PRELIMINARY INJUNCTIONS IN DELAWARE: 
THE NEED FOR A CLEARER STANDARD

I. Introduction

The preliminary injunction is an equitable remedy whereby a court prohibits or mandates certain action pending decision on the legality of that action. The remedy has been characterized as "extraordinary" because it restricts or impinges upon the parties' freedom to act without a full and fair hearing on the legal propriety of those acts.\(^2\)

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1. The language of the injunction may be "mandatory" or "prohibitory." A mandatory injunction commands a party to perform a certain act or acts, whereas a prohibitory injunction prohibits a party from acting. See Plaza Sec. Co. v. O'Kelley, No. 7932 (Del. Ch. Mar. 5, 1985), reprinted in 10 Del. J. Corp. L. 891 (1985), aff'd, 496 A.2d 1031 (Del. 1983) (granted preliminary injunction prohibiting enforcement of bylaw adopted by target corporation). The Delaware Supreme Court has stated that a preliminary mandatory injunction will not issue unless the legal right to be protected is "clearly established." Steiner v. Simmons, 111 A.2d 574 (Del. 1955) (reversed grant of preliminary injunction mandating school board to admit plaintiff negro pupils into segregated schools because plaintiffs had no clearly established right under existing law to attend segregated public schools). This is considered a higher standard than the "probability of success on the merits" standard utilized in determining whether prohibitory injunctive relief should issue. This more stringent standard is applied because the mandatory injunction works an affirmative change in the relationship between the parties. See EAC Indus., Inc. v. Frantz Mfg. Co., No. 8003 (Del. Ch. June 28, 1985), reprinted in 11 Del. J. Corp. L. 608 (1986), aff'd, 501 A.2d 401 (Del. 1986) (granted preliminary injunction which effectively mandated corporation to seat directors elected through consent action under Del. Code Ann. tit. 8, § 228 (1983)). The distinction between mandatory and prohibitory injunctions is a historical one developed in England's Court of Chancery and adopted by American courts. Critics have suggested that the distinction is one of mere language and not useful or necessary to a court in determining whether to grant or deny a preliminary injunction. E.g., EAC Indus., Inc. v. Frantz Mfg. Co., No. 8003 (Del. Ch. June 28, 1985), reprinted in 11 Del. J. Corp. L. 608 (1986), aff'd, 501 A.2d 401 (Del. 1986) (preliminary injunctive relief granted although court noted that there was uncertainty as to whether the relief sought was of the mandatory or prohibitory type). See Black, A New Look at Preliminary Injunctions: Can Principles From the Past Offer Any Guidelines to Decisionmakers in the Future?, 36 Ala. L. Rev. 1 (1984) (historical account of the mandatory/prohibitory distinction and criticism of its continued viability).


107
The preliminary injunction has become a useful, if not necessary, remedy in obtaining immediate relief in disputes which involve corporate law issues. It has emerged as a powerful weapon in battles of appeal for issuing preliminary injunction.

One writer has stated that "[t]he preliminary injunction may be the most striking remedy wielded by contemporary courts. Issued without a full hearing on the merits of the case, [it] can block the enforcement of legislation, place a candidate on the ballot, forbid strikes, prevent mergers, or enforce a school desegregation plan." Leubsdorf, The Standard for Preliminary Injunctions, 91 HARV. L. REV. 525, 525 (1978). See also R. THOMPSON & J. SEBERT, REMEDIES: DAMAGES, EQUITY AND RESTITUTION 3-39, 3-40 (1983) [hereinafter THOMPSON & SEBERT] (the "Extraordinary Remedy" concept may be attributable in part to the fact that in a preliminary injunction, the court "orders" a party to act or not act thus requiring the court to also act as enforcer; whereas in a legal remedy, the court "declares" that one person owes money to another, which can be enforced by merely issuing writs of execution).

3. Another remedy usually sought in conjunction with a preliminary injunction is a temporary restraining order (TRO), which is also designed to prevent irreparable injury and preserve the status quo pending a hearing on the application for preliminary injunction. See DEL. CH. CT. R. 65(b) (1987). Such relief may be granted ex parte, but may not exceed 10 days unless the court finds good cause or the restrained party consents to such extension. Id. The court shall dissolve the TRO if the recipient does not proceed with the preliminary injunction application. Id.

The purpose of a TRO is to preserve the status quo to enable the plaintiff to adequately prepare his case and demonstrate his entitlement to relief at the preliminary injunction stage. Hecco Ventures v. Sealand, No. 8486 (Del. Ch. May 19, 1986), reprinted in 12 DEL. J. CORP. L. 282 (1986); DiEleuterio v. Pennell, No. 8294 (Del. Ch. Dec. 13, 1985). In granting a TRO, the court considers whether an applicant has made a preliminary showing of probability of success on the merits and irreparable harm sufficient to justify holding in abeyance the challenged act or transaction for the brief period necessary to develop an evidentiary record for the preliminary injunction. See Hecco Ventures, No. 8486, slip op. at 8 (Del. Ch. May 19, 1986), reprinted in 12 DEL. J. CORP. L. at 288. As with preliminary injunctions, a TRO will not issue unless the applicant gives security in such sum as the court deems proper, the purpose of which is to pay such costs and damages as may be incurred by a wrongfully restrained party. See Levin v. Metro-Goldwyn-Mayer, Inc., 221 A.2d 499, 505 (Del. Ch. 1966) (denying stockholder's request to temporarily restrain corporation's filing of charter amendment). An appellate court's scope of review of a grant of a TRO is limited to whether the trial court abused its discretion. G.M. Sub. Corp. v. Liggett Group, Inc., 415 A.2d 473, 479-80 (Del. 1980).

4. Corporate law litigation often involves allegations of violations of fiduciary duties owed to the corporation and its stockholders. Corporate directors and officers are considered quasi-trustees with respect to corporate property and shareholders' stock. From this trust relationship arises fiduciary duties in dealings which affect this property and stock. J. POMEROY, EQUITY JURISPRUDENCE 266 (5th ed. 1941). Seeking enforcement of these duties invokes equitable jurisdiction; the usual equitable
for corporate control,\textsuperscript{5} where time is of the essence and the parties are reluctant to wait weeks, possibly months, for a full hearing and final adjudication of their dispute.\textsuperscript{6} The plaintiff may seek to pre-

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remedy is the injunction. \textit{Id.} at 946.

The role of equity in corporate law has been stated as follows:

The internal management of corporations has become increasingly a concern of equity during the past fifty years. The ultimate remedy of a minority stockholder in the event of \textit{ultra vires} acts, corporate mismanagement, or an unjustified starvation policy as to dividends is by bill in equity . . . . The divorce between corporate ownership and corporate control . . . requires that courts of equity be alert to protect the interests of scattered ownership against personal profit-seeking on the part of those exercising centralized control and that minority owners be encouraged to be active in asserting their rights, as the only alternative to some administrative control by government of the internal affairs of large corporations.


6. If a challenged change in control or merger is allowed to proceed before a final adjudication concerning the propriety of crucial actions taken in such a context, the parties incur the risk that one of the corporations will no longer exist or will be in such a substantially different condition that it would be difficult, if not impossible, to restore it to its prior state. \textit{Sext. \textit{E.g.},} Federal Trade Commission \textit{v.} Dean Foods Co., 384 U.S. 597, 599-600 (1966) (Federal Trade Commission sought to preliminarily enjoin a merger based on potential antitrust violations, arguing that should the merger be allowed to proceed, the corporation will no longer exist and it would be extremely difficult and probably impossible to restore it as a viable independent company should the merger subsequently be ruled illegal); AC Acquisitions Corp. \textit{v.} Anderson, Clayton \& Co., 519 A.2d 103 (Del. Ch. 1986) (acquiror corporation in the midst of tender offer needed to immediately enjoin target corporation's planned self-tender which could effectively deprive shareholders of an opportunity to accept tender offer: conditional relief granted); MacAndrews \& Forbes Holdings, Inc. \textit{v.} Revlon, Inc., 501 A.2d 1239 (Del. Ch. 1985), aff'd, 506 A.2d 173 (Del. 1986) (acquiror in midst of tender offer needed to immediately
liminally enjoin certain takeover defense tactics implemented by a corporation during plaintiff’s tender offer, or the plaintiff may seek to prevent a target corporation from adopting a bylaw which effectively restricts plaintiff’s solicitation of proxies prior to the shareholder’s annual meeting. Since only an expedited ruling on the legal propriety of such acts is useful to the parties, the litigants rarely proceed to a final injunction hearing. Thus, a court’s decision at the preliminary injunction stage often disposes of the matter. At such a critical stage in the litigation, the applicable standard for granting relief, and the analysis performed by a court in applying that standard, become an important consideration for a corporation and its counsel.

