Bond Requirements Under Federal Rule of Civil Procedure 65(c): An Emerging Equitable Exemption for Public Interest Litigants

Reina Calderon
I. INTRODUCTION

One of the more significant legal developments of recent decades is the emergence of the “public interest” lawsuit.1 Citizens seeking to force government or industry compliance with existing laws, or to effect specific legal reforms, have resorted to the courts in growing numbers to litigate in such areas as environmental protection, consumer protection, civil rights, employment discrimination, tenants' rights, government benefits law, and the constitutional rights of prisoners, mental patients, and the handicapped.2 In many instances, their access to the judicial forum has been facilitated by a legislative recognition that citizen enforcement is an important strategy for making statutes effective, because government agencies may lack

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1 “Public interest” and “public interest lawsuit” are difficult terms to define because the types of issues and interests they cover change with shifting influences upon the social fabric. This article subscribes to the definition of public interest law adopted by the Council for Public Interest Law, a definition which envisions public interest law as a response to the systemic, recurring problem of unequal access to legal representation:

   Public interest law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that the ordinary marketplace for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others.


2 See Newberg, The Trial Bar's Role in Public Interest Practice, in PUBLIC INTEREST PRACTICE AND FEE AWARDS 9 (H. Newberg ed. 1980).
the will or resources adequately to enforce statutory directives.\textsuperscript{3} This recognition has resulted in the inclusion of citizen suit provisions in numerous federal statutes.\textsuperscript{4} The courts too have recognized the efficacy of public interest litigation and have often facilitated public interest litigants' access to court. The courts' liberalization of the standing doctrine,\textsuperscript{5} and approval of the use of permanent injunctions to effect large-scale institutional reform,\textsuperscript{6} have made possible the now-familiar public interest lawsuit that utilizes injunctive relief to redress injury to large classes of persons or the public interest.\textsuperscript{7}


\textsuperscript{4} That public interest litigation is a necessary supplement to administrative enforcement has been a recurring theme in lawmakers' debates concerning citizen suit provisions. In the Senate debates surrounding the Clean Air Act's citizen suit provision, Senator Phillip Hart (D. Mich.), drawing upon testimony by former Attorney General Ramsey Clark, made the following representative statement:

The basic argument for the [Clean Air Act's citizen suit provision] is plain: namely, the Government simply is not equipped to take court action against the numerous violations of legislation of this type which are likely to occur. In testifying on a similar bill before the Senate Subcommittee on Energy, Natural Resources, and the Environment, former Attorney General Ramsey Clark spoke convincingly of this inevitable incapacity. Mr. Clark stated:

It will be impossible for government enforcement to control all significant acts of pollution . . . . The extension of private right . . . and effective sanctions for the persons directly concerned or affected will be essential if vital interests are to be protected. Our experience in areas of massive unlawful racial discrimination, such as in schooling, employment, and housing, tells us that however hard it might try, the government will never have the manpower, the techniques, or the awareness necessary to enforce the laws for all. Private enforcement of those laws is the only way the individual can be assured that their [sic] rights cannot be violated with impunity.


\textsuperscript{5} See United States v. SCRAP, 412 U.S. 669 (1973). In United States v. SCRAP, the Supreme Court granted standing to citizens who alleged that their interests in the recreational use of a national park were injured by a railroad rate increase that created a disincentive for using recyclable resources. Since the injury that the plaintiffs alleged was the type of generalized injury that could be shared by the public at large, United States v. SCRAP went beyond previous decisions restricting standing to plaintiffs alleging injury that only could be suffered by them individually. See also Duke Power Co. v. North Carolina Environmental Group, Inc., 438 U.S. 59 (1978).

\textsuperscript{6} As Professor Owen Fiss sets out in his seminal work, The Civil Rights Injunction, the Supreme Court's 1955 decision in Brown v. Board of Education of Topeka, Kansas marked a turning point in the judiciary's historic disfavor of injunctive relief. After Brown, the lower courts used permanent injunctions as the remedy of choice for effecting institutional reform in school desegregation cases, as well as in many other settings involving institutional or administrative reformation. O. FISS, THE CIVIL RIGHTS INJUNCTION 1–8 (1978).

\textsuperscript{7} Public interest lawsuits need not seek injunctive relief. For example, consumer protection
The public interest plaintiffs' role has become widely recognized as legitimate, and even indispensable, in helping our governmental system cope with the extraordinary complexities of modern society. Divorced from the politics informing government decision-making, and motivated by incentives other than profit-making incentives, public interest plaintiffs represent significant interests that in the normal course of government and industry affairs would go unrepresented. These interests are often "unfunded" by either government or industry and are often "non-monetizable" as well. They are interests in basic civil rights, safe food and drug regulations, a clean environment, or fair consumer trade practices — interests that a majority of Americans deem important and whose representation provides a crucial counterweight to the government or industry interest in administrative convenience and economic efficiency. Public interest suits ensure that our system of government remains pluralistically democratic — that under-represented groups and interests gain recognition despite built-in systemic disincentives.

This article focuses on preliminary injunctive relief, and, in particular, the obstacle to public interest litigation presented by the injunction bond. The preliminary injunction is an extremely impor-
tant device in public interest litigation. Public interest plaintiffs' status as outsiders to the administrative or industry decision-making process results in a strategic disadvantage that necessitates preliminary relief. Citizens may not be involved in decision-making processes early enough to have a real impact, or they may be perceived by the agency as having no viable interest to protect, and thus they may be consigned to protect their interests through the medium of a lawsuit. Lawsuits can only be successfully litigated when the defendant has firmly committed itself to a plan of action. The resulting scenario, in which the plaintiff citizen public interest group challenges the defendant's action at the eleventh hour, necessitates some type of provisional remedy preventing the defendant from destroying the subject matter of the lawsuit.

These requirements are typically drafted using the term "security;" however, the customary form of security is a bond.

The strategic disadvantage of public interest litigants as outsiders to the administrative process, and their reliance on judicial review to protect their otherwise unrepresented interests, is demonstrated by Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). In *Church of Christ*, the plaintiffs challenged the FCC's license renewal of a station charged with maintaining racially discriminatory programming. The Commission had had a long history of apparent disregard for citizen complaints leveled at the station's practices. The court held both that the plaintiffs had standing to intervene and that they had the right to seek judicial review of the Commission's licensing decision. The subsequent history of *Church of Christ* demonstrates, however, that even with a right of intervention, citizen plaintiffs may lack the institutional clout necessary for effective agency interaction, and may be forced to litigate to make effective their right to intervene. Following the hearing mandated by the first *Church of Christ* decision, the FCC found that the citizen plaintiffs had failed to establish that the licensee's programming was racially discriminatory. On review, the court castigated the Commission for putting the burden of persuasion on the plaintiffs and for failing to develop the issues that they had presented. The court took the unusual step of ordering that the license renewal be vacated and that the Commission proceed with a fresh application. Even with the favorable first *Church of Christ* decision, therefore, citizen plaintiffs were forced to rely on a lawsuit as the effective medium through which their interests were recognized and protected. See *Office of Communication United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969).

Informal actions by subordinate agency staff, for instance, may not be reviewable unless the agency itself reviews the action, even though such informal action may effectively foreclose the plaintiff's exercise of its rights. In *Kixmiller v. SEC*, for instance, the plaintiff stockholder requested a corporation to include certain proposals in its proxy materials, as required by Section 14 of the Securities and Exchange Act of 1934. The corporation, following procedure provided by SEC regulations, notified the Commission of its intention to omit the petitioner's proposals from its proxy materials, and requested a Division of the Commission to confirm that it would not urge action by the Commission. The Division issued an opinion letter stating that it would not recommend Commission enforcement, and the petitioner stockholder filed for review of the Division's action. The court held that the action was unreviewable, reasoning that the Commission had declined to review the Division action, and that the Commission's regulations providing for review of Division action only in extraordinary circumstances was not arbitrary or abusive. *Kixmiller v. SEC*, 492 F.2d 641, 643–46 (D.C. Cir. 1974).
The form of relief tailor-made for such a scenario is the preliminary injunction, whose purpose is to preserve the status quo to prevent the defendant from irreparably harming the plaintiff's interests before trial. Preliminary injunctions are difficult to obtain, however. Historically, courts have not easily granted injunctive relief. Injunctions have been viewed as overly intrusive remedies that infringe upon the defendant's individual autonomy, and involve the court in time-consuming and administratively burdensome management of the defendant's affairs. Preliminary injunctions have been viewed as particularly problematic, since the preliminary injunction proceeding is an abbreviated one that affords fewer procedural protections than a trial. Courts issue preliminary injunctions only in dire cases, where they are absolutely necessary to preserve the interest the plaintiff attempts to protect. On the federal level, the courts have evolved a four-part test designed to restrict relief.

The plaintiff must show that its harm is irreparable. This element, which historically was essential to the court's equity jurisdiction, provides insurance that the defendant will not be enjoined in

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13 Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953). Preserving the status quo does not always mean that the injunction takes a prohibitory form. Courts may also issue a mandatory injunction requiring the defendant to preserve the plaintiff's interests before trial. See, e.g., Toledo A.A. & N.M. Ry. v. Pennsylvania Co., 54 F. 730, 741 (N.D. Ohio, 1889). See also Developments in the Law: Injunctions, supra note 9, at 1056–59.

14 For instance, injunctions, including preliminary injunctions, were originally available only to protect property interests. Developments in the Law: Injunctions, supra note 9, at 998–99. With the changing definition of property interests, and the inclusion of injunction remedies in federal statutes granting private causes of action, injunctive relief has now been extended to protect personal as well as property interests. Id. at 998–1001.

15 Id. at 1056.

16 Id.


18 Dobbs, supra note 17, at 1092.

19 See, e.g., Minnesota PIRG v. Butz, 358 F. Supp. 584, 625 (D. Minn. 1973), aff'd, 498 F.2d 1314 (8th Cir. 1974); Cox v. Northwest Airlines, Inc., 319 F. Supp. 92, 95–97 (D. Minn. 1970). See also Leshy, Interlocutory Relief in Environmental Cases: A Primer for the Practitioner, 6 ECOLOGY L.Q. 639, 641 (1977) [hereinafter cited as Leshy]. The federal courts do not necessarily give equal weight to each of the four factors in all cases, however, and there is variation between courts in the formulation of the separate elements of the test. Leubsdorf, supra note 17, at 525–26. In some courts, for instance, the test's irreparable harm requirement is presumptively met if the defendant's conduct threatens to violate a statutory prohibition. See Developments in the Law: Injunctions, supra note 9, at 1059.

20 Cox, 319 F. Supp. at 96.

21 Leubsdorf, supra note 17, at 590. The historical division between law courts and equity courts resulted in use of the irreparable injury requirement as a method of determining jurisdiction. Where the injury with which the plaintiff was threatened could be adequately
cases where it is unnecessary — where the plaintiff can be fully compensated by final relief in the form of money damages.22

The plaintiff must also show that it has a likelihood of success on the merits.23 This element, which places upon the plaintiff the burden of arguing and proving its case in chief, allows the court to weigh the probable likelihood that the defendant will be erroneously enjoined.24

The plaintiff must prove that, on balance, the denial of an injunction poses graver harm to its interests than the grant of an injunction poses to the defendant's interests.25 This element ensures that relief will only issue where a balance of the equities favors it. In the case of public interest suits, where both sides only putatively represent their own interests and really represent conflicting public interests, the balance ensures that the court will weigh the particular public interest that the plaintiff represents against that represented by the defendant.26

Finally, the plaintiff must prove that the preliminary injunction will not adversely affect the public interest.27 This element ensures that the court considers affected interests extending far beyond the parties' interests — that it considers the wide social and economic impact of an injunction.28

The preliminary injunction test is not the only obstacle public interest plaintiffs face, however. Public interest plaintiffs' claims for

redressed by an award of money damages, it was not irreparable, and equity had no jurisdiction to grant an injunction. See id.

