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THE UNIVERSAL EQUATION TO PRICE ALL CIVIL JUDGMENTS

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I. THE CRUSADE DOWN THE PATH OF GENUINE JUSTICE

Many fraudulent conveyances emerge from the catastrophes that cause great financial and sometimes personal losses. Two antagonistic parties emerge from the debris of civil litigation. The first is the defendant who has defaulted on an obligation, or worse, committed some grievous wrong, including a sexual assault, maiming of a person, brazen theft, infringement, swindle or cheat. The second is the plaintiff who won a big-dollar judgment, but finds that the defendant, now called a debtor, is unresponsive, unwilling, or unable to pay the civil judgment.¹ In other cases, a financial catastrophe produces legions of victims who have suffered at the hands of a Ponzi operator or peddler of defective products on a wide scale.² Other victims include victims of

¹ Homeowner's insurance typically provides the cost of defense, but not the indemnity. "Even conduct that is traditionally classified as 'intentional' or 'wilful' has been held to fall within indemnification coverage." *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 177 (Cal. 1966).

² See *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1587 (2016), which held that fraudulent conveyance (siphoning off corporate assets) is fraud and nondischargeable under Bankruptcy Code Section 523(a)(2) (fraud). Fraudulent conveyances typically

investment schemes, real estate frauds, stock follies, and pyramid schemes, among other large-scale wrongs.³ While the misery level might ascend or descend for each victim, the end result is the same in each case. The debtor owes a large sum of money, including punitive damages, arising from an egregious wrong and refuses to compensate the victims that are cast as the creditors in an ensuing fraudulent conveyance action.⁴

These creditors seek payment of their judgments. Payment is more than just recompense for personal and financial losses that might include the loss of a breadwinner, loss of life savings, enormous financial damage or harm, damage to property, or the inability to engage in meaningful employment. Payment restores the personal dignity and self-esteem suffered by the victim at the hands of malevolent individuals who committed the wrong for their own self-aggrandizement, greed, or malice. Getting paid is more than getting even. Getting paid is getting back a life, and no less.

The quest to seek compensation as restorative of personal esteem is the starter's pistol down this marathon. Astute to the personal anger and unrequited rage of the victim who is now a creditor under fraudulent conveyance

involve "a transfer to a close relative, a secret transfer, a transfer of title without transfer of possession, or grossly inadequate consideration."

³ "What are the obligations of class counsel when he learns that the defendant in the class action he is prosecuting has ceased operations, sold its assets to a third party, and intends to file for bankruptcy?" *Barboza v. W. Coast Digital GSM, Inc.*, 102 Cal. Rptr. 3d 295, 296 (Cal. Ct. App. 2009).

⁴ *See* Cal. Civ. Code § 3439 et seq. Civil Code Section 3439.01(b) (stating claim includes tort claim, without regard to being reduced to a judgment). FRCP 69 compels the court to follow the state law remedies of the domicile state where the court sits, save discovery. The substantive body of fraudulent conveyance law is state law. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Interest accrues at the federal (.6%), not state rate (10% plus). *See also*, Cal. Civ. Code § 3439.05 (West) (discussing balance sheet fraudulent conveyance) or Cal. Civ. Code § 3439.04 (West) (discussing conveyance with the intent to hinder, delay or defraud, and other claims).

laws, the debtor commences his or her (or its) campaign of asset protection to shield any assets from civil enforcement under the judgment.⁵ To avoid any doubt, a fraudulent conveyance is a fraud upon the creditor, even without the necessary representation.⁶ Asset protection means that the debtor either: changes the form or names on the title; or hides, conceals, transfers, buries, or reconfigures assets.⁷ Asset protection cloaks the assets with a veil that conceals the asset from discovery and hides the assets from plain sight.⁸ Even if the assets are discovered, lifting the veil to reach the assets compels the creditor to spend real money to seize the debtor's assets through legal process.⁹ At some point, the financial toll to reach these assets becomes intolerable, which forces the creditor to abandon the quest.¹⁰ All parties are sensitive to the fact that the creditor

⁵ "A. cannot lay a trap for B., secure his confidence, induce him to make a conveyance of his property in the expectation that it will be returned, and thereafter retain the fruits of his perfidy on the ground that B. too readily yielded to temptation to save himself at the possible expense of creditors." *Chamberlain v. Chamberlain*, 95 P. 659, 661 (Cal. Ct. App. 1908).

