

## IS MAREVA THE FACE THAT LAUNCHED A THOUSAND TRIPS TO OFFSHORE HAVENS?

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### QUANTIFYING STATE SPONSORED ASSET PROTECTION

#### **Abstract**

This article lays down the mathematical tracks that predict the success, or the failure, in the enforcement of a judgment, the collection of a debt, or the recovery of property that has been hidden or secreted.

This article rewrites the post judgment world of enforcement and civil asset recovery. Absent the deep pockets of the liable party, the plaintiff levies, liens, and seizes the assets of the defendant in the enforcement of the civil judgment. Will the defendant strike the colors and waive the white flag of payment? Will the defendant's assets take flight from the US shores and take root in an offshore haven that offers state sponsored asset protection, and join the ranks of other scofflaws? What is this new world outside the courthouse when everyone empties the courtroom after judgment? Is this the brave new world of the offshore that empties out the judgment and rewards ever so handsomely the clever and cunning?

Ne'er-do-wells who siphon off billions pose an existential and global risk. Kleptocracy enters the lexicon and U.S. Law under the pending "Kleptocracy Asset Recovery Rewards Act."<sup>1</sup> Law enforcement and civil authorities seek to recover these billions with only middling success, or none at all. The scofflaws include the mid or high-level government employees who have unbridled access to state funds (sovereign wealth, pension, taxes and oil, and natural resource revenues) or snare million in bribes & kickbacks from contractors. Without too much effort, they become the oligarchs with billions of dollars stashed in numbered bank accounts all over the world. They are the shadowy figures whose private LLCs own the \$50 million multi-storied apartments among the spectacular high rises in Manhattan. Others are the law-abiding citizens of Mediterranean countries, or former Soviet Union, who eschew their local tax code. Cypress, Isle of Man and the Cook Islands are favorite homes for their newly found wealth. Offshore havens withdraw billions from the capital market that could reinvigorate any state's gross domestic product (GDP), lift countries out of poverty, finance the membership in the Eurozone, or even pay for a bridge to nowhere. At minimum, the bridge

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<sup>1</sup> H.R. 5101, 115th Cong. (2017-2018).

construction might bankroll the local population. This article offers solace to tax collectors, law enforcement, and private parties who strive to retrieve billions that cheats and traitors park offshore and out of everyone's righteous grasp.

The article also serves the United Kingdom (UK) legal community even though the legal cites refer to California and United States code sections cases. Generally, the UK law provides that the "loser pays" and prohibits contingency fees (save and except a conditional fee, i.e., "Conditional Fee Agreement").<sup>2</sup> The Uniform Voidable Transactions Act ("UVTA"), or its UK equivalent, litigation imposes a greater risk because the "loser pays" and the potential inability by the creditor to secure counsel who would advance the required costs and expenses.<sup>3</sup> Worse, the creditor suffered at the hands of the debtor, but suffering "salt to the wound" if paying the fees arising from enforcement litigation to collect for the prior injuries. Under U.S. law, the creditor would have a "free ride" in pursuing the UVTA litigation to recover an asset, but not so under UK law.

Every crusade requires a first step, paper map, straight edge ruler and simple compass. This article is the first step. It is also the map, math and compass to recoup these funds from the catbird seat of civil process, where something, and certainly better than nothing, is. "Nothing" is carved into the pediment over the foyer of the offshore haven.

### **O' BRAVE NEW WORLD THAT HAS SUCH PEOPLE IN IT!**

This article unveils the post judgment world by illuminating the "space" inhabited by these participants. The "space" of the asset democracies offers all assets to all creditors, or claimants, with all remedies with no restrictions. This is a room full of "stuff" and one or more creditors chasing after every asset of the debtor. Where is the space that warehouses the asset

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<sup>2</sup> See *In re Factor VIII or IX Concentrate Blood Prod. Liab. Litig.*, 408 F. Supp. 2d 569, 581 (N.D. Ill. 2006), *aff'd sub nom. In re Factor VIII or IX Concentrate Blood Prod. Litig.*, 484 F.3d 951 (7th Cir. 2007) ("For one thing, contingent fees are not permitted. The other problem is the 'loser pays' rule, which requires that the loser pay the costs of the prevailing party, including attorney's fees").

<sup>3</sup> The Uniform Voidable Transactions Act (UVTA), is the current U.S. incorporation of the fraudulent conveyance law which tracks UK law from (or earlier) the Fraudulent Conveyances Act of 1571, 13 Eliz. c. 5 (Eng.). See CAL. CIV. CODE § 3439 (West 2018) (providing California's version of the UVTA); *In re Twyne's Case*, 3 Co. Rep. 806, 76 Eng. Rep. 809 (Star Chamber 1601); *In re Abatement Envtl. Res., Inc.*, 102 F. App'x 272, 276 (4th Cir. 2004); The Law of Property Act, 15 Geo. 5 c. 20 § 172 (1925) (Eng.), embodied 13 Eliz. c. 5, but was repealed by the Insolvency Act of 1985 (Eng.); Section 172 repealed by Insolvency Act 1985 (c. 65, SIF 66), § 235(3), Sch. 10 Pt. IV (with saving in Insolvency Act 1986 (c. 45, SIF 66), § 437, sch. 11 ¶ 10 (Eng.)) <https://www.legislation.gov.uk/ukpga/Geo5/15-16/20>.

democracies? This space is the counter of the sheriff (or U.S. Marshal) where a judgment creditor tenders the writ, a check and instructions to seize the debtor's assets.<sup>4</sup> The space is the clerk's counter to issue the writ of execution or other process to reach the debtor's assets.<sup>5</sup> The space is the courtroom where the judge grants orders that compels the debtor to appear for an examination or issue seizure orders.

The space of the asset dictatorship is that no assets exist for anyone including the tax, family law, civil, law enforcement and or just civil creditors. This space is empty of any assets of the debtor that might be subject to enforcement. Imagine that an asset dictatorship is as an empty room, save and except the victims looking in from the outside and bemoaning their impecunious or precarious future. This space might be offshore and beyond the reach of the U.S. courts, whether federal or state.<sup>6</sup>

Offshore havens are the legal and business regimes that host, foster, and protect an asset dictatorship that takes root and prospers. These offshore havens are the space, i.e., the real estate where the asset dictatorship exist, and protected by the local legal regime that consist of statutes, and judges, prosecutors, and private attorneys to enforce them. Asset dictatorships find solace in the alluring arms of an offshore haven because the offshore haven welcomes, fosters, protects, promotes, advertises for, and even seeks out asset dictatorships. The offshore haven is state sponsored asset protection. The physical space for asset dictatorship is the offshore haven.

### **THE REGIMES OF THE ASSET DEMOCRACY AND ASSET DICTATORSHIP**

The post judgment consists of asset democracies and asset dictatorships. Asset democracy guarantees the judgment creditor the unbridled access to all assets of the judgment debtor by all judicial means without restriction.<sup>7</sup> An

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<sup>4</sup> The court issues a writ of execution which is a court order that entitles the sheriff (or U.S. Marshal in federal court) to execute (i.e., levy) upon the debtor's property. *See* CAL. CIV. PROC. CODE § 687.010 (West 2018) (requiring written instructions placed in hands of the levying officer); CIV. PROC. § 685.100 (requiring advance payment of fees and charges accrued by levying officer).

<sup>5</sup> *See* CIV. PROC. § 699.510 (providing after entry of judgment, writ of execution shall be issued by clerk).

<sup>6</sup> *See* FED. R. CIV. P. 69(a); *Duchek v. Jacobi*, 646 F.2d 415, 417 (9th Cir. 1981) (“[T]he district court has the same authority to aid judgment creditors as that provided to state courts under local law.” (citation omitted)).

<sup>7</sup> *See* CIV. PROC. § 695.010 (showing all property, unless immune or exempt, is subject to enforcement); CIV. PROC. § 683.010 (identifying judgments are enforceable upon entry and stays are statutory only). *See generally* *California Commerce Bank v. Superior Court*, 8 Cal. App. 4th 582, 584 (1992); CIV. PROC. § 683.010 (providing court orders not always

asset dictatorship renders these assets inaccessible, invulnerable, and immune to ordinary enforcement by interposing the extrajudicial artifice of discovery, expense, effort, and risk ("DEER"), and thereby removes these assets from the democratic access.<sup>8</sup> The first burden is the *discovery* of the cash, accounts, and other assets and their locale or custodian. The second burden is to finance (i.e., the *expense*) the enforcement to seize the cash or like medium (fees and charges due to the sheriff and counsel). The third burden is the *effort* and time to go through the legal process to recover the cash or like medium, i.e., the number of appearances, drafting of papers, filings, service, preparation for going to court, and the client's investment of time. The fourth burden is a *risk* of a bad outcome without rhyme, reason or failing to locate the cash or like medium at all. Collection can cost the judgment creditor DEARLY.

Asset democracy offers robust and exponential post judgment remedies that enable a creditor to reach any asset, other than those that are exempt or immune.<sup>9</sup> These remedies include mass levies, mass subpoenas, or national sweeps of assignment orders.<sup>10</sup> Levies and liens are limitless in number, sequence or timing.<sup>11</sup> Only circumscribed by some good cause, mass subpoenas are likewise limitless in number, sequence or timing.<sup>12</sup> Asset democracy offers the examinations of the judgment debtor and third party, nearly without limitation and related subpoena to capture the financial records.<sup>13</sup> The focal point of enforcement is the writ of execution, issued by

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required to initiate enforcement).

<sup>8</sup> See generally *In re Bernard*, 96 F.3d 1279 (9th Cir. 1996) (showing liquidation of accounts to cash renders cash difficult to reach); see also *In re Schafer*, 294 B.R. 126, 130 (N.D. Cal. 2003) (moving money into new accounts or cashier's checks is a fraudulent conveyance).

<sup>9</sup> All property subject to enforcement is subject to levy under a writ of execution or other means of enforcement. CIV. PROC. § 699.710.

<sup>10</sup> An assignment order reaches accounts that are conditional or owed in the future and subject to service by mail, as opposed to a sheriff's garnishment. CIV. PROC. § 708.510(a); see also CIV. PROC. § 684.115(a) (explaining central levy department for a bank with nine or more branches).

<sup>11</sup> See CIV. PROC. § 708.110(a) (allowing creditors to apply to court for an order requiring judgment debtor to appear before court to aid in enforcing creditor's money judgment); CIV. PROC. § 697.530 (allowing liens on certain property from filing a JL-1 (equivalent to financing statement under UCC Article 9)); CIV. PROC. § 697.340 (providing an interest in real property arises from recording an abstract of judgment with the local county recorder).

