ALL'S WELL THAT STARTS WELL:

PREJUDGMENT REMEDIES

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I. Introduction

Prejudgment remedies are available to trustees in securing real and personal property prior to obtaining a judgment on claims to recover funds or property. Trustees can use Rules 64 and 65 of the Federal Rules of Civil Procedure to minimize dissipation of assets because they are incorporated into bankruptcy proceedings through Federal Rules of Bankruptcy Procedure 7064 and 7065. Rule 64 provides for prejudgment remedies such as arrest, attachment, garnishment, replevin, sequestration and other equivalent remedies to seize or secure property to satisfy a judgment. Rule 65 potentially provides for the use of a temporary restraining order and a preliminary injunction to preserve assets.

II. Rule 64: Seizing a Person or Property

A. Generally

FED. R. CIV. P. 64 provides:

> (a) At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.
>
> (b) Specific Kinds of Remedies. The remedies available under this rule include the following – however designated and regardless of whether state procedure requires an independent action:
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> - arrest;
> - attachment;
> - garnishment;
> - replevin;
> - sequestration; and
> - other corresponding or equivalent remedies.

In *United States ex rel. Rahman v. Oncology Assocs., P.C.*, the Fourth Circuit observed that the list of remedies in Rule 64 is not an exclusive list:

> Even though the core of the Rule focuses on well-recognized forms of seizures such as attachment, the Rule's language is not so tightly circumscribed. It provides for the adoption of "all" state remedies providing for the seizure of property "for the purpose of securing satisfaction of the judgment ultimately to be entered," including not only attachments but also "other corresponding or equivalent remedies, *however designated*." Fed. R. Civ. P. 64 (emphasis added). This language undoubtedly aims substantively at the control of property for the satisfaction of a judgment rather than at a particular writ or form of proceeding.[1]

The court concluded, "[T]he scope of Federal Rule of Civil Procedure 64 incorporates state procedures authorizing any meaningful interference with property to secure satisfaction of a judgment, including any state-authorized injunctive relief for freezing assets to aid in satisfying the ultimate judgment in a case."[2]

Rule 64 makes explicit that state law applies in determining appropriate provisional remedies and the procedures that apply, so trustees and their attorneys are encouraged to consult the applicable state law in their jurisdiction. "[S]tate law is incorporated to determine the availability of prejudgment remedies for the seizure of person or property to secure satisfaction of the judgment ultimately entered."[3]

Caution should be exercised in seeking these remedies for the following three reasons:

(a) State provisional remedies vary greatly.[4]

(b) Most state laws allow prejudgment remedies only in actions for damages and not in

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[1] *United States ex rel. Rahman v. Oncology Assocs., P.C.*, 198 F.3d 489, 500 (4th Cir. 1999).

[2] *Id*. at 501.

[3] *Granny Goose Foods, Inc. v. Bhd of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty*., 415 U.S. 423, 436 n.10, 94 S. Ct. 1113, 1123 n.10 (1974).

[4] *See* 13 James Wm. Moore, MOORE'S FEDERAL PRACTICE. ¶ 64.02[1] (3d ed. 2011).

actions seeking equitable relief.[5]

(c) The Rule 64 prejudgment remedies are available only to reach those assets of the defendant that may be found within the state in which the suit is pending.[6]

Parts B & C below will review the requirements of the attachment remedy and issues in seeking injunctive relief under state law. The other remedies identified in Rule 64 – arrest,[7] garnishment,[8] replevin[9] and sequestration[10] – appear to be utilized much less frequently.

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[5] 11A Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2932 (2d ed. 1995). *See, e.g.*, *De Beers Consol. Mines v. United States*, 325 U.S. 212, 218, 65 S. Ct. 1130, 1133 (1945) (footnote omitted) ("[U]nder the law of New York, an attachment may issue only in an action seeking a money judgment and will not issue in an equity suit such as the instant one."); *EBSCO Indus., Inc. v. Lilly*, 840 F.2d 333, 335 (6th Cir. 1988) (applying Ohio law).

[6] *Paul H. Aschkar & Co. v. Curtis*, 327 F.2d 306, 310 (9th Cir. 1963); *Murdock v. Allina* (*In re Curtina Int'l*), 15 B.R. 993, 998 (Bankr. S.D.N.Y. 1981); *see also M'Elmoyle v. Cohen*, 38 U.S. 312, 325 (1839).

[7] Section 826 of the New York Civil Practice Act gives a right to arrest in an action involving the wrongful conversion of property. However, "[c]ivil arrest – or body attachment — is now widely regarded as obsolete . . . ." 11A Alan Wright, Arthur R. Miller, & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2932 n.8 (2d ed. 1995). *See, e.g.*, CAL. CIV. PROC. CODE § 501 (West 1974) ("A person may not be imprisoned in a civil action for debt or tort, whether before or after judgment.").