This note addresses the standards and analysis used in granting injunctive relief, focusing especially upon the decisions of the Delaware Court of Chancery, a forum in which such relief is frequently enjoined from transferring assets to third party: relief granted); Joseph v. Shell Oil Co., 482 A.2d 335 (Del. Ch. 1984) (shareholders of target corporation sought to enjoin completion of tender offer after expiration of withdrawal date and less than one week prior to its scheduled expiration: partial relief granted).

7. E.g., Ivanhoe Partners v. Newmont Mining Corp., No. 9281 (Del. Ch. Oct. 15, 1987), aff’d, Nos. 341 & 345 (Del. Nov. 18, 1987) (acquiror sought to enjoin, inter alia, a “street sweep” purchase of target corporation’s stock by its largest stockholder); Newell Co. v. William E. Wright Co., 500 A.2d 974 (Del. Ch. 1985) (acquiror corporation sought to preliminarily enjoin target corporation from acting pursuant to fair price rights plan adopted in wake of acquiror’s announced takeover intent).


9. See supra note 6 (examples in which parties needed expedited rulings).

10. A court’s decision on a preliminary injunction application usually involves a prediction regarding the merits of legal issues. As such, it becomes the decisive legal ruling for the parties, even though, theoretically, it is not final and is designed merely to prevent irreparable harm before a final adjudication may occur. This preliminary determination of the strengths of the respective parties’ legal positions enhances the prospect of settlement or voluntary dismissal, and in many cases obviates any need or desire for a final hearing. See, e.g., Cohn v. Crocker Nat’l Corp., No. 7693 (Del. Ch. Feb. 7, 1985).

11. Unlike the vast majority of American jurisdictions, Delaware maintains in its court system a separation of law and equity. Under Del. Const., art. IV, § 7, the Superior Court of Delaware has jurisdiction over all civil causes at “common law.” The Delaware Court of Chancery has jurisdiction to hear and determine all matters and causes in equity. See Del. Const., art. IV, § 7; Del. Code Ann. tit. 10, § 341 (1975). See also Monroe Park v. Metropolitan Life Ins. Co., 457 A.2d 734, 738 (Del. 1983) (nothing in statute could be construed as conferring any aspects of the chancery court’s statutory jurisdiction on the superior court).
sought in corporate law litigation. Section II of this note reviews the origin and nature of the preliminary injunction remedy. Section III then discusses the standards as applied by the Delaware Court of Chancery. Section IV evaluates the Delaware decisions applying the standards, and concludes that the standards which are repeatedly articulated in the chancery court’s opinions are not what it actually applies. This is partly due to the fact that the Delaware Court of Chancery, like most American courts, is a product of the early English legal system in which courts issuing preliminary injunctions were generally not authorized to conclusively determine the underlying merits of the subject claims.

Many of the archaic principles incor-


court of chancery also has subject matter jurisdiction over other matters where jurisdiction is specifically conferred by statute. For an historical account of Delaware’s judiciary system, see 1 V. Woolley, Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware ch. 1 (1906).


See also Hanrahan, The Development of the Delaware Court of Chancery as a Corporate Forum, 2 Del. Law. 34 (Spring 1984) (tracing the historical development of the Delaware Chancery Court as a suitable forum for the litigation of corporate disputes); Schwartz, The Delaware Chancery Court: A National Court of Corporate Law, 2 Del. Law. 54 (Spring 1984) (praising the Delaware court for its effective leadership in developing long standing principles of corporate law whose impact reaches across the nation).

13. Delaware’s Constitution of 1792, art. IV, § 14, created the court of chancery and thereby divorced equity actions from the law courts.

Hence the Court of Chancery of the State of Delaware inherited its equity jurisdiction from the English courts; and in its organization and proceedings, . . . the Court of Chancery of the State of Delaware, has adhered more closely to English precedents, than those of any of [Delaware’s] sister States.

Woolley, supra note 11, at 35.

14. Traditionally, where an equity court has “concurrent jurisdiction,” the ultimate authorities on the underlying merits are the law courts. The equity court has concurrent jurisdiction where the primary right involved is substantively “legal,” but the remedy available in the law court for enforcing this right is inadequate. 1 Pomeroy, Equity Jurisprudence 233-34 (5th ed. 1941). An equity court has “exclusive jurisdiction” where the primary right involved or the remedy to be granted is purely equitable. Id. at 186-89 (discussing distinctions between equity’s concurrent and exclusive jurisdiction).

For criticism of Pomeroy’s analysis and a discussion of the “exclusive” and “concurrent” jurisdiction distinction in Delaware, see Harman v. Masoneilan Int’l, Inc., 442 A.2d 487, 498 (Del. 1982) (complaint alleging majority shareholder’s breach of fiduciary duty in approving merger was within equity’s exclusive jurisdiction even though money damages might be the only practicable remedy available).
porate into the current "stated" standard for issuing preliminary injunctions unnecessarily cloud the truly significant factors behind the Delaware Court of Chancery's decisions on requests for preliminary injunctive relief.

II. Background

A. Origin of the Remedy and Its Standards for Issuance

The current standards for issuing preliminary injunctive relief are heavily influenced by the early English court system. During the fourteenth century, the English common law courts, or the King's courts as they were called, had limited jurisdiction which hindered their ability to address the legal needs of the community.\(^\text{15}\) Initially, lawsuits could be brought only by the King's Writ.\(^\text{16}\) In response to societal needs, new writs were constructed and the judges allowed actions upon the case.\(^\text{17}\) Nonetheless, the common law courts were empowered only to award damages pursuant to the King's Writ, and thus had little, if any, discretion in formulating remedies to

\(^{15}\) See Black, supra note 1, at 3. Pomeroy attributes these jurisdictional limitations to the common law courts' overly strict adherence to judicial precedents; strict observance of arbitrary and technical doctrines; adherence to institutions of feudalism; antipathy toward the ecclesiastical nature of Roman law; and strict adherence to the common law forms of action system. See 1 Pomeroy, supra note 14, §§ 15-21, at 20-30 (historical analysis of the early English legal system and the origin of equity jurisdiction).

\(^{16}\) Legal rights could be enforced only through one of the established forms of action. A writ issued in the name of the King, called a "King's Writ," was the initial step in every action and constituted the commencement and foundation of all subsequent proceedings. Specific writs had been established for each of the different forms of action and contained specifications as to the facts, circumstances, and events which could constitute the subject matter of a particular form of action. The precedents of all the writs which had been established were housed in the Registra Brevia, an office connected with the chancery. Thus, chancery officers had the duty of issuing writs to plaintiffs by selecting and copying an established writ which substantially corresponded to a plaintiff's case. However, a plaintiff could have no action if the facts of the complaint did not substantially correspond to those of an established writ. The chancery clerks could not draw up new writs nor alter existing ones. See 1 Pomeroy, supra note 14, § 21, at 28-30.

\(^{17}\) A statute enacted during the reign of Edward I, 13 Edw. I, ch. 1, § 24, empowered chancery clerks to issue new writs. The law judges initially refused to accept the new writs, but later accepted them as actions upon the "case," allowing remedies for an unlimited variety of wrongs. Actions on the case were free from the formal restraints of the King's writ system. See 1 Pomeroy, supra note 14, §§ 24-29, at 32-36.
appropriately address the real needs of the parties. Many wrongs went unredressed under this rigid system which required the King, in some circumstances, to exercise royal discretion by modifying the law. The King authorized the chancellor to exercise this equitable discretion and from there developed England’s Court of Chancery.

