Equity Run Amuck: The Necessary Reevaluation of the Preliminary Injunction Standard to Reflect Modern Day Legal Realities—A Comparison of the Massachusetts and Delaware Noncompete Agreement Preliminary Injunction Standard

"The right to speak or vote or worship after trial does not replace the right to speak or vote or worship pending trial, and damages for temporary loss of such rights are not even approximate compensation."[1]

I. INTRODUCTION

The concept of a legal remedy is an old tenant of both the English and the American legal systems.[2] At one time, based on the very remedies they had jurisdiction to provide litigants, American courts were split in two, with courts of equity and courts of law.[3]

Remedies are omnipresent in civil litigation.[4] The relief sought in civil cases fall into two broad categories: monetary or equitable.[5] The concept of monetary damages, at its most basic level, is that the liable party pays a dollar amount for the harm it caused another.[6] Conversely, equitable relief is sought

1. DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 122 (1991).

2. *See* Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 164-69 (2008) (describing history of modern legal remedies in civil litigation). The concept of a legal remedy can be broken down into what the court is able to do for a party if they "win," or conversely, what the court can do to a party if they "lose." *See id.* at 165 (noting universal scope of law of remedies). In 1803, John Marshall, Chief Justice of the Supreme Court, adopted Blackstone's theory of a legal remedy in the iconic case *Marbury v. Madison*. *See* 5 U.S. (1 Cranch) 137, 163 (1803); *see also* Laycock, *supra*, at 168. The modern interpretation, critiquing the Marshall-era legal system, has created a distinct phase of the lawsuit focused on how to correct the wrong. *See* Laycock, *supra*, at 169.

3. *See* Laycock, *supra* note 2, at 171 (describing merger). The merger of law and equity happened over a century from 1848 to 1937. *See id.* In 1937, the Federal Rules of Civil Procedure were created, supplanting the Field Code, which originally merged the two. *See id*; *see also* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV 429, 430-31 (2003). Rule 2 of the Federal Rules of Civil Procedure proscribes that "[t]here is one form of action—the civil action." FED. R. CIV. P. 2. The advisory committee notes for this rule described the new rule as modifying the separate courts of equity. *See* FED. R. CIV. P. 2 advisory committee's note 1. The note further states that all suits, both in law and equity, should be treated as referring to the single civil action referred to in the rule and contained in a single complaint. *See* FED. R. CIV. P. 2 advisory committee's note 2.

4. *See* Laycock, *supra* note 2, at 165 (describing remedies as "[cutting] across other areas of substantive law"); *see also* Mitchell v. House, 26 S.W.3d 586, 587 (Ark. Ct. App. 2000) (noting specific performance of contract appropriate equitable remedy); Hartford-Carlisle Sav. Bank v. Van Zee, 569 N.W.2d 386, 398 (Iowa Ct. App. 1997) (discussing remedy of injunction).

5. *See infra* notes 6-7 and accompanying text (describing equity, monetary relief).

6. *See* Jaffe v. Cranford Ins. Co., 168 Cal. App. 3d 930, 935 (1985) (describing damages as "payment

in situations where money is insufficient to right the wrong suffered by the nonliable party.[7] In many instances, this form of relief can require the liable party to act or forbear from acting.[8]

A preliminary injunction—the focus of this Note—is one equitable remedy granted by the trial court, which typically lasts until a case can be fully adjudicated on the merits.[9] The preliminary injunction is one of the most powerful remedies a court can issue.[10] It is also an important tool for litigators when monetary compensation is insufficient to right the wrong suffered.[11] In modern courts, a preliminary injunction can be the difference between moving forward with the case or dropping it all together because of how long it can take for a contested case to be docketed for trial.[12]

The issuance of a preliminary injunction can provide unique equitable

made to compensate a party for injuries suffered"); 116 Commonwealth Condo. Trust v. Aetna Cas. & Sur. Co., 742 N.E.2d 76, 79 (Mass. 2001) (defining monetary damages). The Commonwealth of Massachusetts defines damages as "the word which expresses in dollars and cents the injury sustained by a plaintiff." Turcotte v. De Witt, 131 N.E.2d 195, 197 (Mass. 1955). The definition of damages used in Massachusetts courts is similar to that used in other jurisdictions. *See Commonwealth Condo. Trust*, 742 N.E.2d at 78.

7. *See* Demoulas v. Demoulas, 703 N.E.2d 1149, 1169 (Mass. 1998) ("Equitable remedies are flexible tools to be applied with the focus on fairness and justice."); BLACK'S LAW DICTIONARY 1408 (9th ed. 2009) (defining equitable remedy as "[a] remedy, [usually] a nonmonetary one such as an injunction or specific performance").

8. *See* Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 498-99 (2003). "An injunction is a court order that commands the nonmovant to do or to abstain from doing a particular action." *Id. Compare* Hurtubise v. McPherson, 951 N.E.2d 994, 995 (Mass. App. Ct. 2011) (affirming order requiring specific performance of agreement), *with* Commonwealth v. Mass. CRINC, 466 N.E.2d 792, 794, 802 (Mass. 1984) (upholding part of trial court's preliminary injunction restraining defendant's business activities).

9. *See* Gimbel v. Signal Cos., Inc., 316 A.2d 599, 617 (Del. Ch.) (describing potential end of case without injunction), *aff'd*, 316 A.2d 619 (Del. 1974). The *Gimbel* court observed that "if the preliminary injunction is denied now, the plaintiff may well be barred of any significant relief" and the denial "may well finally dispose of the case." *Id.*; *see also* Jet-Line Servs., Inc. v. Bd. of Selectmen, 521 N.E.2d 1035, 1038 (Mass. App. Ct. 1988) (stating true purpose of preliminary injunction is "to preserve the status quo while the case is under consideration"); Frederick P. Santarelli, Note, *Preliminary Injunctions in Delaware: The Need for a Clearer Standard*, 13 DEL. J. CORP. L. 107, 120 (1988) (describing chancellor's understanding in *Gimbel*: without injunction case could end).

10. *See* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 525-26 (1978) (describing power in process of preliminary injunctions). Due to their wide-reaching effect, some argue that preliminary injunctions "may be the most striking remedy wielded by contemporary courts." *See id.* at 525; *see also* Rachel A. Weisshaar, Note, *Hazy Shades of Winter: Resolving the Circuit Split Over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1012 (2012) (describing preliminary injunction as "extraordinarily powerful remedy").

11. *See* David McGowan, *Irreparable Harm*, 14 LEWIS & CLARK L. REV. 577, 578-79 (2010) (describing theory of irreparable harm). One factor for preliminary injunctions, irreparable harm, is defined as "that which cannot be compensated adequately with money damages." *Id*. at 578; *see also* Packaging Indus. Grp., Inc. v. Cheney, 405 N.E.2d 106, 112 (Mass. 1980) (describing irreparable harm as part of preliminary injunction standard). The court discussed that "when asked to grant a preliminary injunction, the judge initially evaluates in combination the moving party's claim of injury [(irreparable harm)] and chance of success on the merits." *Id.* at 111-12.

12. *See supra* note 9 and accompanying text (describing importance of preliminary injunctions); *infra* note 118 and accompanying text (discussing delays in courts).

remedies such as: placing candidates on a ballot; blocking legislation; or forbidding strikes, and preliminary injunctions can last days, months, or even years.[13] The test utilized by a majority of courts (majority test) to decide whether to issue a preliminary injunction has three parts: the likelihood of the moving party's success on the merits, the threat of irreparable harm to the moving party, and the balance of the harms between the parties.[14] In some jurisdictions, courts also consider the harm to the public interest, a fourth and final part of the test.[15] Despite the importance of this equitable avenue, courts have historically applied the standard inconsistently and in some instances have come to incompatible holdings on similar facts.[16] This Note will address the issues associated with a strict, legal preliminary injunction standard and proffer a new standard more in keeping with modern day legal realities and equity.

This Note will focus on the preliminary injunction standards used in Delaware and Massachusetts to illustrate the differences between the pure courts of equity in Delaware and the hybrids courts of law and equity in Massachusetts. Part II provides a history of American equity jurisprudence, the history of the preliminary injunction standard, and two competing theories of the purpose of the preliminary injunction. That part also discusses noncompete agreement preliminary injunctions. Part III examines the inconsistencies in the application of the preliminary injunction standards in Massachusetts and Delaware courts as demonstrated by decisions in noncompete agreement cases. Finally, this Note suggests a new standard for preliminary injunctions that would refocus on its equitable roots, promoting rational, legal actors in a modern legal system.

13. *See* Leubsdorf, *supra* note 10, at 525 (describing possible remedies given by preliminary injunction); *see, e.g.*, Bos. Police Patrolmen's Ass'n v. Police Dep't, 841 N.E.2d 1229, 1234 (Mass. 2006) (affirming denial of preliminary injunction); GTE Prods. Corp. v. Stewart, 610 N.E.2d 892, 894 (Mass. 1993) (denying preliminary injunction); *Mass. CRINC*, 466 N.E.2d at 797 (utilizing *Packaging Industries* preliminary injunction standard); *Packaging Indus. Grp., Inc*., 405 N.E.2d at 111 (examining plaintiff's request for preliminary injunction); City Cyber Cafe, LLC v. Coakley, No. 12-4194-BLS1, 2012 WL 6674481, at *1 (Mass. Super. Ct. Dec. 17, 2012) (denying preliminary injunction).

14. *See, e.g.*, Town of Uxbridge v. Tzimogiannis, No. CA002099A, 2000 WL 1821456, at *1 (Conn. Super. Ct. Nov. 15, 2000); *Gimbel*, 316 A.2d at 601-02 (discussing Delaware's three-part preliminary injunction standard); *Packaging Indus. Grp., Inc*., 405 N.E.2d at 111-12 (summarizing Massachusetts' three-part preliminary injunction standard).

15. *See, e.g.*, LeClair v. Town of Norwell, 719 N.E.2d 464, 468 (Mass. 1999) (describing public interest element); Procter & Gamble Co. v. Stoneham, 747 N.E.2d 268, 273 (Ohio Ct. App. 2000) (noting public interest consideration as fourth factor); State v. Imperial Mktg., 472 S.E.2d 792, 798 n.8 (W. Va. 1996) (considering public interest in preliminary injunction standard).

16. *See* Arthur D. Wolf, *Preliminary Injunctions: The Varying Standards*, 7 W. NEW ENG. L. REV. 173, 173 (1984), *available at* http://digitalcommons.law.wne.edu/cgi/viewcontent.cgi?article=1123&context=facschol (describing inconsistent application of standard); *see also* Allen v. Prime Computer, Inc., 540 A.2d 417, 419 (Del. 1988) (outlining preliminary injunction standard in Delaware). *Compare Packaging Indus. Grp., Inc*., 405 N.E.2d at 112 (establishing preliminary injunction standard in Massachusetts), *with* Tri-Nel Mgmt., Inc. v. Bd. of Health, 741 N.E.2d 37, 40-47 (Mass. 2001) (applying preliminary injunction standard inconsistently with *Packaging Industries*).

II. HISTORY

A. Equity

The legal theory of equity developed not only as a way to provide a remedy completely unavailable to litigants at law, but also to lessen the potentially harsh nature of the common-law system.[17] Historically, courts used this equitable power to grant parties "justice," using general principles of fairness where the court found that strict application of the law prevented the appropriate, necessary relief.[18] Both ancient and modern legal systems accepted equity as means to achieve a remedy.[19] Most notably, equity was, and still is, a tenet of both English and American Jurisprudence.[20]

B. Equity in American Courts

Influenced by the teachings of Aristotle, separate courts of law and equity were eventually developed in England.[21] In England, the courts of equity

17. *See, e.g.*, Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944) (noting equity invokes "qualities of mercy and practicality"); James v. Bailey, 370 F. Supp. 469, 471-72 (D.V.I. 1974) (describing harsh restitution requirement lessened by equity); Betsy & Rhoda, 3 F. Cas. 305, 307 (D. Me. 1840) (holding "harsh rules of the common law" mitigated with equity); *In re* Houston, 409 B.R. 799, 808 (Bankr. D.S.C. 2009) (stating mortgage subrogation based on equity); *see also* Main, *supra* note 3, at 430 ("Equity moderates the rigid and uniform application of law by incorporating standards of fairness and morality into the judicial process.").

18. *See* Demoulas v. Demoulas, 703 N.E.2d 1149, 1169 (Mass. 1998) ("Equitable remedies are flexible tools to be applied with the focus on fairness and justice."); Hurtubise v. McPherson, 951 N.E.2d 994, 999 (Mass. App. Ct. 2011) (enforcing agreement as matter of fairness); Main, *supra* note 3, at 444-46 (describing elements of fairness in English equity proceedings).

19. *See* E. Bos. Sav. Bank v. Ogan, 701 N.E.2d 331, 333-34 (Mass. 1998) (applying equitable subrogation); Joseph Hendel, Comment, *Equity in the American Courts and in the World Court: Does the End Justify the Means?*, 6 IND. INT'L & COMP. L. REV. 637, 637-39 (1996) (explaining both Roman and Greek societies understood equity as way to lessen law's rigidity). Aristotle saw equity as both the corrective function of the law and as an extension of natural justice. Hendel, *supra*, at 639. Forwarding natural justice required discretion. *See id.*; Jack Moser, *The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, and Medieval Authoritarian Impacts on the Evolution of Legal Equitable Remedies*, 26 CAP. U. L. REV. 483, 489-94 (1997) (describing ancient origins of equity).

20. *See* Hendel, *supra* note 19, at 642 (describing equity as part of both English and American legal system).

