CLASS ACTIONS AND THE LIMITS OF RECOVERY: THE GLASS JAW OF JUSTICE

Part 1 of 2

By David J. Cook[1]

ABSTRACT

"RIPPED FROM THE HEADLINES"

On April 20, 2010, the *Deepwater Horizon* drilling rig exploded, killing eleven workers and injuring seventeen others. The *Deepwater Horizon* burned and sank, starting a massive offshore oil spill in the Gulf of Mexico, now considered to be the largest environmental disaster in United States history. Transocean, Ltd., the owner of the drilling rig, leased the rig to BP p.l.c., who has accepted full financial responsibility for the losses despite the statutory $75 million cap on liability.[2] Given the magnitude of the losses sustained by businesses and individuals in the Gulf area, class action lawsuits seeking billions of dollars in compensation for economic damages, environmental cleanup costs and other losses are now proliferating. These actions are all newly filed and, in all probability, the plaintiffs are in the midst of effectuating routine service of process upon BP and many others.

The federal government has taken an active role in compelling BP to respond to legitimate damage claims. On June 16, 2010, President Obama and BP reached an agreement in which BP placed $20 billion in an escrow fund managed by Kenneth Feinberg who previously served as the arbitrator in administering the September 11th Victims Compensation Fund.

While the BP Oil Spill Fund will offset the losses sustained by many claimants, other claimants will pursue compensation through class actions or individual lawsuits. The time frame for payment under the BP Oil Spill Fund is unknown at this time, but, if

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[2] The American public and members of Congress welcomed BP voluntary waived of the $75,000,000 damage cap which exposed BP to nearly $20 billion or in civil liability. Mutual funds, individual investors, health, retirement and medical trusts, governmental entities and other public investors who hold large blocks of BP stock had a different reaction when BP's common stock plummeted in value. In 2020 or sooner, legal and business academics might criticize BP in making a $20 billion plus gift and mortgaging its dividend for many years.

the September 11th Victims Compensation Fund is any indicator, delay is inevitable. The extent of this delay is uncertain, although both BP and Mr. Feinberg have offered assurances of prompt payment of claims from the Oil Spill Fund. Using the September 11th Victims Compensation Fund as a guide, the Oil Spill Fund will predicate compensation in exchange for a waiver of claims against BP (and other related parties), offering the Hobson's choice between expeditious recompense for compensatory losses and delayed recovery of broad-based damages which could include potential treble or punitive damages.[3]

While, BP has "deep pockets," its wealth is not unlimited. The claims asserted by the individuals, business, and governments, together with cleanup costs and legal and public relations can readily exceed the $20 billion mark. The bulk of these class actions are filed in Gulf States such as Florida, Alabama, Mississippi, and Louisiana. These States all provide for a pre-judgment writ of attachment but the options are limited to cases in which the plaintiff can demonstrate exigent circumstances such as the prospect that the defendant might fraudulently convey assets or flee the jurisdiction. All States require the payment of a substantial bond as a condition to issuing a writ of attachment. These bonds range from an amount equal to the plaintiff's claims to double that amount. These are multimillion dollar claims, making the bonds inaccessible due to the statutory amounts, rendering a writ of attachment unobtainable. Without the threat of a pre-judgment writ of attachment, BP can delay meaningful compensation by prolonging a class action lawsuit through years of litigation and appeals. Litigation over the *Exxon Valdez* oil spill (which occurred on March 24, 1989) has taken over twenty years, including a most recent decision in which the Supreme Court vacated the $2.5 billion award against ExxonMobil and remanded the case back to the lower court.[4]

An attachment is a pre-judgment remedy which enables a plaintiff to secure his/her claims by imposing a judicially-authorized lien, encumbering the defendant's assets. In prosecuting the motion for an attachment, the plaintiff must typically prove the probable validity of the claim in a kind of mini-trial. The plaintiff must also prove that the damages are fixed and readily ascertainable and that the claim arises out of a contract, either express or implied. The impact of an attachment upon the defendant is sometimes so great that the defendant will resolve the claim rather than having to face liens and levies encumbering valuable assets or posting a bond in the amount of the plaintiff's claims.

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3 *See* Campbell v. State Farm Insurance Co., 538 U.S. 408 (2003)(Due process limits on punitive damages). This decision left punitive damages potentially at a 9:1 ratio to compensatory damages. Aside from its massive campaign to cap off the oil spill and clean up the environment, BP promised immediate compensation to the victims. This promise was publicized through a massive media and internet blitz. BP's campaign seeks to blunt pubic ire and telegraphs the defense to punitive damages.

4 *See* Exxon v. Baker, 554 U.S. ___ (2008)

As suggested in this article, pre-judgment remedies available to class action plaintiffs now assume greater importance. With provisional relief at hand, a plaintiff can assure him/herself of payment, accelerate the pace of litigation, and achieve an earlier final resolution than would be possible with ten (or even twenty) years of bitter and very expensive litigation. However, the necessity of showing exigent circumstances and posting a security equal to or in excess of the claim renders the pre-judgment attachment inaccessible. For example, in the case of the BP claimants, their only effective recourse would be through claiming against a trust fund established by BP, voluntary payments by BP, or years or even decades of litigation. This article will demonstrate the necessity of re-writing state attachment statutes in the face of massive environmental disasters, enabling disaster victims to seek pre-judgment relief to expedite meaningful compensation.

INTRODUCTION

Massive class actions shape social policy, eradicate invidious and horrifying discriminatory practices, revamp industrial and commercial standards, and recoup millions, if not billions for aggrieved consumers. These actions are the heavyweight champions of the courts. Large groups of disenfranchised Americans rely on class actions for tangible socioeconomic justice. Class action lawsuits, however, do not come without obstacles.

What happens if the class action defendant, seeing the writing on the courthouse wall, flees the jurisdiction? Is any defendant facing enormous liability really going to stick around until the bitter end? Leaving on a jet plane to the Bahamas is a recognized form of asset protection. Recycling the assets of the company into another corporate shell, thereby driving up the costs of litigation exponentially, might drive away class counsel, who would confront an empty judgment and decline to pursue the defunct defendant any further. “Why throw good money after bad?” class counsel would say.

One should consider the costs arising from setting aside fraudulent conveyances and other illicit transfers, all costs borne by class counsel coupled with the lack of any affirmative duty on class counsel to secure the assets during the pendency of the class action. Given these factors, can the defendant effectively nullify its underlying liability by engaging in a scheme of asset protection and skip town unscathed, unharmed, and, worse still, unrepentant? Is asset protection the pass from massive liability? Does the courthouse heavyweight champ have a glass jaw?

This article tells the story of one case in which the defendant exited the class action by selling the assets, rendering itself judgment-proof, and stipulated to a $5,000,0000 default judgment. Anticipating a continuing financial drain, class counsel sought to withdraw. The judge denied class counsel’s request. This case implicitly suggests that class counsel may very well have a duty to assure the class recovery by pursuing traditional pre-judgment remedies.

While class actions have generated an enormous and ever-growing bibliography, this article fills a gap in the literature discussing whether class counsel is duty-bound to seek pre-judgment relief to assure the class of recovery for any potential judgment or settlement**.**

This article will explain why class counsel has a duty to seize, lien or otherwise encumber the defendant's assets to assure a recovery; what options are available, and; how this analysis tracks carefully the *T.J. Hooper/Carroll* calculus of risk. This article will also discuss these statutory attachments or Rule 65 injunctions.

As we see it, letting the defendant sneak out the back steps of the courthouse, as we see it, leaves the courtroom empty; this article will show how to keep the defendant in the dock.

This article will also describe the necessary legislative changes in light of the BP Oil Spill and how these changes would expedite compensation to victims who confront catastrophic financial challenges which, if unchecked, will likely drive individuals and businesses into certain financial ruin or bankruptcy.

I.

THE BATTLE FOR RECOMPENSE AND NEW DUTIES ARISING FROM THE DEBRIS OF A FINANCIAL COLLAPSE:

MITIGATING RISKS BY IMPOSING NEW DUTIES

A. EXITING OUT THE BACK DOOR

In *Barboza v. West Coast Digital, GSM, Inc.*,[5] the Court of Appeal, Second District, held that class counsel is required to enforce the class action judgment to the extent practical as an integral part of counsel's duties.[6] This ruling starkly departs from the common law rule that the counsel's duty of representation ends upon entry of the judgment absent an agreement to the contrary.[7] *Barboza*'s underpinnings are that the individual members of the class could never practically enforce a judgment in an aggregate amount, that the amount of the individual claims might be too modest to

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[5] *See* Barboza v. West Coast Digital, GSM, Inc., 179 Cal. App. 4th 540 (Cal. App. 2d Dist. 2009).

[6] *Id.* at pp 546-547.

[7] *Id.* at 545. The duties of counsel to conduct litigation ends upon the entry of judgment. *See*, *also* Mizrahi v. Miscione, 252 Cal. App. 2d 673, 677 (Cal. App. 2d Dist. 1967)("When a judgment has been entered the duties of an attorney are at an end unless the terms of his employment require him to take some action to collect the judgment." [*citing to* 6 Cal. Jur. 2d, Attorneys at Law, ¶ 166])"

Also, Maxwell v. Cooltech, Inc., 57 Cal. App. 4th 629, 632 (5th Dist. 1997) (service upon attorney for party valid, even after dismissal, for purpose of motion to vacate dismissal). As a matter of client expectation, the class would expect that class counsel would pursue the judgment directly or through substitute counsel.

justify the cost or effort of enforcement,[8] and, given the typical number of class members in the hundreds (or even thousands), post-judgment enforcement would be chaotic at best if left in the hands of the individual class members who would likely lack the sophistication necessary to engage in post-judgment representative proceedings.

As the first case to compel class counsel to enforce the class judgment to the extent possible, *Barboza* likewise implicitly compels class counsel to preserve the defendant's assets through attachment or injunction to assure payment of the judgment or settlement. *Barboza* also clarifies class counsel's engagement proposals regarding duties and compensation, such as the defining the scope of pre- and post-judgment remedies which may be sought; additional compensation if required to seek such relief, and; the terms of counsel's cessation of professional duties.

The facts in *Barboza* typify a messy ending. Faced with significant liability for wage-and-hours claims during the midst of an expensive multi-year litigation, the defendant sold its assets to a third-party and ceased operations. In order to avoid the expense of trial, plaintiffs and defendants entered into a stipulation that allowed the plaintiff to take a multimillion default judgment against the defendant.[9] Seeking to exit the case and limit its obligations to the class, class counsel filed notice[10] for court

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[8] Barboza at 547, stating, in pertinent part, as follows:

> "In this case, the trial court properly performed its duty by finding that class counsel's job did not end with entry of judgment. The court was faced with a judgment (and eventually an attorney fee award), and a defendant who may not have any assets, let alone sufficient assets to satisfy both. Since the judgment was for aggregate damages, no individual class member could enforce it to recover whatever is owed to that individual. Moreover, a significant justification for allowing the case to proceed as a class action was that each individual claim was too small to justify the cost to pursue individual actions; those individual claims remain too small to justify the cost to pursue individual actions to enforce the judgment. But more importantly, since it seems unlikely (based upon counsel's own assertions) that there are sufficient assets to pay each class member what is owed, plus attorney fees, there remains an important class issue -- i.e., how the recoverable assets (if any) are to be distributed. In short, class counsel's job -- to represent the class in resolving class issues -- is not yet done."

[9] *Id.* at page 544

[10] Aside from notice advising the class of counsel's intention to abandon the case, the notice might ostensibly foreclose any later malpractice by giving the class notice of the counsel's plan exist and an opportunity to object. *See* Martorana v. Marlin & Saltzman, 175 Cal. App. 4th 685, 695-697 (2d Dist. 2009) (barring a malpractice action against class counsel based an allegedly defective settlement notice which the court has approved after notice to all class members). In *Martorana*, the court stated, as follows:

> "When the court granted final approval of the settlement in the Sekly action, it necessarily found that the notice procedure agreed upon by the parties complied with the requirements of due process and settlement was fair, adequate and reasonable. To the extent that Martorana had any objection to either the settlement or the notice procedure, he had an opportunity to file a written objection with the trial court and to appear at the fairness hearing." (*Martorana* at 695)

approval. The court stated :

> "The proposed notice explained that WCD had sold its assets and ceased operations, and that is claimed to have no assets and would eventually declare bankruptcy. It noted that despite AC's claims, class counsel obtained a judgment against WCD and filed a motion for attorney's fees. But the proposed notice also stated that class counsel no longer had any obligation to pursue the matter on behalf of the class because its obligation was only to represent the class until judgment was obtained. Therefore, the proposed notice advised the class that class counsel would not be taking any further steps to enforce the judgment." [11]

The court denied plaintiffs' request to approve the proposed class notice on the grounds that there was no authority that would permit class counsel to limit its obligations in the manner stated in the proposed notice.[12] Plaintiffs appealed and the appellate court affirmed the trial court's denial.

Had the court approved the notice and conceivably let class counsel out of the case, the class members would face the ensuing burden of identifying, interviewing, communicating, retaining, financing, and compensating collection counsel. Class action judgments are expensive and cumbersome to enforce, raising issues of identification of a participant to finance post-judgment remedies and the marshaling, management and maintenance a sufficient cost fund.[13] Many class action members are wage and hourly

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See, also Golden v. Pacific Maritime Assn. 786 F. 2nd 1425, 1427-1428 (9th Cir. 1986); Laskey v. International Union (UAW), 638 F. 2nd. 954 (6th Cir. 1981); Zimmer Paper Prods., Inc v. Berger & Montague P.C., 758 F. 2nd. 86, 93 (3rd Cir. 1985); Thomas v. Albright, 77 F. Supp. 2nd 1114, 121-123 (D.D.C., 1999).

The *Martorana* court distinguished *Janik* on the basis that the issue of the omitted causes of action (providing for increased monetary damages) were never considered by the trial court in *Janik v. Rudy, Exelrod & Zieff*, 119 Cal. App. 4th 930 (Cal. App. 1st Dist. 2004), in determining whether class counsel properly discharged their duties owed to the class, and that class counsel was obligated to consider all appropriate related claims beyond those set forth in the certification order. *See* Martorana at 695.

[11] Barboza at 544.

[12] *Id.* at 545.

[13] Post-judgment enforcement, supplemental remedies, fraudulent conveyance actions, ferreting out concealed assets, and hiring forensic accountants and experts can accrue costs exceeding $100,000, which is precisely the stated purpose of a fraudulent conveyance and a barrier to setting aside the fraudulent conveyance.

