Behind the Times: Florida's Failure to Recognize Insolvency as Satisfying the Inadequate Remedy at Law Requirement for Injunctive Relief

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I. Introduction

The foundation of equity is based on the principles "of conscience and what is fair and just."[1] Generally, a court should balance equities and make an effort to "avoid harsh results that strict application of law could inflict on a blameless party."[2] Thus, with these enunciated principles of equity, should a plaintiff with a clear right to recovery not have an equitable remedy available to ensure the assets the plaintiff would recover are not dissipated prior to judgment? With the flexibility of equity, one would assume where there is a right, there would exist a remedy, as is the maxim of equity, *ubi jus ibi remedium*.[3] Unfortunately, Florida law fails to follow the majority approach in this regard.

To illustrate this dilemma, I present the following hypothetical: *P* is prudently operating a motor vehicle on the roads of the State of Florida. As *P* slows at a red light, a vehicle driven by *D1* strikes the rear of *P*'s car, causing substantial injury to *P*. *D1* is uninsured; however, *D1* was leaving a job site performing work for *D2*, a company. *P* files suit against *D1* and *D2*. *D2* denies liability on the grounds that *D1* was an independent contractor of *D2*, thus no liability under respondeat superior. *D1*, familiar with the presumption of negligence under Florida law in cases involving rear-end collisions at traffic lights, admits

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1 David v. Sun Fed. Sav. & Loan Ass'n, 461 So. 2d 93, 97 (Fla. 1984) (Overton, J., dissenting).

2 Louis W. Epstein Family P'ship v. Kmart Corp., 13 F.3d 762, 770 (3d Cir. 1994).

3 Carrier v. Vermeulen (*In re* Vermeulen), 122 So. 2d 318, 322 (Fla. Dist. Ct. App. 1960).

liability.[4] Shortly after filing suit, *P* discovers that *D1* is the beneficiary of the estate of a family member and stands to recover $10,000, which will be distributed in 30 days. *D1* has also admitted, and it is undisputed that he is insolvent, has no insurance, and is no longer able to work due to a subsequent disability. It is also determined that the money *D1* inherits will be quickly dissipated. At this time, *P*'s medical bills alone exceed $30,000. *P* cannot get a money damage award against *D1*, as the amount of the damages are not yet determined and will not be resolved until such time as liability is resolved against *D2*. *P* is, however, concerned that the only amount of money recoverable against *D1*, the $10,000, will dissipate prior to entry of a judgment against him. As such, *P* files a motion for temporary injunction against the estate of *D1*'s family member, attempting to enjoin the estate from distributing funds to *D1*. What result? Under principles of fairness and justice, it would seem that *P*, the blameless party, should have a remedy against *D1*. Unfortunately, that is not the case.

II. Florida's Current Inadequate Remedy at Law Jurisprudence

Under Florida law, for an injunction to be granted four criteria must be met: "(1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) consideration of the public interest."[5] Once all four of the criteria are met, the court must comply with the Florida Rules of Civil Procedure and specify "the reasons for entry . . . [and] describe in reasonable detail the act or acts restrained without reference to a pleading or another document . . . ."[6]

Applying the four criteria test, *P* can easily prove element three, "substantial likelihood of success on the merits."[7] Indeed, in the hypothetical above, *D1* in fact admitted liability, and the purely economic

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[4] Bellere v. Madsen, 114 So. 2d 619, 621 (Fla. 1959) ("[W]here a defendant runs into the rear of [a] plaintiff's car while [the] plaintiff is stopped for a traffic light or at an intersection, there is a presumption of negligence of the defendant . . . .").

[5] Dragomirecky v. Town of Ponce Inlet, 882 So. 2d 495, 497 (Fla. Dist. Ct. App. 2004); *accord* Santos v. Tampa Med. Supply, 857 So. 2d 315, 316 (Fla. Dist. Ct. App. 2003).

[6] Fla. R. Civ. P. 1.610(c) (2008).

[7] *See Dragomirecky*, 882 So. 2d at 497.

medical bill damages are in excess of the $10,000. *P* is seeking to prohibit the distribution of $10,000 to *D1*. Likewise, element four is not a hurdle to *P*'s motion. Florida courts defined the public interest element as being met when the issuance of the injunction will not disserve the public interest.[8] There is nothing in the above hypothetical to suggest the injunction will disserve the public interest.