<sup>12</sup> Turnover orders, third party examination orders, assignment orders, charging orders, and receiverships orders are generally accessible, save any expenses for a court order. The court is required to approve these remedies but based on the statutory requirements. See CIV. PROC. § 699.040(a); CIV. PROC. § 708.120(a); CIV. PROC. §§ 708.150(a), .110(a), .310, .620.

<sup>13</sup> Judges order, but do not preside over, a debtor's examination. See CIV. PROC. § 708.110(a); see also CIV. PROC. § 708.120(a) (establishing requirements for orders where property in possession or control of third party).

the court that enables the levying officer to seize, by lawful force, the assets of the judgment debtor.<sup>14</sup> Enforcement does not require judicial pre-approval.<sup>15</sup> Every asset is fair game to any creditor, except assets that are immune or exempt.<sup>16</sup> Asset democracy dissolves the debtor's title to its property, liquidates the property, and distributes the proceeds to the creditor.<sup>17</sup>

An asset dictatorship removes assets warehoused in the regime of asset democracy, by the extrajudicial transfers to a new entity, changing legal title, transforming the asset to new form, concealing the assets or exporting the assets to an offshore haven. All tactics are various incarnations of "asset protection." The Uniform Voidable Transactions Act (UVTA) enables the creditor to recover the asset. However, this only happens if the UVTA rights are exercised, which carries significant costs borne by the creditor.<sup>18</sup> An asset dictatorship, fueled by the recalcitrance of the debtor, inserts an artifice of DEER that renders an UVTA recapture impossible if beyond the financial means.<sup>19</sup> The asset dictatorship empties out the civil judgment by reposing the assets in the hands of the asset dictatorship domicile in an offshore haven.<sup>20</sup> Asset dictatorship is "judgment proofing," that means that the defendants

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<sup>14</sup> List of property subject to levy under a writ. *See* CIV. PROC. §§ 700.010-.200; CIV. PROC. § 687.010 (allowing sheriff to levy without court order).

<sup>15</sup> The judgment creditor must deliver a letter of instructions, describe and locate the property to be levied, complete forms as required, and pay a deposit of the sheriff's fees and charges. CIV. PROC. § 687.010.

<sup>16</sup> *See generally* CIV. PROC. §§ 704.010-.210 (providing list of exempt property); *see also* Wells Fargo Fin. Leasing, Inc. v. D & M Cabinets, 177 Cal. App. 4th 59, 74 (2009) (providing enforcement and exemptions are statutory).

<sup>17</sup> *See* CIV. PROC. § 701.510 (levying officer sells the debtor's property); CIV. PROC. § 701.520(a) (allowing levying officer to collect certain property); CIV. PROC. § 701.010(b)(1) (providing garnishment under levy pays levying officer, not the debtor); CIV. PROC. § 701.810(f) (providing sales proceeds of debtor's assets (or collection) goes to the creditor); CIV. PROC. § 701.650-.670 (levying officer issues its own deed or certificate of sale); CIV. PROC. § 701.680 (providing sales are final); CIV. PROC. § 704.800(b) (providing levying officer can sell residence, 90% rule, and court approval requirements "if no bid is received at the sale of a homestead pursuant to court order for sale"); CIV. PROC. § 704.850(a)(4) (allowing proceeds of sale of the residence go to the creditor).

<sup>18</sup> The Uniform Voidable Transactions Act (UVTA) embodied in CAL. CIV. CODE § 3439 (West 2018); *see also* CIV. § 3439.07 (describing creditors remedies).

<sup>19</sup> UVTA might compel the plaintiff to file multiple lawsuits. *See, e.g.,* *Cardinale v. Miller*, 222 Cal. App. 4th 1020, 1023 (2014) (exemplifying second suit against the "aider and abettor"). *But see, e.g., In re Lawrence*, 251 B.R. 630, 652 (S.D. Fla. 2000), *aff'd*, 279 F.3d 1294 (11th Cir. 2002) (allowing contempt for failure to repatriate assets where "[t]he bankruptcy court also found that any impossibility claimed by the defendant was self-created, and, therefore, was an invalid defense.").

<sup>20</sup> *See, e.g., In re Lawrence*, 227 B.R. 907, 914 (Bankr. S.D. Fla. 1998) ("The purpose of the trust [offshore trust] was clearly to shield the Debtor's assets from a creditor which the Debtor feared was about to obtain a staggering \$20 Million arbitration award against him",

dispose of assets during the pendency of the litigation.<sup>21</sup> At a minimum, asset protection, if reasonably successful, forces the creditor to consider accepting "pennies on the dollar" in satisfaction of the debt.<sup>22</sup>

### POSITIVE AND NEGATIVE JUDGMENTS: THE UNVEILED EQUATION

Toppling the asset dictatorship requires a new strategy that shrinks exponentially the DEER's footprint.<sup>23</sup> DEER deters the UVTA action in light of the non-compensable attorney's fees.<sup>24</sup> Even if victorious under the UVTA and the restoration of asset from the asset dictatorship to the asset democracy, DEER still deters any UVTA action given the risk of zero net return to the creditor based attorney fees, court costs and non-refundable costs. If the UVTA reaches a discrete asset, the court costs, even if recoverable and non-reimbursable, degrade the net return to the creditor.<sup>25</sup> DEER devalues, and

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where \$4-7 million was held in trust).

<sup>21</sup> *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 339 (1999) (citing *Iraqi Ministry of Defence v. Arcepey Shipping Co.*, 1 All E.R. 480, 484-87 (1979)).

<sup>22</sup> Denise C. Brown, *Caribbean Asset Protection Trust: Here Comes the Sun: Dispelling the Dark Clouds of Controversy*, 7 UNIVERSITY OF MIAMI BUS. L. REV. 133, 139 n.36 (1991) (describing a situation where the debtor "does not have adequate assets to satisfy the judgment, other than an APT [i.e., an asset protection trust], the creditor will look to the APT to satisfy the judgment. Once the creditor realizes the terms and implications of the APT, it is likely that the judgment will be settled for pennies on the dollar" (citing Howard B. Young, *Asset Protection Planning With the Use of Foreign Situs Trusts*, 73 Mich. B.J. 446, 446 (1994)); see also Jay Adkisson & Christopher M. Riser, *Asset Protection Concepts & Strategies for Protecting Your Wealth*, 37 (McGraw Hill, 2004) ("Good asset protection planning creates a favorable environment that promotes settlement on terms favorable to clients, which creditors are willing to accept as settlement in full of all outstanding liability. A good plan will thus facilitate an end to the litigation, and it will allow debtors to get on with their business.").

<sup>23</sup> See, e.g., *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987) (providing an inherent power to hold a party in contempt).

<sup>24</sup> UVTA does not award attorney's fees to any party. See, e.g., *Cardinale*, 222 Cal. App. 4th at 1024.

<sup>25</sup> Items allowable include experts' fees, forensic presentations, appraisals, title reports, third party subpoenas, electronic data management, depositions, filing fees and charges. CAL. CIV. PROC. CODE § 1033.5(a) (West 2018); see also *Mehrtash v. Mehrtash*, 93 Cal. App. 4th 75, 81 (2001) (finding for the debtor in a fraudulent conveyance action because the creditor "produced no evidence that the value of the property could support any net recovery for her in the event the conveyance was set aside."). At trial, the creditors are required to prove the fair market value of the property, which requires hiring a forensic expert and deposing the parties and other experts. CIV. PROC. § 1033.5(a)(1)-(2) (listing allowable costs). Post judgment parties file a motion to tax costs. CAL. R. 3.1700(a) (West 2018) (claiming costs); see also CAL. R. 3.1700(b) (West 2018) (contesting costs).

immunizes, the asset from the UVTA.<sup>26</sup> If a *Lawrence* contempt proceeding is initiated, which is a proceeding to recover assets held offshore haven award fees and costs, the creditor finances the contempt proceeding absent engaging the attorney on a contingency fee basis.<sup>27</sup>

On the other hand, the UVTA action accrues its own expenses, efforts and risks borne by the asset dictator who might also initiate settlement.<sup>28</sup> The UVTA does not award fees due to the favor of any prevailing party.<sup>29</sup> Scaling the ramparts of asset dictatorship requires a low cost strategy that causes the asset dictator to incur outrageous, exorbitant and intolerable defense costs and fees, along with the great effort and infinite time.<sup>30</sup> Defeating an authoritarian regime, including the asset dictatorship, with economic competition, or a campaign of unbridled, unabashed and unashamed financial oppression, is an established strategy, and likewise as described here.<sup>31</sup> The purpose of a fraudulent conveyance is to force the creditor to accrue unbearable expenses.<sup>32</sup> The technical term is scorched earth.<sup>33</sup>

Enforcement is worth explaining beyond the simple bank levy. Enforcement offers liens on personal and real property.<sup>34</sup> Enforcement offers

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<sup>26</sup> See *Grupo*, 527 U.S. at 338-39, (Ginsburg J., dissenting) (recognizing that the risk off "sophisticated foreign-haven judgment proofing strategies" and "technology that permits the nearly instantaneous transfer of assets abroad" foster judgment proofing); Lynn M. Lopucki, *The Death of Liability*, 106 YALE L.J. 1, 32-38 (1996) (explaining judgment proofing deters liability suit because nobody would collect); *Id.* at 35 (discussing a doctor going down the path of asset protection in order to fend off creditors, "[w]ith his financial affairs so arranged, the doctor will be in a powerful position to negotiate settlements with is present and future creditors.").

<sup>27</sup> See *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-04 (1947); see also *Cook v. Ochsner Found. Hosp.*, 559 F.2d 270, 272 (5th Cir. 1977) (awarding fees in civil contempt proceeding).

<sup>28</sup> These expenses include retaining counsel, paying filing fees and other costs of litigation and otherwise living "underground," which means putting everything in someone's other name, including a bank account.

<sup>29</sup> See *Cardinale*, 222 Cal. App. 4th at 1024.

<sup>30</sup> UVTA litigation eschews the role as the adversary's "enabler".

<sup>31</sup> See Sam Roberts, *Sam Iacobellis, Whose B-1 Bomber Recast the Cold War, Dies at 87*, N.Y. TIMES, Sept. 08, 2016 at A22 (explaining Ronald Reagan won Cold War by engaging in a "costly arms race that threatened the Soviet with bankruptcy.").

<sup>32</sup> See CAL. CIV. CODE § 3439 (West 2018) (providing even after winning first law suit, to recover a fraudulent conveyance, creditor might have to file another lawsuit to vacate the conveyance and subject it to the judgment under the UVTA or potentially extensive post judgment proceedings, all of which are costly and financed by judgment creditor).

<sup>33</sup> *Minstar Acquiring Corp. v. AMF Inc.*, 621 F. Supp. 1252, 1260 (S.D.N.Y. 1985) ("Scorched earth" means . . . the retreating army "burns the town and fields, so that the conquerors get nothing for their troubles but scorched earth.").