22 For a contemporary statement of the irreparability of injury requirement's function as a limitation upon the unnecessary issuance of injunctive relief, see Coz, 319 F. Supp. at 96 ("Injuries, no matter how substantial, which can be ascertained or approximated and adequately compensated at law do not provide a basis for equitable relief.").


24 In Florida Wildlife Federation v. Goldschmidt, for instance, the court reviewed the plaintiff's argument that the defendant's environmental impact statement was inadequate, focusing on the inadequacy of the plaintiff's proof. See Florida Wildlife Fed'n v. Goldschmidt, 506 F. Supp. 350, 374-78 (S.D. Fla. 1981).


26 In Florida Wildlife Federation v. Goldschmidt, for instance, the court found persuasive the fact that the defendant government's damages amounted to a loss of tax revenues, and considered this factor, in its balancing of harms, to weigh against issuance of an injunction. 506 F. Supp. at 371.

27 See, e.g., Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974).

28 See, e.g., Croskey St. Concerned Citizens v. Romney, 459 F.2d 109 (3d Cir. 1972) (court denied preliminary injunction to citizens challenging discriminatory location of public housing because of urgent need for low-cost public housing.).
injunctive relief are often blocked by other obstacles that are external to the legal system and that stack the deck against a favorable outcome. These obstacles include unavailability of counsel, lack of access to factual information or technical advice, or limited administrative resources. Chief among these constraints, and their underlying cause, is public interest plaintiffs’ lack of money. Public interest plaintiffs represent unfunded citizen voluntarism in their efforts. They typically have no money and their litigation makes no money. All too frequently, they are ad hoc citizen groups with no paid legal staff and are supported entirely by donations. Formed quickly, often in reaction to single, topical, local issues, these citizen groups may lack the institutional status and name recognition essential to effective fundraising. Even if the organization is an established legal defense group capable of successful fundraising, its methods of financing litigation are likely to be more limited than those of the typical “private interest” corporate litigant. Most public interest groups are nonprofit and thus cannot pass onto the consumer the costs of litigation. Moreover, the remedy typically sought by public interest litigants is nonmonetary, eliminating opportunities for contingent fee financing. For, unlike most private interest litigants, who often pay for at least a portion of their litigation costs through damage awards, public interest litigants typically seek injunctive relief.

Recognizing that this situation has a chilling effect upon the litigation of worthwhile public interest lawsuits, Congress and the courts have adjusted certain of the procedural rules governing litigation expenses to ensure judicial access for public interest litigants.

29 King & Plater, The Right to Counsel Fees in Public Interest Environmental Litigation, 41 TENN. L. REV. 27, 29 (1973) [hereinafter cited as King & Plater].
30 Id.
31 See Sive, Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law, 70 COLUM. L. REV. 612, 618 (1970) [hereinafter cited as Sive].
32 King & Plater, supra note 29, at 29.
33 Henson & Gray, Injunction Bonding in Environmental Litigation, 19 SANTA CLARA L. REV. 541, 554 and n.83 (1979) [hereinafter cited as Henson & Gray].
34 See Sive, supra note 31, at 618.
35 A survey of the names of public interest cases indicates how topical and local such public interest groups can be. See, e.g., Committee to Save the Bishop’s House v. Medical Center Hospital of Vermont, 136 Vt. 312, 388 A.2d 827 (1978); Citizens Responsible for Area Growth (CRAG) v. Adams, 477 F. Supp. 984 (1979); Save El Toro v. Days, 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977). In the environmental area, as of 1973, only fifteen percent of major environmental cases were litigated by the three major national public interest environmental groups — the Environmental Defense Fund, the Sierra Club, and the Natural Resources Defense Council. King & Plater, supra note 29, at 75 and n.220.
36 King & Plater, supra note 29 at 29.
For example, in the counsel fees area, Congress has passed more than eighty-five statutes specifically providing for fee-shifting, creating statutory exceptions to the traditional American rule requiring each party to bear its own counsel fees and court costs. While the Supreme Court has limited, with a few equitable exceptions, the award of counsel fees to cases brought under statutes authorizing them, the state courts are free to award counsel and expert witness fees based on general equitable balancing. They have occasionally done so despite the absence of an authorizing statute, where the litigation vindicated an important public policy requiring private enforcement. The cases have been no windfall, however. Plaintiffs must "prevail," judges may be unfriendly, and awards are often niggardly. Plaintiffs thus have to run a difficult obstacle course—they must prevail on the merits of the litigation with the external obstacle of front-end financing, even where there is a possibility of eventual recovery of fees. The obstacles are given a quantum and often insurmountable boost by the injunction bond requirement.

Injunction bonding is a major potential litigation cost affecting public interest litigants' access to court. In theory, in the federal courts and virtually all state courts applicants for preliminary injunctions who have successfully established all the required elements for equitable relief will nevertheless be denied it if they do not post these bonds, which may involve very large sums of money.

37 Newberg, Preface to Public Interest Practice and Fee Awards v (H. Newberg, ed. 1980).
38 See King & Plater, supra note 29, at 30.
41 Trial judges do not enjoy being reversed, and may be especially ill-disposed to granting counsel fees to plaintiffs who have received an appellate reversal of an unfavorable decision. In Hill v. TVA, for instance, the district judge who had refused to enjoin construction of the Tellico Dam, and subsequently had been reversed, dismissed the plaintiffs' petition for an award of counsel fees, stating: "It seems to the Court that the tax payers and rate payers have already been taxed to the limit in this litigation. In the opinion of the Court, the award of attorney's fees and further costs in this case is not appropriate." 84 F.R.D. 226, 229 (E.D. Tenn. 1979).
42 The applicable federal provision is Federal Rule of Civil Procedure 65(c):
SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or an officer or agency thereof.
FED. R. CIV. P. 65(c).
43 Whether the applicable bond provision is contained in a statute or a code of civil procedure varies from state to state. Virtually all states, however, have some type of codified security requirement. See Dobbs, supra note 17, at 1096–97.
44 See Friends of the Earth v. Brinegar, Inc., 518 F.2d 322 (9th Cir. 1975) ($4,500,000 bond);
As developed by the equity courts,\(^{45}\) the bond requirement had two primary purposes, both focused on protecting the preliminary injunction defendant from the monetary loss resulting from an improvidently issued injunction. First, in the event of an erroneous issuance of relief, the bond provided the defendant with a source of compensation.\(^{46}\) Its second function was to deter plaintiffs from filing frivolous claims for relief,\(^{47}\) thus saving the defendant from the expense and nuisance of defending itself in a preliminary injunction hearing. An applicant's failure to post bond allowed the defendant to motion for a dissolution of the injunction.\(^{48}\) Where a preliminary injunction was necessary to prevent the defendant from taking an action that would moot the applicant's lawsuit, the applicant had to comply with the bond requirement to preserve the justiciability of its case. The bond requirement appears to have been developed primarily in cases involving profit-making, commercial adversaries, a setting in which litigation is a cost of doing business and a bond is a perfectly logical method for preventing frivolous and expensive litigation. This traditional setting fundamentally contrasts with the setting of public interest litigation, since public interest plaintiffs cannot be assumed to have the money to post bonds.

It is usually quite difficult for public interest litigants to fulfill bond requirements. If courts refuse to require a bond, or make nominal the bond requirement, public interest litigation can proceed. If, on the other hand, courts set bond amounts according to the defendant's projected damages,\(^{49}\) rather than the applicant's ability to pay, bond amounts may be so high that public interest litigants can undertake neither the bond premium nor the personal liability that posting bond entails.\(^{50}\) Thus, they may be financially barred from obtaining

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\(^{45}\) See infra text and notes at notes 90–92.

\(^{46}\) See infra text and notes at notes 93–94.

\(^{47}\) Note, \textit{Interlocutory Injunctions and the Injunction Bond}, 73 \textit{Harv. L. Rev.} 333, 338 (1959) [hereinafter cited as \textit{Interlocutory Injunctions}].


\(^{49}\) In addition to the bond premium, bonded applicants are potentially liable to the surety

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preliminary injunctive relief, despite establishing that the equitable considerations governing the judicial decision to grant an injunction lie in their favor. In some circumstances, this may mean that a dangerous drug goes on the market, or a potentially dangerous project or process goes into production, for want of the plaintiffs' cash.

For public interest plaintiffs, the ramifications of the injunction bond requirement are far-reaching. The frequent status of public interest plaintiffs as outsiders to the administrative or corporate decision-making process, without prior knowledge of governmental decisions, often necessitates that they challenge the defendant's pending action at the last possible moment: when the defendant's activities are about to ruin an irreplaceable tract of urban park land, or when a municipality is about to engage in the discriminatory delivery of an important municipal service. In such circumstances, a preliminary injunction is the only way that the public interest litigant can preserve its ability to litigate. If the defendant is allowed to destroy the park land, or to disburse the funds, the public interest plaintiff, and the public, lose forever the object of protection. Often, on the injunction bond. See Dobbs, supra note 17, at 1112. Improperly enjoined applicants may collect such damages as they can prove after a decision that an injunction was erroneously granted. See id. at 1122.

The equitable considerations underlying a grant of preliminary injunctive relief are articulated by the preliminary injunction test.

The following quotation characterizes the position of many public interest litigants:

The inequality of information results from the fact that generally the project, which is the subject of the litigation, has been planned, studied, engineered, and reported on in detail over a period of years culminating in the final government action that triggers litigation, before which final action may be premature.

Such prior administrative action is often informal and non-adversary. There may be little opportunity for public knowledge or participation. In those cases where there is public participation, there simply may not be the means available for citizens to participate effectively . . .

Even in those cases in which . . . there has been public participation, . . . such proceedings seldom provide the means of discovery available in plenary actions . . .

Time is often pressing. A large percentage of environmental suits — typically declaratory judgment and injunction suits — are brought in the figurative shadow of the bulldozer. They often feature preliminary injunction motions, necessary to render trial and a meaningful final judgment.

Sive, Successful Conduct of a Public Interest Environmental Practice, in PUBLIC INTEREST PRACTICE AND FEE AWARDS 427 (H. Newberg ed. 1980).

See, e.g., Clements v. Chicago Park Dist., 96 Ill. 2d 26, 449 N.E.2d 81 (1983) (citizen challenge to addition of a driving range to Chicago park designed by Frederick Law Olmsted).


The dilemma the applicant faces was aptly stated by the court in Powelton Civic Home Owners Ass'n v. Department of Housing and Urban Dev.
the statute granting such litigants a cause of action does not provide for damage awards, and in any case the public interest plaintiff’s role as a vindicator of the public interest makes an award of damages inappropriate. The bond requirement thus effectively blocks the litigation of public interest suits by preventing public interest plaintiffs from obtaining preliminary injunctions. It also requires public interest plaintiffs not only to volunteer their time, energies, and limited funds to presenting public interest cases, but also to undertake to subsidize the defendant as if both parties were commercial competitors. Public interest plaintiffs are faced with a high stakes gamble: if they lose on the merits they not only have no hope of reimbursement for court costs, but also lose the “wager” of the bond.

