RUTGERS LAW RECORD
The Digital Journal of Rutgers School of Law
lawrecord.com

Volume 45 2017-2018

CIVIL LITIGATION IN THE AGE OF PRESIDENT DONALD J. TRUMP

WELCOME TO THE NEW WORLD OF COMMERCE AMERICA AND LIABILITY AMERICA AND LIABILITY SUPPRESSION.

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The HARD RIGHT now controls two branches of government. After President Trump fills the empty judicial appointments, including the Supreme Court, the Hard Right will control all three branches of the US government. The Hard Right has a plan that disenfranchises individuals from access to the courts to seek redress for consumer, environmental, civil rights, discrimination, and mass tort claims like voter suppression, which heaved President Trump over the 2016 goal line. This article previews the plan that the Hard Right seeks to execute. They seek to introduce legislation, roll back executive orders (by the former President and governors) which inevitably favors the legacy institutions and solvent parties who are the targets of these claims, and able to litigate endlessly without financial pain. The Hard Rights seeks to do this by perusing their plan through a legislative campaign in Congress, orders by the Executive Branch statutes from state legislative houses, and

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from governors. "Times, they are a changing". The Hard Right seeks to flex its newly found legislative and executive muscle to suppress litigation. It seeks to impose liability on tort plaintiffs, victims of employment and gender discrimination, and consumer class actions litigants, among others. At the hands of the trial bar, The Hard Right seek to shift power to the hands of legacy institutions (and their brethren) who want to oust personal injury claims, class actions, consumer driven litigation, and other claims from the civil courts.

Reaching these goals collides with the improbability of rewriting 230 plus years of common law and statutes that are generally pro-consumer, pro-plaintiff, pro-jury, or pro-class action. However, improbable is not impossible when the Hard Right controls a majority of the statehouses and state legislatures. Rolling back settled expectations is a settled expectation when the Republicans have gained the super majority in many state houses. Wresting social justice out of the grasp of the courts will require only modest procedural and substantive changes. However, these changes are possible and profound, and may migrate into the federal courts at all levels because *Erie Railroad Co. v. Tompkins* imports state law in diversity cases.[2] The Hard Right's proposed changes not only dial down or even abolish consumer or tort friendly statutes, but also burden the civil litigation system with greater expense, risk, and uncertainty. These changes also render the collection of the ensuing judgments more problematic, expensive, uncertain, and, of course, far more difficult. Changing substantive law is difficult, but changing procedural and technical aspects of the law is accessible.

Before delving into the changes, the initial question is whether these changes are real threats to the civil process or just a Trump-driven, post-election fantasy. The answer is found in Obamacare, Medicare, Social Security, the federal regulatory scheme and other long-standing social

[2] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

programs, which benefit large swaths of American society at all economic levels.[3] The Hard Right substitutes its own dogma and threatens to replace these programs, even though these programs benefit tens of millions.[4] Whether encouraged by the Tea Party or far right media, disenfranchised blue-collar workers embrace the dogma of the Hard Right, which seeks to dismantle civil litigation. This agenda is a credible threat in the face of Republican controlled statehouse and governors' seats. This group of individuals is the "base" that elected Trump in the formally "blue states," given that Trump promised them "jobs, jobs, and jobs."

Loser Pays, Post Trump

Nothing suppresses litigation more than the risk of facing a million-dollar fee and cost award if the case is lost. The Loser Pays rule makes everyone hesitate, if not retreat, from any civil litigation when the consequences of losing are financial destruction, and the defendant has unlimited resources to litigate everyone into the ground. The American Rule is that the parties bear their own costs and attorney's fees.[5] "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."[6] On the other hand, English law imposes fees upon the loser.[7] The risk that the losing party must pay fees, deters a litigant from high-risk cases when the outcome is uncertain, suits where the state of the law is in flux, or when the defendant is certain to impose a bone crushing fee claim. The threat of an adverse risk might deter any litigant, if the litigation goes to "hell in a hand basket" and drags the litigant into the pits of financial

[3] Post Trump, President Trump and Republican Congress have gone on binge to repealing pro-consumer, pro-environment, climate change driven and related federal regulations including many coal related regulations.
[4] Only the vote of Senator John McCain saved Obamacare from extinction in rejecting the repeal of the personal mandate and employer requirement under Obamacare.
[5] Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 253 (2010) ("Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise.") (citations omitted).
[6] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).
[7] *Id.* ("At common law, costs were not allowed; but for centuries in England there has been statutory authorization to award costs, including attorneys' fees. Although the matter is in the discretion of the court, counsel fees are regularly allowed to the prevailing party.")

destruction. The Loser Pays rule encourages institutional litigants to stand their ground because if the litigant succeeds, the prevailing party may make an "example" out of the losing plaintiff and "teach them a lesson." Losing a case when facing a billion-dollar corporation, whose legal bills are in the millions, would bankrupt most litigants. Considering this threat, plaintiffs' attorneys would inform the tentative litigant that any suit is "bet the ranch" or "bet the company."

