Congressmen, the Ball is in Your Court: *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*

I. Introduction

The Supreme Court in the 5-4 decision *Grupo Mexicano De Desarrollo v. Alliance Bond Fund*[1] ruled that "the federal district court lacked the authority, in an action for money damages, to issue a preliminary injunction preventing note issuer from disposing of assets in which note holders who sought an injunction claimed no lien or equitable interest." The Court held that the law would not support the grant of preliminary injunctions to prevent the disbursement of assets, maintaining "[c]ongress is in a much better position . . . to design the appropriate remedy" for claimants.[2] *Alliance Bond Fund* has held that in equity cases, defendants may potentially continue to frustrate judgments. Legislative reform is the one avenue of protection that can guarantee the creditor's ability to enforce a potential judgment. This Note evaluates *Alliance Bond Fund,* its holding, reasoning, and ramifications. Ultimately, the need to protect American investors in the age of fast-moving capital and an interdependent economy should fuel congressional involvement in establishing a legal remedy.

A hypothetical illustrates the importance of protecting investors. Suppose, for example, a group of individuals who are employed or associated with a bank, conduct a scheme to defraud the bank. The scheme involves draining the bank of assets through breaches of loyalty and fiduciary duty. Through a pattern of fraudulent racketeering activity the group devised a "heist money" scheme to use $3,000,000.00 of the bank's assets in an attempt to purchase $9,000,000.00 in stolen currency. Fearing the culprits will begin to dissipate this lump sum of money, the bank seeks to obtain a preliminary injunction.[3] Currently, the bank-creditor will lose this motion. The remedy sought is one that is "at law."[4] Therefore, while courts have already hesitated to protect creditors through grant of preliminary injunctions, the Supreme Court's position in *Alliance Bond Fund* instructs federal courts to remain cautious.

Section I provides an introduction to *Alliance Bond Fund* and its facts, while Section II delves into the history of interlocutory injunctions beginning with the legal system. A brief overview of the chief cases involving preliminary injunctions prior to *Alliance Bond Fund* is contained in Section III. Sections IV and V deal solely with the Court's reasoning in *Alliance Bond Fund*, particularly the flaws of the opinion and their ramifications. Section VI explores various areas of law where preliminary injunctions are already available. Lastly, Section VII discusses both the status of creditors and debtors after *Alliance Bond Fund*, and introduces *Haven v. Poland*[5], a case illustrating how at

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1. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 119 S. Ct. 1961 (1999).

2. *Id.* at 1970.

3. Federal Deposit Ins. Corp. v. Antonio, 649 F. Supp 1352. (D.Colo. 1986).

4. To determine a remedy as law or equity, courts look to history and the nature of the remedy, looking to common law and whether it merely declares the law, relying on the execution process for enforcement (in which case it will be deemed legal) or whether it is in personam and then it is an equitable relief. DAN D. DOBBS, LAW OF REMEDIES § 2.1, 2.2, 2.6 (2d ed. 1993).

5. 68 F. Supp. 2d 947 (N.D.Ill. 1999).

least one federal district court reconciled *Alliance Bound Fund* with public policy concerns for protecting creditors.

II. The Facts of *Alliance Bond Fund*

In February 1994, the Mexican holding company Grupo Mexican de Desarrollo (GMD) issued $250 million of 8.25% unsecured, guaranteed notes due in 2001. A group of American investment funds purchased unsecured notes from GMD. Interest payments were due in February and August of every year. The notes were guaranteed by four subsidiaries of GMD. American investment funds purchased $75 million of the notes.

GMD participated in a toll road construction program sponsored by the Mexican government between 1990 and 1994. GMD invested in the concessionaires and also were among the companies granted a contract to build the toll roads. Difficulties in the Mexican economy resulted in large losses that left the concessionaires unable to pay contractors like GMD.

The Mexican government, to remedy the situation, instituted a Toll Road Rescue Program. Under this program, the Mexican government issued guaranteed notes to the concessionaires in exchange for their ceding to the government ownership of the toll roads. GMD was to receive approximately $309 million of Toll Road Notes under the program. The Toll Road Notes were used, in turn, to pay the bank debt of the concessionaires and also to pay outstanding receivables held by GMD and other contractors. Due to further economic difficulties in the Mexican economy, GMD found itself in serious financial troubles. In order to remedy the situation, GMD publicly announced that it would place in trust its right to receive $17 million of Toll Road Notes, as well as transfer to the Mexican government its right to receive $100 million of Toll Road Notes.

Despite attempts to restructure its debts with creditors, including Mexican banks and both Mexican and American investors, negotiations with the American Bond Fund failed. Subsequently, Respondents accelerated the principal amount of their notes, filing suit for the amount due in the United States District Court for the Southern District of New York. In the complaint, Respondents alleged that "GMD is at risk of insolvency, if not already insolvent."[6] Respondents appreciated GMD's incentive to dissipate its assets. Particularly, Alliance Bond Fund feared that assets received from dissipation of Toll Road Notes would go to GMD's Mexican creditors, which would "frustrate any judgment"[7] Respondents could obtain.