Fraudulent conveyance law has its origins in the Statute of 13 Elizabeth, ch. 5 (1571). *See* 5 COLLIER ON BANKRUPTCY, ¶ 548.01 (15th Ed. Revised). The purpose of a fraudulent conveyance doctrine is to prevent assets from being transferred away from a debtor in exchange for less than fair value, leaving a lack of funds to compensate the creditors. *Id.*

In the foundational fraudulent conveyance case, *In re Twyne's Case*, 3 Co. Rep. 806, 76 Eng. Rpt. 809 (Star Chamber 1601), the Star Chamber examined the facts surrounding such transfers to determine whether they had "signs and marks" of a fraudulent or malicious intent, such as secret transfers,

claimants and may lack the financial resources to finance expensive post-judgment remedies.[14] Hovering over the impasse of retaining new counsel is whether the class has sufficient information informing new counsel of the law and facts that further efforts would be productive to justify another set of lawyers to continue litigation.[15] It is no wonder that the *Barboza* court imposed the duty upon the class counsel to retain specialized counsel to undertake such enforcement. [16]

B. A PREORDAINED RESULT.

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continued ownership or possession of property after its alleged transfer, self-serving representations in transfer documents that the transfer was not intended to defraud creditors, transfers of substantially all assets, or transfers made while action was pending against the transferor. *See, also*, COLLIER, *supra*. In short, fraudulent conveyance law is aimed at preventing debtors from making collusive transfers to others – often friendly recipients – in an attempt to avoid their creditors. *See* Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law & its Proper Domain*, 38 Vand. L. Rev. 829, 830 (1985) ("A debtor cannot manipulate his affairs in order to shortchange his creditors and pocket the difference. Those who collude with a debtor in these transactions are not protected either."); *In Re Abatement Environmental Resources,* 102 Fed. App'x. 272, *276, 2004 WL 1326597 (4th Cir., 2004).

[14] Third parties finance typically personal injury cases such as the members of American Legal Finance Association.

[15] The proposed notice failed to provide any meaningful information other than conclusionary statements.

[16] *See* Barboza at 547. The advent of the internet showers a torrent of information showcasing attorneys including their own websites, metatags, search engine placements, catchy or descriptive URL's, listings in Lawyers.com, Superlawyers.com, Findlaw.com, Legalmatch.com, AVVO.com many others. Prior to the advent of the internet, collection lawyers advertised in "lists," which were printed books, such as the Forwarders List of Attorneys, Columbia Law List, The General Bar, The American Lawyer's Quarterly, Retail Collection Attorneys Network, The National List and others. These lists are all online.

The Commercial Law League of America, the nonprofit association of collection attorneys, maintains a website (CLLA.org) which identifies collection attorneys in a geographical area. National bar associations, such as The Federal Bar, and state and local general and practice specific bar associations identifies attorneys by specialty and locale. While these internet resources do not guaranty the quality of counsel, they produce a quantity of counsel and a place to start mandated by Barboza. The interview process seeking to select counsel is derisively nicknamed a "Beauty Contest." *See* Stephen B. Murray and Linda S. Harang, *Selection of Class Counsel: Is It a Selection of Counsel for the Class, a Selection of Counsel with Class?*, 74 Tulane L. Review 2089-2112 (1999-2000); *see, also* In Re Cavanaugh, 306 F.3d. 726, 732 (9th Cir. 2002) ("But this is not a beauty contest; the district court has no authority to select for the class what it considers to be the best possible lawyer or the lawyer offering the best possible fee schedule.") and In Re Roberto Cohen v. United States District Court for the Northern District of California, 586 F.3d 703 (9th Cir. 2009) (*citing to* Cavanaugh at *id.*)

This author conducted a number of beauty contests to select creditor's committee counsel in various large-scale Chapter 11's. The committee picked the attorney who had read the case file, investigated the underlying facts and offered specific and cogent advice.

"The bottom line is it's a beauty contest.*** I wouldn't do very well in a bathing suit but the best I can do is offer my mind and tenacity," confesses Stanley Chesley, Esq., in an interview with the *Wall Street Journal* regarding the selection process for appointment to key lead roles in the BP litigation Dionne Searcey, *Modesty Is Out as Lawyers Vie for Spots in BP Litigation*, WALL STREET JOURNAL, Sept. 28, 2010, at A9.

The dead-end result in *Barboza* was prophetically preordained. Facing the prospect of unending litigation and an immense financial drain in defending the case, the defendant executed a strategic exit by selling its assets to a third party and ceasing operation in the midst of the action.[17] There was no surprise here. The case wound through two prior appeals involving class certification and disallowance of attorneys' fees.[18] Probably seeking to salvage and retain the remaining value of any assets , the defendant left the plaintiffs with an empty judgment [19] and strategically deprived the class members of any compensation. [20] As an empirical matter, emptying out the corporate coffers and leaving the collection cupboard bare deprived class counsel of any potential fee revenue but, even worse, it left class counsel holding a very large bag of costs.[21] Costs in class actions regularly exceed $100,000, and million-dollar cost investments are common.[22]

The *Barboza* class action sought relief for wage and hour violations, such as the failure to pay overtime, unlawful deductions from wages, and failure to provide meal and rest breaks, making any payment through insurance unlikely and rendering the judgment painfully uncollectible.[23]

C. THE DUTY TO INCREASE LEADS TO THE DUTY TO ASSURE.

A textual reading of *Barboza* leads to a more subtle conclusion. The appellate court imposed a duty upon the class counsel to collect the judgment or report back that attempts to collect the judgment would be futile.[24] The court, however, left an ongoing duty as follows:

> "And if, after diligent inquiry, class counsel determines that there are no recoverable assets, counsel may present such findings to the trial court, and the trial court, as guardian of the rights of the absent class members, may determine whether counsel should be relieved of any further

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[17] *Id.* at 544

[18] *See* Barboza at 543. *Barboza*'s protracted history suggests six figure investments in costs of prosecution and defense.

[19] *Id.* at 544 ($4,105,262 principal and $1,669,955 interest for a total of $5,775,217).

[20] *Id.* at 547

[21] Worse, the defendant threatened the filing of bankruptcy. *Id.* at page 544.

[22] Class counsel regularly advance the costs of notice, filings fees, experts fees and charges, forensic services, courtroom presentations, massive rounds of deposition (50 to 100 or more), litigation management services, jury consultants, and travel and related incidentals.

[23] *Id.* at 543

[24] *Id.* at 547

obligations to the class."[25]

The appellate court did not relieve the class counsel and left the issue of counsel's obligations unresolved. Clearly, the appellate court could have suggested, if not mandated, that once class counsel has confirmed that the judgment-debtor was judgment-proof, that the class counsel would, in fact, be relieved.[26]

The answer is found in the fact that the defendant sold the assets and apparently dispersed the proceeds – effectively foreclosing the slightest prospect of compensation due to the class or to counsel.[27] Unstated but bubbling at the surface is whether class counsel should have taken action to protect the class from encountering an empty judgment later. Such action might have included an attachment, injunctive relief or involuntary bankruptcy,[28] and whether these remedies are necessarily part of counsel's

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[25] *Id.* at 547

[26] *Barboza*'s facts opaquely suggest that the judgment debtor was judgment proof and any further efforts would be futile. The opinion does not discuss the disposition of the sales proceeds, whether any insiders received payment or whether the defendant committed a fraudulent conveyance. Given this apparent lack of information, the instructions by the appellate court obliquely compelled trial counsel to investigate the existence of these potential debtor-creditor claims and advise of the feasibility of any further proceedings.

[27] *Barboza* does not suggest any fraudulent conduct, but only that the defendant sold the assets.

[28] To secure payment of a prospective money judgment, California law provides for a statutory authorized attachment (Cal. Civ. Proc. § 483.020, *et seq.*) and even a pre-judgment attachment receiver (Cal. Civ. Proc.. § 488.700[a]). If the class seeks equitable relief, even though money relief is also sought, the court has the jurisdiction to issue broad injunctive relief which would effectively sequester the defendant's assets. While *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 310, 333 (1999), precludes injunctive relief to restrain the disposition of the defendant's pending money judgment, *Grupo* only precludes injunction only where strictly monetary relief is sought. *See* Johnson v. Couturier, Jr., 572 F.3d 1067, 1083-1084 (2009) (current and former employees who are ESOP participants sought relief for damages). *See* Southern New England Telephone v. Global Naps, Inc., 595 F. Supp.2d. 155, 160 (U.S.D.C., D. Mass. 2009) (collection of cases). *See, also* Connecticut General Life v. New Images of Beverly Hills, 321 F.3d 878, 881-2, fn 4 (9th Cir., 2003) (preliminary injunction upheld barring fraudulent transfer of assets where equitable relief is sought although money damages were also claimed) (*citing to* United States Ex. Rel. Rahman v. Oncology Associates, 198 F.3d 489, 494-499 (4th Cir. 1999).

See, also, Commodity Futures Trading Commission v. Kimberlynn Creek Ranch, 276 F.3d 187 (4th Cir., 2002) (upholding preliminary injunction impounding $2.41 million of proceeds from fraudulent activity); Animale Group Inc v. Sunny's Perfume, Inc., 256 Fed. App'x. 707, 2007 WL 4259200 (5th Cir. 2007) (upholding injunctive relief impounding assets in suits sounding in equity) (*citing to* Deckert v. Independence Shares Corp., 311 U.S. 282, 289-297 [1940]); Kennedy Bldg. Assoc. v. CBS Corp., 476 F.3d 530, 535 (8th Cir., 2007); In Re Focus Media, 387 F.3d 1077, 1085 (9th Cir. 2004); SEC v. ETS Payphones, Inc., 408 F.3d 727, 734 (11th Cir. 2005).

See, also F.T. International, FTD v. Mason, WL 1514881, (U.S.D.C. E.D.Pa. 2000) ("Aside from the traditional showing necessary to obtain preliminary injunctive relief, a plaintiff may obtain a pre-judgment freeze on a defendant's assets only if has asserted a cognizable equitable claim, has demonstrated a sufficient nexus between the assets which are the target of the injunctive relief, and has shown that the requested interim relief is a reasonable measure to preserve the status quo in aid of the ultimate equitable relief claimed. [collection of citations omitted]")

pre-judgment implied engagement is yet unresolved. The *Barboza* court cited *Janik v. Rudy, Exelrod & Zieff*,[29] which imposed professional liability[30] on the defendant law firm for failing to properly assert additional claims under the Unfair Competition Law[31] which might have enhanced the recovery with successful prosecution.[32]

The implication is clear. The defendant got the better of everyone: the class, class counsel and even the court itself. The defendant effectively extinguished its liability by selling its assets[33] and reaped the financial windfall.[34] *Barboza* poses the inevitable

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Grupo bars injunctive remedies if the action seeks solely monetary relief, but does not bar injunctive relief if the complaint seeks both equitable and monetary relief. *See, also* Motorola Credit Corp v. Uzan, 202 F. Supp. 2d 239, 250 (U.S.D.C., S.D.N.Y. 2002); Wishmatzki & Nathel, Inc v. H.P. Island Wide Inc., 2000 U.S. Dist. Lexis 15664, *4-6 (U.S.D.C. S.D.N.Y. 2000); CSC Holdings, Inc., v. KDE Elecs. Corp., 2000 U.S. Dist. LEXIS 3231, *9, n.1 (U.S.D.C. N.D.Ill. 2000). These cases instruct that class counsel should plead accessible and extensive equitable relief such as disgorgement as a legitimate platform to reach broad injunctive relief and other remedies, such as a sweeping based injunction and the appointment of a receiver.

Assuming that the class in *Hoxworth v. Blinder*, 903 F.2d 186, 193-194 (3d Cir. 1990)(see discussion following) sought equitable, along with monetary relief, and successfully recast the injunction to encumber an amount equal, but not in excess of the anticipated damages, the *Hoxworth* class would have effectively sequestered sufficient assets to assure payment of the prospective judgment. Post *Grupo*, the district court will condition any Rule 65 pre-judgment injunctive relief on a showing that such relief is predicated upon an independent equitable basis as mandated by *Rosen v. Cascade Int'l, Inc.*, 21 F. 3d 1520, 1530-1531 (11th Cir. 1994). *See, also* United States v. Cohen, 152 F. 3d 321 (4th Cir. 1998) finding that an attachment Rule 64 might be the appropriate remedy, and not injunctive relief under Rule 65 in an action brought by the government to seek monetary penalties for violations of federal banking laws.

See, also Temporary Services Ins., Ltd., v. Michael O'Donnell, 2008 WL 516717 (U.S.D.C. M.D, Fla, 2008) (rejecting a Rule 65 injunction as a disguised attachment under Rule 64 and stating "TSIL [Plaintiff] has not attempted to satisfy the requirements for obtaining an attachment or a "pre-judgment remedy for the sequestration of assets…"[*citing* Rosen at 1531])

[29] *See* Janik *supra*.

[30] Class counsel owes a duty of care to the class as a whole to represent all members with such skill, prudence, and diligence as attorneys of ordinary skill and capacity commonly possess and exercise in the performance of their task. Martorana at 693. Class counsel has duty to adequately represent the class as a whole. 7-Eleven Owners for Fair Franchising v. Southland Corp., 85 Cal. App. 4th 1135, 1159 (Cal. App. 1st Dist. 2000). Attorney-client relationship between class counsel and class members is created by certification of the class. Cal Pak Delivery, Inc. v. United Parcel Service, Inc., 52 Cal. App. 4th 11-12 (Cal. App. 1st Dist., 1997)

[31] Cal. Bus. & Prof. § 17200

[32] *See* Janik at 934.

[33] Presumably, as it is not stated in the case's procedural history.

[34] *See* Lynn M. LoPucki, *The Death of Liability*, 106 Yale L. J. 1, 142-38 ("Judgment-Proofing Strategies")(1996) (referred to herein as "The LoPucki Denouement"). *See, however*, James J. White, *Corporate Judgment Proofing: A Response to Lynn Lopucki's "The Death of Liability"*, 107 Yale L.J. 1363 (1998) (*Corporate Judgment Proofing* takes issue with Professor LoPucki's thesis and factual basis, stating, "[i]mplicit in Professor LoPucki's thesis is the notion that social attitudes are changing to make the kinds of financial and legal structures utilized by persons wishing to avoid liability more acceptable." *Corporate Judgment Proofing* at 1380, n. 61). *See*, *likewise*, Lynn M. LoPucki, *Virtual Judgment Proofing: A Rejoinder*, 107 Yale L. Rev. 1413-1434 (1998); Stephen L. Schwartz, *The*

inquiry whether class counsel, when facing the risk of a potentially empty judgment, is obligated to pursue pre-judgment remedies to assure the class of payment of the judgment itself. *Barboza* also hypothesizes that excusing class counsel from the burden of post-judgment enforcement would, as a matter of law, encourage the defendant, its corporate principals, and others[35] to assist, plan and execute[36] the fraudulent

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Inherent Rationality of Judgment Proofing, 52 Stanford L. Rev. 1-53 (1999); Lynn M LoPucki, *The Irrefutable Logic of Judgment Proofing: A Reply to Professor Schwartz*, 52 Stanford L. Rev. 55-71 (1999); Lynn M. LoPucki, *The Essential Structure of Judgment Proofing*, 51 Stanford L. Rev. 147-160 (1988); Charles W. Mooney, Jr., *Judgment Proofing, Bankruptcy Policy, and the Dark Side of Tort Liability*, 52 Stanford L. Rev. Vol. 52, 73-76 (1999); Stephen Gilles, *The Judgment Proof Society*, 63 William & Mary L. Rev. 603 (2006); Yeon-Koo Che, Kathryn E Spier, *Stragetic Judgment Proofing*, 39 Rand J. Econ. 926-948.