Given social media and the introduction of the word "viral" into the modern lexicon, the legacy institution could readily broadcast a "head on a pole" treatment of the losing party that would serve as a warning to all other potential litigants.[8] There is no doubt that, not only is this image disturbing, but also a pure victory for the legacy institution that, for an investment in one case, would rid itself of dozens or even hundreds of other cases. The Hard Right offers a great justification for trouncing the unlucky plaintiff: lawsuits divert all the capital to the costs of defense or insurance rather than job creation; thus, it is beneficial to deter all litigation.

For state law claims, the state legislature could insert the "Loser Pays" rule into all litigation legislation. Some state claims become part of federal litigation, and therefore, the federal court would apply the "Loser Pays" rule.[9] Congress likewise would not have to work too hard to either (a) convert all statutes that offer fees into "Loser Pays," or (b) eliminate any right to recover fees. Make no mistake that "Loser Pays," or excising any right of fee recovery, deters many litigants from pursuing litigation and likewise deters the attorneys whose clients might turn against them when facing a million-dollar judgment.

[8] "Do you feel lucky, Punk?" (Dirty Harry) would become the moniker of all litigation.
[9] *Erie Railroad Co.*, 304 U.S. at 78.

The "Loser Pays" rule deters litigation that smothers socially important, consumer, civil rights, and environmentally important cases. Like the dangling Sword of Damocles, Loser Pays suppresses any socially-driven litigation, except for the most courageous litigants.

Abolish Contingency Fees

Contingency fees fuel nearly all civil rights, employment, discrimination, ADA, FDCPA, and consumer claim litigation for two reasons. First, consumers, employees, or individuals of limited means, who are unable to pay hourly fees, bring claims for litigation that might span years. Second, most "consumer litigation," or civil rights, consumer, civil rights and related claims incorporate statutory fee clauses in favor of the plaintiff (or prevailing party). Moreover, contingency fees support all personal injury and tort claims, all class actions and antitrust, and virtually all other tort litigation. In response, the defendant is financially capable, retains the best and the brightest legal minds, is insured to the hilt, and is determined to win the case in order to deter others from motoring down the same path. Since contingency fees award the attorney a percentage of the recovery,[10] ridding the court of contingency fees would eject nearly all consumer, tort and mass tort and discrimination litigation from the court. Clearly, the indigent and working or middle class would forfeit any access to attorneys and the courts. Tort law, as litigated for the last 100 years, would languish save for aberrations of the system and well-heeled.

Legacy institutions, who are commonly defendants in tort claims, would rejoice in their near 100% immunity from civil liability arising from product liability, personal injury, or mass torts that befall the American consumer. With the demise of contingency fees, and rise of "Loser Pays," the

[10] Venegas v. Mitchell, 495 U.S. 82, 90 (1990) ("In sum, § 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer. What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the 'reasonable attorney's fee' that a defendant must pay pursuant to a court order. Section 1988 itself does not interfere with the enforceability of a contingent-fee contract.").

U.S. courts take on the mantle of U.K. courts that inevitably favor legacy institutions that have the financial wherewithal to defend any case and the right to recover attorney's fees from the plaintiff. Post-Trump, U.S. Courts would emerge resembling U.K. courts, which close their doors to tort and injury cases.

Oust anti-SLAPP (strategic lawsuit against public participation) from Judicial Filings.

When faced with a lawsuit based on conduct that is constitutionally protected (i.e., free speech, assembly, or petition the government etc.), the defendant can file a motion to dismiss the case.[11] The motion must prove that the conduct, as alleged in the lawsuit, arises from constitutionally protected activity.[12] Under that standard of proof, the plaintiff must prove that the claim is viable.[13] In California, and other states, civil litigation is a constitutionally protected right under anti-SLAPP.[14] Anti-SLAPP clears out malicious prosecution and abuse of process that may arise from ancillary claims during litigation.[15] If granted, the law obligates the plaintiff to pay fees to the defendant, even if the attorney represented the defendant on a contingency fee basis.[16]

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[11] CAL. CIV. PROC. CODE § 425.16 (West 2015) (offering a robust version of anti-SLAPP, like most other states, protecting nearly all constitutional activities, no matter the forum or venue).