As such, the fulcrum of the determination of whether *P* should be entitled to injunctive relief is whether *P* has a likelihood of irreparable harm and whether there exists the unavailability of an adequate remedy at law. To that end, these two elements are indistinguishable in any real sense.[9] As Professor Douglas Laycock notes:

> [t]he irreparable injury rule has two formulations. Equity will act only to prevent irreparable injury, and equity will act only if there is no adequate legal remedy. The two formulations are equivalent; what makes an injury irreparable is that no other remedy can repair it. Attempts to distinguish the two formulations have produced no common usage.[10]

Observing the inadequate legal remedy requirement, it is important to note that the legal remedies that have a nexus to the injunctive relief sought are inapplicable. Florida provides for a writ of garnishment.[11] However, the writ of garnishment is only applicable after a judgment is entered against the garnishee in a tort setting.[12] In addition, Florida offers a writ of attachment.[13] While the writ of attachment is

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[8] *See* NRD Inv., Inc. v. Velazquez, 976 So. 2d 1, 3 (Fla. Dist. Ct. App. 2007); Shaw v. Tampa Elec. Co., 949 So. 2d 1066, 1069 (Fla. Dist. Ct. App. 2007); Fla. E. Coast Ry. Co. v. Taylor, 47 So. 345, 346 (Fla. 1908); DiChristopher v. Bd. of County Comm'rs, 908 So. 2d 492, 497 (Fla. Dist. Ct. App. 2005); Fla. Land Co. v. Orange County, 418 So. 2d 370, 372 (Fla. Dist. Ct. App. 1982).

[9] Lewis v. S.S. Baune, 534 F.2d 1115, 1124 (5th Cir. 1976) ("Often times the concepts of 'irreparable injury' and 'no adequate remedy at law' are indistinguishable [in the context of a permanent injunction].").

[10] Douglas Laycock, *The Death of the Irreparable Injury Rule,* 103 HARV. L. REV. 687, 694 (1990).

[11] FLA. STAT. § 77.01 (2004).

[12] *See* FLA. STAT. § 77.02 (2004) ("Before judgment against a defendant no writ of garnishment shall issue in any action sounding in tort.").

[13] FLA. STAT. § 76.01 (2004).

available prejudgment, it is only applicable to "goods and chattels, lands and tenements" and not to money.[14] In this context, the logical argument is that *P* has no adequate remedy at law, and thus will suffer irreparable harm if *D1*'s limited and finite assets are dissipated prior to *P* obtaining what is, at this point, an inevitable judgment against *D1* in excess of the amount *P* seeks to enjoin the estate from distributing.

In general principles of equity, to invoke the equitable jurisdiction of a court to seek any equitable remedy, a real danger of irreparable injury and inadequacy of legal remedies must exist.[15] Therefore, there is no logical reason to distinguish between the considerations that would satisfy the irreparable injury/inadequacy of legal remedy requirements for one equitable remedy, while not satisfying the elements to obtain an alternate equitable remedy, in the form of an injunction. To this end, Florida courts hold insolvency to meet the inadequate remedy at law requirement for some equitable relief sought outside the context of an injunction.[16]

It would seem, then, the analysis would be complete and *P* would be entitled to injunctive relief. Notwithstanding the use of insolvency to satisfy the irreparable injury/inadequacy of legal remedy requirements for injunctive relief, Florida courts took an inconsistent approach when faced with a plaintiff seeking to enjoin an insolvent defendant from dissipating assets. Florida courts explicitly held that the

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[14] Fine v. Fine, 400 So. 2d 1254, 1255 (Fla. Dist. Ct. App. 1981).

[15] Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 57 (1975); Sampson v. Murray, 415 U.S. 61, 88 (1974); Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 506-07 (1959).