<sup>34</sup> CAL. CIV. PROC. CODE §§ 697.340, .540 (West 2018) (providing personal property lien is a JL-1).

the services of the sheriff (i.e., called the levying officer) to forcibly take property from the judgment debtor, liquidate the property and turn over proceeds to the plaintiff.<sup>35</sup> Enforcement compels the debtor and third parties to disclose financial information that might reveal assets, their locale, and custodian.<sup>36</sup> Enforcement compels the debtor to assign receivables and hand over assets.<sup>37</sup> Enforcement offers suits against the debtor's customers, receiverships of IP and liquor licenses, charging orders to reach partnership and LLC interest, and interests in suits, lottery winnings, among other assets.<sup>38</sup> This is short recitation of a statutory long list.<sup>39</sup>

Among these remedies is the super lien under California law. The service of an order for a debtor's examination (ORAP) imposes a lien on the debtor's personal property, no matter where located and no matter who has possession.<sup>40</sup> The ORAP lien survives virtually all transfers, save a bona fide purchaser and other statutory exceptions.<sup>41</sup> The offshore exit of the debtor's assets would not extinguish the ORAP lien because the transfer is transformative (i.e., change of form only) and the transferee (i.e., any) is the debtor's surrogate and not a BFP.<sup>42</sup> The ORAP lien encumbering the assets sitting in the asset dictatorship (i.e., even offshore) buttresses the *Lawrence* contempt in recovering the offshore domiciled assets.<sup>43</sup>

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<sup>35</sup> CIV. PROC. §§ 701.510-.680 (providing boundaries for sale and turnover of proceeds).

<sup>36</sup> CIV. PROC. §§ 708.110-130 (detailing methods and requirements relating to examination of debtor, third parties and subpoena of records).

<sup>37</sup> See CIV. PROC. § 708.510 (allowing assignment); CIV. PROC. § 699.040 (directing judgment debtor to turnover of property or title papers pursuant to court order); CIV. PROC. §§ 708.180-.205 (providing for turnover of property at ORAP hearing).

<sup>38</sup> See CIV. PROC. § 708.620 (providing for receivership); CIV. PROC. § 708.210 (providing for creditor suits); CIV. PROC. § 708.310 (charging orders); CIV. PROC. § 708.410 (providing for lien and intervention in suits); CIV. PROC. § 708.710 (defining public entities as "state, a county, city, district, public authority, public agency, and any other political subdivision in the state.").

<sup>39</sup> Enforcement is statutory. See *Imperial Bank v. Pim Elec., Inc.*, 33 Cal. App. 4th 540, 546 (1995) ("Detailed statutory provisions govern the manner and extent to which civil judgments are enforceable. In 1982, following the recommendations of the California Law Revision Commission, the Enforcement of Judgments Law ("EJL") was enacted. The EJL appears in sections 680.101 through 724.260 and is a comprehensive scheme governing the enforcement of all civil judgments in California.").

<sup>40</sup> See CIV. PROC. §§ 708.110(d), .120(c) (allowing court orders for judgment creditors when property is in possession of a third party (ORAP)); see also *Credit Suisse First Boston Mortg. Capital v. Danning Gill, Diamond & Kollitz*, 178 Cal. App. 4th 1290, 1299-1300 (2009) (providing ORAP lien might reach funds held in attorney-client trust account).

<sup>41</sup> See CIV. PROC. § 697.740(a)-(k).

<sup>42</sup> See CIV. PROC. § 697.740(a)-(k) (providing liens follow transferred property); see also CIV. PROC. § 695.070(a) (allowing creditor to enforce judgment against the debtor's property, subject to a judgment lien, even if transferred).

<sup>43</sup> Court can order imprisonment to compel a party to comply with a court order. See

Diligence in prosecuting enforcement, or fending off enforcement, is a factor that fuels the enforcement or defense against enforcement ad infinitum. Diligence is a brew of financial ability, the prospect of success, the amounts involved, whether the parties bear a grudge or hatred, whether the creditor is a business entity, what third parties have at stake (i.e., family law and small children), the imperative of compensation (i.e., need), the character of the debt (contract or tort), whether enforcement satisfies an unrequited personal outrage (i.e. sexual assault, personal abuse, personal injury, death of family members), whether the creditor is duty bound to enforce the judgment (i.e., government), the amount of time, effort and energy to prosecute or defend against enforcement, the relative skill of the attorneys and professionals, and complexity and certainty of the asset protection, the statute of limitations, and security and safety. This list is incomplete. The motivations, no matter whether they are calculable by dollars and cents, time, energy, third party effort, become a heavy burden upon someone, no matter the party. The fact that someone spends time in chasing down another person to satisfy a judgment is a burden upon both parties no matter any motivation. Creditors loathe spending money to finance justice. Debtors loathe living underground, fear process servers lurking around the corner or witnessing their bank accounts, PayPal account, Groupon account, and their merchant bank account being wiped out. Debtors fear creditors prosecuting forced sales of their homes, and if successful, watching the sheriff evict them and their family from their home after sales that are no greater victory or horror.

Diligence is measurable because diligence on both sides becomes expensive. The expression "Personal Expense" means more than just money, time and effort. Personal Expense includes all these general intangibles of personal investment, justice, financial recompense, revenge, among other intangibles that constitutes "Diligence."

The list of motivation boils down to two broad categories that are:

1) Whether a party (or attorney) is willing to walk away from prosecution or defense when the enforcement becomes too expensive and declines to finance the campaign. The decision to walk away from the viewpoint of the creditor means that the creditor will cease the high-end campaign to reach non-immune assets, or the debtor decides to pay or settle the claim. The short statement is that everyone will "end it." The success of the *Lawrence* contempt is the Holy Grail.

2) Notwithstanding the expense borne by the parties, the parties will continue the campaign despite the Personal Expense of money time, effort and emotional investment. The creditor (or attorney) will continue to

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Civ. PROC. § 1219(a); 18 U.S.C. § 401 (2018); Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 827(1994); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 442 (1911); Yates v. United States, 355 U.S. 66, 74 (1957).

invest money, time, effort, and skill to collect the judgment, or defend against enforcement ad infinitum. The short statement for everyone is "no end in sight."

*Financial Capability to Finance Enforcement and Costs of Defense* subsume this broad definition of Personal Expense and Diligence because by its very nature whether enforcement, or defense against enforcement, requires an affirmative investment of money, time, diligence, skill, aggravation, fear, and effort, and usually over a long period of time. Personal Expense and Diligence which fuels Financial Capability is better known as "I have more money than you and I am prepared to spend it because I am really mad."<sup>44</sup>

The following are asset dictatorship equations:

Costs to Prosecute Enforcement<sup>45</sup> >  $\sum$  (Financial Capability to Finance Enforcement<sup>46</sup> + Costs of Defense Against Enforcement<sup>47</sup>) = Judgment ( $\emptyset$ ).<sup>48</sup>

*Example:* \$10,000 to unwind a fraudulent conveyance is the Cost to Prosecute Enforcement. The Financial ability to Finance Enforcement is \$1,000.00 which means that the creditor is only willing or able to invest \$1,000.00. The debtor invested \$100.00 in transferring the home to a newly formed LLC. The conveyance will stand, and that the creditor walks away from collection of the judgment given the successful veil of asset protection and unbearable expense to unwind the transaction, including an offshore trust.<sup>49</sup> The debtor invested virtually nothing and therefore is the winner by preventing the creditor from reaching the equity in the home and therefore rendering the judgment uncollectable.

$\sum$  (Financial Capability to Finance Enforcement (w)<sup>50</sup> + Costs of Defense Against Enforcement) + ORAP, JL-1 Liens, or other Enforcement

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<sup>44</sup> This phrase is better known as "where the rubber meets the road." Nabers *ex rel.* Emergystat, Inc. v. Morgan, No. 3:09-CV-00070-CWR, 2011 WL 1884721, at \*4 (S.D. Miss. May 17, 2011) ("For purposes of determining the existence *vel non* of subject-matter jurisdiction, this is the point where the proverbial rubber meets the road.").

<sup>45</sup> Court costs, attorney's fees and expenses of litigation (experts). The asset dictatorship scoops out all assets. Costs are part of DEER that includes all considerations.

<sup>46</sup> Financial Capability of the creditor to finance the expense necessary to fund the campaign to topple the asset dictatorship that includes the creditor, attorney, or litigation financiers who loan money to the attorney at high rates or enter into other relationships.

<sup>47</sup> Costs incurred by the defendant to defend against enforcement or UVTA action.

<sup>48</sup> The judgment is worthless because the debtor cycled into asset dictatorship, and the creditors (or third parties) decline to finance the enforcement campaign.

<sup>49</sup> See Lopucki, *supra* note 26, at 36 (assuming an offshore trust established by the debtor "collection in the Cook Islands would be impossible.").

<sup>50</sup> "W" is the warehouse of public information discussed in this article or otherwise.

liens<sup>51</sup> > Costs to Prosecute Enforcement = Judgment (\$).<sup>52</sup>

*Example:* The creditor is very angry, very rich and hired crack counsel, or the creditor is a governmental entity who is policy bound to collect. Money is no object. The Financial Ability is unlimited in money, time, effort and skill. The creditor will spend \$1,000,000, if required. The Cost of Defense is very substantial because the debtor transferred money to an asset dictatorship sitting in an offshore haven, and that the creditor is proceeding with *Lawrence* contempt. Lest the debtor sit in a jail cell for the next five years, the debtor hires expensive and crack counsel. The debtor has only (or willing to spend) \$50,000. The offshore money is subject to a valid lien that entitles the creditor to reach the funds.<sup>53</sup> The actual cost to prosecute the *Lawrence* contempt is \$100,000. The court will order *Lawrence* contempt. Incarcerating the debtor for \$100,000 is small change, and the debtor is unable, or unwilling to outspend, or out invest, the creditor. Absent sitting in county jail for 5 years, the debtor is likely to surrender.<sup>54</sup>

These equations do not guarantee any outcome or success for anyone but clearly provides a path for enforcement. All enforcement comes to halt when the fund to finance enforcement is exhausted unless the creditor has unlimited resources to finance the post judgment quest or the *Lawrence* contempt proceeding.<sup>55</sup> Reaching funds domiciled in an offshore haven bleeds the judgment creditor to death, which is precisely the point of the

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<sup>51</sup> See CAL. CIV. PROC. CODE §§ 708.110(d), .120(c) (West 2018); CIV. PROC. § 697.530 (allowing a judgment lien to enforce money judgment for accounts receivable if debtor located in California, and other personal property if located in California); CIV. PROC. § 697.540 (a)-(k) (providing liens survive transfer, except BFP and other exceptions). In this equation, the liens would be liens on real property. See CIV. PROC. § 697.340.

