The Remedies Issues: Compensatory Damages, Specific Performance, Punitive Damages, Supersedeas Bonds, and Abstention

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I. Introduction

Pennzoil won the lawsuits, but Texaco won the public relations battle. The New York Times¹ and the Wall Street Journal² found themselves in rare agreement: both thought the judgment was an outrage. Richard Epstein captured the mood with a short article entitled The Pirates of Pennzoil.³ The focus of this reaction was the bottom line: $10.5 billion in damages, $7.5 billion of it compensatory.⁴ The legal and financial communities agreed on one point: no measure of damages that produced such a large verdict could possibly be correct.

This Article tries to show that the compensatory part of the verdict might indeed have been correct. The rule by which damages were measured was entirely conventional, and the calculation of damages under this rule was a question for the jury. Astonishing as the jury’s award may seem, there was no basis on which a reviewing court could set it aside. Any serious argument for remittitur would have required evidence that Texaco had not presented, and it would have required an argument fundamentally inconsistent with the argument Texaco actually made.

The Pennzoil litigation also raised a smorgasbord of other remedies issues. The case produced remedies opinions in the courts of Delaware, Texas, and the United States, dealing with preliminary injunction, specific performance, punitive damages, collection of judgments, and federal injunctions against state litigation. Each of these issues was affected by the pressures of the extraordinary sums at stake, and each illustrates something important about the law of remedies. If there is a unifying theme, it is that Texaco was ultimately held to the same rules as other litigants.

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II. Compensatory Damages

A. The Basic Calculation

It is sufficient for many purposes to describe Pennzoil’s contract as creating a right to acquire three-sevenths of Getty Oil for $3.4 billion. But the deal was more complex than a simple sale of shares, and for some purposes, the complexities matter. Pennzoil contracted with Getty Oil and its two largest shareholders: the Getty Museum (the Museum), and Gordon Getty as Trustee of the Sarah C. Getty Trust (the Trustee). Under this contract, Pennzoil would receive its shares from the Museum, from treasury shares, and from the public, but not from the Trustee. Pennzoil would buy up many of the publicly owned shares through a tender offer. Then Pennzoil and the Trustee would take the company private, forcing the remaining public shareholders to sell at the tender offer price. Getty would issue enough treasury shares to bring Pennzoil’s interest up to three-sevenths; the Trustee would own the remaining four-sevenths. These two shareholders would then attempt to restructure Getty to their mutual satisfaction. If they could not reach a mutual agreement, they would liquidate Getty, and Pennzoil would receive three-sevenths of its assets.

Pennzoil’s damage theory was very simple: three-sevenths of Getty’s assets included more than a billion barrels of proven oil reserves. Pennzoil’s average exploration and development cost for the previous five years was $10.87 per barrel. Based on that experience, it would cost $10.9 billion to replace a billion barrels of oil by drilling. The $10.9 billion replacement cost, less the $3.4 billion contract price, leaves the jury’s award of $7.5 billion in compensatory damages.

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6. The figures in the text have been rounded. More precisely, Pennzoil would have acquired through the contract 1.008 billion barrels of oil at an average cost of $3.40 per barrel. Pennzoil’s exploration cost of $10.87 per barrel, less the contract cost of $3.40, yields a net additional cost of $7.47 per barrel to Pennzoil. This additional cost per barrel, multiplied by 1.008 billion barrels, yields the compensatory verdict of $7.53 billion. Texaco, 729 S.W.2d at 860.
In some ways, Pennzoil's theory was conservative. First and foremost, it ignored the increasing difficulty of finding oil. Pennzoil's exploration costs were increasing at an annual rate of twenty percent.\(^7\) Second, Pennzoil's damage theory did not compensate for the effect of taxes on the judgment. Much of the judgment — Pennzoil said forty-eight percent — would be turned over to the federal government and thus could never be used to search for oil.\(^8\) Third, Pennzoil ignored the value of Getty's other assets: probable and possible oil reserves, unexplored claims, refineries, distribution network, trademarks and goodwill, and the cable television subsidiary.\(^9\) In light of these three omissions, $7.5 billion appears to fall far short of restoring Pennzoil to the position it would have occupied if the contract had been performed. There was no suggestion that Getty owed some massive liability that offset the value of its oil reserves.

Texaco presented no evidence on damages!\(^10\) However, on appeal and in the federal courts, Texaco argued that the cost of oil exploration was irrelevant to a contract for the sale of corporate stock. Texaco assessed Pennzoil's damages as the difference between the contract price and the market price of the stock: at most, the difference between Pennzoil's contract price and Texaco's higher offer. The trial judge in the Southern District of New York estimated this difference at $800 million.\(^11\)

To put Texaco's argument in its strongest form, lost shares of stock can be replaced only by other shares of stock. Oil is a wholly different commodity, bought and sold in a different market, and exploring the world for new oil is not in any sense a way to replace lost shares of stock. This argument is true as far as it goes, and it has persuaded a great many able lawyers. It has the

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7. See Brief of Appellee Pennzoil Company at 261, in Texaco, 729 S.W.2d 768.
8. Pennzoil Brief at 260.
10. Texaco, 729 S.W.2d at 860.
virtue of producing a smaller verdict, and it seems to fit the basic rule of contract/market damages.\textsuperscript{12}

But this argument carefully avoids the only serious damages question in the case. The replacement cost of the oil was not a measure of contract/market damages; it was a measure of consequential damages. Contract/market damages could be measured only in the stock market, as Texaco claimed. But it is equally basic that Pennzoil was entitled to all consequential damages that were contemplated by the parties at the time they made the contract.

This is the rule of \textit{Hadley v. Baxendale},\textsuperscript{13} enshrined in the \textit{Restatement (Second) of Contracts},\textsuperscript{14} codified in uniform law,\textsuperscript{15} and taught in every first-year contracts course.\textsuperscript{16} Thus, the threshold question was this: When Pennzoil and Getty made their contract, did they contemplate that Pennzoil wanted to get control of Getty's oil reserves? Of course they did. As in most oil company acquisitions, the oil reserves were the whole point of the contract.\textsuperscript{17} Compared to the oil reserves, the rest of the company was literally not worth suing over.

Pennzoil did not offer $3.4 billion to become the largest minority shareholder in closely held Getty, subject to the whims of mercurial Gordon Getty as Trustee for the majority shares. Every competent person on both sides of the transaction would have known this even if it had never been mentioned. But in fact it was mentioned. Pennzoil's desire for direct control of Getty's assets was written into the contract. If Getty could not be restructured to Pennzoil's satisfaction, Getty would be liquidated and

\textsuperscript{12} See, \textit{e.g.}, U.C.C. \textsection 2-713 (1987) (damages for failure to deliver goods is difference between contract price and market price, plus incidental and consequential damages).

\textsuperscript{13} 156 Eng. Rep. 145 (1854).

\textsuperscript{14} \textit{Restatement (Second) of Contracts} \textsections 347(b), 351 (1979).

\textsuperscript{15} U.C.C. \textsection 2-715 (1987). This statutory provision applies only to contracts for the sale of goods. The common-law doctrine applied to the contract between Getty and Pennzoil.