[8] "Garnishment . . . generally pertains to the satisfaction of an indebtedness out of property or credits of the debtor in the possession of, or owing by, a third person." *Frank F. Fasi Supply Co. v. Wigwam Inv. Co.*, 308 F. Supp. 59, 61 (D. Haw. 1969) (footnote omitted). The few published fraud or breach of contract cases in which requests for pre-judgment garnishment were reviewed include *Chambers v. Blickle Ford Sales, Inc*., 313 F.2d 252, 259 (2d Cir. 1963) (denying garnishment liability of corporate directors because the defendant-corporation's claim against them was not a "debt due" as required by Connecticut garnishment law); *Raines v. Impact Net Worth Solutions*, 2009 U.S. Dist. LEXIS 62610, at *18 (D. Utah July 21, 2009) (granting pre-judgment garnishment under Utah law). The Supreme Court has held that the due process clause of the Constitution requires that absent an extraordinary situation, any pre-judgment garnishment of wages must afford the defendant an opportunity to be heard before the garnishment. *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 341-42, 89 S. Ct. 1820, 1822-23 (1969).

[9] Replevin is "the return of property wrongfully possessed by another . . . ." *Weener Plastics, Inc. v. HNH Packaging, LLC*, 590 F. Supp. 2d 760, 764 (E.D.N.C. 2008). It is sometimes called "claim and delivery." *Id*. The Supreme Court has held that the due process clause of the Constitution requires that any pre-judgment replevin proceeding must afford the defendant an opportunity to be heard before the replevin. *Fuentes v. Shevin*, 407 U.S. 67, 81-82, 92 S Ct. 1983, 1994-95 (1972).

[10] A sequestration order authorizes a court officer to take possession of property pending the court's determination of the parties' rights. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 602, 94 S. Ct. 1895, 1897 (1974). Sequestration "cannot be applied . . . where the subject *res* cannot be traced or presently identified, and the interests of numerous other similarly-situated claimants are implicated." *Manty v. Miller & Holmes, Inc*. (*In re Nation-Wide Exchange Services, Inc.*) 291 B.R. 131, 144 (Bankr. D. Minn. 2003) (citation omitted). In *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 603-05, 94 S. Ct. 1895, 1898-99 (1974), the Court held that due process does not require that the defendant have an opportunity to be heard before the court enters the sequestration order. *See also J. C. Trahan Drilling Contractor, Inc. v. Sterling*, 335 F.2d 65 (5th Cir. 1964).

B. Attachment

1. Generally

The most commonly sought remedy under Rule 64 is attachment. "Attachment is an ancillary remedy by which a plaintiff acquires a lien upon the property of a defendant in order to obtain satisfaction of a judgment that the plaintiff may ultimately obtain at the conclusion of the litigation."[11] As representative examples, the prejudgment attachment remedies in New York and California are discussed herein. As noted, the availability and requirements of prejudgment attachment vary widely and applicable state law must be carefully investigated and observed.

2. New York Law

In *Monteleone v. Leverage Group*, the plaintiffs sued on several theories of investment fraud and filed a motion for an order of attachment under Rule 64 and N.Y. C.P.L.R. § 6201.[12] The court identified the requirements for a prejudgment writ of attachment:

> New York law requires that plaintiffs seeking attachment must show by affidavit (1) that there is a cause of action, (2) that there is a probability of success on the merits, (3) that a ground for attachment listed in § 6201 exists, and (4) that the amount demanded from defendants exceeds all counterclaims known to plaintiffs.[13]

The court then addressed the specific requirements of New York law. "As to the first and second requirements of § 6212(a), that a cause of action exists and that the movant is likely to succeed on the merits, 'the court must give the plaintiff the benefit of all the legitimate inferences that can be drawn from the facts.'"[14] The court found that these first two requirements were met because the plaintiffs had deposited money with the defendants, the

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[11] *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc*., 14 F.3d 1507, 1521 (11th Cir. 1994).

[12] *Monteleone v. Leverage Grp.*, 2008 U.S. Dist. LEXIS 78983 (E.D.N.Y. Oct. 7, 2008).

[13] *Id*. at *17 (citations omitted).

[14] *Id*. at *18. (citation omitted).

defendants had not returned it as required by contract, and there was systematic misrepresentation of "the nature of the investment" and its current status.[15]

The court further found that the plaintiff's claim exceeded all counterclaims known to them and accordingly turned its attention to whether the plaintiff had established grounds for attachment.

> To establish the relevant grounds for attachment, plaintiffs (a) must be seeking a money judgment, and (b) must show that defendants, 'with intent to defraud creditors or frustrate enforcement of a judgment that might be rendered in plaintiffs' favor, [have] assigned, disposed of, encumbered or secreted property, or removed it from the state or [are] about to do any of these acts.' § 6201(3).[16]

The court readily found that the plaintiffs were seeking a money judgment and that "[the] defendants, with intent to both defraud creditors and frustrate enforcement of a judgment, have disposed of or dissipated their assets and real property and intend to continue to do so."[17] In addressing the latter point, the court stated:

> Under the plain meaning of the statute, there are grounds for attachment when there is a showing of either past disposal or imminent future disposal of assets. Plaintiffs need not show actual proof of disposition or secretion of property. 7A Weinstein-Korn-Miller, *New York Civil Practice P* 6201.12 (1994 ed.). It is enough to show the transfer or disappearance of an abnormal amount of property, although the burden is on the plaintiff to show that the defendant has begun removing its assets.[18]

The court then cited prior findings that the defendants had used the plaintiffs' investments in several real estate transactions for their own benefit. The court also observed that

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[15] *Id*. at *19.