The arguments supporting the bond requirement today are essentially the same as at its genesis: (1) the deterrence of frivolous claims for relief; (2) the indemnification of the defendant in case of an erroneously issued injunction. Set against these concerns, however, are a wider series of propositions developed by the courts, as this article will note, which have from time to time prompted them to decline to require bonds, or, alternatively, to “nominalize,” bonds. Exercising their equitable discretion and harkening back to the traditional scope of equitable discretion, the courts have taken account of the special setting of public interest litigation, a setting distinct from the private interest “commercial” setting. The propositions supporting a public interest bond exemption have included:

(1) The legislature intends that citizen plaintiffs enforce a statute, providing a policy reason to exempt bond requirements.

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It is obvious that the plaintiffs who are merely residents of the proposed project site are unlikely ever to be able to meet such an onerous [bond] requirement. Should the plaintiffs have been unable to meet the requirement in this case, the court could not have issued the preliminary injunction. Disbursement of the federal funds then would have mooted the issues in the case and precluded effective review of the Secretary’s decision to authorize funds.


Lawmakers often limit statutory remedies to injunctive relief to insure that parties are not encouraged to file frivolous claims. In the Senate debates surrounding the Clean Air Act’s citizen suit provision, both Senator Hart’s and the Legal Advisory Committee of the Council on Environmental Quality’s submitted statements focused on the absence of a damages provision to refute the argument that the citizen suit provision would result in large numbers of frivolous lawsuits. 116 CONG. REC. 33,103–04.


Federal Rule of Civil Procedure 65(c) leaves the amount of the bond discretionary. Thus, even under a mandatory interpretation of the Rule judges can “nominalize” bond requirements by requiring only a nominal bond. See, e.g., West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971).

See infra text and notes at notes 145–55, 164–84.
(2) The public interest value of the lawsuit outweighs the possible damage to the defendant, and the court, in a balancing of "public" equities, creates an equitable private attorney general exemption.60

(3) The plaintiffs are indigents, and it would be unjust to impose bond requirements, a proposition that often incorporates some latent consideration of the indigents' status as public interest plaintiffs.61

(4) Frivolous claims are adequately screened out by the preliminary injunction test — particularly the likelihood of success on the merits element — and by the nearly insurmountable financial obstacles to public interest litigation.62

(5) Relative to the plaintiff, the defendant is better able to bear the financial burden of an erroneous issuance of relief and, in the case of a defendant who has violated a statute, should rightfully be required to bear it.63

(6) A systemic need exists for having justiciable cases adjudicated, as opposed to being squeezed out of court onto the streets.64

Recognizing that bond requirements can bar public interest litigants' access to court, the federal courts have fairly consistently decided not to require bonds in two frequent settings — cases brought by indigents65 and those brought by citizen groups enforcing the National Environmental Policy Act (NEPA).66 This limited case law might tend to relieve the burden on plaintiffs in appropriate

60 See infra text and notes at notes 158-63.
61 See infra text and notes at notes 138-63.
62 See infra text and notes at notes 145-57.
63 See infra text and notes at notes 153-58.
64 See infra text and notes at notes 142-45.
public interest cases generally, only the courts have to date not broadly extended the principle that nonprofit public interest plaintiffs are different from commercial adversaries and require different treatment. The NEPA litigation exemption, which most closely approaches a general public interest exemption, appears to be limited to public interest organizations enforcing NEPA. Its basis — that NEPA’s private attorney general enforcement scheme mandates an exemption to the Federal Rule of Civil Procedure bond provision — has afforded limited room for expansion. Thus, even public interest plaintiffs litigating in federal court under statutes granting private causes of action may be unable to argue for an analogous exemption. They may have difficulty convincing a court that the NEPA exemption’s status as a “public interest” bond exemption is sufficient reason to depart from Rule 65(c). From an overview perspective, it is interesting to note that NEPA as a statute has no particular requirements for citizen enforcement which would distinguish it from the large number of other federal statutes which have not received widespread exemptions. Most commentators agree that citizen enforcement was never intended, for NEPA’s legislative history shows that it was never intended. If the exemption is appropriate in NEPA cases, it is appropriate at least where other statutes clearly focus on citizen enforcement.

Since it applies only to poor persons, the indigent exemption has provided limited room for expansion. While the federal courts have on occasion exempted from bond requirements indigent plaintiffs litigating constitutional issues or those seeking judicial review of administrative action, these cases have not been widely used to formulate a broad-based exemption.

State courts are even less likely to exempt public interest plaintiffs from bond requirements than are federal courts. A small number of state courts have created a bond exemption for indigents, or have

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67 The indigent and NEPA bond exceptions cases have developed with some cross-fertilization. However, with the exception of one case, the federal courts have not developed a broad public interest exemption. The exception is Crowley v. Local No. 82 Furniture and Piano Movers, 679 F.2d 978 (1st Cir. 1982), rev’d on other grounds, 104 S. Ct. 2557 (1984). For a discussion of Crowley and related case law, see infra notes 185-201 and accompanying text.

68 For the text of Federal Rule of Civil Procedure 65(c), see supra note 42.

69 See King & Plater, supra note 29, at 27 and n.2.


alluded in dicta to the existence of a public interest exemption. The majority of state bond provisions appear to be stated in mandatory terms. Indeed, state courts have typically considered bonds necessary in all but a few isolated instances. Even where state courts find persuasive the precedent provided by the federal bond exemptions, the tendency has been to construe the exemption narrowly.

The bond requirement’s origins suggest, however, that courts need not limit bond exemptions to indigents or to those litigating under statutes contemplating a private enforcement mechanism. Invented by the equity courts, traditionally the bond requirement was associated with an equitable tailoring of relief. Since tailoring of relief was an area characterized by the judicial flexibility that is a hallmark of equity jurisprudence, courts could waive bond requirements on a case-by-case basis. Thus, under an equity conception of the bond requirement, exemptions could be made at the court’s discretion, and need not be limited to cases where a statutory policy provided a reason for an exemption.

Today, bond requirements are codified on both the federal and state level, making the court’s ability to grant exemptions largely a matter of statutory interpretation. Statutory and rule of civil procedure bond requirements may control a court’s decision to re-

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75 Dobbs, supra note 17, at 1096–99 and notes 14–33.
76 For instance, in Committee to Save the Bishop’s House v. Medical Center of Vermont, a case in which citizen plaintiffs attempted to prevent the demolition of a local landmark, the court treated as inapposite the NEPA bond exception, even though the case was one with environmental impact. 388 A.2d 827 (1978).
77 See infra text and notes at note 85.
78 Judicial flexibility in tailoring remedies is characteristic of equitable discretion. The classic statement of equity’s discretionary ability to tailor relief is contained in Hecht v. Bowles, 321 U.S. 321 (1944):

The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims . . . .

Id. at 329–30.
79 See infra text and notes at notes 97–107.
80 Dobbs, supra note 17, at 1099.
81 Id. at 1096–97.
quire bond, but recent cases\textsuperscript{82} on the federal level suggest a trend towards a more discretionary approach than the mandatory language of the federal provision, Federal Rule of Civil Procedure 65(c), might seem to warrant.\textsuperscript{83} The evolving federal case law indicates that the federal courts are in the process of recognizing a general "equitable" public interest bond exemption — an exemption based on their equitable power discretionarily to except applicants from bond requirements.

This article charts the development of this federal equitable discretionary bond exemption, and uses the emerging exemption as a model to argue that courts should exempt public interest applicants from bond requirements whenever necessary to ensure judicial access. Section II presents a short history of the bond requirement, focusing on the requirement's equity origins, the equity courts' discretion to except applicants from bond requirements, and the ability of modern courts to do the same under various mandatory provisions. Section III presents several federal court decisions that suggest a return to an equity conception of bonding requirements, as well as the continuing development of an equitable exemption for public interest litigants. Section IV discusses contemporary arguments in support of such an exemption, including that a mechanical imposition of bond requirements interferes with the courts' ability to adjudicate justiciable questions; that the bond's deterrence and compensatory functions do not come into play in public interest cases; and that the preliminary injunction test adequately protects defendants from the possibility of an erroneously issued injunction. It concludes that, at the federal level, and in states patterning their bond requirement practices after the federal practice,\textsuperscript{84} public interest litigants should be excepted from bond requirements whenever bonds would effectively bar judicial access.

\textsuperscript{82} See infra text and notes at notes 138–201.

\textsuperscript{83} For the text of Federal Rule of Civil Procedure 65(c), see supra note 42. The federal rules have the status of law, as they are enacted by Congress after being promulgated by the Supreme Court. Both courts and counsel are bound by the rules. See 1 C. Wright and A. Miller, Federal Practice and Federal Procedure, § 1030 (1969). Thus, if Rule 65(c) is a mandatory provision, the courts are bound to follow it; if, on the other hand, it is a discretionary provision, courts may except applicants from bond requirements. See infra text and notes at notes 114–23 for a discussion of the current views of the rule's mandatory or discretionary status.

\textsuperscript{84} A consideration of how the emerging federal exception would apply on the state level is beyond the scope of this article. The federal exception provides, however, a model for state courts that have created exceptions to mandatory bond requirements, find the federal practice persuasive, or consider their jurisdiction's bond provision discretionary.
II. THE HISTORY OF THE BOND REQUIREMENT

A. The Equity Origins of the Bond Requirement

Originally, equity courts did not impose a bond requirement upon successful applicants for preliminary injunctive relief. To ensure that the defendant would not be erroneously enjoined, they relied instead upon the equitable balancing that determined whether an injunction would issue. The injunction bond requirement was a later development, an extension of the equity court's power to impose conditions upon a party upon whose behalf it acted.85 It developed in response to the judicial perception that the preliminary injunction proceeding exposed defendants to a substantial risk of erroneous relief.86 This perception was based on the notion that the short time during which the enjoined party must prepare its case compromised its ability to defend itself at the preliminary injunction proceeding.87 The equity courts reasoned that, because the applicant would be better prepared than the enjoined party, the judge would be overly swayed by its case and would fail to detect inconsistencies.88 To protect the defendant, equity courts instituted the bond requirement.89

At the basis of the requirement, then, was the premise that plaintiffs were likely to be in a more dominant position. This premise was based on the supposition that the injunction plaintiff enjoyed a procedural advantage as the initiator of the action, a procedural advantage that was not offset by any inequality of financial resources or

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85 Russell, 106 U.S. at 438.
86 See Smith v. Day, 21 Ch. D. 421, 424 (C.A. 1882), where the court gave the following historical explanation for the bond requirement:

[It] was invented by Lord Justice Knight Bruce when Vice Chancellor, and was originally inserted only in ex parte orders for injunctions. Its object was, so to say, to protect the Court as well as the Defendant from improper applications for injunctions. If the evidence in support of the application suppressed or misrepresented facts, the Court was enabled not only to punish the Plaintiff but to compensate the Defendant. By degrees, the practice has extended to all cases of interlocutory injunction. The reason for this extension was that though when the application was disposed of on notice, there was not the same opportunity for concealment or misrepresentation, still, owing to the shortness of time allowed, it was often difficult for the Defendant to get up his case properly, and as the evidence was taken by affidavit, and generally without cross-examination, it was impossible to decide on which side the truth lay. The Court therefore required the undertaking in order that it might be able to do justice if it had been induced to grant the injunction by false statement or suppression.