[16] Buffalo Tank Corp. v. Envtl. Control Equip., Inc., 544 So. 2d 1037, 1039 (Fla. Dist. Ct. App. 1989) ("Buffalo Tank failed to allege the absence of an adequate remedy at law against ECE. In order to plead an inadequate remedy at law, Buffalo Tank had to allege that ECE was insolvent or that Buffalo Tank's legal remedy against ECE was otherwise insufficient."); Architectonics, Inc. v. Salem-Am. Ventures, Inc., 350 So. 2d 581, 584 (Fla. Dist. Ct. App. 1977) ("The count for an equitable lien was also dismissed with prejudice because Architectonics failed to allege the inadequacy of a remedy at law, as where the obligor is insolvent."); Lewinson v. Shaw, 56 So. 2d 449, 450 (Fla. 1952) (noting that insolvency of appellees is a consideration of inadequate remedy at law); Hunter v. Bradford, 3 Fla. 269, 290 (Fla. 1850) ("[W]e are clearly of opinion that insolvency of the vendor is good ground for equitable interposition, upon the principle that Chancery will lend its aid, whenever there is not a full, complete, or adequate remedy at law.").

insolvency of a defendant does not satisfy the inadequate remedy at law requirement for injunctive relief.[17] In addition, Florida courts held that the dissipation of assets from an account does not constitute irreparable harm because the loss can be compensated by money damages.[18] As one Florida court put it, "[t]he test of the 'inadequacy of [a] remedy at law is whether a judgment can be obtained, not whether, once obtained, it will be collectible.'"[19] Interestingly, these decisions do not attempt to reconcile the use of insolvency to satisfy the inadequate remedy at law element in the context of other equitable remedies. Indeed, Florida courts held that a party is entitled to a remedy of money damages, which does not become inadequate, merely because these damages will be uncollectible.[20]

What is left, then, is a Florida equity jurisprudence that is inconsistent with the holdings of Florida courts and which does not provide equitable relief to an innocent party. Florida court decisions which hold that insolvency is not adequate to satisfy the inadequate remedy at law requirement have done so, at least in part, based on a 1917 Florida Supreme Court decision, *Tampa & G.C.R. Co. v. Mulhern*.[21] The *Tampa & G.C.R. Co.* Court held:

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[17] *See* Briceño v. Bryden Inv., Ltd., 973 So. 2d 614, 616 (Fla. Dist. Ct. App. 2008) ("In Florida, an injunction cannot be entered to prevent a party from using or disposing of his assets prior to the conclusion of a legal action."); Pianeta Miami, Inc. v. Lieberman, 949 So. 2d 215, 218 (Fla. Dist. Ct. App. 2006) (holding that a defendant leaving the country, thereby making his assets unavailable, did not make an injunction appropriate); Weinstein v. Aisenberg, 758 So. 2d 705, 706 (Fla. Dist. Ct. App. 2000) ("Even where the party seeking injunctive relief alleges that the opposing party may dissipate bank assets, . . . injunctive relief is improper."); Lawhon v. Mason, 611 So. 2d 1367, 1368 (Fla. Dist. Ct. App. 1993) ("An injunction cannot be used to enforce money damages or prevent a party from disposing of assets prior to the conclusion of an action at law."); Konover Realty Assocs. v. Mladen, 511 So. 2d 705, 706 (Fla. Dist. Ct. App. 1987) (holding a request for an injunction is not affected by the claim that recovery of money damages "may be made difficult by the dissipation . . . of the debtor's assets").

[18] Hiles v. Auto Bahn Fed'n, Inc., 498 So. 2d 997, 998 (Fla. Dist. Ct. App. 1986); *see* Digaeteno v. Perotti, 374 So. 2d 1015, 1016 (Fla. Dist. Ct. App. 1979); Adjmi v. Pankonin, 126 So. 2d 153, 154-55 (Fla. Dist. Ct. App. 1961).

[19] *Weinstein*, 758 So. 2d at 708 (Gross, J., concurring) (citing Mary Dee's, Inc. v. Tartamella, 492 So. 2d 815, 816 (Fla. Dist. Ct. App. 1986)).

[20] *Id.*; *Hiles*, 498 So. 2d at 999.

[21] Tampa & G.C.R. Co. v. Mulhern, 74 So. 297 (Fla. 1917).

> The inadequacy of a remedy at law to produce money is not the test of the applicability of the rule. All remedies, whether at law or in equity, frequently fail to do that; and to make that the test of equity jurisdiction would be substituting the result of a proceeding for the proceeding which is invoked to produce the result. The true test is, could a judgment be obtained in a proceeding at law, and not, would the judgment procure pecuniary compensation.[22]

Much of Florida's jurisprudence in this area derives from this decision, which predates Florida's merger of the courts of equity and the courts of law.[23] Prior to the merger, a court had to determine whether or not an action sought damages or other legal remedy as opposed to an equitable remedy.[24] A plaintiff was required to plead and prove "some substantial ground of equitable jurisdiction . . . ."[25] If a plaintiff failed to plead and prove the basis for equitable jurisdiction, "a court of equity [would] not retain jurisdiction and grant a purely legal remedy."[26] Today, following the merger of the courts of equity and law, Florida courts should revisit whether a strict distinction between an action for an equitable remedy and a legal remedy is necessary.[27] It seems appropriate, in the interests of justice and equity, for a Florida

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[22] *Id.* at 299.