⁶ "The degree to which this statute remains embedded in laws related to fraud today clarifies that the common-law term "actual fraud" is broad enough to incorporate a fraudulent conveyance." *Husky*, 136 S.Ct. at 1587.

⁷ *See Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.* 527 U.S. 308, 338–39 (1999) (stating "Moreover, increasingly sophisticated foreign-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").

⁸ "It is in the acts of concealment and hindrance." *Husky*, 136 S.Ct. at 1587.

⁹ The Uniform Voidable Transactions Act succeeded the Uniform Fraudulent Transfer Act, which is successor to the Uniform Fraudulent Conveyance Act. Courts still apply the UFTA. ". . . UFTA [history] . . . makes clear its remedies are cumulative to pre-existing remedies for fraudulent conveyances." *Cortez v. Vogt*, 60 Cal. Rptr. 2d 841, 849 (Cal. Ct. App. 1997).

¹⁰ "Appellants correctly state that the UFTA does not itself authorize a fee award . . ." *Cardinale v. Miller*, 166 Cal. Rptr. 3d 546, 550 (Cal. Ct. App. 2014). However, Cal. Civ. Proc. Code

will expend enormous sums to unwind the debtor's fraudulent conveyance. The ultimate barrier that shields the debtor's assets is the financial burden incurred by the creditor in dismantling the veil to reach the assets. Every dollar that the debtor spends in lifting the veil of asset protection is an additional expense that deters the creditor from reaching the asset. Making the creditor spend money is the debtor's goal. The more that is spent, the closer the debtor comes to shielding all assets, assuming that sometime in the future the creditor will run out of money and quit. In addition, many debtors perceive that the trial courts and appellate courts treated them unfairly in the original proceedings. The debtor seeks to nullify this "unjust result" through asset protection by rendering the judgment uncollectible. Asset protection litigation is the continuation of the prior litigation by other means.¹¹

The battle to recover attorney's fees incurred by a creditor in a fraudulent conveyance action or enforcement takes center stage.¹² Under *Cardinale v. Miller*, the creditor would not collect fees in the fraudulent conveyance action *per se*, but the creditor could recover fees against the debtor (or third party) in the original action, assuming that the judgment itself provides for an award of attorney's fees.¹³ In response, the debtor will necessarily engage in various machinations to prevent the creditor from recovering fees based on the fraudulent conveyance litigation by a timely and precipitous cash payment of the underlying judgment.¹⁴

Section 685.040 imposes fees arising from the fraudulent conveyance actions upon the judgment debtor.

¹¹ "War is the continuation of politics by other means." Carl von Clausewitz. *Clausewitz: War on Politics by Other Means*, ONLINE LIBRARY OF LIBERTY: A COLLECTION OF SCHOLARLY WORKS ABOUT INDIVIDUAL LIBERTY AND FREE MARKETS (Apr. 13, 2016), <http://oll.libertyfund.org/pages/clausewitz-war-as-politics-by-other-means>.

¹² See Cal. Civ. Code § 3439.07(a) (avoid the conveyance), (b) (attachment of asset), (c) (execute on fraudulently conveyed asset).

¹³ *Cardinale*, 166 Cal. Rptr. 3d at 550.

¹⁴ See *In re Conservatorship of McQueen*, 328 P.3d 46, 55 (Cal. 2014). (holding that by timely payment before filing of cost bill

Here are few example of how asset protection accrues an expense that deters enforcement:

1. Facing civil claims arising from sexual assault charges, the perpetrator transferred his home to third parties. In ensuing civil litigation, the victim sought, and was granted, an injunction against the further transfer of the property.¹⁵

2. In the face of a \$78,000,000 liability, the corporate defendant deeded property to the insiders and related parties. The creditor proceeded to attach the property, but the third parties (the conveyees and company insiders) filed a third party claim that the court denied. The appellate court reversed based on the trial court's error in failing to compel the creditor to prove a fraudulent conveyance.¹⁶

3. Husband, a doctor, engaged in an extra-marital affair that produced a daughter. The wife filed for a divorce that culminates in a marital settlement agreement that rendered the husband impecunious. The paramour filed suit to vacate the MSA that landed in the California Supreme Court.¹⁷

or fee motion, debtor avoided liability for post-judgment fees arising from fraudulent actions).

