence like this, a court of equity steps in, arrests the proceedings *in limine*; brings the parties before it; hears their allegations and proofs, and decrees, either that the proceedings shall be unrestrained, or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case, must depend altogether upon the character of the case as disclosed in the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice require the injunction to be issued.[183]

It would appear that the case of *Watson v. Sutherland* is a perfect match for the case of *Grupo Mexican v. Alliance Bond Fund, Inc*. In *Sutherland*, the temporary injunction was requested and granted by the trial judge in an action in equity separate and apart from the action at law. In *Grupo Mexicano*, the temporary injunction was requested and granted by the trial judge in the action at law. Since the Federal Rules of Civil Procedure provide that there is but one form of action, this appears to be a difference without a distinction.[184]

180. *Id*. at 76.

181. *Id.* at 78.

182. Watson v. Sutherland, 72 U.S. 74, 79 (1867).

183. *Id.* The Court found that indeed Wroth & Fullerton had wronged Watson & Co. by selling its property and not paying Watson & Co., but Sutherland was not a party to that wrongdoing. *Id.* at 80.

184. *See* FED. R. CIV. P. 2. Moreover, the rules specify that "[t]hese rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity . . . ." FED R. CIV. P. 1. It should also be noted that Title 28 of the United States Code, dealing with procedural matters of the United States' courts, does not contain any mention of law or equity per se.

Payne v. Hook[185]

"A court of equity adapts its decrees to the necessities of each case . . . . It disposes of a case so as to end litigation, not to foster it; to diminish suits, not to multiply them."[186]

Joy v. City of St. Louis[187]

In 1891, the Supreme Court, in approving of specific enforcement of a contract dealing with personal property, said, through Justice Blatchford:

> [I]t is not unusual for a court of equity to take supplemental proceedings to carry out its decrees, and make it effective under altered conditions . . . . [I]t is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation.[188]

Root v. Woolworth[189]

A quiet title action was initially at issue in this 1893 case. The successful plaintiff brought a second suit to retake possession of a portion of the property which had been physically retaken by the defendant. The plaintiff alleged that in order to carry into effect the quiet title decree it was necessary that the decree be supplemented by an order of injunction against the defendants asserting possession of the property. In authorizing the procedure, the Supreme Court said the following: "It is well settled that a court of equity has jurisdiction to carry into effect it[s] own orders, decrees, and judgments, which remain unreversed when the subject-matter and the parties are the same in both proceedings."[190]

The court added the following: "Where the court possesses jurisdiction to make a decree, it possesses the power to enforce its execution."[191]

Meredith v. City of Winter Haven[192]

In this 1943 case, the Supreme Court held that federal courts have the power to make determinations of state law, even though a state's highest court had not answered the questions at issue. The court justified the holding: "An appeal to

185. 74 U.S. 425 (1868).
186. *Id.* at 432.
187. 138 U.S. 1 (1891).
188. *Id.* at 47-50.
189. 150 U.S. 401 (1893).
190. *Id.* at 10-411.
191. *Id.* at 412. The court made it clear that the supplemental bill may be filed either before or after the decree in the case. *See id.* at 411.
192. 320 U.S. 228 (1943).

the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity."[193]

Hecht Co. v. Bowles[194]

In this 1944 case, the Court held that a statute enacted by Congress did not require an automatic injunction by the district court. The reason given by the Court for its holding was the following:

> The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of a particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.[195]

United States v. United Mine Workers of America[196]

Just after World War II, in response to labor issues that were affecting the economically-vital coal industry, President Harry S. Truman signed Executive Order No. 9725, which authorized the Secretary of the Interior to seize and operate the mines, as well as to negotiate with representatives of miners their terms and conditions of employment.[197] On October 21, 1946, John L. Lewis, President of the United Mine Workers of America, took the position that his union had a right to strike against the mine owners, and hence directed the union members to stop working effective midnight, November 20, 1946. Two days prior to the strike date the United States filed a complaint in the United States District Court for the District of Columbia against the union and Lewis, both individually and as president of the union. The Complaint sought a declaratory judgment to the effect that the union lacked the power to terminate the collective bargaining agreement under which it had been operating.[198] The court, pursuant to a request made by the United States, entered, without notice to the defendants, a temporary restraining order, preventing the mine workers from stopping their work. The United States filed a petition for a rule to show cause why the defendants should not be punished for violating the temporary restraining order. On December 4, 1946, the court fined the defendants (both the union and Lewis) for criminal and civil contempt, and issued a preliminary injunction effective until a final determination of the case in terms similar to