\textsuperscript{16} See, \textit{e.g.}, \textsc{R. Hamilton, A. Rau, \& R. Weintraub, Cases and Materials on Contracts} 42-52 (1984).

\textsuperscript{17} See \textit{Coffee, Shareholders Versus Managers: The Strain in the Corporate Web}, 85 Mich. L. Rev. 1, 7 n.15 (1986) (noting that oil company mergers were driven by a desire to acquire oil reserves, that some acquirers had excess refining capacity even before the acquisition, and that acquisitions were often followed by layoffs).
Pennzoil would get three-sevenths of its assets, including three-sevenths of its oil reserves. The parties’ focus on the oil reserves was established at trial. As the Texas Court of Appeals found, “There was ample evidence that the reason Pennzoil (and later, Texaco) wanted to buy Getty was to acquire control of Getty’s reserves, and not for any anticipated profit from the later sale of Getty stock.”

We can argue about how to value the oil, but we cannot just ignore it. To measure damages in a way that ignores the oil is to ignore the only reason for the contract’s existence—to ignore the economic reality of the transaction. Pennzoil was entitled to the benefit of its bargain, and its bargain entitled it to control a billion barrels of oil. To measure damages without considering the oil would violate the most basic rule of remedies: the remedy should try to restore the plaintiff to the position it would have occupied if the wrong had not occurred. If the contract had been performed, Pennzoil would have received three-sevenths of a dismembered Getty, including a billion barrels of oil, or, less likely, it would have gotten an equally satisfactory restructuring of Getty.

The case highlights the relationship between consequential damages and expectancy damages. If a contract is performed, the promisee receives what was promised and suffers no consequential damages. Thus, one of the benefits of any bargain is the avoidance of consequential damages, and consequential damages are thus one element of the expectancy. In *Pennzoil*, the value of the oil reserves was formally consequential damages, because the oil was lost as a consequence of failure to deliver the stock. But this item of consequential damages was the whole reason for the contract—the very heart of the bargain.

The Texas Court of Appeals affirmed the award of consequential damages, in part because Texaco was held liable for tortious interference with contract instead of breach of contract. The court observed that damage rules are more generous to plaintiffs in tort than in contract. The reasons for this difference between tort and contract are hard to justify, and especially so here, where

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19. *Id.*
20. *Id.* at 859.
the tort damages were simply the loss of a contract. But the tort theory was unnecessary to the measure of damages. Pennzoil’s desire to gain control of the oil reserves easily satisfied the contract test for foreseeability: actual contemplation of the parties at the time of contracting.

Basic damage rules required the court to take account of Getty’s oil reserves. It was less clear that exploration and development costs were the best measure. The standard measure of damages for lost tangible property is the lower of actual value or replacement cost.\(^\text{21}\) In theory Pennzoil could replace the oil by purchase or by exploration. Once again, Pennzoil would be entitled to the smaller of the two numbers.

Pennzoil’s witnesses said the oil could not be replaced by purchase,\(^\text{22}\) and Texaco did not identify any other company willing to sell a billion barrels of proven oil reserves. For an oil company to sell its oil reserves is to sell its reason for existence; it is not done if there is any alternative. Nor did Texaco identify any other oil company with a billion barrels of oil that was vulnerable to a takeover by Pennzoil. Of course, more companies would be vulnerable to Pennzoil once Pennzoil collected a multi-billion dollar judgment. But the $3 billion settlement has so far not enabled Pennzoil to take over another major oil company. Pennzoil has acquired a stake in Chevron, but proclaims its peaceful intentions and its financial inability to buy the company.\(^\text{23}\) The jury could hardly be required to speculate on the cost of a hostile takeover without evidence that such a takeover was possible. On the evidence it heard, the jury was justified in finding that the only way to replace such a large quantity of oil was to find it, and that $10.9 billion was a reasonable estimate of the cost of finding it.\(^\text{24}\)

It was also cheaper for Pennzoil to replace the oil than to do without. At the time of the contract, oil sold for $30 a barrel, far more than Pennzoil’s exploration and development costs plus a reasonable estimate of production costs. One of the ironies of the

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\(^{21}\) O’Brien Bros., Inc. v. The Helen B. Moran, 160 F.2d 502, 505 (2d Cir. 1947).

\(^{22}\) Pennzoil Brief, supra note 7, at 266 n.170 (citing Record at 10,625).

\(^{23}\) See Solomon, Pennzoil Mulled Acquiring Stake in BP or Mobil, Wall St. J., Dec. 18, 1989, at 3, col. 4; see also Solomon, Pennzoil to Boost Stake in Chevron To Almost 10%, Wall St. J., July 17, 1990, at C6, col. 4.

\(^{24}\) See supra note 6.
case is that shortly after the verdict, the price of oil collapsed. That loss would have fallen on Pennzoil if its deal had been completed; the loss now falls on Texaco. However, the decline in price did not affect the measure of damages, which were based on Pennzoil’s replacement cost rather than on actual value. Oil prices had recovered to about $18 per barrel before the Iraqi invasion of Kuwait, and have fluctuated since at much higher levels. Even $18 is well above the $10.87 per barrel used to calculate Pennzoil’s damages. Moreover, the price collapse would have been ignored even if damages had been based on value, because damages would have been fixed on the day of breach.\(^{25}\) That rule would have conferred an undeserved windfall on Pennzoil if it had been applied, but it was not.

Pennzoil also introduced an alternate measure of damages. Pennzoil’s experts presented a cash-flow analysis based on forty years of production and sale of Getty’s reserves, discounted to present value at twelve percent. This analysis produced a damage estimate of $6.68 billion\(^{26}\)—present value of $10.08 billion less the $3.4 billion contract price. This was smaller than replacement cost but in the same range. The jury probably should have picked the smaller number, but Texaco did not argue that. The $10.08 billion figure is a measure of the value of the oil. The reason this figure is so much smaller than the $30- or $18-billion value based on price per barrel is that the price per barrel cannot be immediately realized. It is not expensive to extract oil from the ground, but it takes a long time.

If Texaco had offered its own testimony on the valuation and replacement cost of the oil, it might have proved a smaller number, or it might have raised other questions about the data and assumptions in Pennzoil’s evidence. Instead, Texaco staked its damage case on the argument that the oil was irrelevant. Because the oil was in fact central to the damages issue, the court of appeals rejected the argument.\(^{27}\) Having lost on an all-or-nothing argument, Texaco lost all.


\(^{26}\) Pennzoil Brief, supra note 7, at 264 (citing Plaintiff’s Exhibit 437).

B. The Source of Pennzoil’s Expectancy

Some critics find the verdict impossibly disproportionate to the original transaction. They cannot believe that Pennzoil expected a profit of $7.5 billion on a $3.4 billion deal. The arms length prices negotiated between Getty and Pennzoil, and between Getty and Texaco, must be approximately right. Pennzoil could not have gotten the bargain it claimed.