¹⁵ "The timing of defendant's conveyance of his personal residence to a trust after he was arrested on charges of molestation may be indicative of an intent to protect his assets against creditors." *Oiye v. Fox*, 151 Cal. Rptr. 3d 65, 84 (Cal. Ct. App. 2012).

¹⁶ "A creditor wishing to pursue a fraudulent transfer theory may not escape the burden of proving its claim merely because the contest is played out in a third party claim proceeding." *Whitehouse v. Six Corp.*, 48 Cal. Rptr. 2d 600, 604 (Cal. Ct. App. 1995).

¹⁷ "They entered into an M.S.A. under which Husband conveyed all his interest in the couple's real estate to Wife, and she conveyed her interest in Husband's medical practice to him. The M.S.A. provided that Husband would be solely responsible for his extramarital child support obligation . . . By June 1997, Husband had abandoned his medical practice. He now lives with his mother. He has no assets and little income." *Mejia v. Reed*, 74 P.3d 166, 168 (Cal. 2003).

The simple fact-pattern in these cases illustrates that the victims, including the victim of a sexual assault, a commercial creditor cheated out of payment, and an aggrieved mother, confronted a fraudulent conveyance that was intended to hinder, delay or defraud the plaintiff out of payment of a just liability.¹⁸

II. FRAUDULENT CONVEYANCE ACTION AND ENFORCEMENT ACCRUE EXPENSE AND EFFORT AND REQUIRE SKILL

Cardinale v. Miller shoulders attorney's fees upon each party in a fraudulent conveyance action.¹⁹ Given the proclivity of the debtor to hide and conceal assets, the creditor must take pro-active steps to lock down the assets, lest the debtor launders the property through a bona fide sale or loan transactions that is called "safe harbor."²⁰ To insure that the conveyee will not dispose of the property pending the outcome of the UVTA, the creditor can record a *lis pendens*.²¹ The creditor can attach the fraudulently conveyed property.²² The creditor can execute upon the

¹⁸ Fraudulent cases abound in bankruptcy court. *In re High Strength Steel Inc.*, 269 B.R. 560 (USBC, D. De, 2001) (discussing the right of receivable owed by related party); *In re Bernard*, 96 F.3d 1279 (9th Cir. 1996) (discussing cashing out account in the face of attachment); *In re Wilbur*, 211 B.R. 98, 104 (USBC, M.D. Fla, 1997) (stating that post judgment, debtor converts accounts into cashier's check); *In re Schafer*, 294 B.R. 126, 128 (USDC, ND, CA 2003) (discussing changing banks in the face of attachment); See Bankruptcy Code Sections 548 and 544(b) (discussing incorporating state remedies under the UVTA seq.).

¹⁹ *Cardinale v. Miller*, 166 Cal. Rptr. 3d 546, 550 (Cal. Ct. App. 2014).

²⁰ "Thus, a showing of good faith and reasonably equivalent value is all that is required to defeat a creditor's action based on Civil Code section 3439.04, subdivision (a)." *Annod Corp. v. Hamilton & Samuels*, 123 Cal. Rptr. 2d 924, 929 (Cal. Ct. App. 2002).

²¹ "We believe that this broad language [of the UFTA] allows a *lis pendens* remedy." *Kirkeby v. Super. Ct. of Orange Cty.*, 93 P.3d 395, 401 (Cal. 2004).

²² Cal. Civ. Code § 3439.07(a)(2) (West).

fraudulently conveyed property.²³ In response, the third party (i.e., the conveyee) can file a third party claim which, as in *Whitehouse v. Six Corp.*, compels the creditor to prove up a fraudulent conveyance.²⁴ To obtain information to prosecute a fraudulent conveyance claim, the creditor would proceed with an examination of the debtor and even compel production of records.²⁵ Judgment debtors are less than forthcoming at a debtor's examination.²⁶ Fraudulent conveyances are built on circumstantial evidence based on a conveyance with the intent to hinder, delay, and defraud.²⁷ All of this legal activity accrues attorney's fees and expenses including experts.²⁸

A creditor can enforce a judgment upon entry.²⁹ A judgment creditor must pre-pay the sheriff in order for the sheriff to enforce the judgment under a writ of execution.³⁰ The creditor must identify the property and location of the property in the sheriff's instructions.³¹ While the sheriff is a law enforcement officer, the sheriff is not a detective and

²³ Cal. Civ. Code § 3439.07(c) (West).