In their suit, Respondents sought breach-of-contract damages in the amount of $80.9 million, and requested a preliminary injunction to restrain Petitioners from transferring the Toll Road Notes or receivables. The District Court entered a temporary restraining order, stating:

> the Toll Road Notes were GMD's 'only substantial asset'; that GMD planned to use the Toll Road Notes 'to satisfy its Mexican creditors to the exclusion of [respondents] and other holders of the Notes'; that 'in light of [petitioners'] financial condition and dissipation of assets, any judgment [respondents] obtain in this action will be frustrated'; that respondents had demonstrated irreparable injury; and that it was 'almost certain' that respondents would succeed on the merits of their claim.[8]

The temporary injunction operated to prevent Petitioners from "dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or affecting any

6. Grupo Mexicano De Desarrollo, S.A. v. Alliance Bond Fund, 527 U.S. 308, 119 S. Ct at 161, 1965.
7. *Id.*
8. *Id.*

[petitioner's] right to, interest in, title to or right to receive or retain, any of the [Toll Road Notes]."[9] The District Court then ordered the Respondents to post a $50,000 bond. On appeal, the Second Circuit Court of Appeals affirmed the lower court's decision to grant the preliminary injunction.[10]

III. The Development of the Interlocutory Injunction

"[T]he equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act [of] 1789."[11] Therefore, the roots of interlocutory injunctions in the United States can be traced to interlocutory injunctions in the history of the English legal system.

It is well settled that interlocutory injunctions have a colorful history dating back to the Anglo-Saxon legal system during nineteenth-century England.[12] At one time, the standards for granting interlocutory injunctions were identifiable without much difficulty. Judges usually exercised broad discretion in areas of equity jurisdiction, merely asking "whether the case is so clear and so free from objection upon the grounds of equitable consideration, that the Court ought to interfere by injunction with a previous trial at law."[13]

The standard further developed so as to require the plaintiff to show that there is a 'substantial question' to be decided.[14] The merger of law and equity in the English High Court of Justice eliminated the need for equity to "look quite so nervously over its shoulder at potential allegations of lack of jurisdiction."[15] The result was the formation of criteria for judges to use before granting an interlocutory injunction. The model developed requires a plaintiff seeking an injunction of this kind to demonstrate a strong prima facie case.

When the colonies established their legal system, they borrowed notions of equity jurisdiction. However, along with the English model for granting interlocutory injunctions came a deep-rooted resentment of equity jurisprudence.[16] Thus, American courts did little to develop the jurisprudence of applying injunctive relief, and instead drew upon "the precedents of Courts of Chancery of England."[17] The D.C. Circuit Court, in *Virginia Petroleum Jobbers Association v. F.P.C.*,[18] was the first circuit court to enunciate four factors for consideration when granting an injunction. The four factors include:

(1) Has the petitioner made a strong showing that they are likely to prevail on the merits of their appeal?

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9. *Id.*

10. Alliance Bond Fund, Inc. v. Grupo Mexicano De Desarrollo, S.A., 143 F.3d 688, 698 (2d Cir. 1998).

11. Alliance Bond Fund, 119 S. Ct at 1968.

12. *See generally* R. Grant Hammond, *Interlocutory Injunctions: Time for a New Model?*, 30 U. TORONTO L.J. 240 (1980).

13. Saunders v. Smith, 40 Eng. Rep. 1100, 1107 (1837) (Cottenham, LC)(quoted in Hammond, supra n. 13, at 242).

14. Hammond, *supra* n. *242.*

15. *Id.* at 243.

16. *Id.* at 246-47. "Among the English common people there was a deeply rooted sentiment of attachment to the Saxon trial by jury and of aversion to the 'one-man power' of adjudication. The colonists who settled America brought something of this sentiment with them; there appears in the colonial age to have been real fear of the Court of Chancery as a possible engine for arbitrary power." *Id.*, quoting STORY, COMMENTARIES ON EQUITY JURISPRUDENCE I (10th ed 1970), at 49ff.

17. Charles River Bridge v. Warren Bridge 23 Mass. (6 Pick.) 376, at 395 and 401 (1828).

18. 259 F.2d 921, 925 (D.C. Cir. 1958)..

(2) Has the petitioner shown that without such relief they will suffer irreparable injury?

(3) Will the stay substantially harm other parties interested in the proceeding?

(4) How will the public interest be affected?

Subsequent to the D.C. Circuit Court's initial definition of the four interlocutory injunction factors, circuit courts developed three primary approaches to the factors' application. The first method, the "sequential" approach, applied in *Intercontinental Container Transportation Corp. v. New York Shipping Association,*[19] instructs courts to treat the factors as individual hurdles, requiring that each be passed before any injunction is granted.[20] The second approach, and the one endorsed in *Virginia Petroleum*, is known as the "balancing" test. This approach considers all the factors as equally relevant, weighing all factors concurrently, treating none as being dispositive.[21] Lastly, few circuit courts apply an approach that requires a showing of "either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief."[22]

The history of preliminary injunctions both in England and in the United States reflects its dynamic nature. Though both systems have applied it reluctantly and at times inconsistently, the fact that the preliminary injunction has endured the test of time demonstrates the necessity and effectiveness of it as a remedy.

IV. Interlocutory Injunctions Prior to *Alliance Bond Fund*

The Supreme Court prior to *Alliance Bond Fund* had addressed the issue of preliminary injunctions in three cases, *United States v. First National City Bank,*[23] *Deckert v. Independence Shares Corp.,*[24] and *De BEERS Consol. Mines Ltd. v. United States.*[25] First in the series was *Deckert*, where the Supreme Court in 1940 authorized an interlocutory order granting an injunction. In contrast, five years later, the Court denied the government the right to freeze an antitrust violator's assets pending the outcome of a government suit for injunctive relief in *De BEERS*. The only way preliminary injunctive relief could have been granted, the Court held, was if the injunction was disobeyed, if contempt proceedings were brought, if a fine was levied, if the fine was not paid, and if execution was then sought on the assets. Finally, in *First National* the Court performed another about-face and found the issuance of an injunction pursuant to 26 U.S.C. §7402[26] was a proper exercise of the equity power of the District Court, particularly because it was acting in the public interest.