Id. at 424.

87 Id.
88 Id.
89 Id.
information that impaired its ability to present its case. This sup­position does not exist when public interest plaintiffs with limited funds challenge established and well-funded governmental and corpo­rate interests. There, the public interest litigant’s limited funds may compromise its ability to prepare its case, and its position as an outsider to government or corporate decision-making may mean that it applies for an injunction from a relatively weak position. In short, the bond requirement appears to have developed in a context in which each party had financial and administrative parity, and in which an injunction bond requirement was therefore a fair method of equalizing the procedural advantage that the plaintiff had as the initiator of the action. These conditions simply do not exist in a public interest context.

In the commercial context, therefore, the bond requirement was a logical and fair method of protecting the enjoined party. Consistent with its private interest origins, the requirement’s main function was to provide the defendant with a means of compensation should the injunction turn out to have been issued erroneously. Before such a requirement, an erroneously enjoined party had no such recourse. In order to recover for harm resulting from a preliminary injunction, the defendant was forced to become a plaintiff in a ma­licious prosecution suit. The bond requirement increased the num­bers of situations in which the enjoined party could recover. It also facilitated the enjoined party’s recovery, since the party did not have to file a separate tort action. It had only to collect its damages from the bond.

The bond requirement also protected the enjoined party by func­tioning as a screening device, to deter applicants with frivolous claims from filing for relief. Theoretically, both the bond’s expense and the threat of personal liability that posting bond entailed would discourage frivolous suits.

In addition to protecting the enjoined party, the equity courts may have conceived the bond requirement to be a means for punishing the applicant who abusively appealed to the Chancellor’s conscience to obtain relief. At the time that the bond requirement developed, courts viewed injunctive relief with disfavor. They reserved the...

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90 Beach, Injunctions § 158, at 177–78 (1891).
91 American Circular Loom Co. v. Wilson, 198 Mass. 182, 211, 84 N.E. 133, 139 (1908); Russell, 105 U.S. at 438.
92 Griffith v. Blake, 27 Ch. D. 474, 476 (1884).
93 Smith, 21 Ch. D. at 424.
94 Dobbs, supra note 17, at 1093–94.
permanent injunction as a remedy of last resort, and limited its availability to the protection of property interests. Since the preliminary injunction required the enjoined party to refrain from conduct without a full hearing on the merits, it was viewed as an even less desirable remedial device than the permanent injunction. In view of equity's inherent power to do justice between the parties, courts may have used the bond as an efficient and economical way of applying sanctions against ill-considered applicants.

Prior to enactment of mandatory bond provisions, courts treated flexibly the decision to require a bond, as they treated flexibly the underlying decision to grant a preliminary injunction. In 1889, the British treatise writer Kerr stated that "bond may be required in doubtful cases" and that "where the equity of the plaintiff is perfectly clear, or where the damage, if any, which might accrue is of a vague and uncertain nature, the undertaking will not be required." This indicates that British equity courts looked upon bonding as an issue to be determined on a case-by-case basis, subject to such factors as the defendant's need for protection and the strength of the plaintiff's underlying claim for preliminary relief. American courts considered these, as well as other factors, as elements of the equity court's power to effect a fair compromise between the parties' individual interests and the public interest.

For instance, in the case of Dodd v. Flavel, decided in 1865, a New Jersey equity court, without requiring the plaintiff to post bond, enjoined a defendant-mill owner from flooding the plaintiff's land. The court reasoned that "the right of the complainant is clear, and the infraction of that right is established." This case may indicate that American equity courts may have exempted the plaintiff from bond requirements even where the defendant would certainly suffer damage, so long as that damage was not likely to be legally cognizable. "Under such circumstances," the Dodd court went on, "the fact that the injunction occasions a serious loss to the defendant affords no just ground of complaint. He is deprived of the enjoyment of that which rightfully belongs to another." Essen-

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96 See Developments in the Law: Injunctions, supra note 9, at 998-99.
95 A court's power to tailor relief to do substantial justice is a quintessential aspect of equity jurisprudence. See supra note 78.
97 Kerr, Injunctions 76 (1889).
98 Id. at 565.
99 See Dodd v. Flavel, 2 C. E. Green 255 (1865).
100 Id. at 257.
101 Id.
tially, the *Dodd* court looked to the merits of the case to determine if a bond should be required. Because the plaintiff had, in modern terminology, a strong "likelihood of success on the merits," the court declined to require a bond. The *Dodd* court's approach resembles the approach of some modern federal public interest cases, where the courts exempt bond requirements because the plaintiff has shown it has a likelihood of success on the merits.\(^\text{102}\)

American equity courts also considered factors external to the strength of the plaintiff's claim or the defendant's prospective harm, acting in their capacity to do substantial justice between the parties. In the 1892 case of *Pasteur Chamberland Filter Co. v. Funk*,\(^\text{103}\) for instance, a federal court sitting in Illinois refused to intervene on the behalf of an enjoined party to require a bond because the party had acted in bad faith towards the applicant. Apparently, the courts also had the power to look beyond the parties, themselves, and to balance the public equities. In early cases at least one state court recognized that bond requirements could and should be waived where the plaintiff's petition sought to protect the public interest.\(^\text{104}\)

In summary, bond requirements seemed to partake of the *ad hoc* balancing processes of equity. The United States Supreme Court in *Russell v. Farley*\(^\text{105}\) concluded that, in the absence of a mandatory, statutory bond provision, security requirements were within the court's equitable discretion.\(^\text{106}\) This conclusion obviously contemplated the discretionary waiver of security requirements, guided by the usual considerations underlying an exercise of equitable discretion, including a consideration of the impact the court's remedial order would have upon the public interest.\(^\text{107}\)

Starting in the early nineteenth century, however, civil procedure codes began to provide for preliminary injunction bonds in terms

\(^{102}\)
See, infra notes 175–77, 180 and accompanying text.

\(^{103}\)
*Pasteur Chamberland Filter Co. v. Funk*, 52 F. 146, 147 (N.D. Ill. 1892).

\(^{104}\)

\(^{105}\)
105 U.S. 433 (1881).

\(^{106}\)
Id. at 441–42.

\(^{107}\)
According to Pomeroy, writing in 1881, the same year as the *Russell v. Farley* decision, equity had an "inherent capacity" to meet changing social needs, since it was not governed by rigid precedents but by a system of flexible maxims and rules. See J. POMEROY, EQUITY JURISPRUDENCE § 67 (Symons ed. 1941). The courts' equitable discretion was thus seen by contemporary writers as encompassing more than a power to effect just compromises between the individual parties. It included a power to shape public policy, at least with respect to equitable remedies and other matters over which the equity courts had jurisdiction. This view of equity has survived to the modern day. See, e.g., the statement of the Supreme Court in *Hecht v. Bowies*, 321 U.S. at 329–30, cited supra note 78.
that appeared mandatory. Some, like the New York Code of 1848, provided that "the judge shall require a written undertaking on the part of the plaintiff."108 Others, like the later, federal bond provision of the Clayton Act of 1914,109 which survives intact as Rule 65(c), stated that bond "shall" be required, but left the amount of the bond within the discretion of the trial judge. The enactment of mandatory statutory or rule of civil procedure bond requirements served to curtail the equity courts' authority discretionarily to except applicants. Although the federal courts permitted a few limited exceptions,110 most courts in jurisdictions with mandatory provisions did not view the decision whether to impose bond as susceptible of an equitable weighing of the interests involved.111 Bond requirements took on a rigid, legal112 character, rather than a flexible, equitable character and a sharp division arose between the discretionary decision-making process governing the grant of a preliminary injunction and the nondiscretionary application of bond requirements.113

109 Ch. 323, § 18, 38 Stat. 738 (1914).
110 These exceptions were where the court issued an injunction to protect its subject matter jurisdiction and when it stayed its own hand in the calendaring process. See Dobbs, supra note 17, at 1100.
111 See, e.g., Chatz v. Freeman, 204 F.2d 764 (7th Cir. 1958) (Rule 65(c) is not a discretionary provision); Bayham v. Funk, 3 Ariz. App. 220, 413 P.2d 279 (1965) (state bond provision patterned after the federal rule given a mandatory interpretation). See also 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2954, at 524 ("The conclusion seems inescapable that once the court decides to grant relief under Rule 65(c) it must require security from the applicant.").
112 Since Rule 65(c) as part of the federal rules was enacted into law by Congress, it had the force of law. See supra note 83.
113 Attempts have been made by some courts to bridge the gap between the preliminary injunction and bond determinations in the setting of a regulated party's challenge to a rate setting scheme. In this setting, courts have considered a factor in issuing an injunction the plaintiff's ability to post a bond adequate to indemnify the other affected regulated parties and to offset any harm to the public interest. See, e.g., Beaumont, S.L. & W. Ry. v. United States, 282 U.S. 74, 91-92 (1930) (lower court did not abuse its discretion in granting a stay of an ICC order, where appellants' bond of three million dollars indemnified the affected regulated parties and postponement of the ICC order would inflict no loss upon the public); Virginia Ry. v. United States, 272 U.S. 658, 672-74 (1926) (appeal bond could not indemnify affected mines and railroad for harm resulting from stay of ICC order, and "the public might suffer losses for which there could be no remedy"). See also Yakus v. United States, 321 U.S. 414, 440-41 (1943) ("Where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff") (dicta). These cases suggest that, at least where the public interest is involved, it is appropriate for the courts to consider the preliminary injunction and bond determinations in light of one another, and that some accommodation between these two determinations should be made in the context of suits
Such a discrepancy was not critical where the parties were contending commercial interests, and the plaintiff had enough financial backing to post a bond. Where the applicant was a public interest plaintiff lacking funding, however, the discrepancy between the court's treatment of the preliminary injunction and bonding determinations became very clear. Bonding requirements blocked judicial access and prevented the court from deciding justiciable public interest cases on the merits.

B. Modern Bond Requirements

Today, general statutory or rule of civil procedure bond provisions determine a court's ability to except applicants from bond requirements. Currently, the federal courts and all state courts (with the exception of Massachusetts) have such general bond provisions. The majority appear to be stated in mandatory terms. Federal Rule of Civil Procedure 65(c), which has been copied by a number of states, provides that bond "shall" be required but allows the amount of the bond to be set "in such sum as the court deems proper." Although the federal courts interpreted Rule 65(c) as a mandatory provision for the first forty years of its history, about half of the circuits now consider it a discretionary provision, reasoning that the phrase "such sum as the court deems proper" literally allows the trial judge to dispense with the bond. However, there is little difference in the way that federal courts subscribing to "discretionary" or "mandatory" interpretations of Rule 65(c) treat the bond requirement: with few exceptions, bonds are automatically brought by public interest litigants challenging government actions potentially harmful to the public interest.

