7-1-2016

The Preliminary Injunction Standard in Diversity: A Typical Unguided Erie Choice

David E. Shipley

University of Georgia School of Law, shipley@uga.edu

Repository Citation
THE PRELIMINARY INJUNCTION
STANDARD IN DIVERSITY: A TYPICAL
UNGUIDED ERIE CHOICE

David E. Shipley*

TABLE OF CONTENTS

I. INTRODUCTION................................................................. 1171

II. A HYPOTHETICAL CLAIM AND PRELIMINARY
INJUNCTION STANDARDS .................................................. 1175
   A. THE PRELIMINARY INJUNCTION GENERALLY .......... 1177
   B. PRELIMINARY INJUNCTIONS IN THE ELEVENTH
      CIRCUIT .......................................................... 1182
   C. INTERLOCUTORY INJUNCTIONS IN GEORGIA'S
      SUPERIOR COURTS .................................................. 1187

III. ERIE RAILROAD V. TOMPKINS AND THE DIFFERENT
STANDARDS........................................................................... 1199
   A. SCHOLARLY COMMENTARY ON THE ISSUE .............. 1200
   B. ELEVENTH CIRCUIT PRECEDENT ON THE ISSUE ...... 1203
   C. OTHER JUDICIAL RULINGS ON THE ISSUE ............... 1206

IV. APPLYING THE SEVERAL ERIE DOCTRINE TESTS ......... 1209
   A. IS THE PRELIMINARY INJUNCTION STANDARD
      SUBSTANCE OR PROCEDURE?................................. 1209
   B. DOES FRCP 65 CONTROL? ..................................... 1212
   C. THE TYPICAL UNGUIDED ERIE CHOICE ......... 1215
      1. Forum Shopping ........................................ 1216
      2. Difference in Outcome ............................... 1218
      3. Inequitable Administration of the Laws .............. 1221
      4. State and Federal Interests ................... 1222

* Georgia Athletic Association Professor in Law, University of Georgia School of Law.
D. WHAT ABOUT PRESUMPTIONS? ........................... 1225

V. CONCLUSION ....................................................... 1229
This Article discusses whether the venerable decision in *Erie Railroad Co. v. Tompkins* \(^1\) requires a federal district court, hearing a case under its diversity jurisdiction, to use the preliminary injunction standard that would be applied by a court of general civil jurisdiction in the state where the federal court is located. Federal Rule of Civil Procedure Rule 65(a) on preliminary injunctions does not provide a standard that a federal district court must apply in ruling on these motions,\(^2\) and the same is true of state rules of procedure based on Federal Rule 65.\(^3\) Nevertheless, most federal and state courts weigh roughly the same four criteria in ruling on motions for provisional relief.\(^4\) However, courts in some jurisdictions evaluate the factors on a sliding scale or with a balancing test while some federal circuits require the moving party to establish each of them.\(^5\) The choice-of-law issue is whether a federal court can go with the more

---

\(^1\) 304 U.S. 64 (1938). The Supreme Court held that *Erie* principles were applicable to proceedings in equity in *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 205 (1938).

\(^2\) FED. R. CIV. P. 65(a) states:

(a) Preliminary Injunction.

(1) Notice. The court may issue a preliminary injunction only on notice to the adverse party.

(2) Consolidating the Hearing with the Trial on the Merits. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to jury trial.

\(^3\) See, e.g., O.C.G.A. § 9-11-65(a) (2015) (using, essentially, the same language used in FED. R. CIV. P. 65(a)).

\(^4\) The four factors are: (1) the threat that the moving party will suffer irreparable injury if the injunction is not granted; (2) the moving party's likelihood of success on the merits; (3) the possible hardships to the moving party if the injunction is not granted outweigh the possible harm to the defendant if the injunction is granted (also called the balance of equities); and (4) granting the injunction will be in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted); *Bishop v. Patton*, 706 S.E.2d 634, 638–39 (Ga. 2011) (citations omitted); cf. *SRB Inv. Servs., LLLP v. Branch Banking & Trust Co.*, 709 S.E.2d 267, 271 n.7 (Ga. 2011) (clarifying that *Bishop* should not be read as requiring the moving party to prove all four factors).

\(^5\) See infra notes 25–27 and accompanying text.
demanding federal standard without offending the principles flowing from *Erie* and its progeny. The federal court will be applying the applicable state substantive law when it hears and decides a diversity case, but how far does it have to go in replicating its state's practice on the grant or denial of the provisional remedy?

This *Erie* doctrine choice-of-law issue regarding the standard for preliminary injunctions has been litigated in several jurisdictions, discussed in several articles, and mentioned in passing by the United States Supreme Court. Some courts have said that federal law governs the standards for issuing a

---


7 Cf. STEPHEN C. YEAZELL, CIVIL PROCEDURE 251 (8th ed. 2012) (*Erie* established that federal courts sitting in a diversity action were bound to replicate state practice in some circumstances. . . . [It]s setting suggested that at the very least federal courts sitting in diversity should observe state substantive law . . . .).

8 See, e.g., *Ferrero*, 923 F.2d at 1448 (deciding to apply federal rather than state law to determine whether the preliminary injunction was properly issued); Equifax Servs., Inc. v. Hitz, 905 F.2d 1355, 1361 (10th Cir. 1990) (noting the *Erie* doctrine does not apply to preliminary injunctions); E.I. DuPont de Nemours & Co. v. Kolon Indus., 894 F. Supp. 2d 691, 706 (E.D. Va. 2012) (holding that the rule of *Erie* required the court to use state standards for a preliminary injunction); Curtis 1000, Inc. v. Youngblade, 878 F. Supp. 1224, 1243-44 (N.D. Iowa 1995) (discussing whether to apply state or federal standards for granting a preliminary injunction); see also Kaiser Trading Co. v. Associated Metals & Minerals Corp., 321 F. Supp. 923, 931 n.14 (N.D. Cal. 1970) (citing several conflicting opinions, issued between 1947 and 1969, as to whether state or federal law governs the issuance of an injunction).


10 See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 n.3 (1999) ("Petitioners argue for the first time before this Court that under [Erie] the availability of this injunction under Rule 65 should be determined by the law of the forum state. . . . Because this argument was neither raised nor considered below, we decline to consider it."). The U.S. Supreme Court had an opportunity to discuss the *Erie* doctrine and Rule 65 in the *Grupo Mexicano* decision but failed to explain the relevance of the Rule and the implications of *Erie*. Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1312 (2000).
preliminary injunction in diversity actions,\textsuperscript{11} while others have
applied state law governing preliminary relief.\textsuperscript{12} Of course, the
general \textit{Erie} doctrine issue about which state laws and practices
must be applied in diversity actions has troubled many courts and
commentators since \textit{Erie} was decided in 1938.\textsuperscript{13} It is clear that the
federal courts are to defer to state courts as lawmaking bodies.\textsuperscript{14}
At the same time, it must be acknowledged that the federal courts
are an independent judicial system.\textsuperscript{15} After all, “[t]he line between
procedural and substantive law is hazy, but no one doubts federal
power over procedure.”\textsuperscript{16}

This Article analyzes this particular choice-of-law issue by
focusing on several decisions of the Georgia Supreme Court and
U.S. Court of Appeals for the Eleventh Circuit. The rationale for
this focus is that there is a substantial discrepancy between
Georgia’s standard for preliminary relief and the Eleventh
Circuit’s standard. The difference is significant enough that
choosing to apply one standard instead of the other could result in
a different outcome on the grant or denial of a preliminary
injunction.\textsuperscript{17} Notwithstanding the possible outcome-determinative

\textsuperscript{11} Vector Sec., Inc. v. Stewart, 88 F. Supp. 2d 395, 399 (E.D. Pa. 2000) (holding that
“federal law governs the standards for issuing a preliminary injunction”).

\textsuperscript{12} \textit{Kaiser Trading Co.}, 321 F. Supp. at 931 n.14 (stating that “the best approach would be
to look to state law to determine if “parliamentary injunction as permissible. Then, . . . look
to federal law to determine whether the court should exercise its dissention.”); Port of N.Y.
rather than federal, law applied); see also Cross, supra note 9, at 189–90 (noting some
courts to apply state law governing preliminary injunctions); Crump, supra note 9, at 1272–
73 (same).

\textsuperscript{13} \textit{See generally} Richard D. Freer, \textit{Civil Procedure} 507–08 (3d ed. 2012); Edward A.
Purcell, Jr., \textit{The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change
\textit{Erie} and the lessons one can learn from it). See also Burbank, supra note 10, at 1301 n.56,
1312 (the Supreme Court had an opportunity to rule on a variation of the preliminary
injunction standard question in \textit{Grupo Mexicano} but declined to do so).

\textsuperscript{14} \textit{See Yezell}, supra note 7, at 251 (identifying the opposing principles “that \textit{Erie}
requires deference to state courts as lawmaking bodies; and that federal courts are on
independent judicial system”).

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{Id.} (citing \textit{Erie Railroad Co. v. Tompkins}, 304 U.S. 64, 92 (1938) (Reed, J., concurring)).

\textsuperscript{17} See, \textit{e.g.}, Ferrero v. Associated Materials, Inc., 923 F.2d 1441, 1448 (11th Cir. 1991)
(noting that the significant difference between Georgia and federal law regarding injunctions
could lead to an outcome determinative result).
effect of this choice, as well as the possibility of forum shopping, this Article concludes that federal district courts should apply their federal circuit's preliminary injunction standard when ruling on requests for provisional relief in actions where subject matter jurisdiction is based on diversity.

This conclusion is not justified simply by saying that Federal Rule of Civil Procedure 65(a) is on point and controls, or because the choice of the appropriate standard is a matter of procedure. Rather, it is justified by analyzing and weighing the several factors that have been announced by the U.S. Supreme Court for the typical unguided *Erie* choice. Of these factors, the most important are (1) that the differences between the standards do not result in litigant inequality, (2) that the forum state's and the federal circuit's interests in the grant or denial of equitable relief are congruent, and (3) that the grant or denial of a preliminary injunction is provisional and not a final adjudication of the merits of the claim.\(^{18}\) Moreover, given the similarity of the four criteria weighed by the respective courts,\(^ {19}\) there is a good chance that a state's court of general jurisdiction and a federal district court located in that state will enter substantially similar orders on a plaintiff's motion for a preliminary injunction when they are presented with the same facts.\(^ {20}\)

In order to clearly illustrate this *Erie* doctrine choice-of-law issue, this Article presents a hypothetical lawsuit filed in Georgia, in which a plaintiff employer seeks a preliminary injunction against a defendant employee who wants to go to work for a competitor. It then discusses the preliminary injunction remedy generally and sets out the standards now applied in the Eleventh Circuit and in the Georgia courts, summarizing several decisions to illustrate how the criteria are applied. Next, the Article explains how the differences between the Eleventh Circuit and Georgia standards implicate the *Erie* doctrine. This section includes a summary of scholarly commentary on this choice-of-law issue as well as a discussion of some of the cases that have ruled

\(^{18}\) See infra Part IV.
\(^{19}\) See supra note 4 (listing out four criteria).
\(^{20}\) See infra Part IV.
on this *Erie* doctrine question. The Article’s last section applies the U.S. Supreme Court’s several tests for resolving *Erie* doctrine questions and ultimately concludes that a federal district court should use its federal circuit’s preliminary injunction standard.

II. A HYPOTHETICAL CLAIM AND PRELIMINARY INJUNCTION STANDARDS

Start by assuming a hypothetical dispute between an employee from North Augusta, South Carolina and his employer, a Georgia company based just across the Savannah River in Augusta, Georgia. This employee has had access to customer lists and other proprietary information belonging to his employer, and he is about to jump ship to a competitor notwithstanding the non-compete clause in his employment contract. The employer wants to prevent him from going to work for this rival so it files suit against him in the Georgia Superior Court for the Augusta Judicial Circuit seeking an interlocutory injunction—Georgia’s version of a preliminary injunction.\(^{21}\) One of the reasons the plaintiff employer files this action in a Georgia Superior Court is the vitality of Georgia’s flexible sliding-scale approach to weighing the four factors in the jurisdiction’s interlocutory injunction standard—the factors that are considered by a Georgia Superior Court judge in deciding whether to grant or deny provisional relief.\(^{22}\)

\(^{21}\) O.C.G.A. § 9-11-65(a) (2015). This hypothetical suit is not far-fetched. See, e.g., Holton v. Physician Oncology Servs., LP, 742 S.E.2d 702, 702–03 (Ga. 2013) (interlocutory injunction prohibiting a former employee from working with a competitor and violating non-compete and confidentiality agreements).

\(^{22}\) The four factors are that:

1. there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted; (2) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; (3) there is a substantial likelihood that the moving party will prevail on the merits of her claims at trial; and (4) granting the interlocutory injunction will not disserve the public interest.

Bishop v. Patton, 706 S.E.2d 634, 638–39 (Ga. 2011) (citations omitted). The court is allowed to balance the factors—there is a sliding scale. SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 709 S.E.2d 267, 271 n.7 (Ga. 2011) (clarifying that moving party is not required to prove all four factors, but instead court should consider and weigh each of them). Personal jurisdiction is not an issue because the defendant employee lives across the
next that this South Carolina defendant employee quickly removes
the case to the United States District Court for the Southern
District of Georgia based on diversity of citizenship.\textsuperscript{23} There is no
doubt that Georgia's substantive law will be applied.\textsuperscript{24} The
employee might prefer federal court for many reasons including
the Eleventh Circuit's traditional and rigorous four factor
standard for preliminary injunctive relief.\textsuperscript{25} Specifically, the
preliminary injunction standard in the Eleventh Circuit is more
demanding than the interlocutory injunction standard used in
Georgia's Superior Courts because the Eleventh Circuit requires
the moving party to meet its burden of persuasion on each of the
factors,\textsuperscript{26} while the moving party in Georgia benefits from a
balancing sliding-scale approach.\textsuperscript{27}

Savannah River in North Augusta, South Carolina and has been working at his employer's
Augusta, Georgia office for several years.

\textsuperscript{23} This case would be removable under 28 U.S.C. § 1441(b)(2) (2012) assuming the
amount in controversy requirement is satisfied because the parties are diverse and the
defendant is not a Georgia citizen.

\textsuperscript{24} See, e.g., Ferrero v. Associated Materials, Inc., 923 F.2d 1441, 1444–46 (11th Cir. 1991)
(holding that the district court correctly applied Georgia’s conflict of laws rule). Of course,
"the command of\textsuperscript{25} Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 . . . (1941) is that [the]
federal district court adjudicating a state law issue must apply the [substantive] law of the

\textsuperscript{25} A plaintiff seeking a preliminary injunction in the Eleventh Circuit must establish (1)
that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the
absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an
injunction is in the public interest. See, e.g., Osmose, Inc. v. Viance, LLC., 612 F.3d 1298,
1307 (11th Cir. 2010); Morgan Stanley DW, Inc. v. Frisky, 163 F. Supp. 2d 1371, 1374 (N.D.
Ga. 2001) (same). The plaintiff must clearly establish the burden of persuasion on all four
elements. Horton v. City of St. Augustine, 272 F.3d 1318, 1326 (11th Cir. 2001). Included
among the other reasons the defendant might want to be in federal court is a strategic
preference for the Federal Rules over Georgia’s rules of practice and procedure; for example,
he might prefer the federal approach to jury selection, the tight management of the federal
docket, or having the case tried before an appointed Article III judge instead of an elected
judge. See YEAZELL, supra note 7, at 5 (describing strategic elements be calculated in
state/federal forum choice).