[16] *Id.* at *20-21.

[17] *Id*. at *21.

[18] *Id*. (citation omitted).

one of the defendants had asserted his Fifth Amendment rights, which justified an adverse inference.[19] Accordingly, the court found that the defendants had dissipated assets.[20]

In addressing the proof necessary to establish intent to defraud, the court stated:

> Assignment or disposition of property is not a sufficient ground for attachment; fraudulent intent must be proven. The existence of an actual intent to defraud is never presumed, and intent cannot be inferred lightly. The moving papers must contain facts proving the fraud and not simply conclusions. Affidavits containing allegations raising a mere suspicion of an intent to defraud are insufficient.[21]

After reviewing the evidence and finding the necessary intent to defraud, the court granted the plaintiff's motion and attached the properties of the defendant involved in their fraud.[22]

3. California Law

In *Trachsel v. Buchholz*, the court identified the requirements for attachment under California law:

> Under Code of Civil Procedure section 483.010, a prejudgment attachment may issue only if the claim sued upon is (1) a claim for money based upon a contract, express or implied; (2) of a fixed or readily ascertainable amount not less than $500; (3) either unsecured or secured by personal property, not real property (including fixtures); and (4) commercial in nature." *Goldstein v.*

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[19] *See* Chapter 15, Section 15.02[2][c] of THE PONZI BOOK: A LEGAL RESOURCE FOR UNRAVELING PONZI SCHEMES for a discussion of the negative inference in these circumstances.

[20] *Monteleone*, 2008 U.S. Dist. LEXIS 78983. at *23-24.

[21] *Id*. at *24 (citations omitted).

[22] *Id*. at *31; *see also Intelligent Digital Sys., LLC v. Visual Mgmt. Sys., Inc.*, 683 F. Supp. 2d 278, 288 (E.D.N.Y. 2010) (granting in part plaintiff's request for attachment on a fraud claim); *DirecTV Latin Am., LLC v. Park 610, LLC*, 691 F. Supp. 2d 405, 440 (S.D.N.Y. 2010); *Marchese v. Leverage Grp.,* 2009 U.S. Dist. LEXIS 13318, at *14 (E.D.N.Y. Feb. 20, 2009) (granting attachment in a Ponzi case under New York law); *Thornapple Assocs., Inc. v. Sahagen*, 2007 U.S. Dist. LEXIS 17370, at *28-29 (S.D.N.Y. Mar. 12, 2007); *but see Brastex Corp. v. Allen Int'l, Inc.*, 702 F.2d 326, 331-32 (2d Cir. 1983) (affirming the district court's denial of attachment where plaintiffs' sole evidence of fraudulent intent was defendant's violation of agreement with plaintiff and "shaky financial condition").

> *Barak Const.*, 164 Cal. App. 4th 845, 79 Cal. Rptr. 3d 603, 608 (Cal. App. 2008); Cal. Code Civ. Proc. § 485.210.[23]

The court continued:

> The court must make the following findings as a predicate for issuing a right to attach order:
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> (1) The claim upon which the attachment is based is one upon which an attachment may be issued.
>
> (2) The plaintiff has established the probable validity of the claim upon which the attachment is based.
>
> (3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.
>
> (4) The amount to be secured by the attachment is greater than zero.[24]

The court denied the application for the writ of attachment, finding that the plaintiff had not established the probable validity of the claim. The court so found because the number of investors in the real estate investment that the plaintiff sought to rescind likely made the investment exempt under applicable securities laws and therefore not subject to rescission.[25]

C. Preliminary Injunction as an "Equivalent Remedy"

In *United States ex rel. Rahman v. Oncology Assocs., P.C.*, the court addressed the language in Rule 64 that allows the district court to utilize "other corresponding or equivalent remedies, *however designated*" under state law.[26] The court stated, "This language undoubtedly aims substantively at the control of property for the satisfaction of a judgment rather than at a

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[23] *Trachsel v. Buchholz*, 2009 U.S. Dist. LEXIS 29847, at *3 (N.D. Cal. Mar. 30, 2009).

[24] *Id*. at *8.

[25] *Id*. at *23.; *see also Wind Power Sys., Inc. v. Cannon Fin. Grp., Inc.* (*In re Wind Power Sys., Inc.*), 841 F.2d 288, 291 (9th Cir. 1988) (discussing California's procedure for obtaining a "temporary protective order"); *Rose v. Abraham*, 2008 U.S. Dist. LEXIS 40931, at *7-8 (E.D. Cal. May 21, 2008); *Pos-A-Traction, Inc. v. Kelly-Springfield Tire Co*., 112 F. Supp. 2d 1178, 1182 (C.D. Cal. 2000).