193. *Id*. at 235.
194. 321 U.S. 321 (1944).
195. *Meredith*, 320 U.S. at 329-30.
196. 330 U.S. 258 (1947).
197. *Id*. at 262 n.1.
198. *See id*. at 289-90.

the temporary restraining order.[199]

The main issue in the case was whether the district court had jurisdiction to render a permanent injunction against the union in light of statutory material in effect at the time. As to the peripheral issue concerning whether the district court had jurisdiction to issue the preliminary injunction, the Court took little time in answering the question in the affirmative, holding that the court "had the power to preserve existing conditions [by a temporary restraining order] while it was determining its own authority to grant injunctive relief."[200]

Beacon Theatres, Inc. v. Westover[201]

In this case, where the Court held that the right to a trial by jury cannot be abrogated by an opposing party seeking equitable relief, Justice Hugo Black wrote about the inadequacy of legal remedies and irreparable harm in the following words: "Inadequacy of remedy and irreparable harm are practical terms. . . . As such their existence today must be determined, not by precedents decided under discarded procedures, but in the light of the remedies now made available by [statutes and rules applicable to the case]."[202]

Swann v. Charlotte-Mecklenberg Board of Education[203]

In this 1968 case, Chief Justice Warren Burger wrote the majority opinion, affirming a district court's plan for ridding a school district of racial segregation. Chief Justice Warren cited the Court's discussion of equity in *Hecht, Co. v. Bowles*.[204] The Court also observed, "[a]s with any equity case the nature of the violation determines the scope of the remedy."[205]

V. LOWER FEDERAL COURTS' PRONOUNCEMENTS REGARDING EXPANSIVE EQUITY

Pryor v. McIntire[206]

In 1896, the United States Circuit Court for the District of Columbia explained laches—the limitations rule used in equity proceedings compatibly with the expansive equity jurisprudence.

> The familiar maxim, that "equity aids the vigilant," is a typical doctrine of equity jurisprudence, and in its application, best illustrates the beneficent spirit

199. *See id*. at 304-05.
200. *United Mine Workers*, 330 U.S. at 293.
201. 359 U.S. 500 (1959).
202. *Id*. at 507.
203. 402 U.S. 1 (1971).
204. *See supra* note 195 and accompanying text.
205. *Swann*, 402 U.S. at 16.
206. No. 465, 1896 WL 14856 (App. D.C.).

> of its administration. The rule is neither arbitrary nor technical; but capable of rigid contraction on the one hand, and of wide expansion on the other, in the wide discretion of the chancellor, according to the special circumstances of each particular case. This rule is well expressed by Mr. Justice Brewer in the following words: "The length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defence, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them."[207]

The Salton Sea Cases[208]

In 1909, the Ninth Circuit held that a court of equity, if it has jurisdiction over a defendant, may order that party to take certain action concerning property within its jurisdiction, even though in order to comply the defendant would have to perform certain acts outside the court's jurisdiction.[209]

Bowen v. Hockley[210]

An employee of a large chemical company was killed as the result of injuries incurred while performing his duties. Subsequent to his widow receiving payment of compensation for the death, some of his creditors obtained an order appointing receivers to continue operating the company because liquidating the assets would not satisfy all its debts. The receivers obtained an order permitting them to cease making the compensation payments, and the widow filed an action in federal district court to reinstate the benefits. The judge denied her petition on the ground that there was no statutory or case authority requiring continuation of such payments by a receivership. In reversing the district judge, the Fourth Circuit resorted to an analysis of the nature of the compensation payments and the powers of courts of equity in such circumstances. The court held that as a matter of equity, the payments were an obligation imposed by law because accidents, which are inevitable in modern industry, should be paid by the industry rather than by the public.[211] The fact that the relief sought by the widow was not covered by statute or judicial precedent did not affect the court's holding:

> One of the glories of equity jurisprudence is that it is not bound by the strict

207. *Id.* at *7 (quoting *Halstead v. Grinnan*, 152 U.S. 412, 416 (1894)).

208. 172 F. 792, 818 (9th Cir. 1909).

209. *See generally The Salton Sea Cases*, 172 F. 792 (9th Cir. 1909).

210. 71 F.2d 781 (4th Cir. 1934).

211. *Id*. at 782. In this case the maxim "he who seeks equity must do equity" was applicable because the creditors who asked for the extraordinary remedy of a receivership should be required to continue the payments as a matter of ordinary overhead. *Id*. at 783.