\textsuperscript{26} See, e.g., Osmose, Inc., 612 F.3d at 1307–08 (noting that district courts may only grant
preliminary injunction of all four criteria are established).

\textsuperscript{27} SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 709 S.E.2d 267, 271 n.7 (Ga.
2011) (clarifying that moving party is not required to prove all four factors, but instead
court should consider and weigh them).
Given the differences between the standards, it is conceivable that the plaintiff employer could obtain an interlocutory injunction in the Superior Court for the Augusta Circuit but be unable to obtain a preliminary injunction from the U.S. District for the Southern District of Georgia sitting in Augusta. For example, the Georgia court might be able to presume irreparable harm if the plaintiff establishes it is likely that the defendant employee is misappropriating proprietary information. Would the federal court be able to make the same or a similar presumption? If the balance of hardships tips decidedly in the plaintiff's favor, then a Georgia court, using the state's flexible approach to balancing the four factors, might grant an interlocutory injunction, even if the plaintiff is only able to show serious questions going to the merits instead of having to show the more demanding "substantial likelihood of success on the merits."28 Would a federal district in Georgia, applying the Eleventh Circuit standard, have to deny this preliminary injunction if the plaintiff was only able to show serious questions going to the merits even though the balance of hardships tipped strongly in its favor?

A. THE PRELIMINARY INJUNCTION GENERALLY

The injunction is a powerful judicial remedy. Backed by the contempt power, it "is used to order defendants to engage in, or to refrain from engaging in, an act (or acts)."29 Some injunctions are permanent, issued after the merits of a suit are fully tried and determined, while others are temporary in nature including preliminary or interlocutory injunctions and temporary restraining orders governed by Rule 65 of the Federal Rules of Civil Procedure or comparable state rules of practice and procedure.30 These provisional orders are granted or denied before

29 Russell L. Weaver et al., Remedies: Cases, Practical Problems and Exercises 142 (2d ed. 2010).
30 Under Georgia's Civil Practice Act preliminary injunctions are called interlocutory injunctions. O.C.G.A. § 9-11-65 (2015); see also Bishop, 706 S.E.2d at 638 ("A permanent injunction can be entered only 'upon a final decree.' An interlocutory injunction, by
a final judgment based on a preliminary assessment of the facts and the law by the court. Notwithstanding the ‘temporary,’ ‘preliminary,’ ‘provisional,’ and ‘interlocutory’ labels, the decision to grant or deny provisional relief often “will, as a practical matter, end the case. For example, in many business transactions, market conditions will mean that even a short delay makes the transaction financially infeasible.”

An influential commentator on legal and equitable remedies states:

The central problem that gives rise to the need for preliminary injunctions is the risk that plaintiff will be irreparably injured before the slow processes of litigation can reach a final decision. But the solution to this problem has its own central problem: the court is more likely to err when it acts on partial information after a preliminary hearing, and such an error may lead to an order that causes irreparable injury to defendant. The problem is how to manage these competing risks.

This explanation underscores the extraordinary nature of the preliminary injunction. Some courts refer to it as a drastic remedy. A provision in Georgia’s civil practice act states that a court’s power to grant an interlocutory injunction “shall be

contrast, is a temporary remedy designed to pressure the status quo and keep the parties from injuring one another until the court has had a chance to try the case.”

See, e.g., Bishop, 706 S.E.2d at 638 (describing how courts “confronted with a request for an interlocutory injunction often will not have available all the evidence needed to fully and finally adjudicate the parties’ claims and defenses”).

STEPHEN YEAZELL, CIVIL PROCEDURE 319 (7th ed. 2008).


Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1210 (11th Cir. 2003) (“A preliminary injunction is an extraordinary and drastic remedy . . . .” (citations omitted)); see also Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 542 (1987) (“An injunction is an equitable remedy that does not issue as of course.”).
prudently and cautiously exercised and, except in clear and urgent cases, should not be resorted to."35

The U.S. Supreme Court's most influential decision on the federal standard for issuing a preliminary injunction under Federal Rule of Civil Procedure 65 is the 2008 ruling in Winter v. Natural Resources Defense Council, Inc.36 In reversing the grant of a preliminary injunction that imposed limitations on the Navy's sonar training in the Pacific Ocean near California, the Court announced a four part test:

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."37

This test has been interpreted to establish four separate criteria that the plaintiff "must establish."38 Prior to Winter, however, many federal courts treated the factors as establishing a balancing test or a sliding scale:39 If the claim appeared very strong on the

---

37 Id. at 20.
38 This reading of Winter is arguably based on the Supreme Court's 2006 ruling in eBay, Inc. v. MercExchange, L.L.C., in which the Court announced a four factor test for permanent injunctions that presented each factor as a separately required prong of a true test rather than as factors in a balancing analysis. 547 U.S. 388, 394 (2006) (holding that the district court and Court of Appeals erred in categorically granting and denying injunctive relief without correctly applying traditional four-factor framework governing injunctive relief). The four factor approach to preliminary injunctions had, in contrast, traditionally been seen as involving a process of weighing and balancing. Mark P. Gergen, John M. Golden & Henry E. Smith, The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions, 112 COLUM. L. REV. 203, 211-12, nn.35-41 (2012) (describing the "doctrinal straitjacket" that the eBay ruling imposes on equity courts who had traditionally approached injunctive requests by weighing the factors, i.e., a particularly strong showing on use factor can make up for an inadequate showing on another factor); see also Jean C. Love, Teaching Preliminary Injunctions After Winter, 57 ST. LOUIS U. L.J. 689, 692-93 (2013) (discussing Winter's impact on the alternative "sliding scale" approach to injunction relief).
39 LAYCOCK, supra note 33, at 354 n.3 ("[T]he overwhelming weight of authority in the lower courts had been that these four factors are part of a balancing test or a sliding scale."); Gergen, Golden & Smith, supra note 38, at 211, n.35 (describing previously common approach in lower courts of balancing or sliding scale); Love, supra note 38, at 693, nn.20-22 (citing cases using sliding scale approach).
merits, then the plaintiff needed a lesser showing of irreparable harm and the balance of hardships; or, if the balance of hardships tipped decidedly in the plaintiff’s favor, then he or she needed to establish only that there are serious questions about the merits of the claim.  

Justice Ginsburg, who dissented in Winter along with Justice Souter, emphasized that “[f]lexibility is a hallmark of equity jurisdiction.” She also said that “courts have evaluated claims for equitable relief on a ‘sliding scale,’ sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high.” Justice Ginsburg added that she believed that the majority had not, in ruling against the injunction, rejected that flexible formulation.
Notwithstanding Justice Ginsburg’s belief, several circuits have read Winter as repudiating the sliding scale or balancing approach.\textsuperscript{44} In contrast, other circuits are either unclear about the impact of Winter,\textsuperscript{45} or have found a way to incorporate Winter into their sliding scale approach.\textsuperscript{46}

While the nation’s federal courts have been grappling with the meaning of the U.S. Supreme Court’s preliminary injunction standard in Winter, the Georgia Supreme Court made it abundantly clear to Georgia’s trial courts that the standard for ‘interlocutory’ injunctions under Civil Practice Act section 9-11-65(a) is flexible.\textsuperscript{47} As recently as 2011, in Bishop v. Patton, the state’s highest court stated that a Georgia Superior Court’s\textsuperscript{48} determination is guided by four factors:

\begin{itemize}
\item \textsuperscript{44} Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 346–47 (4th Cir. 2009) (holding that the “balance-of-hardship test may no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit, as the standard articulated in Winter governs”), vacated, 130 S. Ct. 2371 (2010), legal standard for preliminary injunction reinstated, 607 F.3d 355 (4th Cir. 2010) (overturning lesser standard permitting balancing approach for the proper legal standard articulated in Winter); Stormans, Inc. v. Selecky, 586 F.3d 1109, 1126–27 (9th Cir. 2009). \textit{But see} Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011) (holding that the sliding scale test remains viable after Winter).
\item \textsuperscript{45} Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1292 (D.C. Cir. 2009) (postponing the issue).
\item \textsuperscript{46} Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins., Co., 582 F.3d 721, 725 (7th Cir. 2009) (holding that the movement must have plausible claims on all elements articulated in Winter, but reducing ability to balance factors when one is stronger than another); \textit{see also} Laycock, supra note 33, at 444 n.3 (“The Seventh Circuit easily assimilated Winter to its existing sliding-scale standard . . . .”); Sarah J. Morath, \textit{A Mild Winter: The Status of Environmental Preliminary Injunctions}, 37 SEATTLE U. L. REV. 155, 178 (2013) (noting that while the Second, Third, Fourth, Seventh, Eighth, Ninth and Tenth Circuits have considered the effect of Winter either explicitly or implicitly, only the Fourth has said that its earlier standard was invalidated by Winter). The Court of Appeals for the Eleventh Circuit has maintained its pre-Winter insistence that the plaintiff must clearly establish the burden of persuasion as to all four elements, Horton v. City of St. Augustine, 272 F.3d 1318, 1326 (11th Cir. 2001), including showing a substantial likelihood of success on the merits. Osmose, Inc. v. Viance, LLC., 612 F.3d 1298, 1307 (11th Cir. 2010); \textit{see also} Morgan Stanley DW, Inc. v. Frisby, 163 F. Supp. 2d 1371, 1374 (N.D. Ga. 2001) (same). Professor Love calls this the "traditional" test for injunctive relief. Love, \textit{supra} note 38, at 691.
\item \textsuperscript{47} O.C.G.A. § 9-11-65(a) (2015) uses, in contrast to Federal Rule of Civil Procedure 65(a), the term “interlocutory” instead of “preliminary.”
\item \textsuperscript{48} O.C.G.A. § 23-1-1 (1981) vests all equity jurisdiction in the Superior Courts.
\end{itemize}
An interlocutory injunction should not be granted unless the moving party shows that: (1) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted; (2) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; (3) there is a substantial likelihood that the moving party will prevail on the merits of her claims at trial; and (4) granting the interlocutory injunction will not disserve the public interest. 49

This test and its factors are similar to the federal standard announced in Winter. 50 When the Georgia Supreme Court repeated this test in a subsequent opinion, however, it stated in a footnote that "[t]o the extent that [the opinion in Bishop] may be read as requiring the moving party to prove all four of these factors to obtain an interlocutory injunction, it is hereby disapproved." 51 In a nutshell, a flexible test with balancing is alive and well in Georgia's courts while some federal circuits have rejected this test and require the moving party to meet its burden of persuasion on all four of the elements in the Winter standard. 52 Specifically, the preliminary injunction standard in the Eleventh Circuit and Georgia's federal district courts seems more rigorous than the interlocutory injunction standard in Georgia's Superior Courts.

B. PRELIMINARY INJUNCTIONS IN THE ELEVENTH CIRCUIT

It is well established in the Eleventh Circuit that a "preliminary injunction is an extraordinary and drastic remedy." 53 Its purpose is "to preserve the relative positions of the parties until

51 SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 709 S.E.2d 267, 271 n.7 (Ga. 2011).
52 See supra notes 44–51 and accompanying text.
53 McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998).
A trial on the merits,” in other words, to maintain the status quo.54

This form of temporary relief “is customarily granted on the basis of procedures that are less formal and [on] evidence that is less complete than [at] a trial.”55 Evidence such as “affidavits and hearsay materials which [might] not be admissible” at trial may be admitted at a preliminary injunction hearing if “it ‘is appropriate given the character and objectives of the . . . proceeding.’”56

A federal district court in the Eleventh Circuit may grant a preliminary injunction only upon the movant’s showing that (1) it has a substantial likelihood of success on the merits, (2) the movant will suffer irreparable injury unless the injunction is issued, (3) the threatened injury to the movant outweighs the possible injury that the injunction may cause the opposing party, and (4) if issued, the injunction would not disserve the public interest.57

The moving party must clearly establish “the ‘burden of persuasion’ as to all four elements.” The requirement of irreparable harm or injury is another way of saying that the remedy at law is inadequate.58 The Eleventh Circuit’s standard

---

55 Id.
56 Id. (citing and quoting from several Eleventh Circuit decisions).
57 Id. Horton v. City of St. Augustine, 272 F.3d 1318, 1326 (11th Cir. 2001) (quoting Siegel v. Lepore, 234 F.3d 1163, 1176 (11th Cir. 2000)).
58 Bannercraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345, 356 n.9 (D.C. Cir. 1972) ("The very thing which makes an injury ‘irreparable’ is the fact that no remedy exists to repair it.").

As a general rule, harm is irreparable when the legal remedy of damages is inadequate to provide relief. Over the centuries, courts have decreed that the legal remedy is inadequate in various situations: when property is ‘unique’ so that plaintiff cannot readily purchase a substitute; when damages are difficult or impossible to calculate; when defendant is insolvent or it is otherwise impossible to collect a monetary judgment; when plaintiff will be required to bring multiple proceedings to vindicate his rights; and when the plaintiff’s injury is of such a nature (e.g., deprivation
was announced before the U.S. Supreme Court's 2008 decision in Winter, and it has not been modified post-Winter. When a federal district court's entry of a preliminary injunction is reviewed, the court's findings of fact are subject to a clearly erroneous standard, and conclusions of law are reviewed de novo. The grant or denial of a preliminary injunction may be reversed only upon a showing of abuse of discretion.

Osmose, Inc. v. Viance, LLC is an illustrative preliminary injunction ruling from the Eleventh Circuit. Osmose, Inc. (Osmose), a wood preservative manufacturer, brought false advertising claims under the Lanham Act alleging that Viance, LLC (Viance), a competitor, had released several false statements raising safety concerns about wood treated with Osmose's preservative. Viance counterclaimed alleging false advertising by Osmose, and both sides moved for injunctive relief. The district court, after conducting a lengthy hearing, enjoined Viance from making false or misleading statements critical of Osmose's

of civil rights) that the remedy of damages is substitutionary and ineffective.

WEAVER ET AL., supra note 29, at 21–22; see also DAN DOBBS, THE LAW OF REMEDIES 92 (2d ed. 1993) (discussing the irreparability rule and explaining the debate over whether the test restricts access to coercive remedies like the injunction). Cf. LAYCOCK, supra note 33, at 340 n.3 (discussing the meaning of the phrases irreparable injury and inadequate remedy at law in respect to the grant of permanent injunctions). But see Gergen, Golden & Smith, supra note 38, at 209 (explaining that, for permanent injunctions, the U.S. Supreme Court seems to treat irreparable harm and inadequacy of legal remedy as separate requirements and not redundant).