<sup>52</sup> The dollar sign means some recovery given the financial investment and reservoir of accessible assets, if any.

<sup>53</sup> The creditor could reach the funds under the UVTA, but would have a greater claim to the funds because the creditor has a lien interest. See CIV. PROC. §§ 708.110(d), .120(c); see also CIV. PROC. § 697.740(a) (transferring overseas does not discharge the lien).

<sup>54</sup> This is the equation for the UK readership: The Costs to Prosecute Enforcement + UK Fee Burden due the Debtor (or surrogate) >  $\sum$  (Financial Capability to Finance Enforcement + Costs of defense against Enforcement) = Judgment ( $\emptyset$ ); or The  $\sum$  (Financial Capability to Finance Enforcement (w) + Costs of Defense against enforcement) + ORAP or JL-1 Liens, or other judgment liens > Costs to Prosecute Enforcement + UK Fees Burden due the Debtor (or surrogate) = Judgment (\$). For purpose of simplicity, the presumption is that the barrister for the creditor would offer CFA fees. The "Fee burden for due the debtor or surrogate and creditor" and "Fee burden due the creditor's attorney, absent the CFA arrangement or collection" when integrated into the Equation, leads to the result that the judgment might be uncollectable, absent overwhelming Financial Capacity, low dollar costs to actually enforce the judgment, and overwhelming "costs of defense" suffered by the debtor.

<sup>55</sup> Financed either by the judgment creditor, attorneys, or third litigation financiers.

offshore strategy. Asset dictatorship, and taking up residence in the financial resorts of the offshore havens, might defeat the Article III enforcement powers, save and except self-funded and expensive *Lawrence* contempt proceedings, which include a jury trial.<sup>56</sup>

The risk of empty judgments permeates the UK courts where a debtor facing enforcement might dispose of assets.<sup>57</sup> "Enforcement is everything" is the UK clarion call to enforce the judgment and implicitly recover assets which have been "transfer[red] out of the jurisdiction or otherwise dissipates them so that no judgment could be enforced against them."<sup>58</sup> The UK version of this equation magnifies the fee burden of the creditor, assuming that the creditor's barrister declines to offer a CFA arrangement. The fees accruing from enforcement deters the creditor from filing a UVTA unless the creditor collects the judgment and the newly accrued fees. Should the creditor win the UK UVTA case, but fails to collect, the creditor's loss metastasizes by virtue of the endless fee expense. This fee "money pit" is the moat that surrounds the asset dictatorship. Should the creditor lose, the moat is sans a drawbridge. The UK fee rules in the UVTA action tilts the equation (described above) in favor of the debtor by burdening the creditor with a fee investment, subject to collection, if ever, or sometimes never. Therefore, the unintended consequence is that the UK specific fee burden renders the judgment debtor "judgment proof" because the judgment creditor has to finance the enforcement, save and except a CFA arrangement.

The absence of a true contingency fee agreement (save CFA) and "loser pays" rule quantifies the financial investment and ensuing barrier of the creditor in seeking to recapture assets from an asset dictatorship. The quantification of the barrier is finite to the one penny. The inevitable

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<sup>56</sup> See *United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc.*, 602 F. Supp. 1052 (S.D.N.Y.), *aff'd sub nom. United States ex rel. Vuitton et Fils S.A. v. Klayminc*, 780 F.2d 179 (2d Cir. 1985), *rev'd sub nom. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793-94, 801 (1987) (explaining appointment of disinterested attorney to prosecute *criminal* contempt); *Perry v. O'Donnell*, 759 F.2d 702, 704-05 (9th Cir. 1985) (exemplifying that a private party can prosecute civil contempt and recover fees); *Bloom v. State of Ill.*, 391 U.S. 194, 198 (1968) (explaining a "serious" contempt invokes a jury trial right, "[o]ur deliberations have convinced us, however, that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States, and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial.").

<sup>57</sup> See *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 337-38 (1999); David Capper, *The Need for Mareva Injunctions Reconsidered*, 73 FORDHAM L. REV. 2161, 2179 (2005) ("It is counterintuitive to deny that defendants with no defense to civil claims would never transfer assets out of the jurisdiction or otherwise dissipate them so that no judgment could be enforced against them").

<sup>58</sup> *Ibid.*

conclusion is that the absence of a true contingency fee agreement and "loser pays" rule is state sponsored asset protection not by Nevis but the United Kingdom save and except the exercise of a pre-judgment seizure order (injunction) labeled the "nuclear weapo[n] of the law."<sup>59</sup> "Mareva" injunctions require the proof of exigent circumstances of "[a] real risk that any judgment the plaintiff obtains in the proceeding will go unsatisfied," which appears to follow the necessity of exigent circumstances in granting an ex parte writ of attachment.<sup>60</sup> However, a *Mareva* enjoins disposition of the assets, but does not attach (i.e. seizure by the levying officer) and leaves the debtor in control of the assets, but subject to restraining order served on a financial institution.<sup>61</sup> The *Mareva* injunction (normally ex parte) restrains "a defendant in civil litigation from disposing of assets so as to render itself judgment proof."<sup>62</sup>

An attachment under state law enables the sheriff (i.e., the levying officer) to physically take possession of property or impose a lien that enters the public records.<sup>63</sup> Should the defendant have already parked assets offshore, otherwise expertly conveyed or concealed them, the debtor flees with entire kit and caboodle upon the filing of suit, before the *Mareva* injunction, or the entry of judgment, the *Mareva* injunction collapses.<sup>64</sup> If the defendant finds

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<sup>59</sup> *Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A.*, 2 Lloyd's Rep. 509, 510 (1975) (holding, in the words of Lord Denning, that "[i]f it appears that the debt is due and owing—and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment—the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him [*sic*] disposing of those assets."). See also Supreme Court Act of 1981, § 37, 11 Halsbury's Statutes 966, 1001 (1991 reissue) ("nuclear weapo[n] of the law."); *Grupo*, 527 U.S. 328, 329 (providing the *Mareva* injunction has now been confirmed by statute); *Id.* at 337-38 (explaining *Mareva* offers an in personam injunction, not an attachment when defendant still has possession of the attached assets); Capper, *supra* note 57, at 2162.

<sup>60</sup> Capper, *supra* note 57, at 2163 (providing state law allows for ex parte relief to attach assets, but limited (depending on the state) to contract claims, exigent circumstances, ability to reach the asset, and posting of a bond); see also CAL. CIV. PROC. CODE § 485.010(b)(1)-(5) (West 2018) (allowing exigent relief); CIV. PROC. § 489.220(a) (allowing bond).

<sup>61</sup> *Mareva* is injunctive as opposed to attaching (i.e., taking property into custody) the debtor's assets. Capper, *supra* note 57, at 2174 ("Possession is 9/10th of the law" might circumvent a *Mareva* injunction if the assets sit offshore or defendant fled anyway); *Id.* at 2162 (no rights in the defendant's property); *Grupo*, 527 U.S. 328, 331-32 (explaining *Mareva* is big business in the UK courts at the rate of "one thousand per month"); Capper, *supra* note 57, at 2164 (explaining upon service of the *Mareva* order, a bank freezes the defendant's accounts that the bank violates at its own civil peril); *Id.* at 2162 (explaining a *Mareva* injunction is *in personam* order but does not "confer upon the plaintiff any rights in the assets or enhanced priority in the event of the defendant's insolvency" (i.e., an attachment)).

<sup>62</sup> Capper, *supra* note 57, at 2162.

<sup>63</sup> Secretary of State filings for financing statements or the County Recorder for the filing of real property instruments (i.e., deeds, mortgages, deeds of trust, and liens (i.e., tax liens and abstracts)).

<sup>64</sup> The collapse is expensive because the plaintiff had to finance the *Mareva* injunction.

compliance with a contract, the tax code, or loan agreements discretionary or just "suggestive," chances are the defendant would likewise find the *Mareva* injunction advisory.<sup>65</sup> However, not everyone cowers in the face of a court order. Particularly, when there is a *Mareva* injunction and the plaintiff, even though aggrieved, has to finance continuing enforcement of a contempt proceeding.<sup>66</sup>

Concluding that the *Mareva* injunction is a settled expectation and that relief, like *des es machina*, drops from the UK judicial ceiling, *ex parte*, no less. Knowing what is coming around the civil bend is a draconian injunction, *ex parte* no less, *Mareva* exhorts the defendant to transfer assets before the suit is filed and squeeze the asset footprint. *Mareva* injunctions are the "most useful tool created by the common law Courts in England--the *Mareva* Injunction . . . ." yet appear like a "nuclear weapon" on everyone's radar screen.<sup>67</sup> The *Mareva* injunction drives parties at the earliest opportunity to move all assets offshore, hide their tracks and conceal all other assets.<sup>68</sup> The vernacular is priceless: Some assets beat a hasty retreat out the back door in the face of a *Mareva* Injunction pounding at the front door.<sup>69</sup> Inescapably, possession is nine-tenths of the law is the *raison d'être* of a *Mareva* Injunction but likewise the *raison d'être* of an offshore haven.<sup>70</sup> The math is the following:

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<sup>65</sup> Injunction succeeds through the power of contempt. Contempt offers civil and criminal penalties. Should the defendant have fled, these remedies are difficult to enforce absent extradition, another expense, or docketing the case in a foreign jurisdiction and attempting to enforce the *Mareva* injunction.

<sup>66</sup> Either the plaintiff is paying the attorney or the attorney is working off a CFA. Under either set of facts, enforcement requires a continuing investment of financial or personal capital. Hourly rates have hit the £1000 Per Hour rate. Kit Chellel, *Top London Lawyers Now Cost More Than £1000 Per Hour*, BLOOMBERG (Feb. 4, 2016, 7:01 PM), <https://www.bloomberg.com/news/articles/2016-02-05/lawyers-earning-1-100-pounds-an-hour-put-u-k-justice-at-risk>.

<sup>67</sup> Capper, *supra* note 57, at 2161.

<sup>68</sup> See generally *In re Bernard*, 96 F.3d 1279, 1281 (9th Cir. 1996) (explaining how plaintiff's counsel gave notice of an *ex parte* hearing for a restraining order, which in turn prompted defendant to convert to cash a money market account and uncashed check).

<sup>69</sup> See *Bolton v. Travelers Ins. Co.*, 475 F.2d 176, 177 (5th Cir. 1973) (using "beat a hasty retreat" as a legal term, the court reasoned, "[n]onetheless, we must still beat a hasty retreat from ignorance to speculation and determine whether we think the Texas Supreme Court would hold, under its second rule announced in *Latham*, that a party who voluntarily places himself within the Court's jurisdiction shall be considered to have been 'joined.'").