Professor LoPucki takes an expansive view of America's acceptance of justice without recompense: "In *The Death of Liability*, I argued that judgment proofing will prove impossible to eradicate because the principles on which it is based are so deeply rooted in American culture. Nevertheless, I recognized that the American public would not tolerate open, deliberate, hard judgment-proofing of the largest corporations." *See*, *Virtual Judgment Proof: A Rejoinder* at 1430. This suggests that the American public tolerates judgment-proofing for everyone else.

These remarks are unsubstantiated and contravene moral, legal and societal normative expectations that products and services be safe and that all vendors vouchsafe for their products and services through insurance and significant capital base. Bankr. Code 11 § 727(a)(2)(A) bars the discharge of a debtor who has committed a fraudulent conveyance within one year of the petition date and represents public policy against parties from cheating their creditors, lest they forfeit their bankruptcy discharge and face liability in virtual eternity.

35 Judgment-proof strategies spark a new round of civil litigation seeking relief and enforcement strategies as follows:

> 1. Action to avoid the transfer under the Uniform Fraudulent Transfer Act and Uniform Fraudulent Conveyance Act. (Cal. Civ. Proc. § 3439, *et seq*. for the UFTA; *see*, *also* Cortez v. Vogt, 52 Cal. App. 4th 917, 933-934 [Cal. App. 4th Dist. 1997] [holding that a creditor is entitled to remedies under the UFCA]). Safe harbor is the typical defense; Cal. Civ. Proc. § 3439.08(a); *see*, *also* Annod Corp. v. Hamilton & Samuels, 100 Cal. App. 4th 1286 (Cal. App. 4th Dist. 2002).
>
> 2. Breach of fiduciary duty clams against officers and directors for self dealing or "to the avoidance of actions that divert, dissipate or unduly risk corporate assets that might otherwise be used to pay creditor. This would include acts that involve self dealing or the preferential treatment of creditors." Berg & Berg Enter., LLC v. Boyle, 178 Cal. App. 4th 1020, 1041 (Cal. App. 6th Dist. 2009) (*also*, *See* Berg & Berg at 1035, fn. 18 for comprehensive collection of law review articles discussing general duties of corporate directors to creditors); *also*, In Re JTS Corp., 305 B.R. 529, 535-536 (Bankr. N.D. Cal. 2003) (discussion of trust fund doctrine under Delaware law); Pepper v. Litton, 308 U.S. 295, 306-307 (1939) (holding that that fiduciary obligations are enforceable by the trustee in the event of a bankruptcy, a policy "designed for the protection of the entire community of interests in the corporation – creditors as well as stockholders." [*Id*. at 307]).

The acronym encapsulating risk management in prosecuting conspiracy actions against attorneys is LBYL - Look Before You Leap. These issues are more LBYL moments which would require an up to date examination of the law and evaluation of the specific facts to each case. Practice guides suggest deposing or examining (post judgment) the prospective defendant to build a clear factual basis supporting the allegations of the complaint before suit is filed. If a federal judgment, the judgment creditor can proceed

either under Federal Rule 26-37, or under the laws of the domicile. *See* Fed. R. Civ. P. 69(a)(2). *Berg & Berg* sets a very high bar before establishing liability for a director. Directors frequently do not act alone, and attorneys (*id.* at n. 30), accountants and other advisers are participants in any large distribution of the assets.

Assuming that plaintiff overcomes the *Berg & Berg* test, plaintiff will seek to name these enablers but face the equally high barrier of *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 464 (Cal. App. 1st Dist. 1998) ("By extension, therefore, trust beneficiaries may sue third parties who participated with a trustee in alleged breaches of trust, as long as the third parties's participation was both active and for the purpose of advancing their own interests or financial advantage." [Citation omitted] [emphasize added]) *See, also* Casey v. U.S. Nat'l Bank Ass'n, 127 Cal. App. 4th 1138, 1144 (Cal. App. 4th Dist. 2005). ("Liability may . . .be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separating considered, constitutes a breach of duty to the third person. [citations omitted]")

3. Successor liability cases. Ray v. Alad, 19 Cal.3d 22 (1977). (This case is limited to personal injury claims, but serves as the general wellspring for most successor liability cases.) *See Corporate Judgment Proofing* at 1403, n. 155-156 (collection of cases).

4. Unlawful dividend theories (i.e., the distribution of asset to the new shell owned or controlled by the corporate insiders is an unlawful distribution and recoverable by a judgment creditor.) Cal. Corp. §§ 316(c) (liability of directors) and 2009 (liability of shareholders). *See, also* Hoovers v. Galbraith, 7 Cal. 3d 519 (1972)(liability of directors). *Also*, *Corporate Proofing Strategies*, at 1403, n. 149-151 (collection of cases).

5. Alter Ego claims. The transfer of assets to a corporate insider directly or to another corporation is classic alter ego fodder. *See* Associated Vendors, Inc. v. Oakland Meat Co., 210 Cal. App. 2d 825, 836-840 (comprehensive collection of cases and touchstone case for most alter ego discussions); *also*, *Corporate Judgment Proofing Strategies*, at 1402, n. 145).

6. Bankruptcy is not a haven for the dishonest. Consummating a fraudulent conveyance within one year might bar the debtor's discharge under Bankr. Code 11 § 727(a)(2)(A); In re Bernard, 96 F.3d 1279 (9th Cir. 1996). The aggrieved creditor might sue to exempt the debt from the discharge. *See* In Re Bammer, 131 F.3d 788 (9th Cir., 1997), *but*, *See* In re Barboza, 545 F.3d 702 (9th Cir. 2008) under Bankr. Code 11 § 523(a)(6) in the burden of proof issues. A greater discussion of these potential claims exceeds the scope of this article.

The LoPucki strategies build another set of ramparts which gives the plaintiffs pause before storming the battlements based on risk, expense, and delay considerations. The first set of ramparts is the battle for liability and the second is the for compensation.

[36] Attorneys? *See*, Eugene C. Schlitz, *Civil Liability for Aiding and Abetting: Should Attorney's Be Privileged to Assist Their Clients's Wrongdoing?*, 29 Pace L. Rev. 75-150 (2008).

Current case law is conflict and dependent upon the particular state. Attorneys have been held liable as conspirators to defraud creditors when assisting or advising a client to transfer assets to avoid payment of a debt or subject to disciplinary proceedings. *See* McElhanon v. Ong Hing, 151 Ariz. 386, 728 P.2d 256 (App., 1985), *rev'd on other grounds*, 151 Ariz. 403, 728 P.2d 273 (1986); Dalton v. Meister, 71 Wisc.2d 504, 239 N.W.2d 9 (WI, 1976); Townsend v. State Bar of California, 32 Cal.2d 592 (1948); Allen v. State Bar of California, 20 Cal. 3d 172, 178 (1977). *See, also* Morganroth v. DeLorean, 123 R.3d 374 (6th Cir. 1997) (Yes, the DeLorean of DeLorean Motor Company, whose DMC-12 was immortalized by the BACK TO THE FUTURE movies); Morganroth & Morganroth v. Norris, McLaughlin & Marcus, 331 F.3d 406, 414-415 (3d Cir. 2003); Banco Popular v. Gandi, 184 N.J. 161, 876 A. 2d 253

conveyance, encumbrance, secreting and/or liquidation of the defendant's assets, rendering any judgment or settlement putatively empty and providing a judicially-sanctioned justification for class counsel to withdraw from (or flee)[37] the case.

Relieving class counsel from post-judgment enforcement as a matter of law, given the extreme difficulty or practical impossibility of a diffuse class retaining substitute specialized counsel, permits the defendant to recycle itself and/or its key assets into

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(2005). These cases evince significant participation by counsel for the purpose of defrauding a judgment creditor.

But, *See* Freeman v. First Union Bank, 329 F.3d 1231 (11th Cir. 2004) and Nastro v. D'Onofrio, 263 F. Supp. 2d 446, 458-459 (D. Conn 2003)(Connecticut law rejecting liability for attorneys as aiding or abetting the client in consummating a fraudulent conveyance).

This area is still developing. This topic is outside the scope of this article, but pursuit of any fraudulent conveyance necessarily involves casting the widest net to reach professional asset protectors who facilitate these schemes whose purpose is to cheat victims out of recompense, justice, and effective societal change (see prior footnote, however). As a condition of proceeding against an attorney on a conspiracy claim, the plaintiff might confront the statutory requirement of a pre-filing order permitting such a claim. *See* Cal. Civ. Proc. § 1714.10(a) ("No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action.")

The defendant attorneys will claim that their conduct is privileged and file a motion to dismiss under California Anti-SLAPP Statute (Cal. Civ. Proc. § 425.16 *et seq.*) which provides, as follows:

> "(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.
>
> (b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim . . . ."

Many States (about 26) have equivalent statutes. The Anti-SLAPP might succeed or might fail, but these motions generate prodigious attorneys's fees because the defendants must prove that their activities Constitutionally (or otherwise) protected, and that Plaintiff's does not have a meritorious case. Plaintiff need only prove the case some merit (i.e., survive a summary judgment). Rusheen v. Cohen, 37 Cal.4th 1048, 1056 (2006). Fees are awarded in collecting the fees. *See* Ketchum etc. v. Moses, 24 Cal.4th 1122, 1141, fn. 6 (2001).

[37] *See* Barboza at 545

"The court also noted that a well-known practice guide warns of the disadvantages of class actions, including that class counsel may find themselves caught in a class action that has proven to be undesirable due to the costs involved, because they are unable to dismiss class claims or parties without the court's approval." (Emphasis added)

another shell as a winning litigation tactic and to emerge from the litigation as the victor.[38] Immune from the risk of any pre-judgment seizure, by way of attachment or *Grupo*-style approved injunction, a class action defendant would readily embrace an asset protection scheme as a cost-effective strategy to mitigate the financial fallout emanating from a class action.[39]

In *Grupo Mexicano De DeSarrollo v. A.V. Alliance Bond Fund, Inc.*,[40] Justice Ginsburg stated, in her dissent, the following:

> "But as the facts of this case so plainly show, for creditors situated as Alliance is, the remedy at law is worthless absent the provisional relief in equity's arsenal. Moreover, increasingly sophisticated offshore haven judgment proofing strategies, coupled with technology that permits the nearly instantaneous transfer of assets abroad, suggests that defendants may succeed in avoiding meritorious claims in ways unimaginable before the merger of law and equity. See LoPucki, The Death of Liability, 106 Yale L. J. 1, 32-38 (1996).

Justice Ginsburg clearly articulated the necessity of pre-judgment relief to protect the interest of the plaintiffs lest asset-protection strategies pursued by the defendant render any prospective judgment or settlement worthless, destroying the "remedy at law" and potentially eroding traditional concepts of liability and compensation for injuries arising out of contract, tort, statute or other claims for relief.[41] While Supreme

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[38] Had *Grupo* been decided in 2010, Justice Ginsburg might have remarked that a ne'er-do-well debtor could transfer millions through a cell phone, Blackberry, iPhone, or iPad in the courthouse elevator.

[39] As Henry Kissinger once observed, "Even a paranoid can have enemies." In *New England Mut. Life Ins. Co. Sales Practices Litigation*, 183 F.R.D. 33 (D. Mass. 1998), in granting class certification, the court expressed great concern as to the prospect of actual collection, citing Professor LoPucki's article, as follows: "Another related consideration exists and strengthens may determination that class certification is necessary in this case to protect the interests of the plaintiffs. This consideration involves the possibility that, while this litigation is being resolved, NEM may render itself, or may otherwise become, 'judgment proof.'"

Professor LoPucki suggests that corporations facing large obligations owed to involuntary creditors (e.g., judgment creditors) had begun to use a number of strategies to avoid such obligations. *See The Death of Liability*, at 6. LoPucki points out that, in some situations, it may be more economically advantageous for a corporation to undergo reorganization than to satisfy its judgment creditors. *Id.* at 44. A corporation may be able to maintain existing relationships with its contractual creditors because debts owed to such creditors would be satisfied before any payments were made to judgment creditors.

[40] *Grupo* at 338-39

[41] Justice Ginsburg sounds the warning that pre-judgment remedies are a necessity to insure effective justice due the plaintiffs as opposed to a tactical ploy to compel the defendant to come to the bargaining table. At the end of the day, the issue in *Grupo* is not the necessity of pre-judgment relief to secure a recovery for the plaintiff, but what remedy was available. The outcome is *Grupo* mirrors earlier cases, such as *Rosen* and, therefore the better result would have been plaintiff pursuing under the law of the domicile an attachment or state law authorized. New York C.P.L.R. § 6201 limits attachments to non-domiciliary residents, foreign corporations not authorized to do business in New

Court Justices rarely take an interest in general enforcement matters, Justice Ginsburg's comments evoke a significant concern that a shrewd defendant, having cheated large numbers of customers, consumers or employees, could further cheat those same victims of any meaningful compensation for their injuries through asset-protections schemes[42]

York, defendant evading service of process, defendant engaging in a fraudulent conveyance or efforts to render the judgment worth, victims of a crime, and actions on a judgment or decree. New York C.P.L.R. 6212(b) requires the issuance of a bond, the amount of which is left to the court's discretion. *See* Wanga Borges, ENFORCING JUDGMENT AND COLLECTING DEBTS IN NEW YORK, Provisional Remedies ¶ 4:37: "Amount – The amount is to be fixed by the court but it may not be less than $500.00 and often is much more because it should cover not only costs, expenses, reasonable attorney's fees, but also an amount suitable to the value of the attached property and/or potential damages." Experienced practioners advise that bond amounts are frequently set at 110% of the debt.

From *Alliance Bond Fund, Inc.*, 143 F.3d. 688, 691-692 (2d Cir. 1998), the facts strongly suggest fraud, or acts to frustrate collection of the judgment in that the defendant has been assigning hundreds of millions of dollars of assets to pay or secure other creditors, that prior disclosures of the assigned property were erroneous and failed to disclose the correct (and increased) amounts of the transfers, and that only $5,000,000 remained available to satisfy the plaintiff's $75,000,000 note obligations. These funds might have justified New York C.P.L.R. 6201(3) (intent to defraud, or intent to frustrate enforcement of the judgment by assigning, disposing, encumbering or secreting property or removing it from the state). However, the Second Circuit noted that under New York law, an injunction was unavailable because New York's civil procedure rules barred an injunction in an action for money damages only, and that an attachment was also unavailable because the property was not located in the State of New York. A Rule 65 injunction ensued, which was subsequently vacated in *Grupo*.