59 Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1210 (11th Cir. 2003) (stating four factor standard); Canal Auth. of Florida v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974) (discussing four prerequisites for a preliminary injunction); Morgan Stanley DW, Inc. v. Frisby, 163 F. Supp. 2d 1371, 1374 (N.D. Ga. 2001) (identifying standard and holding standard for granting a temporary restraining order is the same as the standard for a preliminary injunction).

60 See, e.g., Amedisys Holding, LLC. v. Interim Healthcare of Atlanta, 793 F. Supp. 2d 1302, 1310 (N.D. Ga. 2011) (requiring the plaintiff to establish the burden of persuasion on all four elements).

61 Horton v. City of St. Augustine, Fla., 272 F.3d 1318, 1326 (11th Cir. 2001).

62 Id. at 1326. See, e.g., Osmose, Inc. v. Viance, LLC, 612 F.3d 1298, 1307 (11th Cir. 2010) (same).

63 612 F.3d at 1298.

64 Id. at 1302.

65 Id.
technology. Viance appealed and the Eleventh Circuit affirmed part of the order, vacated another part, and remanded so that the district court could modify the injunction to alleviate First Amendment concerns. The Eleventh Circuit’s opinion, typical of many appellate court opinions reviewing a preliminary injunction ruling, has a thorough presentation of the facts followed by a factor by factor discussion of the lower court’s ruling.

The court’s discussion of the likelihood of success factor was extensive and concluded that “the district court did not clearly err in finding that Osmose demonstrated a likelihood of success on the merits in its Lanham Act claim.” After a brief discussion of whether it was still appropriate after the Supreme Court’s decision in eBay Inc. v. MercExchange L.L.C. to presume irreparable harm when false advertising has been established, the court said it did not have to resolve that issue because the district court had not relied on a presumption of harm, and that “[e]ven in the absence of a presumption, the district court’s conclusion as to the likelihood of irreparable harm was not an abuse of discretion.”

Similarly, the lower court’s finding that the defendant’s “ads could seriously damage Osmose’s goodwill among consumers and the treated wood industry while Viance would not be seriously harmed because it could still publish its test results” was not an abuse of discretion. Finally, the court said that the district court had not abused its discretion in finding “that the public was served by

---

66 Id. at 1306–07.
67 Id. at 1303.
68 Id. at 1320.
69 547 U.S. 388 (2006) (this is the Supreme Court’s leading decision on the standard for granting permanent injunctions).
70 612 F.3d at 1320. In an earlier opinion the Eleventh Circuit had similarly declined to consider whether irreparable injury could be presumed upon a finding of trademark infringement and whether categorical rules that injunctive relief should follow a finding of infringement were at odds with the U.S. Supreme Court’s decision in eBay Inc. v. MercExchange L.L.C., 547 U.S. 388, 394 (2006), which rejected a categorical rule in regard to the grant of permanent injunctive relief in a patent infringement case. See N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1227–28 (11th Cir. 2008) (declining to address whether a presumption of irreparable injury is equivalent to the categorized rules rejected in eBay). See generally Gergen, Golden & Smith, supra note 38 (discussing the eBay decision and its impact).
71 612 F.3d at 1321.
preventing Viance from disseminating broad conclusions . . . that exceeded the findings of its studies because the public interest is served by preventing customer confusion or deception.” The appellate court remanded with instructions for the lower court to make clear that the injunction’s restrictions on Viance were limited to commercial advertising or promotional statements so as to be consistent with First Amendment principles.73

Amedisys Holding, LLC v. Interim Healthcare of Atlanta, Inc.74 is a representative trial court decision from the Northern District of Georgia that applies the Eleventh Circuit’s standard and thoroughly explains its grant of a preliminary injunction. Amedisys, a provider of home healthcare and hospice services, sued Interim, its competitor, and three former employees who had resigned to work for Interim.75 They allegedly took confidential materials and trade secrets with them in violation of several federal statutes and Georgia’s trade secrets act. Amedisys sought a preliminary injunction to prohibit the defendants from using its confidential, proprietary, and trade-secret information.76

The court’s two day hearing on the motion had live testimony, and focused on the truthfulness of statements made by several of the defendants.77 The court provided a thorough discussion of its factual findings and then made detailed conclusions on each of the

72 Id. The Eleventh Circuit vacated a portion of the preliminary injunction that prevented Viance from claiming or implying that Osmose’s process was not certified as an Environmentally Preferable Product by Scientific Certification Systems because the lower court had not identified any advertising in which the defendant made such claims. Id. at 1321–22 (holding that this aspect of the ruling was an abuse of discretion).

73 Id. at 1324. “[F]alse commercial speech is not protected by the First Amendment,” but the literal terms of the injunction prohibited Viance from making claims in any setting—commercial and non-commercial. Id. at 1323.


75 Id. at 1305.

76 Id. at 1305–06. The court first held a hearing for a temporary restraining order after which it required defendants to refrain from using any of plaintiff’s information, to return certain materials to the plaintiff, and to have their computers examined. Id. at 1307. It also told the parties to consider what discovery they would need for a preliminary injunction hearing. Id. at n.4.

77 Id. at 1308–09 (“[T]he hearing focused on the truthfulness of the statements made by [defendants].”). Other evidence included e-mail exchanges and text messages, as well as the live testimony. Id.
factors of the Eleventh Circuit's test. It found that Amedisys had shown a substantial likelihood of success on its trade secret claim against the competitor and one of the individual defendants, Mack.\textsuperscript{78} It found that the plaintiff would suffer irreparable harm if Mack were allowed to solicit patients from the doctors and facilities listed in a misappropriated patient log, or if Interim allowed her to do so.\textsuperscript{79} The balance of hardships was found to favor Amedisys if the former employee continued to compete unfairly by using the misappropriated logs.\textsuperscript{80} Lastly, the court stated that "[t]here is a strong public policy in favor of promoting fair competition," and that allowing Mack to compete unfairly undermined those policies.\textsuperscript{81}

This brief summary of two preliminary injunction decisions, one from the Eleventh Circuit and one from the Northern District of Georgia, underscores the requirement in the Eleventh Circuit that the moving party must clearly establish each of the four elements. "The burden of persuasion on all of the four requirements for a preliminary injunction is at all times upon the plaintiff."\textsuperscript{82}

C. INTERLOCUTORY INJUNCTIONS IN GEORGIA'S SUPERIOR COURTS

Georgia is unique among the states in that many of the maxims and principles of equity are codified, and this codification occurred in the middle of the nineteenth century.\textsuperscript{83} Thomas R.R. Cobb, David Irwin, and Richard Clark were the Commissioners charged

\textsuperscript{78} Id. at 1312–13.
\textsuperscript{79} Id. at 1313–14 ("Allowing Mack to continue to solicit business from the same doctors and facilities will give Mack and Interim an unearned advantage in the marketplace and will likely cause Amedisys to lose patients and referral sources.").
\textsuperscript{80} Id. at 1314. On the other hand, the court felt that this employee would not be harmed by being prevented from competing unfairly, and Interim would not be hurt because it was only prevented from allowing her to use misappropriated logs. She was still able to engage in other meaningful work. \textit{Id.}
\textsuperscript{81} Id. at 1315.
\textsuperscript{82} Id. at 1310 (quoting Canal Auth. of Florida v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974)). Decisions of the United States Court of Appeals for the Fifth Circuit, handed down by the court prior to close of business on September 30, 1981, are binding as precedent for the Eleventh Circuit. Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir. 1981).
by the Georgia legislature in 1858 to draft a code "which shall as near as practicable, embrace in a condensed form, the Laws of Georgia, whether derived from the Common Law, the Constitutions of the State, the Statutes of the State, the Decisions of the Supreme Court, or the Statutes of England of force in this State." His charge was to draft the civil and penal laws. His work on the Civil Code reduced the general principles of equity into a statutory form; the only time this was ever accomplished in this country. During this period equity was considered by the federal courts as a separate system of law, with its own rules of practice. The Alabama Code contains a section on chancery practice, but not the principles of equity. This inclusion of equity principles was sanctioned under the terms of the statute creating the commission. At this period, Georgia courts generally maintained a separate equity docket, but the general principle was that a litigant could not pursue an equitable remedy if a remedy was provided by the civil law. No litigant could be forced into the equity side of the court. Some procedures used in equity practice were incorporated in the Code, causing them to be merged into the general law. Examples include the procedure for discovery and the extraordinary remedies of injunction, mandamus, and specific performance. The Code preserved equity jurisdiction over charities, fraud, and trusts. However, equity is clearly made subordinate to law. One last provision pertaining to equity stated that this branch of jurisprudence "as was allowed and practiced in England" was a part of Georgia law.

85 Surrency, supra note 83, at 92, 95.
86 Id. at 93.
Much of Cobb’s work, codifying equity, remains intact today with title 23 of the Georgia Code devoted largely to equity. This title’s sections set forth defenses like laches and clean hands and describe some of the traditional maxims like equity is equality, or “[e]quity considers that done which ought to be done,” while some of the title’s sections are substantive. In addition, there are provisions in the Georgia Civil Practice Act that address injunctive relief. For instance, section 9-5-1 is titled “For what purposes injunctions may be issued,” and states:

Equity, by a writ of injunction, may restrain proceedings in another or the same court, a threatened or existing tort, or any other act of a private individual or corporation which is illegal or contrary to equity and good conscience and for which no adequate remedy is provided at law.

Subsequent provisions impose substantive limits on what a Georgia court sitting in equity can accomplish. For instance, equity should not interfere with the administration of criminal law, it should not restrain a trespass unless the injury is irreparable or the trespasser is insolvent, and equity will not generally restrain “the breach of a contract for personal services unless the services are of a peculiar merit or character and cannot

---

88 Id. §§ 23-1-10, -15.
89 Id. § 23-1-9.
90 Id. § 23-1-8.
91 See generally id. §§ 23-2-1 to -136 (providing, for example, grounds for equitable relief in accident and mistake, fraud, accounting for funds, administration of assets generally, powers of appointment and non-performance of contracts).
93 Id. § 9-5-1.
94 Id. § 9-5-2. See generally Owens v. Hill, 758 S.E.2d 794 (Ga. 2014) (reversing a ruling by the Fulton County Superior Court which granted an interlocutory injunction blocking the execution of Warren Lee Hill utilizing drugs from a confidential source in order to consider a constitutional issue).
be performed by others.®6 The Code also provides: “The granting and continuing of injunctions shall always rest in the sound discretion of the judge, according to the circumstances of each case. This power shall be prudently and cautiously exercised and, except in clear and urgent cases, should not be resorted to.”®7

The specific rule on injunctions and restraining orders in Georgia’s Civil Practice Act, section 9-11-65, is similar to Federal Rule of Civil Procedure 65 in most respects. The most notable difference is that a preliminary injunction is called an interlocutory injunction under Georgia’s version of 65(a).®8 Notwithstanding Georgia’s codification of many principles and standards of equity, the state’s version of Rule 65, like Federal Rule 65, does not set forth the standards for granting relief. However, the Georgia’s Code provisions on equity generally, and injunctions specifically, provide some guidance to litigants and the courts. In particular, the requirement of no adequate remedy at law is codified,®9 as is the principle that an injunction is an extraordinary remedy which should be granted only in clear and urgent cases.®10 In addition, a court’s authority to enter interlocutory decrees at any stage in a proceeding is codified.®11

Georgia’s standard for interlocutory injunctions is similar to the Eleventh Circuit’s standard for preliminary injunctions.®12 The interlocutory injunction in Georgia is an extraordinary, temporary remedy that demands prudence and caution on the part of the court that is hearing the motion.®13 The remedy is intended to preserve or restore the status quo, and to keep the parties from injuring each other until the case can be tried on the merits.®14 Georgia’s highest court has pointed out that this prudence and

®6 Id. § 9-5-7.
®7 Id. § 9-5-8.
®12 See supra notes 36–52 and accompanying text; see also infra notes 111–16.
caution is warranted because a judge who is considering a request for an interlocutory injunction “often will not have available all the evidence needed to fully and finally adjudicate the parties’ claims and defenses” since these motions for temporary relief are made under serious time constraints, often before formal discovery has started.\textsuperscript{105} As a result, the careful deliberation and reflection a judge enjoys with a full trial on the merits is impossible. Instead, the court has to make “a judgment call regarding the equities presented.”\textsuperscript{106} The Code provides that the grant of a request for an injunction “shall always rest in the sound discretion of the judge.”\textsuperscript{107} This means that the ruling on the motion will not be reversed on appeal absent an error of law, the absence of evidence on an essential element, or an abuse of discretion.\textsuperscript{108} For example, a court would be reversed if it based its ruling on a misunderstanding or misapplication of the governing law,\textsuperscript{109} or if it attempted to bind persons who had not been made parties to the action.\textsuperscript{110}

\textsuperscript{105} Bishop, 706 S.E.2d at 638.

\textsuperscript{106} Id. The Georgia Supreme Court distinguished interlocutory and permanent injunctions from temporary restraining orders (TROs) in a footnote and, citing O.C.G.A. § 9-11-65(b), explained that TROs last only thirty days and, unlike interlocutory injunctions, are not immediately appealable as of right. \textit{Id.} at 638 n.3. At the same time, unless otherwise ordered an interlocutory injunction is not stayed during the pendency of an appeal. Sherman v. Atlanta Indep. Sch. Sys., 744 S.E.2d 26, 35 (Ga. 2013).

\textsuperscript{107} O.C.G.A. § 9-5-8 (2007). That discretion is abused when the record demonstrates that the trial court failed to perform any substantive analysis of the merits or balancing of the other equities in its decision to enter an interlocutory injunction, Bernocchi v. Forcucci, 614 S.E.2d 775, 777 (Ga. 2005), or when an injunction is granted without adequate notice to the adverse party. Abel & Sons Concrete, LLC v. Juhnke, 757 S.E.2d 869, 871 (Ga. 2014).

\textsuperscript{108} Bishop, 706 S.E.2d at 638; see also Hampton Island Founders v. Liberty Capital, 658 S.E.2d 619, 623 (Ga. 2008); Davis v. VCP South, LLC, 774 S.E.2d 606, 612 (Ga. 2015); Grossi Consulting, LLC v. Sterling Currency Grp., LLC, 722 S.E.2d 44, 46 (Ga. 2012). The \textit{Bishop v. Patton} opinion also notes that a trial court’s findings and rulings on an interlocutory injunction are not final and may be modified or even dissolved as the case develops. 706 S.E.2d at 643. In addition, the denial of an interlocutory injunction does not prevent the disappointed party from seeking interlocutory relief again as the circumstances change. \textit{Id.} See also Gwinnett Cnty. v. McManus, 755 S.E.2d 720, 722 (Ga. 2014).

\textsuperscript{109} Lue v. Eady, 773 S.E.2d 679, 686 (Ga. 2015).

