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Consolidating the Preliminary Injunction Hearing and Trial: Changing the Rules in the Middle of the Game

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CONSOLIDATING THE PRELIMINARY INJUNCTION HEARING AND TRIAL: CHANGING THE RULES IN THE MIDDLE OF THE GAME

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I. BACKGROUND

Two fundamental principles inform our system of justice: the related concepts of notice and the right of parties to be heard by presenting their full case at a trial on the merits. While notice encompasses many aspects of a trial or hearing, this discussion focuses on what constitutes adequate notice to parties when courts seek to control the shape and conduct of litigation. More specifically, this article addresses the issues surrounding consolidation, the situation that arises when a court decides the merits of a dispute based solely on the record produced at a hearing on motion for a preliminary injunction. When notice of consolidation is absent or inadequate, parties are often deprived of the opportunity to put their full case before the trier of fact.

In our view, problems associated with consolidating the preliminary hearing with the trial on the merits deserve serious consideration by the courts and by the Advisory Committee on the Civil Rules. We believe that a rule change is necessitated by current practice in order

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to provide better protection for litigants who find the rules of the game have been changed without adequate notice. Lack of notice often means that parties are forced to engage in collateral litigation, such as appealing a court's consolidation decision or moving for a new trial, rather than addressing the merits of their case. Amendments to the civil rules requiring that actual and adequate notice be given to the parties by the court, trial or appellate, before consolidation takes place would reduce unfair prejudice which results when parties are forced to engage in collateral litigation over procedural problems. Such an amendment would also be beneficial because it would reduce the burden such litigation has on appellate court dockets.

After a hearing on a motion for preliminary relief,[1] the decision on the merits may occur in the trial court or on appeal. Because a preliminary injunction restrains the defendant, the merits should be addressed as soon as possible. While Rule 65(a)(2)[2] gives district courts the authority to consolidate a hearing on a preliminary injunction motion with the trial on the merits, no such express authority exists at the appellate level. The lack of a formal notice requirement in Rule 65(a)(2) and under case law has caused, and continues to cause, problems for litigants and judges who do not provide adequate notice.[3] More explicit protection is required. In this regard, amendments to the civil rules are needed.

Failure at the hearing on the preliminary injunction does not dictate failure on the merits. As the Supreme Court stated in *University of Texas v. Camenisch*,[4] a party "is not required to prove his case in full at a preliminary-injunction hearing."[5] Such hearings are characteristically marked by the need to show entitlement to an order which

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1. For a discussion of the various criteria that federal courts having applied in granting or denying motions for preliminary relief, see generally Wolf, *Preliminary Injunctions: The Varying Standards*, 7 W. NEW ENG. L. REV. 173 (1984).

2. Federal Rule of Civil Procedure 65(a)(2) provides:

> *Consolidation of Hearing With Trial on Merits.*
> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissable upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

FED. R. CIV. P. 65(a)(2).

3. *See generally* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2950 (1973 & Supp. 1989).

4. 451 U.S. 390 (1981).

5. *Id.* at 395 (citing Progress Dev. Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961)).

maintains the status quo of the parties. The hearings are often held under less than ideal conditions because the parties have put together their cases hastily. Therefore, it is unfair to expect them to develop fully their claims or defenses on the merits.[6]

The Court in *Camenisch* also instructed that it is a fallacy to assume that success or failure at a preliminary injunction hearing is synonymous with ultimate success or failure at trial. Success for the defendant does not mean that the plaintiff will lose at trial, because the plaintiff may not have been able to prove irreparable harm at the hearing but may still be able to make out a case for relief at trial. Moreover, the findings of fact and conclusions of law drawn therefrom "are not binding at trial on the merits."[7] Therefore, as the Court in *Camenisch* instructed, "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits."[8]

Under current law, the consolidation decisions fall into two broad categories of cases: express consolidation and "de facto"[9] consolidation. In the first group are placed those cases in which the district court, after notice to the parties, combines a hearing on preliminary relief with a trial on the merits. The "de facto" consolidation cases include those decisions in which the court, usually (but not always) an appellate court, reaches the merits, without notice to the parties, based on the record developed at the preliminary hearing.

To appreciate fully the current law on consolidation, this article first examines its historical antecedents prior to the 1966 amendment to Rule 65 giving the district courts express authority to consolidate. Second, it examines the 1966 amendment to Rule 65 which added subdivision (a)(2).[10] Third, the article discusses the consolidation cases decided after the 1966 amendment to determine what, if any, changes

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6. *Id.*

7. *Id.* (citing Industrial Bank of Washington v. Tobriner, 405 F.2d 1321, 1324 (D.C. Cir. 1968); Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953)).

8. *Id.*

9. We exclude from the category of "de facto" consolidation two other types of cases: (a) those decisions in which the court purports not to be reaching the merits, but could reasonably be accused of doing so; *see, e.g.*, Federal Deposit Ins. Corp. v. Jones, 846 F.2d 221 (4th Cir. 1988) (Wilkins, J., concurring and dissenting); Paris v. Dep't of Hous. and Urban Dev., 843 F.2d 561 (1st Cir. 1988) (Bownes, J., dissenting); Midway Mfg. Co. v. Artic Int'l, 704 F.2d 1009 (7th Cir.), *cert. denied*, 464 U.S. 823 (1983); and (b) those decisions in which the court states or assumes that the lower court reached the merits when reasonable persons could disagree with that assumption, *see, e.g.*, Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 593 (1984) (Blackmun, J., dissenting).

10. For the text of Rule 65(a)(2), see *supra* note 2.

it wrought in the law of consolidation. It concludes with suggestions for changing current law.

II. PRE-AMENDMENT PRACTICE

Prior to the 1966 amendments to Rule 65, the federal courts appeared to take two contrary approaches to the question of whether the court could address the merits of a case after only a hearing on motion for a preliminary injunction. Imprecise language and irreconcilable holdings in Supreme Court cases largely caused the confusion. One line of cases authorized the federal courts to enter final judgment (either for plaintiff or defendant) after a preliminary hearing, while the other line appeared to prohibit it. Each line of decision will be discussed in turn.

A. *Court may decide the merits*

Two vintage Supreme Court decisions began this line of precedent. In *Smith v. Vulcan Iron Works*,[11] the Court affirmed a judgment of the court of appeals, which reversed a temporary injunction restraining a patent infringement, and ordered the case dismissed on the merits. Relying on English and state practice, the Court justified the dismissal as saving the parties "needless expense"[12] if the case were remanded for a trial on the merits.

Three years later in *Mast, Foos & Co. v. Stover Mfg. Co.*,[13] the Court limited the rule in *Smith* to cases where the trial court in fact held "a full hearing,"[14] rather than the abbreviated hearing usually accompanying motions for preliminary injunctions. At the same time, the Court expanded the rule to include cases: (1) where the bill is "devoid of equity"[15] on its face; (2) where the claim is "manifestly"[16] without merit; and (3) where the facts are not in dispute.[17] In any of these instances, the appellate court might resolve the case on the merits in defendant's favor even though the case arose on motion for a preliminary injunction.[18]

In 1903, the Supreme Court characterized the practice announced in *Mast, Foos* as the rule and the three limitations as the "ex-

11. 165 U.S. 518 (1897).
12. *Vulcan*, 165 U.S. at 524.
13. 177 U.S. 485 (1900).
14. *Mast, Foos*, 177 U.S. at 494.
15. *Id.* at 495.
16. *Id.*
17. *Id.*
18. *Accord*, Castner v. Coffman, 178 U.S. 168 (1900).

ceptions."[19] Despite that analysis, the Court acknowledged the difficulties confronting the complainant at a hearing on a motion for preliminary relief. The complainant cannot effectively challenge the defendant's evidence since one cannot cross-examine an affidavit, the usual mode of proof at hearings for preliminary injunctions. The Court further recognized that equity complainants should not be required to put on their whole case when seeking only preliminary relief. If they were, "very few motions of that sort would be made."[20] While that recognition of the realities of hearings for preliminary relief could have undermined the *Mast, Foos* rule, the Court nonetheless adhered to it in later cases.[21] Indeed the Court expanded the rule again a few years later by permitting appellate courts to address the merits if the preliminary injunction would cause "grave detriment to the public interest."[22]

When the courts have applied the *Mast, Foos* rule, the result has generally been a dismissal of the plaintiff's suit with entry of judgment for the defendant. The question arises whether the courts, after a preliminary hearing, may apply *Mast, Foos* against the defendant, entering judgment on the merits for the plaintiff. Despite a contrary suggestion by the Supreme Court,[23] the federal courts have expanded the *Mast, Foos* rule to permit entry of judgment for the plaintiff after a hearing on motion for a preliminary injunction.[24] Indeed within seven

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19. Brill v. Peckham Motor Truck and Wheel Co., 189 U.S. 57, 63 (1903).