Typically, the common law courts could grant relief after determining that a wrongful act had caused damage; but they could not interfere to prevent the wrongdoing prior to such adjudication. Prevention of wrongdoing rested solely in the chancellor’s equitable jurisdiction. Where chancery was requested to assume jurisdiction, resulting in interference with the proceedings of the common law courts, friction between the two courts resulted. This division of jurisdiction placed chancery in a peculiar position. Chancery was requested to preliminarily enjoin certain actions even though the common law court would ultimately determine the legality of the actions and the appropriateness of the relief. Chancery could never be sure that legally protected rights existed until the law courts decided the issue. Chancery’s inability to actually decide the legal merits of the claim thus forced it to assess the “probability” of success on the merits in deciding the appropriateness of interim relief. It was this jurisdictional division which led to the present requirement that in order to justify preliminary relief, the petitioner must demonstrate a “probability” of success on the merits.

The division between law and equity also prompted the limitation of equitable jurisdiction to the special situations in which there was

18. See Black, supra note 1, at 3.
19. Id.
20. One commentator cites a proclamation of Edward III, referring all matters “of our special grace” to the chancellor as the beginning of the court of chancery. Id. at 14. That writer also notes that there was some disagreement on this point. Id. See also 1 POMEROY, supra note 14, § 32, at 38.
21. See Black, supra note 1, at 4.
22. Id.
23. Id. It is believed that the appointment of ecclesiastics, rather than lawyers, as chancellors may have prevented open conflicts between the chancery and common law courts. Id.
24. Leubsdorf, supra note 2, at 530.
25. Id.
26. Id.
27. Id. By virtue of performing this function, chancellors necessarily became accustomed “to assessing the probable strength of plaintiffs’ underlying claim[s].” Id.
no adequate remedy at common law. The rationale was that an injunction could be issued only to enforce a legal right, and that equity therefore had no grounds for intervention unless the legal redress for that right was inadequate. Thus, the chancellor also required a showing of irreparable injury before preliminary relief would be granted.

The history of the preliminary injunction is significant because it reveals the circumstances which prompted the development of the "probability of success on the merits" and "irreparable harm" concepts. These concepts were the product of a system which, in many cases, divided a single controversy between two courts, resulting in an anomalous situation where courts of equity were requested to protect common law rights even though equity courts lacked jurisdiction to decide whether those rights existed. However, the equity courts applied the same standards even where the ultimate issues were within the court's equitable jurisdiction. Even after England and many American states abolished the division between law and equity, the courts continued to rely upon the same concepts in formulating standards for issuing preliminary injunctions.

28. See Thompson & Sebert, supra note 2, at 3-11. Because common law courts were viewed as the preferred forum in which to seek redress, chancery would assume jurisdiction only if traditional legal remedies could not provide satisfactory relief. Id. at 3-25.
29. Id.
30. Leubsdorf, supra note 2, at 530.
31. Id. at 531.
32. Id. at 531-32 (indicating that the standards reflect a theme of comity between two colliding courts rather than the problems associated with granting relief before a full hearing on the merits).
33. See supra note 14 (discussion of equity's "concurrent" and "exclusive" jurisdiction).
34. In 1862, the English Parliament empowered chancery to adjudicate common law issues arising in cases before it and to grant damages previously awarded in the law courts. By the 1870s the English courts of law and equity were merged and thus it became permissible for a trial court to stay its own proceedings. Leubsdorf, supra note 2, at 537. During this time and continuing into the 1940s, many American states abolished the formal distinctions between equity and law courts. See 1 Pomeroy, supra note 14, at 45-46 n.7. But see supra note 11 (Delaware maintains this distinction in its judiciary system).
35. The "probability of success on the merits" and "irreparable harm" concepts have proven to be decisive factors in decisions whether to issue a preliminary injunction. See Wolf, supra note 2, at 228.
36. Professor Leubsdorf has noted that the resulting standards "have outlived this jurisdictional peculiarity . . . [t]he merger of law and equity released older principles from their context, freeing them to become general rules for all preliminary injunctions." Leubsdorf, supra note 2, at 527.
B. Development of a Standard

Three primary considerations emerged from England's Court of Chancery to form the basis for a general standard applicable to preliminary injunctions: 37 the strength of the plaintiff's case, the possibility of irreparable harm to the parties, and the balancing of those harms. 38 Although the initial rationale for an equity court's reluctance to pass on the merits of a plaintiff's case was the fact that it could not ultimately decide an issue reserved for the common law courts, 39 the courts later focused upon concern over premature adjudication of the merits of a claim without a full evidentiary hearing. 40 In cases where equity courts were authorized to ultimately decide the merits of claims, they began to "predict" rather than merely "assess" the plaintiff's probability of success at a final hearing. 41

While preventing irreparable injury to the plaintiff was the primary justification for assuming equitable jurisdiction, the courts were also concerned with avoiding unnecessary restraint of the defendant's actions pending the equity court's full consideration of the merits. 42

37. It is believed that a generally recognized standard applicable to almost all preliminary injunctions did not emerge until the latter half of the nineteenth century. Id. at 534.

38. A third factor which was also prevalent was the preservation of the "status quo" until a final hearing. It originated as a means to protect one's possessory interest in property rights pending a final adjudication. It soon evolved into a generalized preference. Id. at 534-35. This factor while still cited in the Delaware Court of Chancery, has received much criticism lately as an illogical and unjustified reason for limiting the use of preliminary injunctions because the maintenance of the status quo in itself may cause unnecessary irreparable injury. Id. at 546. See Wolf, supra note 2, at 174; Note, Injunctions, 78 HARV. L. REV. 994, 1058 (1965) ("The concept of status quo lacks sufficient stability to provide a satisfactory foundation for judicial reasoning . . . [t]he better course is to consider directly how best to preserve or create a state of affairs in which effective relief can be awarded to either party at the conclusion of trial . . .").

39. Leubsdorf, supra note 2, at 533. See supra text accompanying notes 21-30 (discussion of this jurisdictional division whereby an equity court was forced to assess merits of claims it could not decide).

40. Leubsdorf, supra note 2, at 533.

41. Id.

42. Leubsdorf, supra note 2, at 533-34. Consistent with this desire to avoid unnecessary and wrongful restraint of a defendant, courts have required the posting of security by parties obtaining injunctions. See DEL. CH. CT. R. 65(c) (1987). The purpose of posting security is to pay for such costs and damages as may be incurred by any party who is found to be wrongfully enjoined. Gimbel v. Signal Cos., 316 A.2d 599 (Del. Ch.), aff'd, 316 A.2d 619 (Del. 1974) (a bond of $25 million was fixed as security to enjoin the sale of a wholly owned subsidiary at a price in excess of $400 million).
The equity courts thus began to consider the balance of the harms to the parties so as to avoid undue prejudice to the enjoined party.\textsuperscript{43}

The general principles of the early law of preliminary injunctions have survived and now permeate the modern law.\textsuperscript{44} However, despite the shift in concern from interference with the law court's functions to concern for unreliability arising from hasty interlocutory decision-making, the terminology and principles which were born and nurtured in the equity courts have not changed. This has resulted in the strained formulation of various standards whereby courts have attempted to apply the traditional rubric and terms.\textsuperscript{45}

Commentators have noted that, despite the many standards applied by courts, there are two policy considerations which seem to prevail in the decisions: first, courts are cautious in granting interim relief based on an abbreviated hearing; and second, equity's focus is upon the degree of irreparable injury to the parties.\textsuperscript{46} Guided by these policies, courts have cited several factors that are significant in their decisions: (1) whether the petitioner has made a strong showing that he is likely to succeed on the merits of the claim; (2) whether the petitioner has demonstrated that without such relief he would be injured irreparably; (3) whether issuance of the injunction will substantially harm other parties interested in the proceedings; and (4) whether the public interest favors or disfavors the issuance of the preliminary injunction.\textsuperscript{47} Some courts adhere to the "all or nothing" approach which requires that all four of the above factors be met,\textsuperscript{48} while others follow the traditional "balancing of the factors" approach, which is more flexible and allows a stronger showing on one factor to compensate for a weaker showing on another.\textsuperscript{49}

\textsuperscript{43} Leubsdorf, supra note 2, at 534. This "balancing of the equities" was consistent with the historical concept of chancery being a court of conscience which could consider the equities of both parties and formulate a just and fair result. Thompson & Sebert, supra note 2, at 3-11.