²⁴ Cal. Civ. Proc. Code § 720.360 (West) [Burden of proof].

²⁵ Cal. Civ. Proc. Code §§ 708.110(a) and 708.130 (West).

"Generally, there is no opportunity for discovery." *Whitehouse v. Six Corp.*, 48 Cal. Rptr. 2d 600, 604 (Cal. Ct. App. 1995).

²⁶ "And the sanctity of the oath, by itself, does not ensure that all judgment debtors will be completely forthcoming during a judgment debtor examination." *Jogani v. Jogani*, 45 Cal. Rptr. 3d 792, 813 (Cal. Ct. App. 2006).

²⁷ Cal. Civ. Code § 3439.04(b) (badges of fraud); *Neumeyer v. Crown Funding Corp.*, 128 Cal. Rptr. 366, 369 (Cal. Ct. App. 1976), *overturned due to legislative action on other grounds* (stating fraudulent conveyance cases based on fraud are supported by circumstantial evidence).

²⁸ *Mehrtash v. Mehrtash*, 112 Cal. Rptr. 2d 802, 805 (Cal. Ct. App. 2001) (describing necessity to prove "leviable interest in real property through an appraisal of the real property"). Court cannot judicial notice of appraisal from *Zillow*. *In re Marriage of Trejo*, No. E054775, 2013 WL 1779606, at *5 (Cal. Ct. App. Apr. 26, 2013).

²⁹ Cal. Civ. Proc. Code § 683.010 (West).

³⁰ Cal. Civ. Proc. Code § 683.100(a)(1) (West) (sufficient deposit sheriff to pay the costs of enforcement).

³¹ Cal. Civ. Proc. Code § 687.010(a) (West) (adequate description of any property to be levied upon).

has no obligation to ferret out assets.³² Upon entry of a judgment, the debtor is still free to dispose of assets, but the judgment creditor can impose a lien on the judgment debtor's assets.³³ The creditor is entitled to a turnover order at the conclusion of an examination of the debtor or third party.³⁴ These remedies enable a creditor to reach all property of the debtor but only if the creditor seeks to initiate enforcement.³⁵ Enforcement is statutory.³⁶ However, a court can order extraordinary relief in the preservation of property or order the sheriff to take exceptional steps.³⁷

Given the financial burden of the creditor to enforce the judgment, and the complexity and expense of legal process to recover a fraudulent conveyance or any other asset, the debtor is motivated to hide, conceal, or secret assets solely for the purpose of increasing the creditor's absolute expense. Without a description of the assets in the sheriff's instructions, the sheriff will not enforce a judgment. In the event of a fraudulent conveyance, the creditor must "lock down" the property and therefore plead and prove a fraudulent conveyance by a preponderance of the evidence. Absent affirmative action by the creditor, and subject to the distraint, if at all, arising from any liens, the debtor is free to sell, dispose

³² The sheriff follows the written instructions of the creditor. Cal. Civ. Proc. Code § 687.010(b) (West).

³³ Cal. Civ. Proc. Code § 697.340 (West) (regarding real property); *id.* § 697.530 (allows filing of JL-1, which is similar to a UCC, to encumber certain personal property); *id.* §§ 708.110(d), 708.120(c) (allowing liens on personal property of the debtor and lien on personal property of the debtor in the hands of the third party), among other liens.

³⁴ *Id.* §§ 708.180, 708.205(a); *Id.* § 699.040 (describing a turnover order).

³⁵ *Id.* § 695.010(a) (stating that all property of a judgment is subject to enforcement, unless declared immune or exempt).

³⁶ *Imperial Bank v. Pim Electric, Inc.* 39 Cal. Rptr.2d 432 (Cal. Ct. App. 1995).