[42] Upon confronting an empty judgment, plaintiffs seek to ascribe liability to directors, attorneys, and professional advisors who assisted or participated in the transactions, and the recipient of the fraudulent conveyed property (notes 29-30). Plaintiff might assert a conspiracy to defraud between the debtor, conveyee and closely related party. Monastra v. Konica Bus. Mach., U.S.A., Inc., 43 Cal. App. 4th 1628, 1644-1645 (1996) (compliance with state bulk sale law does not immunize parties from liability for fraudulent conveyance. [*id.* at 1637]) Creditors and trustees have pursued "negligence" claims against officers, directors, attorneys, auditors and investment bankers under the "deepening insolvency theory." *See* Smith v. Arthur Andersen LLP, 421 F.3d. 989 (9th Cir. 2005), holding, as follows:

> "We do, however, agree with the Third Circuit's observation in R.F. Lafferty & Co., Inc., 267 F.3d. 340, 350 (3rd. Cir. 2001) that 'prolonging an insolvent corporation's life through bad debt may' dissipate corporate assets and thereby harm the value of corporate property. 267 F.3d at 350. Thus, we agree that the complaint states a cognizable harm to Boston Chicken when it alleges that the defendants 'prolonged' the firm's existence, causing it to expend corporate assets that would not have been spent "if the corporation [had been] dissolved in a timely manner, rather than kept afloat with spurious debt." *Id.* In so holding, we do not opine whether the incurrence of additional debt that cannot be repaid, in and of itself, constitutes a corporate injury remediable by a trustee. We rely only on the dissipation of assets in reaching the conclusion that Boston Chicken was harmed."

See however, CITX (Seitz v. Detweiler, Hershey and Associates, P.C., Robert Schoen, C.P.A. etc. 448 F.3d. 672, 681 (3rd Cir. 2006 [suit against accountants]. The court rejected liability for the "deepening insolvency theory as follows:

> "In addressing this question, we note that Lafferty holds only that fraudulent conduct will suffice to support a deepening insolvency claim under Pennsylvania law. *See* id. at 347. (defining injury as a "fraudulent expansion of corporate debt and prolongation of

which the courts tragically lack the remedy to avoid.[43]

In Professor LoPucki's seminal article, cited by Justice Ginsburg in *Grupo*,[44] Professor LoPucki predicts the outcome as follows:

> "From such an analysis, this Article concludes that currently effective judgment-proofing strategies are fully capable of defeating the liability system. The remaining barriers that constrain use of these strategies-principally expenses and cultural resistance-are in decline." (Id. at p. 6)45 ("LoPucki Denouement")46

> corporate life."); *See, also* Corporate Aviation Concepts, Inc v. Multi-Serv. Aviation Corp. 2004 WL 1900001 at *4 (E.D. Pa, Aug. 25, 2004) (interpreting Lafferty to hold that only fraudulent conduct will suffice for a deepening-insolvency claim); OHC Liquidation Trust v. Credit Suisse First Boston (In Re Oakwood Homes Corp.), 340 B.R. 510, 2006 WL 864843, at *20 [Bank. D. Del. Mar. 31, 2006 (same). We know of no reason to extend the scope of deepening insolvency beyond Lafferty's limited holding. To that end, we hold that a claim of negligence cannot sustain a deepening insolvency cause of action."

See, also Maaren A. Choksi, *Sink or Swim? A case for Salvaging Deepening Insolvency Theory*, 7 Jour. Bus. & Sec. Law, 1673 (2007); David C. Thompson, *A Critique of "Deepening Insolvency," A New Bankruptcy Tort Theory*, 12 Stanford J. Law, Bus. & Fin. 536 (2007); Robert Millner, Sally Neely, and Michael H. Reed, *Potential Liability for Deepening Insolvency and Breach of Fiduciary Duty to Creditors*, ABA Section of Litigation Annual Conference, April 11-14, 2007.

The Delaware Supreme Court functionally rejected claims of officers and director's direct liability due creditors under deepening insolvency and related claims. *See* North Am. Cath. Ed. Programming Found. Inc v. Gheewalla, 930 A.2d 92, 100-103 (Del. Sup. 2007) (fn. 28 for collection of articles discussing liability of directors to creditor when corporation is in zone of insolvency) ; Trenwick Am. Lit. Trust v. Billett, 906 A. 2d 168, 174 (Del. Supr. 2007)(rejected deepening insolvency as a viable claim. *See, also* Berg & Berg (rejected generalized claims based the corporation's declining financial condition [see p. 1038, n. 18 for collection of articles airing criticism of claims of duty owed by officers and directors directly to creditors]).

43 From the facts of *Grupo*, however, the outcome was potentially preordained by the severe limitations of New York pre-judgment remedies. These strategic decision in *Grupo* was venue. Venue-shopping is a necessity and not a luxury. Interestingly enough, plaintiff solely sought injunctive relief under Rule 65 in the complaint and the Second Circuit's decision was based on that rule and on federal equity principles. The court declined to consider the availability of injunctive relief under the laws of the forum state (New York) on the basis that the argument was not considered below. *Id.* at 318, fn. 3. Whether or not other venues were available is unclear.

44 The Death of Liability, *supra*.

45 Professor LoPucki (pp. 14-38) surveys the most common methods of "judgment proofing." Since 1996 and the rise of the Internet, the proliferation of multiple foreign states sponsored offshore havens, the explosion of published materials offering asset protection formulas, and sophisticated multi-national wire transfer schemes facilitated through the Internet, judgment proofing is unlimited in form and jurisdiction.

46 In *Corporate Proofing Strategies*, (page 1380, n. 61) Professor White states, as follows:

> "It is important to understand what in Professor LoPucki's thesis is explicit, what is implicit, and what is unclear. First, Professor LoPucki does not say merely that certain persons and firms have found ways to avoid their just liability by putting their assets beyond the reach of their creditors. A debtor's divestiture of assets in the face of creditors'

Freeing class counsel from a duty to preserve assets by attachment or injunction increases the probability of harm in the *TJ Hooper/Carroll* equation, leading to "The

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claims or operation with too little capital are well-known and ancient practices. The infamous *Twyne's Case* cast a shadow over modern commercial security law by suggesting that a debtor commits a fraudulent conveyance when he secretly conveys security to a creditor while retaining possession of the property. Taking secret security, making fraudulent conveyances, operating with insufficient capital, and distributing one's assets to shareholders in preference to creditors have been practices for hundreds of years; they are explicitly not the subject of Professor LoPucki's complaint."

"Professor White makes a stronger claim. Through his poker game metaphor, he claims that '[m]ajor players are reducing their stakes' and that '[s]ome large businesses now employ [judgment-proofing strategies] and market forces are driving their competitors to do the same.' Thus, he claims not that a few businesses are doing the things that businesses and individuals have always done, and not only that it is now possible with modern devices to do these things more broadly, but that American businesses are, in fact, judgment proofing themselves, and that there is a trend for a larger number of all firms to do the same. His assertion is not merely that devices are available; it is an empirical assertion that these devices are being used more systematically than ever before and that their use will become more widespread in the future.

"It is important also to understand who Professor LoPucki believes are the victims of these transactions. The victims are not conventional unsecured creditors with contract claims; they are creditors with claims imposed by tort and statute. Professor LoPucki recognizes that contract creditors – creditors ranging from banks to finance companies to suppliers – can and will bargain for protection. He is concerned about people who are sometimes referred to as 'involuntary' creditors, creditors whose claims are thrust upon them as a result of an accident or a violation of a statutory obligation of the debtor. Common examples include parties injured by auto accidents, asbestos exposure, and environmental contamination, and any other victim of tort liability, whether the liability arises from an intrauterine device, a breast implant, or a cigarette."

Claims such as "asbestos exposure, and environmental contamination, and any other victim of tort liability, whether the liability arises from an intrauterine device, a breast implant, or a cigarette. . ." are frequently litigated in class action settings.

Professor White criticizes Professor LoPucki's thesis that wrongdoers facing massive liability [leading to a class action] will seek to diminish or escape liability by engaging in judgment proofing strategies elucidated by Profession LoPucki, that the "judgment proofing strategies" are being used more systematically than ever before, that this process is will become "more widespread in the future."

In his essay, Professor White disagrees with Professor LoPucki and labels LoPucki's claims of wide spread judgment proofing as fantasy, stating that "[t]he specter of widespread judgment proofing by commercial firms is mere fantasy." (*Id.* at 1412) Professor's White's concludes that judgment proofing is not widespread ("While these data do not disprove the possibility of judgment proofing by an occasional company, they refute the proposition that judgment proofing is widespread among American commercial firms.") Id. at 1412.

This author does not dispute Professor's White well supported conclusion. The class counsel necessarily confronts the prospect that the "possibility of judgment proofing," turns into a probability when the defendant lacks adequate (or any) insurance or sufficient capital to survive the prosecution and trial of the class action and executes a strategy of "judgment proofing" as the alternative to litigation.

The class members view the class action as justice, and the defendant views class actions as an expense whose management leads to varied strategic outcomes including judgment proofing.

LoPucki Denouement,"[47] in which a fraudulent conveyance effectively defeats non-contractual liability, an attractive alternative strategy to the rigors, burden and expense of full-frontal litigation.

LoPucki describes asset-laundering strategies[48] such as fraudulent conveyances

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47 The successful fraudulent conveyance eviscerating the underlying and ending civil liability and therefore "The LoPucki Denouement."

In *Virtual Judgment Proofing*, Professor LoPucki summarizes his thesis as follow:

> "As a result, I predicted the American economy was evolving toward a future which:
>
> > There will be entities that own things and entities that do things. Those that own things-the bankruptcy remote vehicle– will not do anything, lest they expose their assets to liability. Those that do things–the operating companies–will not own anything, lest their judgment creditors have something to attach. n 13
>
> In this future, plaintiffs would no longer sue for money judgments because they could not collect. The liability system would not serve any purpose and would die."

Professor LoPucki is the Security Pacific Bank Professor of Law at the U.C.L.A. School of Law (1999 to date). *The Death of Liability* has been cited numerous times, including in Acushnet Co. V. Coaters Inc. 937 F. Supp. 988 (D. Mass, 1997); In Re Brooks, 217 B.R. 98 (D. Conn. 1998), In re New England Mutual, *supra.*; Student Loan Marketing Ass'n v. Riley, 104 F.3d 397 (D.C. Cir. 1997); Grupo, *supra*.

48 In *The Essential Structure of Judgment Proofing*, Professor LoPucki describes his strategy as follows:

> "Judgment are enforced only against assets owned by the debtor. To own no assets is to be judgment proof. Some businesses do operating without owning any assets of significant value. For example, a business may lease all of the assets used its operations or may have granted a security interest in those assets to secure a debt in excess of the value of the assets. In either case, the debtor is judgment-proof in the sense that the debtor has no assets from which the creditor can recover. . .
>
> "Accepting for purposes of argument that such a cushion [unrestricted capital] is necessary, it does not follow that it is impossible to operate a large business in a judgment proof condition. Though the business and the assets are both necessary, they need not be contained in the same legal entity. The judgment proofer's solution to the problem described in the proceeding paragraph [capital on hand to finance the business] is to separate the business into two or more legal entities that continue in a symbiotic relationship. One of these entities, the "owning entity," owns the unencumbered assets of the business. The other, the "operating entity," engages in the potentially liability-generating activity."
>
> Why does this separateness defeat liability? In nearly every instance, liability is generated by employees, but damages can only be collected from assets. Figure 1 show that liability is initially a link between the tort victim and the employee of the business. The doctrine of *respondeat superior* transmits liability to the employing (operating) entity. Once liability has been fixed against that entity, it can be collected from the assets owned by that entity. The weakness in the liability system is the lack of any generally applicable requirement that operating entities own assets." (*Id.* at 149-150)

Housing assets and related liabilities in separate legal units is an established business practice, and large multi-nationals, and national, state and regional operators routinely separate incorporate (or form an LLC) for separate subsidiaries as legitimate liability firewalls. Most commercial and industrial property owners and large scale apartment complexes are housed in separate limited

that permit the defendant to escape the courthouse because class counsel has neither an obligation nor (possibly) any great interest[49] in further chasing the defendant[50] - the prospect that *Barboza* implicitly repudiates.[51]

Imposing the duty to attempt to secure assets pre-judgment to assure recovery is a seamless extension, if not a mirror, of that imposed by the court in *Janik* for failing to plead key claims with a longer statute of limitations which would have increased the class's recovery. Given that the court has already expanded professional liability in *Janik* for failing to increase the recovery due the class given the clarity of additional

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liability companies. This parceling of ownership into separate legal entities slows or even prevents the metastasizing of contract and tort liability. Professor LoPucki suggest housing the assets into one entity, and the liabilities in another entity, but the two entities acting in tandem in conducting the business operation, which is a common asset protection strategy.

Professor's LoPucki's model never leaves the launching pad, much less earth's gravity. Most, if not all, small businesses, and nearly all medium- and large-sized businesses routinely provide financial statement to vendors, banks, finance companies, leasing companies, investors, partners and joint venturers, and their own accountants. Disclosing that the proposed contracting party (the liability side) is without assets would either quash any prospective business transaction or compel the other "non-contracting" party to like execute the contract. If management declines to clearly explain that the contracting party is an empty shell, provides a false financial statement blurring or obliterating the alleged separateness between the two entities, or that the other non contracting "shell" actually owns the asset, the aggrieved party would surely file suit for fraud. Courts would not hesitate to declare the entities joint venturers, alter ego's, one single enterprise or collapse both entities into one. *See* HBE Leasing Corp. v. Frank, 48 F.3d. 623, 635 (2nd Cir. 1995) and Orr v. Kinderhill Corp., 991 F. 2d 31, 35-36- (2nd Cir. 1993).

49 Typically, class counsel finances the litigation, and fraudulent conveyances, even though successfully unwound in post judgment proceeding, succeed in driving up costs and driving away even the most stout hearted.

50 Professor Lopucki distinguishes "judgment proofing" between "hard" and "soft." *The Death of Liability*, at fn. 10-7 (" . . . "hard" judgment proofing to refer to situations where the judgment creditor can reach only nominal asset values and the term "soft" judgments proofing to refer to situations in which the judgment creditor can reach assets of substantial value, but insufficient to satisfy the judgment.") While the facial logic of this statement is impeccable, established asset protection strategies dissuade the judgment creditor from enforcement traditional remedies in light of the expense, delay, time, effort and aggravation suffered by the creditor. The creditor has available an entire grab bag of remedies under the Uniform Fraudulent Transfer Act, unlawful corporate dividends, alter ego, successor liability, breach of fiduciary duty and potential claims against enablers. Chasing down a fraudulent conveyance is costly, bears risk, chews up the potential award by more attorney's fees, and takes time, which are all factors which dissuade any efforts to unwind the judgment proofing. Judgment proofing is neither hard, nor soft, but a financial and litigation barrier.