20. *Id.* at 63.

21. *Accord,* Deckert v. Independence Shares Corp., 311 U.S. 282 (1940); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Meccano, Ltd. v. John Wanamaker, 253 U.S. 136 (1920); Eagle Glass & Mfg. Co. v. Rowe, 245 U.S. 275 (1917); Leeds & Catlin Co. v. Victor Talking Mach. Co., 213 U.S. 301 (1909); Harriman v. Northern Sec. Co., 197 U.S. 244 (1905). *See also* Denver v. New York Trust Co., 229 U.S. 123 (1913) (extending to the Supreme Court the rule permitting the circuit court of appeals to reach the merits on appeal from a deicison regarding a preliminary injunction). *Contra, Ex parte* National Enameling and Stamping Co., 201 U.S. 156 (1906) (Supreme Court cannot reach the merits unless the circuit court of appeals does).

22. United States v. Baltimore & O.R.R., 225 U.S. 306, 326 (1912). *Accord,* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (President Truman's unsuccessful attempt to seize the steel mills during the Korean conflict); National Ass'n of Farmworkers Orgs. v. Marshall, 628 F.2d 604, 622 (D.C. Cir. 1980); Kansas *ex rel.* Stephan v. Adams, 608 F.2d 861, 867 n.5 (10th Cir. 1979), *cert. denied sub nom.* Spannaus v. Goldschmidt, 445 U.S. 963 (1980).

23. *See* Meccano, Ltd. v. John Wanamaker, 253 U.S. 136, 141-42 (1920). *But see* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). In both *Sawyer* and *Thornburgh,* the Supreme Court, in reviewing rulings on preliminary injunctions, reached the merits of the disputes and held for the plaintiffs without further discussion.

24. Standard Oil Co. of Texas v. Lopeno Gas Co., 240 F.2d 504 (5th Cir. 1957); Allegheny Oil Co. v. Snyder, 106 F. 764 (6th Cir. 1900), *cert. denied,* 181 U.S. 618 (1901).

months of the decision in *Mast, Foos*, the Sixth Circuit, in *Allegheny Oil Co. v. Snyder*,[25] upheld the entry of a permanent injunction after only a hearing on motion for a temporary[26] injunction. In *Snyder*, the plaintiff sued to enforce a contract for leasing land to drill for oil and gas. Because "the facts were substantially undisputed,"[27] the appellate court sustained the judgment for the plaintiff. In such instances, the trial court may reach the merits to save the parties "the expense and delay of protracted litigation."[28]

B. *Court may not decide the merits*

Despite this plethora of precedent, the Supreme Court has from time to time read *Mast, Foos* in a more limited fashion.[29] Occasionally, the Court has intimated a disapproval of entering judgment on the merits prior to a full hearing in the trial court.[30] Finally, in *Mayo v. Lakeland Highlands Canning Co.*,[31] the Court appeared to condemn altogether the practice of granting judgment for either party before a full hearing is conducted. In *Mayo*, grapefruit processing companies sued Florida state officials to enjoin the enforcement of a statute setting prices for citrus fruits. A three-judge district court,[32] after hearing, entered a temporary injunction, holding the statute unconstitutional. On direct appeal, the Supreme Court reversed the

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Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (The Supreme Court, on review of a grant of a preliminary injunction, reached the merits of the dispute and held for the plaintiffs without further discussion.) *See also* Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67 (2d Cir.) (decided two weeks after the effective date of the addition of subdivision (a)(2) to Rule 65, the court characterized the issue as one of first impression), *cert. denied*, 385 U.S. 971 (1966).

25. 106 F. 764 (6th Cir. 1900), *cert. denied*, 181 U.S. 618 (1901).

26. Over the years, the courts have used the words "temporary," "preliminary," "interlocutory," and "provisional" to describe interim injunctive relief. This article will use these words interchangeably.

27. *Snyder*, 106 F. at 770.

28. *Id.*

29. Meccano, Ltd. v. John Wanamaker, 253 U.S. 136, 141-42 (1920) (*Mast, Foos* applies only "if it clearly appears that no ground exists for equitable relief"); Eagle Glass & Mfg. Co. v. Rowe, 245 U.S. 275, 280-81 (1917) (*Mast, Foos* applies only if parties consent to a disposition on the merits or if there is no basis for equitable relief on the face of the complaint).

30. *Ex parte* National Enameling and Stamping Co., 201 U.S. 156 (1906); Brill v. Peckham Motor Truck and Wheel Co., 189 U.S. 57 (1903).

31. 309 U.S. 310 (1940).

32. In 1976, Congress essentially repealed the three-judge district court mechanism. Act of August 12, 1976, 90 Stat. 1119. *See generally* HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1333-37 (3d ed. 1988). Congress left the mechanism in place for apportionment cases, and for certain other matters. *Id.* at 1334-35 (citing 28 U.S.C. § 2284).

judgment, stating that the lower court should not have reached the merits on the abbreviated record of the preliminary hearing. It should only have addressed the factors relating to the propriety of entering a preliminary injunction.

Prior to the 1966 amendments to Rule 65, discussed below, some lower federal courts took the *Mayo* approach. In *Progress Development Corp. v. Mitchell*,[33] for example, the plaintiff companies brought suit to enjoin town officials from interfering with the construction of racially integrated housing. In reversing the district judge's entry of summary judgment for the defendant after a hearing on the plaintiff's motion for preliminary relief, the court of appeals broadly disapproved of the practice of reaching the merits on motion for such relief. "No plaintiff is required to prove his case on the merits at a preliminary hearing."[34] The court stated that the purpose of the abbreviated hearing would be defeated if the court addressed the merits since the parties would be required to present their whole case.[35]

III. POST-AMENDMENT PRACTICE

On February 28, 1966, the Supreme Court transmitted to Congress amendments to Rule 65, to become effective on July 1, 1966.[36] Among other changes, those amendments added a new subdivision (a)(2). This provision authorized the trial judge to consolidate the hearing on the motion for a preliminary injunction with the trial on the merits. In one sense it merely codified in the civil rules a practice that the Supreme Court had condoned without subdivision (a)(2) at least since the decision in *Mast, Foos*.[37] The question then is — what impact, if any, has the new subdivision had on prior practice? The impact has been mixed. The cases can be classified into two categories: (a) decisions under Rule 65(a)(2); and (b) decisions outside the rule. Each group will be examined in turn.

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33. 286 F.2d 222 (7th Cir. 1961).

34. *Id.* at 233.

35. *Accord*, Di Giorgio v. Causey, 488 F.2d 527 (5th Cir. 1973); Hoffritz v. United States, 240 F.2d 109 (9th Cir. 1956); Seagram-Distillers Corp. v. New Cut Rate Liquors, 221 F.2d 815 (7th Cir.), *cert. denied*, 350 U.S. 828 (1955); Doeskin Prods. v. United Paper Co., 195 F.2d 356 (7th Cir. 1952); Chicago Great W. Ry. v. Chicago, B. & Q. R.R., 193 F.2d 975 (8th Cir. 1952); *cf.* Tanner Motor Livery v. Avis, Inc., 316 F.2d 804 (9th Cir.), *cert. denied*, 375 U.S. 821 (1963).