114 Dobbs, supra note 17, at 1096-97.
115 Id. at 1096-99.
116 Id. at 1101.
118 Dobbs, supra note 17, at 1100.
119 See, e.g., Urbain v. Knapp Bros. Mfg. Co., 217 F.2d 810 (6th Cir. 1954), cert. denied, 349 U.S. 930 (1955); Corrigan Dispatch Co. v. Casa Guzman, F. A., 569 F.2d 300, 303 (5th Cir. 1972); Scherr v. Volpe, 466 F.2d 1027, 1035 (7th Cir. 1972); Continental Oil Co. v. Frontier Refining Co., 338 F.2d 780 (10th Cir. 1964); Ferguson v. Tabah, 288 F.2d 665 (2d Cir. 1961). The First Circuit also apparently treats Rule 65(c) as a discretionary provision, although it has not expressly held that it is discretionary. See Crowley, 697 F.2d at 1000 and discussion infra notes 185-201 and accompanying text.
120 This rationale was first articulated by the Sixth Circuit in Urbain v. Knapp Bros. Mfg. Co., 217 F.2d 810 (6th Cir. 1954), cert. denied, 349 U.S. 930 (1955).
imposed, at a level measured by the defendant's potential economic loss. 121

That a majority of jurisdictions have enacted mandatory bond provisions differentiates the modern conception of the requirement from the older, equity view. The current rules evidently see the requirement as providing an important source of insurance for the enjoined party that should not be subject to the trial judge's discretion. Consistent with this "insurance" conception of bonding requirements, most jurisdictions automatically impose liability on bonds when the applicant fails to obtain a favorable final determination on the merits. 122 Accordingly, liability is triggered in almost all cases, even those in which the erroneous issuance of relief is not the applicant's fault. 123

III. FEDERAL COURT BOND PRACTICES AND THE EMERGING PUBLIC INTEREST LITIGATION EXEMPTION

The enactment of mandatory bond provisions suggests that modern courts, unlike their equity predecessors, cannot discretionarily exempt applicants from bond requirements. Faced with apparently "mandatory" bond provisions, however, courts have nevertheless acted in appropriate cases to "nominalize" bonds, and, in some cases have declined to require a bond at all. On the federal level, there has been no difference between courts subscribing to "discretionary" or "mandatory" interpretations of Rule 65(c) — courts subscribing to either interpretation have equally as easily exempted public interest applicants from the bond requirement. 124 As such a pattern suggests, the critical factor has not been whether the court holds to a "discretionary" or "mandatory" interpretation of the Rule. Rather, it has been the crucial recognition that bond requirements have little

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121 See, e.g., Reinders Bros. v. Rain Bird Eastern Sales Corp., 627 F.2d 44, 54 (7th Cir. 1980) (court must entertain and expressly rule on request for bond, and errs in not granting request, unless there are extraordinary circumstances).

122 Note, The Triggering of Liability on Injunction Bonds, 52 N.C.L. Rev. 1252, 1276 (1974) [hereinafter cited as The Triggering of Liability on Injunction Bonds]. However, in a few cases the federal courts have avoided holding plaintiffs liable on bonds where a change of law occurred during the period the case was under decision, rendering the injunction erroneous. See Interlocutory Injunctions, supra note 48, at 342.

123 See The Triggering of Liability on Injunction Bonds, supra note 122, at 1276.

124 For instance, courts in the First Circuit have waived or nominalized bond requirements despite the Circuit's never having ruled that Rule 65(c) is discretionary. See Boston Waterfront Residents v. Romney, 343 F. Supp. 89 (D. Mass. 1972); Silva v. Romney, 342 F. Supp. 783 (D. Mass. 1972); Crowley v. Local No. 82 Furniture and Piano Movers, 697 F.2d 978 (1st Cir. 1982).
place in the public interest context — that in the public interest context they unjustly burden applicants with limited financial resources, prevent the realization of congressionally-intended citizen enforcement schemes, function as an absolute bar to relief rather than a selective screening device, and prevent the litigation of public interest suits that the court has determined are worthy of judicial consideration. Against such a realization, courts have been willing to expose government agencies and commercial entities to the risk of erroneous relief, reasoning that the public interest value of the suit outweighs any damage to the defendant or the conflicting social policies that it might represent, that the defendant’s financial resources make it a vastly superior carrier of the risk of an erroneous injunction than the public interest plaintiff, and that the preliminary injunction test provides sufficient insurance against an improvidently-issued injunction. The federal courts have exempted public interest applicants from bond requirements primarily in two situations — where the applicant is an indigent or is enforcing the National Environmental Protection Act (NEPA). They have also occasionally exempted bond requirements where the applicant is seeking judicial review of administrative action, litigating constitutional issues, or, most recently, litigating under the Labor-Management Reporting and Disclosure Act (LMRDA).

Viewed collectively, these exemptions seem to cover a significant portion of public interest suits, which raises the question of the necessity of a general theory of equitable consideration of public interest cases. However, the current patchwork of existing exceptions leaves arbitrary gaps in the application of equitable discretion to public interest litigation generally. With the exception of one circuit, the federal courts have tended to view the recognized bond

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125 See infra text and notes at notes 138–163.
126 See infra text and notes at notes 145–55, 164–84.
127 See infra text and notes at note 207.
128 See infra text and notes at notes 158–63.
129 See infra text and notes at notes 172–74.
130 See infra text and notes at notes 145–57, 175–78.
131 See infra text and notes at notes 151–57.
132 See infra text and notes at notes 138–63.
133 See infra text and notes at notes 164–84.
136 See Crowley v. Local No. 82 Furniture and Piano Movers, discussed infra at notes 185–201 and accompanying text.
137 Id.
exceptions as piece meal departures from Rule 65(c), and have therefore failed to develop a unified approach. Public interest litigants who do not fall squarely under one of the recognized exemptions may have difficulty obtaining an exemption.

Even though public interest litigants are currently likely to obtain bond exemptions in only a limited number of situations, close examination of the federal case law suggests that, over the past twenty years, the federal courts have developed a general public interest bond exemption. This section discusses three sets of key cases establishing this federal practice, and suggests that the federal courts are returning to an equity conception of the bond determination. In so doing, courts are assuming broad discretion to except applicants from bonding requirements whenever their imposition would block litigation calculated to advance the public interest.

A. The Indigent Exemption Cases: Denny v. Health and Social Services Board, Bass v. Richardson, and Bartels v. Biernat

In the late 1960's and early 1970's, with the advent of class actions in which welfare recipients challenged the states' administration of government benefits programs, the federal courts created a bond exemption for indigents. Three representative cases are Denny v. Health and Social Services Board,\(^{138}\) Bass v. Richardson,\(^{139}\) and Bartels v. Biernat.\(^{140}\) These cases establish the general principle that the federal courts have been unwilling to condition preliminary relief upon the applicant's financial resources, at least when the applicant is a poor individual. This principle appears to arise from the court's equitable discretion, rather than from any statutory policy or constitutional right\(^{141}\) mandating a bond exemption.

\(^{140}\) 405 F. Supp. 1012 (E.D. Wis. 1975).
\(^{141}\) It is unlikely that a direct constitutional challenge to Rule 65(c) could be mounted on equal protection or due process grounds. In Lindsey v. Normet, 405 U.S. 56 (1972), the Court held that Oregon's wrongful detainer statute violated the equal protection clause because its double appeal bond requirement discriminated against tenants appealing wrongful detainer decisions. However, in Lindsey no other class of Oregon litigants was required to post a double appeal bond. Rule 65(c), on the other hand, applies to all injunction applicants. Based on the Court's test in Boddie v. Connecticut, a due process challenge to Rule 65(c) seems equally implausible. See Dobbs, supra note 17, at 1113–21. The Denny court could, however, have reasoned that the constitutional issues at stake strongly urged an override of the bond requirement, thus making what was essentially a discretionary exemption appear “mandatory.” The court in Bass v. Richardson, and the courts in the NEPA bond exemption cases, took such an approach, in part. See infra notes 145–58, 164–84 and accompanying text.
In *Denny v. Health and Social Services Board*, the court simply noted that the plaintiffs were proceeding in *forma pauperis* and summery stated: "[The plaintiffs] are by hypothesis unable to furnish security, as contemplated in Rule 65(c), and the court shall order no security in connection with this preliminary injunction." The issue in *Denny* involved the plaintiffs' fourteenth amendment challenge to Wisconsin's statutory requirement that, to be eligible for public assistance, applicants must have continuously resided in the state for one year. The *Denny* court could have held that the constitutional issues at stake provided a compelling reason to depart from the dictates of Rule 65(c). Its statement that the plaintiffs were "unable to furnish security as contemplated by Rule 65(c)" is the court's only express rationale for waiving the security requirement. This rationale is notable for the conspicuous absence of any constitutional override reasoning. Thus, two inferences can be drawn from the court's waiver of the security requirements in *Denny*. First, since the court did not rely on constitutional authority to waive the security requirement, it must have relied on its equity powers. Second, while it did not expressly state its rationale for granting the waiver, its decision would appear to be based on the theory that it would be unjust to an individual to block adjudication for want of money, or on the theory that the legal system itself has an interest in having justiciable issues adjudicated in the judicial forum (rather than the streets), or both. Faced with blocking the indigent plaintiffs' access to court by requiring a bond they could not provide, the court waived the security requirement in a clear demonstration of its reluctance to condition judicial access upon the parties' financial resources.

*Bass v. Richardson*, decided in 1971, reiterated the *Denny* court's holding that bond should not be required of indigents. The court, however, built upon the reasoning in *Denny*: where the applicants litigated under a statute envisioning a private enforcement scheme, the statute's policies implicitly overrode Rule 65(c), necessitating a bond exemption. The plaintiffs in *Bass* were indigent recipients of medicaid benefits who challenged the State of New York's benefits reductions. Citing *Denny* for the proposition that indigents ordi-

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142 285 F. Supp. at 527.
143 Id.
144 Id.
145 338 F. Supp. at 490.
146 Id. at 491.
147 Id. at 490-91.
narily should not be required to post bond, the court in Bass went on to conclude that the Social Security Act’s legislative history indicated that Congress intended parties “adversely affected” by improper administration of Social Security Act programs to seek judicial review. Requiring the posting of a bond would discourage litigation seeking such review, and was therefore inconsistent with Congressional intent. The court also stated that the preliminary injunction standard adequately protected the defendant-state from the erroneous issuance of relief, that the Social Security Act controlled Rule 65(c), and that the “allocation of the risk of not complying with federal law in a comprehensive program to promote national health ... rests upon the defendant governmental bodies whose administration of the program is at issue.”

The decision in Bass can, and has, been read to create a narrow exception for indigent civil plaintiffs seeking judicial review of administrative action. An alternative, equally narrow holding is that bonds should not be imposed upon indigent applicants seeking review under the Social Security Act. However, the Bass decision stands for much broader equitable principles. Like Denny, the Bass decision was based on the idea that it was unjust to require bonds of individuals when such a requirement blocked judicial access. The principle that bond requirements should be waived where necessary to effect a congressionally-intended private enforcement scheme adds the further equitable theory that the legal system has a positive interest in citizen enforcement, and that courts sitting in equity should waive bond requirements to encourage citizen suits. While it draws its rationale from a statute, this line of argument is essentially equitable — the Social Security Act did not explicitly require an exception to bond requirements, therefore the court must have independently determined that bond requirements should be waived. Underlying this determination is the recognition that the best enforcers of statutes are individuals adversely affected by government action, since in many cases the government is part of the problem, unlikely to enforce a statutory command against itself.