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19. 426 F.2d 884 (2d. Cir. 1970).

20. Hammond, *supra* n. 13 at 262.

21. *Id.*

22. *Id.* at 263.

23. 379 U.S. 378 (1965) (where the government sought to enjoin the bank from transferring the property of the taxpayer, a Uruguayan corporation, to protect its jeopardy income tax assessment. See I.R.C. § 7204(a) (1976) ("necessary or appropriate for the enforcement of the Internal Revenue Code")).

24. 311 U.S. 282 (1940).

25. 325 U.S. 212 (1945).

26. 26 U.S.C. §7402 (1994).

Described above is a series of conflicting opinions. First, the *Deckert* Court found it an appropriate exercise of equity jurisdiction pursuant to the Securities Act, which does not expressly provide for injunctive relief.[27] The Court found the authority to grant an injunction in that situation despite a lack of an express remedy set out in the SEC statute. The majority opinion explains: "the Act as a whole indicates an intention to establish a statutory right which the litigant may enforce in designated courts by such legal or equitable actions or procedures as would normally be available to him."[28] After finding that an interlocutory injunction was within the "legal or equitable actions" normally available to a plaintiff in *Deckert*, the Court in *De BEERS* ruled that it was no longer normally available to a plaintiff because that case was not brought pursuant to a statute.[29] The Court stated, "the injunction issued in this case was not authorized either by statute or by the usage of equity and that the decree granting the injunction should be reversed."[30] This position is entirely in conflict with the position taken by the Court in *Deckert* where, pursuant to a SEC statute, equity principles allowed interlocutory injunctions in money damages cases.[31] Finally, the Court once again changes course and holds in *First National* that interlocutory injunctions are within the powers of equity jurisdiction, inherent in the internal revenue law.[32] The statute, 26 U.S.C. § 7402,[33] lacked an express provision for granting injunctions, however in spite of this fact, the Court found it to be within equity powers.[34]

The lower courts responded to the Supreme Court's divergent decisions by developing various justifications for injunctive relief. The Fifth Circuit, in *Productos Carnic, S.A. v. Central Am. Beef & Seafood Trading Co.*,[35] upheld an order requiring that the proceeds of a sale, allegedly obtained by fraud, be preserved in an interest-bearing account pending the final result of the litigation.[36] Without such an injunction, a substantial risk existed that a "meaningful decision on the merits would be impossible" because defendants, by disposing of the assets, could make "any judgment ultimately obtained against [them] unenforceable."[37]

Similarly, the Second Circuit in *International Control Corp. v. Vesco*[38] upheld an order preventing the dissipation or impairment of assets located in the United States, including a Boeing 707, corporate stock, and a yacht.[39] Although the court acknowledged that a preliminary injunction is an uncommon remedy, it concluded that it was appropriate to preserve the status quo pendente lite where the balance of hardships tips decidedly toward the party requesting the temporary relief, and that party has raised questions going to the merits so serious, substantial, and difficult as to make them fair ground for litigation.[40] Similarly, the Second Circuit, in accord with the Supreme Court's holding in *Mills v. Electric Auto-Line Co.*, granted relief in *SEC v. Manor*

27. *See id.*
28. *Id.* at 287-88.
29. *See De BEERS*, 325 U.S. at 218
30. *Id.* at 223.
31. *See Deckert*, 311 U.S. at 290-91.
32. *See First National*, 379 U.S. at 385.
33. *See* supra note 27.
34. *See Id.* at 383.
35. 621 F.2d 683 (5th Cir. 1980).
36. *See Id.* at 686-87.
37. *Id.* at 686.
38. 490 F.2d 1334 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974).
39. *See id.* at 1338.
40. *Id.* at 1347.

Nursing Centers Inc.,[41] explaining:

> Once the equity jurisdiction of the district court has been properly invoked by a showing of a securities law violation, the Court possesses the necessary power to fashion an appropriate remedy. Thus, while neither the 1933 nor 1934 Acts specifically authorize the ancillary relief granted in this case [the appointment of a receiver and an asset freeze,] 'it is for the federal courts to adjust their remedies so as to grant necessary relief where federally secured rights are invaded.'[42]

V. The Reasoning of the Supreme Court in *Alliance Bond Fund*

A. Majority Opinion

The tradition of equitable relief in the United States "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 Courts of Chancery at the time of the separation of the two countries."[43] Delivering the opinion for the Court, Justice Scalia explains the chief reason for reversing the Court of Appeals is, "[t]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief . . . depend on traditional principles of equity jurisdiction."[44]

Justice Scalia relies chiefly on this aspect of history; the only equity relief available today is that which was available at the time of separation from England. Federal Rule of Civil Procedure 65 does not alter the substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief.[45] Whether Rule 65 avails plaintiffs to equity relief depends on "traditional principles of equity jurisdiction."[46]

The Court first eliminates the suggestion that the equity relief sought by Alliance Bond Fund is analogous to the equity relief sought in cases involving a "creditor's bill."[47] This form of equity relief allows a judgment creditor to "discover the debtor's assets, to reach equitable interests not subject to execution at law, and to set aside fraudulent conveyances."[48] Distinguishing the circumstance of *Alliance Bond Fund* from the creditor's bill situation, the Court points out that the present case seeks an injunction prior to an entered judgment, whereas a creditor's bill was available only to a judgment holding creditor.[49]

After discussing the creditor's bills requirement of a judgment before an injunction could be issued, the Court reiterates the general rule that a judgment establishing a debt was necessary before a court of equity would interfere with the debtor's use of the debtor's property.[50] The merger of law and equity under the rules has not changed the general presumption of equity principles prior to judgment. Scalia opines "[n]otwithstanding the fusion of law and equity by the Rules of Civil Procedure the

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41. 458 F.2d 1082 (2d Cir. 1972).