\textsuperscript{110} Barham v. City of Atlanta, 738 S.E.2d 52, 55-56 (Ga. 2013).
Georgia's Superior Courts, like their federal district court counterparts, also evaluate four factors in ruling on motions for interlocutory injunctions. But the sequence is not the same as the Winter sequence and the factors, though very similar, do not have identical wording. The four factor standard has been presented in several relatively recent decisions, including two from 2011: 

Bishop v. Patton\textsuperscript{112} and SRB Investment Services, LLLP v. Branch Banking & Trust Co.\textsuperscript{113} In deciding whether to grant an injunction the Superior Court shall consider whether:

(1) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted; (2) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; (3) there is a substantial likelihood that the moving party will prevail on the merits of [its] claims at trial; and (4) granting the interlocutory injunction will not disserve the public interest.\textsuperscript{114}

\textsuperscript{111} "All equity jurisdiction shall be vested in the superior courts of the several counties." O.C.G.A. § 23-1-1 (1981).

\textsuperscript{112} 706 S.E.2d 634 (Ga. 2011).

\textsuperscript{113} 709 S.E.2d 267 (Ga. 2011).

\textsuperscript{114} Id. at 271 (quoting Bishop v. Patton, 706 S.E.2d 634, 638–39 (Ga. 2011)). It is interesting to note that the Bishop opinion cites the Wright & Miller Federal Practice treatise after it states the four factor standard along with citing two Georgia Supreme Court decisions. 706 S.E.2d at 639. The minor differences between the preliminary injunction test announced by the U.S. Supreme Court in Winter and the interlocutory injunction test in Georgia are as follows: Factor (1) from Winter is that the plaintiff must establish that he is likely to succeed on the merits. This is Factor (3) in Georgia—the moving party has to show a substantial likelihood that it will prevail on the merits of its claims at trial. Compare Winter v. NRDC, 555 U.S. 7, 20 (stating the four-factor test for an interlocutory injunction), with SRB Inv. Servs., LLLP, 709 S.E.2d at 271 (stating Georgia’s four-factor test). The Georgia Supreme Court rejected the argument that a substantial likelihood of success must be shown before an interlocutory injunction can be granted—a lesser showing may be sufficient if other equitable factors weigh in the movant’s favor. See, e.g., Glen Oak, Inc. v. Henderson, 369 S.E.2d 736, 738 (Ga. 1988) ("[T]he possibility that the party obtaining a preliminary injunction may not win on the merits at the trial does not determine the property or validity of the trial court’s granting the preliminary injunction."); Zant v. Dick, 294 S.E.2d 508, 509 (Ga. 1982) ("[T]he grant or denial of an interlocutory injunction rests in the sound discretion of the trial judge according to the circumstances of..."
The Georgia Supreme Court’s 2011 opinion in SRB Investment Services, LLLP further defines Georgia’s test with the following statement: “To the extent that our opinion in Bishop v. Patton . . . may be read as requiring the moving party to prove all four of these factors to obtain an interlocutory injunction, it is hereby disapproved.”115

This footnote supports the proposition that there is a substantial difference between the Georgia and Eleventh Circuit standards. It stands in sharp contrast to the Eleventh Circuit’s statement that the moving party must “clearly establish[ ] the

each case.” (citations omitted)). The flip side is that the court can deny the requested relief if it appears unlikely that the plaintiff will prevail on the merits of his or her claim. Coffey v. Fayette Cnty., 610 S.E.2d 41, 42 n.6 (Ga. 2005). Factor (2) in Winter is that the plaintiff must establish that he is likely to suffer irreparable harm in the absence of preliminary relief. This is Factor (1) in Georgia—the moving party must show there is a substantial threat that it will suffer irreparable injury if the injunction is not granted. SRB Inv. Seros., LLLP, supra. According to the Georgia Supreme Court, this factor—substantial threat of irreparable injury if the injunction is not granted—is the most important one. Bishop, 706 S.E.2d at 639; see also Hobbs v. Peavy, 82 S.E.2d 224, 227 (Ga. 1954) (holding that a plaintiff seeking injunctive relief must show that he is in great danger of suffering an imminent injury for which he does not have an adequate and complete remedy at law). See generally supra note 58 (explaining that the irreparable harm requirement is another way of saying that the remedy at law is inadequate). Factor (3) in Winter is that the plaintiff must establish that the balance of equities tips in his favor. Winter, supra. Factor (2) in Georgia parallels this showing: the moving party has to show that the threatened injury to it if the injunction is not granted outweighs the threatened harm that the injunction may do to the party being enjoined. SRB Inv. Seros., LLLP, supra. “In determining whether to preserve the status quo by [granting the injunction, the] trial court must balance the conveniences of the parties pending the final adjudication, with consideration being given to whether greater harm might come from granting the injunction or denying it.” Cotton States Mut. Ins. Co. v. Stephen Brown Ins. Agency, Inc., 660 S.E.2d 445, 448 (Ga. Ct. App. 2008). This is the balance of hardships factor in Georgia. Factor (4) in Winter is that the plaintiff must establish that an injunction is in the public interest. Winter, supra. Similarly, Factor (4) in Georgia is showing that the injunction will not disserve the public interest. Bishop, 706 S.E.2d at 639.

115 709 S.E.2d at 271 n.7 (citation omitted); see also Jansen-Nichols v. Colonial Pipeline Co., 764 S.E.2d 361, 362 (Ga. 2014) (“Although one seeking interlocutory injunctive relief need not always ‘prove all four of these factors,’ . . . a trial court must keep in mind that ‘an interlocutory injunction is an extraordinary remedy, and the power to grant it must be prudently and cautiously exercised.’ ” (citation omitted)). In a sense these statements reconfirm in part an earlier decision in which the Georgia Supreme Court rejected the argument that a substantial likelihood of success must be shown before an interlocutory injunction can be granted—a lesser showing may be sufficient if other equitable factors weigh in the movant’s favor. See, e.g., Glen Oak, Inc., 369 S.E.2d at 738; Zant, 294 S.E.2d at 509.
'burden of persuasion' as to all four elements."\(^{116}\) This means that in Georgia "a trial court is not required to find that a movant is likely to succeed on the merits before granting an interlocutory injunction, under certain circumstances where other equitable factors counsel in favor of the grant."\(^{117}\) There is no uncertainty about the good health of the sliding scale or balancing approach to the grant or denial of interlocutory injunctions in Georgia's equity jurisprudence.

The decision in *Unified Government of Athens-Clarke County v. Stiles Apartments, Inc.*\(^{118}\) illustrates the flexible nature of Georgia's four factor standard. This suit concerned parking spaces constructed in 1954 by Stiles Apartments pursuant to an agreement with the City of Athens—now called the Unified Government of Athens-Clarke County (ACC).\(^{119}\) About two-thirds of each space is on land owned by Stiles in fee simple.\(^{120}\) The spaces and adjoining sidewalk are maintained by ACC.\(^{121}\) After Stiles received complaints from its commercial tenants about the spaces being used by non-customers and that cars were being left for several days, it attempted to have cars towed only to be stopped by an ACC attorney.\(^{122}\) He said that the spaces were for the general public, not just the customers of Stiles' tenants.\(^{123}\) Then, after losing some tenants and learning that ACC was planning to install meters and start regular patrols, Stiles obtained an interlocutory injunction that blocked the city from exercising any control over the parking spaces until there could be final resolution of "whether the parties to the 1954 agreement intended to create or reserve public property rights in the land owned by

\(^{116}\) Horton v. City of St. Augustine, 272 F.3d 1318, 1326 (11th Cir. 2001) (emphasis added) (citing and quoting Siegel v. Lepore, 234 F.3d 1163, 1176 (11th Cir. 2000)).

\(^{117}\) Toberman v. Larose Ltd., 637 S.E.2d 158, 161 (Ga. Ct. App. 2006) (interpreting the Georgia Supreme Court's decision in *Zant v. Dick*, 294 S.E.2d 508 (Ga. 1982)).

\(^{118}\) 723 S.E.2d 681 (Ga. 2012).

\(^{119}\) Id. at 682.

\(^{120}\) Id.

\(^{121}\) Id. The agreement with ACC provides that at least every seven years Stiles closes the parking area temporarily "to prevent the public from obtaining prescriptive rights to that portion of the property that Stiles[ ] owns in fee simple." Id.

\(^{122}\) Id.

\(^{123}\) Id.
Stiles Apartments, thereby giving the authority to control who can or cannot use the parking area to ACC.\textsuperscript{124} This injunction was intended to maintain the status quo—no meters and no patrol—until the respective property rights of Stiles and ACC could be determined.\textsuperscript{125}

The Georgia Supreme Court, in affirming, went through a factor by factor discussion somewhat similar to how the Eleventh Circuit assesses federal district court rulings on preliminary injunctions. In regard to the first factor, the court said that harm is deemed irreparable where an interest in land is threatened due to the unique character of real property.\textsuperscript{126} In addition, ACC’s plan to install meters, start regular patrols, and issue citations was seen as altering the status quo and causing great harm to Stiles.\textsuperscript{127} The status quo was defined as the parking area being used by the patrons of Stiles’ commercial tenants.\textsuperscript{128} This implicated the second factor: the threatened harm to Stiles without relief outweighed the possible harm an injunction might cause ACC.\textsuperscript{129} In regard to the public interest, the Court agreed with the trial court’s finding that the injunction would not disserve the public interest because a “government entity depriving a private entity of its property without the due process of law can rarely . . . be in the public interest.”\textsuperscript{130}

The Georgia Supreme Court had a relatively full discussion of whether Stiles was substantially likely to prevail on the merits. It said that the trial court had found that the 1954 agreement did not

\textsuperscript{124} Id. at 682–83.
\textsuperscript{125} Id. at 683.
\textsuperscript{126} Id. (citing Westpark Walk Owners, L.L.C. v. Stewart Holdings, L.L.C., 655 S.E.2d 254, 257 (Ga. Ct. App. 2007)). This is a traditional, long-recognized presumption in equity. It is uncertain whether such a categorical presumption is still permissible under federal equity practice, at least in regard to permanent injunctions, after the decision in eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006). See also N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1227–28 (11th Cir. 2008) (discussing how eBay calls into question whether courts may presume irreparable harm where a plaintiff has demonstrated a likelihood of success on the merits).
\textsuperscript{127} 723 S.E.2d at 683.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id. (quoting from the trial court’s ruling).
express an intention that the parking area was intended for public use; and it emphasized that Stiles retained title to the property, that it had paid for the construction of the parking spaces, had been paying taxes through the years on the entire property, and that these and other factors "support[ed] the conclusion that the parties...had no intention of creating or reserving public property rights in the land owned by Stiles." \(^{131}\) The Georgia Supreme Court acknowledged that there may have been evidence supporting ACC's interpretation of the contract, but determined that there was sufficient evidence supporting the trial court's finding regarding the plaintiff's likelihood of success on the merits. \(^{132}\) The Court concluded by saying that ACC "may yet prevail on its claim" about the 1954 agreement, but that the trial court had accepted the evidence introduced by Stiles as authorizing the grant of the injunction. \(^{133}\) This was not a manifest abuse of its discretion. \(^{134}\)

The Georgia Supreme Court's decision in *Great American Dream, Inc. v. DeKalb County* is a rare reversal of a trial court's denial of an interlocutory injunction. \(^{135}\) *Great American, Inc. d/b/a Pin Ups Night Club (Pin Ups)* is an establishment in DeKalb County with restaurant and liquor licenses as well as nude dancing. \(^{136}\) Under these licenses it had to stop serving alcohol each day at the time required by local ordinances. \(^{137}\) It then offered breakfast service until closing at 7:00 am, and would

---

\(^{131}\) Id.

\(^{132}\) Id.

\(^{133}\) Id.

\(^{134}\) Id.

It is immaterial that there also may have been evidence before the trial court that [favored the contract interpretation argued by ACC]. All that is material on appeal is that there is evidence which supports the trial court's finding that [the parties did not intend to create public property rights in the parking area]. Where the evidence is conflicting, "it [cannot] be said that the court abused its discretion in either granting or denying the injunction."

*Id.* (citing Bailey v. Buck, 467 S.E.2d 554, 556 (Ga. 1996)).

\(^{135}\) 727 S.E.2d 667, 667 (Ga. 2012).

\(^{136}\) Id.

\(^{137}\) Id. at 667–68.
reopen at 9:00 am. In June of 2010, the DeKalb Board of Commissioners amended its ordinances so that establishments like Pin Ups would have to close and be clear of customers “one hour after the end of the legal period for selling alcohol,” and that they could not reopen until 9:00 am. Pin Ups alleged that the new ordinances violated its free-speech rights under the Georgia Constitution and sued to enjoin operation of the new ordinances.

The Superior Court, after balancing the equities, denied the interlocutory injunction. It stated that an injunction blocking operation of the new ordinances would alter the status quo because Pin Ups already was complying with the new ordinances—the status quo was compliance. It also said that Pin Ups had an adequate remedy at law since an award of damages would compensate for any loss of income. Finally, the trial court characterized the petition as raising due process concerns and concluded that the ordinances met the rational basis test. It thus found that Pin Ups had little likelihood of success on the merits.