[26] *United States ex rel. Rahman v. Oncology Associates, P.C.*, 198 F.3d 489, 500 (4th Cir. 1999).

particular writ or form of proceeding."[27] Therefore, the court concluded, "[T]he scope of Federal Rule of Civil Procedure 64 incorporates state procedures authorizing any meaningful interference with property to secure satisfaction of a judgment, including any state-authorized injunctive relief for freezing assets to aid in satisfying the ultimate judgment in a case."[28] The court then applied the law of Maryland in sustaining a preliminary injunction under Rule 64.

It must be emphasized again that investigating and applying state law is crucial. For example, Florida does not authorize a preliminary injunction in actions at law in lieu of applying its attachment procedure.[29]

III. Rule 65: Preliminary Injunctions and Temporary Restraining Orders

A. Elements for Preliminary Injunction

The factors that a court must consider in determining whether to grant a preliminary injunction are:

(a) whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits;

(b) whether the plaintiff has shown "a threat of irreparable injury";

(c) whether "the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted"; and

(d) whether the public interest would be disserved by issuing a preliminary

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[27] *Id*.

[28] *Id.* at 501. The Fourth Circuit observed that several circuits had come to the same conclusion, citing *Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A*., 143 F.3d 688, 692 (2d Cir. 1998), *rev'd on other grounds*, 527 U.S. 308, 119 S. Ct. 1961 (recognizing "'that injunctive relief may be granted under Rule 64 if authorized by the applicable state law'"); *Inter-Reg'l Fin. Grp., Inc. v. Hashemi*, 562 F.2d 152, 154 (2d Cir. 1977) ("holding that Rule 64 includes Connecticut's prejudgment remedy of attachment as well as injunctions in aid of attachment"); *FDIC v. Antonio*, 843 F.2d 1311, 1313-14 (10th Cir. 1988) ("utiliz[ing] Rule 64 in applying Colorado state law which authorized prejudgment injunctive relief"); and *Lechman v. Ashkenazy Enters., Inc*., 712 F.2d 327, 330 (7th Cir. 1983).

[29] *Rosen v. Cascade Int'l, Inc*., 21 F.3d 1520, 1531 (11th Cir. 1994).

injunction.[30]

To satisfy the element of "likelihood of success on the merits," the plaintiff need not prove that he will win at trial.[31]

To satisfy the irreparable injury element, the plaintiff must demonstrate that irreparable harm would result if the preliminary injunction is not granted. "In general, a harm is irreparable where there is no adequate remedy at law, such as monetary damages."[32]

B. Alternative Test for Preliminary Injunction

Some courts also apply an alternative test for the issuance of a preliminary injunction. "Alternatively, a court may issue a preliminary injunction if the moving party demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor."[33]

However, in *Natural Resource Defense Council, Inc. v. Winter*,[34] the Ninth Circuit cautioned, "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. They are not separate tests but rather outer reaches of a single continuum." A similar note of caution was sounded in *Dataphase Systems, Inc. v. C L Systems, Inc.*[35]

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[30] *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011).

[31] *Id*.

[32] *Id.* at 600 (citations omitted).

[33] *Global Horizons, Inc. v. United States Dept. of Labor*, 510 F.3d 1054, 1057 (9th Cir. 2007) (internal quotation marks and citation omitted); *see also Fennell v. Butler*, 570 F.2d 263, 264 (8th Cir. 1978); *Gresham v. Chambers*, 501 F.2d 687, 691 (2d Cir. 1974); *Sonesta Int'l Hotels Corp. v. Wellington Assocs*., 483 F.2d 247, 250 (2d Cir. 1973); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc*., 559 F.2d 841, 843-44 (D.C. Cir. 1977).

[34] *Natural Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007) (citation omitted).

[35] *Dataphase Sys., Inc. v. C L Sys., Inc*., 640 F.2d 109, 113 (8th Cir. 1981) (en banc).

C. Appropriateness of Preliminary Injunction Depends on Type of Claim

1. *Grupo Mexicano* Holding

In *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, the Supreme Court held that a district court lacks the authority to issue a preliminary injunction preventing a defendant from disposing of assets pending adjudication of a plaintiff's breach of contract claim for money damages.[36]

There are, however, several important limitations on this holding, discussed below:

2. Injunction Appropriate for Equitable Relief

An injunction freezing the defendant's assets is permitted in a case seeking equitable relief. In *Deckert v. Independence Shares Corp*., the court sustained a preliminary asset freeze order, noting that the "principal objects" of the suit were rescission and restitution and that the injunction freezing assets was proper where the preliminary injunction would be "in aid of the recovery sought by the bill[.]"[37] "A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally."[38]

On this basis, *Grupo Mexicano* does not apply to claims for the avoidance of fraudulent transfers.[39]

Grupo Mexicano also does not apply in a case in which the plaintiff claims the equitable

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[36] *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc*., 527 U.S. 308, 333, 119 S. Ct. 1961, 1975 (1999); *see also Rosen v. Cascade Int'l, Inc*., 21 F.3d 1520, 1528 (11th Cir. 1994) (noting that "the [United States Supreme] Court's language [in *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 222-23, 65 S. Ct. 1130, 1135 (1945)] makes clear, that in "a case seeking money damages in tort or contract in which a preliminary injunction freezing assets is requested; . . . a prejudgment asset freeze, without a doubt, would be beyond the power of the district court").