36. *Amendments to Rules of Civil Procedure*, 39 F.R.D. 69, 228 (1966).

37. Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485 (1900); *see also* Smith v. Vulcan Iron Works, 165 U.S. 518 (1897).

A. *Decisions under Rule 65(a)(2)*

1. History of the Rule

We begin with a brief explanation of how the rule operates. Rule 65(a)(2)[38] allows the district court to consolidate the hearing on a preliminary injunction with the trial on the merits. In effect this means that the preliminary hearing becomes the final trial. According to the Advisory Committee's Note, "[t]he subdivision is believed to reflect the substance of the best current practice and introduces no novel conception."[39] Unfortunately, the Advisory Committee's Note makes no reference to any prior judicial decision or other authority to support its assertion as to "the best current practice." In fact, as noted above, the federal courts had taken at least two different approaches. Nor does the Note explain why one approach is "best."

The purpose of the amendment was to achieve judicial economy and efficiency where desirable and appropriate. The courts of appeals have encouraged the use of consolidation under Rule 65(a)(2) to advance the decision on the merits of the controversy and to save time and expense both at the trial and appellate levels.[40] A court using the rule can avoid repetition of evidence when the evidence on the preliminary injunction motion will also be important to a decision on the merits.[41]

The Advisory Committee on the Federal Rules of Civil Procedure thought that such simultaneous consideration of the application for preliminary relief and of final judgment would provide the party seeking relief with a speedier overall remedy.[42] However, the consolidated proceeding should not, in theory at least, cause any "delay in the disposition of the application for the preliminary injunction, for the evidence will be directed in the first instance to that relief, and the preliminary injunction, if justified by the proof, may be issued in the course of the consolidated proceedings."[43]

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38. For the text of Rule 65(a)(2), see *supra* note 2.

39. *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 73, 124 (1966).

40. *E.g.*, West Publishing Co. v. Mead Data Cent., 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987); Forts v. Ward, 566 F.2d 849 (2d Cir. 1977); Glen-Arden Commodities v. Costantino, 493 F.2d 1027, 1030 n.2 (2d Cir. 1974).

41. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II)*, 81 HARV. L. REV. 591, 609-10 (1968).

42. *Proposed Amendments to Rules*, *supra* note 39, at 124.

43. *Id.*

2. Timing

Rule 65(a)(2) allows the court to order consolidation at any time "[b]efore or after the commencement" of the hearing on a motion for preliminary relief.[44] Many judges have interpreted this to mean that they can consolidate at the end of the hearing as well.[45] In addition some courts have read the rule to give them the power to consolidate retroactively.[46] That is, after the hearing has concluded, the district court enters a consolidation order that relates back to the preliminary hearing and the full trial is merged with the hearing.

In effect, the trial on the merits never takes place because the consolidation occurs at the conclusion of the preliminary hearing and effectively bars a trial. This procedure would seem to be in violation of the spirit of the rule, and "comes perilously close to a violation of due process."[47] The courts, however, have not held such action to be a *per se* violation of Rule 65(a)(2). Rather, they balance the trial court's discretionary power against the degree of prejudice to the complaining party.[48]

3. By motion or own initiative

Consolidation can be ordered by the court on its own initiative[49] or by request of either party for such an order.[50] The judge's discretion is broad.[51] If consolidation is ordered, Rule 65(a)(2) allows evidence already introduced at the hearing to be incorporated in the record at the trial on the merits. It does not preclude the parties from

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44. FED. R. CIV. P. 65(a)(2).

45. Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988); American Fed'n of Gov't Employees v. Colburn, 531 F.2d 314 (5th Cir. 1976).

46. *E.g.*, Wohlfahrt v. Memorial Medical Center, 658 F.2d 416, 418 (5th Cir. Unit A Oct. 1981) (district court denied preliminary hearing on motion for a preliminary injunction); Warehouse Groceries Management v. Sav-U-Warehouse Groceries, 624 F.2d 655 (5th Cir. 1980) (district court denied preliminary relief, issued order consolidating hearing and trial, and issued final relief); *see* Update Art v. Modiin Publishing, 843 F.2d 67 (2d Cir. 1988).

47. Gellman v. Maryland, 538 F.2d 603, 606 (4th Cir. 1976).

48. *Wohlfahrt*, 658 F.2d at 417-18; Dry Creek Lodge v. United States, 515 F.2d 926 (10th Cir. 1975); Nationwide Amusements v. Nattin, 452 F.2d 651 (5th Cir. 1971) (per curiam) (Fifth Circuit case reported as Fourth Circuit case in Federal Reporter); *see* Johnson v. White, 528 F.2d 1228 (2d Cir. 1975); Eli Lilly & Co. v. Generix Drug Sales, 460 F.2d 1096, 1106-07 (5th Cir. 1972).

49. *See* Northern Arapahoe Tribe v. Hodel, 808 F.2d 741 (10th Cir. 1987).

50. K. SINCLAIR, FEDERAL CIVIL PRACTICE 387 (2d ed. 1986).

51. *See* Glacier Park Foundation v. Watt, 663 F.2d 882, 886 (9th Cir. 1981) ("[C]ourt has the power to consolidate . . . . Such action may be taken by stipulation, motion, or even *sua sponte* so long as the procedures do not result in prejudice to either party."); Dillon v. Bay City Constr. Co., 512 F.2d 801, 804 (5th Cir. 1975).

reintroducing evidence or testimony at trial if "finer details of proof are needed on trial than on the preliminary injunction."[52]

4. Notice

The rule does not specify what kind of notice, if any, is required as a prerequisite for consolidation. Consequently, the courts have developed their own standards. Although not unanimous in their approach, they generally have embraced a three-step inquiry. First, has the district court given any notice at all of its intent to consolidate and reach the merits? Second, if so, is that notice adequate or sufficient? Third, if no notice or inadequate notice has been given, has a party (or parties) been prejudiced by the absence of notice? Some courts have added a fourth step: Would the omitted evidence change the result of the decision below?

Although there is no requirement of a formal, written notice of consolidation,[53] "clear and unambiguous notice"[54] of the court's intention to consolidate must be given. The Supreme Court has adopted this standard.[55] Thus, a party has grounds to object if it received no notice or if the notice was inadequate. Most commentators believe that notice should be adequate so that the parties may present their respective cases fairly and fully.[56] The focus of "adequate notice"[57] is whether the objecting party has had the opportunity to develop and present its case. In determining the adequacy of notice, the courts have considered the period of time between the notice and the consolidated hearing,[58] the nature of the case,[59] the words used by the judge

52. Kaplan, *supra* note 41, at 610.

53. H & W Industries v. Formosa Plastics Corp., USA, 860 F.2d 172, 176 (5th Cir. 1988); Nationwide Amusements v. Nattin, 452 F.2d 651, 652 (5th Cir. 1971) (per curiam) (Fifth Circuit case reported as Fourth Circuit case in Federal Reporter).

54. Pughsley v. 3750 Lake Shore Drive Coop. Bldg., 463 F.2d 1055, 1057 (7th Cir. 1972). *Accord*, Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988); Proimos v. Fair Automotive Repair, 808 F.2d 1273 (7th Cir. 1987).

55. University of Texas v. Camenisch, 451 U.S. 390, 395 (1981).

56. *See* 19 FEDERAL PROCEDURE, LAWYERS EDITION 478 (1983); WRIGHT & MILLER, *supra* note 3, at 486.

57. Michenfelder v. Sumner, 860 F.2d 328, 337 (9th Cir. 1988).

58. Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988); Northern Arapahoe Tribe v. Hodel, 808 F.2d 741 (10th Cir. 1987); Commodity Futures Trading Comm'n v. Board of Trade, 657 F.2d 124 (7th Cir. 1981); Gellman v. Maryland, 538 F.2d 603 (4th Cir. 1976).