Buying $10.9 billion worth of oil for $3.4 billion does indeed seem too good to be true. But there were parallels in other large takeovers. Throughout the merger and acquisition boom, the value of assets owned by natural resource companies far exceeded the value of their stock. It was commonly said that the cheapest place to drill for oil was the New York Stock Exchange. The phenomenon is apparently not confined to natural resource companies; there is considerable evidence of large and widespread discrepancies between the value of corporate assets and the value of corporate stock.28

Indeed, Texaco vigorously relied on the same anomaly in its own valuation. The value of all Texaco stock before the Pennzoil verdict was $9.5 billion.29 Yet Texaco argued, and the Second Circuit found there was no serious dispute, that the net worth of Texaco’s assets was at least $22 billion.30 Texaco correctly insisted that this $22 billion net worth was real economic value; this valuation was critical to its claim that Pennzoil’s judgment was safely collectible even without a bond pending appeal.31 But if oil company asset valuations were real for purposes of collecting Pennzoil’s judgment, they were equally real for purposes of measuring Pennzoil’s damages. If Pennzoil could have realized $11 billion in cash out of Texaco’s oil reserves, as Texaco

31. Id.
claimed, then Pennzoil could have realized comparable sums out of Getty’s oil reserves.

Many commentators puzzled over the discrepant valuations of stock and assets, especially economists who believe that markets are always efficient. Of course, some of these same economists argue that the merger and acquisition market should be left unregulated because hostile takeovers unlock hidden values. I share the puzzlement, but I do not share the faith that markets are efficient no matter what the evidence shows.

There was little dispute about either the stock valuation or the asset valuations. Both the stock price and the price per barrel were known. The number of barrels was not disputed. The astonishing discrepancy between the two valuations is certainly cause for continued investigation. But a large and unexplainable discrepancy is not cause for rejecting hard numbers derived from market prices on the ground that they do not fit a theory. Texaco made no effort to reconcile the two valuations. It simply insisted that the value of the oil was irrelevant and that the stock market price could not be far wrong.

Relying on the theoretical efficiency of the stock market in the face of Pennzoil’s evidence was like insisting that bumblebees are too heavy to fly. I do not know how bumblebees fly, but I have seen them do it and I believe what I see. Similarly, I do not know why the stock market prices of oil companies reflected less than half the value of their assets. But the asset values were introduced into evidence, and I would not set aside a jury verdict on the ground that the evidence presented a challenge to economic theory.

Even so, it would be comforting to have some idea of the reason for the discrepant valuations. The key to Pennzoil and other oil company takeovers appears to be that oil and stock trade in separate markets. The difference between the value of the oil and the value of the stock is a potential profit, available to one who can arbitrage between the two markets. These markets can sustain very different prices because very few buyers can arbitrage between them. To buy oil by buying stock, one must buy control

32. Id.
33. See Coffee, supra note 17, at 3.
of the company. Hardly any investors can do that. The expected return to the buyer of a hundred shares, or even a million shares, depends largely on swings in the stock market, dividend policies, and other decisions by the company’s management. The individual shareholder can never claim his share of the oil, and his return on investment may have little to do with the value of oil reserves. In the *Pennzoil* trial, “[t]here was evidence that such fluctuations in market price [of shares] are primarily of interest to holders of small, minority share positions.”

A buyer like *Pennzoil* could trade in both markets, buying enough stock to control the company and thus the oil. Such a buyer could offer an enormous premium to stockholders who traded only in the stock market, and still receive an enormous bargain in terms of the oil market. Getty was trading at $72 per share before *Pennzoil* offered $112.50 and *Texaco* offered $128. Thus, *Texaco* offered a seventy-eight percent premium over the previous stock market price, and it expected profits large enough to justify an enormous litigation risk.

*Texaco* did not expect a stock market profit after buying at $128 per share. Rather, it paid so much for the stock because the oil was worth even more. To learn how much more, we must look to the oil market. There is no serious dispute that three-sevenths of Getty included a billion barrels of oil, that crude oil was selling for $30 per barrel, and that production costs account for only a small part of the difference between oil market valuations and stock market valuations. That is, there is no dispute that for $3.4 billion *Pennzoil* bought assets worth $30 billion. It would take a long time to exploit those assets, so *Pennzoil* was not entitled to $30 billion immediately. It was entitled to a verdict that would enable it to recoup that $30 billion over the life of the Getty oil fields.

This explanation can account for the discrepancy between the stock market and oil market prices in the absence of arbitrage. But it leaves a question about the price to an arbitrage buyer. Once Getty was “in play”—for sale to those few buyers who could

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arbitrage between markets—why was the stock price not bid up to parity with the oil price? Why did no one bid $10 billion for Pennzoil’s three-sevenths share of Getty?

I do not have a full answer to that question either, but again there are some promising hypotheses. First, there were few potential buyers, each of whom could finance only a few acquisitions. Once a target was in play, all potential buyers acted under severe time constraints. Both Pennzoil and Texaco sought to lock up a deal quickly to preclude further bids. There was little time for a fully competitive auction to develop.

Second, and perhaps more important, there is a problem of wealth effects and a resulting difference between bid prices and asking prices.³⁶ Bid prices are limited by the buyer’s capacity to pay. Even at the height of the junk bond market, there must have been some limit on the amount a company could borrow for a major acquisition. Certainly there were limits in January 1984, when Pennzoil signed its contract to acquire a share of Getty. A buyer could pay the interest on its debt only if the acquisition produced sufficient cash flow promptly and continuously. If cash flow was uneven, as it might be from an undeveloped asset deep underground, and if the buyer was unwilling to resell the asset, a forty-year present-value calculation might be of only marginal relevance to immediate debt service. Defaults in the junk bond market suggest that many of these acquisitions occurred at prices near the limit of capacity to service debt. It may be that prices in the arbitrage market had a crude equilibrium determined more by the potential buyers’ capacity to service debt than by the value of the assets.

The owner of such an undeveloped asset would not voluntarily sell it for less than its value, but buyers would not pay more than the amount of debt they could service. If bid and asking prices are far apart, we should expect few voluntary transactions. That

³⁶. “Wealth effects” is an economic label for a common sense idea: how much you are willing to pay for a good depends in part on the amount of your total wealth. Because of wealth effects, and for other reasons, the price at which you would sell something you own is often higher than the price you would pay to acquire it. For analysis and debate on these concepts, see Kennedy, Cost-Benefit Analysis of Entitlement Programs: A Critique, 33 Stan. L. Rev. 387, 401-21 (1981); Markovits, Duncan’s Do Nots: Cost-Benefit Analysis and the Determination of Legal Entitlements, 36 Stan. L. Rev. 1169, 1178-84 (1984).
expectation is consistent with the observation that most of the major acquisitions occurred over the vigorous resistance of incumbent management. Potential buyers dealt directly with the dispersed stockholders or threatened to do so. In Getty's case, discord and deadlock among the insiders forced the company to sell.

Once Pennzoil had a contractual entitlement to three-sevenths of Getty, Pennzoil was entitled to retain its acquisition unless it got its asking price. Thus, the measure of Pennzoil's damages is what it would charge to sell, not what Texaco would offer to pay. The court could not assume that Pennzoil would voluntarily sell for less than the present value of the oil. Thus, the measure of damages was the value of the oil, not the smaller amount at which arbitrage buyers sometimes acquired companies against the target's will.