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148 Id. at 490.
149 Id. at 491.
150 Id.
151 Id.
152 Id.
153 Id.
155 As then-Circuit Judge Burger stated in Church of Christ, in the context of listener intervention in agency proceedings:
Bass also balanced the parties' individual harms, just as a court sitting in equity balances the harms in a preliminary injunction proceeding. Its statement that "the allocation of the risk of not complying with federal law . . . rests upon the defendant governmental bodies whose administration of the program is at issue" embodies a comparison of the relative abilities of the plaintiffs and the defendant to bear the risk of erroneous relief. This balance at once focuses upon the abilities of the individual litigants to bear the risk of erroneous relief, and the larger policy ramifications of requiring one or the other party to bear that risk. It is a balance colored, moreover, by a kind of equitable clean hands principle. Essentially, the Bass court refused to require a bond because the state had acted improperly, a refusal that is reminiscent of Pasteur Chamberland Filter Co. v. Funk, the 1892 case in which the court exempted the applicant from bond requirements because the enjoined party had acted toward it in bad faith. Finally, in stating that the defendant was adequately protected by the preliminary injunction standard, the Bass court added a final equitable theory: that injunction bonds were a superfluous protection against an erroneous grant of relief that the court, at least in the context of public interest suits, could dispense with at its discretion.

The Bass court's approach was extended in 1975, by the court in Bartels v. Biernat. Bartels involved a suit brought by a group of indigent handicapped persons who sought to enjoin the City of Milwaukee from executing a construction contract for public passenger buses because the City had failed to consider the needs of handicapped persons using the bus service. The Bartels plaintiffs' challenge arose under the Mass Transportation Act of 1964 and the Rehabilitation Act of 1973. Citing Denny for the proposition that

The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it.

359 F.2d at 1003-04.

156 It is a basic maxim of equity that the court will not intervene to protect a party who has not acted equitably; one must come into court with "clean hands." See J. Story, Commentaries on Equity Jurisprudence, as Administered in England and America § 59 (1836).

157 See supra text and notes at note 84.


159 Id. at 1014.

160 Id. at 1015.
bonds should not be required where they would discourage suits "to remedy the more flagrant abuses in federal administrative programs," the court waived the bond requirement. However, unlike the court in Bass, the Bartels court did not actually reason that the federal statutes under which the plaintiffs litigated demanded an exemption to Rule 65(c). Instead, it stated: "because the Court determined that the action concerns important social considerations, the Court would exercise [its] discretion to issue preliminary injunctive relief . . . without security." This language suggests an even more expansive approach to bonding requirements than does the Bass court's language. While it must be read in light of the fact that the plaintiffs litigated under federal statutes, Bartels suggests that courts might except indigents from bonds because they find, in their equitable discretion, that the questions presented are of sufficient social significance to warrant an exemption. Bartels seems to contemplate, therefore, an equitable private attorney general exemption triggered by the court's equitable determination that the public interest impact of the litigation requires a waiver of Rule 65(c).

The shift in judicial focus from Denny to Bartels—from the applicant's identity as an indigent, to whether cases involve significant social considerations—suggests that courts are starting to recognize a general public interest bond exemption. Dispensing with bond requirements because the applicant is an indigent creates a narrow exemption applying only to poor persons. Dispensing with bond requirements because they would prevent litigation of important social issues creates a potentially expansive bond exemption that could be triggered whenever the court determines that a case affects the public interest. Furthermore, as a close examination of the three cases' reasoning suggests, the evolving federal public interest exemption appears to be grounded in equity. Thus, while the federal indigent cases arose under statutory causes of action, the courts went far beyond an equitable exemption based on the realization of congressional intent. They relied on other quintessentially equitable principles, such as the fairness of requiring bond from indigents, the balance of the defendant's and plaintiff's harms, the superior ability of government defendants to bear the risk of erroneous relief, the protections afforded by the preliminary injunction test, and the legal system's interest in the adjudication of public

161 Id. at 1019.
162 Id.
163 Id.
interest suits. *Denny, Bass,* and *Bartels* thus suggest that the emerging federal exemption is a broad-based dispensation that applies to a wide variety of public interest cases — not just to those brought by indigents under the particular statutes represented by the indigent bond exemption cases.

**B. The NEPA Litigation Exemption:** Natural Resources Defense Council v. Morton, Friends of the Earth, Inc. v. Brinegar, and *Monarch Chemical Co. v. Exxon*

The equitable nature of the emerging federal public interest dispensation is further established by a line of cases164 litigated under the National Environmental Policy Act (NEPA), in which courts utilized a balancing of the equities to decline to require bonds. Like *Bass,* the courts in these cases reasoned that bond requirements should be waived because Congress intended a citizen enforcement scheme, and without a bond exemption citizen litigation would be effectively barred. NEPA’s enforcement scheme is only implicit, however — no citizen suit provision appears on the face of the Act. Nor, as one might expect, does the Act mention that bond requirements should be waived for NEPA litigants. While at first glance, the courts appeared to exempt NEPA litigants because NEPA’s statutory policy overrode Rule 65(c), such an “override” could only have been very indirect, and could not possibly have amounted to anything like a direct statutory authorization for a bond exemption. Rather, the courts, in their equitable discretion, determined that the public interest value of NEPA suits outweighed both the potential harm to the defendant-government and the public’s interest in administrative efficiency and conservation of tax revenues.

In form, the NEPA cases had two discrete steps. First, courts held that the citizen enforcement policy of the Act afforded a reason for departing from Rule 65(c). Second, they formally balanced the equities, utilizing elements drawn from the federal preliminary injunction test, to determine whether an exemption was appropriate in the particular case. The balancing of the equities functioned in

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164 Many more NEPA cases waived or nominalized bond requirements than actually engaged in equitable balancing. The following cases represent the major ones that engaged in equitable balancing: *Natural Resources Defense Council v. Grant,* 341 F. Supp. 356 (E.D.N.C. 1972), remanded, 473 F.2d 280 (4th Cir. 1972); *Natural Resources Defense Council v. Morton,* 337 F. Supp. 167 (D.D.C. Cir. 1971), aff’d 458 F.2d 827 (D.C. Cir. 1972); *Friends of the Earth v. Brinegar,* 518 F.2d 797 (9th Cir. 1975); *Monarch Chemical Co. v. Exxon,* 452 F. Supp. 493 (D. Neb. 1978). See supra note 66 for a general listing of NEPA bond exemption cases, including cases which did not balance the equities.
two ways. First, it enabled the court to take stock of the general positions of the parties, to determine whether a bond exemption was appropriate with respect to the parties' individual capacities to bear the risk of an erroneous injunction. It allowed the courts to weigh, for instance, the plaintiff's financial need for an exemption, the likelihood that the defendant would be erroneously enjoined, and the extent of the damage that the defendant might suffer. Because parties to public interest suits only putatively represent their own interests and actually represent conflicting public interests, the balancing of the equities also enabled the court to weigh the larger "public equities" of a bond exemption: whether the public interest value of the litigation outweighed the defendant's need for financial protection, and which type of party, government defendant or public interest plaintiff, could and should be expected to bear the risk of an erroneous injunction.

In *Natural Resources Defense Council v. Morton*, for instance, the court first noted that previous federal bond exemptions cases waived bond requirements where necessary to enable judicial review of administrative action. It reasoned that to require the plaintiffs to post the $750,000 minimum security requested by the defendant would block judicial review and contravene Congress' intention that environmental groups enforce NEPA. Conceivably, the NRDC court could have ended its analysis at this point, allowing the opinion to stand for the proposition that the legislative policy underlying NEPA superseded the Rule 65(c) policy of defendant protection. The court went on, however, to a further equitable consideration of the

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165 Plaintiffs in public interest suits only putatively represent their own interests. As the Court in *Newman v. Piggie Park Enterprises, Inc.* stated, speaking specifically of suits under Title II of the Civil Rights Act of 1964:

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under the Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone, but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority...  


As a result, when the court balances the equities in an injunction determination, it in effect balances the harm to the social policy that the plaintiff represents against the harm to the policy that the defendant represents — or the "public equities." The public interest factor in the preliminary injunction determination also involves a balancing of conflicting social policies.


167 Id. at 168.

168 Id.
issue that drew on factors from the preliminary injunction test typically employed by the federal courts.

The first factor that the court considered was the irreparability of harm that the plaintiff-environmental group sought to prevent — damage to a 7.9 million acre estuarine coastal marsh complex on the Outer Continental Shelf, from government oil exploration leasing.\textsuperscript{169} The court described the Shelf Region as a most important natural resource to the nation as a whole and characterized the affected complex as “vital” to fish and wildlife, a part of a delicate ecosystem that had been produced by a “fortuitous” combination of natural conditions.\textsuperscript{170} Essentially, the court described the marsh as an economically and recreationally significant resource whose perfect ecological equilibrium could be spoiled by the proposed leasing activity. While it did not specifically find that the leasing would irreparably harm the marsh complex, the court’s dramatic description suggests at least a presumption of irreparable harm,\textsuperscript{171} and recognizes that such harm would be suffered by the public, not just the particular litigants.

The court next balanced the plaintiff’s and defendant’s prospective harms. Noting that “revenue losses” to the government were not the same as “pecuniary damage” to a private party,\textsuperscript{172} the court stated: “the court believes that the public interest will be far more gravely damaged by the failure of the courts to enforce NEPA than by any harm which could possibly result from delaying this lease sale long enough to resolve the important legal issues presented by this suit.”\textsuperscript{173} This statement compares the prospective harm to the government of an unsecured injunction — loss of revenues from lease sales — with the prospective harm to the environmental plaintiff of a secured injunction — the evisceration of NEPA’s environmental impact statement requirement. Since the parties represented conflicting public interests, such an equitable balancing also incorporated the third preliminary injunction factor that the NRDC court considered: the impact upon the public interest of the remedial options under consideration. It is, of course, a fundamental principle of equitable discretion that courts can and should balance the broader

\begin{itemize}
\item \textsuperscript{169} Id. at 167.
\item \textsuperscript{170} Id. at 168.
\item \textsuperscript{171} This interpretation of the court’s treatment of the irreparable harm factor is discussed in Note, Injunction Bond Amounts in Federal NEPA Litigation, 61 Iowa L. Rev. 580, 588 (1975).
\item \textsuperscript{172} 337 F. Supp. at 168.
\item \textsuperscript{173} Id.
\end{itemize}
interests lying behind the particular parties. Thus, the court's consideration of the public interest, unavoidable as it was because any balancing of the individual litigants' harms involved a balancing of public harms, harmonized with equity's broad power to craft relief in view of its effect upon the public interest.

The court's two-step process in NRDC was repeated in Friends of the Earth, Inc. v. Brinegar, which was decided three years after NRDC, in 1975. Friends of the Earth involved a challenge by a nonprofit environmental organization to compel the City of San Francisco to prepare an environmental impact statement before committing funds to the expansion of San Francisco International Airport. In declining to require a bond, the court noted with approval the plaintiffs' argument that a bond would undermine NEPA's private enforcement scheme. It also considered persuasive the fact that another panel of the court had previously determined that the plaintiffs had a high likelihood of success on the merits. Finally, the court relied on the fact that the government defendant, unlike a private defendant, could easily bear the damage resulting from an erroneous injunction, a rationale that implicitly incorporates the idea that public interest plaintiffs, who typically have less money than private interest defendants, should not be expected to post bonds. Both a likelihood of success on the merits and a balancing of the ability of the parties to bear the costs of relief are part of the preliminary injunction determination.

