

MAXIMIZING PLAINTIFF PROTECTION IN THE WORLD OF ASSET FREEZING AND BYPASSING THE DUE PROCESS REQUIREMENT OF NOTICE: THE MAREVA INJUNCTION AS AN ALTERNATIVE TO THE AMERICAN LEGAL REMEDIES.

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I. INTRODUCTION

The feeling of security is something that everyone covets and pursues, more so, when you are in the position of a plaintiff initiating a lawsuit. You would want to have some reason to believe that there will be money awarded to you in the event that you are successful in the litigation. This expectation can become a mere fantasy and an absolute nightmare when you encounter a defendant who is certain to remove all of his assets out of the country in order to avoid the court's judgment, which in turn leaves you, the plaintiff, with absolutely nothing to collect. While there are some safeguards available to a plaintiff in these situations, the purpose of this paper is to show that the American legal system falls short of fully protecting plaintiffs in these matters. Moreover, it also examines the alternative available to the American legal system, the Mareva injunction.

The American legal system offers a few choices to a plaintiff who seeks protection from a defendant removing his assets before or during trial. Let us first take a look at these choices to understand them and to allow us to compare

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them to the Mareva injunction, in order to point out their shortcomings and inadequacies and show how they fail to give the plaintiff the complete protection and security that the Mareva injunction provides.

II. THE PRE-JUDGMENT ATTACHMENT

The pre-judgment attachment is issued by a court when a plaintiff shows that not only are his claims valid, but that there is also a likelihood that the defendant will remove or dissipate his assets or property from the jurisdiction.¹ The order would allow a sheriff to physically seize the defendant's tangible property located within the jurisdiction, and it would also create a security lien on the defendant's assets that the order is targeting.² Nevertheless, the problem with the pre-judgment attachment arises when we look at the plaintiff's particular claim.³ Since the pre-judgment attachment is controlled by state statute, it is limited to only certain claims listed by the statute.⁴ However, the most important factor that makes this choice unappealing to a plaintiff, is the fact that it requires the court to have *in rem* jurisdiction over the property.⁵ *In rem* jurisdiction is an action against property within the jurisdiction, not against any person in particular.⁶ So if the defendant has assets anywhere outside of the court's jurisdiction, the court would be unable to seize them, and a defendant that acts swiftly may transfer his assets held within the jurisdiction.⁷ The latter point is crucial in the analysis of this paper, since it is concerned with the freezing of assets located overseas, and the pre-judgment attachment would automatically be ruled out as a remedy because of its jurisdictional limitations.

Many commentators also argue that the pre-judgment attachment is intrusive because it has the effect of creating a security lien in the defendant's assets and it encumbers titles.⁸ These additional liabilities that it imposes upon the defendant, can force him into bankruptcy, thus leaving him with nothing to satisfy the plaintiff's judgment.⁹

1. Lars E. Johansson, Comment, *The Mareva Injunction: A Remedy in the Pursuit of the Errant Defendant*, 31 U.C. DAVIS. L. REV. 1091, 1098 (1998).

2. *Id.*

3. *Id.*

4. Mary A. Nation, *Granting a Preliminary Injunction Freezing Assets Not Part of the Pending Litigation: Abuse of Discretion or an Important Advance in Creditors' Rights?*, 7 TUL. J. INT'L. COMP. L. 367, 369 (1999) (discussing that the attachment is not available to a plaintiff seeking monetary damages).

5. Johansson, *supra* note 1, at 1099.

6. BLACK'S LAW DICTIONARY 856 (7th ed. 1999).

7. Johansson, *supra* note 1, at 1096.

8. *Id.* at 1098.

9. *Id.* at 1102.

If we look at the amount of people and businesses that have their assets in located overseas, the chances that plaintiffs involved in litigation in the international arena will encounter such problems and face the reality of a pre-judgment attachment's ineffectiveness in those matters are significant. Consequently, it becomes clear after looking at the pre-judgment attachment's features, that from an international law standpoint, it is completely ineffective because a court will never be able to have control or power over any asset that is found outside of the country.

III. THE PRELIMINARY INJUNCTION

Another form of protection that the American legal system makes available to a plaintiff is the preliminary injunction, which is issued before the trial begins in order to prevent irreparable injury to the plaintiff while the court considers whether to grant permanent relief.¹⁰ Its purpose is to preserve the status quo between the parties pending a final determination on the merits.¹¹ However, it is only granted after the defendant has been given notice and an opportunity to participate in a hearing on the issue.¹² Moreover, the preliminary injunction is only available if the plaintiff is seeking equitable relief.¹³ Some authorities argue that if the plaintiff seeks "legal" relief, then only a preliminary attachment can be used, and that a court granting a preliminary injunction under those circumstances when the assets being frozen are not part of the pending litigation, is abusing its discretion.¹⁴ Nevertheless, the majority leans towards granting a preliminary injunction regardless of the type of relief sought by the plaintiff, as long as the plaintiff can show he will suffer irreparable injury or that failure to grant it would make the defendant judgment proof.¹⁵