\textsuperscript{44} See Note, supra note 38 (exhaustive review of the general law of preliminary injunctions).

\textsuperscript{45} Leubsdorf, supra note 2, at 538.

\textsuperscript{46} Black, supra note 1, at 25-26.

\textsuperscript{47} These factors were enunciated in the often cited case Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958).

\textsuperscript{48} See e.g., Casal Auth. v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974) (representative of the Fifth and Eleventh Circuits' view).

\textsuperscript{49} See e.g., Ambach v. Bell, 686 F.2d 974, 980 (D.C. Cir. 1982); Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency & Office of Emergency Preparedness, 649 F.2d 71, 75 (1st Cir. 1981); Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980); Mason County Medical Ass'n v. Knebel 563 F.2d 256, 264
balancing of factors approach is favored by both commentators and courts. Although the factors relating to the public interest or the interests of non-parties are frequently cited by courts, the reasons for considering such factors have not been clearly stated. Moreover, these factors are rarely determinative in decisions to grant or deny preliminary injunctions. One commentator, noting that an analysis of the public interest tends to be abstract, amorphous and usually unproductive, has suggested that this factor be eliminated from consideration except in limited situations.

Although modern courts cite varying standards and factors in determining whether to issue preliminary injunctions, there is nevertheless a certain consistency in their decisions. Courts focus upon the prevention of irreparable injury pending a final adjudication, while recognizing that the determination should be made cautiously in light of the circumstances.


The balancing of the factors approach provides a judge with needed discretion in weighing claims of irreparable harm. Black, supra note 1, at 49. See Leubsdorf, supra note 2, at 544-48 (proposing a model standard employing the balancing of the factors approach); Wolf, supra note 2, at 228-36 (also proposing model advancing this approach); Note, supra note 38, at 1056 (“Clear evidence of irreparable injury should result in a less stringent requirement of certainty of victory; greater certainty of victory should result in a less stringent requirement of proof of irreparable injury.”) (citations omitted).

50. See Black, supra note 1, at 43; Leubsdorf, supra note 2, at 541-42; Wolf, supra note 2, at 182-84; Note, supra note 38, at 1056.

51. See Gimbel v. Signal Cos., 316 A.2d 599 (Del. Ch.), aff'd, 316 A.2d 619 (Del. 1974) (adhering to balancing of factors approach). See also supra note 49 (cases representing the balancing of the factors approach as applied by the First, Fourth, Sixth, Tenth, and D.C. Circuit Courts of Appeal).

52. E.g., Yakus v. United States, 321 U.S. 414, 440 (1944) (upheld Congress' power to legislatively preclude injunctions concerning congressional statutes based upon equity courts' power to deny preliminary injunctions which will adversely affect the public interest); Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958) (denied preliminary injunction of administrative proceedings based, in part, on conclusion that such relief would not further public interest; also enunciated the often-cited four factors employed in deciding whether to issue a preliminary injunction, which are set forth supra in text accompanying note 47).

53. Wolf, supra note 2, at 234.

54. Id. at 234 (suggesting that in the vast majority of cases, such factors are simply a "make weight" for granting or denying the preliminary injunction).

55. Those limited circumstances are class actions and suits involving governmental parties where varied parties must represent unnamed or absent persons who risk injury. Id. at 234-35.
III. Analysis of Delaware's Standard

A. Gimbel v. Signal Companies, Inc.

The standard cited in the Court of Chancery of Delaware, and approved by the Supreme Court of Delaware, is similar to that cited by most modern courts. In the corporate context, the most frequently cited case enunciating the standard is the 1974 decision Gimbel v. Signal Companies, Inc. In Gimbel, a Signal stockholder sought to preliminarily enjoin the sale by Signal of all stock in its wholly-owned subsidiary oil company. After reciting much of the traditional language associated with the standards for granting preliminary injunctions, Chancellor Quillen, later Justice Quillen, summarized the court's task as follows:

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57. See supra note 11 (equitable jurisdiction in Delaware vested in a separate court of chancery).


59. Id.

60. Id. at 601. The sale price exceeded $480 million, $420 million of which was to be paid in cash. The sale was approved by Signal's Board of Directors on December 21, 1973, and was scheduled to be consummated on January 15, 1974, but no later than February 15, 1974. Id. Plaintiff commenced his action on December 24, 1973, hearing was held on January 4, 1974, and additional affidavits were filed up until January 9, 1974. Id. The court's decision was handed down the following day. Id. at 599. Indeed, the facts in Gimbel demonstrate the classical characteristics of immediacy and expedition normally associated with hearings on preliminary injunctions.

61. The chancellor stated that the preliminary injunction constitutes "extraordinary relief generally employed 'to do no more than preserve the status quo . . .'" Gimbel, 316 A.2d at 602 (citation omitted). He further stated that a preliminary injunction will not be granted unless it is "earned," apparently referring to the heavy burden traditionally placed on plaintiffs. Id. at 603. This language referring to the extraordinariness of the remedy and the plaintiff's heavy burden, finds its roots in the old English system which required chancery to advance special reasons for interfering with rights that only a common law court could ultimately decide. See supra notes 13-56 and accompanying text (discussing an equity court's jurisdiction and procedures).
[T]he court must be satisfied, on the present record, that the plaintiff has a reasonable probability of succeeding on the merits of his claim. Further, the Court must also be satisfied that a preliminary injunction is necessary to protect the plaintiff from irreparable injury and that the plaintiff's need for such protection outweighs any harm that the Court can reasonably expect to befall the defendants if the injunction were granted.62

Chancellor Quillen also endorsed the view that the court may balance the factors and determine that the strength of one element, such as irreparable harm, may be balanced against the weakness of another, such as probability of success.63

Perhaps more important than Chancellor Quillen's statement of the standard is his application of that standard to the facts. The chancellor first determined that the plaintiff would suffer irreparable harm to protected rights if the injunction was not issued.64 The chancellor then determined that the defendant would suffer irreparable injury if the injunction was issued.65 Injury to protected rights was thus unavoidable regardless of the court's decision. Because the plaintiff's injury could only be prevented by risking comparable injury to the defendant, the chancellor concluded that the analysis "should focus on whether the plaintiff has a reasonable probability of success."66

In granting the injunction, the chancellor expressed caution in predicting the outcome on the merits67 of the claim and noted the sparse evidence and expedited record before him:

63. *Id.* Note that this "balancing of the factors" approach is generally favored by most courts and the commentators. *See supra* text accompanying notes 50-51 (discussing criticism and application of the standard).
64. *Gimbel*, 316 A.2d at 603. The chancellor considered other potential remedies, such as rescission after consummation of the sale and damages, but concluded that such remedies were doubtfully meaningful. *Id.* at 603-04.
65. *Id.* at 604. The chancellor recognized that if the injunction issued and delayed the transaction beyond the contract's specified date, Signal could lose its right to enforce the contract for sale, which would produce a taxable gain of $220 million. *Id.*
66. *Id.*
67. The substantive legal issues were (1) whether the sale required authorization by a majority of the outstanding stockholders pursuant to Delaware statutory law, and (2) whether the action of Signal's board in approving the sale price was reckless. *Id.* at 605.
The Court does not want to overemphasize the ultimate significance of its conclusion herein although the Court recognizes the temporary significance. . . . [I]t is hard to imagine a final record after a full trial on the merits bearing much resemblance to the record on which I make the immediate decision in the plaintiff's favor.68

The chancellor found the issue on the merits to be very close and could conclude only that there existed a serious question about the plaintiff's probability of success.69 Recognizing that an erroneous denial of the preliminary injunction could possibly deprive the plaintiff of any meaningful remedy at a later stage, the chancellor decided to grant the relief so as to preserve the issues for a final hearing.70 However, in order to avoid injury to the defendant which could result should the granted relief effectively end the transaction to sell the subsidiary, the chancellor imposed strict time standards for hearings in the immediate future.71

In applications for preliminary injunctions, the result is highly dependent upon the peculiarities of each case.72 A mere recitation