21. *See* Main, *supra* note 3, at 429-31 (tracing tension between law and equity to Aristotle); Hendel, *supra* note 19, at 638-41 (explaining Aristotle's influence on development of equity courts in England and eventual separation of courts). Aristotle recognized that universal laws could promote both justice and injustice, and his views strongly impacted the legal development of the West. *See* Main, *supra* note 3, at 429-30. Discretion played a large role in Aristotle's version of equity. *See* Hendel, *supra* note 19, at 639. Whereas the common law was interested with form over substance, equity courts "had been consumed by a broad substantive mandate." *See* Main, *supra* note 3, at 457. During the fourteenth century "the common law was equitable," leaving no need for the bifurcated system. *See* Hendel, *supra* note 19, at 640; *see also* William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792-1992*, 18 DEL. J. CORP. L. 819, 820-21 (1993) (describing origins of Delaware Chancery courts and European equity). Despite the goal of the Chancery Courts to exact substantive justice, by the end of the eighteenth century they had become just as inflexible as the common-law courts and were abolished in 1875. *See* Quillen & Hanrahan, *supra*, at 821.

served to correct injustice, pulling heavily from general concepts of right and wrong and canon law.[22] Developed as a writ system, the English form of equity generally bucked the trend of legal precedent, allowing the judges more discretion in their decision-making.[23]

England's Court of Chancery shaped the American vision of equity.[24] The American legal system's equitable practices continued to give the judge much discretion but were administered in a nonuniform way, unlike the English Chancery courts.[25] Equity survived America's independence from England

22. *See In re* Quinlan, 348 A.2d 801, 816 (N.J. Super Ct. Ch. Div. 1975) ("Equity speaks of conscience."). "That conscience is not the personal conscience of the judge . . . . It is a judicial conscience—'a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles . . . .'" *Id.* at 816-17 (quoting 1 POMEROY'S EQUITY JURISPRUDENCE § 57, at 74 (5th ed. 1941); *see also* Deweese v. Reinhard, 165 U.S. 386, 390 (1897) (describing role of conscience in court of equity). The Supreme Court has held "[a] court of equity acts only when and as conscience commands." *Deweese*, 165 U.S. at 390; *see also* Hendel, *supra* note 19, at 641 (describing equitable justice based on no more than general ideas of right and wrong).

23. *See* Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences Into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839, 863 (1999) (describing influence of Catholic theology and canon law on courts of Chancery); John R. Kroger, *Supreme Court Equity, 1789-1835, and the History of American Judging*, 34 HOUS. L. REV. 1425, 1434 (1998) (citing Fry v. Porter, 86 Eng. Rep. 898, 898 (1670)) (describing equity as universal truth independent from precedent); Kroger, *supra*, at 1433 (citing Earl of Oxford Case, 21 Eng. Rep. 485 (1615)) (noting "[e]quity speaks as the Law of God speaks"); *see also* Hendel, *supra* note 19, at 641 (describing hardening effect of stare decisis on fourteenth century common-law courts). The common-law system lead to the necessity of an equitable system in part because of stare decisis, which made the law less malleable than it once was. *See* Main, *supra* note 3, at 438-42 (outlining history of formation of courts of law and equity in England); Hendel, *supra* note 19, at 641. The Crown was the only source of relief for causes of action that did not fit exactly within the confines of the common-law system, and it was not until the fourteenth or fifteenth century that the chancery courts developed separately outside of the writ system. *See* Main, *supra* note 3, at 441-42. The American conception of equity was more precedential, with some suggesting that it became more fixed as time went on. *See* Morton Gitelman, *The Separation of Law and Equity and the Arkansas Chancery Courts: Historical Anomalies and Political Realities*, 17 U. ARK. LITTLE ROCK L.J. 215, 228-31 (1995) (describing the evolution of chancery courts in America).

24. *See* DiMatteo, *supra* note 23, at 863 ("[I]t was in the Court of Chancery [in England] where equity matured."); Victor E. Flango & Thomas M. Clarke, *Which Disputes Belong in Court?*, JUDGES' J., Spring 2011, at 22, 25-27 (describing legal underpinnings of equity in English case law); Gitelman, *supra* note 23, at 215-29 (outlining history of chancery in England); Kroger, *supra* note 23, at 1438 (summarizing American equity's roots in English law); H. Brent McKnight, *How Shall We Then Reason? The Historical Setting of Equity*, 45 MERCER L. REV. 919, 943 (1994) (describing historical origins of equity); Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 348-50 (2003) (explaining court system in England); Hendel, *supra* note 19, at 638 n.8 (explaining English origins of American equity jurisprudence). The concept of equity historically developed from the dispositions of the Chancellor, who began to act as a judge in the fourteenth and fifteenth century. *See* Gitelman, *supra* note 23, at 219. The English brought equity to America along with the common law, and at the time of the Constitutional Convention, each of the thirteen colonies had given their court or their governors equitable powers. *See* Kroger, *supra* note 23, at 1438. Despite this, "[t]he equity known by the framers [of the Constitution] was that of Blackstone: tame, precedent-bound, and not at all extraordinary." McKnight, *supra*, at 943; *see also* Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999) (describing equity as judicial remedy devised by English Chancery at time of separation). *See generally* HOLDSWORTH, A HISTORY OF ENGLISH LAW (7th rev. ed. 1956) (outlining detailed history of early English courts).

25. *See* Main, *supra* note 3, at 449-53 (describing differences in European and American legal system

after the Revolutionary War, but the same courts typically offered both legal and equitable remedies.[26] American equity, despite these differences, still focused on basic fairness.[27] The concept of equity was so influential to American legal thought that it was explicitly written into the U.S. Constitution.[28]

Despite this dedication to equity, no statute, or case for that matter, has defined what the phrase "a case in equity" actually means.[29] Section 11 of the Judiciary Act, which created the entire court system in the United States, did not attempt to define "equity."[30] The United States Supreme Court came closest to a definition in *Atlas Life Insurance Co. v. W. I. Southern, Inc*.,[31] mentioning that equity rights originate from the English Chancery.[32]

with respect to equity); Hendel, *supra* note 19, at 642-43 ("English tradition of equity was transported to the United States . . . [but] governments of the United States used various methods to administer equity."). The early American legal system was modeled after the English method of complementary systems of law and equity, and each of the thirteen colonies, even prior to the Revolutionary War, had courts of chancery. *See* Main, *supra* note 3, at 449; Weisshaar, *supra* note 10, at 1018 (describing English influence on American equity case law). In the nineteenth century, the Supreme Court acknowledged American equity's English roots, noting courts could look to English precedents when there was no America jurisprudence on a particular issue. *See* Weisshaar, *supra* note 10, at 1020.

26. *See* Flango & Clarke, *supra* note 26, at 25 (describing merger of courts). Most of the courts of equity were merged with courts of law so parties could obtain both legal and equitable remedies in the same proceeding. *See id.*; Henry H. Ingersoll, *Confusion of Law and Equity*, 21 YALE L.J. 58, 58 (1911) (discussing proliferation of separate courts in America); Sward, *supra* note 24, at 364-69 (detailing separate courts in America as colonies grew). Nevertheless, some separate courts still exist today. *See* Russell Fowler, *A History of Chancery and Its Equity*, TENN. B.J., Feb. 2012, at 20, 20 (describing Mississippi, Tennessee, and Delaware as only states with separate equity courts).

27. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971) (stating in sensitive areas equity intended to serve remedies aligned with "basic fairness"); Demoulas v. Demoulas, 703 N.E.2d 1149, 1169 (Mass. 1998) ("Equitable remedies are flexible tools to be applied with the focus on fairness and justice."); Main, *supra* note 3, at 430 (describing equity as "incorporating standards of fairness and morality into the judicial process").

28. *See* U.S. CONST. art. III, § 1. Article III, Section 1 of the United States Constitution states: "The judicial Power of the United States, shall be vested in one supreme Court . . . ." *Id*. The Constitution goes on to state: "The judicial Power shall extend to all Cases, in Law and Equity . . . ." U.S. CONST. art. III, § 2; *see also* Kroger, *supra* note 23, at 1430-32 (discussing Supreme Court's role in American history of equity). The Constitution, however, did not give the newly created Court any guidance as to how equity should function in the American courts. *See* Kroger, *supra* note 23, at 1431.

29. *See* Richard H.W. Maloy, *Expansive Equity Jurisprudence: A Court Divided*, 40 SUFFOLK U. L. REV. 641, 641 (2007) (describing American equity's lack of definition).

30. *See id.* at 641 (describing ramifications of Judiciary Act). Neither Congress nor the courts have attempted to define equity. *Id.* Section 11 of the Judiciary Act simply stated the circuit courts would have "cognizance . . . of all suits of a civil nature at common law or in equity." Judiciary Act of 1789 § 11, ch. 20, 1 Stat. 73, 78 (describing circuit court equity jurisdiction).

31. 306 U.S. 563 (1939).

32. *See id.* at 568 (comparing role of federal courts to role of English Chancery). The Court stated:

> 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.

Notwithstanding the lack of definition, some of the most influential minds in American legal history have adopted the concept of equity as judging right from wrong.[33]

1. The Courts of Equity in Massachusetts

There are no, nor have there ever been, separate equity courts in the Commonwealth of Massachusetts.[34] In fact, the Massachusetts Constitution lacks any direct provision for equity jurisdiction within the state, although its text implicitly grants equity jurisdiction to the state's courts.[35] In the commonwealth, equity jurisdiction was not derived through the creation of particular courts but instead through statute and the court's own action.[36]

The Massachusetts form of equity, like the entire American legal system, was largely influenced by the English.[37] The process of broadening the state court's equity jurisdiction began in the first half of the nineteenth century when

Id.

33. *See* Kroger, *supra* note 23, at 1427 (describing Chief Justice Burger's thoughts on equity). Chief Justice Warren Burger described equity as having a commitment to "basic fairness." *See id.*; *see also* H. Jefferson Powell, *"Cardozo's Foot": The Chancellor's Conscience and Constructive Trusts*, LAW & CONTEMP. PROBS., Summer 1993, at 7, 22; Hendel, *supra* note 19, at 651-52 (describing Judge Benjamin Cardozo's thoughts on equity). Judge Benjamin Cardozo believed the judge interpreted equity "through his readings of the social mind" and was akin to "the shared morality of the community." Powell, *supra*, at 22.

34. *See* Jones v. Newhall, 115 Mass. 244, 251 (1874) (describing lack of separate equity courts), *superseded by statute on unrelated grounds*, MASS. GEN. LAWS ch. 239, § 2, *as recognized in* Bank of Am., N.A. v. Rosa, 999 N.E.2d 1080 (2013). In Massachusetts, "[the courts] have certain chancery powers conferred upon a court of common law." *Id.*; *see also* James S. Campbell & Nicholas Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 U. PA. L. REV. 965, 967 (1980) (describing lack of separate courts of equity in Massachusetts).

35. *See* MASS. CONST. pt. 1, art. XV (regarding the right to trial). The Massachusetts Constitution states: "In all controversies concerning property, and in all suits between two or more persons, *except in cases in which it has heretofore been otherways used and practiced*, the parties have a right to a trial by jury . . . ." *Id.* (emphasis added). It is the line "except in cases in which it has heretofore been otherways used and practiced," that alludes to the court's equity jurisdiction. *Id.*; *see also* JOSEPH R. NOLAN & LAURIE J. SARTORIO, 31 MASS. PRAC., EQUITABLE REMEDIES § 1.3 (3d ed. 2012) (highlighting fact Massachusetts Constitution makes no direct provision for equity jurisdiction).

36. *See Jones*, 115 Mass. at 251 (describing chancery powers in Massachusetts); Tirrell v. Merrill, 17 Mass. 117, 121 (1821) (noting equity jurisdiction conferred by statute). The Supreme Judicial Court (SJC) held the courts of Massachusetts have "certain chancery power" despite being common-law courts. *See Jones*, 115 Mass. at 251. The SJC further held that the court derives this power from both statute and the court's adoption of equitable remedies when necessary. *See id.*; *see also infra* notes 34-36 (summarizing Massachusetts application of equity by common-law courts).

37. *See* Parker v. Simpson, 62 N.E. 401, 408 (Mass. 1902) (describing English system of equity coming to America).

> In England there were two general systems of jurisprudence working side by side . . . . In one there was an absolute trial by jury; in the other, the right to such a trial was at the discretion of the court. Our ancestors brought the rights equitable as well as legal.

Id.

the state legislature conferred upon the Supreme Judicial Court (SJC), the highest court in Massachusetts, equity power over the foreclosure and redemption of mortgages.[38] Over the next fifty years, statutes granting equitable jurisdiction increased the court's equity powers; this increase was piecemeal, however, conferring equitable jurisdiction subject by subject, statute by statute.[39]

The next statutory grant of equity jurisdiction was embodied in the Law of 1817, chapter 87, giving the SCJ equity jurisdiction over "all cases of trust arising under deeds, wills, or in the settlement of estates" and in contract cases where a party claimed specific performance and there was no "plain, adequate, and complete remedy at law."[40] Over the next thirty years the enactment of several statutes enlarged the scope of the SJC's equity jurisdiction.[41] Despite this broadening, these statutes still required the court to first determine that the parties did not have an existing legal remedy available.[42]

In 1857, the legislature rewrote the statute, changing the word "plain" to the word "full."[43] This limitation on the court's equity jurisdiction was kept in a revision of the statute completed in 1873.[44] Despite the legislature's attempt to affirm the SJC's equity jurisdiction, the court still construed all equity statutes strictly and used its equity jurisdiction less often than the English Court of Chancery.[45] The SJC's hesitance to use its equitable powers led to it sometimes denying equitable relief when available.[46] In 1877, the legislature eliminated the "remedy at law" requirement from the statute, removing all

38. *See* Saunders v. Frost, 22 Mass. (5 Pick.) 259, 264 (1827) (suggesting interpretation of equity statute). "This Court has power, in cases respecting the redemption of mortgages coming within St. 1798, c. 77, to decree, according to the principles of chancery courts, whatever equity requires between the parties." *Id.*; *see also* NOLAN & SARTORIO, *supra* note 35, § 1.3 (describing statutory equity grant in 1789).

39. *See* NOLAN & SARTORIO, *supra* note 35, § 1.3 (describing slow process of statutory grant of equity in Massachusetts).

40. Act of Feb. 10, 1818, ch. 87, 1817 Mass. Acts 486 (enacting "An Act for giving further remedies in equity"); *see also* Stone v. Hobart, 25 Mass. (8 Pick.) 464, 480 (1829) (applying statute to case involving trust property); Jones v. Bos. Mill Corp., 21 Mass. (4 Pick.) 507, 524 (1827) (applying statute to case pleading specific performance).