³⁷ Cal. Civ. Proc. Code § 699.070(a) (West) (stating a court may issue extraordinary relief as circumstances might warrant).

transfer or liquidate any assets.³⁸ Consider the judgment, absent enforcement, in a state of stasis and subject to renewal.³⁹

Given this expense and effort, and burden befalling upon the creditor to prove a fraudulent conveyance, the debtor has every motive in the world to hide, conceal or secret assets.⁴⁰ A conveyance, even if fraudulent, is still a valid conveyance between the parties.⁴¹ The purpose of a fraudulent conveyance is to hinder, delay, and defraud the creditor that deters the creditor from enforcement the judgment itself by concealing accessible assets.⁴²

III. THE UNIVERSAL EQUATION OF IMMUNITY FROM ENFORCEMENT

Compelled to finance enforcement, much less a fraudulent conveyance action and its inherent burden of proof, the conundrum for the creditor and counsel is weighing the likelihood of success. This test is more than a legal analysis of the UVTA and related claims, but rather

³⁸ The UVTA enables a creditor to set aside a conveyance. *Id.* § 3439.07(a) (stating that a "creditor" has standing).

³⁹ *Id.* § 683.020.

⁴⁰ Fraudulent conveyance is potential a nondischargeable debt. *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1581 (2016). A fraudulent conveyance within one year of the bankruptcy might bar the entire discharge. *Bernard*, 96 F.3d at 1279; *see also*, Cal. Bankr. Code § 727(a)(2)(A) (West).

⁴¹ "As Annod points out, a fraudulent conveyance is void as *against the transferor's creditors* and title remains in the transferor as if no conveyance had been attempted." *Annod Corp. v. Hamilton & Samuels*, 123 Cal. Rptr. 2d 924, 934 (Cal. Ct. App. 2002). (emphasis added); *see also*, *Slater v. Bielsky*, 6 Cal. Rptr. 683, 686 (Cal. Ct. App. 1960). Absent timely action, the conveyance becomes immune from enforcement under the UVTA statute of limitations. Cal. Civ. Code §§ 3439.09(a)-(c) (West) (setting the statute of limitations and statute of repose at 7 years).

⁴² *Husky*, 136 S. Ct. at 1587 (holding that fraudulent conveyance as concealment).

an analytical analysis of the financial return to the client after expending time, effort, and most important, money.⁴³

The test is to predict of efficiency of the asset protection scheme. For example, if the debtor successfully hid all assets that renders the assets immune from any enforcement, the efficiency of the asset protection scheme is 100%, or even greater, if the creditor expended money, no matter the cost and whether the outcome was unsuccessful. From these facts, the asset is 0% accessible to the creditor. If, on the other hand, the asset protection scheme immediately failed, and without any expense, the asset fell into the lap of the creditor, the efficiency of the asset protection is 0%, or flipped around, the asset was 100% accessible.

By framing a fraudulent conveyance as an act of concealment, *Husky International Electronics, Inc. v. Ritz* casts assets as inaccessible because these assets are concealed and therefore unavailable to the creditor, absent a fraudulent conveyance action or enforcement. When and if the creditor reaches the "concealed assets," as framed by *Husky*, the asset, in the hand of the creditor, is "accessible." What moves the asset from inaccessibility to accessibility, or not at all, involves an anagram of hard and soft factors, as follows: the hard factor is the dollar value of the concealed asset that has been found or targeted and therefore subject to some type of enforcement, whether successful or not; and second, the burden of the enforcement. The next hard factor is the "burden." The burden means the legal fees, court costs, expert fees, and soft costs (overnight charges, title reports, appraisals etc.) necessarily expended to prosecute the fraudulent conveyance action or enforcement proceeding. Add to the burden the lost opportunity costs, given that the creditor will advance funds and forego another investment opportunity for the funds. Consider the burden an

⁴³ These claims include UVTA, resulting trust theories (no conveyance was made), common law fraudulent conveyances, unlawful corporate distributions under California Corporations Code § 316(a), 506(b), and 2009(b), violation of the Bulk Sales Act (Article 6 of the Uniform Commercial Code), and breach of fiduciary duty if an improper corporate distribution.

element of legal "energy" or "work" that is expended to reach an accessible asset, if possible. The soft factors, which are difficult, but not impossible, to calculate, are the skills of the attorneys (on both sides of the equation), the devotion of each attorney to the case at hand, the availability of capital to prosecute or defend a case, the reputations of the attorneys, the personal and professional risks assumed in reaching property from the grip of an unstable person, the disposition of the particular judge, and the particular body of law (pro debtor or pro-creditor). The factors are incorporated into the attorney's fees that are part of the burden and, therefore, calculable in part. While bankruptcy would stop nearly all state court fraudulent conveyance actions given that the trustee is the owner of the claims, bankruptcy is generally irrelevant because the trustee subsumes the position of the creditor.⁴⁴