68. Id. at 617.
69. Id. The chancellor found the issue on the merits to be so close that he could conclude only that there was a serious question about the reasonable probability that the plaintiff would succeed and that a fuller investigation into the merits was warranted. Id.
70. Id. Here, the chancellor cited the traditional language referring to the "preservation of the status quo" as a basis for issuing a preliminary injunction. Id.
71. Id. at 618.
72. "An application for a preliminary injunction 'is addressed to the sound discretion of the court, to be guided according to the circumstances of the particular case.' " Id. at 601 (citation omitted). A determination of probable irreparable harm, by its very nature, requires a careful review of the circumstances of a particular case. See, e.g., AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103 (Del. Ch. 1986) (acquiror corporation in midst of tender offer needed to immediately enjoin target corporation's planned self-tender which could effectively deprive shareholder's of the opportunity to accept its tender offer: conditional relief granted); MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc., 501 A.2d 1239 (Del. Ch. 1985), aff'd, 506 A.2d 173 (Del. 1986) (acquiror in midst of tender offer needed to immediately enjoin target corporation's transfer of assets to third party: relief granted); Newell Co. v. William E. Wright Co., 500 A.2d 974 (Del. Ch. 1985) (acquiror corporation sought to preliminarily enjoin target corporations from acting pursuant to fair-price rights plan adopted in wake of acquiror's announced takeover intent: relief conditionally denied); Joseph v. Shell Oil Co., 482 A.2d 335 (Del. Ch. 1984) (target corporation shareholders sought to enjoin completion of tender offer after expiration of withdrawal date and less than one week prior to offer's scheduled expiration: partial relief granted).
of the standard applied by the court is of little help in understanding why the relief in *Gimbel* was granted. Many Delaware opinions merely recite the standard and then move on to the merits of the claim.\(^73\) The *Gimbel* opinion, however, reveals the purpose behind the relief (to preserve the status quo pending a full hearing) and the factors which the court deems significant in granting that relief.\(^74\) Although Delaware chancery opinions dealing with corporate issues often cite language in *Gimbel* as authority for applying the standard, the opinions do not always reveal that much consideration and recognition were afforded to the weighing of irreparable harm and the necessary caution to avoid an erroneous, premature adjudication on the merits.\(^75\)

The *Gimbel* opinion teaches how Delaware’s standard for preliminary injunctions should be applied. Foremost, an application for such relief is addressed to the sound discretion of the court, which will give keen consideration to the circumstances of the particular case.\(^76\) The initial question is whether the plaintiff will suffer irreparable harm if relief is not granted.\(^77\) If the answer is no, then the injunction should not issue.\(^78\) If the answer is yes, then consideration is given to whether the defendant will be irreparably harmed if relief is granted. If the answer is no, and the plaintiff has some chance

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\(^74\) One commentator criticizes the current law in that the various standards articulated by courts rest on no coherent theory about the purpose of preliminary relief. He states further that the courts may imply the purposes or goals, but they rarely discuss how these goals relate to each other. Leubsdorf, *supra* note 2, at 526.


\(^76\) *Gimbel*, 316 A.2d at 601-02.

\(^77\) Indeed, the court stated that the first question is whether the plaintiff has shown a reasonable probability of success on the merits and the second question is whether plaintiff has shown irreparable harm. *Id.* Nonetheless, it is the actual analysis of the court, as reflected in the opinion, which is addressed here. It is submitted that the court’s use of traditional language and historical buzzwords is not necessarily a true reflection of that analysis, which can only be determined from a holistic reading of the opinion.

\(^78\) The *Gimbel* opinion states: “Further, the Court *must* also be satisfied that a preliminary injunction is necessary to protect the plaintiff from irreparable injury.” *Id.* at 603 (emphasis added).
of success on the merits, then the injunction should issue. If the defendant is likely to suffer irreparable injury, then the court should weigh the respective harms along with the respective probabilities of success. That course of action which is more likely to cause more harm is the course which should be avoided.

B. Post-Gimbel Case Law

The following discussion reviews some recent Delaware chancery decisions in the corporate law context which exemplify the court’s analysis in considering preliminary injunctive relief. The focus of the discussion is not only on the standard as stated in the opinion, but also on the court’s analysis in applying that standard.

1. Decisions Granting Relief

Generally, the decisions in which preliminary injunctive relief was granted tend to conduct a more thorough analysis of the merits of the claims than do decisions in which relief was denied. This

79. The degree of probability of success required will vary in every case. The court will weigh and balance both the probability of success and the probability of irreparable harm. Id. A strong showing on one factor may compensate for a weak showing on the other. Id.

80. Id. (citing opinion by Justice Tunnell in Bayard v. Martin, 34 Del. Ch. 184, 190, 101 A.2d 329, 333 (1953)).

81. The facts in Gimbel demanded an intricate and delicate balancing of the respective harms in relation to the probabilities of success. Chancellor Quillen recognized that both parties would suffer irreparable harm. Id. at 604.

82. E.g., MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc., 501 A.2d 1239 (Del. Ch. 1985), aff’d, 506 A.2d 173 (Del. 1986) (chancery court found that the applicant acquiror demonstrated reasonable probability of ultimate success in demonstrating that lock-up option given to third party was a usurpation of directorial authority); Mesa Petroleum Co. v. Unocal Corp., No. 7997 (Del. Ch. May 13, 1985), rev’d, 493 A.2d 946 (Del. 1985) (chancery court concluded that applicant acquiror demonstrated probability of success that selective exchange offer by target corporation which excluded acquiror was not protected by business judgment rule); Plaza Sec. v. O’Kelley, No. 7932 (Del. Ch. Mar. 5, 1985), reprinted in 10 Del. J. Corp. L. 891 (1985), aff’d, 496 A.2d 1031 (Del. 1985) (chancery court found that applicant demonstrated likelihood of success on the merits of the claim that corporation’s proposed bylaw restricting solicitation of proxies violated Del. Code Ann. tit. 8, § 228 (1983)); Joseph v. Shell Oil Co., 482 A.2d 335 (Del. Ch. 1984) (court found that applicants, shareholders of target corporation, demonstrated reasonable probability of ultimate success in demonstrating that defendant majority shareholder stood on both sides of tender offer transaction in violation of fiduciary duties to minority shareholders).

83. E.g., In re Chromalloy Stockholders Litig., No. 8537 (Del. Ch. Dec. 17, 1986) (refused to enjoin proposed merger because any unfairness of exchange ratio
could be attributed to various factors. First, since a preliminary injunction is considered an extraordinary remedy, a court granting such relief may be reluctant to rely on a dubious assessment of the merits. Thus, a more thorough analysis of the merits provides stronger justification for granting relief. Also, in some cases where relief is granted, it is possible to make an ultimate decision on the merits despite the abbreviated nature of the proceedings.

For example, in Joseph v. Shell Oil Co., the chancery court preliminarily enjoined a majority stockholder’s tender offer for the remaining shares in the corporation. The court first discussed the merits of the claims, namely, the majority shareholder’s fiduciary duty to minority shareholders. After a lengthy discussion of the merits, the court concluded that the plaintiffs had met their burden of showing a reasonable probability that there was a breach of fiduciary duty. Then the court considered, and found, a threat of irreparable harm. More specifically, the court concluded that “[t]o permit the minority stockholders of Shell to decide to tender their shares without the omissions of the defendants being cured might forever deny to those tendering stockholders their right to be treated fairly.” The court summarily concluded that this predicament of the minority shareholders constituted irreparable harm.

The Joseph opinion seems to reveal a cursory treatment of the issue of irreparable harm. This is most probably due to the court’s belief that there was a “clear” violation of Delaware law in this

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was remediable by money judgment or issuance of additional stock); Initio Partners v. Tandycrafts, Inc., No. 8697 (Del. Ch. Nov. 10, 1986) (refused to enjoin shareholders’ meeting, holding that proxy materials given to shareholders sufficiently disclosed important information); Newell Co. v. William E. Wright Co., 500 A.2d 974 (Del. Ch. 1985) (court refused to pass on merits based upon conclusion that applicant failed to establish existence of a risk of irreparable harm).