51 Post-judgment action to interfere with the judgment creditor's efforts to execute under the judgment are actionable as independent claims for relief under New York law. Unlawful interference with enforcement of a judgment has long been recognized in New York, and that it was always an action triable by a jury. *See* Yates v. Joyce, 11 Johns 136 (1814) (party liable for damages after its fraudulent misconduct where plaintiff acquired a legal lien on a property and injury to property was done with a full knowledge of the plaintiff's rights); *see, also* Quinby v. Strauss, 90 N.Y. 664 (1882). In *Quinby*, an action for damages was held maintainable against a judgment debtor and his attorney for conspiring to keep defendant's property out of the reach of his creditors by securing fictitious debts under which the property was sold to his attorney. *See, also*, Strachman v. Palestinian Auth., __N.Y.S.2d__, 2010 N.Y. Slip Op., 02673, 2010 WL 1203662 (1st Dep't March 30, 2010).

claim for relief, the court could readily construct the parallel liability for failing to assure payment of that same recovery due the class if, in fact, the remedies providing such assurances are statutorily authorized, well established, clearly understood, potentially successful, and accessible without an impossible burden or overwhelming expense.[52]

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[52] The burden to prosecute an attachment is tolerable. To prosecute an attachment application, plaintiff files and serves a three page printed notice (Judicial Counsel Form AT-115), a three page printed application (Judicial Counsel Form AT-105), describes the property sought to be attached (Cal. Civ. Proc. § 484.020(a)-(e)) and 487.010), a supporting declaration (Cal. Civ. Proc. § 484.030) with great particularly and specificity (Cal. Civ. Proc. § 482.040), supporting memorandum of points and authorities (C.R.C. 3.1113), effectuates service of process of the moving paper providing for at least 16 court days, and appears at a hearing. (Cal. Civ. Proc. § 484.040). *See* Hobbs v. Weiss, 73 Cal. App. 4th 76, 81-82 (Cal App., 4th Dist. 1999) (Hearing required as opposed to consideration on the "papers."). The filing fee for the attachment application is $40.00; the cost for personal service of process is about $75.00; the fee for the issuance of the writ is $25.00, and the bond amount is $10,000 (Cal. Civ. Proc. § 489.220(a)), in which the premium is between $100.00 to $200.00. To prevail, plaintiff need only demonstrate probable validity. Cal. Civ. Proc. § 481.190 and 494.090(a)(2). ("A claim has 'probable validity' where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim.") *See* Loeb & Loeb v. Beverly Glen Music etc., 166 Cal .App.3d 1110, 1118 (Cal. App. 2.Dist. 1985) [Plaintiff entitled to attachment if plaintiff can prove "it is more likely than not that plaintiff will obtain a judgment on that claim. . ."] Attachments are a detail driven pre-judgment remedy which secures plaintiff's claim against the defendant irrational machinations to fraudulently convey assets to render collection difficult and discourage plaintiff form continuing litigation in the face of potential empty judgment and great expense.

Attachment applications are routine visitors on the larger California county daily court calendars. Professor LoPucki errors in his overly broad analysis of pre-judgment writ of attachment as follows:

> "Except in exigent circumstances, obligations for civil liability are enforced only after of a judgment. Enforcement prior to the entry of judgment is discouraged because plaintiff might not be entitled to a judgment at all and early enforcement might harm the debtor. The state legislatures have enacted exceptions to this principle, authorizing pre-judgment attachment and garnishment in those rare cases where a plaintiff can prove that the defendant is deliberately in the process of becoming judgment proof. The Supreme Court has generally upheld the laws creating these exceptions, but the exceptions are narrow and rarely used."(LoPucki, id., page 13 "Enforcement Only After Judgment.")

This is just wrong and undermines the central tenet of his article. California permits a pre-judgment writ of attachment without the necessity of showing "exigency." Cal. Civ. Proc. § 484.090 (a) & (b). *See* Alan Ahart [Judge of the United States Bankruptcy Court, CD, CAL], ENFORCING DEBTS AND JUDGMENT ¶ 4:10 (Calif. Practice Guides, The Rutter Group, 2007):

> "Provisional or pre-judgment remedies enable creditors to preserve the value of potential judgment while actions are pending by preventing debtors from transferring, encumbering, dissipating or concealing assets available to satisfy the judgment. These remedies are temporary, and can only be pursuing in connection with actions on the underlying claims."

Other States do, however, compel a showing of exigency as a condition for a pre-judgment attachment. *See*, *e.g.*, Ala. Code § 6-642 (exigent and out of state defendants); Col. R. Civ. Proc. 102(c) (exigent circumstances); Fl. Civ. Prac. & Proc. § 76.04 (exigent circumstances); O.C.G.A. § 18-3-1 (exigent circumstances); 755 I.L.C.S. § 5.101 (exigent circumstances); Ind. Code § 34-25-1 (exigent circumstances of foreign corporation or non resident); Kan. Stat. Ann. § 60-701 (exigent circumstances); Minn. Comp. & Coll. Rem. § 571.93 (exigent circumstances for garnishment summons); Miss. Code § 11-33-9 (exigent or defendant is a foreign corporation or non resident of

Unlike commercial actions brought such as those brought by sophisticated lenders, wholesale merchants or manufacturers, all of whose commercial litigation is managed by educated, trained and specialized in-house finance and credit departments or in-house attorneys, class action plaintiffs are heavily dependent upon the class counsel in the overall strategic and tactical management of the case as supervised by the court.[53] Class counsel therefore assumes a greater role in safeguarding the interests of the class itself.[54] Given this greater responsibility and, of course, offset by the greater financial reward[55] upon a successful conclusion of the case, counsel assumes a unique role in the protection of the class' interests.[56] That role includes the *Janik* duty to increase the recovery and the ensuing duty to assure the recovery. These are adjoining duties and are coextensive to the overall duties of due care owed to the class members.[57]

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state); N.Y. C.P.L.R. 6201; N.C.G.S 1-440.3 (exigent circumstances); O.R.C. 2715.01 (partially exigent, but allowed for non residents, non complying foreign corporations and claim for labor or work); Oklahoma O.S.C.A 1951 § 1151(exigent circumstances); Va. Code § 8.01-534 (exigent circumstances).

Many states allow attachments for foreign (out-of-state) corporations and non-residents. *But see* Conn. Gen. Stat. § 52-278(d); Ha. Rev. Stat. 652.1.5(d); R.C.W. 6.25.030(10) and § 6.25.070(1). None of these three require exigent circumstances. Absent clear injunctive relief and anticipating the necessity of pre-judgment relief to protect the class from a catastrophic loss, class counsel should carefully select view in the jurisdiction in the most "attachment friendly" or state authorized injunction jurisdictions allowed under Rule 64. Procuring an attachment in a jurisdiction requiring a showing of "exigent circumstances," is burdensome, but not impossible. Adverse financial information from EDGAR, adverse public filings, fraudulent conduct such as the transfer, hiding or secreting of assets, change of name of the business, fraudulent mortgages or financing statements filed with the secretary of state, other lawsuits, tax liens, bulk sale notices, the listing of the business with a broker, prior dishonest conduct, threats or boasts of "driving the company" into the ground, laying off employees, and closing the business are common indices of an exigent circumstances. Ex parte writs of attachment are commonplace.

[53] Barboza, 179 Cal. App. 4th at 546.

[54] *Id.* at 546.

[55] *See* Gregory P. Miller and Lori S. Singer, *Nonpecuniary Class Action Settlement*, 60 Law and Contemporary Problems 97-153, App'x A (at 132-153) (analysis of compensation due class action counsel in "coupon" [i.e., non pecuniary] cases)

[56] *Id.* at 546.

[57] These risks are real. Here is Professor's LoPucki's proposal: "Its [judgment proofing] architects will put it in place before the subsidiary incurs any debt, rendering most of fraudulent conveyance law inapplicable. The subsidiary will not own the fixed assets used in the business; it will lease them from the parent at market rates. If the courts do not honor those leases the next round of leases will be negotiated at arm's length with third-party owners. The parent will not control the subsidiary directly. Instead, a board of directors elected by the parent as shareholders will control it. If the board chooses to integrate he business of the subsidiary with that of the parent, it will do so by contract negotiated with the best interests of the subsidiary in mind. The parent will avoid involvement in the 'grand torts' of the subsidiary…" (*Virtual Judgment Proofing* at 1428).

The key language in this statement is "If the courts do not honor those leases, the next round of leases…" This suggests that the corporation is engaging in a deliberate campaign (i.e., the next round) to immunize itself of effective liability for wrongful conduct rendering its assets more difficult to reach through lease and finance transactions. If these transactions succeed in judgment proofing, the debtor can freely engage in dangerous or predatory conduct without the slightest repercussions. Without

D. PRESIDENT OBAMA HAS PROFESSOR LOPUCKI IN MIND IN DEMANDING THE ESCROW FUND.

On June 11, 2010, President Obama announced that BP agreed to deposit $20 billion in a blocked escrow account to fund claims arising from the April 20, 2010 oil spill, the ruptured well from which the oil flowed not having been declared "dead" until September 19, 2010.[58] BP previously accepted complete responsibility for damages, established a claims procedure, deployed a large number of "claims adjustors," and took the first steps to ensure compensation to individuals, businesses, and governmental entities adversely affected by this monumental environmental disaster. What made President Obama's announcement particularly interesting was the fact that the federal government wanted more than "paper assurances" or barren promises of payment. The federal government wanted BP to collateralize these promises of compensation with a trust fund administered by a third person.

Was this action good business practice by the federal government or an act by BP to allay the fears of the American public that BP, potentially motivated by avaricious claims proffered by ambulance-chasing attorneys, would pull up stakes (and its assets) and head back to the safe legal climate of the United Kingdom? Would BP's parting shot be "Sorry that I left a mess" or "Come and get me"?

Probably not. Professor Lopucki suggests a potpourri of corporate strategies to defeat liability in The Death of Liability[59] and circulated, through the legal bibliography of the article, the subtle suggestion that a large corporate entity facing liability possibly

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risk to capital assets and ostensibly free of any financial penalty, the corporation would decline any insurance, or capital reserves because no assets are at risk, and would join a nation of deadbeats.

This destructive outcome is present today. Shoddy products from overseas injure consumers and cause significant property damage such as the Chinese drywall scandal which has caused millions of dollars in uninsurable losses, leaving homeowners with little recourse. The manufacturers, located in China, are virtually immune from liability. *See* http://chinesedrywallcomplaintcenter.com, and Morris-Chin v. Knauf Plasterboard Tian-jin, Co., Case Number: 09CV20796 (KING) (S.D. Fl. 2009)

A Taiwanese manufacturer sold candy products which stuck in children's throats and killed dozens worldwide. Aggrieved parents recovered multimillion judgments but encountered significant barriers in enforcement as Taiwan's law and judicial systems made effective enforcement virtually inaccessible and rendered the manufacturer judgment proof. *Judge Awards $50m in Candy Choking Case*, SILICON VALLEY/S.J. BUS. JOURN., Sept. 9, 2003. The difference between the Lopucki model and the Chinese drywall and Taiwanese candy manufacturers is that judgment proofing for the LoPucki model arose from a deliberate scheme to purge the company of assets subject to enforcement, and Chinese and Taiwanese entities lack any ostensible or readily accessible US assets subject to enforcement. Without assets at risk, insurance is an unnecessary expense.

The consequences of the LoPucki strategy is the following: Civil immunity breeds impunity and licenses high risk-prone conduct unburdened by the cost of insurance or dissipation of capital reserves.

58 Henry Fountain, *U.S. Says BP Well Is Finally 'Dead'*, N.Y.TIMES, Sept. 20, 2010, at A14.

59 Death of Liability, at 14-38.

exceeding $20 billion might engage in asset-protection to protect shareholder value and company assets. Professor Lopucki noted that asset-protection could tarnish the company with the title of "sleaze."[60] Compelling BP to collateralize its promises of payment made good business sense and provided comfort to tens of thousands of claimants, who no longer have to worry that BP might flee or place the probable subsidiary who held legal title to the rig and underlying well under bankruptcy protection.

The BP Oil Spill Fund stands as the proof positive that securing payment remains the paramount concern in large dollar class action suits. Absent one of the most well-capitalized global corporations or the President of the United States staring down the Board of that "supermajor" (as the world's six largest, non state-owned energy companies are called), everyone else will ponder whether pre-judgment relief will really be necessary to assure payment.

E. CLASS ACTIONS SERVE A GREATER GOOD.

In contrast to private actions between a limited number of parties interested in sorting out private, personal and commercial disputes, class actions further greater socioeconomic goals. The class actions provide wide-scale justice to the class members, who may have been subjected to illegal or criminal labor practices; wholesale theft; invidious and repulsive race, gender, age, disability, age, and sexual-orientation discrimination; the oppression of rapacious and unrelenting financial schemes burying its victims in debt or embarrassment; securities frauds; toxic dumping and poisoning of communities; and the sale of shoddy and sometimes dangerous and life-threatening products.[61] Class action litigation shapes public policy, product development and safety, social, race and gender issues, and serves as the judicial bulwark against large-scale insidious conduct. Class action judgments and settlements likewise generate staggering fee awards, regularly reaching or exceeding the $100 million mark.[62] Imposing additional duties upon the class counsel to assure, safeguard and preserve a recovery

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[60] *Id.*, at 52 "...Concern about all these effects might discourage investment in the company. In short, the company might develop a reputation for sleaze." Even more interested is footnote 220.id

[61] Class actions ensure representation of class members whose individual claims do not independently justify full blown civil litigation, which is a fact known to the defendant. On the other hand class action might turn a $500.00 penalty claim into a $5,000,000 lawsuit. Shady Grove Orthopedic Associates P.A. v. Allstate Insurance Co. __U.S.__ (Justice Antonin Scalia) (March 31, 2010) (*see* dissent by Justice Ginsburg who indicates that the $500 penalty becomes a $5,000,000 class action. "The court today approves Shady Grove's attempt to transform a $500 case into a $5,000,000 award..."). In the majority opinion, Justice Scalia notes that the defendant admitted that the individual class members could have readily filed separate suits.