[12] *Id.* § 425.16(b)(1) ("A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution regarding a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.").

[13] Soukup v. Law Offices of Herbert Hafif, 139 P.3d 30, 41 (Cal. 2006) (Section 425.16 posits ... a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity.... If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim." [Citation omitted] "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.") (citation omitted).

[14] Rusheen v. Cohen, 128 P.3d 713, 717–18 (Cal. 2006) ("A cause of action 'arising from' defendant's litigation activity may appropriately be the subject of a section 425.16 motion to strike.") (citation omitted).

[15] *See generally* Cal. Civ. Proc. Code §425.16 (West 2015).

[16] Ketchum v. Moses 17 P.3d 735, 746 n.4 (2001) ("When an attorney is compelled to receive fees, if at all, subject to a contingent risk, a contingent risk enhancement may be appropriate under Code of Civil Procedure section 425.16, subdivision (c); when an attorney is not so compelled, such an enhancement may pose difficult policy issues. We need not, and do not, decide the point here.").

Anti-SLAPP ousts non-meritorious civil litigation whose purpose is to deter others from accessing the courts. In 2016, "voter suppression" became an epidemic because of shortening hours, reducing the number of polling places, imposing "voter ID" rules, or curbing absentee ballots.[17] Eliminating pleadings and papers filed in the courts from the ambit of anti-SLAPP enables the [liable] parties to suppress viable claims by filing non-meritorious cross complaints that are incapable of early resolution. Upon confronting a cross-complaint that emerges from the pleading stage, the hapless cross-defendant cycles through protracted discovery, summary judgment motions, and, if unsuccessful, trial. The risk of non-meritorious actions or cross actions, financed by a solvent party, would deter parties from pursuing their claims if they lack the financial ability to defend the cross action.[18]

Abolish Bankruptcy Code 548, Authorize DAPTS, Restrict UVTA cases, Nationalize Post Judgment Rates of Interest, and Shorten the Life of Judgments.

This list emasculates civil and commercial judgments and claims. Upon concluding that a claim might result in an empty judgment, few litigants, and the attorneys who would have to finance the lawsuit, would abandon the claim in the first place or accept a low dollar settlement. Asset protection is the rage in seventeen states that have enacted Domestic Asset Protection Trusts ("DAPT") which statutorily immunize the assets of a judgment debtor from effective enforcement.[19] DAPTs are state sponsored asset protection.[20]

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[17] Veasey v. Abbott, 830 F.3d 216, 237 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017) ("For example, the record shows that Texas has a history of justifying voter suppression efforts such as the poll tax and literacy tests with the race-neutral reason of promoting ballot integrity.").

[18] Without contingency fees, the party would have to self-finance all litigation that renders civil access the province of the Commerce America and not Working America.

[19] Denise C. Brown, *Caribbean Asset Protection Trust: Here Comes the Sun: Dispelling the Dark Clouds of Controversy*, 7 U. MIAMI BUS. L. REV. 133, 134-35, 139 ("cost-effective settlement [strategy]").

[20] *See* KENNETH L. JORDAN, MORGAN STANLEY, DOMESTIC ASSET PROTECTION TRUSTS 2 (2012), http://www.morganstanleyfa.com/public/projectfiles/3368068a-3af2-4587-a8bb-aa88cef9c68c.pdf (defining DAPT as

Bankruptcy Code Section 548 enables the bankruptcy trustee to vacate fraudulent conveyances perpetrated by the debtor and recover assets for the benefit of the creditors.[21] Section 548 tracks the fraudulent conveyance law, which originated from the reign of Queen Elizabeth I and represented by the state's fraudulent conveyance statutes.[22] Exercising Section 548(a) would immunize billions in pre-petition transactions and repose fraudulently conveyed property in the hands of company insiders, surrogates, confederates, or family members.[23] No doubt, the creditors of the debtor would greatly suffer by depriving the trustee of the right to recover assets that if liquidated, would generate a recovery to the creditors. Of course, repealing Section 548 would be destructive, yet the push back is that the trustee can invoke the rights of the creditors under section 544(b) that places the trustee in the shoes of the state law fraudulent conveyance claims of the creditor if they exist.[24] Under the umbrella of the Hard Right "repeal and replacement" model, the Hard Right will argue that the fraudulently conveyed property reenters Commerce America, immune from the cost of litigation, trustee's fees, the claims of disgruntled creditors who "wrote off their debts," and, if untouched, fosters job creation, the holy Grail of the Hard Right. Replace Section

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"an irrevocable trust set up under the law of a state that specifically provides for the creation of a trust with asset-protection qualities"). *See also In re* Pollack, No. AP 15-1037-BAH, 2016 WL 270012, at *4, n.3 (Bankr. D.N.H. Jan. 20, 2016) (noting that "[t]he legislative history indicates that [11 U.S.C. §548(e)] was enacted to address self-settled or domestic asset protection trusts, which had been authorized by some states and allowed debtors to avoid paying creditors) (citation omitted).