[23] *Weinstein*, 758 So. 2d at 709 n.1 (Gross, J., concurring) (" 'In 1967, Florida adopted rules of civil procedure which gave the circuit courts jurisdiction to hear cases in which counts at law and counts in equity were pled in the same complaint as alternative grounds for relief. *In re* Florida Rules of Civil Procedure 1967 Revision, 187 So. 2d 598, 600 (Fla. 1966); Ch. 67-254, Laws of Fla.; Fla. R. Civ. P. 1.040, 1.110(g).' Billian v. Mobil Corp., 710 So. 2d 984, 991 (Fla. Dist. Ct. App. 1998), *rev. denied*, 725 So. 2d 1109 (Fla. 1998). Prior to that time Florida's courts of law were separate from its courts of equity.").

[24] *See generally* Ramsey v. Lovett, 89 So. 2d 669, 670 (Fla. 1956).

[25] *Id.*

[26] *Id.* (citing Brass v. Reed, 64 So. 2d 646, 649 (Fla. 1953); Norris v. Eikenberry, 137 So. 128, 135 (Fla. 1931); Willis v. Fowler, 136 So. 358, 367 (Fla. 1931); Gentry-Futch Co. v. Gentry, 106 So. 473, 476 (Fla. 1925)).

[27] *Weinstein*, 758 So. 2d at 709 (Gross, J., concurring) ("With the merger of the law and equity courts, the historical reasons for equity's deference to common law courts and remedies disappeared." (citing Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 WASH. L. REV. 257, 319 (1992))).

court to issue an equitable injunction to preserve the effectiveness of a legal remedy. As Judge Robert Gross of the Fourth District Court of Appeal noted:

> [A] temporary injunction may issue where the plaintiff has proven a demonstrable risk that the defendant will transfer, hide, or dissipate her assets, even if the plaintiff's claim is based on an action at law. . . . Florida's preference for legal remedies over equitable ones no longer serves any useful purpose.[28]

III. The Majority View of Insolvency Satisfying the Inadequate Remedy at Law Element for Injunctive Relief

Consistent with Judge Gross's view, the majority of federal courts recognize that an injunction can be issued, assuming the other elements are met, upon a showing that the defendant is insolvent and/or will dissipate any assets available to satisfy a judgment.[29] In *Microsoft*

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[28] *Id.* at 711-12.

[29] *See* Hilao v. Estate of Marcos (*In re* Estate of Ferdinand Marcos, Human Rights Litigation), 25 F.3d 1467, 1480 (9th Cir. 1994) ("We join the majority of circuits in concluding that a district court has authority to issue a preliminary injunction where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant or that defendant has engaged in a pattern of secreting or dissipating assets to avoid judgment."); United States *ex rel.* Taxpayers Against Fraud v. Singer Co., 889 F.2d 1327, 1330 & n.15 (4th Cir. 1989) (The court held a preliminary injunction preventing dissipation of assets was permitted where plaintiffs alleged that defendant was insolvent and where its assets were in danger of dissipation and depletion. Defendant's argument "that the government had to use bankruptcy or attachment proceedings under state law . . ." was inappropriate because it construed "too narrowly the Supreme Court's approval of the exercise of general equitable power to protect a plaintiff's right to recovery." (citing Deckert v. Independence Shares Corp., 311 U.S. 282, 285 (1940))); Airlines Reporting Corp. v. Barry, 825 F.2d 1220, 1227 (8th Cir. 1987) ("[In a civil RICO, fraud, and conversion case] [t]he authority of a trial court to issue a preliminary injunction to ensure the preservation of an adequate remedy is well established." Plaintiff demonstrated that the defendants would not satisfy an award of damages and was "entitled to a preliminary injunction to protect its remedy."); Tri-State Generation & Transmission Ass'n, v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986) (finding a preliminary injunction was warranted where irreparable harm would result from the inability to collect a money judgment); Feit & Drexler, Inc.v. Drexler (*In re* Feit &