Here is the equation that measures the fraudulent conveyance. Under *Husky*, the court frames a fraudulent conveyance as a tool of concealment.⁴⁵ The converse is that the legal action is to reach the fraudulent conveyed property, now reframed as inaccessible, and thereby lift the veil of the concealment. The fraudulent conveyance action filed by the creditor attacks an asset subject to concealment, reveals its existence as property of the debtor, and makes it accessible to enforcement.⁴⁶

The denominator is the total of the claim, i.e., \$1,000,000.00.⁴⁷ The numerator is the following: the dollar value of the recovered asset minus the burden equals the net recovery. This is what the equation looks like:

$$1 - \frac{\text{Total Cash Recovery} - \text{Total Burden}}{\text{Total Dollar value of the Claim}} = \text{Net due the Client} \div \text{Inaccessibility rate } @(\%)$$

⁴⁴ Cal. Bankr. Code §§ 548, 544(b) (West) (stating trustee stands in shoes of creditors).

⁴⁵ *Husky*, 136 S. Ct. at 1587 (describing fraudulent conveyance as concealment).

⁴⁶ Cal. Civ. Code § 3439.07(a)(1) (West) (describes avoiding the transfer of obligation to the extent necessary to satisfy the creditor's claim).

⁴⁷ The hypothetical is that the judgment is in the amount of \$1,000,000. The accrual of interest is irrelevant for these calculations, but when factored in, would necessarily alter the outcome on an incremental basis.

#1. If the claim is \$1,000,000, the cash recovery is \$252,000, the fees are \$151,000.00, the inaccessibility efficiency of the asset protection scheme is 89.9% and the accessibility efficiency is 10.1%.

#2. If the claim is \$1,000,000, and the cash recovery is \$1,000,000, but the burden is \$500,000, the inaccessibility efficiency is 50%, even though the creditor collected 100% on the dollar.

#3. If the claim is \$632,000, and the cash recovery is \$185,000, but the burden is \$100,000.00, the inaccessibility efficiency is 86.6%.⁴⁸

#4. What if the creditor spent more money than the amount of the gross collection? The claim is \$1,000,000.00. The creditor collected \$353,000, but spent \$500,000.00. The inaccessibility efficiency is 114.7% or 14.7% above 100%, which means that the asset protection further damaged the creditor by increasing the creditor's net loss.

#5. Sometimes the debtor succeeds under *Husky* in concealing all assets that leaves the creditor penniless, even for costs. The claim is \$1,000,000. The recovery due the creditor is zero, but the creditor spent \$500,000.00. The inaccessibility efficiency rate is 150%, or increasing the creditor's damages by another \$500,000.

#6. What if the creditor spent just \$1,000 to collection \$1,000,000? The inaccessibility efficiency is .01% and the accessibility efficiency is 99.9%.

The equation establishes a realistic market pricing for any civil judgment. For example, take hypothetical #6 that sounds like an attorney writing up the payoff of the judgment that the judgment debtor or insurance company will pay. The market value of the judgment in #6 is 99.9% or par.⁴⁹ For another example, take hypothetical #5. This is

⁴⁸ To be really exact the inaccessibility efficiency is 86.55363912%. The accessibility efficiency is 13.449367088%

⁴⁹ Par means the face amount of the judgment that includes the principal damages, pre-judgment interest under the California Civil Code § 3287 (West) (describing the right to pre-judgment interest if the amount is fixed] or § 3289(a) (describing the interest on contract debt), court costs and potentially pre-judgment attorney's fees, if any. *Wisper Corp. v. California*

a judgment, which is cloaked under the veil of asset protection. The market value of the judgment in #5 is a negative \$500,000.00, i.e. toxic value.