41. *See* NOLAN & SARTORIO, *supra* note 35, § 1.3, n.3 (citing statutes of 1830, 1851, 1855, 1857, and 1858).

42. *See id.* § 1.3. For example, a statute passed in 1857 provided "[t]he supreme judicial court shall have full equity jurisdiction according to the usage and practice of courts of chancery, in all cases where there is not a full, adequate and complete remedy at law." Act of May 23, 1857, ch. 215, 1857 Mass. Acts 548.

43. *See* NOLAN & SARTORIO, *supra* note 35, § 1.3 (describing ramification of change in statutory language in 1857); *see also* HOWARD J. ALPERIN, 14A MASS. PRAC., SUMMARY OF BASIC LAW § 9.2 (4th ed. 2012).

44. *See* NOLAN & SARTORIO, *supra* note 35, § 1.3 (describing no remedy at law requirement retained in 1873).

45. *See id.* § 1.3. Both the statute and the court's own actions lead to the narrow use of its equity jurisdiction. *Id.*

46. *See* Jones v. Newhall, 115 Mass. 244, 244, 251 (1874) (denying equitable relief of specific performance of contract because remedy at law available), *superseded by statute on unrelated grounds*, MASS. GEN. LAWS ch. 239, § 2, *as recognized in* Bank of Am., N.A. v. Rosa, 999 N.E.2d 1080 (2013).

statutory limitations to the SJC's equity jurisdiction.[47]

The superior courts in the Commonwealth of Massachusetts originally had no equity jurisdiction, but in 1883 it gained the power to grant equitable remedies.[48] Today, chapter 214 section 3 of the Massachusetts General Laws governs the equity jurisdiction of both the Superior and Probate Courts.[49] This statute gives both courts equitable power.[50]

2. Courts of Equity in Delaware

In stark contrast to Massachusetts, the equitable powers of the Delaware courts are a long standing tradition and are also heavily influenced by the Court of Chancery in England.[51] As a result, the history of Delaware's courts of equity is less complicated than that of Massachusetts and began during its colonial era.[52] Equity in colonial Delaware can be broken into two distinct phases: primitive equity and English Chancery equity.[53] In its primitive form, lasting from 1664 to 1701, governors and other royal authorities issued decisions in order to correct unfair jury decisions and attempted to forward natural justice without any formal chancery proceedings.[54] In many instances, the equity power exercised by these courts was similar to some judicial proceedings today that allow judges to reopen judgments, control verdicts, or allow a new trial.[55] It was not until approximately 1726 or 1727 when a drastic shift in equity began and the Gordon statute (the Act) established official courts of chancery.[56] This was the beginning of the second period of equity in

47. *See* NOLAN & SARTORIO, *supra* note 35, § 1.3; *see also* Ingersoll, *supra* note 26, at 67 (noting narrowness of interpretation broadened by Act of 1877). This change in the statute was meant to "express the legislative intention to give [the SJC] the full measure of Equity Jurisdiction formerly exercised by the High Court of Chancery." *See* Ingersoll, *supra* note 26, at 67; *see also* Noyes v. Bragg, 107 N.E. 669, 670-71 (Mass. 1915) (holding equitable relief proper despite legal remedy); Billings v. Mann, 30 N.E. 1136, 1137 (Mass. 1892) (invalidating deed on basis of equity despite remedy at law). In *Noyes*, the SJC states: "The objection that the plaintiff had an action at law to recover damages for breach of [contract] does not deprive equity of its jurisdiction to compel specific performance of the contract." 107 N.E. at 670. Similarly in the *Billings* case, the SJC noted, "[a party's] right to a real action does not exclude this concurrent [equitable] remedy." 30 N.E. at 1137.

48. *See* ALPERIN, *supra* note 43, at § 9.2. The Superior Court gained equity jurisdiction in 1883. *Id.* This grant originally contained the old language requiring that the parties not have "a plain, adequate and complete remedy at law." *Id.* In 1902, the legislature eliminated this limitation. *See* NOLAN & SARTORIO, *supra* note 35, § 1.3 (describing superior courts' equity power in 1902).

49. *See* MASS. GEN. LAWS ANN. ch. 214, § 3 (West 2014) (granting concurrent jurisdiction to SJC and superior courts); NOLAN & SARTORIO, *supra* note 35, at § 2.1.

50. *See* MASS. GEN. LAWS ANN. ch. 214, § 3 (West 2014). The full text of the statute grants equity jurisdiction to these courts, enumerating fourteen specific actions. *Id.*

51. *See* Quillen & Hanrahan, *supra* note 21, at 820-23 (describing history of equity courts in Delaware).

52. *Compare id.* at 822-23 (describing linear history of Delaware's Court of Chancery), *with supra* Part II.B.1 (describing piecemeal grant of equity jurisdiction in Massachusetts).

53. *See* Quillen & Hanrahan, *supra* note 21, at 822 (describing two separate phases of equity).

54. *See id.* at 822-23 (describing equity jurisdiction in Delaware).

55. *See id.* (explaining early phase of equitable jurisdiction in Delaware).

56. *See id.* at 823-24 (describing equity Act and confusion over official date of Act). The Act was named

Delaware, which was in the purview of their new chancery courts.[57] This statute contained a familiar limitation: the Court of Chancery did not have jurisdiction over matters where a remedy at law was available.[58]

In 1792, a constitutional grant of equity codified these separate equity courts in the state.[59] Article VI, section 14 of the Delaware Constitution provided for the courts' equity jurisdiction, bucking the trend in the eighteenth century when many states were specifically moving away from separate courts.[60] Delaware's conception of equity lies in two concepts: that the moral sense of fairness is based on conscience and that a universal rule cannot always be appropriately applied.[61] The separate equity courts and the constitutional grant of equity jurisdiction still exist in Delaware today.[62]

3. The Merger of Law and Equity Courts and its Ramifications on Justice

During the mid-1800s, the procedural codes merged courts of law and equity into a single system in most states.[63] By that time, however, a majority of states had already abandoned separate equity courts, in part, to simplify the complaint process.[64] This merger diminished equity's check on substantive law, arguably undermining its original purpose altogether.[65] The benefit of a

after Patrick Gordon, the Governor at the time it was enacted, and the exact date of enactment is not known. *See id.* at 824.

57. *See* Quillen & Hanrahan, *supra* note 21, at 824 (describing statutory language). The Gordon Act created courts of equity in Delaware with the intention that they observe "the rules and practice of the High Court of Chancery in Great Britain." *Id.*

58. *See id.* (describing equity's limitation enumerated in Section 25 of Act). It stated, "nothing in the statute gave equitable authority in any manner 'wherein sufficient remedy may be had in any other court . . . either by the rules of the common law or . . . the laws of this government.'" *Id.* (quoting Glanding v. Indus. Trust Co., 45 A.2d 553, 561 (Del. 1945)).

59. *See id.* at 825 (describing chancery courts in Delaware). The Delaware Constitution of 1792 contained an article vesting equitable power in the Court of Chancery. *See* DEL. CONST. of 1792, art. VI, § 14; Quillen & Hanrahan, *supra* note 21, at 822, 825-26.

60. *See* DEL. CONST. of 1792, art. VI, § 14 (outlining equity in Delaware courts); *see also* Quillen & Hanrahan, *supra* note 21, at 822 (describing importance of article VI). Delaware created its separate court of equity in 1792, at a time when many states were trending away from them. *See* Quillen & Hanrahan, *supra* note 21, at 825-26 (noting decision stemmed from unique colonial history and status of Chief Justice William Killen); *see also infra* Part II.B.3 (describing merger of courts of law and courts of equity).

61. *See* Quillen & Hanrahan, *supra* note 21, at 821 (describing equity's place in Delaware law).

62. *See* DEL. CONST. art. IV, § 1 (granting equitable power to state courts); *see also* AM Gen. Holdings LLC v. Renco Grp., Inc., No. 7639-VCN, 2012 WL 6681994, at *7 (Del. Ch. Dec. 21, 2012) (using court's equitable powers to dispose of case).

63. *See* Kroger, *supra* note 23, at 1430 (describing merger of law and equity as result of federal system of civil procedure); Main, *supra* note 3, at 431 (discussing unification of law and equity). Since 1938, the United States Federal District Courts have recognized one merged form of action under the Federal Rules of Civil Procedure. *See* Main, *supra* note 3, at 431; Weisshaar, *supra* note 10, at 1020 (describing merger).

64. *See* Leonard J. Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244, 244 (1945). Many states, beginning with Texas in 1845, abandoned separate courts of equity. *See id*. The merger allowed the courts to grant relief in a single action and arguably brought functional efficiency. *See id.* at 248.

65. *See* Main, *supra* note 3, at 478 (exposing potential shortcomings of unified system providing relief in law and equity simultaneously). It has been argued, "the legacy of equity is unfulfilled in a unified procedural

separate system of equity was the ability to act in opposition to the strict law when the specific circumstances of the case dictated a contrary result.[66]

Equity and strict substantive law (or common law) approach a given set of facts from diametrically opposed positions, apply different reasoning, and attempt to achieve different ends.[67] With the abolition of separate courts, equity became similar to the common law, developing a strict precedential system.[68] This change completely undermined the purpose and functionality of flexible equity.[69] As a result of the merger, litigants were forced to enter a courtroom that was tasked with both strictly adhering to the precedential common-law system and administering equity; two forces that often stood in stark opposition to one another and created conflicts.[70] Even after the merger of law and equity, however, courts relied on the same concepts for the preliminary injunction as they did when there were separate courts.[71]

C. Development of the Preliminary Injunction as an Equitable Remedy

A uniform standard for granting a preliminary injunction, like the entire American equity system, was heavily influenced by the courts in England and has not changed significantly since its inception.[72] This standard developed as a result of the inherent differences in the remedies available to judges sitting in

system." *Id.*

66. *See id.* at 477-78 (describing benefits of possible equitable remedies).

67. *See id.* at 444 (highlighting opposing goals of courts of law and courts of equity). "The principles of equity are, of course, merely a part of the larger concept of fairness and justice upon which all law must be based. The law's dilemma long has been to develop a jurisprudence that recognizes when unique circumstances justify a departure from rigid rules." *Id.* (footnotes omitted).

68. *See* Emmerglick, *supra* note 64, at 245 (describing separate equity courts). "Separate equity courts were given up because equity had been made into a body of rigid doctrines which were applied quite as mechanically as the strict common law . . . . [And became] a sterile system and showed a progressive decadence as an agency able to individualize justice." *Id.*

69. *See id.* at 246 (noting drawbacks of merger). This merger caused judges to lose some of their ability to exercise judicial discretion, causing some critics of the merger to argue "justice is not met by providing certainty and predictability. It requires also the ameliorating exercise of discretion." *Id.* However, "there is very real conflict between law and equity [that] is more generally recognized today." *Id.* at 247. The idea that equity and law stand diametrically opposed is not new. *See id.* at 248. Hamilton wrote in the Federalist that:

> To unite the [equity] jurisdiction . . . with the ordinary jurisdiction, must have a tendency to unsettle the general rules, and to subject every case that arises to a special determination; while a separation of the one from the other has the contrary effect of rendering one a sentinel over the other . . . .

THE FEDERALIST NO. 83 (Alexander Hamilton).

70. *See* Emmerglick, *supra* note 64, at 246-47 (describing problems inherent in merged courts of equity and law).

71. *See* Santarelli, *supra* note 9, at 114 (describing standard before and after merger).

72. *See* Denlow, *supra* note 8, at 500 (describing English roots of preliminary injunction); Leubsdorf, *supra* note 10, at 537 (describing similarity of ancient and modern standard); Santarelli, *supra* note 9, at 111-19 (describing origins of preliminary injunction). In fact, the basic standard for granting a preliminary injunction has not drastically changed since the eighteenth century. *See* Weisshaar, *supra* note 10, at 1018-19 (describing English roots of American preliminary injunction).

courts of law and courts of equity.[73] The courts of law were only able to award concrete damages, such as money, as a remedy to litigants and were unable to stop a party from acting.[74] The chancery courts, however, having jurisdiction based in equity, could enjoin a party from acting.[75]

That these two remedies could be pursued concurrently caused some confusion when litigants sought an injunction from the court of chancery at the same time they commenced a legal proceeding in the courts of law.[76] It was ultimately the interplay between these two distinct courts that led to the historical roots of the preliminary injunction standard.[77] The courts of chancery focused on three distinct factors in deciding whether to grant an injunction: the probability of success on the merits, the irreparable harm, and the balance of the harms between the parties.[78]

Because courts of law had jurisdiction to decide legal questions, and the courts of chancery had jurisdiction to disperse equitable justice, the necessity for the moving party to demonstrate a probability of success on the merits in an equitable proceeding involving law arose as a tenet of the preliminary injunction.[79] The reasonable chance of success on the merits requirement arose from the chancery's reluctance to reach a final decision without a full hearing on the merits (which it was unable to provide) and its unwillingness to adjudicate common-law issues.[80] This jurisdictional distinction led to the

73. *See* Weisshaar, *supra* note 10, at 1018-19 (describing law courts' limitation of only providing damages).

74. *See* Santarelli, *supra* note 9, at 112-13 (describing courts of law's inability to "appropriately address the real needs of the parties"); Weisshaar, *supra* note 10, at 1018, 1020 (highlighting limitations of remedies available in English common-law courts and American adoption of similar system).

75. *See* Santarelli, *supra* note 9, at 113 (describing court of chancery's ability to prevent wrongdoing).

76. *See* Leubsdorf, *supra* note 10, at 530 (noting struggles of chancery courts). Courts of chancery often faced difficulty in protecting a plaintiff's rights while he waited for relief from common-law courts. *See id*. This was due in part to the fact that until a common-law court determined a plaintiff's rights were violated, courts of chancery could not ensure there were any rights at all to protect. *See id.*; *see also* Santarelli, *supra* note 9, at 113 (describing interplay between courts of law and equity).

77. *See* Leubsdorf, *supra* note 10, at 530 (describing interplay between courts of law and equity); Santarelli, *supra* note 9, at 112-14 (describing development of standard).