59. Without belaboring the obvious, a litigant may need more time to prepare for trial "in a complicated case" Michenfelder v. Sumner, 860 F.2d 328, 337 (9th Cir. 1988), than in one less astounding. *Compare Michenfelder* (five weeks is sufficient time in a prisoner's suit challenging strip searches and use of taser guns) *with* H & W Industries v. Formosa Plastics Corp., USA, 860 F.2d 172 (5th Cir. 1988) (six weeks of discovery is insufficient time to prepare a breach of contract and antitrust suit).

purporting to consolidate,[60] the opportunity or plans of the party to undertake discovery,[61] and other related factors. The adequacy of the notice "must be evaluated in light of whether the plaintiff [or defendant] would have used the additional time productively."[62] Where the district court entered the consolidation order after the preliminary hearing and during oral argument, the Fourth Circuit found error.[63]

If the objecting party has not received any notice of the court's intent to decide the merits after a preliminary hearing (so-called "de facto consolidation"[64]), or if the notice is inadequate, the courts are divided as to whether that alone constitutes reversible error. Although the Supreme Court did not address this point in *Camenisch*,[65] the lower federal courts have regularly dealt with the issue, reaching different conclusions. Some courts have adopted the automatic reversal approach.[66] In *Puerto Rican Farm Workers ex rel. Vidal v. Eatmon*,[67] for example, the Fifth Circuit Court of Appeals reversed a judgment denying the plaintiff a permanent injunction after a hearing on its motion for preliminary relief because the district court failed to notify the plaintiff of its intent to reach the merits. It held that, under Rule 65(a)(2), the plaintiff is entitled to notice and a trial on the merits. Courts have reached this result even where the preliminary hearing has produced an extensive record.[68]

Similarly, where the district court fails to provide adequate notice, some courts have reversed a merit judgment without any showing of prejudice. In *Gellman v. Maryland*,[69] it was enough that the plain-

60. *E.g.*, Pughsley v. 3750 Lake Shore Drive Coop. Bldg., 463 F.2d 1055, 1056-57 (7th Cir. 1972) (inadequate notice of preliminary hearing to "complete" its "total case" before resting).

61. Northern Arapahoe Tribe v. Hodel, 808 F.2d 741 (10th Cir. 1987); Gellman v. Maryland, 538 F.2d 603 (4th Cir. 1976); Pughsley v. 3750 Lake Shore Drive Coop. Bldg., 463 F.2d 1055 (7th Cir. 1972).

62. Michenfelder v. Sumner, 860 F.2d 328, 337 (9th Cir. 1988).

63. Gellman v. Maryland, 538 F.2d 603 (4th Cir. 1976).

64. Brotherhood of Ry. Carmen v. Pacific Fruit Express Co., 651 F.2d 651, 653 (9th Cir. 1981).

65. University of Texas v. Camenisch, 451 U.S. 390, 395 (1981).

66. Woe by Woe v. Cuomo, 801 F.2d 627 (2d Cir. 1986); Crowley v. Local No. 82, 679 F.2d 978, 998 n.23 (1st Cir. 1982) (dictum), *rev'd on other grounds*, 467 U.S. 526 (1984); Gellman v. Maryland, 538 F.2d 603 (4th Cir. 1976); Penn v. San Juan Hosp., 528 F.2d 1181 (10th Cir. 1975); Puerto Rican Farm Workers *ex rel.* Vidal v. Eatmon, 427 F.2d 210 (5th Cir. 1970) (per curiam); SEC v. Pearson, 426 F.2d 1339 (10th Cir. 1970). *See also* Proimos v. Fair Automotive Repair, 808 F.2d 1273 (7th Cir. 1987).

67. 427 F.2d 210 (5th Cir. 1970) (per curiam).

68. Woe by Woe v. Cuomo, 801 F.2d 627, 629 (2d Cir. 1986); West Publishing Co. v. Mead Data Cent., 799 F.2d 1219, 1229-30 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987).

69. 538 F.2d 603 (4th Cir. 1976).

tiff had additional evidence to offer and had been denied the opportunity to engage in discovery after the preliminary hearing. The court of appeals refused to assess the kind and quality of evidence the plaintiff might later introduce at a merits trial.

In contrast, other courts have held that, even if the district judge consolidates without any notice or without adequate notice, this will not result in automatic reversal. Although courts have stated that the better or preferred practice is for the district court to give notice[70] and to place the response of the parties on the record,[71] they have not required it. If the facts are undisputed based on the existing record, if the case involves only a question of law, or if the complaining party fails to show prejudice, the appellate court will affirm the judgment on the merits even though there has been no trial. First, with regard to undisputed facts, the Eighth Circuit, in *United States ex rel. Goldman v. Meredith*,[72] found that the preliminary hearing record disclosed "no conflict of material fact"[73] and, thus, entry of final judgment for the defendant was appropriate even though the plaintiff had not received adequate notice. Second, the courts have not required notice when the dispute concerns exclusively questions of law.[74]

Third, if the complaining party fails to demonstrate "prejudice," the judgment on the merits will be affirmed.[75] Some courts require the complaining party to demonstrate "substantial prejudice"[76] to its case caused by the inadequate notice of consolidation. To show prejudice, the objecting party must prove "how additional evidence could have

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70. *E.g.*, United States *ex rel.* Goldman v. Meredith, 596 F.2d 1353 (8th Cir.), *cert. denied sub nom.* Goldman v. Merrill Lynch, Pierce, Fenner & Smith, 444 U.S. 838 (1979); Atlantic Richfield Co. v. FTC, 546 F.2d 646 (5th Cir. 1977).

71. Fenstermacher v. Philadelphia Nat'l Bank, 493 F.2d 333 (3d Cir. 1974); Pughsley v. 3750 Lake Shore Drive Coop. Bldg., 463 F.2d 1055 (7th Cir. 1972).

72. 596 F.2d 1353 (8th Cir.), *cert. denied sub nom.* Goldman v. Merrill Lynch, Pierce, Fenner & Smith, 444 U.S. 838 (1979).

73. *Id.* at 1358.

74. Brotherhood of Ry. Carmen v. Pacific Fruit Express Co., 651 F.2d 651, 653 (9th Cir. 1981).

75. *E.g.*, Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988); H & W Industries v. Formosa Plastics Corp., USA, 860 F.2d 172 (5th Cir. 1988); Holly Sugar Corp. v. Goshen County Coop. Beet Growers Ass'n, 725 F.2d 564 (10th Cir. 1984); Paris v. United States Dep't of Hous. and Urban Dev., 713 F.2d 1341 (7th Cir. 1983); Commodity Futures Trading Comm'n v. Board of Trade, 657 F.2d 124 (7th Cir. 1981); Atlantic Richfield Co. v. FTC, 546 F.2d 646 (5th Cir. 1977); Eli Lilly & Co. v. Generix Drug Sales, 460 F.2d 1096 (5th Cir. 1972); Nationwide Amusements v. Nattin, 452 F.2d 651 (5th Cir. 1971) (per curiam) (Fifth Circuit case reported as Fourth Circuit case in Federal Reporter).

76. Michenfelder v. Sumner, 860 F.2d 328, 337 (9th Cir. 1988); Eli Lilly & Co. v. Generix Drug Sales, 460 F.2d 1096, 1105 (5th Cir. 1972).

altered the outcome."[77] Thus the objecting party must show what evidence would have been introduced at trial,[78] or what additional discovery was required in order for it to put on its complete case.[79] In short, the complaining party must show that it was denied "a full and complete hearing."[80]

Some courts have added a fourth step. In these cases, the appellate courts evaluate the sufficiency of the additional evidence or discovery against the standard for rendering judgment on the merits.[81] If the additional "proffered evidence"[82] is not sufficient to carry the burden of proof required to overturn the trial decision, the error is deemed to be harmless because a remand would be "a useless gesture."[83]

5. Consent and waiver

The courts have also reached the merits of a controversy after a preliminary injunction hearing, without formal consolidation under Rule 65(a)(2), in two additional circumstances: (1) when the parties consent to the court deciding the merits; and (2) when they waive the right to notice and opportunity to be heard further on the merits. Numerous decisions have noted that formal consolidation is unnecessary if the parties expressly consent to the district court combining the preliminary hearing with the trial.[84]

Similarly, courts have found waiver based on the behavior of the complaining party or parties. Such waiver may occur when the complaining party: (1) fails to object when the district judge in fact con-

77. *Michenfelder*, 860 F.2d at 337.