Some courts have granted preliminary injunctions even though the remedy sought was legal, but it was granted because if not, any other available equitable remedies would have been extinguished.¹⁶

In the case of *De Beers Consol. Mines v. U.S.*, 325 U.S. 212 (1945), the United States sued a corporation that produced gems and industrial diamonds and exported them to the United States.¹⁷ The United States claimed that the defendant conspired to monopolize United States commerce with foreign

10. MARC ROHR, CASES AND MATERIALS ON CIVIL PROCEDURE, 26 (2002).

11. Samuel K. Alexander, III, Book Review, 39 VA. J. INT'L. 503, 526 (1999) (reviewing DR. MARK S.W. HOYLE, *THE MAREVA INJUNCTION AND RELATED ORDERS* (1997)).

12. *Id.* at 525.

13. Johansson, *supra* note 1, at 1098.

14. Nation, *supra* note 4, at 371.

15. *Id.* at 369.

16. *Id.* at 382 (discussing that the preliminary injunction was justified because removal of the assets by the defendant would have made any other remedy inadequate to the plaintiff).

17. *Id.* at 373.

nations, and the United States tried to prevent further monopolization by the defendant by obtaining a preliminary injunction freezing their assets and property in the United States.¹⁸ The Court reversed the granting of the injunction because it would create a “sweeping effect” where every plaintiff going to the court for any type of relief, would be able to impose an injunction on the defendant by merely stating that the defendant might transfer his goods.¹⁹ The court in reversing the injunction, reasoned that the injunction requested dealt with a matter wholly outside of the issues in the lawsuit, and that it involved property which in no circumstances could be dealt with in any final injunction that could be entered.²⁰

In *In Re Estate of Ferdinand Marcos*, 25 F.3d 1467 (1994), the families of torture victims sued Ferdinand Marcos and his estate, and applied for an injunction against it.²¹ The purpose of the injunction was to prevent the defendant from encumbering real property that was located in New York, which had been allegedly purchased with funds illegally taken from the Philippines.²² When the case finished, the plaintiff sought a continuance of an injunction in another suit against the Marcoses in California, which was granted.²³ However, since the plaintiff only sought monetary damages, the defendant claimed that the court had abused its discretion in granting a preliminary injunction.²⁴ The purpose of the injunction in this case was to personally prevent them from transferring assets wherever they might have been located, including assets in banks in other countries.²⁵ The court said that it could issue the injunction in order to prevent a defendant from dissipating assets, in order to preserve the possibility of equitable remedies that could have arisen later in the proceedings.²⁶ Thus, in this case, the court said that the district courts had the authority to issue preliminary injunctions where the plaintiff could show that monetary damages would be inadequate due to “impending insolvency of the defendant or that the defendant [had] engaged in a pattern ...of dissipating assets to avoid judgment.”²⁷ The court mentioned the *De Beers* case in reasoning that only allowing preliminary injunctions in extraordinary cases

18. See generally 325 U.S. 212 (1945).

19. Nation, *supra* note 4, at 383 (explaining that granting the injunction under those circumstances would be completely unjustified by the long history of equity jurisprudence).

20. *DeBeers*, 325 U.S. at 212.

21. See generally 25 F.3d 1467 (9th Cir. 1994).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Nation, *supra* note 4, at 382 (explaining that the asset freeze was a provisional remedy to giving final relief).

27. *Id.* at 383.

where equitable relief is not sought, the “sweeping effect” of concern in the *DeBeers* case, could be avoided.²⁸

So we have seen that the United States courts may grant preliminary injunctions outside of suits asking for equitable relief, and we saw its denial where the funds sought to be frozen, had nothing to do with the final relief or decree sought. On the other hand, this shows a rather inconsistent if not unpredictable argument and trend between the different courts of the American legal system. It seems unlikely that a plaintiff could rely on a strong precedent for expecting the preliminary injunction to serve as protection in freezing a defendant’s assets.