C. The Second-Takeover Argument

But what if Pennzoil itself were vulnerable to a hostile takeover? Perhaps Pennzoil would never have received the oil market price for its billion barrels of oil. Perhaps someone bigger and tougher would have acquired Pennzoil at the arbitrage price. If so, a conceivable measure of damages would be the amount Getty would have added to Pennzoil's takeover value. This might have been Texaco's best argument. For convenient reference, I will call it the second-takeover argument.

The possibility of a hostile takeover against Pennzoil, like the possibility that Pennzoil could have replaced Getty by acquiring another company, is not an outcome on which the jury could speculate without evidence. It is not inevitably true as a matter of law that Pennzoil would have lost its windfall to a hostile takeover. Presumably, investment bankers could have testified about Pennzoil's vulnerability and its capacity for self-defense. Whatever its strengths and weaknesses, the second-takeover argument was for the jury, and Texaco waived the argument.

Indeed, the second-takeover argument is almost a mirror image of Texaco's actual argument on appeal. Texaco argued that Pennzoil's damage inquiry went too far; the second-takeover argument is that Pennzoil's damage inquiry did not go far enough. Texaco argued that damages should have been based exclusively on the price of Getty's stock, ignoring Pennzoil's acquisition of
the oil. The second-takeover argument is that the jury should have considered the stock, the acquisition of the oil, and the risk of losing the oil. Committed to its theory that the oil was irrelevant, Texaco never got this far.

Suppose Texaco had made the second-takeover argument. Should the jury have been allowed to consider the possibility of a hostile takeover of Pennzoil? The court might well have said that the jury could not speculate about a subsequent transaction, especially an unplanned and involuntary transaction with an unknown fourth party. A hostile takeover of Pennzoil probably was not in contemplation of the parties when Pennzoil and Getty made their contract. Courts do not compensate the lost profits from an unusually profitable resale; why should they reduce compensation for the risk of an unusually unprofitable resale? If Texaco had stolen uninsured property from a warehouse on Monday, and the warehouse burned to the ground on Tuesday, Texaco would not be permitted to defend on the ground that the property would have been lost anyway. To think in these terms at all requires an unusual form of corporate veil piercing, treating the ultimate lower price to Pennzoil's stockholders as damages to Pennzoil. Thus, a court could have offered many reasons for excluding the second-takeover argument.

But judicial reluctance to trace out the continuing consequences of a wrong is troubling, especially where huge sums are at stake. Pennzoil based its damage theory on the economic reality of the transaction. If the economic reality was that Pennzoil could never have realized its enormous gain, that fact should have been relevant. If credible investment bankers were prepared to testify that Pennzoil with three-sevenths of Getty would have been an attractive and vulnerable takeover target, the evidence should not have been excluded on grounds of being too remote or too speculative.

The second-takeover argument raises another issue that is even more difficult. But for Texaco's tort, Pennzoil would have acquired a billion barrels of oil. Texaco tortiously took that oil away. The premise of the second-takeover argument is that someone else—even Texaco itself—might have taken the oil away.

37. See Restatement (Second) of Contracts § 351 comment b & illustration 6 (1979).
without committing a tort. Does the possibility that the same harm might have been inflicted lawfully justify a refusal to compensate when the harm was in fact inflicted unlawfully? Justice Frankfurter once suggested an affirmative answer to this question, but he was dissenting, and the majority did not reach the issue.\(^\text{38}\)

Any general answer to this question would require a separate article. But my tentative views are as follows: I would not let the jury consider whether Texaco itself might have taken over Pennzoil and thus inflicted the same damage by lawful means. Texaco did not use lawful means, and its choice to tortiously interfere with Pennzoil’s contract suggests that it viewed a later tender offer as less likely to succeed. Perhaps Texaco did not view a later tender offer for Pennzoil as a possibility at all.

More generally, we can never be sure that a defendant could have inflicted the same harm by lawful means. Perhaps Pennzoil could have fought off a tender offer even though it could not prevent Texaco from dealing with Getty. If we permit wrongdoers to defend on the ground that they could have achieved the same ends lawfully, we reduce the incentive to use lawful means in the first place, and we shift from wrongdoers to victims the risk of uncertainty about whether lawful means would have succeeded. Thus, damages should not have been measured on the assumption that Texaco might have taken over Pennzoil.

Similar arguments apply to the risk that someone other than Texaco might have acquired Pennzoil, but with less force. If wrongdoers foresee that they can defend on the ground that someone else might have inflicted the same harm by lawful means, their incentives to use lawful means are reduced and some of the risk of uncertainty about the success of lawful means is shifted to victims. But these effects are smaller than they would be if the wrongdoer could rely on its own access to lawful means, because the wrongdoer must show that someone else had the motive and means to inflict the harm lawfully. In some cases, this difference would be dispositive, because no one else would have both motive and means. This difference might have been insignificant in

\(^{38}\) See Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 266 (1946) (Frankfurter, J., dissenting). For an analysis of Justice Frankfurter’s argument in these terms, see D. Laycock, Modern American Remedies 176 (1985).
Pennzoil: if Pennzoil with a billion barrels of oil would have been vulnerable to a takeover, then Texaco was not the only potential acquirer.

The shift of litigation risk seems especially unfair when it is unilaterally imposed by the wrongdoer. It is especially troubling to permit Texaco to speculate about the consequences if it had acted lawfully, because if Texaco had acted lawfully, no one would have to speculate. But no matter what Texaco did, Pennzoil would have been exposed to the risk of someone else attempting a hostile takeover. The risk that Pennzoil might have lost its gain lawfully to some other actor in the market place seems to me part of the economic reality of the dispute, a risk that must be considered once we accept Pennzoil's invitation to consider economic reality. Thus, I would let Texaco make the second-takeover argument with respect to other potential acquirers.

D. Discounting to Present Value

On appeal, Texaco argued that damages must be discounted to present value, because Pennzoil's search for replacement oil would continue for many years. This is not a niggling point. Failure to discount long-term damages to present value can increase damages several fold. If there were a present-value error in Pennzoil's calculations, the mystery of its great bargain is solved. But Texaco did not find such an error.

The court of appeals rejected Texaco's present-value argument, but it did so for a specious reason. The court said that if Texaco had not interfered with the contract, Pennzoil would have received all the oil reserves immediately. But Pennzoil could not have converted the oil into cash immediately. Instead, Pennzoil would have pumped the oil and realized profits over a period of many years. That is why Pennzoil's alternate measure of damages, the cash-flow analysis, was discounted to present value. Discounting to present value reduced the value of the oil from $30 billion to $10.08 billion.

40. Id. at 862.
41. See supra text accompanying note 26.
An accurate explanation for the holding is that damages had already been discounted to less than present value, because the calculations were based on Pennzoil's historic exploration and development costs. It is entirely appropriate to simplify the jury's task by offsetting future inflation against the discount rate. Pennzoil's damage calculation assumed that future increases in its exploration and development costs would equal its potential earnings from investing its damages. If that assumption was reasonable, or if it was generous to Texaco, then the damage calculation was acceptable.

Pennzoil offered evidence to show that the assumption was more than reasonable. Pennzoil's exploration and development costs were increasing at an annual rate of twenty percent, because undiscovered oil is increasingly scarce and found in increasingly difficult locations. This rate of increase far exceeds any reasonable discount rate; if the cost of exploration were inflated by twenty percent a year and then discounted to present value, the judgment would be much larger. Thus, Pennzoil thought the verdict undercompensatory. Even if it had been collected, the judgment would not have enabled Pennzoil to actually find a billion barrels of oil.