[21] 11 U.S.C. § 548.

[22] *Id.*

[23] *See id.* Congress would have to excise Section 548 if part of DAPT wealth protection. Section 548 enables a trustee, or Debtor in possession, to recover a fraudulent conveyance. In many cases, the debtor engages in extensive "pre-bankruptcy planning" which entails transfers to family members, recently formed LLC's or corporations, or offshore or onshore trusts. The expectation of the debtor is the trustee, who lacks any capital in the estate to finance the Section 548(a) litigation, will decline to take any action.

[24] In re Pharmacy Distrib. Servs., Inc., 455 B.R. 817, 820 (Bankr. S.D. Fla. 2011)
("For purposes of section 544(b)(1), 'applicable law' is almost always state fraudulent conveyance law. Section 544(b)(1) empowers a trustee to take advantage of state fraudulent conveyance law for the benefit of the estate.").

548 with Section 544(b), which offers creditors, through a trustee, whatever UVTA claims were available under state law.

If the pre-determined goal is the expansion of capital that will create thousands of jobs exceeds all other imperatives, rewrite the law of contracts. If a party breaches a contract, the aggrieved party can sue for damages that are a legal premise that dates to 1791.[25] If on the other hand, the party who breached the contract redeployed the capital, tethered to the breached contract, in a more productive manner, the logic is that the breaching party benefited society at law, and the damages due the aggrieved party should be reduced accordingly. This outcome, unknown to English Common law or alien to U.S. law or a law school curriculum, in rational in the age of Trump.

Enforcement of judgments threatens legacy capital.[26] Immunizing assets keeps the asset in the hands of Commerce America and away from the grasps of the insane juries.[27] Sheltering Commerce America from Liability America would only require that each state adopt DAPTs, impose the burden of proof of clear and convincing in a fraudulent conveyance case, eliminate constructive fraudulent conveyance claims, and reduce the UVTA statute of limitation to two years. [28] Embracing asset protection that shelters the assets of heinous individuals from the consequences of their wrongs is lost in the chipper of the Hard Right whose sole interest is compost for job

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[25] Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 564 (1990). We turn now to the constitutional issue presented in this case-whether respondents are entitled to a jury trial. The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend VII. The right to a jury trial includes more than the common-law forms of action recognized in 1791.

[26] Kellsie J. Nienhuser, Note, *Developing Trust in the Self-Settled Spenthrift Trust,* 15 WYO. L. REV. 551, 563-64 (2015) ("The self-settled spendthrift trust is less of a means to avoid debts and more a mechanism to protect individuals from losing everything they have spent years earning.").

[27] Ronald J. Mann, *A Fresh Look at State Asset Protection Trust Statute,* 67 VAND. L. REV. 1741, 1749 (2014) [hereinafter Mann] ("Still, it is just as easy to construct a contrary, quasi-heroic perspective, in which the statutes [DAPT] are a populist reaction to the outrages of the broken American liability system—dominated by insane juries that hand out appalling verdicts for punitive damages, which leads to malpractice premia that make it all but impossible for doctors and lawyers to provide the services our communities so sorely need.").

[28] These are common terms of most DAPT statutes, i.e., burden of proof, elimination of constructive fraudulent conveyance, short statute of limitation, and in some states loser pays rules.

creation. Again, the reader might recoil from the words rising from the screen (or paper), but 17 states, and multiple offshore havens that empty out most civil judgments.[29]

Interest accruing on a credit card, car loan, house loan or commercial transaction compels the parties to pay on time and avoid a contract default, lest the interest gobbles up the payment and the principal amount of the debt never declines.[30] States set their own rate for post judgment interest that hover in the 10% range. Facing a doubling of the judgment over 10 years, and the rise of real properties equity post-2011, interest chews into the real property equity of the debtor. Given current bank rates of interest of about 1%, a judgment paying interest at 10% is an exception deal.[31] In the hand of the Hard Right, Congress can end this nightmare by imposing the federal rate of interest that is about 1%.[32]

DAPTs intimate that any enforcement chews up capital and life savings that augurs that enforcement gobbles down the lifelong savings of hardworking members of the community. In order to protect the "savings" of the hardworking but the hapless judgment debtor, DAPTs empty out the civil judgment by virtually immunizing all assets from any civil enforcement. A national enactment that limits the period of enforcement to five years for all judgments that are domesticated from state to state or registered from district to district would take DAPTs one step further.[33] The initial push back is whether to limit "Full Faith and Credit" to judgments of less than five years because each state may impose its own state of limitation on the enforcement of a judgment or debt.