[37] *Deckert v. Independence Shares Corp.,* 311 U.S. 282, 289-90, 61 S. Ct. 229, 233-34 (1940).

[38] *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220, 65 S. Ct. 1130, 1134 (1945).

[39] *Rubin v. Pringle* (*In re Focus Media, Inc.*), 387 F.3d 1077, 1084-86 (9th Cir. 2004); *see also United States ex rel. Rahman v. Oncology Assocs., P.C.*, 198 F.3d 489, 496-97 (4th Cir. 1999) (citations omitted) ("The complaint's request to void transfers as fraudulent-a form of rescission-is also an equitable remedy."); *Larosa v. Pecora*, 2009 U.S. Dist. LEXIS 38060, at *11-12 (N.D. W. Va. Apr. 29, 2009).

remedy of constructive trust. "Since the assets in question here were profits the Redisis made by unlawfully stealing Cablevision's services, the freeze was appropriate and may remain in place pending final disposition of the case."[40]

3. Injunction Appropriate for Claim to Recover Property

The plaintiff may seek preliminary relief to constrain property that is related to any of the claims in the case. In *United States v. First National City Bank*, the court sustained a preliminary asset freeze order, finding that "there is here property which would be 'the subject of the provisions of any final decree in the cause[.]'"[41] On that basis, *Grupo Mexicano* does not apply to a receiver's claim to recover property.[42]

4. Injunction Appropriate If in Public Interest

"'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'"[43]

5. Reconciling the Supreme Court Cases

Reconciling the Supreme Court's decisions in *Grupo Mexicano*, *Deckert* and *First National City Bank* can be challenging. In *Oncology Assocs.*, the Fourth Circuit harmonized these decisions as follows:

> First, where a plaintiff creditor has no lien or equitable interest in the assets of a defendant debtor, the creditor may not interfere with the debtor's use of his property before obtaining judgment. A debt

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[40] *CSC Holdings, Inc. v. Redisi*, 309 F.3d 988, 998 (7th Cir. 2002); *see also Focus Media*, 387 F.3d at 1084-86.

[41] *United States v. First Nat'l City Bank*, 379 U.S. 378, 385, 85 S. Ct. 528, 532 (1965) (citation omitted).

[42] *FTC v. NHS Sys., Inc.*, 708 F. Supp. 2d 456, 465 n.12 (E.D. Pa. 2009).

[43] *United States v. First Nat'l City Bank*, 379 U.S. 378, 383, 85 S. Ct. 528 (1965) (quoting *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552, 57 S. Ct. 592 (1937)).

> claim leads only to a money judgment and does not in its own right constitute an interest in specific property. Accordingly, a debt claim does not, before reduction to judgment, authorize prejudgment execution against the debtor's assets.
>
> On the other hand, when the plaintiff creditor asserts a cognizable claim to specific assets of the defendant or seeks a remedy involving those assets, a court may in the interim invoke equity to preserve the *status quo* pending judgment where the legal remedy might prove inadequate and the preliminary relief furthers the court's ability to grant the final relief requested. This nexus between the assets sought to be frozen through an interim order and the ultimate relief requested in the lawsuit is essential to the authority of a district court in equity to enter a preliminary injunction freezing assets.[44]

D. Requirement for a Bond

When a preliminary injunction or temporary restraining order is sought by a bankruptcy trustee, Federal Rule of Bankruptcy Procedure 7065, which incorporates Federal Rule of Civil Procedure 65(c) specifically eliminates the requirement of posting a bond.[45] FED. R. CIV. P. 65(c), provides, "The United States, its officers, and its agencies are not required to give security."[46]

E. Cases Addressing Trustees' Requests for Preliminary Injunctions

Trustees have successfully obtained preliminary injunctive relief in many cases. In *Rubin v. Pringle* (*In re Focus Media Inc.*), the Ninth Circuit held that *Grupo Mexicano* does not bar the issuance of a preliminary injunction freezing assets when a trustee asserts fraudulent transfer or constructive trust claims, because these are equitable claims.[47] The trustee sued Pringle to recover $20 million in fraudulent transfers and requested a temporary restraining order and a preliminary injunction. The bankruptcy court granted and order enjoining him from "spending,

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[44] *Oncology Associates*, 198 F.3d at 496-97.

[45] FED. R. BANKR. P. 7065 and FED. R. CIV. P. 65(c).

[46] *See also* 15 U.S.C. § 77t(b) (allowing the SEC to obtain an injunction "without bond").