78. Rosenthal v. Carr, 614 F.2d 1219 (9th Cir.), *cert. denied*, 447 U.S. 927 (1980).

79. Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988) (district court ordered consolidation five weeks before trial and seven weeks after the action commenced; additional time would not have helped the plaintiff prepare any more thoroughly). *Compare* Paris v. United States Dep't of Hous. and Urban Dev., 713 F.2d 1341 (7th Cir. 1983) (judge consolidated just before adjourning the preliminary hearing, thus cutting short plaintiff's discovery).

80. H & W Industries v. Formosa Plastics Corp., USA, 860 F.2d 172, 178 (5th Cir. 1988).

81. Reese Publishing Co. v. Hampton Int'l Communications, 620 F.2d 7 (2d Cir. 1980).

82. Berry v. Bean, 796 F.2d 713, 719 (4th Cir. 1986). *See also* Socialist Workers Party v. Illinois State Bd. of Elections, 566 F.2d 586 (7th Cir. 1977) (per curiam) (after the defendant's evidentiary hearing, court found that such facts would not alter the result), *aff'd* 440 U.S. 173 (1979).

83. Berry v. Bean, 796 F.2d 713, 719 (4th Cir. 1986).

84. Proimos v. Fair Automotive Repair, 808 F.2d 1273 (7th Cir. 1987); Pughsley v. 3750 Lake Shore Drive Coop. Bldg., 463 F.2d 1055 (7th Cir. 1972); Puerto Rican Farm Workers *ex rel.* Vidal v. Eatmon, 427 F.2d 210 (5th Cir. 1970).

solidates in the presence of the parties;[85] or (2) files a post-hearing brief and proposed order which assume a disposition on the merits.[86] Finally, in *Channel Home Centers v. Grossman*,[87] the plaintiff objected to the district court's failure to give advance notice of consolidation. When the judge offered to permit the plaintiff to introduce additional evidence at a second hearing, the plaintiff declined because it first wanted more discovery. The court of appeals held that this constituted a waiver of any defect under Rule 65(a)(2) because the plaintiff never asked for additional discovery or more time to prepare.

6. Jury trial

The rule also protects the parties' right to jury trial. It directs that "subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury."[88] Thus, when a party requests a jury trial, evidence already heard at the hearing may be reintroduced for the benefit of the jury, even if repetitious, because reading the record from the preliminary hearing to the jury may not be realistic.[89] Often critical testimony of prior witnesses may require that the jury observe the demeanor of the witness in order to determine how much weight to give the testimony.

The parties will probably also want to reintroduce evidence presented in affidavits and depositions at the hearing after consolidation takes place. Similarly, if the consolidated trial is to be held before a different judge, the parties have the right to reintroduce evidence presented at the hearing.[90] Finally, after consolidation, the party who has demanded a jury trial may inadvertently lose that right since the court is now hearing the case on the merits without a jury.[91] Courts

85. DeLeon v. Susquehanna Community School Dist., 747 F.2d 149 (3d Cir. 1984); Fenstermacher v. Philadelphia Nat'l Bank, 493 F.2d 333 (3d Cir. 1974).

86. Fenstermacher v. Philadelphia Nat'l Bank, 493 F.2d 333 (3d Cir. 1974); *see* Paris v. United States Dep't of Hous. and Urban Dev., 713 F.2d 1341 (7th Cir. 1983). *But cf.* Woe by Woe v. Cuomo, 801 F.2d 627 (2d Cir. 1986) (plaintiff's request for a permanent injunction in its post-hearing brief does not constitute a waiver by defendant).

87. 795 F.2d 291 (3d Cir. 1986). *See* National Ass'n of Farmworkers Orgs. v. Marshall, 628 F.2d 604, 622 (D.C. Cir. 1980) (parties consented on appeal to a decision on the merits); *cf.* United States v. Jefferson County, 720 F.2d 1511, 1519 n.21 (11th Cir. 1983) (parties did not consent on appeal to consolidating preliminary relief with merits). *Contra*, Di Giorgio v. Causey, 488 F.2d 527 (5th Cir. 1973) (parties' agreement on appeal to reach merits is not sufficient basis for court to do so); Doeskin Prods. v. United Paper Co., 195 F.2d 356 (7th Cir. 1952) (same).

88. FED. R. CIV. P. 65(a)(2) (last sentence).

89. *Amendments to Rules of Civil Procedure*, *supra* note 36, at 122.

90. *Id.*

91. *Cf.* Progress Dev. Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961).

have been quite sensitive to this concern, and have reversed merits judgments that appeared to trench upon a litigant's right to jury trial.[92] The remedy is for the court to revoke the consolidation order, postponing the trial on the merits, or to impanel a jury to find the facts.

7. Continuance

The rule is silent about continuance and time for additional discovery. Parties involved in preliminary injunction hearings are usually rushed by the need to prepare for the hearing. Thus, consolidation may work a real hardship if the judge is unwilling to grant additional time for discovery and case development. In some instances the trial judge has told the parties they must put on their full cases immediately and has denied requests for additional time for discovery.[93]

8. Summary judgment

In other instances, courts have used rulings in the nature of summary judgment whereby plaintiff's motion for a preliminary injunction is denied and other legal or equitable relief prayed for is also denied or granted.[94] When district courts do this, they are not affording the parties the procedural safeguards of either motions to dismiss under Rule 12 or summary judgment under Rule 56.[95] In one case, a judge even fashioned permanent relief after the close of the preliminary injunction hearing while the case was on appeal.[96] He did so based on the hearing record, pleadings, and affidavits. He simply ordered the parties to court, informed them that he had consolidated, and issued his final order on the merits.[97]

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92. H & W Industries v. Formosa Plastics Corp., USA, 860 F.2d 172 (5th Cir. 1988); Proimos v. Fair Automotive Repair, 808 F.2d 1273 (7th Cir. 1987); Eli Lilly & Co. v. Generix Drug Sales, 460 F.2d 1096 (5th Cir. 1972).

93. Pughsley v. 3750 Lakeshore Drive Coop. Bldg., 463 F.2d 1055 (7th Cir. 1972).

94. Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975).

95. Motions to dismiss under Rule 12(b) and motions for summary judgment under Rule 56 are ordinarily made in writing prior to a hearing. FED. R. CIV. P. 7(b). The federal rules generally require five days notice of the hearing on the motion. FED. R. CIV. P. 6(d). If the motion is for summary judgment, ten days notice is required. FED. R. CIV. P. 56(c). A party opposing a motion for summary judgment may obtain discovery if needed to prepare counter-affidavits. FED. R. CIV. P. 56(f).

96. Eli Lilly & Co. v. Generix Drug Sales, 460 F.2d 1096 (5th Cir. 1972).

97. *Id.* at 1096.

B. *Decisions Outside Rule 65(a)(2)*

Analytically, the "consolidation" decisions under and outside Rule 65(a)(2) raise identical concerns regarding the disposition of cases on the merits after only an abbreviated hearing on a motion for preliminary relief. Despite the addition of subdivision (a)(2) to Rule 65 in 1966, the federal courts continue to decide cases on the merits, without reference to Rule 65(a)(2), after only a preliminary hearing.