42. *Id.* at 1103 (footnote omitted).

43. *See* Grupo Mexicano De Desarrollo, S.A. v. Alliance Bond Fund 1195 S. Ct. at 1968 (*quoting* Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939)).

44. *Id.* at 1968 (quoting 11A C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2941, 31 (2d ed. 1995)).

45. *Id.*

46. *Id.*

47. *See id.*

48. *Id.* (footnotes omitted).

49. *See Alliance Bond Fund*, 119 S. Ct. at 1968.

50. *See Id.* at 1968-69.

substantive principles of Courts of Chancery remain unaffected."[51] Furthermore, the Court found that

> [e]ven in the absence of historical support, we would not be inclined to believe that it is merely a question of procedure whether a person's unencumbered assets can be frozen by general-creditor claimants before their claims have been vindicated by judgment. It seems to us that question goes to the substantive rights of all property owners.[52]

Since equity jurisdiction in the United States is what was exercised by the High Court of Chancery at the time of separation from England, the Court turned toward England for instruction. The opinion points to the fact that the English courts did not provide a prejudgment injunctive remedy until 1975 as a strong argument that federal courts should continue to be reluctant in granting preliminary injunctions.[53] Specifically, the British Court of Appeal decided *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A*[54]. in 1975, holding that the "court has no power to protect a creditor before he gets judgment."[55] While acknowledging that England has moved away from the traditional equity principle of not granting prejudgment injunctions, the Supreme Court finds that it is "incompatible with our traditionally cautious approach to equitable powers."[56]

The Court suggests lastly that, if the remedy were granted, Rule 64 of the Federal Rules of Civil Procedure would be rendered irrelevant. Rule 64 authorizes the use of state prejudgment remedies. As another consequence of granting the requested relief, the Court foresees, the disruption of the balance between debtors' and creditors' rights established by centuries' enactment of state laws.[57]

The majority opinion addresses the post-merger cases *Deckert*, *First National City Bank*, and *De BEERS Consol. Mines*. Justice Scalia distinguishes *Deckert* by finding that "[t]he preliminary relief available in a suit seeking equitable relief has nothing to do with the preliminary relief available in a creditor's bill seeking equitable assistance in the collection of a legal debt."[58] Furthermore, the Court found *Deckert* not controlling because "the bill states a cause [of action] for equitable relief."[59]

Unsurprisingly, the second principal Supreme Court case to grant preliminary injunctions was also distinguished by the Court. Specifically, the majority opinion distinguished *United States v. First National City Bank* on three grounds. First, the Court recognizes the injunction being sought in *First National* was being sought pursuant to a statute authorizing tax injunctions. Second, courts of equity will "go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."[60] Lastly, the Court points out that the

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51. *Id.* at 1970 (quoting Stainback , 336 U.S. at 382, n. 26 (1949)).

52. *Id.*

53. *See Id.* at 1972.

54. 2 Lloyd's Rep. 509. "Apparently the first 'Mareva Injunction' was actually issued in Nippon Yusen Kaisha v. Karageorgis, 1975. 2 Lloyd's Rep. 137 (C.A.), in which Lord Denning recognized the prior practice of not granting such injunctions, but stated that "the time has come when we should revise our practice."" *Id.* at 138; see also Hetherington, Introduction to the Mareva Injunction, in Mareva Injunctions 1, n. 1 (M. Hetherington, ed. 1983)." Grupo Mexicano, 119 S. Ct. at 1973, footnote 9.

55. *Alliance Bond Fund*, 119 S. Ct. at 1973, n. 10.

56. *Id.* at 1972-73.

57. Laws related to bankruptcy, fraudulent conveyances, and preferences.

58. *Alliance Bond Fund*, 119 S. Ct. at 1971.

59. *Deckert*, 311 U.S. at 288.

60. *First National City Bank*, 379 U.S. at 383 (quoting Virginian R. Co. v. Federation, 300 U.S. 515, 552 (1937)).

creditor had an equitable lien on the property, which is different than an unsecured general creditor.

The Court agreed with the principles set forth in *De Beers Consol. Mines Ltd. v. United States*[61] which held in a suit seeking equitable relief against alleged antitrust violations, that a preliminary injunction is inappropriate. The long history of equity jurisprudence does not allow for an interference with debtor's rights, "disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree."[62]

B. The Dissent

An analysis of history does not necessarily dictate the outcome reached by the Court in *Alliance Bond Fund*. The dissent's discussion of history provides the American Bond Fund with preliminary injunctive relief. "The Judiciary Act of 1789 gave the lower courts jurisdiction over 'all suits . . . in equity.'"[63] The Supreme Court has interpreted this jurisdiction over suits in equity to confer the "authority to administer . . . the principles of the system of judicial remedies which had been devised and was being administered"[64] by the English Courts at the time of separation. Justice Ginsburg, writing for the dissent, argued that the Court "long ago recognized that district courts properly exercise their equitable jurisdiction where 'the remedy in equity could alone furnish relief, and . . . the ends of justice require the injunction to be issued.'"[65] Federal courts further have the authority to use their judicial discretion in the form of provisional relief to preserve the status of the case at bar pending the outcome of the case.[66] The District Court in this case acted completely in accordance with these principles, using its discretion to grant the "preliminary injunction only upon well-supported findings that Alliance had '[no] adequate remedy at law.'"[67] Historically courts have always valued the adaptable character of federal equitable power.[68] "[A] court of equity has unquestionable authority to apply its flexible comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties."[69]

VI. Commentary on *Alliance Bond Fund*

At the end of the day the Supreme Court merely presented a historical argument for why courts should not exercise their equity jurisdiction. This section discusses weaknesses of the Courts' analysis. Included in this discussion are arguments regarding why a static view of equity jurisdiction is inappropriate. Also discussed are issues raised pertaining to the Court's analysis of both the All Writs Act and Rule 65.