84. See supra note 2 (discussing characterization of injunction remedy as extraordinary).

85. But see Gimbel, 316 A.2d at 617 (relief granted although merits were unclear).

86. Plaza Sec. Co. v. O’Kelley, No. 7932 (Del. Ch. Mar. 5, 1985), reprinted in 10 Del. J. Corp. L. 891 (1985), aff’d, 496 A.2d 1031 (Del. 1985) (chancery court concluded that a proposed bylaw which restricted proxy solicitation was clearly at odds with shareholders’ statutory right under Del. Code Ann. tit. 8, § 228 (1983)).

87. 482 A.2d 335 (Del. Ch. 1984).

88. Id. at 338.

89. Id. at 340.

90. Id. at 344.

91. Id.

92. Id.
case. The court also failed, without explanation, to consider the balancing of respective harms, perhaps because the court believed such analysis to be unnecessary since the merits of the case were so clear. Nonetheless, this is not apparent from the language of the opinion. The court’s analysis, as reflected in the opinion, indicates that it found that there was a reasonable probability of success on the merits, and then considered whether there existed a probability of irreparable harm to the plaintiff if the injunction was not issued. Joseph nevertheless can be viewed as consistent with Gimbel insofar as Gimbel indicated that a strong showing on the merits may compensate for a weak showing of irreparable harm.

Similar analysis is found in Plaza Securities Co. v. O’Kelley where Chancellor Brown preliminarily enjoined the enforcement of bylaws adopted by Datapoint Corporation and which adversely affected Plaza Securities’ ability to obtain consent solicitations for the purpose of acquiring control of Datapoint. The court first considered the probability of Plaza’s success on the merits and concluded that the bylaws were in direct conflict with the Delaware statutory provision giving shareholders the right to vote by written consent. The court then determined that the irreparable harm requirement was satisfied because the legal right was clear and money damages could not adequately compensate the plaintiff for the defendant’s interference with that legal right. Upon balancing the respective hardships, the court found that Datapoint could defend the validity of its bylaws

93. Specifically, the court concluded that the tender offeror/majority stockholder clearly failed to meet its duty of disclosure in relation to the tender offer. Id. at 343.

94. This is indicated by the following language: “Having found that the plaintiffs have shown the reasonable probability [of success on the merits], it is now necessary to consider whether there exists the reasonable probability of irreparable harm.” Joseph, 482 A.2d at 344.

95. Gimbel, 316 A.2d at 603.


97. The bylaw attempted to establish a regulatory procedure for parties seeking consent solicitations to take corporate action. Id., slip op. at 7-9, reprinted in 10 Del. J. Corp. L. at 897-98. Datapoint alleged that the bylaw’s purpose was to assure an orderly, informed, and meaningful expression of shareholder will. Id., slip op. at 6, reprinted in 10 Del. J. Corp. L. at 896-97. Plaza Securities alleged that the bylaw was a management entrenchment device. Id.

98. Id.


in a summary proceeding challenging the eventual election of the directors, whereas Plaza Securities, if the bylaws were not enjoined, would be precluded from ever asserting its clear statutory right to solicit consents.  

A similarly thorough analysis of the merits can be found in *Mesa Partners v. Phillips Petroleum* where Vice-Chancellor, now Justice, Walsh granted Mesa’s application for a preliminary injunction restraining Phillips from relying on a standstill agreement between Mesa and a named target corporation. Phillips claimed that the standstill agreement effectively precluded Mesa from making a tender offer for the target corporation. Unlike the courts in *Joseph* and *Plaza Securities*, however, the court here first addressed the issue of whether Mesa would suffer irreparable harm without the requested relief. The court concluded that “[d]elay in a tender offer may, in itself, constitute irreparable injury since [delay] is recognized as ‘the most potent weapon for incumbent management.’” Having *first* found a probability of irreparable injury, the court *then* determined that Mesa had met its burden of showing a reasonable probability that it would succeed in proving that Phillips could not beneficially rely upon the standstill agreement.

The above cases are examples of the analyses performed by the Delaware Court of Chancery when it granted preliminary relief. The opinions reveal that the court engaged in a thorough analysis of the merits which provided strong justification for granting the extraordinary relief. Although the opinions reveal comparatively little analysis of irreparable harm, this is probably because the high probability of success on the merits compensated for any deficiency regarding the showing of irreparable harm.

2. Decisions Denying Relief

While decisions granting preliminary relief tend to focus on the merits of the claims, the decisions denying relief tend to focus on

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104. In the standstill agreement, Mesa purportedly agreed not to attempt to acquire Great American Oil Company, which was sought by Phillips. *Mesa Partners*, No. 7871, slip op. at 1.
105. Phillips claimed the agreement had the effect of restricting Mesa from launching an effort to acquire an interest in Phillips within five years of its execution. *Id.*
106. *Id.*, slip op. at 11.
107. *Id.*, slip op. at 11-12.
108. *Id.*, slip op. at 23.
the existence and balancing of irreparable harms. In denying relief, the court need not always consider the merits since a denial may be based solely upon a finding that the plaintiff failed to demonstrate that irreparable harm will result.109 The case which best exemplifies this type of analysis is Newell Co. v. William E. Wright Co.110

In Newell, the plaintiff, a thirty-five percent shareholder of Wright Company, sought to enjoin the "Fair Rights Plan"111 adopted by Wright's Board in response to plaintiff's announced intent to replace the Board and management of Wright.112 Chancellor Allen noted at the outset that the rights under the plan would probably be triggered before a final hearing on their validity.113

Chancellor Allen stated the standard for granting preliminary injunctive relief in terms of purpose:

The office of the writ of preliminary injunction is to prevent irreparable injury that threatens to occur before a final adjudication of a claim may be had. Assuming such a risk exists, the writ will only issue if the Court is persuaded from a preliminary evaluation of the merits of the claim that plaintiff has a probability of ultimate success on his claim and providing there is no supervening reason relating to the balance of hardships or the public interest that counsels withholding such provisional remedy.114

This statement recognizes the theory implied in Gimbel,115 namely,

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109. See, e.g., In re Chromalloy Stockholders Litig., No. 8537 (Del. Ch. Dec. 17, 1986), reprinted in 12 Del. J. Corp. L. 1061 (1987) (plaintiffs' failure to show that irreparable harm would result if merger was not enjoined was sufficient in itself to deny preliminary injunctive relief); Newell Co. v. William E. Wright Co., 500 A.2d 974 (Del. Ch. 1985) (chancellor found it unnecessary to evaluate merits since plaintiff failed to establish any irreparable harm with respect to target corporation's adoption of fair rights plan); USACafes v. Office, No. 8186 (Del. Ch. Oct. 28, 1985), reprinted in 11 Del. J. Corp. L. 1034 (1986) (plaintiff's failure to show that corporation's implementation of super-majority voting requirement would deter shareholders from submitting their consents established that there was no irreparable harm thus obviating need to pass on merits).

110. 500 A.2d 974 (Del. Ch. 1985).

111. The rights plan included two elements: first, a right to purchase stock in Wright or any surviving corporation after a merger with Wright, at a low price; second, a limited right to acquire a 10 year variable rate note. Exercise of the rights were to be triggered by a "change in control" which was specifically defined. Id. at 975.

112. Id. at 977-78.

113. Id. at 975.

114. Id. (emphasis added).

that a preliminary injunction should not issue without a showing that irreparable harm will occur before a final adjudication can be had.116 The Newell court indicated that it would perform a preliminary review of the merits only if there existed such risk of injury.117 This analysis is unlike the analysis in decisions granting injunctive relief where the focus tends to be on whether there exists a reasonable probability of success on the merits.118 Nonetheless, Chancellor Allen’s analysis focused on an evaluation of ‘‘the threatened consequences of not issuing a preliminary injunction,’’119 rather than on a premature prediction of the validity of the rights plan at issue. The chancellor found it unnecessary to evaluate the plaintiff’s likelihood of succeeding on the merits because he concluded that the plaintiff failed to establish the existence of a risk of irreparable harm.120 This reflects the chancellor’s recognition that a preliminary analysis of the merits should be done with caution so as to avoid a potentially erroneous decision which could cause injury to the losing party.121

116. Cf. supra text accompanying notes 64-71 (discussion of irreparable harm analysis performed by the court in Gimbels).