This equation proves that, at a given time the market value of judgment appreciates, or depreciates, based on the total recovered less the burden and divided by the total. However, should the creditor later discover the hidden "treasure map" that reveals the debtor's secret bank account, or box of gold doubloons, the probable recovery skyrockets accompanied by an increase, or maybe decrease, in costs to collect the judgment itself. Given that enforcement is linear (i.e., from event to another event), and that the debtor might dance around each act of enforcement, this equation can predict the future value. If the debtor ramps up an asset protection campaign by opening the closing bank accounts, or cashing out bank accounts, the response by the creditor is to levy every bank in town, and likewise serve a subpoena on every bank.⁵⁰

Unstated, but part of the equation, is the fact that the debtor might be incurring attorney's fees in fending off enforcement. The equivocation in this sentence is not by happenstance. The fact that the debtor files papers with the sheriff or court in pro per, while the creditor has to pay for an attorney to likewise file papers with the sheriff or the court, is part and parcel of all asset protection which is to bleed the other party to death. The more polite language is a "war of attrition," which should not be understated. A famous New Yorker cartoon stated "You have a pretty good case, Mr. Pitkin. How much justice can you afford?"⁵¹ The wonderful expression applies to both parties, but the judgment debtor needs not to retain an attorney to exchange in penny-ante tricks, including

Commerce Bank, 57 Cal. Rptr. 2d 141 (Cal. Ct. App. 1996)
(describing entitlement to prejudgment interest).

⁵⁰ \$40.00 for the sheriff's fee per bank; \$100.00 for the process server to serve the levy; and \$100.00 to serve the subpoena for each bank for a total of about \$240 per package. Given 10 banks in town, the total burden is \$2,400.00 to reach all banks to serve the levy and subpoena, plus paying for the subpoena charges incurred by the bank.

⁵¹ Cartoon by J.B. Handelsman. Copyrighted The New Yorker Collection, 1973.

moving funds from bank to bank or opening bank accounts in the name of newly minted LLC's which are domestic, out-of- state, or even offshore. The debtor need not spend too much money in depositing cash into the bank account of a related entity that provides unrestricted access to the debtor. With little or virtually no effort, the debtor can: transfer title in real property to family members; record false and fraudulent mortgages, deeds of trust and financial statements; create promissory notes and bogus contracts that would make the debtor look insolvent; or establish "trusts" that warehouse all assets. While the debtor might fill out the asset protection forms or hire an attorney, the burden on the debtor is a trifle when compared to the time, effort, and energy of the creditor and attorney, given that the burden of proof falls upon the creditor to prove a fraudulent conveyance.⁵²

Should the creditor engage in a relentless and highly aggressive campaign to collect a judgment, a judgment debtor might raise the white flag of surrender and offer a cash settlement that be the 100% of the judgment or a cash settlement. This equation still applies, because the debtor would not have settled unless the creditor had expended a lot money, time, and resources to bring the debtor to the bargaining table.

IV. PRICING THE JUDGMENT PRICES THE SETTLEMENT

Everything has a price including civil judgments. Absent judgment for the recovery of personal property, consent decrees, or injunctive relief; nearly all judgments award money damages to the plaintiff for a precise and specified sum of money.⁵³ All judgments accrue interest that range from less than 1% for federal judgment to about 10% in most states.⁵⁴ Given the accrual of interest, and the

⁵² *Whitehouse v. Six Corp.*, 48 Cal. Rptr. 2d 600, 604 (Cal. Ct. App. 1995).

⁵³ "In any judgment, or execution upon such judgment, the amount shall be computed and stated in dollars and cents, rejecting fractions." Cal. Civ. Proc. Code § 577.5 (West).

⁵⁴ *Id.* § 685.010(a) (listing 10% for California).

statutory right to recover post-judgment attorney's fees and costs, the debtor is motivated to pay off the judgment in order to shrink the liability footprint.⁵⁵ This judgment, given the absence of any burden and its appreciating value, is priced at 100% or even more should the debtor "dally," which enables the creditor to collect accrued interest. A delay in payment penalizes the solvent debtor given the accrual of interest in state court but not federal court.⁵⁶

On the other hand, the debtor is recalcitrant.⁵⁷ Recalcitrance causes the creditor to accrue fees and costs which resets the price of the judgment. Take the example of the \$632,000 civil judgment that produces a net return of \$85,000.00. The market price of the judgment is 13.4% of its face value.⁵⁸ What does 13.4% really mean? The equation that the defendant successfully shrunk the liability footprint by 86.6%, even though losing the original [tort] case at the jury trial. This victory replicates a jury award for \$85,000 when in fact the damages equaled \$632,000.00. Better stated, the 13.4% price recalibration of the judgment is a repudiation of the original jury award. Granted that a judgment for \$85,000 is an affront to the plaintiff, much less to the court itself, but the inaccessibility at 86.6% of enforcement resets the price of the judgment.