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61. 325 U.S. 212 (1945).

62. *Id.* at 222.

63. *Alliance Bond Fund*, 119 S. Ct. at 1976.

64. *Id.* at 1976, (quoting Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939)).

65. *Id.* at 1976, (quoting Watson v. Sutherland, 72 U.S. 74, 79 (1867)).

66. 11A C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2943, p. 79 (1995).

67. *Alliance Bond Fund*, 119 S. Ct. at 1975.

68. "We have also recognized that equity must evolve over time, 'in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly committed.'" Union Pacific R. Co. v. Chicago, R. I. & P.R.Co., 163 U.S. 564, 601 (1896). See also 1 J. POMEROY, EQUITY JURISPRUDENCE § 67, 89 (S. Symons 5th ed. 1941) (the "American system of equity is preserved and maintained . . . to render the national jurisprudence as a whole adequate to the social needs . . . . [I]t possesses an inherent capacity of expansion, so as to keep abreast of each succeeding generation and age.").

69. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

A. Flaws in the Reasoning of *Alliance Bond Fund*

1. The Alliance Court's Static View of Equity Relief

In the opinion, the majority acknowledges that "there is nothing new about debtors' trying to avoid paying their debts, or seeking to favor some creditors over others – or even about their seeking to achieve these ends through 'sophisticated . . . strategies."[70] Given that debtors are prone to this behavior, it should not be beyond the powers of equity jurisdiction to protect the creditor. The Court holds on to an unreasonable static conception of equity jurisdiction, one that existed during the Revolutionary War era of legal jurisprudence. Although it may be true that federal equity jurisdiction has been defined by the principles of England at that time, there is no doctrine that requires federal jurisdiction in equity to be limited to those specific practices and remedies of the pre-Revolutionary era. We no longer live in an "age of slow-moving capital and comparatively immobile wealth,"[71] so federal courts should not necessarily practice the principles of that world.

Although the Court acknowledges that the "age of slow-moving capital and comparatively immobile wealth" is over, it cannot or will not foresee the consequences of this decision. An unwavering adherence to this view of equity relief that was perhaps acceptable in a different age effectively allows dead-beats and fly-by-nighters to dissipate their assets, leaving their victims without hope of satisfying any judgment they might receive. Corporations are left largely unaffected by this decision. Their assets are sufficiently large and immobile so as to prevent them from being dissipated. Likewise, on the other end of the spectrum are the small-time frauds and petty swindlers who lack significant assets, making preliminary injunctions unnecessary. Ultimately those that fall in that middle category, between the large corporations and the small time crooks, benefit from this decision. It is unlikely the Court would hand down a decision to benefit dead-beats, and the fact that it has, raises questions as to the soundness of the decision.

2. The Court's Misconstrued Application of the All Writs Act and Rule 65

The majority opinion raises questions relating both to Rule 65 and the All Writs Act[72] without addressing them at length. This Section explores the possibilities and problems that arise when these issues are explored.

a. The All Writs Act

In *American Bond Fund*, the Court distinguished *First National*, finding that it involved, "powers under the statute authorizing issuance of tax injunction."[73] Looking to footnote 8 of the opinion, the Court references the All Writs Act, particularly the argument made in the Brief for the United States. The United States as Amicus Curiae argued "that there is statutory support for the present injunction in the All Writs Act."[74] In response, the opinion states: "we have said that the power conferred by the predecessor of that provision is defined by 'what is the usage, and what are the principles of equity applicable in such a case.' That is the very inquiry in which we have engaged."[75]

An inquiry into the All Writs Act should have little to do with the inquiry the Court engages in involving the traditional principles of equity. Jurisprudentially, they are and

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70. *Alliance Bond Fund*, 119 S. Ct at 1970.
71. *Id.* at 1969.
72. 28 U.S.C. § 1651 (1948).
73. *Alliance Bond Fund*, 119 S. Ct at 1971.
74. *Id.* at 1971, n.8.
75. *Id.* n.8 (quoting *De BEERS Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 219 (1945)).

have been two separate vehicles for relief. The Act provides that, "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[76] The All Writs Act provides courts with a standing inherent power to issue a preliminary injunction to preserve the status quo.[77] This authorizes courts to implement their powers to ensure a potential judgment. The traditional principles of equity the majority in *American Bond Fund* discusses provide a distinct remedy from the statutory authority pursuant to the All Writs Act, and the Court ought to have engaged in a discussion of relief under this provision separate from the discussion about equity principles.

Under the All Writs Act, the traditional criteria of the likelihood of success, irreparable harm, balance of harm, and public interest are to be applied. Under the modern view, these factors must be evaluated in combination. This stems from the recognition that, where certain aspects of the test are strongly shown, the showing on the other factors may be lessened.[78] Whether requiring all the criteria or the standard of the modern view, the American funds are entitled to the relief sought pursuant to the Act.

b. Rule 65

Traditionally, Rule 65 is "firmly grounded in the pre-rule federal practice in injunction suits . . . the general availability of injunctive relief . . . [is] not altered by the rule and depend[s] on traditional principles of equity jurisdiction."[79] Under general federal equity jurisprudence, issuing an injunction or a temporary restraining order is a matter of discretion and not of right.[80] The test for exercising this discretion in granting a preliminary injunction traditionally has emphasized four factors: 1) irreparable harm to the plaintiff, 2) balance of interests of the plaintiff and the defendant, 3) probability of success on the merits, and 4) the public interest, irreparable injury or serious question and balance of the hardships.[81] Some courts have reformulated these factors eliminating one or stressing others but, generally these factors are formulated and applied in the traditional fashion.