In addition to weighing the individual and "public" equities, the courts have used an equitable approach to separate commercial, private interest litigants from non-commercial, public interest litigants. In the case of commercial litigants, bond exemptions have not been made. In Monarch Chemical Co. v. Exxon, a 1978 NEPA case, the court imposed bond requirements after balancing the plaintiff chemical company's financial ability to post a $10,000 bond against the defendant state's ability to bear the cost of an erroneous injunc-

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174 For instance, in the permanent injunction setting courts have denied relief to plaintiffs, even where the plaintiffs have established a cognizable injury, on the grounds that enjoining the defendant's activities would have grave economic consequences for the surrounding local community. See, e.g., Madison v. Ducktown Sulphur, Copper, & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904); Smith v. Staso Milling Co., 18 F.2d 736 (2d Cir. 1927).
175 518 F.2d 797 (9th Cir. 1975).
176 Id. at 799.
177 Id.
178 Id.
tion. The chemical company was mounting a challenge under NEPA to halt an eminent domain proceeding against its own property, a fact that the court noted in its earlier discussion concerning whether relief should issue. The court used equitable balancing to refuse the company a bond exemption. Its denial of an exemption, despite the plaintiff’s perfectly valid NEPA claim, indicates that the underlying reason for the court’s refusal to exempt the company was the company’s status as a noncommercial, private interest litigant. This rationale would tend to further prove that the NEPA exemption is based on the court’s equity powers, not on any implied statutory authorization from NEPA.

The NEPA cases indicate that the federal courts are moving toward the recognition of an equitable public interest exemption. The courts’ balance of the equities indicates that the decision to waive bond is incomplete without some consideration of the impact a secured or unsecured injunction would have upon the parties’ interests, and the case’s “public equities.” The importance of equitable balancing in the NEPA cases beyond the override element is emphasized by the fact that NEPA contains no provision for judicial enforcement. It is not at all clear that Congress contemplated that any citizen suits would be brought under the Act. Indeed, the legislative history is silent as to citizen enforcement. Thus, the NEPA cases indicate that the courts are moving towards creation of a broad dispensation for public interest law suits in general, not just one for law suits brought under statutory private enforcement schemes.

C. The Emerging Federal Public Interest Exemption: Crowley v. Local No. 82, Furniture and Piano Movers

Decided in 1982 by the First Circuit, Crowley v. Local No. 82 Furniture and Piano Movers created the first and the only bond exemption test developed by a federal court. The test confirms a

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180 Id. at 503. In accordance with Friends of the Earth, Inc. v. Brinegar, the Monarch court considered that the plaintiff had a likelihood of success on the merits in its balance of the equities. Id. It found, however, this factor less persuasive than had the Brinegar court, since it required the plaintiffs to post bond in reliance on the fact that they had the financial resources to provide security, and on the fact that the defendant-state needed partial indemnity. Id.

181 Id. at 499.

182 See King & Plater, supra note 29, at 27 and note 2.

183 Anderson, supra note 70, at 1–14.

184 Id. at 15.

185 697 F.2d 978 (1st Cir. 1982).
trend toward a general, equitable public interest bond exemption suggested by the indigent and NEPA cases. First, the court in *Crowley* viewed the plaintiff access problem posed by Rule 65(c) as a recurring one that required a general test. Unlike the NEPA courts, the *Crowley* court fashioned a bond exemption test applicable to all public interest cases. Second, as discussed in the following section, the test in *Crowley* was a fundamentally “equitable” test whose triggering event was the noncommercial, public interest status of the plaintiff.

The court began by summarizing the district court decision. In *Crowley*, the plaintiffs were union members who sued their local, as well as certain of its officers. They brought the action under the Labor Management Reporting and Disclosure Act (LMRDA) to enjoin the tabulation of the union’s election results and to order a new election. The district court waived the bond requirement on the ground that bonds would discourage the enforcement of the union members’ Title I LMRDA rights. It also engaged in a balancing of three factors drawn from the federal preliminary injunction test: the harm to the enjoined party an injunction posed, the plaintiff’s likelihood of success on the merits, and the plaintiff’s ability to post bond. On appeal, the First Circuit refused to base its decision concerning whether the lower court had acted improperly on a determination of the “mandatory” or “discretionary” status of the federal rule. Instead, the court relied on past federal bonding practices.

It divided bond cases into two types. The first type involved commercial cases where an unsecured injunction exposed the defendant to a risk of monetary loss. In these cases, the courts required bonds. The second type of case involved “important federal rights or ‘public interests’” brought, often by indigents, under remedial social legislation. In these cases, the courts waived or nominalized bond requirements. After dividing the federal case law into “commercial” and “public interest” types, the court constructed its exemptions test.

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186 Id. at 999.
187 Id. at 982.
188 Id. at 999.
189 Id.
190 Id. at 1000.
191 Id.
192 Id.
193 Id.
194 Id.
The test resembled the two-step analysis used in *NRDC v. Morton*. The *Crowley* court, however, balanced the equities first, and then considered the bond requirement’s impact upon the enforcement of statutorily created federal rights. In noncommercial cases, the district courts were first to consider the harm to the defendant of an unsecured injunction with the burden upon the plaintiff of posting security. The court distinguished between commercial and non-commercial cases because commercial plaintiffs could be presumed to have the financial resources to post bond. Second, “in order not to restrict a federal right unduly,” the district courts were to consider the “impact that a bond requirement would have upon the enforcement of the right.” One factor in determining this impact was the relative positions of the plaintiff and the defendant. Where the plaintiff and defendant were both individuals or institutions, the impact was not as great as where the plaintiff was an individual over whom the defendant institution had some control.

Applying the test, the First Circuit reasoned that the absence of a bond would pose no “great burden” on individual officers named as defendants because the local would bear any costs resulting from an erroneous injunction. The court noted that the bond requirement would adversely affect the enforcement of Title I LMRDA rights because individual union members were at a great financial disadvantage in litigating against unions.

The *Crowley* court synthesizes the equity and legislative lines of reasoning in *Bass v. Richardson* and *NRDC v. Morton* in an attempt generically to describe the type of public interest case meriting a bond exemption. While the NEPA cases may have suggested that the court could not exempt plaintiffs from bond requirements in the absence of a compelling legislative policy, the *Crowley* court forever dispels this notion. *Crowley’s* starting point, after all, is the noncommercial, public interest status of the plaintiff. The court never states that bond exemptions should be granted only where necessary to effect a statutory private enforcement scheme. Furthermore, its “federal rights” factor focuses on the individual’s ability to exercise its rights, suggesting that this factor was one in a set of equitable

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195 Id.
196 Id.
197 Id.
198 Id.
199 Id.
200 Id.
201 Id.
considerations focusing upon the individual equities of the case, including, as the court’s balancing of harms indicates, a comparison of the particular litigants’ abilities to bear an erroneous injunction. Finally, the measure supplied by the court for determining the impact of bonding upon federal rights is curiously equitable. The factor — a comparison of the applicant’s and enjoined party’s status as individual or institution — is an equitable consideration of the applicant’s financial need for a bond exemption, as the court’s application of this factor demonstrates.

The bond exemptions test articulated by the court in Crowley is a general, equitable one applicable to all public interest litigants. It can be seen as the culmination of the line of cases beginning with Denny v. Health and Social Services Board, and extending through the NEPA bond exemptions cases. In making bond exemptions available to public interest litigants, the Crowley decision ensures that federal public interest litigation will not be barred by the applicants’ limited financial resources. The next section considers arguments supporting the federal bond exception from two other perspectives: the court’s and the defendant’s.

IV. JUDICIAL TAILORING OF RELIEF, DEFENDANT PROTECTION, AND THE FEDERAL PUBLIC INTEREST EXEMPTION

A. Rule 65(c) and the Court’s Tailoring of Relief: the Contribution of the Federal Public Interest Bond Exemption

One of the more striking effects the enactment of Rule 65(c) produced was a schism between the decision to grant a preliminary injunction and the decision to impose bond requirements. As discussed in Section II, both decisions had once been subject to the court’s equitable discretion. However, the enactment of Rule 65(c), and the resulting mechanical, rather than flexible, application of bond requirements produced a nearly irreconcilable conflict. If the plaintiff lacked the financial resources to post bond, the court’s decision to impose the bond requirement could vitiate its decision to grant relief. The court could not easily solve this dilemma, since it lacked the discretion to waive or nominalize the bond requirement.

The situation produced by the enactment of a mandatory bond requirement can prevent public interest litigants from getting into court. It can also, however, disrupt the court’s decision-making process. The mandatory application of bond requirements makes the availability of relief turn on such legally irrelevant factors as the
applicant's financial resources or the availability of a bondsman\textsuperscript{202} willing to secure the injunction. In public interest cases, this result is particularly worrisome. The impact of public interest litigation requires the court to engage in a delicate balancing of all the public policy aspects of the case, a balancing process necessitated both by the public interest aspect of the issues, and, where the case involves injunctive relief, the balancing of harms and public interest elements of the injunction test.\textsuperscript{203} The policy aspects of public interest cases involving injunctive relief are particularly inescapable, in fact. Injunctions, especially those involving government defendants, involve conflicting interests that extend beyond the parties to the lawsuit.\textsuperscript{204} Allowing legally irrelevant, random factors to undercut the court's decision to grant an injunction undermines the court's decision-making process and results, at the very least, in a waste of judicial resources. At worst, it can result in a failure of the system to protect interests vital to the general welfare.

In the public interest context, the bond requirement prevents the court from deciding fundamentally important legal issues. Public interest cases often involve recurring legal questions that result from the collision of conflicting social policies. The court's decision to grant a preliminary injunction in such a context is more than a decision to grant relief in the particular case; it is a policy decision validating the type of litigation presented by the injunction applicant — a judicial determination that the issues to be litigated, and the conflict of interests presented, are important enough to warrant litigation, even though the injunction making litigation possible exposes the enjoined defendant to a risk of loss.

The value of the public interest exemption articulated in the Crowley decision and the federal bond exceptions cases lies in its unification of the discretionary preliminary injunction test and the bonding decision. Under the evolving exemption, the court may adjust the bond requirement to permit the litigation of all public interest cases, and thereby avoid a vitiation of its decision to grant an injunction. The federal equitable bond exemption is more consistent with the discretionary view of Rule 65(c), a view that is gaining

\textsuperscript{202} Bondsmen undertake to secure injunctions on the basis of the plaintiff's apparent financial ability to pay damages covered by the bond, not the plaintiff's likelihood of success on the merits. Dobbs, \textit{supra} note 17, at 1113.

\textsuperscript{203} See \textit{supra} text and note at note 164.

\textsuperscript{204} The recognition that injunctions involve an impact on the public interest is embodied in the public interest element of the preliminary injunction test.
currency, than is an exemption relying on the implied requirements of a statutory enforcement scheme. Finally, as the Crowley test demonstrates, an equitable, case-by-case approach to bond requirements involves consideration of the defendant’s risk of harm; thus, the defendant’s interests are fully protected.

Assuming arguendo that such a balance fails to protect the defendant, the following section presents the argument that, at least in the public interest setting, a bond requirement fails to successfully protect the defendant. This section also suggests that the bond requirement duplicates the preliminary injunction’s function as a screening device for frivolous claims, and that therefore it may be dispensed with in public interest cases.


1. The Bond’s Protective Functions in a Public Interest Litigation Context

The bond requirement’s two functions — deterrence of frivolous claims and compensation of the defendant — are often cited by commentators as compelling reasons for courts ordinarily to require security from injunction applicants. The “deterrence” argument holds that the bond premium and ultimate liability on the bond will discourage plaintiffs who have unsound claims for relief from filing for an injunction. The “compensation” argument holds that a bond is necessary to compensate the defendant for the harm that it might suffer if the court erroneously issues an injunction. Both of these arguments presume, however, that the applicant has the financial resources to post bond. Since public interest plaintiffs typically lack the financial resources to post bonds, neither of the bond requirement’s functions operate in a public interest litigation setting.