In the case of *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, (1999), the plaintiff, an investment company, bought \$75 million in unsecured notes from a Mexican company, who along with four other subsidiaries named as defendants in the suit, guaranteed the notes.²⁹ The plaintiff alleged that the defendant was insolvent and claimed that it was giving its Mexican creditors preference on the notes, which frustrated any judgment the plaintiff could obtain in the United States.³⁰ The plaintiff sued for the amount of the notes and to obtain a preliminary injunction to prevent the defendant from removing its assets.³¹ The Court held that granting the preliminary injunction to freeze the defendant’s assets was beyond the district court’s equitable authority, and since the plaintiff sought a legal remedy based on a breach of contract and not an equitable remedy based on an existing statute, the preliminary injunction was inappropriate.³² Furthermore, the Court held that a United States district court could only award a preliminary injunction if it provides a remedy that would have been available from the English Court of Chancery at the time the United States Constitution was adopted in 1787.³³

To complicate matters further, the injunction requires that the plaintiff meet several requirements, such as showing that they will suffer irreparable injury if the injunction is not issued, which is a requirement that is normally not satisfied and leads to a denial of the granting of the injunction.³⁴

These two remedies, while providing some protection to a plaintiff, do not give enough coverage and foster more uncertainty than assurance, because the preliminary injunction will be denied if it targets a legal remedy, and the pre-judgment attachment will not be granted if the plaintiff’s claim falls outside of

28. *Id.*

29. *See generally* 143 F.3d 688 (2nd Cir. 1998).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* (arguing that the English Court of Chancery is the foundation of the American legal system).

34. Johansson, *supra* note 1, at 1100.

the statute's scope.³⁵ The Mareva injunction applies to claims that these two remedies cannot.³⁶

Our constitution requires that notice and a hearing be given before our property or assets may be seized by way of these procedures.³⁷ Yet it is quite disturbing to think that the notice given in order to comply with due process, is what would allow a defendant to remove his assets from the jurisdiction of the court.

IV. THE TEMPORARY RESTRAINING ORDER (TRO)

There is perhaps one choice available to a plaintiff that can solve the problem of having to give notice to the defendant that his assets are being seized, which has the effect of giving him time and a warning that he should remove them if he wants to make himself judgment proof.³⁸ Rule 65 of the Federal Rules of Civil Procedure authorizes United States district courts to issue a temporary restraining order to freeze assets when there is a threat of dissipation of assets.³⁹ The importance of the TRO for the purposes of this paper, is that it is sometimes granted to a plaintiff without giving notice to the defendant.⁴⁰ A TRO is issued on an *ex parte* basis, as is the Mareva injunction, and it will be issued without written or oral notice to the adverse party only if: immediate and irreparable harm is likely to result, and the attorney certifies the efforts made to give notice or reasons supporting why notice should not be required.⁴¹ However, the courts make every effort to give notice to the defendant, and they also require that the plaintiff show that he will suffer irreparable injury if the order is not issued, a requirement that is not commonly met, as well as requiring a hearing on the issue, at which time the TRO's effect ends.⁴²

It seems as if the TRO, which can be seen as the harshest and most extreme order that can be issued against a defendant, defeats its own purpose, because in most cases it exhausts all possible avenues in order to give notice to the defendant, thus eliminating the element of surprise that one would hope and imagine it was designed to accomplish. Moreover, when we look at the fact that the plaintiff has to meet several strict requirements in order to receive the grant, the TRO seems to be an unattainable remedy. As we will see later in this paper,

35. *Id.*

36. *Id.*

37. Alexander, III, *supra* note 11, at 525.

38. *Id.* at 526.

39. *Id.*

40. ROHR, *supra* note 10, at 26.

41. *Id.*

42. Alexander, III, *supra* note 11, at 526 (explaining that a hearing is required after the TRO is issued to determine if it should remain in effect).

the TRO has some similarities with the Mareva injunction, but we will find that the Mareva Injunction has a much more potent and restrictive effect on a deceitful defendant.

V. THE MAREVA INJUNCTION DEFINED

The Mareva Injunction is an interlocutory order generally obtained in an ex parte hearing before a lawsuit is filed, but it may be obtained at any stage of the proceedings and in aid of execution.⁴³ It has been referred to by many commentators as a creditor's legal "nuclear weapon."⁴⁴ The term ex parte means, without notice to or argument from the adverse party or anyone adversely affected.⁴⁵ The reason why an ex parte application is made, is that the order would be ineffective if the defendant knew about its existence and disposed of his assets before the injunction could be granted.⁴⁶ This is important in the analysis because the element of surprise and lack of notice to a dishonest defendant, is what this paper attempts to highlight in the application of the Mareva injunction. It restrains a defendant from disposing of his assets where there is a real risk or danger that he may dispose of them to frustrate any judgment that the court might award.⁴⁷ So foreign defendants will not have a chance to remove or dissipate their assets from the jurisdiction in an attempt to avoid a judgment from the court.⁴⁸ Likewise, if a foreign debtor has assets in the United States that it is seeking to remove for the benefit of creditors in its home country, the Mareva injunction is an invaluable weapon to prevent this from happening.⁴⁹

A. Origin

In 1975, in the case of *Nippon Yusen Kaisha v. Karageorgis*, 1 W.L.R. 1093 (Eng. C.A. 1975), the English Court of Appeals reversed a High Court judge's ruling that denied the plaintiff's application for an emergency injunction, thus giving rise to the first grant of an injunction with the aim of preventing a defendant from disposing of his property in lieu of a judgment in

43. David L. Zicherman, *The Use of Pre-Judgment Attachments and Temporary Injunctions in International Commercial Arbitration Proceedings: A Comparison Analysis of the British and American Approaches*, 50 U. PITT. L. REV. 667, 668-669 (1989).