[47] *Rubin v. Pringle* (*In re Focus Media Inc.),* 387 F.3d 1077, 1085 (9th Cir. 2004).

transferring, concealing, dissipating, encumbering, assigning, and/or hypothecating" $20 million in assets.[48] The Ninth Circuit affirmed, finding that the bankruptcy court did not abuse its discretion in granting the relief sought.[49]

Similarly, in *Green v. Drexler* (*In re Feit & Drexler, Inc.*), the Second Circuit affirmed a preliminary injunction based on the trustee's allegations of conversion, corporate waste and mismanagement, breach of fiduciary duty, fraudulent conveyance, and fraudulent transfer.[50]

IV. Distinguishing Rule 64 and Rule 65

A. Why the Distinction Is Important

Courts struggle with the question whether the prejudgment relief that a party seeks should be considered under Rule 64 or Rule 65. "[T]he distinction between an attachment issued under Rule 64 and an injunction issued under Rule 65 is a blurry one at best."[51] In *Mason Tenders District Council Pension Fund v. Messera*, the court observed:

> Examination of case law reveals that the Funds have plunged themselves into the heart of a dilemma not yet fully resolved by the Second Circuit. The dilemma is whether a party may seek to freeze assets for a potential judgment through a Rule 65 preliminary injunction, or whether the party is limited to Rule 64, which points to state law for remedies that "secur[e] satisfaction of the judgment ultimately to be entered in the action." Under Rule 64, the Funds would seek relief via New York's attachment statute, CPLR § 6201. If the party may proceed under Rule 65, the usual preliminary injunction requirements, irreparable injury, likelihood

[48] *Id.* at 1080.

[49] *Id*. at 1086-87.

[50] *Green v. Drexler* (*In re Feit & Drexler, Inc.*)760 F.2d 406, 408 (2d Cir. 1985); *see also Sharp v. Sayler* (*In re SK Foods, L.P.*), 2010 WL 5136187 (E.D. Cal. Dec.10, 2010); *Pheasant v. Zaremba*, 398 B.R. 583 (N.D. Ohio 2008); *Yagow v. GEF Servs., LLC* (*In re Content Distrib., Inc.*) 2011 WL 5244900 (Bankr. D. Colo. Nov. 2, 2011); *Dillworth v. Leary* (*In re Infolink Grp., Inc.),* 2011 WL 1655882 (Bankr. S.D. Fla. May 2, 2011); *In re Newport Creamery, Inc.*, 293 B.R. 293 (Bankr. D.R.I. 2003).

[51] *Daye Nonferrous Metals Co. v. Trafigura Beheer B.V.,* 1997 U.S. Dist. LEXIS 9661, at *12 (S.D.N.Y. July 7, 1997), *aff'd in part and vacated in part*, 152 F.3d 917 (2d Cir. 1998).

> of success on the merits and greater balance of hardships, will apply.[52]

The distinction is crucial for at least four reasons. First, both the applicable procedures and the substantive standards are different.[53]

Second, "[f]or [appellate] jurisdictional purposes, it matters whether the relief requested is more appropriately classified as an injunction or an attachment."[54]

An order granting or denying a preliminary injunction is immediately reviewable.[55] However, it is less certain whether an order granting or denying a Rule 64 order is immediately appealable.

> It is common ground that - at least in the absence of special circumstances - federal appellate courts lack jurisdiction to undertake interlocutory review of orders granting prejudgment attachments. *See Teradyne, Inc. v. Mostek Corp*., 797 F.2d 43, 45-47 (1st Cir. 1986); *see also* 16 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 3922 (2d ed. 1995). By like token, orders denying prejudgment attachments are not per se appealable when issued.[56]

What makes uncertain the issue of appellate jurisdiction over a Rule 64 order is the collateral order doctrine.[57] The cases on this question are in conflict.[58]

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[52] *Mason Tenders District Council Pension Fund v. Messera*, 1997 U.S. Dist. LEXIS 5931, at *11-12 (S.D.N.Y. May 1, 1997) (footnotes omitted).

[53] This difference is developed in Sections 21.02 and 21.03 of THE PONZI BOOK: A LEGAL RESOURCE FOR UNRAVELING PONZI SCHEMES.

[54] *Charlesbank Equity Fund II v. Blinds To Go, Inc.,* 370 F.3d 151, 156 (1st Cir. 2004); *see also Rosenfeldt v. Comprehensive Accounting Serv. Corp*., 514 F.2d 607, 610-11 (7th Cir. 1975).

[55] *Rosenfeldt*, 514 F.2d at 611 (citing 28 U.S.C. § 1292(a)(1)).

[56] *Charlesbank Equity Fund II*, 370 F.3d at 156 (citation omitted).

[57] In *Charlesbank Equity Fund II*, 370 F.3d at 156 n.1, the court summarized this doctrine:

> The collateral order doctrine is a judge-made exception to the finality principle . . . . To satisfy this doctrine-and thus furnish a valid basis for an interlocutory appeal-the order appealed from must satisfy four basic criteria . . . . First, it must involve an issue unrelated to the merits of the main dispute, which is capable of review without disrupting the main litigation. Second, the appeal must be capable of finally resolving the issue. Third, the order must implicate a

Third, while a Rule 64 order is generally limited to property within the state in which the court sits,[59] a Rule 65 preliminary injunction can have extraterritorial effect.

> [T]he order appealed from appears to be injunctive in nature. Because virtually all of BTG's assets are located outside of Massachusetts, the order, if granted, will operate by restraining BTG's conduct (i.e., commanding it to take certain actions and prohibiting it from taking others.). This is the classic modus operandi of injunctive relief.[60]

The extraterritorial effect of a preliminary injunction arises from the court's personal jurisdiction over the defendant.[61]

Fourth, some courts have held that where the legal remedy of attachment is adequate, an injunction should not be granted.[62]

> right incapable of vindication upon review after final judgment. And finally, the order must embody an important and unsettled question of controlling law.