[62] The bibliography featuring attorney's fees for class actions is vast. *See, e.g.*, Theodore Eisenberg and Geoffrey P. Miller, *Attorneys Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Studies 27 - 78 (2004). *See, also Nonpecuniary Class Action Settlement, supra*..

from the vantage point of a scaled socioeconomic plateau would assure the class members, some present and others absent, all dependent upon class counsel, an effective recovery, meaningful justice, and societal or commercial change.

F. JUDGE LEARNED HAND'S CALCULUS OF RISK

New duties traditionally have arisen from the physical and financial debris of wholly avoidable disasters, accidents and calamities. This lockstep expansion of the duty of class counsel to assure payment rests upon the historic foundations laid by Judge Learned Hand in *The T.J. Hooper*,[63] which rejected reasonable prudence as common prudence and stated "whole callings may have lagged in the adoption of new and available devices."

"Courts must in the end say what is required; there are precautions to imperative that even their universal disregard will not excuse their omission."[64] In light of the relative ease, low cost and modest burden of proof, attachments or injunctions are a readily accessible remedy whose enforcement would preserve the assets of a potentially unstable or irascible defendant and provide security for a multimillion dollar claim. *TJ Hooper* heralds the coming algebra of risk, burden and reward constituting the famous equation laid down by Judge Learned Hand in *United States v. Carroll*[65] as follows:

> "***(1) The probability [of an accident]…; (2) the gravity of the resulting injury, if [it is does]…; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL."[66]

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[63] The T.J. Hooper. The Northern No 30 and No. 17, the Montrose. In Re. Eastern Transp. Co. New England Coal & Coke Co v. Northern Barge Corporation, H.N. Hartwell & Son , Inc., etc., 60 F.2[d]. 737 (2d Cir. 1932).

[64] *Id.* at 740

[65] United States v. Carroll 159 F.2d 169, 173 (2nd Cir. 1947)

[66] While this math is impeccable, Judge Hand neglected to include another component to the equation when applied to civil litigation, which is the personal, and sometimes irrational, motivation of the parties and their attorneys. "Scorched earth" is a recognized litigation strategy. *See* Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors, Inc. v. Love Funding Corp., 499 F.Supp.2d 314, 318 (S.D.N.Y. 2007), 556 F.3d 100 (2d Cir. 2009) (certified question: "For the next two years, the Trust and UBS engaged in what is referred to colloquially as scorched earth litigation; it proceeded in one federal court, two Texas state courts and New York state court, involved approximately seventy attorneys at ten separate law firms, and spent tens of millions of dollars in legal fees.")

Another expositive case is *Jankey v. Lee*, 181 Cal. App. 4th 1173, 1182 (Cal. App.1st Dist. 2010) in which the court stated:

> "The court concluded that entitling a prevailing defendant to fees on the same basis as a

Pre-judgment writs of attachment or injunctions, if available, closely track the *TJ Hooper/Carroll*[67] calculus in advocating the enforcement of a remedy whose burden and cost are manageable, and whose enforcement protects the class from a multimillion dollar catastrophe (gravity of harm, the LoPucki Denouement) which is highly probable (*see Hoxworth*, *Deckert* and *Barboza*). Absent any constraint imposed by accessible pre-judgment remedies, the class action defendant would have the ability to bail out of the litigation and vitiate any liability through recognized and sanctioned asset protection, such as bankruptcy or an assignment for the benefit of creditors, or illicit asset protection such as transfer to a newly created corporate shell, offshore trust,[68] or massive insider encumbrance.[69]

> prevailing plaintiff under Section 55, without a finding that the plaintiff's claims were frivolous, does not violate "[t]he spirit of California's statutory scheme." (164 Cal. App. 4th at p. 792.) A plaintiff should be held accountable for "the consequences of this scorched earth strategy" of electing to pursue every available statutory option available to enforce his right of access under California law, thereby "maximiz[ing] the litigation expenses of his adversary." (Emphasis added)

[67] These two cases launched many law review and journal articles. See, for example, Michael S. Shapo, *Responsibility for Injuries: Some Sketches*, 100 Northwestern L. Rev. 481-500 (2006)

[68] Ownership of real property in the U.K. held in trust deemed a fraud. In Re Marriage of Dick, 15 Cal. App. 4th 144, 163-164 (Cal. App. 2d Dist. 1993); disclosure to financial institution and tax return confirm ownership of other secreted property. *Id.* at page 164.

[69] This brew of *Hooper/Carroll* probability and gravity in one drink is called "The LoPucki Denouement."

Fraudulent conveyances typically transform title to the debtor's property to another entity which the debtor's control, but the debtor keeps the beneficial interest. Transferring the assets of ABC INC. to ABC INC.(1) in which the operators, directors and shareholders are the same, ABC Inc.(1) declines to assume the debts of ABC INC., and no consideration is paid is the epitome of fraudulent conveyances. Wiring funds to offshore or out of state accounts with the intent to place them out the reach of creditors is another type of fraudulent conveyance. Fraudulent conveyance includes purely transformative schemes in which the character of the property is transformed for the purpose rendering it more inaccessible to a creditor.

In *In Re Bernard*, 96 F.3d 1279 (9th Cir. 1996), the Ninth Circuit held that withdrawing money from a money market account, and cashing a company check constituted a fraudulent "transfer" under Bankr. Code, 11 § 727 (a)(2)(A) (discharged barred for committing fraudulent conveyance within one year of filing bankruptcy). The debtors claims that the creditor suffered no loss and that "[b]y taking money out of the bank, as it were, they claim the merely moved their asset from one of their pockets to another-they had not 'transferred' anything to anyone." (*Id.* at 1282) The court rejected that claim and held that an actual injury to the creditor was not required under *In Re Adeeb*, 787 F.2d 1339, 1343 (9th Cir. 1986): "When they withdrew from their accounts, they exchanged debt for money (which , more than incidentally, was more difficult for the Shaeffers to acquire). The Bernards intentionally and successively hinder this effort by making withdrawals from accounts which were under threat of attachment…" In re Bernard at p. 1283. *In re Bernard* renders the transaction fraudulent because the effect of the transfer was to make the property "more difficult to reach," even though the debtor still retained possession of the property.

When faced with collection, tort, or property damage actions, vulnerable business owners habitually close down their established bank accounts and reestablish new accounts nearby, the next county, or,

F. THE FINANCIAL PAGES RECYLCE TERRIBLE TRAGEDIES EVERY DAY

The article is written in light of current events. Class action plaintiffs frequently seek recovery based on a large scale multimillion or multibillion dollar swindles, frauds and Ponzi schemes, which have dominated the news cycle (Bernie Madoff, Marc Dreier, Alan Sanford, etc.) and whose perpetrators would readily hide, transfer or secret assets and readily render any judgment uncollectible. Wall Street routinely incubates swindles, class actions and pre-judgment attempts to secure a recovery. In *Hoxworth v. Blinder*,[70] a case serving as the paradigm of financial swindles and catastrophic losses, class counsel succeeded at the trial court level in enjoining the defendant from making transfers out of the ordinary course of business and compelled the clawback of any funds fraudulently conveyed.[71] However, the circuit court reversed because the district court failed to estimate the probable amount of plaintiffs' likely final judgment, making any injunctive relief potentially excessive or overbroad.[72] Pre-*Grupo*,[73] *Hoxworth* stands for the proposition that a judge may issue a preliminary injunction pursuant to Rule 65 to protect a damage remedy.[74] However, absent an independent statutory basis

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better yet, across state lines. Debtor's counsel frequently advise moving funds of state on the premise that a writ of execution or attachment stops at the state's border, although a turnover order would compel the repatriation of the funds. Bernard characterizes a transfer as fraudulent if the transformative effect of the transfer renders the asset more difficult, problematical, or expensive to reach.

70 Hoxworth at 193-194

71 *Id.* at 192-194.

72 *Id.* at 198-199. At page 198, the court stated as follows:

> "Alternatively, the principle grows out of any of the usual preliminary injunction criteria. Thus, when "success on the merits" is quantified to varying degrees, a plaintiff likely to succeed in winning a judgment of at least $25,000 is not necessarily likely to win a judgment of at least $10 million. Similarly, a plaintiff expecting to win a judgment liberally estimated to be worth $25,000 might suffer an irreparable injury absent a preliminary injunction designed to ensure the availability of at least that amount, but is unlikely to suffer any injury whatsoever absent a preliminary injunction designed to ensure the availability of $10 million. Harm to a defendant is a third factor to be considered, and a defendant--even an unsavory one--is harmed more than necessary by an injunction encumbering far more of its assets than are at stake in the underlying litigation. Finally, the public interest is hardly served by the sheer *in terrorem* effect of allowing plaintiffs to impose (or even threaten to impose) burdens on defendants above and beyond those necessary to protect plaintiffs' otherwise unsatisfiable claims."

73 Grupo at 333

74 Hoxworth at 194-198. At 197, the court stated as follows:

> "Of course, just because a district court enjoys the power to protect a potential future damages remedy with a preliminary injunction does not mean that such an injunction is

or equitable relief, even in tandem with monetary relief, *Grupo* bars a judge from using equitable remedies such as an "asset freeze" to secure payment in an action seeking monetary relief only.[75] Given the nature of potential equitable claims for relief, *Hoxworth* (decided in 1990) may survive the rigors of *Grupo* (decided in 1999) and

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> appropriate in a run-of-the-mill damages action. The traditional requirements for obtaining equitable relief must be met. These include, in this context, a showing that plaintiffs are likely to become entitled to the encumbered funds upon final judgment and a showing that without the preliminary injunction, plaintiffs will probably be unable to recover those funds. Neither of these was met in *De Beers* [*referring to* De Beers Cons. Mines, Ltd v. United States, 325 U.S. 212 (1945)]. As to success on the merits, 'the possibility of an ultimate levy was too remote in practical terms to justify freezing the property from the outset of the litigation.' First National, 379 U.S. at 398, 85 S.Ct. at 539 (Harlan, J., dissenting) (discussing *De Beers*). As to irreparable injury, the government's evidence consisted only of one conclusory affidavit submitted by the government accusing De Beers of secreting assets – in other words, 'a mere statement of belief that the defendant can easily make away with or transport his money or goods.' De Beers, 325 U.S. at 222, 65 S.Ct. at 1135."

Against this background, the passage from De Beers on which appellants rely so heavily, *see* supra at 195, can be understood more sensibly. De Beers was concerned that not just "any action for personal judgment" should result, "on a mere statement" by a plaintiff, in burdensome encumbrances imposed on the assets of a defendant as yet found liable to no one. A case in which recovery is especially likely is not just "any action," however, and a case in which asset secretion has been proven involves more than just "a mere statement" of irreparable injury. We have not yet addressed the extent to which these factors are present in this case; so far, we have held only that De Beers does not preclude a preliminary injunction regardless of their presence."

75 *Grupo*, at 330-332. Justice Scalia writes as follows:

> "The requirement that the creditor obtain a prior judgment is a fundamental protection in debtor-creditor law—rendered all the more important in our federal system by the debtor's right to a jury trial on the legal claim. There are other factors which likewise give us pause: The remedy sought here could render Federal Rule of Civil Procedure 64, which authorizes use of state pre-judgment remedies, a virtual irrelevance. Why go through the trouble of complying with local attachment and garnishment statutes when this all-purpose pre-judgment injunction is available? More importantly, by adding, through judicial fiat, a new and powerful weapon to the creditor's arsenal, the new rule could radically alter the balance between debtor's and creditor's rights which has been developed over centuries through many laws— including those relating to bankruptcy, fraudulent conveyances, and preferences. Because any rational creditor would want to protect his investment, such a remedy might induce creditors to engage in a 'race to the courthouse' in cases involving insolvent or near-insolvent debtors, which might prove financially fatal to the struggling debtor. (In this case, we might observe, the respondents did not represent all of the holders of the Notes; they were an active few who sought to benefit at the expense of the other noteholders as well as GMD's other creditors. (n. 11) It is significant that, in England, use of the Mareva injunction has expanded rapidly. "Since 1975, the English courts have awarded Mareva injunctions to freeze assets in an ever-increasing set of circumstances both within and beyond the commercial setting to an ever-expanding number of plaintiffs." Wasserman, supra, at 339. As early as 1984, one observer stated that '[t]here are now a steady flow of such applications to our Courts which have been estimated to exceed one thousand per month.' Shenton, Attachments and Other Interim Court Remedies in Support of Arbitration, 1984 Int'l Bus. Law. 101, 104." (Emphasize added).

serves as a guide to use equitable relief to preserve sufficient assets of the defendant to assure payment of the prospective judgment. [76]

G. RULE 65 INJUNCTIONS REJECTED AS SUBSTITUTES FOR STATE LAW AUTHORIZED ATTACHMENTS

Rejecting the reasoning of *Hoxworth*, in *Rosen v. Cascade International, Inc.,* the Eleventh Circuit held that a plaintiff seeking to assure payment of the prospective money judgment must seek relief under the state laws providing for a pre-judgment attachment under Rule 64[77]; the plaintiff may not use broad federal injunctive relief

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[76] Post-*Grupo*, the gatekeeper for Rule 65 injunctive relief impounding the assets of the defendant is cogent equitable relief linking the claims for relief to the assets, such as disgorgement, constructive trust, equitable tracing, accounting, fraudulent conveyance claims, and other claims for equitable relief. *See, also* United States ex rel Rahman v. Oncology Assoc., P.C., 198 F.3d 489, 497-499 (4th Cir. 1999) which upheld an injunction, entered just prior to *Grupo*, prohibiting transfers outside the ordinary course of business, transfers or fraudulent conveyances. Post-*Grupo*, defendant seek to vacate the injunction, which the trial court denied the circuit court affirmed. The Circuit Court upheld the injunction on the ground that the complaint sought claims cognizable in equity, such as unjust enrichment, avoidance of fraudulent conveyances, imposition of constructive trust, alter ego allegations, (Rahman at 497-498. The justification is heightened by the fact that the public interest is at stake (*Id.* at 499). The court summarized the access to pre-judgment remedies of an attachment and injunction as follows:

> "From these controlling precedents, we draw several principles applicable to the case before us. First, where a plaintiff creditor has no lien or equitable interest in the assets of a defendant debtor, the creditor may not interfere with the debtor's use of his property before obtaining judgment. A debt claim leads only to a money judgment and does not in its own right constitute an interest in specific property. Accordingly, a debt claim does not, before reduction to judgment, authorize pre-judgment execution against the debtor's assets."

On the other hand, when the plaintiff creditor asserts a cognizable claim to specific assets of the defendant or seeks a remedy involving those assets, a court may in the interim invoke equity to preserve the status quo pending judgment where the legal remedy might prove inadequate and the preliminary relief furthers the court's ability to grant the final relief requested. This nexus between the assets sought to be frozen through an interim order and the ultimate relief requested in the lawsuit is essential to the authority of a district court in equity to enter a preliminary injunction freezing assets. Thus, the court in *Deckert* entered an injunction freezing assets "in aid of the recovery" sought by the lawsuit. 311 U.S. at 289. In De Beers, the court noted in a similar vein, "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." 325 U.S. at 220. And finally, *Grupo Mexicano* held that because the plaintiff claimed no interest in the defendant's assets (by way of lien or an equitable interest), but rather claimed only a money judgment, the district court lacked authority to freeze or otherwise interfere with the defendant's assets. *See* 119 S. Ct. at 1975.