> rules of the common law, but can mold its decrees to do justice amid all the vicissitudes and intricacies of life. The principles upon which it proceeds are eternal; but their application in a changing world will necessarily change to meet changed situations. If relief had been granted only where precedent could be found for it, this great system would never have been developed; and, if such a narrow view of equitable powers is adopted now, the result will be the return of the rigid and unyielding system which equity was designed to remedy.[212]

Hamilton v. Nakai[213]

A district court, pursuant to request by the Hopi Indian Tribe, determined the relative rights and interest of the Hopi and Navajo Tribes to certain lands within a reservation in Arizona. Subsequently, the Hopi Tribe petitioned the court for an order of compliance or writ of assistance to enforce its rights. The district judge denied the request, and the Ninth Circuit reversed, stating, "The equitable jurisdiction of a federal court extends to supplemental or ancillary bills brought for the purpose of effectuating a decree of the same court."[214]

The appellate court made it clear that the relief rendered by the court of equity may include matters not within the proceeding to which its relief is ancillary.[215]

Danielson v. Local 275, Laborers International Union[216]

In *Danielson*, the Second Circuit issued a preliminary injunction in a labor dispute. The court's holding was based on several rationales. First, that the status quo should be maintained under general equitable principles where a union is engaging in unfair labor practices. Second, that the status quo should be maintained, not necessarily because management is suffering irreparable harm, but because there is a strong public interest in maintaining the free flow of commerce and the encouragement of collective bargaining which was not being maintained.[217] Third, that if irreparable damage must be proved in this case, it is certain that some damage will result due to the slowdown of planned construction.[218]

This case should be remembered when discussing expansive equity jurisprudence for at least two reasons. First, there is a public interest in seeing matters resolved in a proper manner. Second, there is considerable difficulty in undoing a wrongdoing.

212. *Id*. at 786.

213. 453 F.2d 152 (9th Cir. 1971).

214. *Id*. at 157.

215. *Id*. at 160. The court observed that the All Writs Act, 28 U.S.C. § 1651(a) (2000), is actually an extension of the same legal principle. *Id.* at 157.

216. 479 F.2d 1033 (2d Cir. 1973).

217. *See id*. at 1035.

218. *See id*. at 1036.

Hughes v. Cristofane[219]

The district court issued a temporary order restraining a township from enforcing an ordinance prohibiting topless dancing in establishments that serve alcoholic beverages. In the court's opinion, maintenance of the status quo until final disposition of the case was of considerable importance. The court stated that in order for the plaintiffs to obtain the desired order, they must prove:

> (1) that unless the restraining order issues, [the plaintiffs] will suffer irreparable harm; (2) that the hardship they will suffer absent the order outweighs any hardship the defendants would suffer if the order were to issue; (3) that they are likely to succeed on the merits of their claims; (4) that the issuance of the order will cause no substantial harm to the public; and (5) that they have no adequate remedy at law.[220]

United States v. Price[221]

The United States, pursuant to two statutes,[222] sued more than thirty-five past and present owners of a landfill on behalf of the Administrator of the Environmental Protection Agency for improper use made of the landfill by the owners. The plaintiff requested that the district court issue a preliminary injunction requiring certain defendants (1) fund a diagnostic study of the threat posed to Atlantic City's public water supply by certain toxic substances emanating from the landfill; and (2) provide an alternate water supply to homeowners whose private wells [had] been contaminated by substances leaching from the landfill. The district court denied the request for the preliminary injunction and the Third Circuit Court of Appeals affirmed. The appellate court reasoned that although the remedy requested was well within the power of the district court to grant, they should not have granted it because only a few of the more than thirty-five defendants would have been required to pay for the relief. Additionally, the appellate court noted some questions about the financial ability of the affected defendants to fund it.[223] The court's opinion contained two very pertinent pronouncements of the law concerning preliminary injunctions:

> A court of equity has traditionally had the power to fashion any remedy deemed necessary and appropriate to do justice in the particular case . . . . Among the factors which guide the exercise of the courts' equitable discretion are: "(1) the probability of irreparable injury to the moving party in the absence of relief; (2) the possibility of harm to the non-moving party if relief is granted; (3) the likelihood of success on the merits; and (4) the public

219. 486 F. Supp. 541 (D. Md. 1980).
220. *Id.* at 544.
221. 688 F.2d 204 (3d Cir. 1982).
222. *See id.* (citing 42 U.S.C. § 6973 and 42 U.S.C. § 300i).
223. *See id.* at 214.

interest."[224]

This case stands for the proposition that if a preliminary injunction is otherwise appropriate, the court will not order it if it must be paid for by an unreasonably small number of defendants whose ability to pay is questionable. These conditions did not exist in *Grupo Mexicano*.