44. Nation, *supra* note 4, at 399.

45. BLACK'S LAW DICTIONARY, *supra* note 6, at 597.

46. Nation, *supra* note 4, at 400.

47. *Id.* at 397.

48. Alexander, III, *supra* note 11, at 505.

49. Ronald L. Cohen, *Second Circuit Allows U.S. Creditors To Freeze Foreign Assets*, 11 INT'L. SEC. REG. REP. 14 (1998).

favor of the plaintiff.⁵⁰ The plaintiffs in *Nippon* were ship owners who had issued a writ against defendants, Greek charterers, who failed to pay a certain amount for the use of the plaintiff's ship.⁵¹ At a later point in the proceedings, when the plaintiffs feared that the defendants would remove their assets out of the jurisdiction, they applied *ex parte* for an injunction to restrain the defendant from transferring assets outside of the English jurisdiction, and even though the defendant lacked an effective defense and the plaintiff had clearly shown that the money was owed to him, the absence of case law supporting the request of the injunction resulted in the denial of their application.⁵² Nevertheless, the plaintiffs appealed and were successful when the judge, Lord Denning, held that the High Court could grant an injunction by an interlocutory order in every case where it appeared to be convenient and just, and that if the court failed to grant the injunction in this case, the money owed to the plaintiffs would be transferred out of the jurisdiction and they would encounter difficulty in retrieving any payment whatsoever.⁵³ Even though the *Nippon* case is not the case considered to be the origin of the Mareva Injunction, it certainly signaled the change in practice of the English Courts in granting an emergency injunction to prevent a defendant from dissipating his assets in view of a judgment for the plaintiff.⁵⁴

The case that gives the Mareva injunction its name, *Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A.*, 1975 L. Lloyd's Rep. 509 (Eng. C.A.), dealt with plaintiffs who had chartered their ship, the *Mareva*, to the defendants, who in turn had contracted with the Indian government to deliver phosphate to India.⁵⁵ After delivery of the phosphate, the Indian government deposited its payment to the defendant for the phosphate in a London account, but the defendant defaulted on its last payment for the ship to the plaintiffs, and claimed that it did not have the money to satisfy the debt.⁵⁶ The plaintiff made an *ex parte* application on June 20, 1975 to freeze the account because they feared removal of the \$30,800 owed to them, and Lord Denning, again applying the reasoning from the *Nippon* case and using the Supreme Court of Judicature (Consolidated) Act 1925, granted the injunction.⁵⁷

As we can see from the dates of the aforementioned decisions, the change in English law in terms of granting the injunctions, has been a relatively recent phenomena.⁵⁸ The two cases can be seen as the triggers for the change,

50. See generally 1 W.L.R. 1093 (Eng. C.A. 1975).

51. *Id.*

52. *Id.*

53. *Id.*

54. Alexander, III, *supra* note 11, at 508.

55. See generally 1975 Lloyd's Rep. 509 (Eng. C.A.).

56. *Id.*

57. *Scope of Mareva Injunction*, MAR. NEWSL. (Guardian Law Reports.), Jan. 2000, at 1.

58. James R. Theuer, *Pre-Judgment Restraint of Assets for Claims of Damages: Should the United*

although the latter is the one widely recognized as the origin of the Mareva Injunction.⁵⁹

B. Scope of the Mareva Injunction

A Mareva Injunction may be granted against a defendant or a third party that is holding assets for the defendant.⁶⁰ The subject of a Mareva injunction is any asset in legal or beneficial ownership of the defendant, which is potentially available to an anticipated judgment award.⁶¹ Perhaps a feature of this injunction that makes it even more attractive and favorable than the available United States remedies, is the fact that it can attach to assets either tangible or intangible, personal or realty.⁶² This factor weighs heavily on the Mareva Injunction's utility and scope when we compare it to the shortcomings and limitations of the pre-judgment attachment and preliminary injunction. Moreover, when we consider Lord Denning's reasoning and the Mareva injunction's broad attachment power, it is safe to say that as long as the basis for granting the injunction is reasonable, it will be granted and applied to all types of property regardless of the cause of action or debt owed to the plaintiff.⁶³ We can easily contrast this approach with that of the TRO, which seems to impose more of a barrier on the plaintiff than an available solution.