The Georgia Supreme Court reversed and remanded, holding that the trial court erred in applying the rational basis test and determining that plaintiff had little likelihood of success on the merits. It said that Pin Ups had alleged a violation of free-speech rights protected by the Georgia Constitution, noted that Georgia's protection of free speech is broader than that provided by the First Amendment of the U.S. Constitution, and said that

---

138 Id. at 668.
139 Id.
140 Id. at 668–69. It also sought declaratory relief and damages. Id. at 668 n.4 (stating that Pin Ups estimated it would lose $2,000 per week in breakfast sales). Nude dancing is recognized as expressive conduct under Georgia's free speech clause, Harris v. Entm't Sys., Inc., 386 S.E.2d 140, 141–42 (Ga. 1989), and the new ordinances limited this activity by requiring the establishment to close. 727 S.E.2d at 668–69.
141 727 S.E.2d at 668.
142 Id. at 670 n.8.
143 Id. at 670.
144 Id. at 668.
145 Id.
146 Id. at 667.
147 Id. at 669.
content-neutral ordinances that incidentally affect protected expression have to undergo more than a rational basis test.\textsuperscript{148} In regard to the lower court's determination that Pin Ups had an adequate remedy at law for damages, the Georgia Supreme Court said that the loss of free-speech rights, even for minimal periods of time, constitutes irreparable harm for which damages are inadequate.\textsuperscript{149} Finally, in response to the trial court's finding that the status quo was compliance with the new ordinances, the Supreme Court indicated that there was no authority for the "proposition that a party must either violate [the] law it is challenging or forfeit its claim" for an injunction.\textsuperscript{150} On remand the trial court was to evaluate the plaintiff's request under the correct legal standard.\textsuperscript{151}

This summary of two Georgia Supreme Court decisions on interlocutory injunctions underscores the flexible nature of Georgia's standard. In the \textit{Stiles Apartments} case, the Court presumed irreparable harm because the owner's interests in real property were threatened by ACC's proposed action.\textsuperscript{152} Similarly, it said that it is rarely in the public interest for a government entity to deprive a person of property without due process.\textsuperscript{153} In regard to the landowner's likelihood of success on the merits it acknowledged that ACC might ultimately prevail on its interpretation of the 1954 agreement but said there was sufficient evidence supporting the Superior Court's ruling.\textsuperscript{154} In essence, a Georgia trial court is not required to find that the moving party has a substantial likelihood of success on the merits before granting an interlocutory injunction where other factors counsel in favor of the provisional relief.\textsuperscript{155} In \textit{Great American Dream}, the DeKalb County nude dancing case, the Court, in reversing, was

\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.} at 670.
\textsuperscript{150} \textit{Id.} at 670 n.8.
\textsuperscript{151} \textit{Id.} at 670.
\textsuperscript{152} See supra note 126 and accompanying text.
\textsuperscript{153} See supra note 130 and accompanying text.
\textsuperscript{154} See supra notes 131--34 and accompanying text.
willing to presume irreparable harm since free speech rights were at issue, and said there was no authority for the proposition that a person had to violate a law or forfeit his right to seek injunctive relief. The Court concluded that the lower court applied the wrong standard in evaluating the strip club’s likelihood of success on the merits. It did not say that Pin Ups would win on its free speech challenge but the Court’s discussion of the several factors makes clear that it regarded the establishment’s claim for an interlocutory injunction to be fairly strong.156

III. *Erie Railroad v. Tompkins* and the Different Standards

The hypothetical lawsuit described earlier157 presents the *Erie* doctrine issue that is the focus of this Article. A suit has been removed to the United States District Court for the Southern District of Georgia based on diversity. It is an employment dispute involving an employee who is a citizen of South Carolina that is jumping ship to one of his employer’s competitors. The employer, a Georgia company, fears that he is misappropriating customer lists and other proprietary information. There is no doubt that Georgia’s substantive law will apply.158 The employer filed originally in a Georgia Superior Court in part because of the vitality of the state’s flexible, sliding scale approach to weighing the four factors for provisional relief.159 The defendant removed the case to federal court for a number of reasons, including the Eleventh Circuit’s more rigorous approach to weighing those four factors. Given the differences between the respective standards, it is possible that the plaintiff could obtain an interlocutory injunction in the Superior Court for the Augusta Judicial Circuit but be unable to obtain a preliminary injunction from the U.S. District Court for the Southern District of Georgia sitting in

156 See *supra* notes 148–51 and accompanying text.
157 See *supra* Part II.
158 See *supra* note 24 and accompanying text.
159 See, e.g., *Ferrero v. Associated Materials Inc.*, 923 F.2d 1441, 1444 (11th Cir. 1991) (holding when employee sues in state court, defendant employer removes, both sides seek a preliminary injunction, that relief is granted and the Eleventh Circuit holds that the district court correctly applied Georgia’s conflict of laws rule).
Augusta. Does the federal court have to apply the Georgia standard or should it go with the Eleventh Circuit's standard?

A. SCHOLARLY COMMENTARY ON THE ISSUE

Leading authorities on federal practice and procedure are not in agreement on the application of the *Erie* doctrine when injunctive relief is sought in federal court, but they appear to be in agreement that the U.S. Supreme Court has not resolved the issue. Accordingly, the *Erie* doctrine choice-of-law issue resulting from the differences between the Eleventh Circuit and Georgia standards merits careful and thorough analysis.

A leading civil procedure treatise states that:

> whatever the relevance of state law in a diversity action involving a request for permanent injunctive relief, it seems clear that plaintiff should be able to obtain a temporary restraining order or a preliminary injunction to preserve the status quo even though he is suing to enforce a state right and those devices are not provided for by the forum's law or are available only upon a different showing than is required under Rule 65.

---

160 See supra notes 26–27 and accompanying text.

161 E.I. DuPont de Nemours & Co. v. Kolon Indus., 894 F. Supp. 2d 691, 704 (E.D. Va. 2012) (stating that the scholarly works on this subject illustrate "the extant, rather broadly based, disagreement respecting the meaning of *York* and the application of *Erie* when injunctive relief is sought in federal court where the plaintiff has proved that the defendant has violated a state statute that authorizes injunctive relief. Those works also illustrate the divergence of decisional authority respecting the topic.").

162 Professor Burbank, in discussing the *Erie* doctrine issues raised in *Grupo Mexicano*, said that the decision "does not clearly leave it open to [federal courts] to grant provisional injunctive relief when such relief is authorized by state law." Burbank, supra note 10, at 1344. In a footnote he adds that "the Court would have to make a bunch of mistakes in order to [foreclose] application of state law, including holding that Rule 64 does not apply to injunctions and that 'under Rule 65' a federal court is not required to follow state law authorizing provisional injunctive relief." Id. at 1344 n.285.

163 WRIGHT ET AL., supra note 6, § 2943, at 78 (emphasis added); see also id. § 4513, at 443–44 n.64 (explaining that a party may be able to get a preliminary injunction to preserve the status quo in a diversity case though state law may not allow it).
The treatise reaches this conclusion because Federal Rule of Civil Procedure 65 is on point and should control, and because preliminary injunctions, as provisional relief, do not substantially impair state interests since they are not permanent but are of limited duration.\textsuperscript{164} Another section of this treatise states:

\[ \text{T} \text{he federal courts are free to follow the practices and procedures authorized under the Federal Rules or an Act of Congress, despite the fact that a particular practice or procedure might not be available in a state court and might be viewed as "remedial." Thus the absence of a corresponding procedure or remedy in the forum state's court system does not affect the ability of a federal court in a diversity case to do any of the following: \ldots to issue a preliminary injunction or temporary restraining order under Rule 65.} \textsuperscript{165} \]

This section also includes the following statement:

Unless a Federal Rule \ldots clearly is applicable, the Rules of Decision Act as interpreted by Erie and its progeny constrains whatever inherent equitable and remedial powers federal courts possess.\ldots In addition, an independent federal law of remedies would be contrary to the twin aims of Erie as described in the Hanna decision. The existence of that law would encourage litigants to shop between federal and state fora and would give rise to disparate treatment among litigants.\textsuperscript{166}

These statements reflect the fact that Justice Frankfurter's opinion in \textit{Guaranty Trust Co. v. York},\textsuperscript{167} in announcing what came to be known as the "outcome determinative test,"\textsuperscript{168} was not

\begin{footnotes}
\item[164] \textit{Id.} § 2943, at 78–80.
\item[165] \textit{Id.} § 4513, at 442–43.
\item[166] \textit{Id.} at 446.
\item[167] 326 U.S. 99 (1945).
\item[168] FREER, \textit{supra} note 13, at 527.
\end{footnotes}
especially clear in defining the equitable powers of federal courts hearing diversity cases.\textsuperscript{169} Professor Cross writes that Frankfurter's opinion in \textit{York} suggests "that federal courts could often diverge from state law in equity, especially on questions of remedy" but that the Justice did not explain the source of this prerogative.\textsuperscript{170} Professor Cross explains that this aspect of the \textit{York} opinion is hard to reconcile "with the basic principle of limited federal judicial authority set out in the remainder of the opinion."\textsuperscript{171}

Another treatise on federal practice and procedure states the familiar principle that if a Federal Rule is on point, the standard for determining whether the Rule applies notwithstanding a "conflicting state law derives not from the Rules of Decision Act but rather from the Rules Enabling Act."\textsuperscript{172} This treatise then points out that Rule 65 "does not itself authorize injunctive relief."\textsuperscript{173} Accordingly, if state law precludes injunctive relief in regard to a state law created claim, then the federal court is precluded from granting an injunction absent a superseding federal statute.\textsuperscript{174}

Professor Crump's thorough analysis of the equity jurisdiction of the federal courts and the \textit{Erie} doctrine says that there is a "muddled soup of inconsistent principles that characterizes the Court's handling of the \textit{Erie} problem," and that when ruling on requests for injunctive relief "[t]here is a body of decisions that follow federal law, and there is a group that adopts state law."\textsuperscript{175} Professor Cross says that "court decisions that involve an actual conflict between state and federal law are split."\textsuperscript{176} Most courts look to state law for rules governing defenses like laches and

\begin{thebibliography}{9}
\bibitem{169} WRIGHT ET AL., supra note 6, § 4513, at 439.
\bibitem{170} Cross, supra note 9, at 174.
\bibitem{171} \textit{Id.} Professor Cross also explains that because differences in remedy affect the outcome of cases, many courts conclude that state law must be followed, but he also says that other courts rely on \textit{York} and do not feel bound by state rules on remedies. \textit{Id.} at 190–91.
\bibitem{172} 13 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 65.07[2] (3d ed. 2015).
\bibitem{173} \textit{Id.}
\bibitem{174} \textit{Id.}
\bibitem{175} Crump, supra note 9, at 1241–42.
\bibitem{176} Cross, supra note 9, at 189.
\end{thebibliography}
unclean hands, and many turn to state law on questions of remedy.\textsuperscript{177} Some courts offer no rationale for this choice, while others explain that "because differences in remedy directly affect the outcome of litigation, the Supreme Court's later \textit{Erie} cases mandate use of state law."\textsuperscript{178} However, other courts rely on other statements from \textit{York} and hold that they are not bound by state rules dealing with equitable remedies.\textsuperscript{179}

In a nutshell, leading civil procedure authorities are not in agreement on the application of the \textit{Erie} doctrine when injunctive relief is sought in a federal court sitting in diversity.

\textbf{B. ELEVENTH CIRCUIT PRECEDENT ON THE ISSUE}

The Eleventh Circuit grappled with the choice between Georgia law and Federal Rule 65 in \textit{Ferrero v. Associated Materials Inc.}\textsuperscript{180} Ferrero, a former employee of Associated Materials, Inc., sued in a Georgia Superior Court for declaratory and injunctive relief against his former employer after it had announced its intention to enforce a covenant not to compete.\textsuperscript{181} The defendant employer removed the case on the basis of diversity the day after it was filed, filed a counterclaim, and then obtained a preliminary injunction against Ferrero's plan to work for a competitor in violation of the covenant.\textsuperscript{182} Ferrero filed an appeal.\textsuperscript{183} Meanwhile, the district court 'blue penciled' the covenant to restrict him from competing in two counties for a period of eighteen months.\textsuperscript{184}

One of the issues on appeal was whether the court should have applied Georgia law to determine the appropriateness of the preliminary injunction.\textsuperscript{185} A Georgia statute then in effect permitted enforcement of some contracts in restraint of trade and

\textsuperscript{177} Id. at 190.  
\textsuperscript{178} Id. at 191.  
\textsuperscript{179} Id. at 190.  
\textsuperscript{180} 923 F.2d 1441 (11th Cir. 1991).  
\textsuperscript{181} Id. at 1443.  
\textsuperscript{182} Id. at 1443-44.  
\textsuperscript{183} Id. at 1444.  
\textsuperscript{184} Id.  
\textsuperscript{185} Id. at 1448.
some covenants not to compete, and presumed injunctive relief to be an appropriate remedy for violations of these agreements—in essence, an injunction should issue in most cases.\textsuperscript{186} The Eleventh Circuit noted, in contrast, that federal law allows preliminary injunctions to issue only when the moving party established the standard’s four factors.\textsuperscript{187} There was no presumption under federal law that an injunction is an appropriate remedy for violation of a covenant not to compete.\textsuperscript{188}

The court said it was “clear that the outcome of this threshold choice of law question could lead to an outcome determinative result.”\textsuperscript{189} The court cited the Wright & Miller treatise, discussed the Supreme Court’s decision in \textit{Hanna v. Plumer,}\textsuperscript{190} and stated that:

\textit{federal courts are required to apply the federal rules of civil procedure to the exclusion of any contrary state procedure as long as the rule is both constitutional and within the scope of the rules’ enabling act... As previously noted, Federal Rule of Civil Procedure 65 incorporates traditional federal equity practice. We hold that rule 65 meets the criteria of \textit{Hanna, and therefore we apply federal procedure to determine whether the preliminary injunction was properly issued.}
The court then engaged in a factor by factor analysis and affirmed the district court’s determination that Associated Materials Inc. was entitled to a preliminary injunction. Specifically, the employer had shown a substantial likelihood of success on the merits, irreparable harm, that it would be damaged more without the injunction than Ferrero would be harmed by being enjoined, and that the public interest favored the employer. The court also said that the lower court’s conclusion that the public interest favored the employer was evidenced by Georgia’s presumption that injunctive relief was appropriate for violations of this kind of restrictive covenant.

Ferrero was cited in 2008 by a federal district court in Florida for the proposition that federal procedural law governs under Hanna “even when the standard for an injunction in state court is more permissive than federal court.” The plaintiff sued a credit union, alleging that it had converted his funds and failed to pay him according to a contract. He argued that state law controlled and that under a Florida statute courts could, under certain circumstances, enjoin a “theft” without the moving party having to show irreparable harm. The trial court disagreed. It said the case was in federal court and subject to federal procedural law, showing irreparable harm is the “sine qua non of injunctive relief,” and that the plaintiff’s possible injury could be undone through an award of damages. In essence, notwithstanding the state statute, the plaintiff still had to establish irreparable harm. 