<sup>70</sup> See JAMES CHARLES SMITH ET AL., *PROPERTY: CASES AND MATERIALS* 47 (4<sup>th</sup> ed. 2018) ("That possession is nine-tenths of the law is a truism hardly bearing repetition. Statements to this effect have existed almost as long as the common law itself."); FREDERICK POLLOCK & ROBERT SAMUEL WRIGHT, *AN ESSAY ON POSSESSION IN THE COMMON LAW* 5 (Cornell Univ. 2009) (1888) ("[I]n the eyes of medieval lawyers . . . Possession largely usurped not only the substance but the name of Property."); *Willcox v. Stroup*, 467 F.3d 409,

*Mareva* (Injunction) x Effort (x) > Offshore Haven - Time (-x) = \$\$\$<sup>71</sup>

A *Mareva* Injunction is "worldwide," which means that the injunction prohibits the disposition of assets even outside the UK jurisdiction.<sup>72</sup> If the assets are gone, or secreted, and the defendant is gone, or in hiding or inaccessible, the *Mareva* Injunction loses its allure.<sup>73</sup>

Asset protection, when joined by fee allocations, renders a judgment either a positive or negative asset. The math tells the same story. Start with the UVTA claim to recover the property that is the sole asset available to the creditor but held under the regime of an asset dictatorship. The underlying claim is \$1,200,800. Assume a bad ending for the plaintiff who recovered nothing. Assume that the plaintiff spent \$102,850 on his or her own fees.<sup>74</sup> Assume that the plaintiff paid the defendant's lawyer \$89,110 in fees under the UK's loser pays rule. The total fees out the door are 15.986% of the total face value of the judgment.<sup>75</sup> The total loss is -115.986% of the face amount of the judgment or a negative judgment of -\$1,392,759.88.<sup>76</sup> This is an

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412 (4th Cir. 2006) (explaining *Mareva* offers an injunction against disposition of assets (not a lien) but the coercive and punitive implications foster a de-facto lock-down of the assets, i.e. "possession," from viewpoint of the creditor).

<sup>71</sup> "x" is a multiplier of Effort. Effort includes the filing, drafting, preparation and successful prosecution of the *Mareva* Injunction, and, most important, the effective service and follow-through to insure that the assets are locked down, as opposed to already repatriated offshore. Effort includes the financial investment in prosecuting this pre-judgment remedy. The greater the effort, and timeliness, the more likely the success in prosecuting the *Mareva* Injunction that also includes contempt... The "(-x)" is negative time (i.e., excessive delay) which means that the debt must expeditiously transfer the assets offshore and, likewise in short order, abscond to jurisdiction unlikely to entertain domestication of the case and enforce the *Mareva* Injunction. For example, if the debtor is lackadaisical in shipping assets offshore and absconding, and during this delay (i.e., negative time), the creditor secures a *Mareva* Injunction and effectuates service of process, the creditor might have well secured payment of the debtor.

<sup>72</sup> See David Capper, *Worldwide Mareva Injunctions*, 54 MOD. L. REV. 329 (1991) (explaining if debtor fled to another jurisdiction, creditor is obligated to hire a local attorney, who would domesticate the action and attempt to enforce the *Mareva* Injunction, if possible, or at all, at a great expense and effort).

<sup>73</sup> A *Mareva* injunction is a court order, and not a lien on the assets. See, e.g., CAL. CIV. PROC. CODE § 488.500 (West 2018) (providing levy by way of attachment creates a lien on the assets).

<sup>74</sup> The usual ratio is that defense fees are about 75% of the plaintiff's fees. This is purely anecdotal.

<sup>75</sup> Presume costs are included, but under these facts, the costs can equal or exceed \$20,000.00. Loser pays all costs under UK and US law.

<sup>76</sup>  $(\$102,850 + 89,111) \div \$1,200,800 = .15986092604$  or 15.986% of face amount of the judgment and understood as the cash loss ratio. The negative calculation is also the addition of all fees to the face amount of the judgment. The percentage calculation means that the

example of the successful asset dictatorship. Notably, the plaintiff must pay her counsel and her opponent's fees as a result of UK "loser pays" rule, which renders the judgment toxic and the judgment debtor essentially immune from enforcement.<sup>77</sup> If the plaintiff recovered something, the plaintiff probably would not face a fee claim from the defendant, but the plaintiff would have had to expend the cash to prosecute the case that which are added as the new fees to the judgment. However, if the fees incurred by the plaintiff exceed the recovery, the "negative net recovery" renders the judgment toxic and fosters immunity from enforcement. The negative net recovery converts the judgment into a negative judgment. On the other hand, a judgment, whose enforcement accrues any recovery, above all expenses and fees, is a positive judgment. Thus, framing a civil judgment as a negative judgment and ascribing a number quantifies the asset dictatorship. Failure to breach the ramparts of the asset dictatorship that warehouses the vulnerable and liquid assets renders the judgment is empty and hence a negative judgment.

Offshore havens are not cheap. Here is probable model of costs given a \$1,000,000 cache.  $\sum \$1,000,000 \times (1-1\%)(A) \times (1-5\%)(B) \times (1-3\%)(C) \times (1-5\%)(D) = \$866,670.75$ .

(A)=Risk of capture by domicile creditor based on the variable of information, capital and ability to manage legal provisional remedies. The 1% does not mean that the debtor would pay 1%, but given decent planning, the risk that that the creditor would lock down funds which have already been secreted is very low. This percentage is variable given the creditor's legacy knowledge of the debtor's financial condition. If the creditor retains competent counsel, and the creditor is aware of existence of the funds and the identity of the bank, the creditor can attach or impound the funds. "A" is therefore 100% risk of loss because the funds never exit the US domicile.

(B)=Cost to form offshore entities, legal fees, accounting fees, bank fees, costs of travel, and risk of detection (Panama Papers). This number is market based and subject to expansion should the horde be disclosed. Offshore attorneys are expensive. Moving money from jurisdiction takes money, time and effort.

(C)=Cost of transactions, maintenance, accounting charges, bank charges, burden of rerouting money to make it accessible, formation of new entity, local counsel and secrecy risks. This number is market based, but the number includes the risk of loss when funds are parked overseas in the hands of unknown people.

(D)=Risk of discovery in domicile, contempt, disclosure in tax returns

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judgment creditor wagered 15.986% of the face amount of the judgment in the campaign to seek payment.

<sup>77</sup> Few creditors would finance enforcement if the enforcement lacks any prospect of recovery.

(discoverable), discovery in financial statements or bank records, risk of perjury in debtor's examination, bankruptcy fraud, money laundering, and marital meltdowns. This is a wildcard number. If the US creditor discovers the offshore cache, and succeeds in holding the debtor in coercive contempt, the debtor has to make a decision whether to sit in jail for a very long time, or repatriate the money. Should contempt succeed, this "D" is 100%.<sup>78</sup>

Money laundering offers a fabulous return on investment. Although there is an expense associated with moving the asset overseas, the return on moving such assets is better than losing that amount to a creditor in the United States. If the protected funds are \$1,000,000 and model net, after factoring all expenses and risks, is \$866,670.75, the shrinkage is \$133,329.25. This shrinkage is the sum total of the risk and expenses factor that burdens the \$1,000,000 cache. If the shrinkage represents an expense or "load factor," and the net return is \$866,670.75, the return on investment is 650.02% by converting an asset accessible to the creditor into an asset inaccessible to the creditor.<sup>79</sup> Money laundering (or any asset protection) succeeds when the asset disappears from the enforcement radar scope.<sup>80</sup>

### STATE SPONSORED ASSET PROTECTION IS THE ASSET DICTATORSHIP

Asset dictatorship hawks an alternative reality that enables a person to access their wealth unrestricted and untouched by any civil process, no matter the origin.<sup>81</sup> Asset dictatorships thrive in the offshore havens that

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<sup>78</sup>  $1 - 100\% = 0 \times \$ 866,670.75 = \$0$ .

<sup>79</sup> The bedrock principle is that all assets of a debtor are subject to enforcement. See CAL. CIV. PROC. CODE § 695.010(a) (West 2018). Hiding, concealing, transferring, or altering title to the assets (all transfers under the UVTA) compels the creditor to vacate the conveyance, which is another legal step, costly, and with some risk. CAL. CIV. CODE § 3439.07(a)-(c) (West 2018) (providing remedies available to creditors).

<sup>80</sup> See CIV. PROC. § 708.110(a) (allowing creditor to examine debtor under oath); see also *Jogani v. Jogani*, 141 Cal. App. 4th 158, 188 (2006), *modified on denial of reh'g* (July 27, 2006) (explaining debtors may still fail to cooperate as "the sanctity of the oath, by itself, does not ensure that all judgment debtors will be completely forthcoming during a judgment debtor examination.").

<sup>81</sup> See *In re Wyly*, 552 B.R. 338, 655–56 (Bankr. N.D. Tex. 2016) (involving 17 trusts, 40 subsidiary companies, Isle of Man trustees, army of lawyers, offshore accountants, domestic employees to handle the administration of the trusts); *Offshore Income and Filing Information for Taxpayers with Offshore Accounts* FS-2014-7, INTERNAL REVENUE SERVICE (June 2014), <https://www.irs.gov/newsroom/offshore-income-and-filing-information-for-taxpayers-with-offshore-accounts> ("In most cases, affected taxpayers need to fill out and attach Schedule B to their tax returns. Part III of Schedule B asks about the existence of foreign accounts and usually requires U.S. citizens to report the country in which each account is located.").

surround great wealth with a legal [and blue water] moat that keeps former spouses, civil judgments creditors, taxing agencies, malpractice judgment holders and very angry former business partners at a great distance, including separate time zones or even beyond the date line.<sup>82</sup> Offshore havens are the "legal space" that consists of the laws, judges, attorneys, "trustee protectors," accommodating banks, electronic and encrypted smart phone conduits, and lots of mailbox drops that reside in the offshore haven.<sup>83</sup> Whether a Caribbean island nation, Switzerland, Luxemburg, the Cook Islands, Panama, Isle of Man, South Pacific island nations, Cypress or other nation, these countries are often the physical spaces that host an Asset Dictatorship.<sup>84</sup>

An asset dictatorship thrives in an offshore jurisdiction that offers state sponsored asset protection that fends off creditors, taxing authorities and family law claimants by force of local law.<sup>85</sup> In particular, the offshore havens (i.e. their state sponsored contrivances shielding assets) is the space that warehouses the asset dictatorship because the offshore courts bar enforcement brought by a creditor as specifically mandated by law.<sup>86</sup> Asset dictatorships, nestled in the offshore situs, have their own laws, legislatures, and judges and, island situs protect by the blue water moat that preclude or deter any enforcement.<sup>87</sup>

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<sup>82</sup> See *In re Lawrence*, 227 B.R. 907 (Bankr. S.D. Fla. 1998) (involving debtor who transferred assets offshore, refused to repatriate, and faced coercive contempt and incarceration).