A bond protects defendants from frivolous claims only where it can function as a screening device, to deter those applicants lacking a good faith belief in their petitions for injunctions. The requirement assumes that applicants will not be willing to lose money over cases in which they have no valid interest, or in which the factual or legal arguments are less than compelling. This assumption, however, is based on a further assumption: that the applicant can afford to post

206 See supra text and notes at notes 114–123 for a summary of current federal interpretations of Rule 65(c).

207 Dobbs, supra note 17, at 1092.
a bond. Only where the applicant can afford to post a bond does its failure to provide security reflect its lack of good faith or the lack of meritoriousness of its petition. The typical public interest plaintiff's failure to post a bond says nothing about its good faith or confidence of success, or the strength of its claim for relief. For in the public interest context, the bond operates not as a screening device, eliminating some claims, but as a financial bar, blocking all claims.207

Similarly, the public interest litigant's lack of financial resources makes the bond's compensatory function inoperative. Ideally, the bond requirement provides a source of compensation for the defendant in case of an erroneously issued injunction. In order for a bond to provide such compensation, however, the applicant must actually obtain preliminary relief. Without preliminary relief, the enjoined party suffers no harm on account of an injunction and there is no harm for which it can be compensated. In the context of private cases, applicants required to provide bonds are usually financially able to post them, and to obtain injunctions. In public interest cases, where applicants cannot post bond, the bond requirement can play no compensatory role. If the court attempts to protect the defendant by requiring a bond, the applicant is barred from obtaining the injunctive relief that occasioned the need for the bond in the first place. Requiring a bond thus removes a pre-condition to fulfillment of the requirement's compensatory function: that the defendant actually be enjoined.

Because the bond requirement developed in a context in which applicants reasonably could be presumed to have the financial resources to post bonds, it does not work well in the public interest context. In the public interest context, the only protection that it provides is the dubious one of shielding all defendants of a certain class — defendants in public interest suits brought by plaintiffs who cannot provide bonds — from the judicial decision to issue an injunction. Apart from the bond requirement's impact upon public interest plaintiffs' access to court, or its impact upon the court's decision to decide justiciable cases, the bond requirement's dysfunction in the public interest context would seem to provide ample reason for a public interest exemption. Furthermore, as the next section demonstrates, no defendant in a public interest case would be left unprotected in the absence of a bond. The preliminary in-

207 This argument was made by the Supreme Court with respect to double appeal bonds required by Oregon's wrongful detainer statute. See Lindsey v. Normet, 405 U.S. 56, 78 (1972). See also Henson & Gray, supra note 33, at 565–69.
junction test, which is specifically designed to screen frivolous claims, provides insurance against an erroneous issuance of relief. Since the test determines whether relief shall issue at all, it is the defendant’s primary, and therefore best, protection.

2. The Preliminary Injunction Test and the Protection of the Defendant

The argument that a bond is necessary to protect the defendant from the hazards of preliminary injunctive relief presumes that there is a substantial risk that the court will erroneously issue an injunction. This presumption seems questionable in the public interest setting, where the broad social and economic impacts of injunctions make judges especially circumspect about issuing relief. The decision-making model provided by the preliminary injunction test, insures, moreover, that the chances are small that defendants will be erroneously enjoined. The difficulties of prevailing under the preliminary injunction test are magnified by the primary strategic disadvantages facing public interest litigants — lack of money and lack of information. Furthermore, both of these disadvantages themselves discourage the litigation of marginal cases.

The four part test used by the federal courts limits the availability of relief. The plaintiff must establish: (1) a likelihood of success on the merits; (2) irreparable harm; (3) on balance the plaintiff’s and defendant’s harms favor a grant of relief; (4) the injunction will not adversely affect the public interest. The burden of proof is on the plaintiff on all four factors, a burden of proof which commentators agree is a comparatively heavy one.

The likelihood of success on the merits factor provides the court with a screening device, to eliminate frivolous claims for relief. It fulfills, therefore, one of the primary functions of the bond requirement. As the court in *Friends of the Earth v. Brinegar* recognized, a number of courts have relied on the preliminary injunction test as a rationale for declining to require bonds. See, e.g., *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323 (9th Cir. 1975); *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972); *State of Alabama ex rel Bagley Corps of Eng'rs*, 411 F. Supp. 1261 (N.D. Ala. 1976); *Bass v. Richardson*, 338 F. Supp. 478 (S.D.N.Y. 1971).

See *Henson & Gray*, supra note 33, at 566–67.

For federal cases setting out the preliminary injunction standard, see note 19 and cases cited therein.

See, e.g., *Callaway*, 489 F.2d at 573.

*Leubsdorf*, supra note 17, at 547.

518 F.2d 797.
the likelihood of success on the merits factor serves as an adequate substitute for the bond: where the plaintiff's case has weak facts or where under the law it has a dubious right to final relief the court will deny preliminary relief. The likelihood of success factor is also relatively easy for the court to administer. It is at base the same type of determination that the court makes at the trial level. Although in the preliminary injunction proceeding the court usually decides on the basis of limited amounts of evidence and through an abbreviated hearing, these factors do not necessarily mean that its decision is less than trustworthy. Even at trial the court's decision is based on probabilities, rather than certainties. Since in the preliminary injunction setting the court openly decides on the basis of tentative information, its decision to grant an injunction may issue after comparatively more circumspection and weighing of competing factors than in the trial setting, where the validity of facts and final legal determinations must be presumed.

The public interest factor and the irreparable harm factor may be difficult for public interest plaintiffs to fulfill, since under either factor the court essentially balances the public policy that the plaintiff represents against that represented by the defendant. The public interest status of the plaintiff's case is thus no guarantee of relief. For example, in environmental cases, where the plaintiff challenges development activities, courts have found that the grant of a preliminary injunction is adverse to the public interest where it would result in the government's loss of revenues, even where the defendant has allegedly violated a statute. Other types of public interest cases may involve a balancing of conflicting social policies. In housing discrimination cases challenging government housing authorities' location of public housing, the policy against racial discrimination may be outweighed by an urgent public need for low-cost shelter.

The irreparable harm factor also may be a difficult one to prove. While some courts consider statutory violations to constitute irreparable harm, other courts have required public interest plaintiffs

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214 Developments in the Law: Injunctions, supra note 9, at 1056.
215 Id.
216 Leubsdorf, supra note 17, at 555–56.
217 Id.
219 See, e.g., Blackshear Residents Org. v. Romney, 472 F.2d 1197 (5th Cir. 1973).
220 See Developments in the Law: Injunctions, supra note 9, at 1059. Some courts do not balance the equities at all where a statutory violation of NEPA has occurred. See Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971) (court held plaintiffs entitled to preliminary injunctive
to prove that a concrete, physical irreparable injury will result from the defendant's action.221 This requirement may be quite difficult for public interest plaintiffs to fulfill, especially when litigating under statutes such as NEPA, where the statutory violation is essentially procedural.

Success under the preliminary injunction test turns, moreover, on the quality of the public interest plaintiff's legal services and case preparation. To prove a likelihood of success on the merits requires a plaintiff to present its case in chief.222 While preliminary injunction motions are normally subject to a streamlined procedure,223 complicated cases involving complex facts may force the parties to call on experts.224 At a stage of the proceedings characterized by an emergency atmosphere, the public interest litigant may find itself pitted against a better-financed, better-organized government or industry defendant. In addition to the obstacles posed by the preliminary injunction test, the limited resources of public interest litigants may therefore provide an effective screening device: only well-litigated, well-thought-out cases are likely to succeed under the preliminary injunction standard, a reality for which public interest litigants with limited resources must account in deciding whether to litigate at all. Defendants in public interest cases are thus well-screened from the issuance of an erroneous injunction, even without the "screening" device provided by a bond.

V. CONCLUSION

Developed by the equity courts in a commercial, private interest setting, the bond requirement was designed to protect the defendant from two threats posed by a preliminary injunction: monetizable damage resulting from an erroneously-issued injunction, and the expense and nuisance of fending off frivolous claims for relief. As originally developed, the bond requirement was subject to the balance of private and public interests that is at the heart of equity's ability discretionarily to tailor relief. Thus, while the requirement focused on monetary damage to the defendant, the equity courts did not view it as conferring upon the defendant any right to protection without a balancing of the equities because the plaintiffs established a violation of NEPA).

221 See Callaway, 489 F.2d at 574–76.
222 Leshy, supra note 19, at 643.
223 Id.
by a bond. Courts could and did discretionarily waive bond requirements where indicated by a variety of equitable considerations, even if the defendant was subjected to a risk of monetary loss.

While the enactment of mandatory bond provisions would seem to have removed the bonding decision from the court's equitable discretion, some jurisdictions with mandatory provisions have at least acknowledged the possibility of bond exemptions. The federal courts have gone beyond a mere acknowledgement, and, despite the seemingly mandatory language of Rule 65(c), have evolved a general, equitable bond exemption for public interest litigants. They have led the way in recognizing that public interest litigants' lack of financial resources should not bar judicial access and prevent the litigation of public interest cases that have been deemed worthy of judicial consideration. Returning to an equitable treatment of the bond requirement, the federal courts have considered a variety of factors in exempting bond, focusing both upon the requirement's impact upon public interest litigation, and the possible harm to the defendant of an unsecured injunction.

The federal exemption demonstrates that bond can and should be waived by courts in the public interest litigation setting. The federal exemption's equitable character insures that both the defendant's and plaintiff's interests will be adequately considered by the court. The ad hoc balancing of equitable discretion provides a sensitive tool for separating meritorious public interest suits in which bond waivers are needed, from frivolous public interest suits, or from essentially private interest suits in which the plaintiff can afford to post bond. Bond waivers based on an equitable balancing ensure, moreover, that courts will consider the gravity of harm that an unsecured injunction poses to the defendant.

As the various propositions underlying the federal bond exemption make clear, the bond requirement is of questionable utility in the public interest context. It fails to screen unmeritorious claims, effecting a financial bar to relief, instead. It duplicates the screening function provided by the preliminary injunction test. Finally, as this article has noted, the bond requirement performs no compensatory role, since it prevents the plaintiff from obtaining an injunction in the first place. Combined with the fact that the requirement bars the litigation of worthwhile public interest suits, the fact that it serves no deterrence or compensatory purpose creates a compelling case for a bond exemption.

While the federal public interest bond exemption might be seen as a departure from prevailing bond practices, it can also be seen as
a return to an equitable treatment of the bonding requirement necessitated by the special situation of public interest litigation. For while in the private interest setting the application of bond requirements poses no obstacle to relief, in the public interest setting it prevents the individual plaintiff from obtaining an injunction, ultimately barring the litigation of cases protecting vital public interests. Sitting in equity but operating under the apparently mandatory Rule 65(c), the federal courts clearly have had difficulty ignoring the reality of the "equitable" decision to require bonds of public interest plaintiffs, and have looked behind the often-recited rubric of "defendant protection" to confront what type of protection bond requirements would afford in the public interest context. The resulting equitable bond exemption, while responsive to the new situation presented by public interest litigation, is a return to an older conception of bonding requirements whose time has come.