78. *See* Santarelli, *supra* note 9, at 113-16 (describing historical development of elements of preliminary injunction test).

79. *See* Leubsdorf, *supra* note 10, at 530 (noting division of courts as reason for reasonable success on merits requirement). Because of this division of courts, "[c]hancellors became accustomed to assessing the probable strength of the plaintiff's underlying claim." *Id.*; *see also* Weisshaar, *supra* note 10, at 1019 (explaining creation of merits requirement).

80. *See* Weisshaar, *supra* note 10, at 1019 (discussing success on merits requirement causing reluctance to issue injunction prior to full trial). In his practice treatise, William Kerr discussed how this was applied in practice, stating:

> In interfering by interlocutory injunction, the court does not in general profess to anticipate the determination of the right, but merely gives it as its opinion that there is a substantial question to be tried . . . . It is enough if [the movant] can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the court that the property should be preserved in its present actual condition, until such question can be disposed of.

historical roots of the proverbial "no adequate remedy at law requirement" of equity jurisdiction; if a remedy at law existed, it should be solely heard in the courts of law.[81]

Historically, an injunction defended a legal right of one of the parties.[82] This tenet led to the addition of the irreparable harm requirement.[83] It became necessary for the party to demonstrate harm in order for the chancery court to exercise jurisdiction, thus making this showing indispensible to an injunction action.[84] Without irreparable harm, damages would adequately compensate the harmed party and such a remedy existed solely within the purview of a court of law.[85]

Finally, a historical tradition developed where balancing the harms became necessary.[86] This aspect of the court's test developed when the merits of a movant's claim were in doubt.[87] If there was doubt, the court was to balance the potential harms, or perform a "balance of convenience."[88] All elements of the test were aimed at the goal of maintaining the status quo pending a full hearing on the merits.[89]

1. Preliminary Injunction in Massachusetts

Massachusetts Rule of Civil Procedure 65 sets out options for injunctions that do not differ greatly from the Federal Rules.[90] Massachusetts Rule of Civil

WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 11-12 (Wm. A. Herrick ed., 1871).

81. *See* Denlow, *supra* note 8, at 501 (describing adequate remedy at law impediment to chancery jurisdiction); *see also* Douglas Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEX. L. REV. 1065, 1071 (1979) (reviewing OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978)) (defining adequacy rule). Traditionally, a legal remedy will be determined to be adequate, trumping equity, if it is "a remedy as complete, practical, and efficient as the equitable remedy." Laycock, *supra*, at 1071; *see also* Santarelli, *supra* note 10, at 113-14 (describing history of "no adequate remedy at common law"); Weisshaar, *supra* note 10, at 1019 (describing adequacy doctrine as critical in determining lack of law remedy). Once the chancery court believed no adequate remedy at law existed, it was able to exercise jurisdiction. *See* Weisshaar, *supra* note 10, at 1019.

82. *See* Santarelli, *supra* note 9, at 114 (describing preliminary injunction as means to protect legal right).

83. *See id.* (summarizing development of irreparable harm).

84. *See id.* (discussing harm necessity); Weisshaar, *supra* note 10, at 1020 (describing harm as irreparable injury).

85. *See* Leubsdorf, *supra* note 10, at 533 (noting irreparable harm requirement invoked inconsistently by nineteenth century). A chancellor was not allowed to issue an injunction simply because he believed the substantive law to be defective but instead because damage remedies were inadequate. *See id.* at 533-34. The irreparable harm requirement, however, did allow the chancellor to balance the needs of a party with respect to the available legal remedies. *See id.*

86. *See* Santarelli, *supra* note 9, at 115 (describing historical balancing).

87. *See* Leubsdorf, *supra* note 10, at 533 (describing development of standard to predict outcome, not assessing merits).

88. *See id.* (noting reluctance of predicting outcome of common-law case as rationale for balancing of convenience).

89. *See id.* at 534-36 (describing goal of keeping status quo).

90. *See* MASS. R. CIV. P. 65(b) (outlining statutory preliminary injunction grant); MASS. R. CIV. P. 65

Procedure 65(a) does not set out the test for preliminary injunctions, it instead sets out some general requirements, such as the necessity of notice to the adverse party and the possibility of consolidation.[91]

A modern judge has great discretion in deciding whether to grant a preliminary injunction but is restrained compared to traditional equitable powers.[92] The considerations involved in deciding whether or not to order a preliminary injunction have been described as a complex calculus, yet rooted in the law.[93] To this day, however, judges continue to use the three-part test developed hundreds of years ago to guide their decision of whether or not to grant a preliminary injunction: the moving parties likelihood of success on the merits; the extent of the injury suffered by both parties; and balancing of the harms to each party.[94] In some instances, courts may consider a fourth factor: the risk of harm to the public interest.[95] Overall, the purpose of a preliminary

reporter's notes 1996 (describing similarity between Massachusetts' injunction rule and federal injunction rule). It should also be noted there are numerous statutes that deal with injunctions on a topic-specific basis. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 150, § 1 (West 2014) (outlining conciliation and arbitration of industrial disputes rule); MASS. GEN. LAWS ANN. ch. 214, § 7A (West 2014) (outlining environmental damage and temporary restraining orders); MASS. GEN. LAWS ANN. ch. 231A, § 2 (West 2014) (detailing declaratory judgment procedure and enjoining governmental practice or procedure rule).

91. *See* MASS. R. CIV. P. 65(b) (outlining requirement of notice for preliminary injunction and possibility of consolidation with trial on merits).

92. *See* Tri-Nel Mgmt., Inc. v. Bd. of Health, 741 N.E.2d 37, 46 (Mass. 2001) (affirming judge's denial of preliminary injunction); GTE Prods. Corp. v. Stewart, 610 N.E.2d 892, 894 (Mass. 1993) (highlighting judge's award of preliminary injunction only overturned on appeal if judge abused his discretion). *But see* Shondel v. McDermott, 775 F.2d 859, 867-68 (7th Cir. 1985) (noting judges have less discretion in equity now than those in the past); Wilson v. Comm'r of Transitional Assistance, 809 N.E.2d 524, 533-34 (Mass. 2004) (overturning judge's issuance of preliminary injunction as abuse of discretion); Kenneth R. Berman, *Preliminary Injunctions: Time to Reject* Tri-Nel *and Revert to First Principles*, B. B.J., May-June 2005, at 10, 10 (describing discretionary power of judge in *Tri-Nel* to rework standard for preliminary injunction). In his opinion in *Shondel*, Judge Posner refers to this difference, noting:

> A modern judge, English or American, state or federal, bears very little resemblance to a Becket or a Wolsey or a More, but instead administers a system of rules which bind him whether they have their origin in law or in equity and whether they are enforced by damages or by injunctions . . . . Even when the plaintiff is asking for the extraordinary remedy of a preliminary injunction . . . the request is evaluated according to definite standards, rather than committed to a free-wheeling ethical discretion.

Shondel, 775 F.2d at 868; *see also* Hendel, *supra* note 19, at 656 (describing difference between modern and ancient legal equity).

93. *See* JAMES W. SMITH & HILLER B. ZOBEL, 7 MASS. PRAC., RULES PRACTICE § 65.4 (2d ed. 2013) (describing elements to consider when granting preliminary injunction).

94. *See* Eaton v. Fed. Nat'l Mortg. Ass'n, 969 N.E.2d 1118, 1123 (Mass. 2012) (applying preliminary injunction standard); *see also* Gen. Accident Ins. Co. of Am. v. Bank of New England, 531 N.E.2d 252, 254 (Mass. 1988) (describing preliminary injunction standard). "The issuance of a preliminary injunction generally rests within the sound discretion of the judge, after a combined evaluation of the moving party's likelihood of success on the merits, its claim of injury, and finally, a balancing of the competing harms to each party." *Gen. Accident Ins. Co. of Am.*, 531 N.E.2d at 254 (internal citations omitted); *see also* Packaging Indus. Grp., Inc. v. Cheney, 405 N.E.2d 106, 110-11 (Mass. 1980) (applying preliminary injunction standard).

95. *See, e.g.*, Commonwealth v. Mass. CRINC, 466 N.E.2d 792, 798 (Mass. 1984) (holding consideration

injunction is to prevent irreparable harm.[96]

In Massachusetts, one of the most frequently cited cases stating the standard for preliminary injunction is *Packaging Industries Group, Inc. v. Cheney*.[97] In *Packaging Industries*, a corporation and a subsidiary brought an action against a former corporate executive seeking injunctive relief and damages.[98] In its analysis, the SJC noted that although the purpose of a preliminary injunction is to protect the moving party from losses sustained that cannot be appropriately remedied after a full hearing on the merits, it must be balanced against the same harm that might come to the enjoined party.[99] The SJC noted that the decision of whether to grant a preliminary injunction must be made after an "abbreviated presentation of the facts and the law."[100] While describing the appropriate preliminary injunction standard, the SJC further stated that Massachusetts courts must evaluate a combination of "the moving party's claim of injury and chance of success on the merits," conforming with the majority view of the preliminary injunction standard.[101]

The SJC began, as the standard suggests, by discussing the harm to the moving party.[102] Despite the court's insistence that this is the first and most important equitable element of the standard, the harms were addressed only briefly.[103] The court then moved on to the merits of the moving party's

of injunction surrounding governmental action ought to be weighed against public risk); Town of Brookline v. Goldstein, 447 N.E.2d 641, 644 (Mass. 1983) ("In an appropriate case, the risk of harm to the public interest also may be considered."); Biotti v. Bd. of Selectmen, 521 N.E.2d 762, 763 (Mass. App. Ct. 1988) (stating dispute between public entities ought to weigh risk of harm to public).

96. *See* Bos. Teachers Union, Local 66 v. City of Boston, 416 N.E.2d 1363, 1372 (Mass. 1981) (describing substantial risk of irreparable harm standard). When a judge is considering whether to issue a preliminary injunction, he must balance the substantial risk of irreparable harm to the moving party should the injunction not be issued against the potential harm caused to the nonmoving party. *See id.*

97. *See* 405 N.E.2d at 111. Many cases apply the standard announced in *Packaging Industries*. *See GTE Prods. Corp.*, 610 N.E.2d at 894 (citing *Packaging Industries* as appropriate standard for preliminary injunctions); City Cyber Cafe, LLC v. Coakley, No. 12-4194-BLS1, 2012 WL 6674481, at *2 (Mass. Super. Ct. Dec. 17, 2012) (applying balancing test described in *Packaging Industries* regarding preliminary injunction); *see also* ALEXANDER J. CELLA ET AL., 40 MASS. PRAC., ADMINISTRATIVE LAW & PRACTICE § 1792 (2012) (stating *Packaging Industries* cited many times by SJC and Massachusetts Court of Appeals); Cameron F. Kerry, *Unpacking the Massachusetts Preliminary Injunction Standard*, 90 MASS. L. REV. 160, 161 (2007), *available at* http://www.massbar.org/media/298621/mlr%20winter%2007%20low%20res.pdf (citing *Packaging Industries* as preliminary injunction standard in Massachusetts); John Leubsdorf, *Preliminary Injunctions: In Defense of the Merits*, 76 FORDHAM L. REV. 33, 46 n.68 (describing preliminary injunction standard as set forth in *Packaging Industries*).

98. *See Packaging Indus. Grp., Inc.*, 405 N.E.2d at 111. In the lawsuit, the plaintiff alleged misuse of the company's trade secrets in the former executive's new business venture. *See id.*

99. *See id.* at 111 (describing limited record at time decision made).

100. *See* Packaging Indus. Grp., Inc. v. Cheney, 405 N.E.2d 106, 110-11 (Mass. 1980).

101. *Id.* at 111-12 (citing John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 540-44 (1978)) (describing balance involved in preliminary injunction analysis). *See generally* Leubsdorf, *supra* note 10; *supra* Part 1.C (describing majority view of preliminary injunction test).

102. *See Packaging Indus. Grp., Inc.*, 405 N.E.2d at 110-11.

103. *See id.* at 112. In only one paragraph, the court summarily agrees with the lower court's finding on the issue of irreparable harm and holds that the moving party did not demonstrate that it faced greater harm

argument, a discussion spanning many paragraphs and comprising the majority of the written opinion, ultimately deciding that the moving party could not prevail on the merits.[104] Balancing the unlikelihood of success of the moving party's claim and the potential harm suffered by the defendant as a result of the injunction, the court denied the plaintiff's injunction.[105]

2. Delaware Court Ordered Injunctions

Delaware's Court of Chancery has the power to grant preliminary injunctions.[106] Similar to Massachusetts Rules of Civil Procedure, Chancery Court Rule 65 sets out the basic rules relating to preliminary injunctions.[107] Overall, the rule in Delaware is very similar to the rule in Massachusetts, requiring notice and allowing for consolidation.[108]

Interpreting the rule, the chancery courts in Delaware have held that a preliminary injunction will be granted when the moving party demonstrates: a reasonable probability of success on the merits at a final hearing; an imminent threat of irreparable injury; and a balance of the equities that tip in favor of issuance of the requested relief (the injunction).[109]

The standard for preliminary injunctions cited frequently in the State of Delaware, affirmed by the Delaware Supreme Court, is contained in *Gimbel v. Signal Companies, Inc*.[110] In its discussion of the preliminary injunction standard, the court first emphasized the necessity of the moving party to prove that there is a "reasonable probability" they will prevail on the merits.[111] The moving party must also prove that there is risk of irreparable harm if the court fails to issue the injunction.[112] The corollary of the harm to the moving party is the harm to the nonmoving party, and it is the plaintiff's duty to tip the balance in its favor.[113] The Chancellor in *Gimbel* went on to note that the court could

than that of the defendant. *See id.*

104. *See id.* at 112-14.

105. *See id.* at 114.

106. *See* DEL. CONST. art. IV, § 14 (describing power granting preliminary injunction remedy to court). "The President Judge of the Superior Court or any Judge shall have power, in the absence of the Chancellor . . . to grant restraining orders . . . [and] to grant preliminary injunctions . . . ." *Id.*; *see also* Gimbel v. Signal Cos., Inc., 316 A.2d 599, 601-02 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974) (describing preliminary injunction standard and notice requirement).