---

192 923 F.2d at 1449.
193 Id.
194 Id.
195 England v. USA Fed. Credit Union, 2008 WL 660294, at *2 (M.D. Fla. Mar. 6, 2008). The claim was filed initially in the Orange County Circuit Court and removed to federal court. Id. at *1.
196 Id. at *1.
197 Id. at *2 n.3 (“Section 812.035 of the Florida Statutes allows Florida courts to enjoin a theft under section 812.014 without a showing of irreparable harm to the movant.”).
198 Id. at *2.
199 Id. at *1–2. The plaintiff also failed to show a substantial likelihood of prevailing on the merits. Id. at *2.
had an adequate remedy at law—damages—so injunctive relief was not warranted.\textsuperscript{200}

These two decisions resolved the \textit{Erie} doctrine question the easy way: Federal Rule of Civil Procedure 65 incorporates traditional federal equity practice and is on point, Rule 65 is valid, and, under \textit{Hanna}, Rule 65 controls. There were no in-depth discussions on forum shopping, inequitable administration of the law, and the possibility that applying the federal standard instead of the state standard might have an impact on the outcome of the litigation. After all, courts have noted that a preliminary injunction is often “so inextricably interwoven with the substantive right invaded that the denial of the remedy would be tantamount to the denial of the right.”\textsuperscript{201}

\textbf{C. OTHER JUDICIAL RULINGS ON THE ISSUE}

Courts in other federal circuits also have concluded that federal law controls but not necessarily by following the same rationale as the Eleventh Circuit in \textit{Ferrero}. For instance, in \textit{Southern Milk Sales, Inc. v. Martin} the Sixth Circuit reviewed the denial of a preliminary injunction sought by an agricultural cooperative to block certain persons from interfering with milk marketing agreements.\textsuperscript{202} The choice-of-law question was whether Michigan or federal law applied to the plaintiff’s request for injunctive relief.\textsuperscript{203} The plaintiff contended that a Michigan statute titled “Persons Liable for Damage for Encouraging Breach of Contracts and Agreements” controlled and that the only prerequisite to issuing a preliminary injunction was showing that this statute had been violated.\textsuperscript{204} It argued that the moving party did not have to establish the other prerequisites for injunctive relief.\textsuperscript{205} The court

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{200} \textit{Id.} at *2.
\item \textsuperscript{202} 924 F.2d 98, 98 (6th Cir. 1991).
\item \textsuperscript{203} \textit{Id.} at 101.
\item \textsuperscript{204} \textit{Id.} at 102 (citing and discussing \textit{MICH. COMP. LAWS § 450.109}).
\item \textsuperscript{205} \textit{Id.}
\end{itemize}
\end{footnotesize}
said that this choice-of-law issue was not settled merely because of Rule 65, and that it was necessary to ask whether the scope of that rule "is sufficiently broad to control the issue before the Court." The court then stated that

Rule 65 does not provide explicit guidance as to the factors to be considered when making a preliminary injunction decision. We have looked, therefore, to general equitable principles in establishing the standards used to measure the appropriateness of granting a preliminary injunction under Rule 65. . . . Consequently, we have filled the interstices of Rule 65 in such a way as to address the question involved in this case: whether the facts compel the granting of a preliminary injunction. To determine whether we are bound to apply state law under these circumstances we turn to the methodology adopted in *Hanna v. Plumer.*

The court said that the lessons from *Hanna* required it to defer to state law unless some important federal interest was involved: "for example, where the matter is one of procedure rather than substance." The court cited the U.S. Supreme Court's decision in *Guaranty Trust Co. v. York* for this proposition and proceeded to discuss the Michigan statute. The court was inclined to accept the trial court's determination that the statute applied only to permanent injunctions, and concluded that this really did not matter because "the issue in question is procedural" since the purpose of a preliminary injunction is to maintain the status quo until trial on the merits. In short, federal law controlled

---

206 *Id.* at 101 (citing and quoting from Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980)).
207 *Id.* at 102 (citations omitted).
208 *Id.*
210 *Id.*
211 S. Milk Sales, Inc. v. Martin, 924 F.2d 98, 102 (6th Cir. 1991).
because the concerns that guide the court in applying Rule 65 are essentially procedural.\textsuperscript{212}

The Fourth Circuit faced a similar choice-of-law problem in \textit{Capital Tool & Manufacturing v. Maschinenfabrik Herkules.}\textsuperscript{213} The plaintiff sought a preliminary injunction to prevent a former employee from working for a competitor and using trade secrets in violation of Virginia's trade secrets statute.\textsuperscript{214} It argued that it did not have to show irreparable harm as a prerequisite for provisional relief because it was invoking state law, and that state law controlled under \textit{Erie.}\textsuperscript{215} The lower court denied the preliminary injunction and the Court of Appeals affirmed.\textsuperscript{216} It agreed that under Virginia law the complaining party did not have to allege or prove irreparable harm when it invokes a statute authorizing injunctive relief; it only has to prove a violation of the statute.\textsuperscript{217} The problem with the plaintiff's argument was that it did not recognize the difference between preliminary and permanent injunctions.\textsuperscript{218} The Fourth Circuit said that "[t]here is no reason to exclude from \textit{Erie} state substantive law regarding the issuance of final injunctions."\textsuperscript{219} The court continued:

But the purpose of a preliminary, as opposed to a final injunction "is merely to preserve the relative positions of the parties until a trial on the merits can be held." . . . Typically—and this is a typical case—the parties do not provide the court sufficient information to decide the merits of the case when application is made for a preliminary injunction. For this reason a district court must balance the hardship the parties

\textsuperscript{212} \textit{Id.}

\textsuperscript{213} 837 F.2d 171 (4th Cir. 1988).

\textsuperscript{214} \textit{Id.}

\textsuperscript{215} \textit{Id.} at 172.

\textsuperscript{216} \textit{Id.} at 171.

\textsuperscript{217} \textit{Id.} at 172.

\textsuperscript{218} \textit{Id.}

\textsuperscript{219} \textit{Id.} The court based this statement on \textit{Erie}'s criticism of the infamous \textit{Black & White Taxicab Co.} case which had upheld a permanent federal injunction that would have been denied by a state court under the law of the forum state. \textit{Id.} (citations omitted).
will suffer pending trial according to the factors set forth in *Blackwelder Furniture Co. v. Seilig Mfg. Co.*

The court said *Blackwelder*’s principles applied to diversity cases, that there were not significant differences between the federal and Virginia standards for preliminary injunctions, and that the plaintiff was not entitled to a preliminary injunction as a matter of right.

Which approach is correct? Does federal law control because Rule 65 is directly on point? Does federal law control because the grant or denial of these provisional injunctions is essentially procedural? Does federal law control because a preliminary injunction, unlike a permanent injunction, merely maintains the status quo until there can be a trial on the merits? Are there other reasons to support adhering to the application of the federal preliminary injunction standard in diversity cases in states like Georgia that use a balancing or sliding scale approach to the grant of a preliminary injunction, or should federal district courts apply the state standard in those situations?

IV. APPLYING THE SEVERAL *ERIE* DOCTRINE TESTS

A. IS THE PRELIMINARY INJUNCTION STANDARD SUBSTANCE OR PROCEDURE?

Notwithstanding the Sixth Circuit’s conclusion in *Southern Milk Sales*, the question of whether a state’s preliminary or interlocutory injunction standard should be applied instead of the federal standard cannot be answered by simply concluding that the issue is procedural. The Sixth Circuit’s ruling was based on the U.S. Supreme Court’s decision in *Guaranty Trust Co.* However, *Guaranty Trust Co.* put an end to the simple substance

---

220 Id. (citations omitted).
221 Id. at 173. The lower court found that the plaintiff would not suffer irreparable harm if an injunction were withheld for several reasons. Id. Its findings were not clearly erroneous. Id.
222 S. Milk Sales, Inc. v. Martin, 924 F.2d 98 (6th Cir. 1991).
223 Id. at 102.
versus procedure test for resolving the *Erie* choice-of-law issue.\textsuperscript{224} The Court decided that a federal diversity action alleging misrepresentation and breach of trust under New York law was barred by the New York statute of limitations even though it was brought on the equity side in federal court where there had not been strict adherence to state statutes of limitations.\textsuperscript{225} The Court stated:

\begin{quote}
[T]he question is not whether a statute of limitations is deemed a matter of "procedure" in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?\textsuperscript{226}
\end{quote}

The choice of the appropriate injunction standard is not simply a matter of procedure. A trial court must make an assessment of the moving party's likelihood of success on the merits under both state and federal standards. Courts also have to balance the relative hardships of the parties, and determine whether the moving party has an adequate remedy at law or will suffer irreparable harm under both state and federal standards.\textsuperscript{227} Moreover, it is important to recognize the practical impact that the

\textsuperscript{224} 326 U.S. 99, 109 (1945).
\textsuperscript{225} Id. at 101.
\textsuperscript{226} Id. at 109.
\textsuperscript{227} Compare supra note 22 and accompanying text, with supra note 25 and accompanying text. The four part test seems to be applied in all federal circuits, but there is not a uniform rule on whether or not the sliding scale or balancing approach survived the Supreme Court's decision in Winter. LAYCOCK, supra note 33, at 354 n.3.
grant or denial of temporary relief can have on the outcome of the underlying dispute between the parties.\textsuperscript{228} There is a risk that plaintiff will be irreparably injured before the slow processes of litigation can reach a final decision. But the solution to this problem has its own central problem: the court is more likely to err when it acts on partial information after a preliminary [injunction] hearing, and such an error may lead to an order that causes irreparable injury to defendant.\textsuperscript{229}

In view of these factors, there is a substantial argument that a jurisdiction’s preliminary or interlocutory injunction standard is much more than “merely the manner and means by which a right to recover . . . is enforced.”\textsuperscript{230} In a sense, this was acknowledged by the Eleventh Circuit in \textit{Ferrero} when the court said that this choice-of-law issue could make a difference in outcome,\textsuperscript{231} and it is seen in statements about rights and certain remedies being so inextricably intertwined with a substantive right that the denial of the remedy is effectively a denial of the right.\textsuperscript{232}

\textsuperscript{228} \textsc{Yeazell}, supra note 7, at 351–52 n.1 (discussing the harm that a performing injunction can cause when affinity to abate another harm); \textsc{Yeazell}, supra note 32, at 319 (“[T]he decision about the preliminary injunction will, as a practical matter, end the case.”).

\textsuperscript{229} \textsc{Laycock}, supra note 33, at 353–54 n.2.

\textsuperscript{230} Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). \textsc{Contra} \textsc{Wright et al.}, supra note 6, § 2943, at 79 (asserting that Rule 65 is procedural in nature in that it merely provides procedures by which the federal court can handle the cases brought before them).

\textsuperscript{231} Ferrero v. Associated Materials Inc., 923 F.2d 1441, 1448 (11th Cir. 1991). \textit{But see} Grossi Consulting, LLC v. Sterling Currency Grp., LLC, 722 S.E.2d 44, 47 (Ga. 2012). Grossi argued that the interlocutory injunction was in reality a mandatory permanent injunction that affected the rights of the parties. \textit{Id.} The court disagreed, emphasizing that the trial court’s order did not render a final decision on the merits because it only preserved the status quo pending the final hearing. \textit{Id.}

\textsuperscript{232} Port of N.Y. Auth. v. E. Air Lines, Inc., 259 F. Supp. 745, 753 (E.D.N.Y. 1966). This court acknowledged that the issue may have been academic since this case concerned the grant of a permanent injunction and there was no showing that the New York and federal standards for permanent injunctive relief were different even though the federal preliminary injunction standard was more rigorous than the state standard. \textit{Id.} at 753 & n.10.
B. DOES FRCP 65 CONTROL?

Based on the *Ferrero* decision, there is an argument that a federal court sitting in diversity should apply its federal circuit's preliminary injunction standard, instead of the state standard, because the situation is covered by Federal Rule of Civil Procedure 65(a). The U.S. Supreme Court stated in *Hanna v. Plumer* that

> [w]hen a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

In short, when a Federal Rule is on point for the particular issue of pleading or practice, it governs in a diversity action even if the application of the state practice would cause a different result. Even though Rule 65(a) does not provide a standard, let alone the four factor test,

> it does purport to uphold the historic federal judicial discretion to preserve the situation pending the

---

233 WRIGHT ET AL., supra note 6, § 2943, at 78–79.

[I]t seems clear that plaintiff should be able to obtain a . . . preliminary injunction to preserve the status quo even though he is suing to enforce a state right and those devices are not provided for by the forum’s law or are available only upon a different showing than is required under Rule 65.


235 FREER, supra note 13, at 542 (“So once a court determines that a federal directive (such as a Federal Rule of Civil Procedure) (1) applies to the facts of the case and (2) is valid, the Supremacy Clause requires that it be applied.”); YEAZELL, supra note 7, at 262–63 n.2(a).
outcome of a case lodged in the court. Thus the rule may be read as a codification of the traditional federal equity practice and although the standards are not articulated, there is enough detail in Rule 65 to make it clear that it embodies an important federal policy.236

Moreover, courts have not questioned the constitutionality of Rule 65 or suggested that it falls outside of the U.S. Supreme Court's rulemaking authority as provided in the Rules Enabling Act (REA).237

Notwithstanding the Ferrero decision and the confident tone of a statement from a leading treatise that allowing temporary relief under Rule 65 when it “would not be available under state law seems consistent with” the decision in Hanna,238 the fact that this Rule does not state any test provides a strong argument that Rule 65 may not be as broad as some scholars and circuits urge.239 Another treatise states that Rule 65 “merely sets forth the procedural terms for the issuance of injunctions . . . and does not itself authorize injunctive relief.”240

The Supreme Court acknowledged in Hanna that there had been cases where it applied a state rule or practice even though there was a good argument that the situation was covered by a Federal Rule.241 The Court explained that


237 See, e.g., Ferrero, 923 F.2d at 1448 (holding Rule 65 constitutional and within the scope of the Rules Enabling Act); WRIGHT ET AL., supra note 6, § 2943, at 79. The REA provides that Rules prescribed by the Supreme Court “shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b) (2012).

238 WRIGHT ET AL., supra note 6, § 2943, at 78.

239 Crump, supra note 9, at 1243-45; see, e.g., Walker v. Armco Steel Corp., 446 U.S. 740, 749-50 (1980) (“The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court. It is only if that question is answered affirmatively that the Hanna analysis applies.”).

240 See MOORE, supra note 172.

the holding of each such case was not that \textit{Erie} commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, \textit{Erie} commanded the enforcement of state law.\textsuperscript{242}

The Sixth Circuit made this point about Rule 65 in \textit{Southern Milk Sales, Inc.}\textsuperscript{243} In addition, the practical impact of the grant or denial of provisional injunctive relief on the ultimate resolution of the underlying dispute between the parties\textsuperscript{244} supports the contention that Federal Rule 65 is not directly on point.\textsuperscript{245}

This analysis of Rule 65 is also supported by the U.S. Supreme Court's analysis of Rule 59 in \textit{Gasperini v. Center for Humanities, Inc.}\textsuperscript{246} Rule 59 simply states that a court may, on motion, grant a new trial after a jury trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court."\textsuperscript{247} Notwithstanding this Rule's silence on specific grounds, federal courts apply a "shock the conscience" test in determining whether or not a jury's award of damages might be the basis for a new trial.\textsuperscript{248} Nevertheless, the Court held in \textit{Gasperini} that a federal court in a diversity case may be required to apply a state law standard when assessing whether an award of damages is excessive.\textsuperscript{249} Rule 65, like Rule 59, is silent on the specific grounds

\textsuperscript{242} Hanna, 380 U.S. at 470.
\textsuperscript{243} 924 F.2d 98, 101–02 (6th Cir. 1991) ("The choice of law question in this case is not settled, however, merely by the existence of a federal procedural rule governing preliminary injunctions .... Indeed, the Supreme Court has framed the threshold inquiry as 'whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the court.").
\textsuperscript{244} See supra notes 228–29 and accompanying text.
\textsuperscript{245} Assessing the applicability of a Federal Rule or other federal directive—whether the Rule or directive is on point—can be difficult. FREER, supra note 13, at 549–54.
\textsuperscript{246} 518 U.S. 415 (1996).
\textsuperscript{247} FED. R. CIV. P. 59(a)(1)(A).
\textsuperscript{248} FREER, supra note 13, at 498 (in Federal Court "the jury's assessment of damages may be the basis of a new trial order if it shocks the judge's conscious").
\textsuperscript{249} 518 U.S. at 430–31, 437. New York had enacted, as part of a tort reform package, a statute that allowed judges to order a new trial when a verdict deviated materially from verdicts in similar cases. Id. at 423. This showing more demanding than the traditional
for granting provisional relief, and thus a federal court in a
diversity case may be required to apply a state law standard for
granting injunctive relief.