Id. (*citing Espinal-Dominguez v. Puerto Rico*, 352 F.3d 490, 495-96 (1st Cir. 2003)).

[58] Cases holding that a Rule 64 order is immediately appealable include *Britton v. Howard Sav. Bank*, 727 F.2d 315, 320-22 (3d Cir. 1984); *Brastex Corp. v. Allen Int'l, Inc*., 702 F.2d 326, 330 (2d Cir. 1983); *Baxter v. United Forest Prods Co*., 406 F.2d 1120, 1123-25 (8th Cir. 1969). Cases holding otherwise include *U.S. Fid. & Guar. Co. v. Arch Ins. Co*., 578 F.3d 45, 56-60 (1st Cir. 2009); *Micro Signal Research, Inc. v. Otus*, 417 F.3d 28, 33-34 (1st Cir. 2005); *Banque Nordeurope S.A. v. Banker*, 970 F.2d 1129, 1132 (2d Cir. 1992); *Perpetual Am. Bank., F.S.B. v. Terrestrial Sys., Inc*., 811 F.2d 504, 506 (9th Cir. 1987); *Matthews v. IMC Mint Corp*., 542 F.2d 544, 546 (10th Cir. 1976); *W.T. Grant Co. v. Haines*, 531 F.2d 671, 678 (2d Cir. 1976); *Rosenfeldt v. Comprehensive Accounting Serv. Corp.*, 514 F.2d 607, 610-11 (7th Cir. 1975).

[59] *See* Section 21.02 of THE PONZI BOOK: A LEGAL RESOURCE FOR UNRAVELING PONZI SCHEMES.

[60] *Charlesbank Equity Fund II*, 370 F.3d at 157 (citation omitted); *see also Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 206-07 (3d Cir. 1990).

[61] *United States v. First Nat'l City Bank*, 379 U.S. 378, 384, 85 S. Ct. 528, 531 (1965); *see also Waffenschmidt v. MacKay*, 763 F.2d 711, 714 (5th Cir. 1985) (Under rule 65, "[n]onparties who reside outside the territorial jurisdiction of a district court may be subject to that court's jurisdiction if, with actual notice of the court's order, they actively aid and abet a party in violating that order."); *Green v. Drexler* (*In re Feit & Drexler, Inc*.), 760 F.2d 406, 414 (2d Cir. 1985) (citations omitted) ("[The defendant's] contention that the district court lacked the power to compel her to deliver her property from outside the court's territorial jurisdiction must be rejected because the court had personal jurisdiction over [the defendant] herself."); *Inter-Reg'l Fin. Grp., Inc. v. Hashemi*, 562 F.2d 152, 155 (2d Cir. 1977); *United States v. Ross*, 302 F.2d 831, 834 (2d Cir. 1962).

[62] *EBSCO Indus., Inc. v. Lilly*, 840 F.2d 333, 336 (6th Cir. 1988); *Dorfmann v. Boozer*, 414 F.2d 1168, 1171-72, 1174 (D.C. Cir. 1969).

B. How the Cases Distinguish Relief Under Rules 64 and 65

It is clear enough that the labels used by the parties carry little weight in resolving whether Rule 64 or Rule 65 applies. "[I]t will be well to note exactly what is the substance of the injunction, since the name given to the process is not determinative."[63] "When faced with motions appearing to call for an attachment but labeled something else, federal courts again look past the terminology to the actual nature of the relief requested."[64] The court colorfully continued, "[W]e will call a duck a duck when characterizing district court rulings in this context."[65]

Beyond that the courts have used different analyses to resolve the issue.

In *Teradyne, Inc. v. Mostek Corp.*, the court concluded, "Factors to be considered are: the present and future consequences of the constraint involved; whether the order directs or restrains conduct of one of the parties; how the order was treated below by the district court and the parties."[66]

Other courts have examined the purpose and effect of the injunction. If it is to provide security for performance of a future order which may be entered by the court, the order is a Rule 64 order.[67] However, if the order directs that the defendants act or refrain from acting, it is the

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[63] *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 219, 65 S. Ct. 1130, 1134 (1945).

[64] *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc*., 14 F.3d 1507, 1521 (11th Cir. 1994).

[65] *Id*.

[66] *Teradyne, Inc. v. Mostek Corp*., 797 F.2d 43, 47 (1st Cir. 1986); *see also Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 157 (1st Cir. 2004).