<sup>83</sup> See, e.g., *In re Tax Liabilities of John Does*, No. 0223032CIVSEITZ, 2002 WL 32881074, at \*1 (S.D. Fla. Oct. 31, 2002) ("Antigua, and Barbuda, the Bahamas and the Cayman Islands which countries have a history and reputation of being offshore tax havens and financial privacy jurisdictions reasonably suggest the purpose of such procedure is tax avoidance.").

<sup>84</sup> See *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1240 (9th Cir. 1999) ("The 'asset protection' aspect of these foreign trusts arises from the ability of people, such as the Andersons, to frustrate and impede the United States courts by moving their assets beyond those courts' jurisdictions").

<sup>85</sup> See *S.E.C. v. Brennan*, 230 F.3d 65, 82 n.1 (2d Cir. 2000) ("More generally, [an offshore asset protection trust] can be viewed as a trust, the assets of which are, as to a particular beneficiary, immune from the claims of that beneficiary's creditors.").

<sup>86</sup> See *Affordable Media*, 179 F.3d at 1240 ("Perhaps most importantly, situs courts typically ignore United States courts' demands to repatriate trust assets to the United States. A situs court will not enforce a United States order from a state court compelling the turnover of trust assets to a creditor that was defrauded under United States law, or assets that were placed into a self-settled spendthrift trust") (quoting James T. Lorenzetti, *The Offshore Trust: A Contemporary Asset Protection Scheme*, 102 COM. L.J. 138, 143-44 (1997)).

<sup>87</sup> *Affordable Media*, 179 F.3d at 1240 (supporting the idea that trusts shield assets (along with corporations and LLCs) the court explains "[s]o-called asset protection trusts are designed to shield wealth by moving it to a foreign jurisdiction that does not recognize U.S. judgments or other legal processes, such as asset freezes." (citation omitted)).

### THE QUEST TO UNMASK THE ASSET DICTATORSHIP

"You know, the rich are different from you and me," said F. Scott Fitzgerald. Hemingway replied, "Yes. They've got more money."<sup>88</sup> Absent insurance or adequate solvency, a defendant hears the sirens of asset protection when facing a world-class lawsuit and inevitable gargantuan judgment.<sup>89</sup> The tort bar worries that the uninsured defendant, or underinsured, will conceal or transfer assets that make the anticipated judgment difficult, expensive or even impossible to collect. Impossibility is a real risk because the defendant can transfer an asset to transferee who can sell the property to a bona fide purchaser that extinguishes the UVTA claims.<sup>90</sup>

The risk faced by the tort bar percolates in the real estate section of the *Los Angeles Times*. Southern California real estate has blossomed in value, post real estate crash.<sup>91</sup> In the light of the newly found wealth, the policy limits of the general comprehensive liability, E&O, and auto insurance or even the insurance umbrella policies, failed to track the newly booming and newly minted real estate equities. Million dollar homes on the west side of Los Angeles are common and likewise have \$300,000 policy limits for auto insurance.<sup>92</sup> This person is "exposed" in to the tune of \$1,500,000, less the

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<sup>88</sup> Deirdre N. McCloskey, *'You know, Ernest, the rich are different from you and me': a comment on Clark's A Farewell to Alms*, OXFORD ACADEMIC (Aug. 1, 2008), <https://doi.org/10.1017/S1361491608002189>.

<sup>89</sup> CAL. CIV. CODE § 3439 (West 2018) (Uniform Voidable Transactions Act) (providing statutory fraudulent conveyance law, but fraudulent conveyance includes prior fraudulent conveyance acts and common law).

<sup>90</sup> CIV. § 3439.08(a) (providing safe harbor for a purchaser or financier for value, without notice and in good faith).

<sup>91</sup> Jeff Collins, *California home prices on track to hit a record high in 2018, Realtor forecast says*, THE ORANGE COUNTY REGISTER (Oct. 12, 2017, 8:03 AM), <https://www.ocregister.com/2017/10/12/realtors-forecast-modest-gains-in-home-prices-sales-in-2018> ("California's five-year run of rising home prices is expected to last another three to five years, with median house prices on track to beat the record highs set during the housing bubble, a Realtor economist said Thursday, Oct. 12.").

<sup>92</sup> *How Much Auto Insurance Coverage Do I Need?*, NATIONAL GENERAL INSURANCE, [http://www.nationalgeneral.com/learning-center/insurance-basics/how\\_much\\_coverage.asp](http://www.nationalgeneral.com/learning-center/insurance-basics/how_much_coverage.asp) ("The amount of liability coverage you carry should be high enough to protect your assets in the event of an accident. Most experts recommend a limit of at least \$100,000/\$300,000, but that may not be enough. This is no place for cheap auto insurance. If you have a million-dollar house, you could lose it in a lawsuit if your insurance coverage is insufficient. You can get additional coverage with a Personal Umbrella or Personal Excess Liability policy. The greater the value of your assets, the more you stand to lose, so you need to buy liability insurance appropriate to the value of your assets.").

homestead, if any. Current insurance limits might fail to match the escalation of big dollar judgments in catastrophic personal injury suits. The tort bar worries that the verdict might deliver justice, but the defendant's assets are cloaked under the regime of the asset dictatorship given their vulnerability to active enforcement that includes discovery.<sup>93</sup> The challenge is to discover a fraudulent conveyance through means other than civil discovery given the bar against asset discovery, absent a court order arising from a punitive damage claim.<sup>94</sup> However, recent changes in enforcement law compel a party to hand over their tax returns that might reveal assets.<sup>95</sup> The UVTA, among other remedies, enables a creditor to set aside a fraudulent conveyance, enjoin a further disposition, attach the assets, or even appoint a receiver.<sup>96</sup> The UVTA only reaches a transfer, not the threat of a transfer.<sup>97</sup> Few defendants broadcast their intention to commit a fraudulent conveyance, but all attempt to conceal the transactions.<sup>98</sup>

Public record searches enable the plaintiff to discover the onrushing asset dictatorship. Public records are the nearly free warehouses of information including the federal and state version of the Freedom of Information Act(s).<sup>99</sup> While a defendant might transfer or liquidate the bank or stock accounts in

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<sup>93</sup> See Civ. § 3439.01(b) (providing a tort claim supports an UVTA claim); *Oiye v. Fox*, 211 Cal. App. 4th 1036, 1057–58 (2012) (“It is well settled in this state that the relationship of debtor and creditor arises in tort cases the moment the cause of action accrues . . . [O]ne having a claim for a tort is a creditor before the commencement of an action thereon, as well as after, and as such creditor, is, upon recovering judgment, entitled to avoid a fraudulent transfer antedating the commencement of his action.” (citations omitted)).

<sup>94</sup> See *Rawnsley v. Superior Court*, 183 Cal. App. 3d 86, 91 (1986) (limiting asset discovery pre-judgment and only on proof of viable punitive damage claim and might include tax return); see also *Weingarten v. Superior Court*, 102 Cal. App. 4th 268 (2002).

<sup>95</sup> See *Li v. Yan*, 247 Cal. App. 4th 56, 67-68 (2016) (requiring production of tax return in the face of fraudulent conveyances of property generating favorable tax consequences (i.e., deduction of interest and expense on the tax return)).

<sup>96</sup> See *Husky Int’l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1587 (2016) (“The principles of the Statute of 13 Elizabeth—and even some of its language—continue to be in wide use today. The modern law of fraudulent transfers had its origin in the Statute of 13 Elizabeth” (quoting *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 540 (1994)); see also Civ. § 3439.07(a)-(c) (providing for remedies). Compare *Cortez v. Vogt*, 52 Cal. App. 4th 917 (1997) (exemplifying common law fraudulent conveyance law offers a later statute of limitation), and *Macedo v. Bosio*, 86 Cal. App. 4th 1044 (2001), with *Hsieh v. Hsieh*, No. B250938, 2015 WL 914025, at \*1 (Cal. Ct. App. Mar. 2, 2015) (finding statute of limitations period runs three years from date of judgment if plaintiffs opts to first obtain judgment).

<sup>97</sup> See Civ. § 3439.05 (setting aside a transfer if the debtor was insolvent or rendered insolvent without reasonably equivalent consideration); see also Civ. § 3439.04(a) (providing ability to set aside transfers, for example, made with intent to hinder or delay).

<sup>98</sup> Civ. § 3439.04(b)(3) (providing concealment is a badge of fraud).

<sup>99</sup> 5 U.S.C. §552 (2018) (Freedom of Information Act (FOIA)).

secret, the transfer of capital assets leaves visible breadcrumbs.<sup>100</sup> The public records offer accurate and current information that identifies the asset dictatorship holding title to a capital asset and thereby might warrants UVTA relief. The public records might drive the UVTA litigation past the demurrer (or Federal Rule of Civil Procedure (FRCP) Rule 12(b)(6) motion), summary judgment and into the embrace of the jury.<sup>101</sup>

### THE ARCHEOLOGICAL DIG OF THE GRANTOR AND GRANTEE INDEX

Nearly all county recorders offer online access to the grantor/grantee index whereby the searcher could locate the instrument, if property indexed.<sup>102</sup> Absent a secret transaction, all parties to a real property transaction record in the offices of the county recorder a grand deed, quitclaim deed, deed of trust, easement, memorandum of lease, assignment of lease, or other recordable documents including a UCC filing.<sup>103</sup> The recorder grantor/grantee index is alphabetical and easy to search. The customer service department of most title companies provides copies of recorded documents for free or for a small dollar financial charge. Quitclaim and grant deeds contain a box in the upper right-hand corner that discloses payment of transfer taxes, which routinely would reveal the purchase price of the property.<sup>104</sup> A conveyance, without any consideration, bears the moniker of “gift,” “grantor(s) and grantee(s) are comprised of the same parties, and their proportional interest remains the same immediately following transfer,” or similar non-taxable exemption.<sup>105</sup>

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<sup>100</sup> *Power v. Barnhart*, 292 F.3d 781, 785 (D.C. Cir. 2002) (“Following the trail of agency pronouncements on this subject poses only slightly less difficulty than following the trail of bread crumbs left by Hansel and Gretel.”).

<sup>101</sup> *See generally* *Wisden v. Superior Court*, 124 Cal. App. 4th 750 (2004); *see also* *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (finding right to jury trial for Bankruptcy Code § 548 action).

<sup>102</sup> *See* *Lewis v. Superior Court*, 30 Cal. App. 4th 1850, 1866-67 (1994), *as modified on denial of reh'g* (Dec. 29, 1994) (“Thus, it is not sufficient merely to record the document. California has an “index system of recording,” and . . . *correct indexing is essential* to proper recordation. The reason for this rule is obvious. The courts have long recognized that constructive notice is a “fiction”, so if a recorded document is going to affect title there must at least be a way for interested parties to find it: “The California courts have consistently reasoned that the conclusive imputation of notice of recorded documents depends upon proper indexing because *a subsequent purchaser should be charged only with notice of those documents which are locatable by a search of the proper indexes.*” (citations omitted)).