107. *See* DEL. CH. CT. R. 65 (describing injunctions allowed in Delaware and notice requirements).

108. *Compare* MASS. R. CIV. P. 65 (describing statutory grant in Massachusetts), *with* DEL. CH. CT. R. 65 (describing statutory grant in Delaware).

109. *See In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 435 (Del. Ch. 2012) (outlining preliminary injunction standard); *In re* Del Monte Foods Co. S'holder Litig., 25 A.3d 813, 830 (Del. Ch. 2011) (referring to three-element standard required in granting preliminary injunction); *In re* Cogent, Inc. S'holder Litig., 7 A.3d 487, 497 (Del. Ch. 2010) (describing elements of preliminary injunction standard).

110. 316 A.2d at 602. In *Gimbel*, a stockholder wanted to enjoin the sale of all stock to a subsidiary oil company. *See id.* at 601.

111. *See id.* at 602.

112. *See* Gimbel v. Signal Cos., Inc., 316 A.2d 599, 602 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974).

113. *See id.*

balance factors against one another; for example, a weak showing of a likelihood of success on the merits could be balanced against the strength of the irreparable injury argument.[114]

In that case, after discussing the potential harm to both parties thoughtfully and explicitly, the Chancellor determined that both could suffer irreparable harm, the plaintiff if the injunction was not granted and the defendant if the injunction was issued.[115] Considering the parity of the potential harm, the Chancellor felt it appropriate to stress the merits of the moving party's case.[116] After a lengthy discussion of the merits, the Chancellor held that "there remain[ed] a serious question about the reasonable probability that the plaintiff [would] succeed in [the] action" but granted the injunction considering the significant loss to the plaintiff that could result without the injunction.[117] The Chancellor, however, set three quick dates for a trial on the merits to try to guarantee the defendant was not harmed more than necessary.[118]

D. Two Conceptions of the Preliminary Injunction

1. John Leubsdorf's Conception of the Preliminary Injunction

Professor John Leubsdorf's theory of the preliminary injunction (Leubsdorf Standard) has been widely cited, not only for its analysis of the underlying purpose of this form of equitable relief but also for describing how and why each element should be applied in deciding whether or not to grant an injunction.[119] Professor Leubsdorf argues that the standard is heavily

114. *See id.* at 601-02 (describing balancing of merits and harm); *see also* Santarelli, *supra* note 9, at 118-22 (analyzing preliminary injunction standard forwarded in *Gimbel*).

115. *See Gimbel*, 316 A.2d at 604. The court noted that whether or not the injunction issued, "there is irreparable harm to the losing side on this preliminary injunction application." *Id.*

116. *See id.* In this case, the plaintiff was the moving party. *See id.*

117. *See id*. at 617-18.

118. *See* Gimbel v. Signal Cos., Inc., 316 A.2d 599, 618 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974). Quickly scheduling a trial date is not possible in all jurisdictions and this backlog has become a growing problem in the American legal system. *See* Daniel A. Fulco, *Delaware's Response to Inefficient, Costly Court Systems and a Comparison to Federal Reform*, 20 DEL. J. CORP. L. 937, 937 & n.3 (1995) (highlighting inefficiency of legal system); BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION: REPORT OF A TASK FORCE 1 (1989) (describing delays in American court system). In many jurisdictions, litigants must wait years for a trial date, which means that the event at the center of the litigation happened years before. *See* Fulco, *supra*, at 939. This creates problems with the court's potential to fulfill substantive justice, especially when a quick decision is needed, such as is the case when a preliminary injunction is necessary. *See id*. This is a particularly trying issue for Massachusetts courts. *Compare* Margaret H. Marshall & Robert A. Mulligan, *Timely Justice Threatened by Fiscal Challenges*, B. B.J., Fall 2009, at 10, 10 (describing problems associated with backlog), *with* William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992) (describing less backlog as result of corporate focus).

119. *See* Packaging Indus. Grp., Inc. v. Cheney, 405 N.E.2d 106, 111 (Mass. 1980) (citing Leubsdorf's article in forming preliminary injunction standard in Massachusetts); Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine,* 58 STAN. L. REV. 381, 388 (2005) (describing Leubsdorf's work as "classic study"). Leubsdorf's article on injunctions is well

influenced by the historic jurisdictional limitations of the courts of law and chancery.[120] The Leubsdorf Standard proposes a two-part test to determine whether or not to grant a preliminary injunction: a likelihood of success on the merits and balancing the potential harm to each party.[121] In his opinion, the injunction should issue only when the success on the merits and the potential harm to each party tip in favor of the moving party.[122] The Leubsdorf Standard views the purpose of the preliminary injunction to be to "minimize the probable irreparable loss of [legal] rights caused by errors incident to hasty decision."[123]

The first element of the Leubsdorf Standard is the likelihood that the facts and the law forwarded by the moving party will prevail at trial.[124] Historically, it was the chancery's reluctance to address the underlying claims on the merits (which was solely in the purview of the courts of law at the time) that necessitated a discussion of only the *probability* of success on the merits.[125] Part of the historical rationale of this test was conditioned on the fact that the plaintiff would quickly resort to a lawsuit for full adjudication on the merits.[126] Professor Leubsdorf concedes that the more quickly the court is able to explore the merits in their entirety, the less likely there is a chance it makes an error assessing the parties' rights and liabilities; he acknowledges that the best way to avoid error is to expedite a full hearing on the merits.[127] Despite this ideal scenario, Professor Leubsdorf admits that in reality docket backlog precludes this from happening.[128] The merits are important, Professor Leubsdorf argues, in order to confirm that the moving party actually has a claim that could be found at a full trial so as to not infringe on the defendant's rights unnecessarily.[129]

After a finding or holding that the plaintiff is likely to succeed on the merits, the Leubsdorf Standard requires the court to assess the potential for irreparable harm sustained by each party.[130] This element is again derived from

used, and as of October 2014 has been cited over 200 times. *See* Search of Westlaw, KeyCite Service (Oct. 5, 2014) (search for sources citing John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978)).

120. *See* Leubsdorf, *supra* note 10, at 527, 537 (describing modern problems resulting from lack of evolution from historic purpose of preliminary injunction); *supra* Part II.C (describing historical origins of preliminary injunction standard). Leubsdorf further notes the standard has not drastically changed since the era where separate courts of law and courts of equity were commonplace in both England and the United States. *See* Leubsdorf, *supra* note 10, at 537.

121. *See* Leubsdorf, *supra* note 10, at 527, 537 (describing elements of test).

122. *See id.* at 556-60 (describing balancing test).

123. *See id.* at 540-41; *see also* Brooks & Schwartz, *supra* note 119, at 388 (describing Leubsdorf's argument).

124. *See* Leubsdorf, *supra* note 10, at 530 (discussing historical emergence of merits element).

125. *See id.* (noting judges growing accustomed to assessing probable success on merits).

126. *See id.* at 529 (describing necessity of expedited resolution on legal merits).

127. *See id.* at 556 (explaining necessity of merits analysis).

128. *See* Leubsdorf, *supra* note 10, at 556 (discussing problem with merits in light of backlogged courts).

129. *See id.* at 557-558 (noting caution when success on merits is in doubt).

130. *See id.* at 541 (describing appropriate analysis of loss).

the remedy's ancient standard—whereby the courts of equity would not be able to provide a remedy without a harm.[131] Here, the Leubsdorf Standard requires the judge to balance the harm between the parties.[132] If the irreparable loss the plaintiff would suffer if the injunction is denied is greater than the irreparable loss the defendant will suffer if the injunction is granted, the court should grant the injunction and vice versa.[133] Professor Leubsdorf writes that if a court can remedy the moving parties' injury after a full hearing on the merits, there is no reason to enjoin a party during the pendency of the litigation.[134] In fact, Professor Leubsdorf suggested that "[e]nlarging monetary recovery beyond the usual damage principles may be a useful alternative to equitable relief."[135]

2. The Brooks and Schwartz Theory of Preliminary Injunctions

Richard R.W. Brooks and Warren F. Schwartz have forwarded an alternative theory (Brooks-Schwartz Theory) of what the goal of a preliminary injunction in the modern legal world should be.[136] They suggest that an often overlooked part of the remedy of the preliminary injunction is whether it promotes or discourages desirable activities before the act which is the subject of the injunction takes place.[137]

To highlight their point, the authors summarize the basic analysis a party undergoes when deciding to breach a legal obligation that might require them to pay damages.[138] Brooks and Schwartz suggest that rational actors will discount the potential costs of a breach of performance by the likelihood that

131. *See id*. at 530, 533-34 (outlining ancient origins relating to harm standard).

132. *See* Leubsdorf, *supra* note 10, at 541-42.

133. *See id*. at 542 (explaining process of balancing harms).

134. *See id*. at 541 (describing importance of irreparable harm standard).

135. *Id.* at 558 (arguing increasing monetary damages can make harmed party whole).

136. *See* Brooks & Schwartz, *supra* note 119, at 382 (describing their theory of preliminary injunction standard). In the article, published in 2005, the authors "consider[ed] preliminary injunctions from a radically different perspective than that articulated in judicial opinions and prior legal scholarship." *Id.*

137. *See id.* at 383. The authors stated: "[R]emarkably little attention has been paid to whether these [preliminary injunction] proceedings tend to promote or discourage desirable activities." *Id.*

138. *See id*. at 385 (describing typical cost-benefit analysis of breaching legal obligation).

> For concreteness, consider the following hypothetical involving a contract for the provision of a well-specified good by a seller to a buyer who has paid a fixed amount up front. If we set the seller's cost to 70 and the buyer's value to 100, performance of the contract would increase social welfare by placing the good in the hands of the higher-valuing party (the buyer, in this case). The possibility of expectation damages makes it in the personal interest of the seller to do what is socially desirable. If she does not perform, the seller saves 70 in terms of performance costs but must pay 100 in the form of expectation damages to the buyer. The remedy thus aligns the seller's incentives with that which is socially desirable. However, this simple implication does not hold when liability is uncertain—a state of the world which, we again emphasize, is reasonably presumed in the context of preliminary injunction hearings.

Id. at 386 (footnote omitted).

they are enjoined, which is quite low.[139] They suggest that the party will internalize the cost they will have to pay for harming someone by their conduct, as well as the cost imposed on others for similar behavior.[140] The party will engage in the breach only to the extent the benefits exceed the costs of doing so.[141]

The authors further point out that when there is uncertainty, which is always present in preliminary injunction proceedings, the parties will rationally discount the harms to an even greater extent when choosing what to do.[142] The authors posit that the goal of the Leubsdorf Standard, to make sure parties receive adequate damages at the conclusion of a case, does not give the parties any incentive to engage in efficient, legal conduct before or after the case ends.[143] In responding to the Leubsdorf Standard, the Brooks-Schwartz Theory suggests courts should grant a preliminary injunction "if [the moving party] were prepared to assume liability for defendant's compliance costs . . . and a rule requiring a finding that performance would be efficient before granting a preliminary injunction."[144]

E. The Inequity of Noncompete Agreements

The preliminary injunction is a widely sought remedy in the employment law context, specifically in cases involving noncompete agreements.[145] A noncompete agreement prohibits employees from competing with their

139. *See id.* at 386-87 (describing discounting harm); *supra* note 138 (and accompanying text). The authors, continuing on with their breach of contract example state:

> Uncertainty over entitlements changes the efficient breach calculation. For example, imagine that the seller believes there is a 50% chance that her obligation to perform, under the prevailing circumstances, will be legally excused. Under these circumstances, she will not perform (though performance results in the most efficient result), even when expectation damages are perfectly estimated and fully compensatory. When deciding whether to perform, the seller still compares the expected cost of performance (70) to the expected damages for breaching. In this case, however, her expected damages are now 50, reflecting the expectation damages (100) discounted by the likelihood that the seller will not be held liable for breach (50%).

Id.

140. *See* Brooks & Schwartz, *supra* note 119, at 385 (explaining thought process involved in deciding whether to fulfill legal obligations).

141. *See id.* at 383, 386-87 (describing litigants cost-benefit analysis).

142. *See id.* at 386-87 (giving example of economic risk assessment).

143. *See id.* at 385 (describing perverse incentives).

144. Brooks & Schwartz, *supra* note 119, at 409.

145. *See* Alexander & Alexander, Inc. v. Danahy, 488 N.E.2d 22, 31 (Mass. App. Ct. 1986) (describing injunctive relief written into noncompete contract). Sometimes the right to injunctive relief is written directly into the noncompete agreement. *See id.*; SCOTT C. MORIEARTY ET AL., 45 MASS. PRAC., EMPLOYMENT LAW § 5.14 (2d ed. 2013) (describing preliminary injunction's place in noncompete agreements). This section is not meant to be a comprehensive discussion of the law of noncompete agreements, but will merely serve as an example of the inconsistency inherent in the preliminary injunction standard as described below.

employer for a specific duration of time after discharge.[146] Companies have tried to protect their business interests through these types of agreements for centuries.[147]

Covenants not to compete are on the rise with an increasingly mobile work force, especially in high tech industries.[148] They can have drastic effects on both employees and employers.[149] When an employee breaches a noncompete agreement, monetary or injunctive relief following a drawn out trial is often deficient to remedy the harm done to the employer.[150] For this reason, despite the fact that the court does not frequently issue preliminary injunctions enforcing noncompete agreements, employers frequently file for injunctive relief after filing a complaint alleging a breach.[151]

1. Massachusetts Noncompete Agreement Injunctions

In *DePuy Spine, Inc. v. Stryker Biotech, LLC.*,[152] the court considered a noncompete agreement of G. Joseph Ross, a former DePuy Spine, Inc. employee who left the company to join Stryker Biotech, LLC.[153] In 2007, Ross resigned from DePuy to take a job at Stryker as its Vice President of Marketing, despite having signed a noncompete agreement with DePuy.[154] The agreement was to be enforced for eighteen months after Ross left DePuy for any reason.[155] DePuy moved for injunctive relief, requesting that Ross be

146. *See* William G. Porter II & Michael C. Griffaton, *Using Noncompete Agreements to Protect Legitimate Business Interests*, 69 DEF. COUNS. J. 194, 194 (2002) (describing noncompete agreements generally). A noncompete agreement typically restricts an employee from competing with his employer after he leaves under specified circumstances, such as not allowing him to solicit the company's clients, nor allowing disclosure of any of the company's confidential business information. *See id*.; *supra* Part III.A (analyzing inconsistent application of preliminary injunction standard).