In terms of jurisdiction, the Mareva injunction will bind a defendant even if he is not domiciled or present within the jurisdiction, and it will specify which assets belonging to the defendant it will cover, and it will only be valid against those assets which are specified.⁶⁴ Its jurisdiction extends to debts and commercial transactions, as well as to any action for damages for breach of contract or tort.⁶⁵

If a plaintiff's claim is for a small sum, the injunction may be limited to that specific amount, but if the claim is significant, the plaintiff will normally make an application to freeze all of the defendant's assets.⁶⁶ However, a defendant will not be deprived of living expenses, so courts will normally allow the defendant to decrease the assets below the amount indicated by the injunction if he needs money for those basic expenses.⁶⁷ It is also not

States Follow England's Lead?, 25 N.C. J. INT'L. & COM. REG. 419, 422 (2000).

59. *Id.* at 425.

60. Zicherman, *supra* note 43, at 675.

61. *Scope of Mareva Injunction*, *supra* note 57, at 2.

62. Alexander, III, *supra* note 11, at 513.

63. *Id.* at 507.

64. Zicherman, *supra* note 43, at 674.

65. *Scope of Mareva Injunction*, *supra* note 57, at 2.

66. *Mareva Injunctions- Uses and Abuses*, NEWSL. (Myers, Fletcher & Gordon, Kingston, Jam.), Dec. 1998, at 2.

67. Zicherman, *supra* note 43, at 676.

uncommon for the defendant himself to apply to the court so that the injunction will allow him to meet ordinary living and business expenses, but this will only be allowed if he has disclosed all of his assets.⁶⁸

The Mareva injunction's scope is far greater than that of an ordinary injunction, but it will only be granted if there is evidence showing that the defendant possesses assets within the court's jurisdiction, or that there is a likelihood of their removal.⁶⁹

It applies on an *in rem* basis, but it is an *in personam* order, and it takes effect from the moment it is pronounced on every asset of the defendant in relation to which it is granted.⁷⁰ The fact that it applies *in rem* in some circumstances, presents complications when it requires the court to have jurisdiction over foreign assets.⁷¹ Nevertheless, there are disclosure orders which require a defendant to reveal all of his assets within or outside of the court's jurisdiction, and they allow the plaintiff to attach assets located in foreign jurisdictions as well to seek enforcement of the judgment.⁷² So this is yet another key factor in favor of the Mareva injunction, because as was mentioned earlier, the prejudgment attachment used in the American legal system requires *in rem* jurisdiction, so a foreign defendant's assets would be untouchable.⁷³

The Mareva injunction does not directly affect third parties, except to the extent that they are not allowed to "aid and abet a breach of its orders."⁷⁴ For example, a bank that is holding a defendant's assets that are the target of the injunction, is not permitted to transfer the defendant's funds or use any of the assets to make payments that would violate the injunction.⁷⁵ A third party could face contempt charges without even being aware that an injunction is in effect.⁷⁶ Every person who has knowledge or notice of the injunction is obliged to do whatever he reasonably can to preserve the assets affected by its terms.⁷⁷ So we see that not only is the need to give notice to the defendant bypassed, but it would also affect others without giving them any type of notice either. I believe that this factor serves as a perfect example of the power and value that the Mareva injunction possesses.

68. *Mareva Injunctions- Uses and Abuses*, *supra* note 66, at 2.

69. *Scope of Mareva Injunction*, *supra* note 57, at 2.

70. *Id.*

71. Johansson, *supra* note 1, at 1096.

72. *Id.*

73. Nation, *supra* note 4, at 399.

74. *Id.*

75. *Id.*

76. *Id.* at 400.

77. *Scope of Mareva Injunction*, *supra* note 57, at 2.

The Mareva injunction can also be issued against a trustee, ordering him to freeze all of the assets and compelling him to provide access to his files to the plaintiff, in order to allow him to modify his complaint if necessary.⁷⁸ However, a plaintiff will almost always apply for an order that would require a defendant to file an affidavit disclosing his assets within a specified time, because many times the plaintiff will not know the amount or nature of the assets held by the defendant.⁷⁹ If the trustee transfers the assets out of the jurisdiction himself, he faces contempt of court charges and can be charged for fraudulent transfer.⁸⁰ In addition, the grant can affect assets that are located within the court's jurisdiction, or they can apply to assets on a worldwide basis.⁸¹

Many countries use the Mareva injunction, and the trend is toward giving it more recognition and use as a tool to protect plaintiffs from insolvent or untrustworthy defendants.⁸² Mareva injunctions have been granted in Australia, New South Wales, Western Australia, the Australian Capital Territories, New Zealand, the Canadian Federal court, the Provincial courts of Ontario, British Columbia, New Brunswick, Nova Scotia, Singapore, Malaysia, and Hong Kong.⁸³ It can also be granted in a jurisdiction that is a party to the Brussels or Lugano conventions, which relate to jurisdiction and judgments.⁸⁴ These conventions recognize the use of the Mareva throughout the European Union.⁸⁵