In the *Alliance Bond Fund* majority opinion, there appears to be the suggestion that the application of Rule 65 will no longer depend on one set of the traditional factors. Instead the Court suggests in footnote 3 of the opinion, that application of Rule 65 creates an *Erie* question. The Court raises this question, but then declines to answer it; "[p]etioners argue for the first time before this Court that under *Erie R. Co. v. Thompkins*,[82] the availability of this injunction under Rule 65 should be determined by the law of the forum state (in this case New York). Because this argument was neither raised nor

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76. 28 U.S.C. §1651(a).

77. *See* F.T.C. v. Dean Foods Co., 384 U.S. 597, 603-605 (preliminary injunction issued to prevent merger).

78. The parameters of the burden that the applicant must meet under the sliding scale evaluation have been summarized by the 10th Circuit in Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980).

79. 11 C. WRIGHT & A. MILLER, *supra* note 52, § 2941, at 359. *See generally Developments in the Law – Injunctions* 78 HARV. L. REV. 996 (1965).

80. Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) ("equitable remedies are a special blend of what is necessary, what is fair, and what is workable."); Hecht Co. v. Bowles, 321 U.S. 321, 328-29 (the language "shall be granted" does not make injunction mandatory); Sports Form, Inc. v. United Press Int'l, 686 F.2d 750, 752-54 (9th Cir. 1982) (standard of review is abuse of discretion).

81. 11 C. WRIGHT & A. MILLER *supra* note 52, § 2948.

82. Grupo Mexicano De Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 119 S. Ct. 1961, 1968 (1999)(*citing* 304 U.S. 64 (1938).

considered below, we decline to consider it."[83] However, instead of limiting the Rule 65 analysis to federal equity principles, the Court opens Pandora's box. The application of Rule 65 in an "*Erie*" fashion would become a quagmire of state practices and laws. The direction of the Court on Rule 65 is uncertain, but if it continued on this course, it would certainly change the traditional application of injunctive relief. Considering the chief argument of the majority opinion demonstrates a reluctance to move away from traditional applications of equity principles, the Court should follow its own advice and apply Rule 65 how it has traditionally been applied.

An argument can be made that the application of Rule 65 already exists as a hodgepodge of criteria applied in an equally confusing manner by the federal circuit courts. Although this may be the case there is no codified directive that authorizes the federal courts to rule in this way. Whether this is what Justice Scalia purports to create is unclear. However, he raises the issue and for future Rule 65 cases, this may be a relevant avenue of litigation.

3. Alliance's Treatment of the Post-Merger Cases

This section suggests that the Court's treatment of the three Supreme Court cases dealing with preliminary injunctions prior to *Alliance Bond Fund* is less than accurate.[84] Taken altogether, the three cases support the availability of a preliminary injunction to freeze assets which may be subject to an equitable decree when the judgment is entered[85] It can be said that in the case of a future money judgments, such as *First National*, a preliminary injunction would also be available.[86]

a. Deckert v. Independence Shares Corporation [87]

Deckert involved several purchasers who brought a suit in equity to rescind the fraudulent sale of securities and to obtain restitution. The monies necessary to satisfy the purchaser's claim were in the hands of a third-party trustee, named as a defendant, but not as a violator. The suit was brought pursuant to 15 U.S.C. § 77(v),[88] where the Supreme Court upheld the freeze.

The reasoning of *Deckert* speaks to the issue of allowing preliminary injunctions to "protect a final equitable remedy of restitution or constructive trust."[89] *Deckert* is applicable only to those seeking preliminary injunctions having an equitable claim to holdings within the possession of defendants, therefore its inappropriate to apply it to a case where the plaintiff seeks money damages as a final remedy.[90]

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83. *Id.*

84. "We have on three occasions considered the availability of a preliminary injunction to freeze assets pending litigation. . . . These cases involved factual and legal circumstances markedly different from those presented in this case and thus do not rule out or in the provisional remedy at issue here." (Ginsburg, dissent) *Id.* at 1967 n.3.

85. *See* Ronda Wasserman, *Equity Renewals: Preliminary Injunctions to Secure Potential Money Judgments*, 67 WASH. L. REV. 257, 318 (1992).

86. *Id.* at 318.

87. 311 U.S. 282 (1940).

88. 15 U.S.C. § 77v (1999) (granting district courts jurisdiction over suits brought to enforce any liability under the securities act).

89. Wasserman, *supra* note 80, at 311.

90. *Id.* at 312.

b. De BEERS Consolidated Mines, Ltd. v. United States[91]

The majority opinion in *Alliance Bond Fund,* finds *De BEERS*[92] strongly supportive of the position that preliminary injunctions are not a remedy within the federal court's equity jurisdiction. The Court in *De BEERS* presented a slippery slope argument that suggested a "plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action."[93] Although dicta, the last statement was persuasive to the Court in *Alliance Bond Fund.*

An accurate reading of *De BEERS* would limit it. The Third Circuit has done that by finding, it "simply held that a defendant's money may not be encumbered by a preliminary injunction when the final merits judgment sought by plaintiffs cannot involve a transfer of money from defendants to plaintiffs. Similar to *Deckert, De BEERS* is inapplicable to a case where the plaintiff is seeking money damages."[94]

c. United States v. First National City Bank[95]

Of the three post-merger cases, *First National* is the most relevant to preliminary injunctive relief in money damages cases. In *First National,* the government sought to freeze the assets of several banks and brokerage firms to prevent them from dissipating their holdings, rendering them judgment-proof. After the Second Circuit reversed the district court's grant of injunctive relief, the Supreme Court reaffirmed the district court decision. *First National* presents a unique situation. According to the Court, "[c]ourts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."[96] This is the case which is most relevant to *Alliance Bond Fund.* The Court in *First National* quoted both *De BEERS* and *Deckert* and found the injunction appropriate to "preserve the status quo" because the assets to be enjoined were to be the "subject of the provisions of any final decree in the cause."[97] Ultimately, the result was to freeze the defendant's assets in order to ensure a future money judgment, which the American funds in *Alliance Bond Fund* should be equally entitled to as well.