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[29] Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 36 (1996) (Finding that "[a]bsent a mistake on the part of the doctor or his lawyers, collection in the Cook Islands would be impossible.").

[30] Most consumer and commercial transactions apply payments to interest first, principal second and imposes steep penalty interest in the event of a default.

[31] CAL. CIV. PROC. CODE § 683.150(c) (Finding that "In the case of a money judgment, the entry of renewal shall show the amount of the judgment as renewed. Except as provided in subdivisions (d) and (e), this amount is the amount required to satisfy the judgment on the date of the filing of the application for renewal and includes the fee for the filing of the application for renewal.")

[32] *See* 28 U.S.C. § 1961; Wickard v. Filburn, 317 U.S. 111, 129 (1942).

[33] *See* 28 U.S.C. § 1963; FED. R. CIV. P. 69(a)(1).

Getting Congress to enact this legislation might accrue resistance; however, 17 DAPTs states would hardily object given that timing out a judgment immunizes all assets from any enforcement and consists with the DAPT goal of protecting assets and deterring enforcement.**Bluster or Blueprint?**

Seventeen states adopted DAPTs that immunize the assets of the debtor from the active enforcement of a judgment and that deters the filing of the "worthless" lawsuits in the first place.[34] The DAPT bibliography makes no bones that DAPTs offer American state sponsored asset protection to the judgment debtor who otherwise might have considered the offshore havens as the repository for vulnerable assets.[35] The DAPTs regime opens the legislative door to the Hard Right whose legislative agenda likewise benefits Commerce America who will confront fewer lawsuits, lower insurance premiums, and smaller (or no) dollars paid in settlements or judgments. Imposing the loser pays rules, dumping contingency fees, shrinking anti-Slapp, that quashing fraudulent conveyance are the logical step down the line from DAPTs and not a quantum leap at all. These changes are the accessible and attractive options available to the Hard Right through its vice grip of the state houses and governorships and wear the chevron of "job creation" on its sleeve. The Hard Right cheers this outcome because Commerce America ostensibly invests in job creation and jettisons job killing civil liability foisted upon it by the trial attorneys. Does this sound reasonable, a rant or delusional? The Hard Right wanted to repeal Obamacare that insured 20 million Americans on Day One, this blueprint sits in the state legislative hoppers or in the big hands of President Trump.

Elections have Consequences

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[34] ELEVENTH ANNUAL ACTEC COMPARISON OF THE DOMESTIC ASSET PROTECTION TRUST STATUTES (David G. Shaftel ed., 2017), http://www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf.

[35] *See* Mann*, supra* note 27, at 1747 ("As was immediately obvious, these statutes were likely to make the practice of asset protection much easier, both because they would be cheaper to arrange and because of the greater ease (and comfort level) of transactions wholly situated in this country.").

Trump won the 2016 Presidency because he promised a long-lost livelihood to the blue-collar non-college educated voters. He offered his base Manna from Heaven. Yes, the jobs that fueled that livelihood are gone forever, vaporized in the maw of a better offshore supply chain, inexpensive automation, computerized and robot run factories, the revamping of energy including solar, wind, natural gas and coal, and low cost solar panels from China. This is no surprise and the easy part. What Trump really sold his bases was an excruciating rollback of pro-consumer, pro-environment, and downright progressive statutes, regulations and policies, triumphed by President Obama, which benefited consumers, minorities, undocumented aliens, the elderly, the disenfranchised, and the needy. Did the Obama driven legislative, regulatory, and social changes disentitle Trump's base? The answer is not really. The slide suffered by the Trump base came out of the woodworks the day that Jobs and Wozniak handed down the MAC, natural gas prices plummeted, America embraced offshore products.

The secret it that Trump won because the Hard Right wants to reset the clock to May 16, 1954, which the day before the Supreme Court handed down *Brown vs. Board of Education.* Trump's rollback of massive consumer and laudatory legislation is nothing less the descent of the Iron Curtain on America itself that divides the country, separating two aggrieved sides, and never to be joined because in their heart, the Hard Right embraces a separate country. To achieve Trump's goals of rollback to a different and more inequitable era, the agenda of Hard Right, embodied in Trump, is to suppress liability, which is the only remaining recourse available to the individual.