C. Limits

The Mareva injunction, although wide and sometimes unlimited in scope, does not give the plaintiff a security interest in the defendant's frozen assets prior to a final judgment from the court.⁸⁶ It only serves to freeze the assets until a judgment is reached later in time.⁸⁷ As was mentioned earlier, if a plaintiff's claim is relatively small, the injunction will only freeze as much of the defendant's assets as is necessary to satisfy the plaintiff's claim.⁸⁸ This can

78. F. Bentley Mooney Jr., *The Mareva Injunction*, 13 FBM REP. 4 (2000).

79. *Mareva Injunctions- Uses and Abuses*, *supra* note 66, at 2.

80. Mooney Jr., *supra* note 78, at 1.

81. *Mareva Injunctions- Uses and Abuses*, *supra* note 66, at 1.

82. See *The Long Arm of the Law: International Fraud and Worldwide Mareva Injunctions*, FRAUD. L. UPDATE (ACFI, Can.), Dec. 2001, at 3 (discussing how the increase in international business transactions calls for extended use of the Mareva Injunction).

83. Zicherman, *supra* note 43, at 676.

84. Alexander, III, *supra* note 11, at 528.

85. *Id.*

86. Zicherman, *supra* note 43, at 669.

87. Eric S. Rein, *International Fraud: Freeze, Seize, and Retrieve*, 116 BANKING L.J. 144, 147 (1999).

88. *Mareva Injunctions- Uses and Abuses*, *supra* note 66, at 2.

be seen not only as a limit on the plaintiff and of the injunction's scope, but also as a measure of protection for the defendant.⁸⁹

Another limit imposed on a plaintiff seeking a Mareva injunction, is that if the defendant that he is targeting is either bankrupt or insolvent, he will rank in order of priority with all of the other defendant's creditors; he will not get preference in receiving the defendant's assets.⁹⁰ Furthermore, another one of the limits of the Mareva injunction, which can also be viewed as both a hurdle for the plaintiff and a safeguard for the defendant, is the burden of proof requirement imposed on the plaintiff.⁹¹ The plaintiff must show a "good arguable case", and the factors required of him to meet the burden of proof are conjunctive, thus if he fails to meet just one, the injunction should not be granted.⁹² The plaintiff must fully disclose all matters of which he has knowledge that are material for the judge to know, as well as the grounds for his claim, the amount, and any other particulars regarding his claim against the defendant.⁹³ In addition, the plaintiff should give his reasons for believing that there is a risk of the assets being removed before a final judgment, and his grounds for believing that the defendant has assets within the jurisdiction.⁹⁴ There are several factors used by the courts to determine if there is a risk of removal of assets.⁹⁵ Real risk is present and immediate when the defendant has in the past, removed assets out of the jurisdiction, when the defendant is a foreign business and can easily become judgment proof, and when the defendant's past business dealings show dishonesty.⁹⁶ Finally, the plaintiff must pay a sum of money that works as a bond or security interest in case the injunction is erroneously granted.⁹⁷ These requirements differ from those of the TRO because they are only asking the plaintiff to give some reasons for why the injunction should be granted, he is not being asked to show irreparable injury and to try everything in his power to give notice to the defendant.

Nevertheless, even if the plaintiff has met the burden of proof, there is yet another limit on the injunction's effectiveness that arises after it has been granted, this is the injunction's duration.⁹⁸ The duration of the Mareva injunction is normally between five days to a week, and if the plaintiff wishes

89. *Id.*

90. Nation, *supra* note 4, at 399.

91. Zicherman, *supra* note 43, at 673.

92. *Id.* at 673-74.

93. *Id.*

94. *Id.*

95. Johansson, *supra* note 1, at 1105.

96. *Id.*

97. Zicherman, *supra* note 43, at 673.

98. *Id.* at 675.

to extend it beyond the expiration date, he must give notice to the defendant of his intention to apply for an extension of the injunction.⁹⁹

D. Procedure

The procedural requirements that a plaintiff must meet in order to apply for a Mareva injunction, include all of the requirements previously mentioned to meet the burden of proof, as well as a statement of the plaintiff's claim, an affidavit in support of his claim, and copies of the draft of the order that the plaintiff is requesting the court to issue.¹⁰⁰ The draft of the order includes the terms or parts of the injunction that the plaintiff is applying for, and it is delivered to the court before the hearing.¹⁰¹ Oral arguments then take place based on the documents that were submitted, and the order will be given and become immediately operative upon the judge's approval of the application.¹⁰² In terms of the legal fees that accompany a Mareva injunction, the party that receives the order for the injunction may recover legal fees and costs by filing a motion with the court with an attached affidavit of attorneys' fees and cost.¹⁰³