There is one more layer of complexity to the present-value problem. Replacement cost inflated at twenty percent a year would soon become greater than the existing market value of the oil. At that point, Pennzoil should quit looking for oil and measure its damages by market value rather than replacement cost. Pennzoil might have responded that if oil remained so expensive to find and replace, the price would increase with the depletion of existing reserves. But any measure of damage based on future increases in the value of oil would plainly have to be reduced to present value.

If Texaco had raised this issue, and if it had been fully explored at trial, the jury might have been presented with each side's version of two curves. One curve would have represented es-


43. See supra text accompanying note 7.
timates of future exploration and development costs, and the other would have represented estimates of the future price of oil. Both curves would have been discounted to present value. The price curve would probably have been higher than the cost curve, but in some years they might have crossed. For each year of the expected life of the Getty reserves, the jury would have awarded the lesser of Pennzoil’s exploration and development costs for that year or the value of the Getty oil to be pumped in that year. This process would have been more complicated and more speculative than what the jury actually did. If the jury accepted the twenty percent rate of increase in exploration and development costs, the whole exercise probably would have helped Pennzoil more than Texaco.

Pennzoil’s twenty percent rate of increase in exploration and development costs may turn out to be too high or too low as an estimate for the future. All projections of the future are speculative, especially in the oil business. Hardly anyone predicted the extraordinary increases and decreases in the price of oil over the last two decades. Exploration and development costs may be even harder to predict, because sheer luck is a large component of the cost of exploration per barrel. A major oil strike lowers the cost per barrel; a dry hole raises it. The cost per barrel of a single well may range from nominal to infinite. But over the long run, the cost of finding oil is increasing. Because Pennzoil used historical costs instead of future costs, its damage calculations were roughly discounted to present value.

E. Compensating Lost Expectancies

A basic theoretical issue in contract damages is why expectancies are compensated at all. The law has always done so, and reasons have been offered, but doubters continue to suggest that reliance damages would be sufficient.\textsuperscript{44}


Pennzoil is the ultimate test case for this issue. Pennzoil’s expectancy was very large, very short-lived, and contingent on a factual dispute about intent. Even assuming that an expectancy worth $7.5 billion came into existence on the evening of January 3, 1984, why should we compensate it? What did Pennzoil do to earn or deserve it? Reliance damages would have been limited to a case of champagne and two days’ work on the merger documents. Much of the hostility to the verdict is based on the perception that Pennzoil did not lose anything. Pennzoil merely failed to gain something, and it did nothing to deserve such an extraordinary gain.

Pennzoil “earned” its expectancy by being first, by negotiating hard, and by leaning on the Getty interests to conclude a deal immediately. If the Getty interests had insisted on holding the bidding open a little longer, they could have accepted the Texaco offer and Pennzoil would have been out of luck. Pennzoil had no special leverage that enabled it to insist on an immediate agreement. Pennzoil threatened to withdraw its offer if it were not accepted immediately, and to continue with its hostile tender offer at a lower price.46 But any potential acquirer could have done the same, and Texaco’s offer at a higher price would have defeated Pennzoil’s tender offer. But the Getty interests blinked first, and Pennzoil got a contract.

The usual arguments for compensating expectancies have little application to this contract. The transaction was not Adam Smith’s invisible hand at work. There is no pretense that Pennzoil conferred some social benefit deserving of a billion barrels of oil in compensation, and there is no basis to claim that the oil would be more valuable in Pennzoil’s hands than in Texaco’s, or vice versa. Economic efficiency is not at issue here except in marginal and attenuated ways. This contest was high stakes poker for distributional gains. The conflict within Getty created an opportunity for someone to reap a windfall, and Pennzoil seized the opportunity first.

The reason for compensating Pennzoil’s expectancy is simply that it falls within the general rule that we compensate contractual

expectancies. All rules have boundaries, and some cases fall close to the line. In some cases, breach will occur immediately after the point at which the jury finds that the parties formed a binding contract. In some cases, the existence of a binding contract will be disputed; in some cases, the expectancy will be disproportionate to any reliance loss; and in some cases, the expectancy will appear largely unearned. In *Pennzoil*, all of these things were true. But once the jury found a binding contract, the case fell within the rule, and *Pennzoil* was entitled to full compensation for its expectancy.

The rule could be changed to exclude expectancies that are disproportionate, unearned, short lived, not relied upon, or otherwise undeserved. But few critics of the verdict have proposed such a rule. The merits of such a proposal are beyond the scope of this Article, but I doubt that we should make parties litigate such defenses on a regular basis.

The traditional rule makes it possible for parties to know when they are bound. Parties can create a bright line, ending negotiations and beginning a contractual relationship, with the signing of an unambiguous writing. Parties are not always so careful, and parties often disagree about whether they are bound, but the law provides tools to minimize such disagreements. If the right to an expectancy were subject to review by judge or jury to determine whether the plaintiff really deserved the expectancy, those tools would be taken away. No amount of planning would enable parties to know exactly when they entered into a full contractual relationship with full contractual remedies. The period of uncertainty would always be extended until performance had proceeded to the point that neither side could plausibly argue that the other side's expectancy was undeserved. Such a regime would probably increase litigation, and the results would be less efficient and less fair.47

This line of argument leads far beyond the *Pennzoil* judgment. Critics cannot object to compensating Pennzoil's expectancy with-

out challenging the traditional rule that contractual expectancies are compensated. The judgment’s critics must assume the burden of articulating a general rule restricting or eliminating expectancy damages, and of showing how their proposed rule would apply across the range of cases.\(^\text{48}\)

III. Specific Performance and the Motion for Preliminary Injunction

The simplest remedy in *Pennzoil* would have been specific performance of Pennzoil’s contract to acquire three-sevenths of Getty. Pennzoil would have received what it was promised, Texaco would have been spared the risk of destruction, and the trial would have been greatly simplified. The whole damage issue would have disappeared, along with the risk of over- or under-compensation. There would have been no argument about the value of Getty’s oil or the measure of Pennzoil’s replacement costs. The $10.5 billion verdict would never have been awarded.

It is important to understand why specific performance would have been preferable for Texaco. It is not because of some error in the measure of damages, or even because the damages exceeded the value of specific performance. A specific performance decree would have required Texaco to give up three-sevenths of Getty, including the billion barrels of oil. That oil was worth some $30 billion in 1984—far more than the damage verdict. Assuming the oil would be produced over a period of forty years, there was evidence that the discounted cash flow would approximately equal the compensatory damages.\(^\text{49}\)

The financial impact on Texaco arose from three distinctions between specific performance and compensatory damages. Most important, damages had to be paid immediately and in cash. Damages could not be paid over forty years as the oil was sold. Texaco could raise the money only by selling assets, probably at

\(^{48}\) For attempts to construct such a principle, see Friedman, *An Economic Analysis of Alternative Damage Rules for Breach of Contract*, 32 J.L. Econ. 281 (1989); Gergen, *supra* note 46. Professor Gergen views the Pennzoil-Getty contract as a case of mistake in formation, and he would limit damages to reliance. But he acknowledges that this proposal would require substantial changes in the law of mistake and in the law of damages. *Id.* at 443 (damages), 446-47 (mistake).