Corp. v. U- Top Printing Corp., Microsoft sued U- Top claiming that U- Top "manufactur[ed] and trad[ed] illegal copies of MS-DOS 5.0 and Windows operating system software."[30] Microsoft petitioned for, and the district court granted, an injunction effectively freezing U- Top's assets.[31] U- Top appealed the issuance of the injunction.[32] The Eleventh Circuit Court of Appeals affirmed the issuance of the injunction due to the district court's finding that "U- Top had attempted to secrete or dissipate assets, based on the disappearance of $1.89 million from a Hong Kong bank account, unauthorized draws on other bank accounts, and U- Top's continuing refusal to comply with the court's order to provide an accounting of its assets."[33] The Court specifically noted, "[a] district court has authority to issue a preliminary injunction where

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Drexler, Inc.), 760 F.2d 406, 416 (2d Cir. 1985) ("[E]ven where the ultimate relief sought is money damages, federal courts have found preliminary injunctions appropriate where it has been shown that the defendant intended to frustrate any judgment on the merits by transfer[ring its assets] out of the jurisdiction. . . . [T]his is an appropriate case for the issuance of injunctive relief to prevent [the defendant] from making uncollectible any judgment . . . .") (second alteration in original) (citations omitted) (internal quotation marks omitted); Foltz v. U.S. News & World Report, 760 F.2d 1300, 1309 (D.C. Cir. 1985) ("[A]n equitable remedy designed to freeze the *status quo* . . . would be entirely in keeping with the principles that undergird equity jurisprudence."); Cent. States, Se. & Sw. Areas Pension Fund v. Jack Cole-Dixie Highway Co., 642 F.2d 1122, 1123 (8th Cir. 1981) (holding that injury may be irreparable if defendants will be financially unable to pay damages), *aff'g* 511 F. Supp. 38, 43 (D. Minn. 1980). *But see* Mitsubishi Int'l Corp. v. Cardinal Textile Sales, 14 F.3d 1507, 1520 (11th Cir. 1994) (recharacterizing preliminary injunction freezing assets to preserve judgment as writ of attachment, for which state law did not provide authority); Dixie Carriers, Inc. v. Channel Fueling Serv., Inc. (*In re* Fredeman Litigation), 843 F.2d 821, 824 (5th Cir. 1988) ("The general federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment."). It should be noted, however, that the Fifth Circuit Court of Appeals' jurisprudence in this area is inconsistent. *See, e.g.*, Fed. Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 560 n.1 (5th Cir. 1987) ("We are unwilling to say that *no* circumstances could support an injunction to secure a legal remedy. . . . [D]ifficulty in collecting a damage judgment may support a claim of irreparable injury.") (internal quotation marks omitted).

30 Microsoft Corp. v. U- Top Printing Corp., No. 93-16048, 1995 WL 7950, at *1 (11th Cir. Jan. 9, 1995).

31 *Id.*

32 *Id.*

33 *Id.*

the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant or that defendant has engaged in a pattern of secreting or dissipating assets to avoid judgment."[34] Consistent with this, the United States District Court for the Central District of California looked at the insolvency of a defendant as a factor to consider in determining whether the inadequate remedy at law element was met for the issuance of an injunction.[35] Likewise, Judge Richard Posner, writing for the Seventh Circuit Court of Appeals, noted that a damages remedy is inadequate where "[d]amages may be unobtainable from the defendant because he may become insolvent before a final judgment can be entered and collected."[36] The majority of federal circuit courts reached similar conclusions.[37]

Various state courts support the view that insolvency of a defendant satisfies the inadequate remedy at law element for the issuance of an injunction.[38] A federal district court in New York and the South Dakota Supreme Court appeared to take an alternate view.[39] Moreover,

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[34] *Id.* (quoting Hilao v. Estate of Marcos (*In re* Estate of Ferdinand Marcos, Human Rights Litigation), 25 F.3d 1467, 1480 (9th Cir. 1994)).

[35] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197, 1219-20 (C.D. Cal. 2007).

[36] Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 386 (7th Cir. 1984).

[37] *See* cases cited *supra* note 29.