These decisions outside the rule probably persist in the jurisprudence of injunction law because (1) they trace their history to precedents antedating by at least sixty years the amendment to Rule 65; and (2) they arise largely, although not entirely, in the appellate courts hearing appeals from judgments granting or denying preliminary injunctions. Although Rule 65(a)(2) is technically applicable only in the United States district courts,[98] the concerns underlying the rule should guide the appellate courts as well. In an analogous context, the Supreme Court has noted: "Although the Federal Rules of Civil Procedure strictly apply only in the district courts . . . the policies informing [them] may apply equally to the courts of appeals."[99] Indeed the Supreme Court has on occasion applied the civil rules to cases before it.[100]

Like their counterparts prior to the Rule 65 amendment, the decisions after the amendment take two disparate approaches. One line of cases, which dates at least to *Mayo v. Lakeland Highlands Canning Co.*,[101] appears to prohibit decisions on the merits after only a preliminary hearing. The second line of precedents, permitting such "de facto consolidation," is more hoary, dating to cases decided at the turn of the century.[102]

The progeny of *Mayo* are numerous in the post-1966 period. Although the courts do not always refer specifically to *Mayo*, they nonetheless faithfully apply its rationale. The essence of *Mayo* is that the parties at a hearing on motion for preliminary relief do not have sufficient time or opportunity to prepare their cases fully. Such hearings are regularly conducted on the papers, including affidavits, depositions, exhibits, and other documentary proof. The inability to

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98. FED. R. CIV. P. 1.

99. Newman-Green, Inc. v. Alfonzo-Larrain, 109 S. Ct. 2218, 2223 (1989) (in fact the Court approved the application of those precise policies in the court of appeals).

100. Mullaney v. Anderson, 342 U.S. 415 (1952) (applicability of Rule 21 of the Federal Rules of Civil Procedure to cases pending in the Supreme Court).

101. 309 U.S. 310 (1940). *See supra* notes 31-35 and accompanying text.

102. Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485 (1900); Smith v. Vulcan Iron Works, 165 U.S. 518 (1897).

conduct extensive discovery is another limiting factor. The abbreviated nature of the proceeding makes it a poor vehicle for exploring the merits of the controversy. Thus, it is not surprising that in *Withrow v. Larkin*[103] the Supreme Court chastised a lower federal court for declaring a state statute unconstitutional after only a preliminary hearing. While relying on *Mayo*, the Court did not refer either to Rule 65(a)(2) or the *Mast, Foos* line.

A few years later, the Supreme Court, even more emphatically, underscored the importance of not deciding the merits solely on the basis of a hearing on motion for preliminary relief. In 1981 the Court decided *University of Texas v. Camenisch*,[104] which in some respects represents the intersection of the rule and non-rule lines of decision. Camenisch, a deaf college student, commenced a civil action against the University of Texas under Section 504 of the Rehabilitation Act of 1973.[105] He claimed that the University violated the Act because it refused to pay for a sign language interpreter. The plaintiff moved for and the district court granted a preliminary injunction requiring the University to pay for an interpreter until a decision on the merits.

While the case was on appeal from the grant of the injunction, Camenisch graduated from the University. As a consequence, he claimed in the Supreme Court that the case was moot, while the defendant asserted it was still alive because Camenisch had posted a $3,000 bond as a condition of the preliminary injunction. In effect the defendant was asking the Court to address the merits of the dispute to determine if Camenisch should be liable under the bond for its payments to the interpreter.

The Supreme Court agreed with Camenisch that the case was moot, but only as to the propriety of the preliminary injunction. It held that the security bond for the injunction operated to keep the merits alive, but not the preliminary relief. The Court stated, however, that "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits."[106]

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103. 421 U.S. 35 (1975). *See also* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 814-26 (1986) (O'Connor, J., dissenting); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 338-58 (1985) (Brennan, J., dissenting); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 601-04 (1984) (Blackmun, J., dissenting); Brown v. Chote, 411 U.S. 452, 457 (1973) ("this Court may only consider" the matters going to the issuance of the preliminary injunction).

104. 451 U.S. 390 (1981). Of course, the doctrinal antecedent of *Camenisch* goes back at least to Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310 (1940). *See supra* notes 31-35 and accompanying text. The Court never cited *Mayo* in *Camenisch*.

105. 29 U.S.C. § 794 (1982 & Supp. II 1984).

106. *Camenisch*, 451 U.S. at 395. *See also* Thornburgh v. American College of Ob-

Because of the limited purpose and nature of the preliminary hearing, a party "is not required to prove his case in full"[107] at that stage of the proceedings. The Court noted, however, that consolidation procedures under Rule 65(a)(2) authorize the district court judge to combine the preliminary hearing with a trial on the merits, suggesting that approach as the exclusive mode of proceeding. A number of lower federal courts have followed this line of reasoning.[108]

In contrast with the *Larkin-Camenisch* line is the other group of precedents in which the Supreme Court and other federal courts have reached the merits although the cases arose on motions for preliminary relief. *Thornburgh v. American College of Obstetricians and Gynecologists*[109] is the leading case after the 1966 amendment adding subdivision (a)(2) to Rule 65. In *Thornburgh* the plaintiffs challenged the constitutionality of the Pennsylvania Abortion Control Act. The district court issued very limited preliminary relief, which the Court of Appeals expanded considerably in holding major portions of the statute unconstitutional.

Without any reference to Rule 65(a)(2), the Supreme Court held that appellate courts (and logically trial courts as well) may dispose of a case on the merits even though the record was developed on motion for a preliminary injunction. The Court stated that the normal rule articulated in *Camenisch* is not "inflexible"[110] or a limitation on "judicial power."[111] Courts may address the merits if the case rests "solely" on questions of law and if "the facts are established or of no

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stetricians and Gynecologists, 476 U.S. 747, 814-26 (1986) (O'Connor, J., dissenting); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 338-58 (1985) (Brennan, J., dissenting); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 601-04 (1984) (Blackmun, J., dissenting); Brown v. Chote, 411 U.S. 452, 457 (1973) ("this Court may only consider" the matters going to the issuance of the preliminary injunction).

107. *Camenisch*, 451 U.S. at 395.

108. Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236 (1st Cir. 1986) (en banc), *cert. denied*, 481 U.S. 1014 (1987); Thournir v. Buchanan, 710 F.2d 1461 (10th Cir. 1983); West Point-Pepperell v. Donovan, 689 F.2d 950, 953 n.1 (11th Cir. 1982); Brooks v. Nacrelli, 415 F.2d 272 (3d Cir. 1969).

109. 476 U.S. 747 (1986). *See also* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

110. *Thornburgh*, 476 U.S. at 756. Two years before *Thornburgh*, the Court of Appeals for the District of Columbia Circuit stated that *Camenisch* was not "an insurmountable bar" to an appellate court deciding the merits on review of a preliminary injunction motion. West Virginia Ass'n of Community Health Centers v. Heckler, 734 F.2d 1570, 1579 (D.C. Cir. 1984).

111. *Thornburgh*, 476 U.S. at 757. *See* Mercury Motor Express v. Brinke, 475 F.2d 1086, 1091 (5th Cir. 1973) (rule limiting appellate review to issues of the preliminary injunction, not the merits, "is one of orderly judicial administration and not a limit on jurisdictional power"). *See also* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985).

controlling relevance."[112] Relying on the *Smith*[113] and *Sawyer*[114] decisions, the Court stated that such a practice is calculated "to save the parties the expense of further litigation."[115]

In a sharp and vigorous dissent, Justice O'Connor,[116] relying on *Camenisch*, criticized the majority for prematurely deciding "serious constitutional questions on an inadequate record."[117] In *Thornburgh*, she noted, the district court conducted the usual abbreviated hearing for preliminary relief, consisting of affidavits, stipulated facts, oral argument, and legal memoranda. Justice O'Connor complained that the defendants did not have the opportunity "to develop facts that might have a bearing on the constitutionality of the statute."[118] The defendants, she observed, stipulated to facts in the district court only for the purpose of the decision on the preliminary injunction motion. If the majority view prevails, she stated, future parties will convert the preliminary hearing into a full trial on the merits for fear that the court will decide the merits without giving adequate opportunity to present their entire case. This will make litigation "more expensive, less reliable, and less fair."[119]

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112. *Thornburgh*, 476 U.S. at 757.