\(^{49}\) *See supra* text accompanying note 26.
distress prices, or perhaps by borrowing at high interest rates in the junk bond market.

The second problem with damages was that Texaco was forced to pay for Getty twice. Texaco had paid nearly $9 billion to purchase Getty, and the damage verdict required it to pay $10 billion more to Pennzoil. Texaco had agreed to indemnify the Getty interests, so it could not look to them for reimbursement.\(^{50}\) Having presumably used the great bulk of its borrowing power to pay Getty, Texaco would have had difficulty borrowing that much more to pay damages—a payment that would not have produced a scrap of new collateral or new earning power.

Texaco would not have had to pay twice if Pennzoil's contract had been specifically enforced. The indemnity and related provisions in Texaco's contract guaranteed that the Getty interests would get at least $112.50 for their shares.\(^{51}\) But a completed sale to either Texaco or Pennzoil would have satisfied that guarantee. Texaco did not agree to pay for all of Getty even if the Getty interests failed to deliver all of the company. If the Getty interests had been ordered to specifically perform their contract with Pennzoil, Texaco would not have been required to pay the whole purchase price.

The third problem with the damage remedy is that it exposed Texaco to the risk of punitive damages, which the jury assessed at $3 billion.\(^{52}\) If Getty had been ordered to specifically perform the contract with Pennzoil, Texaco could not have completed its tort, and it could not have faced liability for punitive damages. Even if one can imagine an outraged Texas jury awarding specific performance and punitive damages,\(^{53}\) that could not have happened to Texaco. The specific performance litigation was in the Delaware Chancery Court,\(^{54}\) where punitive damages cannot be awarded.\(^{55}\)

\(^{51}\) \textit{Id.}
\(^{52}\) \textit{Id.} at 784.
\(^{53}\) \textit{Cf.} Fillion v. Troy, 656 S.W.2d 912 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (awarding punitive damages and equitable rescission for property acquired by fraud, but no compensatory damages).
The risk of punitive damages was unusual in a contract case. But the first two reasons for preferring specific performance are variations on points of general application. Specific performance often benefits defendant as well as plaintiff. Specific performance always limits consequential damages, because it gives plaintiff what was promised. It is always the case that damages must be paid immediately and in cash. But defendant does not necessarily bear the full cost of specific performance. Many of the resources required to perform the contract have already been paid for; some may be employed at less than full capacity. If the defendant performs, he will receive the price in exchange. Thus, the net cost of specific performance is often less than the cost of paying damages, especially in cases with significant consequential damages. Nor does the fact of breach show that the cost of performance would exceed the cost of damages. More often, breach shows only that the defendant thinks or hopes he can get away with it.

If specific performance would have been simpler for the court, cheaper for Texaco, and full justice for Pennzoil, why was it not the remedy? The answer to that question appears in an important unpublished opinion of the Delaware Chancery Court.\(^{56}\)

Getty and Texaco announced their deal on January 6, 1984. On that same day, Pennzoil filed suit in the Delaware Chancery Court for a declaratory judgment. On January 10, Pennzoil amended its complaint, demanding specific performance of its contract and a preliminary injunction to preserve the Getty assets pending resolution of the claim for specific performance. On February 6, in a lengthy, careful, but sometimes cryptic opinion, the chancellor denied the preliminary injunction.\(^{57}\)

To get the preliminary injunction, Pennzoil had to show probable success on the merits and irreparable injury. The chancellor held that Pennzoil would probably succeed on its contract claim. He held that Pennzoil could probably prove that a valid contract "came into being" when the Getty board conditionally approved the Pennzoil proposal and Pennzoil accepted the condition.\(^{58}\) He

\(^{56}\) Pennzoil, 1984 WL 15,664.

\(^{57}\) Id.

\(^{58}\) Id. at 34, 36.
also held that Pennzoil could probably show that the minutes of the Getty board meeting and the Getty press release satisfied the Statute of Frauds. The chancellor also found that Pennzoil's three-sevenths interest in Getty was unique, and that breach of the contract would cause irreparable injury to Pennzoil, so that the contract was suitable for specific performance.

Some of Pennzoil's attorneys have written that the chancellor's denial of the preliminary injunction was based on the irreparable injury rule, and that his "decision indicates how foolish the ancient rules are about specific performance." The irreparable injury rule is indeed foolish, but it was not the culprit this time. The opinion unambiguously finds that the irreparable injury rule was satisfied. Three other issues led the Chancellor to deny relief.

First, the chancellor held that one of the Getty parties had a possible defense to the contract. Recall that only the Museum and Getty Oil promised to sell shares to Pennzoil. Pennzoil could purchase more shares through its tender offer. But the principal part of a specific performance decree would have ordered Gordon Getty, as Trustee of the family trust, to carry out his agreement to take the company private, to achieve the agreed ownership ratio, and to liquidate the company if it could not be restructured to the satisfaction of both sides. If the Trustee were not bound, specific performance of the rest of the contract would leave Pennzoil as a minority shareholder in an untenable situation.

The Trustee claimed that he was not bound. He argued that a letter dated January 2 was a side agreement, and that it made the contract subject to his fiduciary duties to the trust beneficiaries. The Trustee argued that the chance for his beneficiaries to cash out at Texaco's price was a better deal than remaining in

59. Id. at 35.
60. Id. at 37-38.
64. See supra text accompanying note 5.
control of Getty, so his fiduciary duty required him to accept Texaco’s offer.\textsuperscript{66} This was the key argument in the Delaware court, although Texaco appears to have abandoned it in Texas.\textsuperscript{67}

The chancellor did not expressly say whether Pennzoil or the Trustee would probably prevail on the argument that the Trustee was not bound. But he did say that this argument was “sufficient to . . . cast doubt on the right of Pennzoil to claim an entitlement to a 3/7 interest in Getty . . . .”\textsuperscript{68} This statement seems to address the probability of success on the merits. It implies that although there may have been a valid contract, the key defendant probably had a right to repudiate the contract.

This brought the chancellor to the second issue resolved against Pennzoil. He said that his conclusion that Pennzoil might not be entitled to three-sevenths of Getty made it necessary to consider Pennzoil’s claim against Texaco.\textsuperscript{69} Presumably he meant that even if the Trustee had the right to breach for reasons of fiduciary duty, it would still be tortious for Texaco to induce the breach.

The chancellor found that Pennzoil failed to show a probability of success against Texaco. Although he considered the issue close, he thought that Pennzoil had not yet offered sufficient evidence that Texaco knew that Getty and Pennzoil had a binding contract.\textsuperscript{70} Accordingly, he found no basis for a preliminary injunction against Texaco.