[38] *See* Jay County Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, 692 N.E.2d 905, 910 (Ind. Ct. App. 1998) (holding that plaintiffs are irreparably harmed when unable to collect a damages judgment; thus, a preliminary injunction against dissipation was proper); Van Loan v. Van Loan, 895 P.2d 614, 618 (Mont. 1995) ("If [a defendant] disperses his assets, rendering a judgment against him worthless, [the plaintiff] will suffer irreparable injury absent the issuance of a preliminary injunction."); Tanguy v. Laux, 259 S.W.3d 851, 857 n.5 (Tex. App. 2008) (citing Tel. Equip. Network, Inc. v. TA/Westchase Place, Ltd., 80 S.W.3d 601, 611 (Tex. App. 2002)).

[39] *See* Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 86 (W.D.N.Y. 1982) ("It is questionable whether the sort of harm plaintiff points to—frustration of enforcement of a money judgment—can ever constitute irreparable harm for purposes of preliminary injunctive relief, absent specific statutory authorization . . . ."); Dacy v. Gors, 471 N.W.2d 576, 579 n.2, 580 (S.D. 1991) (finding no abuse of discretion in the trial judge's decision to not grant preliminary injunction because the defendant was not disposing of his assets to defraud creditors, but rather to defraud "persons seeking money damages in a tort action.").

two states, Delaware and New Jersey, take an intermediate view.[40] The Delaware approach, previously adopted by New Jersey, recognizes that equity will intervene when a defendant appears unlikely to be able to satisfy a money judgment, as the inability to respond to the judgment "negates the adequacy of the legal remedy."[41] However, the court held that inability to satisfy a judgment in and of itself does not provide a basis for invoking jurisdiction of equity.[42] There must exist "an independent jurisdictional basis, apart from the insolvency itself, for equity to intervene."[43] The Pennsylvania Supreme Court appeared to apply this same test as far back as 1860.[44] Even with the intermediate approach of Delaware, New Jersey, and Pennsylvania, Florida's view, as recognized by the New Jersey Superior Court, is very much in the minority.[45] When compared to other jurisdictions, Florida represents the far end of the spectrum in its refusal to recognize the realities that a money judgment is only an adequate remedy if it is collectible.[46]

Several prominent scholars wrote in this area and support the use of insolvency of a defendant as satisfying the inadequate remedy at law element. Professor Laycock logically noted that "[d]amages are no remedy at all if they cannot be collected, and most courts sensibly conclude that a damage judgment against an insolvent defendant is an inad-

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40 E.I. Du Pont de Nemours & Co. v. HEM Research, Inc., 576 A.2d 635, 641 (Del. Ch. 1989); Del. River & Bay Auth. v. York Hunter Constr., Inc., 781 A.2d 1126, 1129 (N.J. Super. Ct. Ch. Div. 2001).

41 *E.I. Du Pont de Nemours & Co.*, 576 A.2d at 641.

42 *Id.*

43 *Id.*

44 Heilman v. Union Canal Co., 37 Pa. 100 (Pa. 1860) ("It is not intended here to say that insolvency is never a consideration moving a chancellor. It frequently does, but not alone. The equitable remedy must exist independently.").

45 *See* Del. River & Bay Auth., 781 A.2d at 1128.

46 *See id.* ("Decisions from other jurisdictions cover the spectrum of possible resolutions. Florida, for example, holds that irreparable harm is determined without reference to the ultimate collection of a money judgment. The position is stated succinctly in Mary Dee's, Inc. v. Tartamella, 492 So. 2d 815, 816 (Fla. 4th DCA 1986): 'We agree with the defendants that the plaintiffs had an adequate remedy at law because they could obtain a money judgment against the defendants. The test of inadequacy of remedy at law is whether a judgment can be obtained, not whether, once obtained, it will be collectible. *See* St. Lawrence Company v. Alkow Realty, 453 So. 2d 514 (Fla. 4th DCA 1984).'").

equate remedy."[47] Likewise, Professor Rhonda Wasserman wrote extensively on this issue in her article *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*.[48] Judge Gross relied heavily upon Professor Wasserman's article in his concurring opinion in *Weinstein v. Aisenberg*.[49] Professor Wasserman points out that " 'in cases in which the plaintiff sues to collect money damages and can demonstrate that the defendant is about to dissipate her assets to frustrate the potential money judgment,' the plaintiff's harm should be considered irreparable," which is echoed by Judge Gross.[50] This view is also supported by the Restatement (Second) of Torts.[51] The Restatement provides that "[t]he relative adequacy of the damage remedy for tort as compared with the remedy of injunction, depends, insofar as its compensatory function is concerned, upon . . . the collectibility of the judgment . . . ."[52] The comment to this section of the Restatement advises that "[t]o the extent that the damages awarded cannot be realized upon execution, the damage remedy is proportionately inadequate. Therefore, in appraising the relative adequacy of damages as an alternative remedy, the court from which an injunction is sought should consider the probable collectibility of the judgment."[53] Of course, this view is not unanimous and there exists other authors who disagree with this approach.[54]

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47 Laycock, *supra* note 10, at 716.