117. Note the language used by the court: ‘‘...assuming such a risk exists, the writ will only issue if the court is persuaded from a preliminary evaluation of the merits...’’ Newell, 500 A.2d at 975 (emphasis added).


119. Newell, 500 A.2d at 982-83.

120. Id. at 975. More specifically, the court recognized that the stock rights plan could assess a high cost upon Newell should it elect to effect a merger, or engage in other transactions, with Wright. The court concluded, however, that Newell could avoid the costs simply by refraining from such transactions. Any injury resulting from such restraint could be compensated by money damages after a final decision. Id. at 983. Concerning the notes rights plan, the court recognized that the plan vested in Newell the discretion to accept shares tendered into its offer without knowing with certainty the amount of debt which could be assumed by Wright. Such amount depended on the plan’s validity. Nonetheless, the court concluded that such uncertainty does not constitute a threat of irreparable injury. Rather, Newell must evaluate the risks of accepting the tendered shares amid such uncertainty. Chancellor Allen concluded that making such a decision ‘‘is what business persons do every day,’’ Id. at 985.

121. Cf. supra text accompanying notes 67-71 (discussion of Gimbels v. Signal Cos. opinion in which Chancellor Quillen expressed similar caution over the potential consequences of an erroneous preliminary decision on the merits).
Similarly, in *USACafes v. Office*, the chancery court declined to pass on the underlying merits of plaintiff’s claim. In *USACafes*, the plaintiff sought to preliminarily enjoin the implementation of a corporation’s super-majority voting requirement installed in response to plaintiff’s announced intention to solicit stockholder consents to increasing the size of the board of directors. An increased number of board positions would enable the plaintiff to further solicit stockholder consents to elect a majority of the board.

The court first addressed the issue of irreparable harm. There were conflicting expert opinions on the effect that a super-majority voting requirement would have on stockholders contemplating participation in the plaintiff’s ongoing consent solicitation. The court noted the highly speculative nature of plaintiff’s claim that the voting requirement would deter shareholders from submitting consents. The court could not conclude that the voting requirement produced a shareholder perception that his or her consent was futile, and thus the court determined that the voting requirement did not...

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123. The proposed bylaws would (1) require a supermajority to increase the number of directors and to amend the supermajority rule and (2) establish a procedure for determining the validity of any consent obtained. Any action authorized by such consent would be placed on hold until the procedure is complete. *Id.*, slip op. at 1-2, reprinted in 11 Del. J. Corp. L. at 1036. This second requirement could effectively act as a built-in device to delay corporate action by consent.

124. *Id.*, slip op. at 6, reprinted in 11 Del. J. Corp. L. at 1038.

125. *Id.*, slip op. at 7-9, reprinted in 11 Del. J. Corp. L. at 1038-39. One expert opined that many shareholders would refrain from submitting consents based upon the belief that it would be futile to attempt to satisfy the proposed high vote requirement. Another expert believed that the amended bylaws would not deter stockholders from submitting consents if they were otherwise inclined to do so. He opined that no such deterrence existed because the shareholders would base their decision on the merits contained within the consent solicitation. He concluded that the shareholders would likely be encouraged, if anything, to submit consent due to the realization that their consent would be needed to overcome the supermajority voting requirement. *Id.*

126. The court noted that the conflict in the expert opinions itself is evidence of the speculative nature of the threatened harm. *Id.*, slip op. at 9-10, reprinted in 11 Del. J. Corp. L. at 1039.

127. The Chancellor concluded that the claimed threatened harm was not like that in Plaza Sec. Co. v. O’Kelley, No. 7932 (Del. Ch. Mar. 5, 1985), reprinted in 10 Del. J. Corp. L. 891 (1985) where the court found an interference with a clear legal right under Delaware statute § 228, and it appeared that money damages were inadequate, and the company was under time constraints due to impending liquidation or sale. *USACafes*, No. 8186, slip op. at 10, reprinted in 11 Del. J. Corp. L. at 1040 (emphasis added).
directly or necessarily affect the shareholders’ decision. The court concluded that because the plaintiff had failed to establish the risk of irreparable harm, it was not necessary to pass on the merits of the bylaw’s voting requirement, and refused to preliminarily enjoin implementation of the bylaw.

Other chancery decisions refusing to issue preliminary injunctions reveal a similar emphasis on the likelihood of irreparable harm, although some of these decisions also conduct a preliminary review of the merits of the underlying claims. In In re Chromalloy Stockholders Litigation, the court refused to enjoin a corporate merger, concluding that any injury resulting from an ultimate adjudication that the merger plan’s exchange ratio for shares was unfair was compensable by money damages after a full hearing. The court expressly stated that failure to prove irreparable injury was sufficient in itself to justify denial of the application for a preliminary injunction, but nonetheless the court included a review of the merits and considered the balance of respective harms to the parties. However, the court confirmed that preliminary injunctive relief should be granted only in order to prevent truly irreparable injury. The discussion pertaining to the merits appears to be mere surplusage.

In Cohn v. Crocker National Corp., the court used a similar analysis in refusing to enjoin the defendants from submitting a proposed settlement agreement outlining the plans for a merger, over plaintiffs’ (the preferred shareholders) claim that they had a right to vote on the merger. The court first concluded that plaintiffs were not likely to suffer irreparable harm because their arguments could be raised and considered at the settlement hearing itself and stated that this would be sufficient grounds to deny the application for

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130. E.g., In re Chromalloy Stockholder Litig., No. 8537 (Del. Ch. Dec. 17, 1986), reprinted in 12 Del. J. Corp. L. 1061 (1987) (in refusing to enjoin merger, court concluded that an ultimate adjudication that exchange ratio for shares was unfair could be compensated by money damages); Cohn v. Crocker Nat’l Corp., No. 7693 (Del. Ch. Feb. 7, 1985) (court refused plaintiff’s application for a preliminary injunction because there existed a good faith dispute as to whether preferred shareholders could vote on a proposed merger).
132. Id., slip op. at 5.
133. Id.
134. Id.
135. Id., slip op. at 4.
preliminary injunction. Nonetheless, the court reviewed the merits. Interestingly, the court went so far as to declare that there was a "good faith dispute" as to whether the preferred shareholders had a right to vote on the merger. This statement may have been intended to encourage the parties to compromise the claim out of court, and thereby narrow the issues remaining to be addressed at the settlement hearings.

On the other hand, some chancery decisions have denied preliminary relief without addressing the issue of irreparable harm at all. One decision went so far as to proclaim that because the plaintiff failed to establish a probability of success on the merits, it was unnecessary to consider the issue of irreparable harm. In another chancery decision where the court found no reasonable probability of success on the merits, the court stated, "On this basis alone, the Court denies the application for injunctive relief," but further stated that it would have ruled the same way had it "gotten as far as having to balance the equities." These cases represent an anomaly whereby the court seems to recognize that prevention of irreparable injury is the purpose of preliminary relief, yet undertakes virtually no analysis concerning such injury. Nevertheless, the court's analysis of the merits could prove helpful to parties contemplating settlement because it would indicate how the court views the strengths of their cases. Opinions in which the court primarily analyzes the merits typically indulge in lengthy discussions

137. Id., slip op. at 7.
138. Id., slip op. at 12.
139. The court expressly stated that the disputed right of the preferred shareholders to vote on the proposed merger is subject to compromise in this case. Id.
140. After declaring that the disputed right to vote on the merger was subject to compromise, the court noted that the issue would be whether the proposed compromise is a fair settlement. This question, the court stated, could only be decided after the final settlement proceedings before the court. Id.
143. Reading Co., No. 7422, slip op. at 17.
144. Id., slip op. at 18.
146. See supra note 10.
in finding that the plaintiff has little chance of succeeding\textsuperscript{147} and then, in summary fashion,\textsuperscript{148} conclude with a statement that there is no showing of irreparable harm. There is little, if any, balancing of harms. One can speculate that in some cases the court is attempting to clarify a point of law addressed by prior case law.\textsuperscript{149} The court may also wish to express its opinion on the ultimate outcome of the dispute.\textsuperscript{150}

The Delaware Court of Chancery, like most American courts,\textsuperscript{151} has not articulated a uniform, consistent, and clear standard for deciding whether to issue a preliminary injunction.\textsuperscript{152} Clarification of the standard and its rationale, and consistency in the court's analysis in applying that standard, are worthy objectives to strive for, especially in litigation involving corporate law issues, where the preliminary injunction state is a crucial one.\textsuperscript{153}

IV. EVALUATION OF THE DELAWARE DECISIONS APPLYING THE STANDARD

The Delaware chancery decisions indicate that the court seems to perform various analyses when deciding whether to issue a preliminary injunction. Some decisions focus on the existence of irrepar-


\textsuperscript{148} Examples of the typical language in the opinions are: "[i]n addition, plaintiffs failed to establish that they would suffer irreparable harm," \textit{Rabkin}, 480 A.2d at 662; "[a]lthough the legal conclusions stated above, the plaintiff has failed to convince the court he will suffer irreparable injury," \textit{Gerschel}, No. 6843, slip op. at 11-12.