Byron v. Clay[225]

Judge Richard Posner of the Seventh Circuit Court of Appeals tells us that courts must take into account the effect of equitable decrees on persons who are not parties to the action.[226] The injunction in *Grupo Mexicano* benefited, rather than harmed, the creditors which included the plaintiff and non-parties.[227]

Han v. United States[228]

A married couple purchased a home upon which there were two encumbrances—one to a mortgagee and the other, an inferior lien to the Internal Revenue Service (IRS). The purchasers were aware of the mortgage but not the IRS lien. After the sale, the IRS attempted to foreclose on its lien. The Ninth Circuit held that it could not, as the couple was subrogated to the rights of the mortgagee, which primed the rights of the IRS.[229] The court's opinion reveals how the doctrine of equitable subrogation has expanded over the years:

> The doctrine of equitable subrogation is not a fixed and inflexible rule of law or of equity. It is not static, but is sufficiently elastic to take within its remedy cases of first instance which fairly fall within it. Equity first applied the doctrine strictly and sparingly. It was later liberalized, and its development has been the natural consequence of a call for the application of justice and equity to particular situations. Since the doctrine was first ingrafted on equity jurisprudence, it has been steadily expanding and growing in importance and extent, and is . . . now broad and expansive and has a very liberal application.[230]

224. *Id.* at 211 (quoting *Goldhaber v. Foley*, 519 F. Supp. 466 (E.D. Pa. 1981)).

225. 867 F.2d 1049 (7th Cir. 1989).

226. *Id.* at 1051.

227. The plaintiff was interested in establishing an "equal playing field." *See supra* note 39. While it may be said that debtors commonly prefer some creditors to others, such conduct is not to be condoned, and is punishable by Section 547 of the Bankruptcy Code.

228. 944 F.2d 526 (9th Cir. 1991).

229. The court described subrogation in the following manner: "[S]ubrogation is applied when one person, not acting as a mere volunteer or intruder, pays the debts of another and which in equity and good conscience should have been discharged by the latter." *Id*. at 529.

230. *Id*. (citing In re Estate of Johnson, 240 Cal. App. 2d. 742, 744-45 (9th Cir. 1966)).

Abbott Laboratories v. Mead Johnson & Co.[231]

In this case, one of only two pharmaceutical companies who shared a limited market sued the company which produced a product that allegedly unfairly infringed upon its earlier medicinal remedy, and sought a preliminary injunction against false advertising and "trade dress infringement."[232] The court found that to obtain a preliminary injunction prior to final judgment, the plaintiff would be required to prove four prerequisites:

> (1) some likelihood of succeeding on the merits[;] (2) that it has "no adequate remedy at law" and will suffer "irreparable harm" if preliminary relief is denied; . . . . (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest . . . .[233]

The Seventh Circuit reversed the district court's denial of the plaintiff's motion for a preliminary injunction. One of its grounds for doing so was that even if the plaintiff prevailed upon a trial on the merits and obtained a permanent injunction, and the defendant were allowed to re-enter the market under some sort of judicial restraint, the plaintiff would be damaged by doubts planted in the minds of the consuming public because of the defendant's wrongful advertising.[234] The court added that a plaintiff need not be required to show that its damages were incapable of proof in order to be "irreparable," since irreparable damages may be those to which there is simply an extreme difficulty in measuring.[235]

Kaepa, Inc. v. Achilles Corp.[236]

In this case, Kaepa, Inc. sued Achilles Corporation in a state court in Texas. Thereafter, Achilles removed the case to a federal district court, but thereafter filed an action in its home country of Japan. The district court granted Kaepa's motion for an order enjoining Achilles from litigating the action in Japan. The Fifth Circuit Court of Appeals affirmed the district court's action, holding that federal courts have the power to enjoin persons subject to their jurisdiction from prosecuting foreign suits, particularly where the second (foreign) action is so duplicative of the first action as to constitute "'an absurd duplication of effort' and would result in unwarranted inconvenience, expense and

231. 971 F.2d 6 (7th Cir. 1992).

232. "Trade dress infringement" refers to the protection that one is given by Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (2000), where the plaintiff, by its product-design or packaging has established some unique character that is being duplicated by a competitor. Justice Scalia, writing for the Court refused to expand the remedy by holding that a product's design is "distinctive and therefore protectible, only upon a showing of a secondary meaning." *See* Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 216 (2000).

233. *Abbott Laboratories*, 971 F.2d at 11-12 (internal citations omitted).

234. *See id*. at 17.

235. *See id*. at 18.

236. 76 F.3d 624 (5th Cir. 1996).

vexation."[237]

Rivera v. Apfel[238]

District Judge Hellenstein embraced the expansive equity theory in awarding interim disability payments to the plaintiff, a minor, during remand of the case to the Social Security Administration, despite contrary rulings by the Fourth and Tenth Circuits. As justification for his ruling, Judge Hellenstein traced the development of equity, quoting a law review article: "[i]t was the inflexibility and technicality of common law rules that produced the need for intervention of chancery equity."[239]

VI. STATE COURT PRONOUNCEMENTS ABOUT EXPANSIVE EQUITY

As the following cases demonstrate, state courts have had no problem expanding the breadth of equitable remedies as the facts warranted such development.