[67] *De Beers*, 325 U.S. at 219, 65 S. Ct. at 1134; *see also U.S. Fid. & Guar. Co. v. Arch Ins. Co*., 578 F.3d 45, 54 & n.13 (1st Cir. 2009); *Micro Signal Research, Inc. v. Otus*, 417 F.3d 28, 33 (1st Cir. 2005) (citations omitted) ("Admittedly, substance, and not the name given in the order, controls as to whether relief amounts to an injunction."); *Rosen v. Cascade Int'l, Inc*., 21 F.3d 1520, 1530 (11th Cir. 1994); *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc*., 14 F.3d 1507, 1521-22 (11th Cir. 1994) ("We conclude that Rule 64, and not Rule 65 (which governs injunctions generally), provides the standard for evaluating a request for preliminary injunctive relief that is, in reality, no more than a request for prejudgment attachment . . . ."); *Unsecured Creditors' Comm. of DeLorean Motor Co. v. DeLorean* (*In re DeLorean Motor Co*.), 755 F.2d 1223, 1227 (6th Cir. 1985).

substance of a classic injunction.[68]

In *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, the court cautioned against "commingling the jurisprudence of Rule 65 with that of Rule 64" because "[e]ven though [an injunction] may serve many of the same ends as an attachment, [an injunction] acts upon a party whereas [an attachment] is directed at specific property."[69]

V. *Mareva* Injunctions in Common Law Jurisdictions

A *Mareva* injunction, now called a "Freezing Injunction," is an order freezing the respondent's assets to preserve the plaintiff's opportunity to collect on its claim.[70] It is available in England and Wales and in other common law jurisdictions including Canada.[71] The common name of the injunction comes from the case of *Mareva Compania Naviera SA v. International Bulkcarriers SA*.[72] In that case, Lord Denning stated:

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[68] *U.S. Fidelity & Guaranty Co. v. Arch Insurance Co*., 578 F.3d 45, 54 & n.13 (1st Cir. 2009).

[69] *Charlesbank Equity Fund II v. Blinds To Go, Inc*., 370 F.3d 151, 162 (1st Cir. 2004); *see also U.S. Fid. & Guar. Co. v. Arch Ins. Co.*, 578 F.3d 45, 54 n.13 (1st Cir. 2009) ("But here, the attachment is simply that: a classic lien on property pending the outcome of litigation that does not, by its terms, compel the defendants to do or refrain from doing anything.").

[70] *Mareva Compania Naviera SA v. Int'l Bulk Carriers SA* (The *Mareva*), [1980] 1 All E.R. 213 (Eng. C.A. Civ. Div.); *see also Stewart Chartering, Ltd. v. C. & O. Mgmts. S.A*., [1980] 1 All ER 718, [1980] 1 WLR 460. *See* Section 19.04 of THE PONZI BOOK: A LEGAL RESOURCE FOR UNRAVELING PONZI SCHEMES.

[71] *See Aetna Fin. Servs. Ltd. v. Feigelman*, [1985] S.C.J. No. 1, 1985 CarswellMan 19, 1985 CarswellMan 379, [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161, [1985] 2 W.W.R. 97, 56 N.R. 241, 32 Man. R. (2d) 241, 29 B.L.R. 5, 55 C.B.R. (N.S.) 1, 4 C.P.R. (3d) 145 (S.C.C.); *see also The Nuclear Weapons of English Commercial Litigation*, at 509-10; Ronald Silverman, *Mareva Orders: Fact of Fiction in the United States?*, 21 Am. Bankr. Inst. J. 24 (Nov. 2002) ("Since the Mareva decision, requests for Mareva injunctions have become commonplace in common-law jurisdictions."); David L. Zicherman, *The Use Of Pre-Judgment Attachments And Temporary Injunctions In International Commercial Arbitration Proceedings: A Comparative Analysis Of The British And American Approaches*, 50 U. Pittsburgh L. Rev. 667, 676-77 (Winter 1989) ("Mareva injunctions have been granted in the High Court of Australia, New South Wales, Queensland, Western Australia, Victoria, the Australian Capital Territories, the Federal Court of Australia, New Zealand, the Canadian Federal Court, the Provincial Courts of Ontario, British Columbia, New Brunswick, Nova Scotia, Manitoba, the Court of the North West Territories, Malaysia, Hong Kong, and Singapore.").

[72] *Mareva Compania Naviera SA v. Int'l Bulk Carriers SA* (*The Mareva*), [1980] 1 All E.R. 213 (Eng. C.A. Civ. Div.).

> In my opinion [the power to protect a party's legal or equitable right] applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing - and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment - the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.[73]

The authority of the English courts to grant this relief is now also statutory.[74] The Civil Practice Rules of the United Kingdom establish the straightforward procedures for obtaining a Freezing Injunction and also include a sample form of a Freezing Injunction.[75]

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[73] *Id*.

[74] Supreme Court Act, 1981, c. 54, § 37(1) (Eng.) ("The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."); Civil Jurisdiction and Judgments Act 1982, UK Statute 1982 c. 27 Pt. IV s. 25, entitled "Interim relief in England and Wales and Northern Ireland in the absence of substantive proceedings." *See Ryan v. Friction Dynamics Ltd*., [2001] C.P. Rep. 75 (Ch. Div.).

[75] U.K. Civ. P. R., Practice Direction 25A, Annex, sample "Freezing Injunction," http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_part25a.htm#IDASPSIC.

See generally Three If by Equity, at 700 ("As an initial matter, a plaintiff seeking to secure a *Mareva* order in support of a legal claim must apply for one - usually in the form of a standard, fill-in-the-blank proposed order provided in the U.K. Practice Directions, the precise wording of which depends on the scope of assets sought to be covered by the order.") (footnotes omitted).