Pennzoil argued that even if Texaco were allowed to acquire Getty, Texaco should be ordered to hold the Getty stock and assets separate from the rest of the company, so that the transaction could

\textsuperscript{66} \textit{Id.}

\textsuperscript{67} The Texas Court of Appeals quotes the letter for another purpose in Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 798-99 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.), \textit{cert. dismissed}, 485 U.S. 994 (1988). The Trustee promised, subject to his fiduciary duty, to support the proposed contract at the Getty board meeting, and if the board failed to approve, to support the appointment of new directors. The letter does not appear to subject the completed contract to the Trustee’s fiduciary duties. That is, it does not appear to reserve a right to breach the contract after its approval by the board. Texaco did argue that the Getty board had a fiduciary duty to accept a higher price despite its agreement with Pennzoil. The Texas court rejected that argument, holding that the board had satisfied its fiduciary duty by obtaining a fair price and by exercising due care before accepting the Pennzoil offer. \textit{Id. at} 807-08.

\textsuperscript{68} \textit{Pennzoil}, 1984 WL 15,664 at 40-41.

\textsuperscript{69} \textit{Id. at} 41.

\textsuperscript{70} \textit{Id. at} 42-46.
be undone if Pennzoil ultimately prevailed. Pennzoil cited a large number of federal cases granting such relief.\textsuperscript{71}

The logic of these cases is that an order to delay an acquisition is more intrusive, more costly, and more risky, than an order to hold the assets separate. Consequently, a much lesser showing of probable success and irreparable injury would justify an order to hold the assets separate. Preliminary injunctions are supposed to minimize the risk of irreparable injury to both sides.\textsuperscript{72} If the injunction can be structured in a manner that greatly reduces the risk of harm to the defendant, the whole balance changes and the court must decide anew whether to issue the injunction.

Unfortunately, the chancellor did not understand the preliminary injunction process in such terms. Instead, he viewed probability of success as a threshold question to be answered yes or no. Pennzoil had not shown probable success against Texaco, so no preliminary relief could be entered against Texaco, however unintrusive. He distinguished the federal cases on the basis of the public’s interest in antitrust enforcement.\textsuperscript{73}

The denial of Pennzoil’s preliminary injunction motion significantly reduced the chances of an eventual specific performance decree and increased the chances that the remedy, if any, would be an award of damages. But in the Delaware Chancery Court, Pennzoil could not get a jury trial on its damage claim.\textsuperscript{74} At this point, Pennzoil took advantage of Texaco’s failure to answer the complaint, dismissed its Delaware claim against Texaco, and filed a new lawsuit in Texas.\textsuperscript{75} Pennzoil could not obtain specific performance in Texas, because Texaco was the only defendant. The Delaware litigation against the Getty interests lay dormant, awaiting the outcome of the Texas litigation. Compensatory damages plus specific performance would have been a double recovery, so once Pennzoil recovered damages, its claim for specific performance came to an end.

\textsuperscript{71} Id. at 46.
\textsuperscript{73} Pennzoil, 1984 WL 15,664 at 47.
IV. Punitive Damages

The jury awarded $3 billion in punitive damages; the court of appeals remitted $2 billion.\textsuperscript{76} Both figures seem to be have been pulled out of thin air.

The case illustrates only one important point about punitive damages: the traditional notion that punitive damages should be proportionate to compensatory damages is absurd. Where the compensatory damages are large enough to punish or deter, punitive damages are unnecessary. Thus, once the jury awarded $7.5 billion in compensatory damages, it did not need to award punitive damages to get Texaco’s attention, to deter, or to punish. All these goals had been accomplished.

Yet under common rules of thumb, the jury could have awarded punitive damages as a multiple of compensatory damages—$15 billion or $22.5 billion. Texas still adheres to the doctrine that punitive damages should be proportional to compensatory damages,\textsuperscript{77} but New York does not,\textsuperscript{78} and New York law controlled.\textsuperscript{79} The court of appeals would have remitted $2 billion under either state’s law.\textsuperscript{80}

Punitive damages are necessary primarily when compensatory damages are small. Indeed, punitive damages originated as a remedy for dignitary torts at a time when the common law refused to compensate mental distress.\textsuperscript{81} When it rejected the proportionality rule, the New York Court of Appeals offered the example of malicious defamation of a victim with impeccable reputation.\textsuperscript{82} The victim’s compensatory damages might be nominal if no one believed the defamation. It does not follow that punitive damages should be nominal, or that a victim of marginal reputation deserves a much higher award of punitive damages merely because he

\textsuperscript{76} Id. at 866.


\textsuperscript{79} See Texaco, 729 S.W.2d at 787.

\textsuperscript{80} Id. at 865-66.

\textsuperscript{81} See Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 12-20 (1982).

\textsuperscript{82} See Toomey, 2 N.Y.2d at 83, 138 N.E.2d at 228, 156 N.Y.S.2d at 849.
deserves a much higher award of compensatory damages. It is an
oversimplification to state that punitive damages should be in-
versely proportional to compensatory damages, but that would
come closer to good sense than the existing rule. \footnote{83}

V. The Federal Injunction Litigation

Texaco responded to the trial court's judgment in Texas by
filing a suit to enjoin Pennzoil from enforcing the judgment. \footnote{84}
Texaco filed this suit in the United States District Court for the
Southern District of New York—not in Manhattan, but in suburban
White Plains, where Texaco is headquartered. It was no more
blameworthy for Texaco to file in White Plains than for Pennzoil
to file in Houston, where Pennzoil is headquartered. But plaintiffs
generally are permitted to select the forum in our system; and
Pennzoil was the plaintiff. Moreover, New York was plainly not
a permissible venue in which to litigate a challenge to the enforce-
ability of a Texas judgment. \footnote{85} Texaco seemed to be appealing a
state-court judgment to a federal trial court, and its leap across the
country added to the appearance of absurdity.

Texaco's claims were not absurd as a matter of first principle.
But they ran up against an array of hostile precedent from the
Supreme Court, much of it rebuffing the efforts of poor people
and civil rights litigants to bring federal challenges to the fairness
of state procedures or state courts. Granting federal relief to
Texaco, after turning away these other litigants, would have been
an outrageous case of special justice for the rich. But Texaco had
one remarkably similar precedent on its side. The Fifth Circuit
had once enjoined enforcement of a state court judgment against

\footnote{83. For similar criticism of the traditional rule, see Mallor & Roberts, \textit{Punitive Damages: Towards a Principled Approach}, 31 \textit{Hastings L.J.} 639, 666-67 (1980). \textit{See also} Villella v. Walkem Motors, Inc., 45 Ohio St. 3d 36, 543 N.E.2d 464 (1989), affirming punitive damages of $150,000 and compensatories of $250, where defendant exhibited total disregard for law and customer's rights. The punitive damages were probably excessive, but not because of the ratio.}


a defendant who wanted to appeal but could not post a supersedeas bond. The successful federal plaintiff—defendant in the state court—had been the National Association for the Advancement of Colored People.

By the time the federal case reached the Supreme Court, Texaco's array of theories had been distilled to their strongest and narrowest form. Of necessity, Texaco's argument contained two major components. First, to state a federal claim on the merits, Texaco had to show that the Texas procedures for collecting judgments were unconstitutional. Second, to present this claim in federal court, Texaco had to avoid the abstention doctrines that seemed to require it to present its constitutional claim to the Texas courts in the pending litigation.

Texaco lost 9-0 in the Supreme Court, but different justices relied on different grounds. The majority held Texaco barred by Younger abstention. One justice thought that Texaco was barred by Pullman abstention. One thought that Texaco was barred by the Rooker-Feldman doctrine, which forbids appeal of state judgments to any federal court other than the Supreme Court. Three justices (including the Rooker-Feldman justice, who joined three opinions) argued that Texaco had no claim on the merits.