E. The Worldwide Mareva Injunction

The origin, scope, and development of the Worldwide Mareva injunction differ from the injunction that only affects assets within the jurisdiction.¹⁰⁴ When we consider the amount of business that is conducted today in the international arena, and we take into account how many illegal and corrupt maneuvers accompany those transactions, it would be absurd not to think of extending an asset freeze or Mareva injunction to a defendant's assets that are located in another country. When a court issues a worldwide Mareva injunction, it is not attempting to exercise jurisdiction in foreign territories, instead it is directing the defendant that is subject to its jurisdiction, not to dissipate or transfer his assets wherever they are situated.¹⁰⁵ The order will bind him whether his acts or omissions take place within the jurisdiction or abroad.¹⁰⁶ It was not until the late 1980's that England began to issue Worldwide Mareva injunctions.¹⁰⁷ The Worldwide Mareva was established in the case of *Babanaft Int'L Co S.A. v. Bassatne*, 1990 Ch. 13 (Eng. C.A.), where the court authorized

99. *Id.*

100. Alexander, III, *supra* note 11, at 509.

101. *Id.* at 510.

102. *Id.*

103. *Id.* at 512.

104. *Mareva Injunctions- Uses and Abuses*, *supra* note 66, at 1.

105. *Id.*

106. *Id.*

107. Mooney Jr., *supra* note 78, at 1.

the granting of an order against the defendant otherwise within its jurisdiction, relating to assets that he held overseas.¹⁰⁸ The issue in that case was whether a Mareva injunction could be granted to freeze a defendant's foreign assets so that "notice can be given by the plaintiffs to all and sundry abroad."¹⁰⁹

When foreign assets are involved in the matter, the court will apply a proviso to the order, known as the Babanaft proviso.¹¹⁰ This proviso states that nobody in the foreign jurisdiction will be affected by the order of the injunction until it is declared enforceable by a foreign court, at which point it will only be enforceable to the extent that that they are: a person addressed by the order or, persons subject to the court's jurisdiction who have received notice of the order within the jurisdiction and are able to prevent acts outside the jurisdiction that would assist in a breach of the order.¹¹¹ So a plaintiff that wants a Worldwide Mareva injunction to be issued by the court, must make a further application in the foreign jurisdiction where he believes the defendant's assets are located.¹¹²

The requirements that a plaintiff needs to meet for the Worldwide Mareva injunction are similar to those needed for the basic Mareva injunction.¹¹³ The plaintiff must show a good arguable case on the merits, that there are insufficient assets in England to meet his judgment, that the defendant has foreign assets, and that there is a real risk of disposal of the assets that would frustrate enforcement of the plaintiff's judgment if one were to be obtained.¹¹⁴ It appears that a Worldwide Mareva injunction will only be appropriate where large sums are involved and there is evidence that the defendants are used to moving assets around the world through sophisticated means so that enforcement of the judgment would cause great difficulty to the plaintiff.¹¹⁵

In the case of *Republic of Haiti v. Duvalier*, 1990 Q.B. 202 (Eng. C.A.), the Court upheld the granting of a worldwide Mareva injunction against Jean-Claude Duvalier, his wife, and his mother, that prevented them from transferring their assets, wherever they were located, which represented funds allegedly embezzled from the Republic of Haiti.¹¹⁶ The Haitian government filed suit in France and then sought a restraining order in England, and even though the Duvaliers did not reside in England, the court said that there was jurisdiction to

108. Alexander, III, *supra* note 11, at 520.

109. *Babanaft Int'l Co. S.A. v. Bassame*, 1990 Ch. 13 (Eng. C.A.).

110. Alexander, III, *supra* note 11, at 520.

111. *Id.* at 521.

112. *Id.* at 522.

113. *The Long of Arm of the Law: International Fraud and Worldwide Mareva Injunctions*, *supra* note 82, at 2.

114. Alexander, III, *supra* note 11, at 522.

115. *Id.* at 523.

116. *See generally* 1990 Q.B. 202 (Eng. C.A.).

grant the Mareva injunction pending trial, over assets worldwide.¹¹⁷ The court came to this conclusion because it said that the determining factor was the “plain and admitted intention of the defendants to move their assets out of the reach of courts of law and the vast amounts of money involved,” and the resources and skill that they showed in doing so.¹¹⁸

A case where the United States pursued and resorted to the use of a Mareva injunction, was the case of *FTC v. On Line Communications*.¹¹⁹ This was a landmark case where the United States for the first time, obtained an asset freeze issued by a foreign court and was successful in returning those frozen assets to United States telemarketing fraud victims.¹²⁰ The FTC filed suit against On Line Communications and their hidden principal, but after learning that the principal had transferred assets to the Bahamas, it requested that the Department of Justice’s Office of Foreign Litigation bring an action in the Bahamian court for the purpose of freezing the assets and returning them to the United States.¹²¹ The Bahamian court issued a Mareva injunction that froze the principal’s assets pending inclusion of the Bahamas proceeding.¹²²