Dobson v. Pearce[240]

In 1854, New York's highest court held that a court of chancery has the power to enjoin the prosecution of a judgment procured by fraud in another state. The court opined:

> [A] court of chancery has power to grant relief against judgments when obtained by fraud. Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not avail himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an interference by a court of equity.[241]

Burnley v. Stevenson[242]

Not only have courts of equity long exercised powers usually reserved for courts at law, but their powers have extended beyond their own state lines. As early as 1873, the Ohio Supreme Court stated that "courts exercising chancery powers in one state have jurisdiction to enforce a trust, and to compel the specific performance of a contract in relation to lands situate in another state, after having obtained jurisdiction of the persons of those upon whom the obligation rests . . . ."[243]

237. *Id.* at 627.
238. No. 99CIV.3945(AKH), 2000 WL 628724 (S.D.N.Y. May 15, 2000).
239. *Id.* at *7 n.6.
240. 12 N.Y. 156 (1854).
241. *Id.* at 165.
242. 24 Ohio St. 474 (1873).
243. *Id.* at 478.

State ex rel. McElvain v. Riley[244]

In this 1925 prohibition proceeding, the Missouri Court of Appeals held that a divorce court had the equitable power to order a non-party bank to refrain from paying money to a husband/father in a divorce action pending determination of the rights of the parties' children. The opinion in the case, quoting Pomeroy on Equity, said the following:

> While it must be admitted that the broad and fruitful principles of equity have been established and cannot be changed by any judicial action, still it should never be forgotten that these principles, based as they are upon a divine morality, possess an inherent vitality and capacity of expansion, so as to ever meet the wants of progressive civilization.[245]

Meyer v. Reif[246]

The Supreme Court of Wisconsin permitted a judgment creditor to obtain an injunction against a trust beneficiary that prevented him from disposing of the corpus before his interest became present, thereby subjecting the corpus to satisfaction of the judgment.

> [E]quity "has never placed any limitations to the remedies it can grant, either with respect to their substance, their form or their extent; but has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case." If the customary forms of relief do not fit the case, or a form of relief more equitable to the parties than those ordinarily applied can be devised, no reason is perceived why it may not be granted . . . . "Though no precedent may be at hand in a given situation, since principles of equity are so broad that the wrong involved [or the right to be enforced] need not go without a remedy, the door will swing open for the asking, and a new precedent will be made."[247]

Reeves v. Crownshield[248]

In 1937, the New York Court of Appeals clarified that a court has inherent power to require a defendant to comply with its final orders, by contempt, if necessary. It opined that "[t]o compel the judgment debtor to obey the order of the court is not imprisonment for debt, but only imprisonment for disobedience of an order with which he is able to comply."[249]

---

244. 276 S.W. 881 (Mo. Ct. App. 1925).

245. *Id.* at 883 (quoting JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 63 (Bancroft & Whitney Company, 4th ed. 1918)).

246. 258 N.W. 391 (Wis. 1935).

247. *Id.* at 394 (quoting JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 111 (Bancroft & Whitney Company, 4th ed. 1918); Harrigan v. Gilchrist, 99 N.W. 909, 936 (Wis. 1904)).

248. 8 N.E.2d 283 (N.Y. 1937).

249. *Id.* at 285.

State v. Red Owl Stores, Inc.[250]

This 1958 case demonstrates the principle that courts have equitable jurisdiction where the remedy at law is inadequate. A Minnesota statute made it a misdemeanor to violate its regulation of drug stores. Though the statute did not contain a provision authorizing state officials to seek an injunction against those in violation, Minnesota, through its Attorney General, brought an action against a large number of retail food-market operators. The suit alleged that they sold and distributed various "drugs, medicines, chemicals and poisons" in the state of Minnesota without registering or being licensed by the state Board of Pharmacy.[251] The remedy sought was an injunction against the continuation of such activity. The trial court held that, as the violation of the statute was a misdemeanor, it was the duty of the City Attorney of the City of Minneapolis to prosecute, and since the legislature had not granted state officials the power to seek injunctive relief, the court was powerless to comply with the request. The trial court relied on authority that courts of equity were loathe to enforce criminal statutes by injunction because "criminal equity deprives the defendant of a jury trial, and for the definite penalties fixed by the legislature whatever punishment for contempt a particular court may see fit to enact."[252] The Minnesota Supreme Court reversed.