C. THE TYPICAL UNGUIDED ERIE CHOICE

If Federal Rule of Civil Procedure 65 is not directly on point,
and if the four factor test for evaluating the grant of
preliminary/interlocutory injunctions is not simply a matter of
procedure, then it is necessary to assess a discrepancy between a
federal circuit's practice and a state's practice as the typical
unguided Erie choice. The Court stated in Hanna:

Not only are nonsubstantial, or trivial, variations [in
outcome] not likely to raise the sort of equal protection
problems which troubled the Court in Erie; they are
also unlikely to influence the choice of a forum. The
“outcome-determination” test therefore cannot be read
without reference to the twin aims of the Erie rule:
discouragement of forum-shopping and avoidance of
inequitable administration of the laws.250

Hanna cites the U.S. Supreme Court's 1958 decision in Byrd v.
Blue Ridge Rural Electric Cooperative, Inc. for the proposition that
the outcome determination test was not meant to be a talisman.251
In that decision, the Court announced a nuanced, multi-factored
approach for deciding whether to follow a particular state practice
when a different federal practice was not governed by a Federal
Rule or statute.252

“shock the conscience” test commonly followed in federal courts applying Rule 59. Id. at
423–24.

250 Hanna v. Plumer, 380 U.S. 460, 468 (1965); see also Michael S. Green, The Twin Aims
of Erie, 88 NOTRE DAME L. REV. 1865, 1875 (2013) (discussing problems with how one
applies the “inequitable administration of the laws” test).
251 380 U.S. at 466–67 (citing 356 U.S. 525 (1958)).
252 Green, supra note 250, at 1876 (“[F]ederal courts should also consider 'countervailing'
federal interests in favor of a uniform federal rule.”); YEAZELL, supra note 7, at 263–64
(setting out approach via flow-chart).
The *Byrd* approach requires the court to first determine whether the state practice is "bound up with the substantive rights and obligations created by state law." If so, state law controls.\(^{253}\) If not, then the court is to ask if there are "countervailing considerations inherent in the federal" approach. If there are, then the federal practice ordinarily should be followed.\(^{254}\) Finally, it is necessary under *Byrd* to consider the likelihood of a different outcome if the federal practice is followed instead of the state practice.\(^{255}\) The Court noted that its discussion of state interests and countervailing federal interests in this particular case was made upon the assumption that the outcome of the litigation may be *substantially affected* by whether the issue of [the defendant's] immunity is decided by a judge or a jury. But clearly there is not present here the *certainty* that a different result would follow . . . or even the strong possibility that this would be the case.\(^{256}\)

Even though this is the stuff of Civil Procedure exams and outlines prepared by 1Ls throughout the United States, there is not a proper order for assessing and weighing the several factors from *Hanna* and *Byrd* in making the typical unguided *Erie* choice. This Article will start with what *Hanna* called the twin aims of *Erie*: discouraging forum shopping and avoiding the inequitable administration of the laws.\(^{257}\)

1. *Forum Shopping.* Could the difference between a federal circuit's and a state's standards for a preliminary injunction lead


\(^{254}\) 356 U.S. at 537–38; Green, *supra* note 250, at 1876 (stating that the *Byrd* concern about countervailing federal interests is still viable as shown by the Supreme Court's decision in *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 431–32 (1996)); *Yezell*, *supra* note 7, at 264 n.3.


\(^{256}\) 356 U.S. at 539 (emphasis added).

\(^{257}\) *Hanna* v. Plumer, 380 U.S. 460, 468 (1965).
to forum shopping? Consider Georgia, where there is a significant
difference between the state’s and the Eleventh Circuit’s
standards.258 Odds are that a plaintiff who is seeking to enjoin his
or her defendant’s actions and maintain the status quo pending a
full trial on the merits would prefer the more flexible Georgia
approach and opt for filing in one of Georgia’s superior courts
instead of filing in a federal district court in Georgia. At the same
time, the difference in the standards might cause a diverse
defendant sued in a Georgia superior court to remove the case to
federal court if possible.259 The plaintiff’s lawyer would prefer
Georgia’s sliding scale, balancing approach to the grant of an
interlocutory injunction instead of the Eleventh Circuit’s
established “you must prove all four factors” approach. The
defendant’s counsel would want the plaintiff to prove all of the
factors. Even if the balance of hardships decidedly favored the
plaintiff, he or she should still have to show a substantial
likelihood of success on the merits.

On the other hand, is the difference between the standards
really the decisive factor in choosing the forum? For example,
differences in jury selection practices, differences in discovery,
differences in docket management, and perceptions about
appointed judges instead of elected judges are among the
considerations that might affect a litigant’s and his or her lawyer’s
choice of where to file an action.260 Moreover, the difference
between the Georgia and Eleventh Circuit standards for
preliminary injunctive relief is not the same qualitatively as the
difference in duty of care at issue in Erie or the difference in what
tolled the running of a state statute of limitations in Ragan v.
Merchants Transfer & Warehouse Co.261 and Walker v. Armco Steel
Corp.262 The difference in the standards for preliminary relief does

258 See supra notes 46–51 and accompanying text.
259 See, e.g., Ferrero v. Associated Materials, Inc., 923 F.2d 1441 (11th Cir. 1991) (showing
a defendant who removed his case under diversity jurisdiction).
260 See, e.g., YEAZELL, supra note 7, at 5 (describing some relevant considerations when
choosing between two courts); see also Green, supra note 250, at 1892–96 (discussing the
rationale for discouraging forum shopping).
261 337 U.S. 530 (1949).
262 446 U.S. 740 (1980).
not automatically result in a different outcome unlike the differences at issue in those landmark decisions. The difference in the standards might be one of many factors that a lawyer weighs in choosing the forum, but it is not likely to be as decisive as the differences between state and federal practice seen in some of the *Erie* doctrine cases where state law was held to control including in *Erie* itself, *Guaranty Trust Co.*, *Ragan* and *Walker*.

2. *Difference in Outcome*. The next consideration is whether the outcome of the litigation would in fact be substantially affected by choosing the federal approach to weighing the four factors over a state’s approach. Is there a certainty or even a strong possibility that a different result will follow from the choice?\(^{263}\) The answer is no because a substantially different outcome should not automatically result even when a state’s standard clearly permits a balancing or sliding scale approach, while the approach followed in that state’s federal circuit requires the moving party to meet his or her burden on each factor.

First, the final decision after a full trial on the merits should not be substantially affected by going with the federal standard instead of a state’s standard for provisional relief. A court’s ruling on a preliminary or interlocutory injunction is not final. That ruling will have a significant practical impact in the litigation, but the underlying dispute is not permanently resolved by a court’s ruling on a moving party’s request for temporary relief. If the provisional relief is granted the defendant is not permanently barred from engaging in particular conduct. Preliminary or interlocutory injunctions under both federal and state standards are for a limited duration,\(^{264}\) and a “trial court’s findings and legal rulings at [this] stage” of litigation are subject to be “dissolved or modified as the case develops” or circumstances change.\(^{265}\)

---

\(^{263}\) Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 539 (1958) (“[C]learly there is not present here the certainty that a different result would follow . . . or even the strong possibility that this would be the case.”).

\(^{264}\) WRIGHT ET AL., supra note 6, § 2943, at 79 (“[T]hey only afford temporary relief.”); see generally O.C.G.A. § 9-11-65(a) (2015) (detailing the interlocutory injunctions involvement in the later trial).

Second, even though the grant or denial of an interlocutory or preliminary injunction may often, "as a practical matter, end the case,"\textsuperscript{266} it does not necessarily follow that a Georgia superior court and a federal district court in Georgia would rule differently on a request for provisional relief due to the difference in the standards. Even though a court under Georgia's more flexible standard can issue an interlocutory injunction without requiring the moving party to satisfy each of the four criteria by a preponderance of the evidence, it does not follow that utilizing the Eleventh Circuit standard will lead necessarily to a different result on granting or denying relief. When presented with the same facts at a preliminary or interlocutory injunction hearing, it is likely that the state court and the federal court will rule substantially the same way. The primary concerns under both state and federal standards are preventing irreparable harm and maintaining the status quo pending the ultimate resolution of the dispute between the parties.\textsuperscript{267} Under both approaches, the court must make an assessment of the moving party's likelihood of success on the merits, the threat of irreparable harm, the relative equities or hardships of the parties, and the public interest. The risks of making a faulty assessment of hardships, of the moving party's likelihood of success on the merits, of irreparable harm, and of the public interest are inherent in both approaches. This situation is somewhat analogous to the judge versus jury determination of the issue of immunity in \textit{Byrd}, in which the Court assumed outcome could be substantially affected but found no certain or even a strong possibility that it would be.\textsuperscript{268}

In the \textit{Capital Tool} decision, the U.S. Court of Appeals for the Fourth Circuit used some of this reasoning in responding to an argument that a trial court's denial of a preliminary injunction in

\textsuperscript{266} YEAZELL, supra note 32, at 319.

\textsuperscript{267} Bishop, 706 S.E.2d at 638–39; WRIGHT ET AL., supra note 6, § 2948.1; see also Morath, supra note 46, at 160 (saying that there has been no significant change in the rate at which preliminary injunctions are granted in environmental cases post \textit{Winter} but reporting that environmental lawyers regard \textit{Winter} as a serious problem).

\textsuperscript{268} See supra note 256 and accompanying text.
a diversity case was erroneous because Virginia’s trade secret act did not require a showing of irreparable injury. The court said that the plaintiff, in making this argument, failed to understand the difference between preliminary and permanent injunctive relief; the goal of the former is to preserve the relative positions of the parties until trial. Typically, the parties are not able to provide the court with enough evidence to decide the merits at a preliminary injunction hearing so it is necessary for the court to “balance the hardships the parties [would] suffer pending [full] trial according to the factors set forth in [the Fourth Circuit’s] Blackwelder Furniture Co. v. Selig Manufacturing Co.” decision. The appellate court acknowledged that Blackwelder dealt with a federal claim but said that the decision’s principles also applied in diversity cases. It then added that there was not much of a difference between the Virginia and federal standards: under either approach the plaintiff was not entitled to a preliminary injunction as a matter of right. Accordingly, it was essential for the district court to weigh several of the factors that traditionally guided the grant or denial of a preliminary injunction.

Decisions by federal district courts in New York and in Iowa have reached similar results: the choice between the state and the federal preliminary injunction standards is not likely to result in a substantial difference in outcome, so the federal standard should be used.

---

270 Id.
271 Id. (citing Blackwelder, 550 F.2d 189 (4th Cir. 1977)).
272 Id. at 173.
273 Id. The court asserted that even if Virginia’s trade secret act had lowered the hurdles that had to be crossed before a judge could grant an injunction, that act still gave the court discretion by providing that the threatened misappropriation of a trade secret may be enjoined. Id.
274 Id.
275 Pro Edge, L.P. v. Gue, 374 F. Supp. 2d 711, 735 (N.D. Iowa 2005) (“[T]he question ... would not be ‘outcome determinative’ as Iowa courts apply roughly the same standards, although the Iowa standard may ... be more lenient.”); Uncle B’s Bakery Inc. v. O’Rourke, 920 F. Supp. 1405, 1422 (N.D. Iowa 1996) (“As a practical matter, [the] application of federal rather than Iowa law ... would not be ‘outcome determinative,’ as Iowa courts apply roughly the same test as do federal courts of [the Eighth Circuit] although the Iowa standard may ... be more lenient.”); Curtis 1000, Inc. v. Youngblade, 878
3. Inequitable Administration of the Laws. Although the differences between a states and the applicable federal preliminary injunction standard might lead to some forum shopping, those differences do not raise the kind of litigant inequality issues that concerned the Supreme Court in *Erie* and its progeny.  

For instance, the duty of care the Erie Railroad owed a trespasser was much lower under Pennsylvania law than under the general federal common law which treated Tompkins as an invitee—Tompkins wins as an invitee but he loses if he is deemed a trespasser. The plaintiff in *Guaranty Trust Co.* was barred by a state statute of limitations while under federal equity practice it was not barred by laches—the plaintiff had a viable claim in federal court in contrast to having the claim time barred if state law applied. Also, the plaintiffs’ claims in *Ragan* and *Walker* were filed in a timely fashion under Federal Rule 3 but were not served on the defendants within the statute of limitations as required by state law—those plaintiffs were litigating in federal court as opposed to having their claims time-barred and dismissed.

F. Supp. 1224, 1244 (N.D. Iowa 1995) ("As a practical matter, application of federal rather than Iowa law to the question . . . will not be 'outcome determinative.' "); Webcraft Techs., Inc. v. McCaw, 674 F. Supp. 1039, 1042 n.2 (S.D.N.Y. 1987) (noting defendant's argument that New York law should dictate whether a preliminary injunction should be issued and stating that the court was 'convinced that preliminary relief [was] appropriate under the New York, as well as the Second Circuit, standard'). *Cf. Morath,* supra note 46, at 160 (suggesting that there had not been a significant change in the rate at which preliminary injunctions have been granted in environmental cases after *Winter*—supporting the proposition in the text that the choice between the post-*Winter* federal standard and a state's traditional sliding scale or balancing approach should not result in a substantial difference in outcome).  

276 Freer, *supra* note 13, at 517 (describing basic notes of litigant equality); Green, *supra* note 250, at 1875 (discussing inequality created by substantially different state and federal rules).  

277 Eric R.R. Co. v. Tompkins, 304 U.S. 64, 70–71 (1938). Under state law, as a trespasser, Tompkins would lose because he would have to prove willful or wanton behavior by the railroad. *Id.* at 70. Under the general federal common law, as an invitee, he only had to establish mere negligence and could win. *Id.; see also Freer, supra* note 13, at 515.  

278 Guaranty Trust Co. v. York, 326 U.S. 99, 101 (1945). The lower court, sitting as a court of equity, allowed the plaintiff to proceed because it was not guilty of laches. *Freer, supra* note 13, at 526.
in their respective state courts. In each of these venerable cases the choice of federal law instead of state law was black and white: the selection was decisive in determining whether the plaintiff had a viable claim. From the defendants' perspectives there was unequal administration of the laws in each case if the federal courts were allowed to follow the federal practice or standard instead of being controlled by the state practice or standard.

In contrast, following the preliminary injunction standard used in a federal circuit like the Eleventh instead of a state's practice like Georgia's interlocutory injunction standard does not result in such an all or nothing, viable claim or no viable claim, in court or thrown out of court, difference in respect to the plaintiff's underlying claim. The choice does not result in litigant inequality. In regard to the employment litigation hypothetical presented earlier in this Article, the U.S. District Court for the Southern District of Georgia sitting in Augusta could very well grant a preliminary injunction virtually identical in all respects to an interlocutory injunction granted by a Georgia Superior Court sitting in Augusta on the same set of facts.