<sup>103</sup> U.C.C. § 9-501 (AM. LAW INST. & UNIF. LAW CMM’N 2017) (providing filing requirements for fixtures attached to real property).

<sup>104</sup> *See* *Brown v. Cty. of Los Angeles*, 72 Cal. App. 4th 665, 668 (1999) (imposing county taxes in transfer of property if a bona fide sale for consideration).

<sup>105</sup> CAL. REV. & TAX CODE § 11925 (West 2018).

Any transfer without reasonably equivalent consideration of a capital asset, in the middle of a lawsuit, when the defendant is uninsured (or underinsured) bears many badges of fraud and that an asset dictatorship that has taken title to the asset.<sup>106</sup> Deeds of trusts, memorandum of long term leases, easements, and other conveyances to related parties, bear strong evidence of haste or irregularity, lack of any business justification, or are multiple in number, serial order, or in favor of multiple family members sets anyone's "hair on fire."<sup>107</sup> These conveyees include family members, LLC's, corporations, limited partnerships, and the trustees of "offshore trusts."

These recorded deeds or other instruments justify the UVTA action to vacate conveyance or justify an injunction or appoint a receiver.<sup>108</sup> Asset dictatorship emerges when these suspect recordings and conveyances track the progress of the lawsuit including the filing of suit, service of process, an unfavorable outcome of a motion, filing or granting of summary judgment, trial setting, trial, and the award of judgment or entry of judgment.<sup>109</sup>

The county recorder would also reflect the recorded notice of bulk sale and notice of intention to transfer a liquor license.<sup>110</sup> These transfers would set off every alarm bell because the tort claimant is required to file a claim with the escrow holder, lest forfeiting any claim to the proceeds.<sup>111</sup> If the transfer of the business or liquor license is clearly a fraudulent conveyance, the remedy of the creditor is to seek an injunction and appoint a receiver, even though the tort lawsuit is in progress.<sup>112</sup> Probable cause enables the newly minted plaintiff to defeat the likely motion to expunge the *lis pendens*, lock down the asset (i.e., real estate) pending the outcome of the case and

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<sup>106</sup> CAL. CIV. CODE § 3439.04(b)(1)-(11) (West 2018); *see also* CIV. § 3439.05 (providing transfers are voidable if made "without receiving a reasonably equivalent value in exchange for the transfer").

<sup>107</sup> CIV. § 3439.04(b) (providing 'actual intent' can be proven by considering many factors, like transfers made by debtor to insiders (i.e., additional badges of fraud)).

<sup>108</sup> *See* CIV. § 3439.07(a)-(b) (filing suit is a remedy available under the UVTA).

<sup>109</sup> Other suspicious filings appear in the record of the UCC filing Division of the secretary of state. A debtor can file the UCC's without the signature of the "creditor" that suggests a gaggle of creditors.

<sup>110</sup> *See* CAL. COM. CODE § 6105(b)(1) (West 2018) (requiring recording with the county recorder); *see also* CAL. BUS. & PROF. CODE §§ 24071-24074 (West 2018) (requiring recording with the county recorder); *Monastra v. Konica Bus. Machines, U.S.A., Inc.*, 43 Cal. App. 4th 1628 (1996) (holding bulk sales law are subject to fraudulent transfer laws).

<sup>111</sup> COM. § 6106.4; *see also* BUS. & PROF. § 24074.

<sup>112</sup> CIV. § 3439.07(a)(3)(A)-(C).

wrest the property from the asset dictatorship.<sup>113</sup> The conveyers are the usual cast of related characters which includes newly formed trusts, LLCs, corporations, limited partnerships and trustees of offshore trusts.

### **SECRETARY OF STATE ARCHIVES OFFER THE PATH LIT BY PUBLIC FILINGS**

The records of the secretary of state (or department of) are all public records and available partially online. Some states offer cross-referencing of officers, directors, agents and incorporators (Nevada, Florida and Oregon). Search services, or even the secretary of state, would make these records readily available for little or no fee or charge.

When confronting a large claim and ensuing the judgment and sans adequate insurance, the defendant contemplates transferring the business to a new entity, but it is owned and controlled by the same principals.<sup>114</sup> This transfer is absolute from one entity to another entity on paper. Nevada is a common place to incorporate such new entities as a corporation or LLC because of the state's alleged "pro privacy laws," which strongly suggests an asset dictatorship, provided that Nevada has no rational relationship with the defendant.<sup>115</sup>

Asset dictatorship scenarios include the defendant transferring assets to a limited partnership in which the defendant is the general partner of the newly minted limited partnership. This scheme is very common because the defendant argues he still owns and controls the assets, therefore, the defendant asserts that there is no injury to the creditor, even though the assets are held in a new legal entity, i.e., the limited partnership.<sup>116</sup> Notwithstanding these claims, a conveyance by a debtor with the intent to hinder, delay, and defraud does

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<sup>113</sup> CAL. CIV. PROC. CODE § 405.32 (West 2018) ("In proceedings under this chapter, the court shall order that the notice be expunged if the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim.").

<sup>114</sup> Sometimes the parties ignore the state's bulk sale act, even though required.

<sup>115</sup> See Patricia Cohen, *Need to Hide Some Income? You Don't Have to Go to Panama*, N.Y. TIMES (Apr. 27, 2016), <https://www.nytimes.com/2016/04/08/business/need-to-hide-some-income-you-dont-have-to-go-to-panama.html> ("In Wyoming, Nevada and Delaware, it's possible to create these shell corporations with virtually no questions asked," said Matthew Gardner, executive director of the Institute on Taxation and Economic Policy, a nonprofit research organization in Washington.").

<sup>116</sup> See e.g., *In re Schafer*, 294 B.R. 126 (N.D. Cal. 2003) (showing a debtor that has titular control over funds does not immunize transfers from UVTA as debtor still subject to UVTA when he still had possession of funds, but transferred funds to another account and transformed funds into cashier's checks).

not necessarily require the debtor to transfer absolute title of the property.<sup>117</sup>

Asset dictatorship is any transformation of title, possession, custody or form of the asset that hinders, delays, or defrauds a creditor.<sup>118</sup> For example, cashing out checks or clearing out bank accounts is a fraudulent conveyance because the creditor would accrue great difficulty in reaching the funds.<sup>119</sup> The newly formed entity, (i.e., a corporation, limited liability company or limited partnership), appears on the rolls of the secretary of state. The name of the defendant and the new entity share aligned names, businesses, addresses, officers and directors (or closely related), and the incorporator's current defense counsel or an asset protection attorney. These facts evidence asset dictatorship because the inescapable purpose of the new entity is warehousing the assets of the defendant in the name of the new entity that renders additional protection from direct enforcement.

The likelihood of an asset dictatorship looms even larger because the purported conveyance from the defendant to the new entity, other than a bona fide sale, serves no independent purpose other than to cloak the asset under the mantle of a new entity. Transferring assets from entity to entity may not even offer an independent tax benefit, estate planning, or an asset reorganization and presumptively fraudulent.<sup>120</sup> Transferring any asset to the trustee of an offshore trust is unlikely to serve a viable business benefit under these circumstances.<sup>121</sup> The transfer to the new entity, if actually a transfer at all, requires the new entity to initiate new credit accounts with its vendors. The

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<sup>117</sup> Civ. § 3439.01(m) ("Transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, license, and creation of a lien or other encumbrance.").

<sup>118</sup> Civ. § 3439.04(b) (providing fraud factors (i.e., badges of fraud)).

<sup>119</sup> *In re Bernard*, 96 F.3d 1279 (9th Cir. 1996) (holding debtor engaged in fraudulent transfer upon liquidating accounts to avoid creditors attempt to attach his accounts).

<sup>120</sup> See *In re Saba Enterprises, Inc.*, 421 B.R. 626, 643 (Bankr. S.D.N.Y. 2009) ("The 'badges of fraud' on which a trustee may rely include: (1) the lack or inadequacy of consideration; (2) the family, friendship or close associate relationship between the parties; (3) the retention of possession, benefit or use of the property in question; (4) *the financial condition of the party sought to be charged both before and after the transaction in question*; (5) *the existence or cumulative effect of a pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors*; (6) *the general chronology of the event and transactions under inquiry*; (7) *a questionable transfer not in the usual course of business*; and (8) *the secrecy, haste, or unusualness of the transaction.*" (emphasis added)).

<sup>121</sup> See generally *In re Saba Enterprises, Inc.*, 421 B.R. 626 (Bankr. S.D.N.Y. 2009); see also *Menick v. Goldy*, 131 Cal. App. 2d 542, 547 (1955) (applying Uniform Fraudulent Conveyance Act, predecessor to UVTA, the court held "[a] voluntary conveyance made by a debtor to a member of his family while insolvent or in contemplation of insolvency, is conclusively presumed to be fraudulent as to existing creditors.").

new entity would notify the landlord and obtain an assignment of the lease, seek a new sales tax and other tax and city and county permits, post new utility deposits, seek a transfer of the registered trademarks, patent or copyright, and changeover any franchise, among other business requirements.<sup>122</sup>

Formation records, domestic stock corporation records, and information from commercial services would identify the principals of the new entity. If these principals are the same as the principals of the current debtor, related by family, common bond, or otherwise, again, the inference arises of an asset dictatorship that warehouses the assets of the defendant.

### **FICTITIOUS BUSINESS NAMES FILINGS ARE THE HPANDORA'S BOX**

Facing the damage claim, or the judgment, the defendant takes shelter under the asset dictatorship by transforming itself to a new entity ("NewCo"). Wearing the mantle of the defendant's name draws in the revenues from the defendant's original customer base. NewCo can cloak itself with the defendant's name by filing and publishing a fictitious business name statement ("FBN").<sup>123</sup> These filings are online in most counties and subject to cross-indexing (i.e., the fictitious business name and "owner"). All counties will provide the paper copies of the FBN that identify the "owner" of the business doing business under the fictitious names.