> [W]here the acts complained of are [violations] of the criminal law, the courts of equity will not on that ground alone interfere by injunction to prevent their commission, since they will not exercise their preventive power for the purpose of enforcing criminal laws by restraining criminal acts. However, courts of equity will interfere by injunction to restrain acts amounting to a public nuisance, if they affect public rights or privileges or endanger public health, regardless of whether such acts are denounced as crimes.[253]

The court noted that the case involved more than the prosecution of a misdemeanor. It involved the question of whether, in the absence of an adequate remedy at law, a court is without jurisdiction to enforce a statute adopted to enforce public health merely because the statute did not explicitly prescribe such a remedy.[254] The court left no doubt that the remedy at law—that of depending on multiple prosecutions—was inadequate.[255] It reversed the trial court and ordered a new trial.

250. 92 N.W.2d 103 (Minn. 1958).

251. *See id*. at 106 n.1.

252. *Id.* at 109.

253. *Id.* at 110.

254. *See* State v. Red Owl Stores, Inc., 92 N.W.2d 103, 110 (Minn. 1958).

255. *Id.* at 112-13. "It should be recognized that for the state to undertake to prosecute each violation in face of resistance over a great area of the state would, in effect, set at naught the effective and uniform enforcement of the act." *Id*. at 112. "[I]n the face of organized resistance [on the part of the defendants], it must rely on one prosecution at a time to accomplish enforcement." *Id*. "[U]nder the circumstances, the pharmaceutical board could make little progress toward enforcing the act if it was limited to prosecutions to recover the small penalties provided." *Id*. at 113.

McElreath v. McElreath[256]

At times courts of equity have used non-equitable doctrines to extend their powers beyond the usual contours of equity jurisprudence. In this 1961 case, the Supreme Court of Texas held, as a matter of comity, that its courts will enforce the equitable decrees of a sister state affecting Texas land "so long as such enforcement does not contravene an established public policy" of Texas.[257]

Perry v. Perry[258]

This 1972 decision demonstrates the equitable maxim "Equity Delights to Do Justice and not by Halves," arguably at heart a facet of expansive equity jurisdiction. A husband and wife, as part of their divorce proceedings, agreed that the husband would change the designation of beneficiary on life insurance policies from his mother to their children. He failed to file the requisite forms, and his mother continued to pay the premiums on one of the policies and remained the named beneficiary on all. When the insured died, his mother collected all the proceeds and spent them on her personal needs. The former wife brought an action to impress a constructive trust on the proceeds. As there were no proceeds left, the mother argued that there was no equitable jurisdiction to impose a constructive trust because there was no fund which could become the trust corpus, and that the plaintiff's only recourse was to file an at-law action against the mother seeking a general judgment against her for the dissipated sums. The trial court rejected the mother's suggestion and entered a judgment for the children as to three of the policies. As to the policy on which the mother paid the premiums, the trial court held for the mother on the equitable doctrine that "one who pays the premiums on a policy to keep in force, in the reasonable expectation of being the beneficiary of it, will, upon the disappointment of that expectation, be entitled to reimbursement for his outlay from the one who ultimately profits from it by receiving the policy proceeds."[259]

The Missouri Supreme Court upheld the trial court its determination that the plaintiffs would not be required to dismiss the equity action and file a new action at law.

> It is a settled maxim that equity, once having acquired jurisdiction of a cause,

256. 345 S.W.2d 722 (Tex. 1961).

257. *Id*. at 733.

258. 484 S.W.2d 257 (Mo. 1972).

259. *Id*. at 260. There is a corollary to that principle to the effect that once the person who pays the premiums becomes aware that he or she is not to receive the proceeds, the presumption in that person's favor terminates. In this case there was no proof to the effect that the mother ever knew of her son's agreement to change beneficiaries because he failed to confirm his agreement with his wife by any "proper arrangement." *See generally id*.

> will not relinquish it without doing full and effective justice between the parties, even though, to right the wrong complained of, resort must be had to a remedy within the traditional province of law, as by a judgment for money by way of restitution.[260]

Farash v. Sykes Datatronics, Inc.[261]