However, even though the United States was successful in protecting those assets, it had to initiate suit in the Bahamas by way of its foreign litigation office, and the Bahamian court was the one that issued the Mareva injunction.¹²³ Had the United States adopted the Mareva injunction as a remedy available in its own courts, it could have been operational earlier, and they would have resolved the problem in a more time-efficient manner. The FTC could have applied for a Mareva in the United States when it made its initial complaint, and then all it would have had to do to have it enforced in the Bahamian court was to make a further application to that court. Even though the freeze was successful, it required extra steps that would not have been necessary had the United States already possessed the Mareva as a possible remedy in the first place.

If the Mareva injunction’s utility is valuable to a plaintiff when he is pursuing a defendant with assets located inside the court’s jurisdiction, then it only multiplies when its reach is extended on a global basis when the defendant’s assets are located in another country. Imagine someone initiating a lawsuit in the United States, against a company or individual who has enough money to satisfy a judgment against him, but his money is not only likely to be

117. *Id.*

118. *Id.*

119. *See generally Bahamas Freezes, Confiscates and Returns Assets to Fraud Victims*, 13 INT’L ENFORCEMENT L. REP. 1 (1997).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

transferred so as to render it untouchable by the court, but it is located outside of the United States. Next, consider what the United States remedies could accomplish for the plaintiff. As we saw earlier, the pre-judgment attachment's requirement of *in rem* jurisdiction, does not allow it to have power over the money. Furthermore, the preliminary injunction would be useless because the plaintiff is looking for monetary relief, which renders the preliminary injunction completely ineffective. In contrast, when we apply the Worldwide Mareva Injunction, we see that not only would the plaintiff be able to freeze the foreign assets, but most importantly, he would be able to do so without having to give any type of notice to the defendant himself.

After September 11th, when examining the topic of asset freezing, it is necessary to briefly mention the United States effort in freezing the assets of corporations suspected of financing terrorist groups. Even these types of asset freezes by the United States, in a time of heightened national security, have faced some resistance and close scrutiny.¹²⁴ Lawsuits alleging violation of due process and equal protection under the Fifth Amendment because the government's functions were not exercised with a proper hearing and other processes, are not uncommon.¹²⁵ However, freezing the assets of suspected terrorist groups, while deserving mention, differs from the analysis of this paper because they tend to have a degree of governmental immunity and are powered by executive orders and national security concerns.¹²⁶

VI. CONCLUSION

There are numerous reasons why the United States might want to resist adopting the Mareva injunction. Perhaps they do not want to go against a strong precedent, or because the principles of due process would be offended by its adoption. Nevertheless, the service and protection that they would be providing for a plaintiff, could in some instances, justify such an effect.

When discussing the Mareva injunction, we are usually considering its use when an American plaintiff is dealing with a foreign defendant in possession of foreign assets, or assets that have the potential to be removed to another country. So the person who requires the protection here is the plaintiff. If not, what is to stop the defendant from committing the same act in the future? The second that the court gives the defendant notice of a proceeding against him, the plaintiff's chances of recovery will have decreased substantially. This paper does not seek to bypass or attack the need for notice that the Constitution calls

124. See generally Bruce Zagaris, *Counter-Terrorism Financial Enforcement*, 18 INT'L ENFORCEMENT L. REP. 5 (2002).

125. *Id.*

126. See generally *Anti-Terrorism and Economic Sanctions: U.S. Orders Freezing of Assets of Suspected Terrorist Groups*, 11 INT'L ENFORCEMENT L. REP. 3 (1995).

for, but when we consider a situation from an international perspective, we need to realize that the dealings between individuals and companies and the potential for a defendant making not only himself but his assets disappear, calls for different and more severe measures. It seems fair to say that the person being protected here is an American plaintiff, and his own Constitution acting as the source of the problem by requiring the very notice that gives the defendant the chance to elude a judgment against him, is completely unjustified.

A plaintiff dealing with a defendant in the international business arena needs to feel that there is a sure and effective remedy for him in the event that he has to initiate a lawsuit. As we have seen from the analysis of the American legal system, the plaintiff will face more uncertainty than peace of mind. Many of the requirements that need to be met to obtain either the Mareva injunction or any one of the American remedies, share some similarities as well as some differences. Nevertheless, the fact that notice is not required, as well as the Mareva injunction's ability to apply on a worldwide basis, thereby surpassing the jurisdictional shortcomings of the American remedies, marks the difference that separates a secure plaintiff from one that will be left empty-handed.