48 *See generally* Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 WASH. L. REV. 257 (1992).

49 Weinstein v. Aisenberg, 758 So. 2d 705, 709-12 (Fla. Dist. Ct. App. 2000) (Gross, J., concurring).

50 *Id.* at 710 (citing Wasserman, *supra* note 48, at 293).

51 *See* Restatement (Second) of Torts § 944 cmt. i (1977).

52 *Id*. § 944 (1)(f).

53 *Id*. § 944 cmt. i.

54 *E.g.*, Robert J.C. Deane, *Varying the Plaintiff's Burden: An Efficient Approach to Interlocutory Injunctions to Preserve Future Money Judgements,* 49 U. TORONTO L.J. 1, 23-24 (1999) ("Interlocutory injunctions to preserve future money judgments address the harm suffered by a plaintiff who may succeed at trial only to have an unrecoverable judgment. Many courts have objected that this harm does not arise from the original *lis* and that it is a remedial complication of all litigation which, unless it comes within the terms of the appropriate attachment statutes, cannot be the subject of an injunction. This is not 'irreparable harm' for which damages would be inadequate, one might continue, because the mere fact that a defendant has insufficient assets to satisfy a judgment does not 'harm' the plaintiff during the pendancy of the

IV. Safeguards to Abuse

Substantial concern exists that the burden to the defendant of an injunction against the use of one's assets prior to a judgment may outweigh the plaintiff's interest in securing a judgment. To this end, a plaintiff seeking an injunction must plead and prove a substantial likelihood of success on the merits.[55] To establish a substantial likelihood of success on the merits, it is not enough that the plaintiff advances a colorable claim.[56] "Prior to issuing a temporary injunction, a trial court must be certain that the petition or other pleadings demonstrate a prima facie, clear legal right to the relief requested."[57] In other words, the plaintiff must establish a clear legal right.[58] This requirement protects against a petition for an injunction in bad faith. It also mitigates any undue burden to the defendant by restraining his assets. Finally, this element ensures the injunction eliminates a scenario where a party only has a *possible* claim against another party and seeks to restrain that party's assets, prior to any judgment or finding of fault against said party. Instead, the likely scenario is one in which a plaintiff shows a right to recovery against a defendant, as in the hypothetical discussed above, and merely seeks equitable relief to ensure a legal remedy will be adequate once the case is fully resolved. Otherwise, what would prevent a defendant who knows a judgment will be entered against him in the future from wasting these assets prior to entry of the judgment, almost as if it were free money?

Additionally, an injunction "may be no broader than is necessary to restrain the unlawful conduct and should constitute the least intrusive

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litigation. It merely makes it more difficult for her to remedy the harm that has already been suffered.").

[55] *E.g.*, Dep't of Cmty. Affairs v. Holmes County, 668 So. 2d 1096, 1102 (Fla. Dist. Ct. App. 1996); PCA Life Ins. Co. v. Metropolitan Dade County, 682 So. 2d 1102, 1103 (Fla. Dist. Ct. App. 1995).

[56] City of Jacksonville v. Naegele Outdoor Adver. Co., 634 So. 2d 750, 753 (Fla. Dist. Ct. App. 1994).

[57] *Id.* (citing Oxford Int'l Bank & Trust, Ltd. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 374 So. 2d 54 (Fla. Dist. Ct. App. 1979)).