The plaintiff, owner of a building, made an oral agreement with the defendant to lease the building if the plaintiff made certain improvements on an expedited basis. The agreement was never reduced to writing, and the defendant reneged on his promise. The plaintiff alleged that the parties agreed to enter into an oral lease for a term greater than one year and that the court should enforce it as such. New York's trial court dismissed the cause of action on Statute of Frauds grounds, and the Appellate Division affirmed.[262] The plaintiff, on a quasi-contract theory, further sought to recover the value of the work done to the building in reliance on the defendant's promise, despite the fact that the defendant received no benefit from the plaintiff's work. The doctrine of quasi-contract acknowledges that there is no ground at law upon which the plaintiff can recover, but that the basis of plaintiff's recovery is "an obligation imposed by law to do justice."[263] The court noted that in a quasi-contract case, the plaintiff may present contradictory characterizations of the contract, and, in fact, the modern rule of pleading also permits such presentations of alternate theories of relief.[264] One of the major factors supporting quasi-contract law is the importance of maintaining the status quo.[265] As noted, above, the plaintiffs in *Grupo Mexicano* also articulated the desire to maintain the status quo pending final judgment.[266] Moreover, isn't the concept of quasi-contract simply an example of expansive equity?

VII. CONCLUSION

The Federal Constitution refers to "cases . . . in equity" and the Judiciary Act of 1789 referred to "suits . . . in equity." Both documents were drafted when there were common-law courts and equity (or Chancery) courts, separate and apart from one another. District or federal trial courts were responsible for trying "equity cases" and "law cases." Such a distinction no longer exists, as all equity and law actions have been merged into "civil actions." District courts

260. *Id*. at 259.

261. 452 N.E.2d 1245 (N.Y. 1983).

262. *Id.* at 1246.

263. *Id*. at 1247.

264. *Id*. The Court made clear that recovery was not restitution but damages incurred in reliance on the defendant's promise, a position taken by the second Restatement of Contracts. *See id* (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 139, 349 cmt. B (1979)).

265. *See Farash*, 452 N.E.2d at 1247.

266. *See generally supra* Section II.B.

still regularly refer to "equity cases,"[267] but since 1937 when the Federal Rules of Civil Procedure merged law and equity procedure, only four circuit courts have specifically used that term.[268]

The current Supreme Court has used the term "equity case" only in opinions authored by Justice Scalia.[269] This is not the only place in which Justice Scalia has adhered to historical precedent. In *Burnham v. Superior Court*,[270] a New Jersey resident was personally served with the process of a divorce court emanating from an action instituted by his estranged wife, then a California resident. The Supreme Court held that the in-state service was sufficient for the California court to impose jurisdiction over the husband, even though he was temporarily in California on affairs that had nothing to do with the divorce. Justice Scalia, in a plurality opinion, acknowledged that the Court had conducted no independent inquiry into the desirability or fairness of the "prevailing in-state service rule, leaving that judgment to the legislatures that are free to amend it."[271] He added, "for our purposes, its validation is its pedigree, as the phrase 'traditional notions of fair play and substantial justice' makes clear."[272] So as to leave no doubt as to the historical reason for his decision Justice Scalia wrote: "we affirm our time-honored approach."[273]

Justices Scalia and Thomas cannot be blamed for their commitment to history and tradition. That is one of the hallmarks of *stare decisis*. However, their insistence on that adherence in the realm of such a dynamic subject as equity is narrow minded. Where a set of principles exists for the improvement of the legal system, the fact that jurists two or three hundred years ago in using those principles held certain remedies applicable to certain factual situations should be given only passing notice now.

When we use the term "equity" today we are not referring to a court or courts; we are referring to "the body of principles constituting what is fair and

267. *See, e.g.*, Ear, Nose & Throat Consultants v. State Auto Ins., No. Civ.A 3:05CV18-B-B, 2006 WL 1071834, at *2 (N.D. Miss. Apr. 21, 2006); Serio v. Black, Davis & Shue Agency, Inc., No. 05 Civ. 15(MHD), 2005 WL 3642217, at *7 (S.D.N.Y. Dec. 30, 2005); Wildeman v. Daimlerchrysler Corp., No. 03-70371, 2005 WL 3071934, at *1 (E.D. Mich. Nov. 14, 2005).

268. The Federal Circuit has used the term. *See* Markman v. Westview Instruments, Inc., 52 F.3d 967, 978 n.9 (Fed. Cir. 1995); Power Lift, Inc. v. Weatherford Nipple-Up Systems, Inc., 871 F.2d 1082, 1086 (Fed. Cir. 1989). The Court of Customs and Patent Appeals has also utilized the term "equity case." *See* Walker v. Altorfer, 111 F.2d 164, 169 (C.C.P.A. 1940); United States v. Fred. Gretsch Mfg. Co., 26 C.C.P.A. 267, 272 (1938). Dissenting judges have used the term "equity case." *See* King Instruments Corp. v. Perego, 65 F.3d 941, 959-60 (Fed. Cir. 1995); In re McFarlane, 125 F.2d 169, 175 (C.C.P.A. 1942). And one concurring judge has used the term. *See* United States v. Del. Tribe of Indians, 427 F.2d 1218, 1231 (Cl. Ct. 1970).