147. *See* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 629-38 (1960) (describing historic origins of noncompete agreements); Kenneth R. Swift, *Void Agreements, Knocked-out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 223, 224 (2007) (describing noncompete agreements as over one century old).

148. *See* Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1164-65 (2001) (describing extent and application of noncompete agreements).

149. *See* Melinda Ligos, *Job Contracts with Noncompete Teeth*, N.Y. TIMES (Nov. 1, 2000), http://www.nytimes.com/2000/11/01/jobs/job-contracts-with-noncompete-teeth.html (describing several noncompete actions restricting employees). *But see* David Koeppel, *Lose the Employee. Keep the Business.*, N.Y. TIMES (May 5, 2005), http://www.nytimes.com/2005/05/05/business/05sbiz.html?pagewanted=all&_r=0 (describing risks to employers lacking noncompete agreement).

150. *See* MORIEARTY ET AL., *supra* note 145, § 5.14 (describing problems with injunctive relief in noncompete agreements).

151. *See id.* (describing frequency of preliminary injunction in noncompete cases).

152. No. 071464BLS1, 2007 WL 1418507 (Mass. Super. Ct. Apr. 17, 2007).

153. *See id.* at *1. G. Joseph Ross was a high level employee at DePuy, serving as Worldwide Vice President of New Business Development. *See id*.

154. *See id.*

155. *See id.*

enjoined from working at Stryker for the duration of the noncompete agreement.[156]

The court cited *Packaging Industries* as the appropriate preliminary injunction standard.[157] It first discussed the merits of DePuy's case.[158] The court's discussion, however, focused more on the law involved than the facts.[159] Based on the law and the brief facts set out at the beginning of the opinion, the court balanced the harms by stating "[Ross] cannot freely walk away from [the] [a]greement. At the same time, DePuy Spine cannot reach too far . . . ."[160] The court enjoined Ross from certain business activities commensurate with the agreement he signed and for the duration of the agreement.[161] The court looked to more than just economic harm in its order for preliminary injunction.[162] It enjoined Ross from using any confidential information he acquired during his employment at DePuy in his current employment at Stryker.[163] The court also enjoined Ross from consulting with Stryker employees in connection with the sale or marketing of any non-Stryker Biotech products.[164]

The motions filed in *Biosystems of New England, Inc. v. DePuy Spine, Inc.*[165] present another example of an alleged breach of a noncompete agreement.[166] *Biosystems* involved several sales representatives, employees of DePuy, leaving to work for another company, Biosystems of New England.[167]

156. *See Stryker Biotech*, *LLC*, 2007 WL 1418507, at *1.

157. *See id.* at *3. The court stated that, according to *Packaging Industries*, "a preliminary injunction must be granted or denied after an abbreviated presentation of the facts and the law." *Id.* The court described DePuy's burden as the familiar balancing test: the likelihood of successes on the merits; that DePuy would suffer irreparable harm if the injunctive relief sought was not granted; and that DePuy's harm outweighs the harm to Ross. *See id*.

158. *See* DePuy Spine, Inc. v. Stryker Biotech, LLC, No. 071464BLS1, 2007 WL 1418507, at *3-4 (Mass. Super. Ct. Apr. 17, 2007).

159. *See id*. (discussing standards of proof and other rules regarding noncompete agreements).

160. *See id.* at *4.

161. *See id.* at *4-5.

162. *See Stryker Biotech, LLC*, 2007 WL 1418507, at *4-5.

163. *See id.* at *5. The court held the defendant was enjoined from disclosing "any confidential DePuy Spine information, including any confidential information regarding any DePuy Spine products, either in existence or in development, its distribution network, or its business plan . . . ." *Id.*

164. *See* DePuy Spine, Inc. v. Stryker Biotech, LLC, No. 071464BLS1, 2007 WL 1418507, at *5 (Mass. Super. Ct. Apr. 17, 2007).

165. *See* Plaintiffs' Opposition to DePuy Spine, Inc.'s Motion for Preliminary Injunctions, Biosystems of New England, Inc. v. DePuy Spine, Inc., No. 2012-1393 (Mass. Super. Ct. filed May 1, 2012); Memorandum in Support of DePuy Spine, Inc.'s Motion for Preliminary Injunction, Biosystems of New England, Inc. v. DePuy Spine, Inc., No. 2012-1393 (Mass. Super. Ct. file Apr. 26, 2012).

166. *See* Order Upon Application for Preliminary Injunction by DePuy Spine, Inc., Biosystems of New England, Inc. v. DePuy Spine, Inc., No. 2012-1393 (Mass. Super. Ct. May 7, 2012) (order denying preliminary injunction).

167. *See* Memorandum in Support of DePuy Spine, Inc.'s Motion for Preliminary Injunction at 6, Biosystems of New England, Inc. v. DePuy Spine, Inc., No. 2012-1393 (Mass. Super. Ct. filed Apr. 26, 2012). The employees had all worked for DePuy, ranging in experience from three to eleven years. *See id.* at 4. When they collectively resigned, they represented six accounts around Worcester and Lowell, Massachusetts. *See id.*

All of the employees signed a noncompete agreement when they began their employment with DePuy.[168] This noncompete agreement had language that was very similar to that examined by the court in the *Stryker* case.[169] DePuy later discovered that these employees had not only filed a preemptive lawsuit alleging the noncompete agreements were unenforceable, but they also had begun to solicit their old clients for Biosystems.[170] Despite the similarities to the case described above, the court did not issue the preliminary injunction enjoining the defendants from joining Biosystems, nor did it limit their activities.[171] The court stated that the preliminary injunction would not issue because DePuy failed to show the requisite irreparable harm.[172] The court further held that the harm proffered by DePuy was solely monetary and could adequately be addressed at law by monetary damages.[173]

Geosonics, Inc. v. Hicks[174] provides a third example of a company that sought injunctive relief in response to employees violating a noncompete agreement.[175] Hicks originally signed a noncompete agreement that prohibited him from working with any company in direct or indirect competition with GeoSonics.[176] Hicks voluntarily resigned from GeoSonics in 2000.[177] He then started his own business in the same industry as GeoSonics within the two-year window.[178]

In analyzing whether it should issue a preliminary injunction, the court cited *Packaging Industries* as the appropriate preliminary injunctions standard.[179] The court then discussed the merits of GeoSonic's case for the majority of its opinion, before only briefly discussing the irreparable injury to GeoSonics.[180] Having found that irreparable injury was present in this case, the court turned to the balance of the harms, finding it weighed in GeoSonic's favor.[181] Accordingly, the court issued a preliminary injunction enjoining Hicks from working at his new company, thus enforcing the noncompete agreement.[182]

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at 3-4.

168. *See id*. at 5 (describing existence of noncompete).

169. *See id*. at 5-6.

170. *See id*. at 6-8.

171. *See* Order Upon Application for Preliminary Injunction by DePuy Spine, Inc., *supra* note 166.

172. *See id.*

173. *See id.*

174. No. 012261A, 2001 WL 1811970 (Mass. Super. Ct. Dec. 5, 2001).

175. *See id*. at *1.

176. *See id.* The provisions included a geographic limitation: Hicks was not allowed to work within 100 miles of any GeoSonics office. *See id*. The agreement also prohibited Hicks from divulging any confidential business information which was disclosed to him during the course of his employment. *See id.*

177. *See id*. at *1.

178. *See Geosonics, Inc.*, 2001 WL 1811970, at *1.

179. *See id*. at *2.

180. *See* Geosonics, Inc. v. Hicks, No. 012261A, 2001 WL 1811970, at *2-3 (Mass. Super. Ct. Dec. 5, 2001) (discussing first two elements of preliminary injunction standard).

181. *See id*. at *4.

182. *See id*.

2. Delaware Noncompete Agreement Injunctions

In *Caras v. American Original Corp.*,[183] the court weighed whether to grant an employee's motion for preliminary injunction against his former employer.[184] Before beginning his employment, the employee signed two agreements, one of which contained a section entitled "noncompete."[185]

The court applied the *Gimbel* court's preliminary injunction standard.[186] Turning to the merits, the court concluded that the plaintiff-employee would most likely prevail in his case because there were no geographic limitations on the noncompete, making it far too broad.[187] The court then found that the plaintiff would be irreparably harmed if the injunction was not issued and that the equities tipped in his favor.[188] Furthermore, the court required the plaintiff to pay a $5000 bond.[189]

In *Deloitte & Touche USA LLP v. Lamela*,[190] the court again considered whether or not to grant a preliminary injunction enforcing a noncompete agreement.[191] Deloitte hired the defendant, Jose Lamela, in May of 2002 as a financial consultant to advise clients on multistate tax matters.[192] When Lamela began his employment with Deloitte, he signed a partnership agreement that contained restrictive covenants (including a noncompete agreement) controlling his potential employment after leaving the company.[193]

After only three years of employment, Lamela resigned.[194] Less than one month after his resignation, using a binder full of his Deloitte contacts, he sent emails to his former clients containing his new contact information with his new employer.[195] He also took further steps to solicit his old clients, including additional emails, phone calls, and in-person visits.[196]

183. 1987 WL 15553 (Del. Ch. July 31, 1987).

184. *See id*. at *1. In *Caras*, the plaintiff-employee worked for the defendant company beginning in 1979. *See id*.

185. *See id*. The "noncompete" provision stated the employee was not allowed–during the time of employment, or eighteen months after—to sell, buy, or process products bought and sold by American. *See id*. The second contract stated that the employee could not compete with the company for five years after termination but contained no geographic limitations. *See id*.

186. *See id.* at 2.

187. *See Caras*, 1987 WL 15553, at *2.

188. *See id.*

189. *See* Caras v. Am. Original Corp., 1987 WL 15553, at *2 (Del. Ch. July 31, 1987).

190. No. Civ. A. 1542-N, 2005 WL 2810719 (Del. Ch. Oct. 21, 2005).

191. *See id*. at *1.

192. *See id.*

193. *See id.* at *2 (describing noncompete agreement). This agreement forbid Lamela from providing any information to a future employer regarding the names of clients, services rendered to clients, and trade secrets relating to business practices. *See id*. Furthermore, the noncompete agreement required Lamela to leave any materials acquired while working for Deloitte with the company. *See id*. There were also geographic and time restrictions contained within the agreement. *See id*.

194. *See Lamela*, 2005 WL 2810719, at *3.

195. *See id.* By that time, Lamela worked for Alvarez and Marshal, Tax Advisory Services. *See id*.

196. See Deloitte & Touche USA LLP v. Lamela*,* No. Civ. A. 1542-N, 2005 WL 2810719, at *3 (Del. Ch.

Deloitte, attempting to enforce the noncompete agreement, sought a preliminary injunction to enjoin Lamela from any further alleged breach.[197] When deciding whether or not to enjoin Lamela, the court cited the typical elements of the preliminary injunction test developed through the progeny of *Gimbel.*[198] The court then engaged in a lengthy discussion of the likelihood that Deloitte's case would succeed on the merits.[199] The court found that Deloitte had shown a reasonable probability of success on the merits.[200] The court then briefly discussed irreparable harm and the balance of the equities, holding that Deloitte would suffer irreparable harm and lose legitimate business interests and that this harm outweighed the potential harm to Lamela.[201]

In *Lehman v. Standard Forms, Inc.*,[202] the defendant company, Standard Forms, Inc. (SFI), bought Lehman's company and hired Lehman as a sales manager.[203] Upon joining the company, Lehman signed an agreement not to compete, which included language prohibiting Lehman from conducting similar business with another company for five years after his employment with SFI ended.[204]

While working for SFI, Lehman's friend, Kowaiski, approached him for help in starting a new company.[205] Lehman helped Kowaiski begin his new company, Design Desktop Solutions (DDS), which directly competed with Lehman's current employer.[206] Lehman's performance at SFI became a problem and he was terminated.[207] Almost immediately after Lehman's termination, he began his own company, PrintGraphics.[208]

SFI brought suit, filing a motion for preliminary injunction in an attempt to enforce the noncompete provision of Lehman's employment contract.[209] The court cited the standard preliminary injunction test.[210] It then went into a

Oct. 21, 2005) (highlighting solicitation actions).

197. *See id.* at *1.

198. *See id.* at *5 (describing elements of preliminary injunction analysis). The court noted: "[T]he moving party must satisfy the Court that: (1) it has a reasonable probability of success on the merits at a final hearing, (2) it faces an imminent threat of irreparable injury, and (3) the balance of the equities tips in favor of issuance of the requested relief." *Id.*

199. *See id.*

200. *See Lamela*, 2005 WL 2810719, at *12 (holding of court).

201. *See id.* at *11-12.

202. No. 13688, 1995 WL 54443 (Del. Ch. Jan. 12, 1995).

203. *See id.* at *2.

204. *See id*. at *4. The agreement also prohibited Lehman's use of confidential information obtained during his employment. *See id.*

205. *See id.* at *6-7.

206. *See Lehman,* 1995 WL 54443, at *6.

207. *See id.* at *7. Lehman failed to meet performance expectations and began to funnel work to DDS. *See id*.