4. State and Federal Interests. The Byrd approach requires the court to first determine whether the state practice is bound up with substantive rights and obligations created by state law. If so, state law controls. If not, then the court is to ask if there are countervailing considerations inherent in the federal approach. If there are, then the federal practice ordinarily should be followed. "Unfortunately, the [Supreme] Court has never defined 'bound up.' It seems, though, that the phrase encompasses things that define the state's assessment of when someone is entitled to recover from another." Moreover, the Court did not

---

279 Walker v. Armco Steel Corp., 446 U.S. 740, 742–43 (1980); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 531–32 (1949); see also Freer, supra note 13, at 528 (discussing the limitations practice in Ragan). But see Green, supra note 250, at 1896–1900 (presenting a different view about what this means).

280 See supra Part II.

281 Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 536–37 (1958); Freer, supra note 13, at 531–35; Green, supra note 250, at 1879; Yezell, supra note 7, at 264 n.3.

282 356 U.S. at 537–38; Yezell, supra note 7, at 264 n.3.

283 Freer, supra note 13, at 533.
A TYPICAL UNGUIDED ERIE CHOICE

provide guidance about weighing competing state and federal interests. Nevertheless, this Article takes a stab at assessing and weighing state and federal interests in the context of the discrepancy between Georgia's and the Eleventh Circuit's respective interlocutory and preliminary injunction standards.

Although the codification of equity by the Georgia legislature in the nineteenth century can be seen as evidencing the state's strong interest—making this important area of practice predictable and concrete, codification did not set Georgia's equity practice and procedure at odds with federal interests and federal equity practice. The standards are not competing. Instead, state and federal interests are congruent. Preliminary injunctions granted by federal district courts in Georgia and interlocutory injunctions issued by Georgia's superior courts are intended to maintain the status quo pending the outcome of a full trial on the merits. Both the Georgia legislature and the Georgia Supreme Court direct lower courts to use caution and prudence in ruling on requests for interlocutory injunctions. Similarly, the Eleventh Circuit has said that the "preliminary injunction is an extraordinary and drastic remedy." The Georgia Civil Practice Act has a bond requirement for interlocutory injunctions in section 9-11-65(c) and so does Federal Rule 65(c) in regard to preliminary injunctions. Both the Georgia Code and the U.S. Code allow immediate appeals of the grant or denial of these

284 Id. at 535.
285 See supra notes 83–97 and accompanying text.
287 O.C.G.A. § 9-5-8 (2007); Bishop, 706 S.E.2d at 638.
290 FED. R. CIV. P. 65(c). Federal Rule 65(c) seems to require the posting of a bond while Georgia's version is permissive. Compare id. ("The court may issue a preliminary injunction . . . only if the movant gives security . . . . "), with O.C.G.A. § 9-11-65(c) ("As a prerequisite to the issuance of . . . an interlocutory injunction, the court may require the giving of security . . . . ").
injunctions. Finally, the standard of appellate review for the grant or denial of these injunctions is the same in both the Georgia Supreme Court and the Eleventh Circuit; abuse of discretion.

Justice Frankfurter's Guaranty Trust Co. discussion of the authority of federal courts to hear and decide equity suits in cases of diversity jurisdiction, although perhaps dicta, says a great deal about federal interests and the relationship between equity in the states and equity practice in the federal courts. He wrote that "Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law." But

[t]his does not mean that whatever equitable remedy is available in a State court must be available in a diversity suit in a federal court, or conversely, that a federal court may not afford an equitable remedy not available in a State court. Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery...; a plain, adequate and complete remedy at law must be wanting...; explicit Congressional curtailment of equity powers must be respected...; the constitutional right to trial by jury cannot be evaded...; that a State may authorize its courts to give equitable relief unhampered by any or all such restrictions cannot remove these fetters from the federal courts.... State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts. Contrariwise, a federal court may

292 Horton v. City of St. Augustine, 272 F.3d 1318, 1326 (11th Cir. 2001); Bishop, 706 S.E.2d at 638; Hampton Island Founders v. Liberty Capital, 658 S.E.2d 619, 623 (Ga. 2008).
293 Cross, supra note 9, at 174 (suggesting Justice Frankfurter's discussion was dicta); Crump, supra note 9, at 1241 (same).
295 Id. at 105.
afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it. . . . [T]he body of adjudications concerning equitable relief in diversity cases leaves no doubt that the federal courts enforced State-created substantive rights if the mode of proceeding and remedy were consonant with the traditional body of equitable remedies, practice and procedure, and in so doing they were enforcing rights created by the States and not arising under any inherent or statutory federal law.296

Dicta or not, this passage shows that there are affirmative federal considerations at work in regard to a federal court's exercise of its equitable power.297 Given the similarities between the federal and Georgia standards for provisional relief, these should not be regarded as countervailing considerations as in Byrd where the federal system's allocation of functions between judge and jury and the command of the Seventh Amendment were at odds with the South Carolina practice of having the judge decide a particular contested issue.298 Still, these federal interests and considerations are weighty and giving them effect is consistent with the fact that the "federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction."299 These considerations weigh in favor of having a federal district court in Georgia exercising diversity jurisdiction apply the Eleventh Circuit's preliminary injunction standard instead of Georgia's interlocutory injunction standard. This would not be at odds with Georgia's interests.

D. WHAT ABOUT PRESUMPTIONS?

Another issue that needs to be considered in making the choice between state and federal standards for the grant of a preliminary

296 Id. at 105–07 (footnotes omitted) (citations omitted).
297 Cf. Cross, supra note 9, at 231–32; Crump, supra note 9, at 1257–58.
299 Id. at 537.
injunction concerns the use of presumptions. If a state court is able to apply certain presumptions in weighing the four traditional criteria for provisional relief, does a federal court in that state have to apply those presumptions or would that be contrary to the U.S. Supreme Court’s eBay decision rejecting categorical presumptions in regard to the grant of permanent injunctions? It has been asserted that eBay has had a “cataclysmic effect” in the lower courts, and that established presumptions which were applied when preliminary injunctions were sought have been swept away.

For example, in patent cases prior to eBay it was often presumed that the violation of the patent owner’s right to exclude justified a preliminary injunction given the difficulty of protecting this right through monetary remedies that allowed the infringer to continue using the patented invention against the patent owner’s wishes. Similarly, under Georgia’s equity jurisprudence there are a number of situations where irreparable harm is presumed when the plaintiff shows that a particular right is being violated by the defendant. The two Georgia Supreme Court decisions discussed earlier in this Article illustrate how these presumptions can work. In the Stiles Apartments, Inc. litigation, the plaintiff's property interests were threatened by local government and irreparable harm was presumed due to the unique nature of an interest in real property. Similarly, in the litigation over the DeKalb County ordinances ostensibly aimed at restricting nude dancing, which is recognized as expressive conduct under

---

300 eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 395 (2006); Laycock, supra note 33, at 340 n.4 (discussing split of authority over confused viability of presumptions after eBay); Gergen, Golden & Smith, supra note 38, at 211–13 (discussing presumptions); see also Robert Bosch LLC v. Pylon Mfg. Corp., 659 F.3d 1142, 1149–50 (Fed. Cir. 2011) (holding that eBay abolishes any presumption of irreparable injury in patent cases but reversing a district court's refusal to enter an injunction in view of the plaintiff's loss of market share and pricing power along with the difficulty of measuring damages).

301 Gergen, Golden & Smith, supra note 38, at 205.

302 eBay, 547 U.S. at 395 (Roberts, C.J., concurring).

Georgia’s free-speech clause, the court was willing to presume irreparable harm in light of threats, the ordinances posed to those free-speech interests. Similarly, Georgia courts have frequently stated that fraudulent transfer cases are amenable to interlocutory injunctive relief in order to prevent a defendant from placing assets beyond the court’s reach and thus leaving the plaintiff remediless. Courts in other jurisdictions have said that a plaintiff does not have to plead or prove irreparable harm when it is able to show the violation of a statute that authorizes injunctive relief.

There is, however, uncertainty in the federal courts after the U.S. Supreme Court’s decision in eBay v. MercExchange as to whether such categorical presumptions can still be made. The eBay case deals with permanent injunctions, but it is having an impact on how federal courts are ruling on preliminary injunctions as well. For example, in Osmose, Inc. v. Viance, LLC, the Eleventh Circuit asked, but did not decide, whether irreparable harm could still be presumed after the eBay decision once it determined that the defendant had made false statements and

---

305 Great Am. Dream, Inc. v. DeKalb Cnty., 727 S.E.2d 667, 670 (Ga. 2012); see also supra notes 134–55 and accompanying text.
308 547 U.S. 388 (2006); Robert Bosch LLC v. Pylon Mfg. Corp., 659 F.3d 1142, 1149–50 (Fed. Cir. 2011) (discussing viability of presumptions after eBay); see Gergen, Golden & Smith, supra note 38, at 211–13. Courts used to presume irreparable injury in intellectual property cases because damages are very difficult to measure but courts are now split on whether any such presumption is allowed. LAYCOCK, supra note 33, at 340 n.4.
309 Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010) (“[A]nd once again, the Court appeared oblivious to any differences between permanent and preliminary injunctions.” (reaffirming eBay’s four factor text)); see also LAYCOCK, supra note 33, at 341 n.7 (discussing Monsanto and its impact); Gergen, Golden & Smith, supra note 38, at 205, 210–13.
misrepresentations about the plaintiff's product.310 In North American Medical Corp. v. Axiom Worldwide, Inc. the Eleventh Circuit declined to decide whether the lower court was correct, after the eBay decision, to hold that a finding of "trademark infringement [gave] rise to a presumption of irreparable injury."311 "In other words, we decline to address whether such a presumption is the equivalent of the categorical rules rejected by the Court in eBay."312

The basic question is as follows: if a federal circuit court applies the lessons about permanent injunctions from eBay to preliminary injunctions so that traditional presumptions about irreparable harm are rejected, such as the categorical rules that were rejected in eBay, then is a federal district court in that circuit, hearing a diversity case, prevented from using presumptions about irreparable harm that would otherwise be followed in the forum state's courts? Specifically, can a federal district court in Georgia, in ruling on a preliminary injunction in a diversity case, consider and weigh Georgia's equity jurisprudence on presumptions of irreparable harm?

One answer is to recognize that presumptions are not per se rules. They are rebuttable principles, derived from years of practical experience, which have simplified litigation. The Georgia Code provides that the "[a]ctual or threatened misappropriation [of a trade secret] may be enjoined."313 A court may very well refuse to grant an injunction against a misappropriation of trade secrets when damages are shown to be an adequate remedy.314 Although Georgia courts have stated that "when an interest in land is threatened with harm, equitable injunctive relief is appropriate,"315 this presumption "does not preclude the denial

310 612 F.3d 1298, 1320 (11th Cir. 2010) ("[N]o presumption was necessary because [the trial court found that] the advertisements, on their face, would likely cause irreparable harm.").
311 522 F.3d 1211, 1228 (11th Cir. 2008) (declining to address the question because the district court had not addressed the effect of eBay).
312 Id.
of . . . an interlocutory injunction when the [court determines that 
the plaintiff] is unlikely to prevail on his claim."316 Similarly, a 
motion to enjoin the operation of a nuisance that allegedly harms 
the moving party’s property interests might be denied if the court 
finds that the plaintiff has lived next to the alleged nuisance for 
several years and that the requested injunction would alter the 
status quo.317 Although presumptions have simplified litigation by 
being practical and by reflecting many years of dealing with 
certain kinds of disputes time and time again, they do not 
guarantee particular results. Another answer is that federal 
courts should not read eBay as replacing traditional approaches to 
the tests for preliminary relief. Instead, they should continue to 
employ the “structured sets of presumptions and safety valves that 
have characterized traditional [equity] practice.”318

V. CONCLUSION

The standard for granting preliminary injunctions in some 
states is not the same as the preliminary injunction standard that 
is used in the federal district courts in the federal circuit where 
the state is located. For example, the standard for interlocutory 
injunctions in Georgia is not the same as the standard for 
preliminary injunctions used in the Eleventh Circuit. Georgia’s 
superior courts and the federal district courts in Georgia consider 
four similar factors in deciding whether to grant or deny 
provisional injunctive relief, but a balancing or sliding-scale 
approach can be used in Georgia’s courts where the moving party 
need not prove all four of the factors. In contrast, the Eleventh 
Circuit insists that the plaintiff must clearly establish the burden 
of persuasion as to all four elements. The interlocutory injunction 
standard in Georgia’s courts is not as demanding as the

had lived next to a kennel for several years before alleging it was a nuisance and seeking 
injunctive relief); DBL, Inc. v. Carson, 585 S.E.2d 87, 92 (Ga. Ct. App. 2003) (involving a 
similar result in respect to a marina that had been operating in front of the plaintiff’s 
property for years).
318 Gergen, Golden & Smith, supra note 38, at 206.
preliminary injunction standard in Georgia’s federal district courts.\textsuperscript{319}

This kind of difference in the standards for preliminary injunctions between a state court and a federal court in that state implicates the principles announced in \textit{Erie Railroad Company v. Tompkins}\textsuperscript{320} and that venerable decision’s progeny. Specifically, should a federal district court in Georgia apply the Eleventh Circuit’s standard in a diversity case or does the \textit{Erie} doctrine require it to apply Georgia’s standard for interlocutory injunctions? It is reasonable to assume that a plaintiff seeking to enjoin particular actions by a diverse defendant would prefer the Georgia standard and would forum shop by filing his or her claim in a Georgia superior court, and that the diverse defendant would, in turn, remove the case to federal district court if possible. Also, it is conceivable, given the discrepancy between the standards, that there could be a difference in outcome on the grant or denial of provisional injunctive relief depending on which standard is applied—with the plaintiff favoring Georgia’s interlocutory injunction standard because it is not as demanding as the Eleventh Circuit standard.

Notwithstanding the possibility of forum shopping and of different outcomes on the grant or denial of the interlocutory or preliminary injunction, this Article concludes that a federal district court should apply its circuit’s standard, not the forum state’s standard. This conclusion is not justified by saying Federal Rule of Civil Procedure 65(a) is on point and controls, or because the choice of the appropriate standard is simply a matter of procedure. Rather, it is justified by analyzing and weighing the several factors that were announced by the U.S. Supreme Court in \textit{Hanna v. Plumer} and \textit{Byrd v. Blue Ridge Rural Electric Cooperative, Inc.}\textsuperscript{321} for the typical unguided \textit{Erie} choice. Of these factors, the most important are: that the differences between the standards do not result in litigant inequality, that the forum

\textsuperscript{319} See supra notes 21–27 and accompanying text.
\textsuperscript{320} 304 U.S. 64 (1938).
\textsuperscript{321} 380 U.S. 460 (1965); 356 U.S. 525 (1958); see also supra notes 249–99 and accompanying text.
state's and the federal circuit's interests in the grant or denial of equitable relief are not at odds but congruent, and that the grant or denial of this interim equitable relief is provisional and not a final adjudication of the merits of the claim. Moreover, given the similarity of the four criteria weighed by the respective courts, there is a good chance that the state court and a federal district court in the forum state would, on the same set of facts, enter substantially similar orders on a plaintiff's motion for an interlocutory or preliminary injunction.