The "hair on fire" moment arrives when plaintiff's counsel first discovers that the principals of the defendant formed a new LLC which itself is disconcerting, but not alarming. However, when plaintiff's counsel cycles the FBN portal of the county clerk that reveals that NewCo is going into business under the name of the defendant, counsel's hair is visible from the ISS. The inference is that the defendant, as an entity, ceased operating its business, whatever it might be, but that another entity, the conveyee, operates the same business. An asset dictatorship emerges as the principals of the

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<sup>122</sup> If a trademark, the United States Patent and Trademark Office ("USPTO") online records reflect the transfer of the patent and trademarks. *See Getting Started with Trade Marks*, UNITED STATES PATENT AND TRADEMARK OFFICE (last visited June 14, 2018); *Search trademark database*, UNITED STATES PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/trademarks-application-process/search-trademark-database> (last visited June 14, 2018); *Marshak v. Green*, 746 F.2d 927, 929 (2d Cir. 1984) ("A trade name or mark is merely a symbol of goodwill; it has no independent significance apart from the goodwill it symbolizes. A trademark only gives the right to prohibit the use of it so far as to protect the owner's goodwill; a trademark cannot be sold or assigned apart from to goodwill it symbolizes. There are no rights in a trademark apart from the business with which the mark has been associated; they are inseparable." (citations omitted)).

<sup>123</sup> CAL. BUS. & PROF. CODE § 17910 (West 2018) (requiring filing of fictitious business name with the county clerk a publication in a newspaper of general circulation).

defendant formed a new entity, during high stakes litigation, and now masquerade under the name of the defendant.

An asset dictatorship invites the defendant to transfer the trademark for its name to NewCo.<sup>124</sup> The records of the USPTO are available online, which reveals a transfer of the trademark(s) to the new entity, along with copies of the transfer documents. The USPTO and fictitious names statement reveal that NewCo is the owner of the defendant's business (and its assets) that support the conclusion that the asset dictatorship has taken possession of the defendant's assets.

What makes a new fictitious name statement near certain evidence of an asset dictatorship is that the filing of the fictitious name statement, and the parallel USPTO transfer, tracks the civil litigation and supports a UVTA lawsuit. The FBN filings and the USPTO records and broadcasts the existence of an asset dictatorship.

### **CHANGE OF LICENSES, PERMITS OR REGISTRATIONS LIFT THE VEIL OF THE SUCCESSOR**

Operating any business requires an entire raft of permits, licenses, and certificates (collectively "licenses"). The business owner (i.e., the defendant) must complete a detailed form, which is usually under penalty of perjury, prove up the existence of an operating entity, show a driver's license, and maybe post a bond.<sup>125</sup> These federal, state, regional, county and state, city licenses enable the defendant to operate the business. Counties and states require environmental, health and other permits to operate everything from restaurants, hotels, hospital, medical clinics and just about everything else. For example, a business cannot sell goods without a resale permit issued by the State Board of Equalization (i.e., sales tax).<sup>126</sup> A business cannot sell any alcoholic beverages without a liquor license issued by the Department of Alcoholic Beverage Control.<sup>127</sup> Nearly all cities and counties require that businesses take

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<sup>124</sup> These transfers include patents, domain names, copyrights, and operating license. The regulatory entities reflect these transfers by the online filings.

<sup>125</sup> See *City of Vallejo v. NCORP4, Inc.*, 15 Cal. App. 5th 1078, 1081–82 (2017) ("State law permitting medicinal marijuana use and distribution does not preempt "the authority of California cities and counties, under their traditional land use and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana, and to enforce such policies by nuisance actions.").

<sup>126</sup> BOE-400-SPA, Rev 4 Application for Seller's Permit (ABC-208-A "Individual Personal Affidavit") (providing pre-printed form that requires detailed personal disclosure of applicant to acquire sale tax permit and sworn affirmation of accuracy of statements).

<sup>127</sup> BUS. & PROF. § 23300 ("No person shall exercise the privilege or perform any act which a licensee may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division.").

out a "city business license," that which identifies the business and enables the government to collect tax and licensing revenues.<sup>128</sup> States agencies regulate medical, health care, contracting, financial and lending, real estate, and just about any other sophisticated professions, require that the business carry a license, comply with rules and regulations, post a surety bond, when required and absent compliance, forfeit any compensation for service rendered.<sup>129</sup>

All licenses are a matter of public records. The licenses identify the owner and operator of the business.<sup>130</sup> A sales tax permit identifies the owner because only the owner can operate the business, file sales tax returns, and pay the sales taxes.<sup>131</sup> Professional licenses are accurately given the requirement of education, training, a background check, bond, or a detailed test.

Plaintiff's counsel suspects an asset dictatorship when the counsel ascertains that the defendant closed out its SBE permit but someone is still operating the business. When the SBE permit is closed out, it means that the defendant shut down the business. Continuing with the Newco example above, an asset dictatorship is likely triggered when counsel discovers that NewCo opened up its own SBE permit under the same name, same location, same line of business, and the same principal that is contemporaneously filed upon the close of the defendant's SBE permit.<sup>132</sup>

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<sup>128</sup> See *Weekes v. City of Oakland*, 21 Cal. 3d 386, 392 (1978) ("In reviewing the applicable law we acknowledge, preliminarily, the long standing principle that the power to raise revenue for local purposes is not only appropriate but, indeed, absolutely vital for a municipality. Moreover, the power to tax for local purposes clearly is one of the privileges accorded chartered cities by the home rule provision of the California Constitution." (citations omitted)).

<sup>129</sup> *Hydrotech Sys., Ltd. v. Oasis Waterpark*, 52 Cal. 3d 988, 995 (1991) ("The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services. The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. [CAL. BUS. & PROF. CODE] Section 7031, advances this purpose by withholding judicial aid from those who seek compensation for unlicensed contract work." (citations omitted)).

<sup>130</sup> See *Associated Creditors' Agency v. Davis*, 13 Cal. 3d 374 (1975) (explaining liquor wholesaler could rely on liquor license as believing that the licensee was the owners of the business).

<sup>131</sup> State Board of Equalization (or "SBE").

<sup>132</sup> See *In re Twyne's Case*, 76 Eng. Rep. 809, 810–11 n. B (1601) (listing examples of "badges" or "marks" of fraud); see also *In re Bledsoe*, 569 F.3d 1106, 1114 (9th Cir. 2009); *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1587 (2016) ("[T]he statute of 13 Elizabeth ... has been universally adopted in America, as the basis of our jurisprudence on the same subject" (quoting *Boston Trading Group, Inc. v. Burnazos*, 835 F.2d 1504, 1505–06 (C.A. 1 1987))).

### EDGAR: THE SERENGETI OF DISCLOSURES

The Security and Exchange Commission (“SEC”) requires that the entities coming under its jurisdiction file its financial statements, and other disclosures required by law, updates and other SEC mandated filings.<sup>133</sup> If the defendant is a public entity of some type, the defendant is required to file 10k and 10q, among others that reveal the structure of the defendant, the defendant’s financial condition, disclose any reorganizations, asset sale agreements and transfers, and other significant events.<sup>134</sup> Should the defendant have sold its business to insiders, EDGAR requires disclosure of this information. EDGAR filings disclose the termination of the business, and "doubts about a going concern" comments from the auditor. EDGAR discloses the termination, sale, close or liquidation of the business. Similarly, the mandated filings posted on EDGAR disclose major refinances or loan transactions.<sup>135</sup> EDGAR might track the formation of a closely related entity, the transfer of the trade name and trademark registration, the consideration, if any, paid for the transfer, the insider affiliation with the transfer, and the date of the transfer in favor of the new entity.<sup>136</sup> The filing dates for the disclosures on EDGAR, along with the underlying events, routinely track the docket and offer another piece in the fraudulent conveyance puzzle. EDGAR is online, costs nothing, and will help to reveal an asset dictatorship.

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<sup>133</sup> *EDGAR Company Filings*, U.S. SECURITIES AND EXCHANGE COMMISSION, <https://www.sec.gov/edgar/searchedgar/companysearch.html> (last visited June 14, 2018) (providing online search function to locate all entities that file financial, SEC required disclosure and other documents, and their filings which can be downloaded); *see also Fast Answers*, U.S. SECURITIES AND EXCHANGE COMMISSION, <https://www.sec.gov/fast-answers/answersform8khtm.html> (last visited June 14, 2018) (“In addition to filing annual reports on Form 10-K and quarterly reports on Form 10-Q, public companies must report certain material corporate events on a more current basis. Form 8-K is the “current report” companies must file with the SEC to announce major events that shareholders should know about.”).

<sup>134</sup> *See generally* Securities Exchange Act of 1934, §§ 13, 15(d), 15 U.S.C. §§ 78m, 78o(d).

<sup>135</sup> *See generally* Securities Exchange Act of 1934, §§ 13-15, 15 U.S.C. §§ 78m, 78n, 78o (1976) (requiring periodic reports to Securities and Exchange Commission (SEC) and disclosure in proxy statements and tender offers); Securities Act of 1933, §§ 7, 10, Schedule A, 15 U.S.C. §§ 77g, 77j, 77aa (1976) (requiring disclosure in registration statements and stock offering prospectus). *See* Jeffrey D. Bauman, *Rule 10b-5 and the Corporation’s Affirmative Duty to Disclose*, 67 GEO. L.J. 935, n.1 (1979).

<sup>136</sup> *Ibid.*

**IS THE OFFSHORE HAVEN ANOTHER "IRON CURTAIN  
[THAT] HAS DESCENDED ACROSS THE CONTINENT "OF  
AMERICAN CIVIL JUSTICE?**

The tort universe of the Los Angeles County Superior Court offers mega-tort claims, contract claims with 10 zeroes, multi-million-dollar wage and hour cases, and epic class action suits that all might flop if the defendant is uninsured, underinsured, or insolvent. Absent the hope of a Hail Mary ending, the defendants have only two options: Chapter 11 bankruptcy or an asset dictatorship during the course of the case, or even after judgment, when no one is ostensibly watching.<sup>137</sup> No matter the option, when the judgment is handed down, asset dictatorships empty the judgment and sometimes the money emigrates to sunny Caribbean climates only to return on the horseback of the expensive *Lawrence* contempt.

Many articles culminate with the elixir that resolves the conundrum described in the article. Some elixirs are clarions calls for legislative change. Other elixirs are exhortations that the Supreme Court of a state or Supreme Court of the United States overturned precedential law. Existing precedent might be vulnerable but only if five out nine justices say so, who will be or is elected President, and which party controls the United States Senate. The fantasy elixirs are the changes in the law of offshore havens, and for the UK readers, another fantasy is the introduction of true contingency fees and abolishment of "loser pays."

This article does not offer any elixirs. The author believes these bodies of law are likely to remain the same for a significant amount of time. However, this article offers the mathematical tracks that enable a private party who is a judgment creditor, tax collector, or government that seeks to recover capital funds, evaluate collection efforts, and ways to predict whether such efforts will succeed or fail.

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<sup>137</sup> 11 U.S.C. § 101 et seq. (2018) ( Bankruptcy Code) (providing the debtor is still in charge of its assets, pending a Chapter 11 trustee, Chapter 7 trustee, or creditor's committee who takes control of the debtors' claims against the insiders).