VII. Existing Methods To Obtain Preliminary Injunctions

The legal system is no stranger to preliminary injunctions. Injunctive relief is already available in a number of areas. The American state court system offers one example, such as in New York. In New York, preliminary injunctions are available through means other than Rule 65. Another forum where preliminary injunctions are available is the English legal system, which authorizes relief in the form of Mareva injunctions.

A. State Courts

New York provides for pre-judgment injunctions for debtors who establish and maintain assets in New York. This remedy is set out in the New York Rules of Civil Procedure issuing preliminary injunctions in a case for money damages where, "the

91. 325 U.S. 212 (1945).

92. Where the United States brought suit against several corporations seeking equitable relief against alleged antitrust violations. The United States sought a preliminary injunction restraining the defendants from removing their assets from this country pending adjudication of the merits.

93. *De BEERS,* 325 U.S. at 222-223.

94. Wasserman, *supra* n. 80, at 314.

95. 379 U.S. 378 (1965).

96. *Id.* at 383 (*quoting* Virginia Ry. Co. v. Federation, 300 U.S. 515, 552 (1937)).

97. 379 U.S. at 385.

defendant is a non-domiciliary residing without the state, or is a foreign corporation not qualified to do business in the state."[98] Extremely broad in its scope, this is an alternative available also to creditors in Australia, Bermuda, the Bahamas, the Cayman Islands, Canada, Hong Kong, Singapore, Malaysia, New Zealand and the Republic of Ireland.[99]

Colorado also statutorily provides pre-judgment injunctive relief for money damages. It is one of twenty-nine states[100] to enact state RICO legislation, including provisions for granting interlocutory injunctions. Colorado's RICO statute[101] expressly permits the grant of injunctive relief to a private plaintiff in conformity with the principles that govern the granting of injunctions from threatened loss or damage in other civil cases, except that no showing of special or irreparable damage to the plaintiff has to be made.[102] In the case of a debtor dissipating assets, an injunction under this statute would be appropriate. *FDIC v. Antonio*[103] is illustrative of a preliminary freeze under this statute in order to ensure money damages. The District Court addresses the question of whether there exists the authority, by preliminary injunction, to prevent dissipation of the defendant's assets necessary to satisfy a potential judgment, without proof that the assets are the product of wrongdoing. Finding that the authority to grant such injunctions does exist, the Court supports its view citing the Colorado statute which "expressly provides for injunctive relief in private party cases."[104]

B. *Mareva* Injunctions

Preliminary injunctions were not available in England[105] until 1975, when the English Court of Appeal granted a freeze of assets in *Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A.*[106] The owners (plaintiffs) chartered out their ship, the *Mareva,* to foreign defendants for $3850 (£ or $) per day. After paying the first two payments on time, the defendants subsequently failed to pay the third. In an action that was at law for debt, the plaintiffs sued to collect the money due to them. Fearing that the defendant's assets in a London bank would be dissipated, the plaintiffs sought a preliminary injunction.

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98. N.Y. C.P.L.R 6201 (Consol. 1999).

99. Clyde Mitchell, *Limits on Federal Court Injunctions in Aid of Creditors*, N.Y.L.J., Oct. 1999, at n.18.

100. G. Robert Blakey and Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God – Is this the End of RICO?"* 43 VAND. L. REV. 851 (1990).

101. COLO. REV. STAT. §§ 18-17-106 (6) (1981).

102. The statute states:

> Any aggrieved person may institute a proceeding, under subsection (1) of this section. In such proceeding, relief shall be granted in conformity with the principles that govern that granting of injunctive relief from threatened loss or damage in other civil cases; except that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits

Id.

103. 649 F. Supp 1352 (D. Colo. 1986).

104. *Id.* at 1354.

105. For a historic review, *See* Rasu Maritima v. Pertambangan [1977] 3 All. E.R. 324, 331-32 (C.A. Denning, J.).

106. [1980] 1 All E.R. 213 (C.A. 1975). The injunction granted in *Mareva* was the second granted in a couplet of cases. The first case was Nippon Yusen Kaisha v. Karageorgis [1975] 1 W.L.R. 1093 (C.A.). *See also* Prince Abdul v. Abu-Taha [1908] 3 All. E.R. 409, 412. The present state of English law, in which such injunctions are fairly easy obtained, is reflected in Bayer A.G. v. Winter, [1986] 1 All. E.R. 733, 737(C.A.). *See generally* Profits of Crime and Their Recovery: Report of Howard League for Penal Reform 104-111 (1984) (discussion of *Mareva* injunctions).

The English Court granted the injunction holding that if a "debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him from disposing of those assets."[107] Noting that the defendants could at any moment withdraw their funds from the London bank, the court granted a freeze of their assets.