[77] Rule 64 reads, in pertinent part, as follows:

> "(A) Remedies under state law-in general.
>
> At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

under Rule 65.[78] The general fact pattern in Hoxworth and Rosen are very close. Pursuing another set of securities swindlers, the class members at the trial court obtained a preliminary injunction freezing the defendant's assets.[79] Plaintiffs sought only money damages for violations of federal securities laws and state common law.[80] The clear purpose of the injunction was to freeze the defendant's assets so that funds would be available to satisfy any money judgment.[81] Reversing this injunction and rejecting the reasoning of *Hoxworth*,[82] the Eleventh Circuit held, as follows:

> "It is axiomatic that equitable relief is only available where there is no adequate remedy at law; cases in which the remedy is sought is the recovery of money damages do not fall within the jurisdiction of equity. Based on this fundamental principle of equity jurisprudence, we have explained, "'the general federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment." [83]

"(B) Specific Kinds of Remedies.

The remedies available under this rule include the folloiwng-however designated and regardless of whether procedure requires an independent action:

- Arrest;
- Attachment;
- Garnishment;
- Replevin;
- Sequestration; and
- Other corresponding or equivalent remedies.

[78] Rosen at 1530

[79] *Id.* at 1525: "...[defendant] restrained and enjoined from, directly or indirectly, assigning, bartering, conveying, destroying, encumbering, hypothecating, liquidating, mortgaging, pleading, selling, transferring, or in any other manner disposing of any asset, or any interest in any asset, held by him, or on his behalf, whether under this name or otherwise, to any person..." This "freeze order" ostensibly reached assets which might be exempt under state and federal law.

[80] *Id.* at 1526.

[81] *Id.* at 1526.

[82] *Id.* at 1529: "We recently concluded that the Third Circuit's interpretation tortures the express language of *De Beers* runs counter to established equitable principals." *Citing to* Mitsubishi Int'l Corp v. Cardinal Textile Sales, Inc., 14 F.3d. 1507, 1522 at fn. 24 (11th Cir. 1994).

[83] Rosen at 1526, and *citing* Mitsubishi at 1521, (*quoting* In re Fredeman Lit. Dixie Carriers, Inc. v. Channel Fueling Svce., Inc., 843 F.2d 821, 824 (5th Cir. 1988) ("The general federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment. The Supreme Court so held in *De Beers Consolidated Mines v. United States*. In *De Beers*, a civil antitrust prosecution, the government obtained a pretrial preliminary injunction freezing all the property the defendant held in

The Eleventh Circuit went on to note that the plaintiffs might seek an attachment as the proper pre-judgment remedy: "On the contrary, Rule 64 of the Federal Rules of Civil Procedure authorize the pre-judgment attachment of property for the benefit of a plaintiff in certain situations and provides a proper vehicle for plaintiffs seeking to restrain a defendant's assets with an eye toward satisfying a potential money judgment."[84] The Eleventh Circuit held that Rule 64 - not Rule 65 (which governs injunctions generally) - provides the standards to evaluate pre-judgment relief constituting a pre-judgment writ of attachment.[85] It soundly condemned the use of an injunction as a substitute attachment,[86] holding that "the use of injunctive relief as a substitute for the remedy of pre-judgment attachment, with its attendant safeguards,[87] is improper."[88] Like *Hoxworth*, but rejecting the reasoning that justified a Rule 65 injunction and the outcome (*i.e.*, the preservation of the injunction and further remand to quantify the amount), *Rosen* serves as a guidepost for a pre-judgment attachment to preserve sufficient assets of the defendants to assure payment of the prospective judgment.

II.

DEFINING AND REDEFINING THE CLAIMS

STEP ONE: QUASI CONTRACT AND ASSUMPSIT

A. FITTING A SQUARE PEG IN ROUND HOLE BY SHAVING OFF THE EDGES

Running the gamut of contract, tort and statutory claims, class actions typically fall into five separate and partially overlapping classifications: (1) employment claims; (2) race, gender, age disability and/or sexual orientation claims; (3) consumer

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the United States to secure payment of any fine for contempt that the court might impose should the defendant disobey a court order. The Supreme Court reversed, holding that this theory was far too broad and was not supported by statute or general equitable principal"; *accord*, Home-Stake Prod. Co v. Talon Petroleum, 907 F.2d 1012, 1021 (10th Cir. 1990).

84 Rosen at p. 1530.

85 *Id.*

86 Rule 64 incorporates the law of the domicile state. Granny Goose Foods, Inc. v. Brotherhood of Local Teamsters Local 70, 415 U.S. 423, 436 fn. 10 (1974).

87 While unstated in the record, those safeguards include an obligation that plaintiff demonstrate the necessity for the attachment, reach only non-exempt assets, that attachment are based on contract claim, and post a significant bond. Injunctive relief is not hidebound to these restrictions and might protect tort claims as long as the damages are reasonably approximated which the omission is *Hoxworth*.

88 Rosen at 1531

products,[89] financial and banking services, and securities claims; (4) mass tort claims, and; (5) federal and state statutory claims.

Employment claims seek compensation for underpayment of statutorily or contractually guaranteed compensations, such as wages-and-hours claims; overtime pay; uncompensated services; improperly allocated tips[90] and gratuities; and guaranteed or statutory but undelivered benefits.

Race, gender, age, disability, and sexual orientation claims seek compensation for discriminatory conduct, engendered by either (a) illegal conduct subjecting employees (or purchasers) to discriminatory or other invidious treatment, or; (b) engaging in compensation, promotion, hiring, retention, or other employment practices in which the class members suffer financially, or both.

Consumer, financial and banking services, and securities claims seek compensation for shoddy, fraudulent, dangerous, misrepresented, non-existent, mislabeled or falsely advertised products; financial or banking services; insurance, false or misleading (or even damaging) Internet services; securities frauds; as well as mortgage schemes, swindles and shenanigans.

Mass tort claims range from personal injury and property damage claims, which could include economic damages for treatment of personal injuries, and non-economic damages for pain & suffering and, in extraordinary circumstances, punitive and/or treble damages for claims arising out of the negligent design, testing, manufacture, advertising, and sale of goods, including adulterated food, unsafe or improperly tested pharmaceuticals and medical devices, homes and home goods such as insulation or paint, automobiles, as well as many other consumer goods. Federal and state statutory claims provide for compensation based on statutory mandates such as the WARN Act,[91] to ensure that workers receive sixty-day advance notice of plant closures and mass

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[89] *See* In Re: Toyota Motor Corp Defective Gas Pedal Products Liability Litigation; MDL:F 021512, U.S.D.C., S.D.Ca.

[90] The best form of asset protection is winning. Starbucks beat back a challenge to "tips" sharing with its employees in *Chau v. Starbucks Corp.*, 174 Cal. App. 4th 688 (Cal. App. 4th Dist. 2009), *rehearing den'd and modif.*, 175 Cal. App. 4th 632a (Cal. App. 4th Dist. 2009). The runner-up is defeating class certification which converts a million dollar case into a potential small claims court action. *See* Arenas v. El Torito Rest., __C.A.4th__, 2010 WL 892290 (Cal App. 2d Dist. 2010) (order affirming trial court denial of class certification for claim based improper classifications, failure to pay overtime wages, failure to pay timely upon termination, failure to pay accurate payroll records, wrongfully withheld wages, and related wage and hour claims)

[91] The 1993 Worker Adjustment and Retraining Notification Act. *See* 20 C.F.R. Sec. 639.1, *et seq.* (1993), ("The Worker Adjustment and Retraining Notification Act ... provides protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market..."). *Id.*

layoffs that affect their jobs.[92] This warning helps the workers adjust to the loss of employment, plan for readjustment or a new job and seek retraining to successfully compete in the job market.[93]

B. CLAIM ANALYSIS

In a class action, plaintiffs may bring an entire assortment of claims, such as those arising out of environmental damage as in the BP case; claims for "wage and hours;" those arising out of defectively designed and manufactured consumer goods (such as the Toyota Prius); losses from financial misdeeds (e.g., the aforementioned Bernard Madoff and Dreier Law Firm, along with the usual accounting fraud claims such as with Enron and AIG); defective construction (including lead paint, asbestos, drywall, and toxic mold); as well as other injuries which require redress. Some of these claims arise out of a pre-existing contractual setting, such as in an employer-employee setting. These claims allege that the employer engaged in some type of wrongful conduct, the effect of which was to deprive the plaintiffs of just and due compensation. The wrongful conduct could be anything from underpayment to engaging in invidious discrimination based upon race, gender, or other arbitrary standards, such as in the Wal-Mart case.

Therefore, the plaintiffs' claims have, at their core, three potential claims which would support an attachment. First, some plaintiffs have their contract claim. Pursuit of an attachment is predicated ultimately upon a breach of contract either express or implied.[94] This also would cover a good deal of the defective goods or service claims, in which the amount of the damages are a diminution in the value of the property, repair and maintenance, rehabilitation, or other traditional contract damage analysis.

Other cases are based upon quasi-contract, in which the law creates a fiction of a "quasi-contractual relationship" between plaintiff and defendant, the effect of which is to fashion the remedy of "unjust enrichment" due the plaintiff. Quasi-contract claims arise in a contractual setting due to the lack of the capacity of the parties to voluntarily enter into a contract, the contract fails for the statute of frauds, or some type of illegality, or excuse or impossibility, or some other complete bar. In other cases, plaintiffs may "waive the tort" and proceed on "contract." The core of all of these claims is that the defendant has received something of value and in which plaintiff is entitled to recovery lest the defendant is "unjustly enriched."

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[92] 29 U.S.C. § 2102(a)(2000) ["... An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order..."). *Id.*

[93] *See*, *gen*. Alarcon v. Keller Industries, 27 F.3d 386, 388 (9th Cir. 1994).

[94] Cal. Civ. Proc. § 480.010

Unjust enrichment is a modern designation for the older doctrine of quasi contract. Equity will seek to remedy unjust enrichment, even in the absence of a contract or understanding between parties as to a payment. The courts have generally allowed quasi-contractual recovery for services rendered when a party confers a benefit with a reasonable expectation of compensation.[95] This type of quasi-contract recovery or *quantum meruit* entitles the performing party to recoup the reasonable value of services rendered. The *Restatement of Restitution* provides that a person who has been unjustly enriched at the expense of another is required to make restitution to the other.[96]

In *RB Ventures, Ltd. v. Shane*, 112 F.3d 54 (2nd Cir. 1997), the Second Circuit held that a plaintiff may recover in quasi-contract from a defendant who received a benefit from plaintiff's services where the circumstances precluded the defendant from denying an obligation to pay. Unjust enrichment and *quantum meruit* are non-contractual remedies available at equity that are inapplicable if there is an enforceable agreement covering the same subject matter. Liability under quasi-contract arises by implication from the specific facts and circumstances of each case. There are, however, two classes of implied contract: (a) implied in law and (b) implied in fact.

Contracts implied in law are titled "quasi-contracts" or "constructive contracts" and do not arise because of the manifestation of intention to create them. Rather they rest on the equitable principle that a person shall not be permitted to enrich himself or herself unjustly at the expense of another. Such contracts are fictions of the law and are adopted to achieve justice where no true contract exists at all.

Quasi-contractual liability is imposed independent of any express contract provided the subject matter of the dispute is not covered by the express contract. However, there are two exceptions: (1) when the plaintiff has partially performed an express contract but, because of the defendant's breach, the plaintiff is prevented from completing the contract; and (2) when plaintiff partially performs an express contract that happens to be unilateral in nature.

In a class action setting, plaintiff, holding essentially a "tort claim," may proceed under a theory of unjust enrichment or quasi-contract. Would this apply in the BP spill case? Title I of the Oil Pollution Act ("OPA") [33 U.S.C. §§ 2701 - 2720] establishes civil liability for oil spills. Statutorily-defined "responsible parties" are liable for removal costs and damages from oil and other pollutants discharged from a vessel or facility into the navigable waters of the United States, adjacent shorelines, or exclusive economic zones.[97] OPA § 1001(3)[98] defines removal costs as those actions that are "necessary to

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95 *See*, *gen.* Earhart v. William Low Co., 25 Cal. 3d 503, 515, 158 Cal. Rptr. 887 (1979) (compensation for a party's performance should be paid by the person whose request induced the performance)

96 Restatement of Restitution Section 1 (1937)

97 See OPA § 1001(a) [33 U.S.C. § 2701(a)].

minimize or mitigate damages to the public health and welfare, including but not limited to, fish, shellfish, wildlife, and public and private property, shorelines and beaches. The recoverable damages include injury and destruction of and/or loss of natural resources, economic losses, including damage of property, loss of subsistence use of natural resources, net loss of taxes and other revenue from injury or loss of property, loss of profits from damage to property or natural resources, and the net costs of government providing increased or additional public services typically used to minimize, ameliorate, or clean up the spill or affected shorelines or other property."

The Fifth Circuit has held that the specific enumeration of damages precludes an award of punitive damages under OPA.[99] The OPA places strict liability on the responsible parties, who may also be held jointly and severally liable, subject to various narrow defenses. OPA § 1003.[100] The OPA does not provide an exclusive basis for awarding damages for an oil spill.[101] State and local governments may impose greater liability for the discharge of oil or other pollution by oil, or for any removal activities in connection with such a discharge.[102]

BP has admitted in its May 26, 2010 "BP Claims Process" Report, the following:

> "BP has been designated as a responsible party under the Oil Pollution Act of 1990 (OPA) and has accepted that designation. BP will carry out its responsibility under OPA and will pay all necessary response costs and legitimate claims for damages recoverable under OPA that were caused by the oil spill from MC 252 following the deep water incident on 5/20/10. BP will pay claims consistent with the law and will be guided by the relevant statutes and regulations, including the United States Coast Guards guidelines addressing claims compensability and claims handling procedure. Throughout, BP aims to be efficient, practical and fair."[103]

Therefore, the OPA imposes liability upon BP as a "responsible party" pursuant to 33 U.S.C. § 2703(b)(1)(2), covering an entire array of damages. From the viewpoint of class action counsel with respect to the potential pursuit of pre-judgment relief, counsel must fashion a claim based on contract, express or implied, which would support an attachment. BP and its victims have no privity of contract and stand as strangers by any standard.

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[98] 33 U.S.C. § 2701(30)

[99] Southport Marine, LLC v. Gulf Oil Ltd. Partnership, 234 F.3d 58 (4th Cir. 2000).