113. Smith v. Vulcan Iron Works, 165 U.S. 518 (1897). Reliance on *Smith* is somewhat misplaced since the Court itself has described *Smith* as having been decided after "a full hearing . . . upon pleadings and proofs." Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 494 (1900). As Justice O'Connor pointed out dissenting in *Thornburgh*, the district court did not conduct a full hearing in the *Thornburgh* case. *Thornburgh*, 476 U.S. at 815-26.

114. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Reliance on *Sawyer* may also be misplaced since that case arose under "highly unusual circumstances," *Thornburgh*, 476 U.S. at 822 (O'Connor, J., dissenting): President Truman had seized the steel mills, the Government did not object to a merits decision, the steel companies affirmatively wanted it, and time was of the essence.

115. *Thornburgh*, 476 U.S. at 756.

116. Justice O'Connor appears to be the only member of the current Court who has taken a consistent position on this issue, whether she is in the majority or in dissent. The other justices appear to ignore or embrace *Camenisch* depending on whether the majority of the court accepts or rejects their view on the merits. For example, Justice Blackmun essentially ignored *Camenisch* writing for the majority in *Thornburgh*, 476 U.S. at 755-56, but embraced it when dissenting in *Stotts*, 467 U.S. at 601-04. Similarly, Justice Brennan joined Justice Blackmun in *Thornburgh*, but relied heavily on *Camenisch* dissenting in Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 338-58 (1985). Justice Rehnquist wrote for the Court in *Walters*, ignoring *Camenisch*, but embraced it dissenting with Justice O'Connor in *Thornburgh*. Lastly, Justice White, disregarding *Camenisch*, spoke for the majority in *Stotts*, but adopted *Camenisch* dissenting in *Thornburg*. Similar observations may be made of the other justices by examining their voting patterns in *Camenisch*, *Stotts*, *Walters*, and *Thornburgh*. A foolish consistency, as Emerson once wrote, may very well be the hobglobin of little minds and law review articles.

117. *Thornburgh*, 476 U.S. at 815.

118. *Id.*

119. *Id.* at 826.

Lower federal courts have, like the *Thornburgh* Court, reached the merits of cases after a preliminary hearing without regard to Rule 65(a)(2). They have, however, adopted various approaches to that inquiry. The courts have decided the merits in the following circumstances: (1) where the dispute, as in *Thornburgh*, presents only legal questions and the facts are not in dispute;[120] (2) where the complaint fails to state a claim upon which relief may be granted;[121] (3) where the record is fully developed, the legal issues are obvious, and immediate resolution of the merits is needed;[122] and (4) where the record is fully developed and the dispute turns largely on legal questions.[123] As in the period prior to the amendment to Rule 65(a)(2), the majority of cases have involved entry of judgment for the defendant, although a few, such as *Thornburgh* itself, have ruled for the plaintiff on the merits.[124]

IV. PROPOSALS FOR REFORM

A. *Introduction*

Although more than two decades have passed since the 1966 amendment to Rule 65(a)(2) expressly authorized consolidation, confusion over when consolidation is proper still exists. The problems identified in this article suggest the need for reform. The following proposals are addressed to both trial and appellate practice. They are designed to ensure that parties receive notice of consolidation and have full opportunity to object. More importantly, they are designed to ensure that all parties have a full and fair opportunity to present

120. West Allis Memorial Hosp. v. Bowen, 852 F.2d 251 (7th Cir. 1988); Faheem-El v. Klincar, 841 F.2d 712 (7th Cir. 1988) (en banc); Callaway v. Block, 763 F.2d 1283, 1287 n.6 (11th Cir. 1985); Otero Sav. and Loan Ass'n v. Federal Reserve Bank, 665 F.2d 275 (10th Cir. 1981); Montano v. Lefkowitz, 575 F.2d 378 (2d Cir. 1978). *See also* Socialist Workers Party v. Illinois State Bd. of Elections, 566 F.2d 586 (7th Cir. 1977) (per curiam), *aff'd* 440 U.S. 173 (1979).

121. American Cyanamid Corp. v. Connaught Laboratories, 800 F.2d 306, 310 (2d Cir. 1986) (where the claims are "utterly without merit"); Friarton Estates Corp. v. City of New York, 681 F.2d 150, 161 (2d Cir. 1982) (where the complaint has "no equity"); Kershner v. Mazurkiewicz, 670 F.2d 440, 447 (3d Cir. 1982) (en banc) (where there is "no merit to the complaint whatever"); Lee v. Ply*Gem Indus., 593 F.2d 1266 (D.C. Cir.), *cert. denied*, 441 U.S. 967 (1979).

122. South Carolina *ex rel.* Tindal v. Block, 717 F.2d 874 (4th Cir. 1983), *cert. denied*, 465 U.S. 1080 (1984).

123. New York v. Lyng, 829 F.2d 346 (2d Cir. 1987); Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987).

124. *See* Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987); National Ass'n of Farmworkers Orgs. v. Marshall, 628 F.2d 604, 622 (D.C. Cir. 1980); Hurwitz v. Directors Guild of America, 364 F.2d 67 (2d Cir.) (decided two weeks after the effective date of the 1966 amendment to Rule 65), *cert. denied*, 385 U.S. 971 (1966).

their case on the merits, either at the preliminary injunction hearing or at the trial. We first present current Rule 65(a)(2) followed by a suggested amendment. We then propose a comparable amendment to reform appellate practice for the courts of appeals and the Supreme Court.

B. *Current Rule 65(a)(2)*

> *Consolidation of Hearing With Trial on Merits.*
> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.[125]

C. *Proposed Amendments*

1. Amendment to Rule 65(a)(2)

> *Consolidation of Hearing With Trial on Merits.*
>
> (i) At any time during the pendency of a motion for a preliminary injunction, the court, upon motion or upon its own initiative, may order the trial of the action on the merits to be advanced and consolidated with the hearing on the motion. Prior to the entry of such order, the court shall give clear and unambiguous notice of the proposed order to every party. Unless expressly waived in open court, every party shall be afforded adequate time to object in writing to the proposed order. The court may order consolidation only if the objecting party has had a full and fair opportunity for discovery and to present to the court the factual and legal materials in support of its case on the merits. The court shall enter into the record its reasons for ordering consolidation.
>
> (ii) An order consolidating the hearing and trial shall not operate to delay the granting or denial of preliminary relief. Even when consolidation is not ordered, any evidence received upon a motion for a preliminary injunction which would be admissible at the trial on the merits becomes part of the record for such trial and need not be readmitted.

125. FED. R. CIV. P. 65(a)(2).

(iii) This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

2. Amendment to Appellate Practice[126]

Whenever an appeal is taken pursuant to Section 1292(a)(1) or otherwise, the court of appeals, upon motion or upon its own initiative, may enter an order stating its intention to decide the case on the merits. Prior to the entry of such order, the court shall give clear and unambiguous notice of the proposed order to every party to the action. Unless expressly waived in open court or in writing, every party to the action shall be afforded adequate time to object in writing to the proposed order. The court may enter such an order only if the objecting party has had a full and fair opportunity to present its factual and legal materials in support of its case on the merits to the district court or the court of appeals. The court of appeals shall enter into the record its reasons for the order. This subdivision shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

D. *Discussion*

The proposed changes take into account a number of factors and seek to address the apparent reasons for the types of misapplication of the current rule discussed above. The most important change is the one requiring a court to provide adequate notice to the parties. Requiring that the court provide the parties with *clear and unambiguous notice* of consolidation conforms with the most widely cited standard employed by the federal courts of appeals.[127] The proposed amendments adopt this standard of notice because it ensures that the parties know what the court contemplates; that is, it ensures that the parties understand the procedural setting in which they are operating. Anything more might needlessly hamstring the court. A formal notice requirement, such as one mandating that ten days before consolidation takes place the parties be served with a written order, would not serve the ends of a preliminary injunction remedy, nor would such a formal notice requirement provide the flexibility required to deal with preliminary injunctions. The reason for only requiring that notice be ade-

126. This amendment is proposed as a new subdivision to 28 U.S.C. § 1292 or as an addition to the Federal Rules of Appellate Procedure. A comparable amendment should also govern practice in the United States Supreme Court.