A *Mareva* injunction is available to a creditor if the creditor can prove three things: (1) a good arguable case, a requirement that is similar to the American standard of likelihood to succeed on the merits standard, (2) the existence and location of the assets, which if located would have an effect, and (3) that there is a real risk of irreparable harm. This last criterion may be proven by demonstrating that the assets are quickly transferable and that the owners of the assets are abroad. Additionally, the court must determine that granting the injunction is necessary under the circumstances. *Mareva* injunctions may reach both domiciled parties and non-domiciled parties who are subject to the court's jurisdiction. In turn, there are several protections provided for the debtor. For example, the amount to be restrained must be limited and the defendant has access to other funds for, among other things, day to day expenses, attorney's fees, and cost of living expenses.[108]

VIII. Living With *Alliance Bond Fund*

There are two groups who feel the impact of the holding in *Alliance Bond Fund*: lower federal courts and those unsecured American creditors seeking to do business with foreign debtors.[109] Lower federal courts must wield their general equitable jurisdiction with extreme caution in cases where the claim is a legal one for equitable damages.[110] Perhaps affected in a larger sense are ". . . creditors, like that/those in *Alliance Bond Fund*." Unsecured creditors are encouraged to "better protect themselves from actions by non-U.S. debtors that may frustrate a traditional breach of contract action following a default."[111]

Creditors are left with few options. It would be to their benefit them to either contract for better protections in the event that a default on payments occurs, or to do what this Note suggests, endeavor to pass legislation expressly allowing for preliminary injunctive relief of this nature.[112]

To the end of better protecting themselves, the unsecured creditors should first, if the debtor holds assets in England, contract for English forum and law so as to allow for *Mareva* injunctions should the need arise. Second, unsecured creditors should research the various laws within the American states and require the debtor to perform transactions in a state where injunctive relief of this nature is granted according to state law. Lastly, creditors should include in their contracts provisions that, after default, prohibit the debtor from performing certain transactions to other creditors without lender approval.[113]

The stark reality of the consequences of *Alliance Bond Fund* is the virtual overruling of *Deckert* and *First National*. In those cases, pursuant to a grant in equity jurisdic-

107. Mareva [1980] 1 All E.R. at 215 (Denning, M.R.) (quoting *Beddow v. Beddow*, 9 Ch. D. 89 (1878)).
108. Wasserman, *supra* n. 80, at 343-44.
109. Clyde Mitchell, *supra* n. 95, at 6.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 6-7.

tion,[114] the Court found it well within its equity jurisdiction to wield the tool of a preliminary injunction. The circuit courts interpreted those decisions to mean that preliminary injunctions were an available tool of the court's equity powers. Currently, Justice Scalia has effectively overruled prior landmark Supreme Court decisions. Circuit courts have begun and will continue to implement this new view of equity powers. *Deckert* and *First National* are now dead.

In *Haven v. Poland*[115] the District Court was presented with the same claim for relief that faced the *Alliance Bond Fund* court: a grant of injunctive relief in a suit for money damages. The case involved a class action suit involving former Polish nationals attempting to sue the Polish treasury on a claim relating to matters during the World War II period. While dismissing the case for lack of subject matter jurisdiction, the district court held that even if there were subject matter jurisdiction, a federal court lacked the authority to serve "as the enforcing agent for matters of conscience, or of justice in the abstract."[116]The District Court cites the Supreme Court's holding in *Alliance Bond Fund* limiting the power of federal courts in equity matters.

In *Haven* the court states, "no federal court is vested with a roving commission to force any foreign government to do equity. If any such government fails or refuses to act in its governmental capacity as conscience would command, no federal court is empowered to force it to do so except as Congress has specified."[117]

IX. Conclusion

In *American Bond Fund*, Justice Scalia, relying on an original intent argument, maintains that the initial intent of the Judiciary Act of 1789 was not to include preliminary injunctive relief as part of equity jurisdiction. Since the Judiciary Act codified the English principles of equity relief, and given that they were not available under English law at that time, it is not within the powers of the Court to grant the remedy today. To do so would be an unacceptable expansion of federal judicial powers. Despite England's departure from traditional equity jurisdiction in the form of the *Mareva* injunctions, courts lack the authority to depart minus a direct grant of power from Congress.

This Note presents a commentary on *Alliance Bond Fund* and the issues it raises. It primarily suggests that history should not be the motivation to protect debtors who endeavor to frustrate future judgments. Congress can take action to prevent this from happening through statutory reform by passing legislation in support of *Mareva*-style injunctions in the United States. The Supreme Court's original intent argument should not bar creditors from satisfying a potential judgment.

Both the decisions in *Alliance Bond Fund* and *Haven v. Poland* point to the need for Congress to implement new legislation. There is scant recourse for victims of debtors whose actions are not as "conscience would command."[118] Although the *Haven* court acknowledges the possibility that justice will not be served, the court will not be swayed by the fact that, "plaintiffs cannot obtain justice (or even a fair trial) in the Polish courts."[119] Although justice often dictates that injunctive relief be granted, federal

114. The initial grant in equity jurisdiction came in the form of an SEC statute and a tax statute, but neither of them expressly provide for preliminary injunctions.

115. *See supra* note, 6. Although mentioned in support of the holding for lack of equity jurisdiction, the historical argument Justice Scalia puts forth in *Alliance Bond Fund* is not what seems to be the overriding concern to the *Haven* court. The District Court grapples with an issue not mentioned by the majority opinion in *Alliance Bond Fund*, specifically the extra-territoriality concerns with exercising equity jurisdiction.

116. *Id.* at 957.

117. *Id.*

118. *Id.*

119. *Id.*

courts are now hesitant because of the "jurisdictional limitations imposed by Congress."[120] Congress should address this need to preserve justice and integrity in our legal system.

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120. *Id.*

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