208. *See* Lehman v. Standard Forms, Inc., No. 13688, 1995 WL 54443, at *4 (Del. Ch. Jan. 12, 1995). The company later merged with DDS and became Print Partners. *See id.*

209. *See id.*

210. *See id*. The court noted that the legal standard was "well-settled," stating, "[t]he moving party must

lengthy discussion of SFI's probability of success on the merits.[211] Next, the court turned to a brief discussion of irreparable harm, concluding SFI would be irreparably harmed if Lehman was allowed to breach his noncompete agreement.[212] Then, in balancing the equities, the court held that it still favored granting SFI's request for preliminary injunction.[213]

III. ANALYSIS

A. Inconsistent Application of the Preliminary Injunction Standard

Historically, the preliminary injunction standard has been inconsistently applied.[214] Generally the goal of the preliminary injunction is thought to be "to minimize the probable irreparable loss of rights caused by errors incident to hasty decision[s]."[215] This poses a significant dilemma.[216] If the court does not grant the moving party the requested relief, that party may lose rights that can never be restored.[217] Alternatively, if the court does grant the requested relief, the nonmoving party might lose the same right.[218]

Despite the variations apparent in case law, the widely held view is that the preliminary injunction should maintain the status quo between the parties, thus allowing the court to fully address the merits of the case while minimizing the harm of an incorrect preliminary decision.[219] The consensus on how to best achieve this end, however, is less apparent.[220] Additionally, according to Brooks and Schwartz, whether maintaining the status quo in a modern legal proceeding is the best end for a preliminary injunction should be questioned.[221]

1. Inconsistencies in Massachusetts Case Law

The holding in *Packaging Industries* came shortly after the merger of law

prove (1) a reasonable probability of success on the merits; (2) irreparable harm; and (3) a balance of hardships that favors the moving party." *Id*. at *4.

211. *See id*. at *4-8.

212. *See Lehman*, 1995 WL 54443, at *8.

213. *See id*. at *9.

214. *See* Leubsdorf, *supra* note 10, at 525-26 (stating standard for issuing preliminary injunctions "suffers from inconsistent formulations"); Weisshaar, *supra* note 10, at 1015 (describing inconsistencies among circuit courts existing in modern preliminary injunction jurisprudence). This inconsistency in application creates a risk that courts will come to inconsistent judgments. *See* Weisshaar, *supra* note 10, at 1015.

215. *See* Leubsdorf, *supra* note 10, at 540-41 (describing necessary irreparable harm standard).

216. *See id*. at 541 (explaining preliminary injunction dilemma).

217. *See id*. (noting potential loss of rights).

218. *See id*. (describing difficulty in balancing).

219. *See* Leubsdorf, *supra* note 10, at 541 (describing purpose of preliminary injunction).

220. *Compare* Brooks & Schwartz, *supra* note 119, at 393-95 (detailing economic efficiency theory of preliminary injunctions), *with* Leubsdorf, *supra* note 10, at 541 (describing preliminary injunction standard without concern for economic efficiency).

221. *See* Brooks & Schwartz, *supra* note 119, at 393-95 (describing economic efficiency theory of preliminary injunctions).

and equity in Massachusetts.[222] Some practitioners have described this case as demonstrating "traditional equitable principles."[223] This case completely integrated the work of Professor John Leubsdorf into Massachusetts case law and does not cite any cases supporting its resuscitation of the preliminary injunction standard.[224] *Packaging Industries* demonstrated how the courts in Massachusetts should apply the preliminary injunction standard, by balancing three elements.[225] Courts should first look to the potential for irreparable harm to the moving party.[226] Courts should consider the merits second.[227] Finally, the judge must balance the potential harms suffered by each party.[228] The current standard is very similar to the standard that originated in old English law.[229]

It appears that this standard is in keeping with principles of equity.[230] The court held that harm to a party should be the most important consideration, second only to the merits, which is consistent with equitable principles.[231] Additionally, the SJC made it apparent that the court's discretion in weighing the risk of harm against the probability of success on the merits meant that injunctions may issue even if the moving party did not show that it was more likely than not to succeed on the merits.[232]

222. *See* Kerry, *supra* note 97, at 161 (describing historical context for *Packaging Industries* decision); *supra* Part II.B.1 (describing equity courts in Massachusetts); *supra* Part II.B.3 (describing merger of law and equity).

223. *See* Berman, *supra* note 92, at 10 (highlighting *Packaging Industries* as representing "traditional equitable principles").

224. *See* Packaging Indus. Grp., Inc. v. Cheney, 405 N.E.2d 106, 111 (Mass. 1980) (citing Leubsdorf's article as demonstrative of preliminary injunction standard adopted in case); Kerry, *supra* note 97, at 161 (describing Leubsdorf's influence on *Packaging Industries* decision). "In *Packaging Industries*, the SJC explicitly and thoroughly committed Massachusetts to Leubsdorf's model." Kerry, *supra* note 97, at 161; *see also supra* Part II.D.1 (describing Leubsdorf's conception of preliminary injunction purpose).

225. *See* Kerry, *supra* note 97, at 161 (describing *Packaging Industries* as preliminary injunction standard to follow in Massachusetts); *supra* Part II.C.1 (describing *Packaging Industries* preliminary injunction standard).

226. *See Packaging Indus. Grp., Inc*., 405 N.E.2d at 112 (describing irreparable harm as first important element); *see also* Commonwealth v. Mass. CRINC, 466 N.E.2d 792, 797 (Mass. 1984) (citing *Packaging Industries* as appropriate preliminary injunction standard in most circumstances). The importance of the irreparable harm inquiry as the first consideration was reaffirmed in *Mass. CRINC*. *See* 466 N.E.2d at 797.

227. *See Packaging Indus. Grp. Inc.,* 405 N.E.2d at 617 (analyzing risk of harm first and merits second); Kerry, *supra* note 97, at 165 (describing importance of harm). "Irreparable harm remains a *sine qua non* for preliminary injunctions." Kerry, *supra* note 97, at 165.

228. *See Packaging Indus. Grp., Inc.*, 405 N.E.2d at 621-22 (balancing harms); Kerry, *supra* note 97, at 114 (describing balancing test).

229. *See* Leubsdorf, *supra* note 10, at 527-30 (describing historic preliminary injunction standard); *see also supra* Part II.C (describing origins of preliminary injunction standard).

230. *See supra* Part II.A (describing origins of American judicial equity theory).

231. *See* Packaging Indus. Grp., Inc. v. Cheney, 405 N.E.2d 106, 112 (Mass. 1980). When a party was harmed by the strict application of the law, equity's role was to ameliorate that litigant's position. *See supra* note 17 and accompanying text (describing equity basis in fairness).

232. *See Packaging Indus. Grp., Inc.*, 405 N.E.2d at 112-14 (discussing likelihood of success on the merits); Kerry, *supra* note 97, at 165 (citing low merits standard). "In theory at least, this sliding scale gives a

This assertion suggests that the SJC was adhering to traditional equitable principles in two additional ways; the first is allowing the judge to utilize his or her discretion.[233] The second is potentially allowing fairness to trump the strict application of the law by announcing that a judge can overlook a weak showing on the merits (law) when there is a strong showing of irreparable harm (equity).[234] This case also incorporated the statutory grant of equity, allowing equitable remedies even when there were remedies at law.[235] Furthermore, *Packaging Industries* stressed irreparable harm was the most important aspect of the injunction standard.[236]

Despite this, the equitable standard announced in *Packaging Industries* is not always applied.[237] This is seen in the Massachusetts Superior Court's application of the standard in noncompete cases as highlighted in Part II.E.1.[238] Differing standards often lead to incongruous results, despite similar facts.[239]

When looking to the *Stryker* case, instead of beginning with a discussion of the irreparable harm to both parties, the court began with a discussion of the merits.[240] This is not only contrary to historical equitable principles but goes against the appropriate standard set forth in *Packaging Industries*.[241]

court discretion to issue injunctive relief in response to a strong showing of irreparable harm even if the court is not convinced the plaintiff will prevail." Kerry*, supra* note 97, at 165.

233. *See* Emmerglick, *supra* note 64, at 245 (highlighting need for discretion in equity due to strictness of legal doctrines); Hendel, *supra* note 19, at 637-39 (describing origins of equity). The English form of equity pulled heavily from general concepts of right and wrong. *See* Powell, *supra* note 33, at 22 (describing discretion in equity); Hendel, *supra* note 19, at 641-42.

234. *See* Demoulas v. Demoulas, 703 N.E.2d 1149, 1169 (Mass. 1998) (describing equity's roots in flexibility and fairness); Kroger, *supra* note 23, at 1427 (describing Chief Justice Warren's conception of equity as aligning with basic fairness); Main, *supra* note 3, at 430 (explaining judicial equity moderated rigidity in law with fairness).

235. *See Packaging Indus. Grp., Inc.*, 405 N.E.2d at 111 (describing no remedy at law requirement); ALPERIN, *supra* note 43, at § 9.2 (describing change in statutory language allowing equity even when remedy at law available); *see also supra* Part II.B.1 (describing equity in Massachusetts).

236. *See Packaging Indus. Grp., Inc.,* 405 N.E.2d at 112 (describing element of irreparable harm); Kerry, *supra* note 97, at 165 (arguing importance of irreparable harm).

237. *See* Kerry, *supra* note 97, at 165 ("[I]n no reported SJC or Appeals Court case has an injunction issued or been affirmed on less than a likelihood of success despite the *Packaging Industries* [standard] . . . .").

238. *See supra* Part II.B.1 (describing equity grant to superior courts in Massachusetts); *supra* Part II.E.1 (outlining noncompete cases in Massachusetts).

239. *Compare* DePuy Spine, Inc. v. Stryker Biotech, LLC, No. 071464BLS1, 2007 WL 1418507, at *4 (Mass. Super. Ct. Apr. 17, 2007) (granting preliminary injunction), *with* Order upon Application for Preliminary Injunction by DePuy Spine, Inc, *supra* note 166 (denying preliminary injunction despite similar circumstances).

240. *See Stryker Biotech, LLC*, 2007 WL 1418507, at *3-5. The court goes on for several pages discussing the legal enforceability of the noncompete agreement. *See id.*

241. *See* Packaging Indus. Grp., Inc., v. Cheney, 405 N.E.2d 106, 111 (Mass. 1980) (describing preliminary injunction standard). In *Packaging Industries*, the court stressed the importance of irreparable harm. *See id.* at 112; *see also* Kerry, *supra* note 97, at 165 (describing irreparable harm in *Packaging Industries*). Without irreparable harm, the court should not address the merits. *See* Kerry, *supra* note 97, at 165 (noting preliminary injunctions should not issue if no irreparable harm, despite likelihood of prevailing on merits).

Furthermore, that court does not even explicitly address harm.[242] Considering the omission of a discussion of the harms, there is certainly no discussion of balancing the harms between the moving and nonmoving party.[243] This case only addresses the legal merits, seemingly in contrast to the equitable principles inherent in the preliminary injunction analysis.[244]

When compared to *Stryker*, the *Biosystems* decision highlights the court's inconsistent application of the preliminary injunction standard.[245] In this short order, the court did discuss the harms to each party.[246] The discussion of the harms was, in fact, the only element of the standard discussed at all.[247] The judge's emphasis on the harms was in line with both the proclamation in *Packaging Industries* and traditional equitable principles.[248]

Despite the noncompete agreement clauses striking similarities to the agreement in the *Stryker* case, the court refused to enjoin the former employees.[249] The court failed to address any other potential harms to the defendant, DePuy, such as the potential loss of confidential information to which former employees were privy.[250] The court chose instead to focus solely on money damages, which is historically a legal, not equitable, remedy.[251]

In *Geosonics*, the court also discussed the merits at great length, seemingly bucking the equitable considerations inherent in a preliminary injunction and the *Packaging Industries* standard.[252] The discussion of the irreparable harm was very short—only four sentences long.[253] This is a seemingly insufficient discussion of harm when it should be considered the most important element of whether or not to grant a preliminary injunction.[254] The balance of harms is

242. *See Stryker Biotech*, *LLC*, 2007 WL 1418507, at *3-5.

243. *See id*.

244. *See id*; *supra* Part II.B.3 (describing equity's place in contrast to common law).

245. *See* Order upon Application for Preliminary Injunction by DePuy Spine, Inc., *supra* note 166 (denying preliminary injunction); DePuy Spine, Inc. v. Stryker Biotech, LLC, No. 071464BLS1, 2007 WL 1418507 (Mass. Super. Ct. Apr. 17, 2007).

246. *See* Order upon Application for Preliminary Injunction by DePuy Spine, Inc., *supra* note 166.

247. *See id*.

248. *See* Packaging Indus. Grp., Inc. v. Cheney, 405 N.E.2d 106, 111-12 (Mass. 1980); Kerry, *supra* note 97, at 165 (describing importance of irreparable harm).

249. *See* Order upon Application for Preliminary Injunction by DePuy Spine, Inc., *supra* note 166 (refusing injunctive relief). The court held that "DePuy Spine, Inc. is not entitled to a preliminary injunction where it has failed to show irreparable harm because money damages at law will be adequate to compensate any harm DePuy Spine, Inc. suffers." *Id.*

250. *See id.* (ignoring nonmonetary harms).

251. *See id.*; Weisshaar, *supra* note 10, at 1018 (describing law courts limitation in only providing money damages).

252. *See* Geosonics, Inc. v. Hicks, No. 012261A, 2001 WL 1811970, at *4 (Mass. Super. Ct. Dec. 5, 2001) (allowing preliminary injunction); Kerry, *supra* note 97, at 165 (describing irreparable harm standard in *Packaging Industries*).

253. *See Geosonics*, *Inc.*, 2001 WL 1811970, at *3.

254. *See* Kerry, *supra* note 97, at 195 (discussing importance of irreparable harm in issuing preliminary injunction); *see also supra* Part II.C.1 (outlining preliminary injunction standard in Massachusetts).

discussed in one sentence.[255] Furthermore, there is no discussion of the balance between the harms and the likelihood of success on the merits, an important consideration described in *Packaging Industries*.[256]

2. Inconsistencies in Delaware Case Law

The *Gimbel* opinion explains how the Delaware standard for the motion for preliminary injunction should be applied.[257] More important than the court's recitation of the standard for a preliminary injunction is the application of the standard to the facts of the case.[258] In the first instance, despite the court holding that the merits should be addressed first, the court considered the question of irreparable harm, historically an equitable consideration.[259]

Furthermore, the chancellor stated that the court may balance the factors in a case and can determine that the strength of one element, such as the merits of the case, can be balanced against the weakness of another, such as the irreparable harm.[260] Overlooking the legal merits in order to instead consider what is fair is a historically equitable concept.[261] In *Gimbel*, the chancellor expressed doubt at the potential of the plaintiff's ability to succeed on the merits; despite such doubt, the chancellor allowed the injunction because the plaintiff could be barred any meaningful relief if the injunction was denied.[262] *Gimbel* further demonstrates that the judicial discretion a court holds is necessary for an appropriate determination of whether to issue a preliminary injunction, a tenet of the legal system of equity.[263]

Despite Delaware's history of a separate chancery court, it does not seem to

255. *See Geosonics*, *Inc.*, 2001 WL 1811970, at *3 (discussing balance of harms).