\textsuperscript{149} \textit{See} Rabkin v. Hunt, 480 A.2d 655, 659-60 (Del. Ch. 1984) (addressing an issue relevant to the important decision in Weinberger v. UOP, 457 A.2d 701 (Del. 1983)).

\textsuperscript{150} \textit{See Initi Partners}, No. 8697, slip op. at 3-4; Moore v. Moore, No. 1011, slip op. at 5 (Del. Ch. May 12, 1983).

\textsuperscript{151} \textit{See generally} Black, \textit{supra} note 1; Leubsdorf, \textit{supra} note 2; Wolf, \textit{supra} note 2; Note, \textit{supra} note 38.

\textsuperscript{152} One commentator has recognized the inherent difficulties in attempting to apply a uniform standard, but concludes that the absence of a clearly articulated rationale for the standard has caused thoughtless and inconsistent application. Leubsdorf, \textit{supra} note 2, at 565-66.

\textsuperscript{153} \textit{See supra} notes 3-10 and accompanying text (discussing the importance of the preliminary injunction).
arable harm, and refuse to even consider the merits if no threat of harm exists. Other decisions focus on the merits and decline to delve into the realm of irreparable harm. Many decisions analyze both the merits and respective harms. Some perform lengthy analyses of the merits, and then summarily address the irreparable harm requirement. With the exception of the Gimbel decision, the opinions rarely reflect a delicate balancing of respective harms and a cautious weighing of the strengths of the parties' cases. This is not to suggest that any of the decisions were erroneous. In the interests of clarity, conciseness, and the avoidance of pedantry, the written opinion may not express the intricate and detailed analysis which actually underlies the decision. Moreover, it is true that the decision of whether to issue a preliminary injunction is a matter in which a court has broad discretion. The particular circumstances of each case play a significant role in the court's decision. Nonetheless, clarification of the standard for issuing preliminary injunctions is a desirable goal. Attainment of that goal will require a clear and definitive proclamation of the purpose of a preliminary injunction, i.e., to prevent

158. 316 A.2d 599 (Del. Ch.), aff'd, 316 A.2d 619 (Del. 1974) (for a discussion of the Gimbel decision, see supra notes 57-81 and accompanying text).
159. The case law seems to be in agreement on this point. See Gimbel, 316 A.2d at 601-02; Moore v. Moore, No. 1011, slip op. at 4 (Del. Ch. May 12, 1983) (although plaintiff bears ultimate burden of proving entitlement to such relief, court has broad discretionary power).
160. See Gimbel, 316 A.2d at 601-02.
161. Most Delaware Court of Chancery opinions properly cite the purpose of preliminary injunctive relief as being to prevent truly irreparable harm which may occur before a final hearing on the merits can be had. In re Chromalloy Stockholders
truly irreparable harm to legal rights which may occur before a final hearing on the merits can be had.162

Preliminary injunctions are issued on the basis of expedited hearings where much of the evidence consists of affidavits.163 The sparse record and the limited time in which the court must make a decision inevitably increase the chances of an incorrect decision.164 The true dilemma faced by the chancery court is the need to perform an interlocutory assessment of the parties’ underlying rights even though the court’s decision may be different after a full hearing.165 Thus, the standard for issuing preliminary relief should aim to minimize the probable irreparable loss of protected rights caused by errors incident to a hasty decision based on an incomplete record.165

Because the relief is “preliminary,” and a full hearing on the merits is available in the future,166 the court need only consider that type of harm which a final judgment cannot redress.167 If a plaintiff’s injuries can be remedied by a final judgment, there is no reason to preliminarily enjoin the defendant when such a decision could turn out to be erroneous.168 By the same reasoning, if a defendant’s injuries resulting from an erroneously issued injunction are remediable at a final hearing, then the injunction should not be denied if it is otherwise warranted.169 If the court determines that irreparable harm could occur to both parties, then it should attempt to minimize the probable harm.170

162. See supra note 38 (discussing preservation of the status quo).
164. See Leubsdorf, supra note 2, at 541.
165. Id.
166. Id.
167. But see supra notes 9-10 and accompanying text (litigants will rarely proceed to final injunction hearing).
169. Leubsdorf, supra note 2, at 541.
170. Id.
The court should examine two scenarios. First, it should evaluate the probable harm if a decision to grant the relief turns out to be erroneous. Second, it should evaluate the probable harm if a decision to deny the relief turns out to be erroneous. Implicit in the court’s analysis will be its prediction of which decision, to grant or deny, is less likely to be erroneous. This prediction incorporates the “probability of success on the merits” factor. Through this analysis, the court can determine the course which is likely to cause the slightest probable irreparable harm to legal rights and can best serve the primary purposes of preliminary injunctive relief. Of all the recent chancery decisions addressing requests for preliminary injunctions in the corporate law context, Newell seems to present the clearest statement of the purpose of the relief and the standard to be applied, while Gimbel seems to present an analysis which is the most consistent with the real purposes of preliminary relief. Furthermore, Gimbel reflects two primary concerns of the court which should be considered in all decisions on requests for preliminary injunctions: (1) the focus should be on the prevention of irreparable harm; and (2) the court should proceed with great caution in granting relief at the preliminary injunction stage.

A combination of the standards and analyses expressed in Gimbel and Newell would produce a clearer, and more definitive and consistent application of the standard for issuing preliminary injunctions in the Delaware Court of Chancery.

172. The following analysis is based on a model proposed by Professor Leubsdorf. See Leubsdorf, supra note 2, at 541.
173. Id. at 541.
174. Id.
175. Id. at 542.
176. Id.
177. See supra note 114 and accompanying text (discussion of generally accepted purpose of preliminary injunctive relief in Delaware).
178. Newell Co., 500 A.2d at 975 (for a direct quote of the pertinent language in the opinion, see supra text accompanying note 122).
180. See Black, supra note 1, at 49.
181. See supra text accompanying notes 68-71. See also Black, supra note 1, at 49; Leubsdorf, supra note 2, at 540-41.
V. Conclusion

The issuance of a preliminary injunction is a matter properly within the discretion of the court. This note, as well as other commentaries on preliminary injunctions, does not seek to intrude upon that discretion. Rather, this note attempts to demonstrate the need for a clearer and more definitive standard which is capable of uniform application in the Delaware Court of Chancery decisions on preliminary injunctions. This can be achieved through combining the standards and analyses found in the chancery court’s decisions in Gimbel and Newell.

The Newell decision declares that the primary purpose of a preliminary injunction is to prevent irreparable harm to legal rights which may occur prior to a full hearing and final adjudication concerning those rights. The relief should not be granted if there is no risk of such harm. The Gimbel decision provides a model for the court’s analysis in deciding whether to grant preliminary relief. That decision teaches that a court should weigh and balance the probable irreparable harms to both parties in relation to the strengths of their respective cases. After such analysis, the court will be able to choose the course, either a grant or denial of relief, that is likely to result in the slightest irreparable harm.

A clearer standard which is uniformly applied would provide predictability for corporate counsel and client corporations, and thus enhance their ability to organize their affairs to conform with established legal principles.

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183. See Black, supra note 1; Leubsdorf, supra note 2; Wolf, supra note 2; Note, supra note 38.
186. See supra text accompanying notes 114-21.
187. See supra text accompanying notes 57-81.
188. Id.
189. See supra text accompanying notes 172-82.
190. Wolf, supra note 2, at 236-37.