127. *See, e.g.*, Pughsley v. 3750 Lake Shore Drive Coop. Bldg., 463 F.2d 1055, 1055-57 (7th Cir. 1972).

quate is simply to ensure that the parties know what is expected of them in terms of case presentation.

When it appears to the parties that the notice afforded to them by the court does not provide adequate time for full case development and presentation, the suggested amendments, which include an explicit procedure for objection, would provide the protection which is now lacking. A party who feels that consolidation will work prejudice because of the pressures of obtaining or defending against a preliminary injunction would have the power to object at this point without resorting to additional procedural litigation. A party could request time to prepare the objection. Faced with a proposed order of consolidation, a party could object, either orally or in writing, so that the district court would know the basis for the objection.

It must be remembered that it is the trial which is being expedited, and some parties may not have even begun to prepare for trial. They may need time for discovery or to find witnesses. Should a party come forward and show that consolidation is prejudicial because it forces that party to address issues it is not yet prepared to litigate, the court should continue to conduct the hearing and wait to consolidate at a later time. The proposal allows the court to order consolidation over objection but only "if the objecting party has had a full and fair opportunity to present to the court the factual and legal materials in support of its case on the merits." As a further safeguard against arbitrary action, the proposal requires the district judge to "enter into the record its reasons for ordering consolidation."

These provisions should make it clear that any doubts which the court may have should be resolved in favor of the objecting party. A court should never consolidate after refusing to hear proffered evidence or before inquiring what further evidence a party contemplates adducing at trial. The objection provision of the proposal is intended to avoid the problems encountered in a case like *Dillon v. Bay City Construction Co.*[128] where the district court refused to hear new evidence and refused to allow more time for discovery after counsel objected to consolidation.[129]

The proposed revision would also make it clear to the federal courts that retroactive consolidation should never work to deprive parties of the opportunity to present their case at trial. Retroactive consolidation is, in effect, summary judgment without the procedural

128. 512 F.2d 801 (5th Cir. 1975).

129. *Id.* at 803.

protections of Rule 56.[130] It is premised on the often mistaken belief that the issues litigated at a preliminary injunction hearing are identical to those litigated at the trial. The recognition of the right to object should prevent this aberrant form of summary judgment from occurring because courts would have to give notice before deciding the merits. Such a notice requirement avoids the problems found in *Woe by Woe v. Cuomo,*[131] where the defendant held back evidence and, in fact, did not put on a case at the hearing because defense counsel expected to introduce their case at a trial on the merits. Under the proposed amendment, parties whose litigation strategy was to concede the preliminary injunction and resist vigorously the final relief would not find themselves surprised by an after-hearing consolidation order coupled with final judgment.

The objection provision, in conjunction with the notice provision, allows the court to test its perception of the case against that of the parties. This is important because, although the issue at the hearing is not the same as at trial, frequently the evidence offered at the preliminary hearing bears on issues to be decided at trial. The proposed amendments would prevent the trial court from losing sight of the fundamental difference between issues litigated at a preliminary hearing and those litigated at a trial on the merits.[132] For example, in a case like *Gellman v. Maryland,*[133] the proposed change could have prevented the prejudice to plaintiff in the trial court by forbidding the district judge to consolidate without notice and opportunity to be heard by the parties.

In *Gellman*, the plaintiff Gellman had obtained a temporary restraining order pursuant to Rule 65(b). Gellman was seeking to enjoin Morgan State College in Baltimore, Maryland, from engaging in alleged acts of racial discrimination.[134] At the conclusion of the hearing on a motion for a preliminary injunction, the district court consolidated the hearing with the trial.[135] Plaintiff's counsel objected vociferously to the consolidation. Counsel informed the court that she had prepared only for the preliminary hearing and that the plaintiff had yet to engage in discovery. Furthermore, counsel for Gellman informed the court that she had evidence to present that was pertinent to the merits, but had not offered it because her understanding was that the

130. Gellman v. Maryland, 538 F.2d 603, 605 (4th Cir. 1976).
131. 801 F.2d 627 (2d Cir. 1986).
132. *See* University of Texas v. Camenisch, 451 U.S. 390 (1981).
133. 538 F.2d 603 (4th Cir. 1976).
134. *Id.* at 604.
135. *Id.*

hearing was on a preliminary injunction motion.[136]

If Gellman's counsel had been forced to come forward with evidence or with reasons why it was not possible to go forward with a consolidated trial, then the court would have been in a better position to judge whether Gellman's claim was frivolous or without factual support. Only after giving Gellman this opportunity would it have been proper to render a final judgment. If the court felt that the evidence introduced at the hearing was insufficient to support a finding at trial for plaintiff, a proposed consolidation order would have helped determine if the court's perception was on target. The modification of Rule 65(a)(2) would make it clear to district courts that the rule was not intended to provide the means for judges to dispose unfairly of litigation in a summary manner. The rule was intended to save time and money by permitting courts to incorporate the preliminary proceedings into the trial on the merits by eliminating repetition of evidence.

The modification would continue the present flexibility afforded the district courts. For instance, if a court felt it did not have sufficient evidence at the preliminary stage to render relief, it could consolidate the hearing and trial. One commentator would require even more extensive evidentiary hearings and oral argument before issuing a preliminary injunction.[137] The feeling is that the current standards for issuance of an injunction do not afford the defendant enough protection. The proposed amendment would allow a court this kind of flexibility while making it clear that consolidation should not unnecessarily prevent or slow down the granting of preliminary relief.

Finally, this change, which would require clear and unambiguous notice and the opportunity to object in a formalized fashion, would insure that there is a record of the proceedings. This is important because the era of the "managerial judge"[138] is here to stay. Creating a record thus prevents the possibility for misunderstanding and abuse which is possible under the rule as currently worded. It would compel judges, on the record, to consult with the parties before ordering con-

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136. *Id.*

137. Since interlocutory problems arise from the need to grant or deny relief on what may prove a mistaken view of the parties' rights, the court should consider ways of making its preliminary appraisal more accurate. The simplest way of doing this is to expedite the final hearing when necessary to avoid thorny preliminary issues. . . . Even without moving to a final hearing, the court can give fuller attention to the merits by allowing oral testimony and briefing the counsel in fit cases.

Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 556 (1978).

138. *See generally* Resnick, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

solidation. A public record of the consolidation procedure protects the parties from "managerial judging," the "less visible and actually unreviewable" method of docket management that writers have criticized as giving "trial courts more authority . . . with fewer procedural safeguards to protect [litigants] from abuse of that authority."[139]

V. CONCLUSION

This article has identified some of the more flagrant abuses that trial and appellate courts have committed in reaching the merits after only a hearing on a motion for preliminary relief. Rule 65(a)(2), as currently worded and as interpreted by the courts, is not providing the safeguards required by a system in which judges play an active role. As the pressures on judges increase to settle litigation, to weed out frivolous claims, and to move other claims quickly through the system, parties must not be subject to *ad hoc*, expedient procedural decisions.

The proposed amendments outlined above would serve both courts and parties. They would prevent the kind of abuses discussed in this article by requiring that the parties be informed of the procedural setting in which the court intends to operate. They would also afford the parties the opportunity to object to a consolidation order in much the same way as parties do when faced with a summary judgment motion. The provisions would insure that due process is provided and that parties have the chance to present all the evidence they plan to introduce. The proposed amendments are also designed to avoid tying the hands of the courts. While the judges may still play an active role in litigation, the proposed changes clarify what that role should be by adding specific procedures to govern a disposition on the merits after only a hearing on a motion for a preliminary injunction.

139. *Id.* at 380.