256. *See id*. at *4 (balancing harms against irreparable injury); *see also* Packaging Indus. Grp., Inc. v. Cheney, 405 N.E.2d 106, 111-12 (Mass. 1980) (describing balancing between merits and harm); *supra* Part II.C.1 (discussing *Packaging Industries* decision).

257. *See* Gimbel v. Signal Cos., Inc., 316 A.2d 599, 602 (Del. Ch.) (describing standard), *aff'd*, 316 A.2d 619 (Del. 1974); Santarelli, *supra* note 9, at 121 (describing significance of *Gimbel* standard).

258. *See Gimbel*, 316 A.2d at 602 (outlining injunction standard); Santarelli, *supra* note 9, at 118 (describing significance of *Gimbel* analysis).

259. *See Gimbel*, 316 A.2d at 602 (announcing first question of preliminary injunction analysis as probability of success on merits). *But see id.* at 603 (discussing irreparable harm to plaintiff and defendant first).

260. *See id.* at 603 (describing possibility of balancing merits and irreparable harm); Santarelli, *supra* note 9, at 119 (discussing significance of balancing).

261. *See* Betsy & Rhoda, 3 F. Cas. 305, 307 (D. Me. 1840) (stating harsh common-law rule mitigated by equity); Main, *supra* note 3, at 430 (describing moderating effect of equity on law); *see also supra* Part II.B (outlining origins of American equity).

262. *See Gimbel*, 316 A.2d at 617-18. The court described its conclusion on the probability of success on the merits only "tentative." *See id.*; *see also* Santarelli, *supra* note 9, at 120 (describing holding). The issue of which party would prevail on the merits in *Gimbel* was so close that the court could only conclude that there existed "a serious question about the plaintiff's probability of success [on the merits]." Santarelli, *supra* note 9, at 120.

263. *See* Powell, *supra* note 33, at 22 (describing discretion in equity); Hendel, *supra* note 19, at 639 (describing discretion historically inherent in equity).

apply its preliminary injunction standard with any additional emphasis on historical equitable principles.[264] In *Caras*, the court first addressed the ability of the plaintiff to succeed on the merits.[265] To begin the analysis with a discussion of facts pertaining to the legal arguments belies both the preliminary injunction test forwarded in *Gimbel* and equity in general.[266] *Caras* is further separated from traditional equitable principles and *Gimbel* by the lack of a substantive discussion of the irreparable harm suffered by each party.[267] There is also no discussion of the balancing test in the *Caras* case, again seemingly ignoring the standard set forth in *Gimbel* and traditional equitable principles.[268]

In *Deloitte*, the court again began with an intense discussion of the merits of the case.[269] This leans towards the analytical style of a court of law as opposed to an equity court.[270] In addition, the immediate discussion on the merits goes against the court's holding in *Gimbel.*[271] After finding that the moving party had shown a reasonable probability of success on the merits, the discussion of harm was quite short.[272] This is, once again, against the holding in *Gimbel* as well as to the principles of equity.[273]

Once again, in *Lehman*, the court began with a lengthy discussion of the merits, despite the *Gimbel* court's holding.[274] The irreparable harms seems to

264. *See* Quillen & Hanrahan, *supra* note 21, at 820-23 (describing historically separate equity courts in Delaware); *supra* Part II.B.2 (describing history of equity courts in Delaware); *supra* Part II.E.2 (describing Delaware noncompete cases).

265. *Compare* Caras v. Am. Original Corp., 1987 WL 15553, at *1 (Del. Ch. July 31, 1987) (discussing merits as first element), *with supra* note 259 and accompanying text (describing discussion in *Gimbel* starting with irreparable harm).

266. *See* Gimbel v. Signal Cos., Inc., 316 A.2d 599, 604 (Del. Ch.) (applying standard to facts), *aff'd*, 316 A.2d 619 (Del. 1974); Santarelli, *supra* note 9, at 119 (describing irreparable harm addressed in first instance); Weisshaar, *supra* note 10, at 1018 (describing different remedy given by courts of law and courts of equity). Common-law courts, just as it sounds, utilized the common law to give damages. *See* Weisshaar, *supra* note 10, at 1018. Equitable courts traditionally gave equitable remedies outside the purview of the common law. *See id.* at 1018; *see also supra* Part II.B.3 (discussing merger of law and equity).

267. *Compare Caras*, 1987 WL 15553, at *1 (ignoring harm), *with Gimbel*, 316 A.2d at 603 (discussing irreparable harm), *and* Santarelli, *supra* note 9, at 119 (describing irreparable harm as discussed first).

268. *See* Santarelli, *supra* note 9, at 119 (describing importance of balancing harm in *Gimbel* decision). *Compare Caras*, 1987 WL 15553, at *2 (ignoring balancing test), *and Gimbel*, 316 A.2d at 603 (balancing harms).

269. *See* Deloitte & Touche USA LLP v. Lamela, No. Civ. A. 1542-N, 2005 WL 2810719, at *5-6 (Del. Ch. Oct. 21, 2005).

270. *See* Weisshaar, *supra* note 10, at 1018-19 (describing different remedy given by courts of law and courts of equity).

271. *See Gimbel*, 316 A.2d at 603 (applying standard to facts); Santarelli, *supra* note 9, at 119 (describing irreparable harm addressed in first instance).

272. *See Lamela*, 2005 WL 2810719, at *11.

273. *See* Gimbel v. Signal Cos., Inc., 316 A.2d 599, 603 (Del. Ch.) (applying standard to facts), *aff'd*, 316 A.2d 619 (Del. 1974). The court believed irreparable harm to be the most important aspect of whether a preliminary injunction should issue. *See id.*; *see also supra* Part II.B (describing equity jurisprudence).

274. *See* Santarelli, *supra* note 9, at 119 (describing irreparable harm addressed in first instance). *Compare* Lehman v. Standard Forms, Inc., No. 13688, 1995 WL 54443, at *4-8 (Del. Ch. Jan. 12, 1995) (focusing on merits), *with Gimbel*, 316 A.2d at 603 (focusing on irreparable harm).

be merely an afterthought and not the crux of the analysis as *Gimbel* suggests it should be.[275] The discussion of the balancing of the harm is paltry, contrary to the analysis in *Gimbel*.[276] Finally, there is no direct discussion whatsoever of a balancing of the merits of the case with the potential irreparable harm.[277]

B. What Can Be Done Differently?

Despite the merger of law and equity in Massachusetts and the historically separate equity courts in Delaware, both state court systems seem to fail at providing truly equitable remedies in the face of the common law.[278] In the cases highlighted above, the courts focused on the merits of the case and not what seemed fair or right based on the harms to each party.[279] It would not have been surprising if Delaware was more equitable in its ruling when compared with Massachusetts, considering Delaware's courts have exercised their chancery power since their inception.[280]

The correct standard, as articulated by both of the seminal preliminary injunction decisions in each state, should focus on the harms involved in each case.[281] These courts should focus on all of the harms that would be suffered by the parties if there was no injunction, not just the potential monetary damages.[282] There should be a low threshold for showing a potential to succeed on the merits because the party wrongly sued already has recourse against frivolous lawsuits, such as Rule 11 sanctions.[283]

The new standard should not focus on harms alone, however, the standard needs to break free from its ancient roots and begin to adapt to a new legal and economic environment.[284] Considering the length of time it takes to be given a

275. *See Lehman,* 1995 WL 54443, at *8; *see also supra* Part II.C.2 (describing *Gimbel* preliminary injunction standard).

276. *See generally Lehman*, 1995 WL 54443.

277. *See* Santarelli, *supra* note 9, at 119 (describing importance of element balancing). *Compare Lehman*, 1995 WL 54443, at *4-9, *with Gimbel*, 316 A.2d at 603.

278. *See* Emmerglick, *supra* note 64, at 245 (describing benefit of separate equity courts); Main, *supra* note 3, at 477-78 (describing problems in merged systems of law and equity); *see also supra* Part II.B.1 (describing separate equity court in Massachusetts); *supra* Part II.B.2 (describing separate equity court in Delaware).

279. *See supra* Part II.E.1 (describing Massachusetts employment law cases); *supra* Part II.E.2 (describing Delaware employment law cases).

280. *Compare supra* Part II.B.1 (outlining equity jurisdiction in Massachusetts courts), *with supra* Part II.B.2 (noting equity jurisprudence in Delaware courts).

281. *See* Gimbel v. Signal Cos., Inc., 316 A.2d 599, 603 (Del. Ch.) (indicating standard focuses on harm to each litigant), *aff'd*, 316 A.2d 619 (Del. 1974); Packaging Indus. Grp., Inc. v. Cheney, 405 N.E.2d 106, 112 (Mass. 1980) (describing irreparable harm as part of preliminary injunction standard); Wolf, *supra* note 16, at 235 (describing new standard for preliminary injunction focusing on harms).

282. *See generally* Brooks & Schwartz, *supra* note 119 (discussing importance of non-economic harm).

283. *See* DEL. R. CIV. P. 11 (describing potential sanctions for frivolous pleadings); MASS. R. CIV. P. 11 (allowing for disciplinary action against attorney who signs pleading without law supporting argument).

284. *See* Brooks & Schwartz, *supra* note 119, at 393-95 (describing new theory, forwarding model promoting economic efficiency).

full trial on the merits in both states, the preliminary injunction is an important tool in litigation.[285] With the advent of technology, such as email, breaches of confidential information can happen in a matter of seconds.[286] The current standard makes no attempt to fully dissuade parties from intentionally breaking the law; the nonmoving party hopes he will not be enjoined, knowing once the preliminary injunction does not issue, the moving party will most likely choose not to prosecute the case further because the harm is already done.[287]

Once an employee leaves a company with whom he has a noncompete agreement for a competitor, the harm is already done and the employee seemingly takes his chances that a court will not disrupt his decision to leave.[288] Because of this new legal reality, the preliminary injunction should buck the trend of solely preserving the status quo and adopt an additional consideration that would support economically efficient choices by litigants.[289] This might persuade people to act in a legal manner and fully take into account, and not discount, the potential harms of their action.[290] This change in standards can happen in three distinct ways: by pronouncements by the highest courts in both states; state legislative action; or the Supreme Court of the United States can pronounce the new standard, although it has historically been unable, or unwilling to do so.[291]

IV. CONCLUSION

Delaware and Massachusetts both inconsistently apply the preliminary

285. *See supra* Part II.B.1 (describing backlogged courts); *supra* Part II.E (describing preliminary injunction as tool to enforce noncompete agreement).

286. *See* Deloitte & Touche USA LLP v. Lamela, No. Civ. A. 1542-N, 2005 WL 2810719, at *3 (Del. Ch. Oct. 21, 2005) (summarizing breach of noncompete agreement). The employee emailed all of his contacts developed at Deloitte when he began employment in his new firm. *See id.*

287. *Compare* Brooks & Schwartz, *supra* note 119, at 393-95 (describing purpose of preliminary injunction to promote legal behavior), *with* Leubsdorf, *supra* note 10, at 525 (supporting status quo purpose of preliminary injunction standard).

288. *See, e.g.*, *Lamela*, 2005 WL 2810719, at *2 (describing employee leaving for competitor); Memorandum in Support of DePuy Spine, Inc.'s Motion for Preliminary Injunction, *supra* note 165 (describing sales force leaving DePuy for competitor); DePuy Spine, Inc. v. Stryker Biotech, LLC, No. 071464BLS1, 2007 WL 1418507, at *3 (Mass. Super. Ct. Apr. 17, 2007) (involving executive leaving DePuy for competitor).

289. *See* Brooks & Schwartz, *supra* note 119, at 393-95 (supporting economic efficiency argument for preliminary injunctions).

290. *See id.* (describing discounting-harm problem with preliminary injunctions).

291. *See* Grupo Mexicano de Desarollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 333 (1999) (holding district court lacked equity jurisdiction and authority to order preliminary injunction); Hecht Co. v. Bowles, 321 U.S. 321, 328-31 (1944) (noting mandate within statute lacking requirement for preliminary injunction); Weisshaar, *supra* note 10, at 1015 (describing lack of uniform standard). "The Supreme Court has had numerous opportunities to enunciate a uniform federal standard for preliminary injunctions but has repeatedly declined to do so . . . ." Weisshaar, *supra* note 10, at 1015; *see also* DEL. R. CIV. P. 65 (outlining Delaware's equity statute); MASS. R. CIV. P. 65 (outlining Massachusetts equity statute); *supra* Part II.C.1 (describing Massachusetts' preliminary injunction statute); *supra* Part II.C.2 (describing Delaware's preliminary injunction statute).

injunction standard with respect to noncompete agreements. The effect on business can be drastic. Both states also largely, if not entirely, pull their standard from the eighteenth century origins of the preliminary injunction. Today, the business world moves quicker than ever before with the advent of the internet, email, and redlines in communal documents. Processes that took weeks years ago, can now take days or mere hours.

The problem with the court's hesitance to issue injunctions in light of this reality is the extreme backlog in some state courts. The juxtaposition of lightning speed business transactions and painstakingly slow courts leads to problems for employers. It is because of this that a new standard should be considered.

In light of this predicament, two broad changes need to occur: the threshold for issuing a preliminary injunction must be lowered, and the court must greatly accelerate the trial date and have a hearing on the merits quickly. When deciding whether to grant the injunction, the court should focus on the irreparable harm. If there is irreparable harm to one or both litigants and the legal argument passes the Rule 11 test, the court should grant the injunction when the moving party is injured more than the nonmoving party. This version of the preliminary injunction standard would act as a deterrent to those who want to breach their contractual obligations, thus inducing efficient behavior.

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