[58] *Oxford Int'l Bank*, 374 So. 2d at 56; *see also* I.C. Sys., Inc. v. Oliff, 824 So. 2d 286, 288 (Fla. Dist. Ct. App. 2002).

remedy that will be effective."[59] In the context of the hypothetical, this requirement prevents a court from prohibiting the use of more assets than the *P* established a right to collect. For instance, if the *P* seeks to enjoin the use of $10,000, *D* admits liability, and the *P* submits proof of over $100,000 in special medical damages, for which there is no setoff, an injunction of $10,000 is no broader than necessary to protect *P*'s right to compensation for his damages. In the alternative, if *P* seeks to enjoin the use of $100,000 and submits only $10,000 in damages, such an injunction would be overly broad and a court should deny the motion, or order that only the amount the *P* established a clear right to be enjoined from use.

Additionally, a court should be cautious of finding that a plaintiff established a clear right to an amount of money, even where liability is conceded, where the plaintiff's damages are based on nonpecuniary damages, such as pain and suffering. These damages are speculative in nature; thus, it would seem difficult for a plaintiff to ever show a clear right to a speculative damage.[60] There, of course, may be a scenario where the plaintiff's pain and suffering damages, while speculative in nature, so greatly exceed the amount to be enjoined that a court may correctly find a clear right to an amount greater than the amount sought to be enjoined. Such a determination should be left to the broad discretion of the trial court in granting or denying injunctions and should not be reversed absent a clear finding of abuse of discretion on the part of the trial court.[61]

Finally, the Florida Rule of Civil Procedure that allows for the issuance of a temporary injunction has a built in safeguard against abuses by the plaintiff.[62] Florida Rule of Civil Procedure 1.610(b) requires the petitioner for an injunction to post a bond in an amount

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[59] Pediatric Pavilion v. Agency for Health Care Admin., 883 So. 2d 927, 930 (Fla. Dist. Ct. App. 2004).

[60] *See* Tamiami Trail Tours v. Wooten, 47 So. 2d 743, 747 (Fla. 1950) (finding that pain and suffering damages are speculative).

[61] *See, e.g.*, Cohen Fin., L.P. v. KMC/EC II, L.L.C., 967 So. 2d 224, 226 (Fla. Dist. Ct. App. 2007) ("In reviewing a trial court's ruling on a request for a temporary injunction, we must affirm unless the appellant establishes that the trial court committed a clear abuse of discretion.").

[62] FLA. R. CIV. P. 1.610(b) (2008).

deemed proper by the court.[63] Such a bond is posted "for the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined."[64] Therefore, if a plaintiff were to petition for an injunction in bad faith, and the judicial safeguards did not protect against its issuance, the defendant would have recourse for any damages suffered by the wrongful injunction, the collectibility of which is guaranteed by the bond. It is reversible error for a trial court to issue an injunction without the posting of a bond.[65]

V. Conclusion

Florida's refusal to view insolvency or likely dissipation of assets as satisfying the inadequate remedy at law elements appears to be an exercise in applying form over substance. Florida courts focus on the adequate legal remedy being the money judgment; however, an uncollectible money judgment is worthless in any real sense. In addition, many plaintiffs will likely not pursue a case to the point they are able to obtain a judgment against an insolvent defendant, as, in that case, their legal remedy will be the uncollectible money judgment, which cost them substantial expenses in the form of attorney fees and trial expenses. Such a result ignores the time honored principle of equity recognized by Florida courts, that "equity regards the substance rather than the form of things, looks to the substance and not to the shadow, to the spirit and not to the letter; that it seeks justice rather than technicality, truth rather than evasion, common sense rather than quibbling."[66]

As discussed in the first paragraph of this note, Florida courts recognize the maxim of equity '*ubi jus ibi remedium*, there is no wrong without a remedy.[67] This principle "guarantees a remedy for the enforcement of every right . . . ."[68] While a money judgment may provide

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[63] *Id.*

[64] *Id.*

[65] *See, e.g.*, Denowitz v. Info. Television Network, Inc., 717 So. 2d 1106, 1106 (Fla. Dist. Ct. App. 1998).

[66] Coleman v. Coleman, 191 So. 2d 460, 471 (Fla. Dist. Ct. App. 1966).

[67] Carrier v. Vermeulen (*In re* Vermeulen), 122 So. 2d 318, 322 (Fla. Dist. Ct. App. 1960).

[68] Strickland v. Commerce Loan Co. of Jacksonville, 158 So. 2d 814, 815 (Fla. Dist. Ct. App. 1963).

a legal remedy for the harm done to a plaintiff by a soon-to-be insolvent defendant, equity, under the maxim of *ubi jus ibi remedium*, ought to provide a remedy for the *enforcement* of that legal remedy.