269. *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213, 215 (2002); Mertens v. Hewitt Assocs., 508 U.S. 248, 259 n.7, 268 (1993). Justice Scalia concurred in *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 614 n.1 (2001). Justice Breyer used the term in a dissenting opinion in *Miller v. Frank*, 530 U.S. 327, 360 (2000) (Breyer, J., dissenting).

270. 495 U.S. 604 (1995).

271. *Id*. at 621.

272. *Id*.

273. *Id.*

right."[274] That body of principles is not static; it is dynamic. It is ready to expand, to reach new factual situations, and to apply its remedies to meet those new situations.

The holding in *Jenkins v. Missouri* was a narrow one. The Court found a district court incorrectly attempted to correct an intra-district violation of the Constitution by creating an inter-district plan which far exceeded its powers. Justice Thomas' concurring opinion identified the district court's fault, as the majority saw it to be, as an overexpansion of its equity powers. One cannot read *Jenkins* without considering the Thomas concurring opinion and coming to the conclusion that at least one Supreme Court Justice considers that there are limits on courts' powers of equity which may not be exceeded.

The holding in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.* was an extremely narrow one. The Second Circuit Court of Appeals, after the Supreme Court opinion was entered, merely afforded the defendant, GMD, a cause of action on the $50,000 preliminary injunction bond which the plaintiffs were required to post.[275] As far as equity jurisprudence is concerned, however, *Grupo Mexicano* has an extremely broad effect. It placed a restraint on the jurisprudence of expansive equity in the federal courts, and has brought into serious question the weight to be afforded to at least seven maxims of equity as they are to be applied by the federal courts of this country. Those maxims are: (1) equity aids the vigilant, not those who slumber on their rights; (2) equity follows the law; (3) equity delights to do justice and not by halves; (4) equity will not suffer a wrong to be without a remedy; (5) equity regards as done that which ought to be done; (6) equity regards substance rather than form; and (7) equality is equity. One of the most important of those maxims is the third, which says that equity delights to do justice and not by halves. In *Grupo Mexicano*, the United States Supreme Court failed to use this maxim where it should have been used—to assure that a judgment in a breach of contract case would be satisfactory and not a meaningless gesture.

The holding in *Great-West Life & Annuity Ins. Co. v. Knudson* is also fairly narrow. It denies to a party injunctive relief under the ERISA statute. The reasons for the holding, however, as reflected in the majority opinion, are extensive. They say that regardless of what a statute allows, a litigant will not be furnished a remedy if that remedy will impose a legal liability on a contractual obligation to pay money. This type of relief "was not typically available in equity."[276]

Justice Scalia wrote that the plaintiff was not entitled to equitable relief under the Act simply because it was seeking restitution. The case was not one in equity. "[I]n the days of the divided bench restitution was available in

274. BLACK'S LAW DICTIONARY 579 (8th ed. 2004).

275. *See* Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 190 F.3d 16, 26 (2d Cir. 1999).

276. *Id*. at 210.

certain cases at law and certain cases in equity."[277] These are far reaching pronouncements which conflict with many pronouncements of just what is equity.

The position taken by *Jenkins*, *Grupo Mexicano*, and *Knudson*, unless modified in some manner, augurs a period in our federal court system during which there will be little development of that great and hitherto all encompassing body of law known as equity. Presently, federal courts are limited to those developments fashioned by English Chancellors prior to the founding of this country. Why our federal jurists may not, in the spirit of equity, adapt to new needs as time progresses is not satisfactorily explained. The Supreme Court in 1989 said that as to the jurisdiction of federal courts to abstain, abstention is "the exception, not the rule."[278] The decisions in *Jenkins*, *Grupo Mexicano*, and *Knudson*, all of which followed that 1989 pronouncement, appear to have overruled it.

Justices Scalia and Thomas do not believe in an expansive interpretation of equity. Specifically, Justice Scalia has announced that if a certain remedy "was not typically available in equity,"[279] the federal court will not be allowed to order it. Justices Ginsburg and Souter are in favor of expanding the use of equitable remedies when the facts of a case justify such expansion. Justice Ginsburg has announced that "equity, characteristically, was and should remain an evolving and dynamic jurisprudence."[280] Based upon what the jurists and scholars have said about the subject, rather than what the English jurists did more than two hundred years ago, Ginsburg and Souter have the stronger of the two opposing positions.

277. *Id.* at 212.

278. New Orleans Pub. Servs., Inc. v. Council of City of New Orleans, 491 U.S. 350, 359 (1989).

279. *See id*. at 210.

280. *See id*. at 233.