[100] 33 U.S.C. § 2703

[101] OPA § 1001(a)

[102] 33 U.S.C. § 2718

[103] BP CLAIMS PROCESS, *Subject: MC 252 Incident Date: 26 May 2010 Report Topic: Description of Claims Process*, (May 26, 2010), http://www.slideshare.net/BPfanpage/bp-claims-process .

These victims, now claimants, would not have a viable claim under a quasi-contract theory because quasi-contract seeks to compel disgorgement of "unjust enrichment." No matter what the savings would be to BP by skimping on safety, those savings do not amount to the many billions of dollars of damages suffered by the claimants. Similarly, the claimants would not have an implied contract claim because the conduct of the parties does not amount to a contractual setting in which a court might imply a contract based upon the conduct of the parties.

Aside from attachment statutes, which are based upon any claim for monetary damages, most attachment statutes authorize an attachment if the claim is based upon a "contract, express or implied." Here, the primary contract is the oil lease from the United States as the leaseholder to BP, the lessee, coupled with the drilling permits necessary. The lease and permits would be the contracts from which the claim arose (i.e., the blown well). The specific claim of the victim is found in the OPA, deemed incorporated by reference in and to the lease and the permit.

This is concept is well established. Parties do not need to incorporate applicable existing law into a contract to ensure a deliberate expression by the parties. Parties to a contract, including governmental entities and subdivisions, are presumed or deemed to have contracted with reference to existing principles of law.[104] Under this presumption of incorporation, valid applicable laws then existing at execution form a part of the contract as fully as if expressly incorporated in the contract.[105] Contractual language must be interpreted in light of existing law, the provisions of which are regarded as an implied term of the contract, regardless of whether the agreement refers to governing law.[106] The principle of incorporation includes the common law in effect in the jurisdiction, as well as Constitutional provisions, statutes, ordinances and regulations, including provisions that affect the validity, construction, operation, affect obligation, performance, termination, discharge, and enforcement of the contract. This applies to both federal and state law.[107]

OPA necessarily would be incorporated by reference in and to the lease with BP and the application for a permit. Therefore, the claimants would be able to base their OPA claim, both upon the statutory enactment and their status as victims, but moreover, base their OPA claim upon its incorporation in the contract (the lease and oil permit) by and between BP and the United States.

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[104] Great Northern Railway Co. v. Sunburst Oil & Refining, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360, 85 A.L.R. 254 (1932); *See, also*, Resolution Trust Corp. v. Diamond, 45 F.3d 665, 132 A.L.R. Fed. 637 (2nd Cir. 1995); Salsbury Industries v. U.S., 905 F.2d 1518 (Fed.Cir. 1990)

[105] *See* Morfork & Western Railway Co. v. American Train Dispatcher's Ass'n, 499 U.S. 117, 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991).

[106] Montoya v. Postal Credit Union, 630 F.2d 745 (10th Cir. 1980)

[107] Resolution Trust, *supra*.

A review of the class action lawsuit shows that most of the complaints allege a combination of negligence claims and statutory violations, rather than a contract claim arising out of and based upon the lease agreement. Alleging a "contract claim" as a third-party beneficiary would entitle the claimant to interest at a higher rate in addition to potentially being subject to an attachment. Most of the damage calculations are made in broad-based terms.

In *Marine Horizons etc. v. BP*,[108] the plaintiffs claim damages equivalent to the statutory entitlement under 33 U.S.C. § 2702(b)(2)(c) as "damages equal to the loss of the profits and impairment of the earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources which shall be recoverable by claimant." In addition to *Marine Horizons*, the plaintiffs in *Cooper v. BP*,[109] *Nova Affiliated S.A. v. BP*,[110] and *Cajun Maid LLC v. BP, PLC*,[111] all seek damages pursuant to Section 2702(b)(2)(c). These plaintiffs could readily add an additional claim for relief seeking damages based on a contractual theory as third party beneficiaries to the contract by and between the United States and BP. The contract damages would be co-equal to the damages under the OPA and theories of general negligence and/or gross negligence. However, once alleging a breach of express contract claim, the plaintiffs would be entitled to pursue a pre-judgment writ of attachment.

Even if they surmount this hurdle, the plaintiffs are still not out of the woods. They need to be able to calculate their damages as a reasonably fixed and readily ascertainable amount. This would exclude general "tort damages" such as a non-economic loss encompassing consortium claims or pain and suffering. Setting damages in a fixed and readily ascertainable amount is no more promising than filing a claim directly with BP or the Oil Spill Fund being administered by Mr. Feinberg, setting aside the difficulty and expense associated with prosecuting a claim up to and through trial.

BP has stated in the media repeatedly that it will pay claims quickly and expeditiously. Coast Guard Adm. Thad Allen expressed his confidence in BP's willingness to pay. With compensation appearing over the horizon, many litigants will question the necessity of proceeding with a cumbersome pre-judgment writ of attachment when, in fact, BP appears ready to cut checks sooner than later. Of course, BP's incentive to pay is greatly enhanced by the plaintiffs in the class actions, who have a statutory right they may effectively use to obtain a pre-judgment writ of attachment. Some have already sought such a writ and are aggressively pursuing the matter. The

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[108] Marine Horizons etc. v. BP, Case No. 1:10-cv-00227-WS-N (S.D.Ala.), at 12, ¶ 48

[109] Cooper v. BP, Case No. 2:10-cv-01229-AVE-SS (E.D. La.)

[110] Affiliated S.A. v. BP, Case No. 2:10-cv-01313-LMA-JCW (E.D. La.)

[111] Cajun Maid LLC v. BP, PLC, Case No. 1:cv-176-HSO-JMR (S.D. Miss.), at 17, ¶ 84

threat of an attachment itself would expedite the payment process, and might even enhance a recovery.

C. FIXED AND READILY ASCERTAINABLE DAMAGES

Pre-judgment writs of attachment are limited to claims whose amount is fixed and readily ascertainable.[112] Absolute precision is not required; the claimant need only estimate the damages to show that they are finite and measurable.[113] This requirement forces class counsel to redefine and sculpt the claims into "contract claims, implied or express." [114] Under a contract theory, the damages should be readily ascertainable given that employment race and gender, consumer product,[115] financial services, banking,

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[112] Cal. Civ. Proc.§ 483.010(a). ("Except as otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars ($500) exclusive of costs, interest, and attorney's fees.").*Id.*

[113] Shifting the burden of proof in estimating the loss becomes dispositive in meeting the standard of "fixed and readily ascertainable" or for a Rule 65 injunction, "reasonable approximation." California cases start with *Zinn v. Ex-Cell-O Corp*., 24 Cal.2d 290, 297-298, 149 P.2d 177 (1944), in which the court held, as follows:

> "One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness."

In *Pacific Scientific Co. v. Glassey*, 245 Cal. App. 2d 831, 842-843, 54 Cal.Rptr. 235 (Cal. App. 1st Dist. 1966) (collection of cases), the court repeated this statement, as follows:

> "It is well established that one whose wrongful conduct has rendered difficult the ascertainment of damages cannot complain because the court must make an estimate of damages rather than an exact computation."

In *Ramona Manor Convalescent Hospital v. Care Enterprises*, 177 Cal. App. 3d 1120, 1140, 225 Cal.Rptr. 120 (Cal. App. 4th Dist. 1986), the court reiterated the rule. *See, also*, GHK Associates v. Mayer Group, 224 Cal. App. 3d 856, 873-874 (Cal. App. 2d Dist. 1990) (same).

[114] Various states limit attachments to "contract," claims while other states include "tort claims." *See* Ala. Code § 6-6-41 (". . enforce collection of a debt, whether it due or not . . for any money demanded. . .. recover damages for a breach of contract.. . . action sounds in damages. . . "); Fla. Stat. § 76.04 ("debt actually due to the creditor"); O.C.G.A. § 18-3-2 ("Right to seek attachment on money demands generally."); Idaho Code § 8.501 ("…upon a judgment, or upon contract, express or implied.. . ."); 735 I.L.C.S. § 4-101 ("having a money claim, whether liquidated or unliquidated, and whether sounding in contract or tort…"); Kan. Stat. Ann. § 60-704 ("…plaintiff has a just claim against the defendant…"); Mont. Code § 27-18-101 ("…contract , express or implied, for the direct payment of money where the contract is…"); N.Y. C.P.L.R. 6021 (4) and (5) ("the action is brought by the victim. . . of a crime. . . ") (" . . . the cause of action is based on a judgment…"); N.C. § 1.440.2("…in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money…"); Va. Code § 8.01-533 ("…Damages for breach of any contract implied or implied… for damages for a wrong…").

Each State has its own unique requirements. Venue again is the battleground.

[115] An orthopedic practice brings a class action against Allstate Insurance Co for the failure to pay statutory interest (roughly $500) arising from the tardy payment of an insurance medical claim. The lower courts dismissed the action based N.Y. C.P.L.R. § 901(b), which precludes a class action to

securities claims[116] and other statutory claims might be reasonably quantifiable despite varying somewhat from class member to member given the economic component.

In formulating a pre-judgment remedy, class counsel must endeavor to quantify the aggregate class loss to prove up the total claim as fixed and readily ascertainable. Some relatively simple calculations include WARN damages (sixty days of payroll), uncompensated and travel time (such as in uniformed police cases), consumer products or financial services claims (refund of purchase price or reimbursement of commissions, charges or other fees), repair and/or replacement costs for major consumer products if uniform (residential and automobile repairs), securities claims measured by the market drop in share price,[117] lost compensation for the failure to promote, retain or hire an employee, or lowest average amounts of unpaid overtime, vacation time, meal and rest breaks and other wage, hour and benefits claims.[118] Arriving at an amount might require averaging, statistical modeling, or a calculus offering the lowest possible dollar recovery.

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recover a penalty as applied in diversity suits in federal court. 28 U.S.C. § 1332(a). The Supreme Court reversed and held that Fed. R. Civ. P. 23(a) permits the prosecution of a class action for the statutory interest in federal court. *See* Shady Grove Orthopedic Associates P.A. v. Allstate Ins. Co., __U.S.__ (Justice Scalia) (March 31, 2010)

[116] Shoddy residential construction has precipitated massive class actions against the developer, general contractor, subcontractors and material suppliers for defective drywall, concrete foundations, substandard construction practices, toxic mold, and airborne illnesses. The blinding haste to build vast suburban planned communities first spawned acres of uninhabitable tract homes and second launched the careers of hundreds or even thousands of attorneys prosecuting and and defending class actions. These cases cover thousands of class members.

This author was retained in a class action pending in El Centro, Ca. (Imperial County Superior Court) to defend a subcontractor facing an application for a writ of attachment prosecuted by the plaintiffs. That attachment application dialed up the pending settlement discussions, which was the exact purpose of the proceedings. Even if the class action defendant is insured, the attachment pressures the defendant to compel the insurer to settle the action. The primary case involved claims that the developer, contractor and subcontractor build defective substandard tract homes. El Centro is near the U.S.-Mexico border.

Class actions suits against stock brokers, underwriters, auditors, boards of directors, and the issuing entities are *de rigeur* when the stock price implodes.

[117] *The Wall Street Journal*, *The New York Times*, and other major national papers runs legal advertisements advising of class actions securities settlements which sometimes provide a formula showing the measurement of loss for the class members. *See* In Re Cavanaugh, *supra*., for the typical fact pattern:

> "The share price of Copper Mountain Networks, Inc., a Palo Alto supplier of Digital Subscriber Line (DSL) products, fell from $125 to less than $10 in the fourth quarter of 2000. Its most dramatic plunge occurred immediately after management announced that fourth-quarter revenue and earnings per share would, contrary to earlier predictions, decline. Lawsuits followed swiftly. Different plaintiffs filed over twenty separate class action complaints in the Northern District of California, alleging securities fraud by the same defendants over essentially the same period."

[118] The uniformity of the defendant's conduct in causing a large scale harm aids in quantifying the loss. Most class actions resolve around the commonality of the wrongful conduct and similarity of the losses.

However, that number may still be fixed and readily ascertainable, with the final number representing the minimum recovery per class member and avoiding the spectre of a potential over recovery.[119]

The fact that other relief is sought does not preclude an attachment,[120] further supporting an attachment in a complaint asserting contract, tort and equitable claims, all of which are commonly plead in many class actions. Admittedly, quantifying the class damages into a figure which is fixed and readily ascertainable would necessitate a forensic analysis buttressed by verifiable mathematical and statistical modeling. Such expert analysis involves significant costs. This financial burden would be offset by the obvious value to the class in securing recovery and enhancing the assurance of payment of the judgment or settlement as illustrated by the *TJ Hooper/Carroll* equation. With statisticians and forensic experts onboard, class counsel can then seek to obtain a pre-judgment writ of attachment.

This article will be concluded in the next issue of the

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[119] *Hoxworth*'s injunction crumpled because the district failed to estimate the potential loss. *See*, Hoxworth at 198-199 ("the district court made no findings estimating the likely size of the judgment plaintiffs were likely to obtain Even if such a finding were ours to be make in the first instance, we can locate no evidence within the voluminous record helpful on this score." *Also*, "In sum, the district court made no attempt to estimate the probable amount of the plaintiffs' likely final judgment, and no attempt to relate the scope of its world-wide, multimillion dollar asset dragnet to that amount… However, some attempt to tailor the scope of the injunction to the likely size of the judgment is necessary, although the determination regarding how precise that tailoring must or can be in any particular case lies in the equitable discretion of the district court.")

Hoxworth's potential judgment, including attorneys' fees, might have easily exceeded the million dollar mark which would have "tailored" the shape of the injunction. A *Hoxworth* injunction needs equitable running shoes to leap over the *Grupo*-made barrier. *See* Securities & Exchange Comm. v. ETS Payphones, Inc., 408 F.3d. 727, 734 (11th Cir. 2005) in which the court authorized a Rule 65 injunction as follows:

> "The Fourth Circuit recently addressed this issue and said that in cases involving equitable relief, even where money damages are also claimed, *Deckert* control. *See* United States v. Oncology Assoc's, P.C. Under *Deckert*, equitable remedies employed to 'preserve the status quo' are proper in action arising under the Securities Act. 61 S. Ct. 234. We accept the reasoning of the Fourth Circuit and conclude that *Grupo Mexicano* does not control the outcome of this case, because the SEC seeks equitable relief (disgorgement), not just money damages."
>
> We acknowledge that the SEC also seeks the legal remedy of civil damages. But, the asset freeze is justified as a means of preserving fund for the equitable remedy of disgorgement. We do not believe that the inclusion of a claim for civil penalty damages make the remedies sought wholly legal and not equitable."

[120] Cal. Civ. Proc.§ 483.010(d). ("An attachment may be issued pursuant to this section whether or not other forms of relief are demanded.")

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