This equation accurately monetizes the efforts of a debtor to frustrate the efforts of a creditor in seeking to enforce a judgment in the face of robust asset protection strategies. *Husky International Electronics, Inc. v. Ritz* resets the price of every judgment. Asset protection renders inaccessible the debtor's assets that shrink to a finite number the debtor's liability under the civil judgment of this equation. Alternatively, a robust campaign, well-

⁵⁵ *Id.* § 685.040 (enables the creditor to collect post-judgment attorney's fee if the judgment allows fees as a line item).

⁵⁶ The daily rate of interest for \$1,000,000 is \$273.97 in state court, and \$16.44 in federal court.

⁵⁷ Family law courts are common forums for fraudulent conveyances. See *In re Marriage of Dick*, 18 Cal. Rptr. 2d 743 (Cal. Ct. App. 1993) (optimizes offshore asset protection schemes). The family law court awards attorney's fees. *Id.* at 168 (granting \$750,000-in part related to asset protection).

⁵⁸ This number is rounded to the nearest 10th of a decimal point.

financed and with competent representation, alters the pricing of the judgment, which would, of course, expand, or even exceed, the debtor's true liability footprint under the original judgment.⁵⁹ This equation prices to the judgment all "price points" up and down this asset protection continuum. The efforts to hide, and the efforts to seek, assets are now calculated to 7th decimal point, which includes, for example, the net payment of \$84,999.999691 due the creditor based on the \$632,000 judgment.⁶⁰

Pricing through this equation is more than just quantifying the success or failure of asset protection campaign. The pricing of judgment through this equation takes center stage in the medium of settlement, whether by direct contact, a judicially mandated settlement conference, or mediation, when the parties have a good idea in pricing the potential judgment at par. After years of litigation, and rounds of discovery, chances are that the parties can reasonably predict the outcome of the case. Clearly, parties and their attorneys are sometimes surprised, but generally experienced attorneys have a good grip on the final "price" of the judgment. Absent a fully insured defendant for the costs of defense and indemnity, or a very solvent defendant, the equation becomes part of, if not overwhelms, all dispute resolutions. Nothing is more important than getting paid and paid without further litigation, expensive enforcement or toppling asset protection schemes. This imperative drives all settlements and the respective strategies of the warring parties that reveal themselves in settlement "Technicolor." The erstwhile defendant boasts that the plaintiff never collects come "hell or high water" or, alternatively, the plaintiff

⁵⁹ If the creditor collected interest, costs and attorney's fees, and tort damages that arise out of the fraudulent conveyance action, the price of the original judgment would exceed its par value. A creditor can recover damages arising from a fraudulent conveyance and even punitive damages. *Cardinale v. Miller*, 166 Cal. Rptr. 3d 546, 549 (Cal. Ct. App. 2014) (granting compensatory damages of \$2,170,593; punitive damages of \$900,000; and \$293,937.50 in attorneys' fees). The accessibility quotient might exceed 100%.

⁶⁰ Based on hypothetical #3.

threatens that "no stone shall be unturned."⁶¹ Based on the risk of nonpayment of a settlement and applying this equation, the plaintiff's counsel is instructed to: demand security to insure performance under a payment program given the risk of a later asset protection or debtor fatigue; agree to accept a cash sum to avoid the risk of the pre-ordained default under the payment program; or demand and receive a personal guaranty from a solvent party.⁶² Other settlement options abound.

Whatever the charges or counter charges in the medium of a settlement, the parties and their attorneys apply this equation to reach, if possible, a number that fairly reflect the true price of the judgment and settle the case accordingly.

⁶¹ *Hooser v. Superior Court*, 101 Cal. Rptr. 2d 341 (Cal. Ct. App. 2000).

⁶² Debtor fatigue means that the debtor defaults because the debtor decides that "enough money has been paid." This term is common in Chapter 13s.