A. The Merits of the Federal Claim

Texaco's claim on the merits ran as follows: The Texas trial court entered judgment against Texaco for more than $11 billion—

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88. Pennzoil, 481 U.S. at 27-29 (Blackmun, J., concurring) (citing Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941)). For analysis of this argument, see infra subpart V(B).2.


90. Pennzoil, 481 U.S. at 22 (Brennan, J., & Marshall, J., concurring); id. at 29-34 (Stevens, J. & Marshall, J., concurring). For analysis of this argument, see infra subpart V(A).
$10.5 billion plus interest.\textsuperscript{91} Pennzoil could begin executing on that judgment thirty days after its entry, unless Texaco filed a supersedeas bond in the full amount of the judgment.\textsuperscript{92} It was impossible for Texaco to file an $11 billion bond.\textsuperscript{93} Consequently, Texaco claimed that the bond requirement would result in a forfeiture of its right to appeal. Moreover, the bond was unnecessary and served no purpose, because Texaco had a net worth of $23 billion and a liquidation value of $22 billion.\textsuperscript{94} Thus, Texaco could pay the judgment, but it could not post a bond. Because the bond requirement would deprive Texaco of its appeal without benefitting Pennzoil, the bond requirement was arbitrary, irrational, and a violation of the due process and equal protection clauses.\textsuperscript{95}

The Second Circuit held that the due process claim presented fair grounds for litigation,\textsuperscript{96} that Texaco faced irreparable injury,\textsuperscript{97} and that the hardships to Texaco of requiring the bond exceeded the hardships to Pennzoil of not requiring it.\textsuperscript{98} Thus, the court affirmed a preliminary injunction against "any action of any kind whatsoever to enforce or attempt to enforce" Pennzoil's judg-


\textsuperscript{92} The clerk may issue execution of a judgment thirty days after the judgment is signed if no supersedeas bond has been filed. Tex R. Civ. P. 627 (Vernon Supp. 1990). At the time of the Pennzoil judgment, a judgment debtor could suspend execution of a money judgment only by filing a bond for "at least the amount of the judgment, interest, and costs." Tex. R. Civ. P. 364(b) (Vernon 1985). In 1988, the rule was recodified and amended; the amendment was obviously adopted in response to Pennzoil. In the following quotation, the first sentence is the pre-1988 rule; the second and third sentences were added in 1988.

When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs. The trial court may make an order deviating from this general rule if after notice to all parties and a hearing the trial court finds that posting the amount of the bond or deposit will cause irreparable harm to the judgment debtor, and not posting such bond or deposit will cause no substantial harm to the judgment debtor. In such a case, the trial court may stay enforcement of the judgment based upon an order which adequately protects the judgment creditor against any loss or damage occasioned by the appeal.


\textsuperscript{94} Id. at 1152.

\textsuperscript{95} Id. at 1145, 1153-54.

\textsuperscript{96} Id.

\textsuperscript{97} Id. at 1152-53.

\textsuperscript{98} Id. at 1154-55.
ment.\textsuperscript{99} The court thought that “little, if any, security” was required for this preliminary injunction.\textsuperscript{100} But the federal district court had ordered Texaco to post a $1 billion bond, and Texaco had complied, so the court of appeals left the bond in place.\textsuperscript{101}

As an original matter, there is much to be said for the Second Circuit’s argument against supersedeas bonds. There is also much to be said against it. The court ignored contrary Supreme Court authority, overestimated the risks to Texaco, and underestimated the risks to Pennzoil. If supersedeas bonds are to be held unconstitutional, Texaco is not the most appealing litigant to present the claim. To understand the claim, it is necessary first to review the actual situation in which the parties found themselves, then the relevant Supreme Court authority, and finally the logic of Texaco’s argument.

1. The Situation Pending Appeal.—Despite loose talk about the right to appeal, that was not the real issue. Texaco was free to appeal without posting a bond; bond was required only to stay execution of the judgment.\textsuperscript{102} Texaco’s real complaint was that if Pennzoil aggressively levied on Texaco assets while the appeal was pending, Texaco could be irretrievably destroyed before the appeal was decided.\textsuperscript{103} This risk was real, but there were several possible solutions.

The most obvious solution was a bankruptcy petition, which Texaco eventually filed. Some analyses of the case view bankruptcy not as a solution, but as the end of any meaningful right to appeal.\textsuperscript{104} Bankruptcy carries connotations of financial death,\textsuperscript{105}

\begin{footnotes}
\item[99] The operative paragraph of the injunction appears in Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 8 n.7 (1987).
\item[100] Texaco, 784 F.2d at 1155.
\item[101] Id. at 1156.
\item[102] For a careful explanation of the procedure, see Carlson, Mandatory Supersedeas Bond Requirements—A Denial of Due Process Rights, 39 Baylor L. Rev. 29, 33-36, 45, 55 (1987).
\item[103] Texaco, 784 F.2d at 1154.
\item[104] See id. at 1154; Carlson, supra note 102, at 37; see also Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 28 n.* (1987) (Blackmun, J., concurring) (suggestion that Texaco could continue “business as usual” after bankruptcy and a successful appeal would be “at odds with reality”). But see id. at 22 (Brennan, J., concurring) (Texaco “clearly” could appeal while in bankruptcy, and if the appeal were successful, the bankruptcy petition could be dismissed).
\item[105] See T. Sullivan, E. Warren & J. Westbrook, As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America 3 (1989) (“Bankrupt. The single word is a body blow, like ‘Dead’.”).
\end{footnotes}
but that is because most debtors are in terminal financial distress before they file for bankruptcy.\footnote{See \textit{id.} at 63-82 (reporting data on “serious, even hopeless financial trouble” of most consumer bankrupts); see also \textit{Report of the Commission on the Bankruptcy Laws of the United States}, H.R. Doc. No. 137, 93d Cong., 1st Sess. 14 (1973) (business debtors do not file for bankruptcy until assets are depleted and situation is hopeless). For an analysis of the incentives that cause this delay in filing for bankruptcy, see LoPucki, \textit{A General Theory of the Dynamics of the State Remedies/Bankruptcy System}, 1982 Wis. L. Rev. 311, 352-62.} In fact, the bankruptcy code is a sophisticated statutory scheme designed to provide exactly what Texaco needed—temporary shelter from the overwhelming demands of creditors. Since the 1978 amendments, it has served that function rather well. Once Texaco settled its litigation with Pennzoil, it emerged from bankruptcy quite intact.

The key benefit of a bankruptcy petition is the automatic stay of all efforts to collect debts from the bankrupt debtor.\footnote{11 U.S.C. § 362 (1988) (automatic stay).} The bankruptcy code contains detailed provisions for protecting creditors affected by the automatic stay and for supervising the affairs of debtors who benefit from the stay. The stay is subject to detailed limitations and exceptions. Most important for Pennzoil, a bankruptcy petition would subject all creditors to the automatic stay, not just Pennzoil. This would mean that no existing creditor could improve its priority in the fight for Texaco’s assets. New credit necessary to operate Texaco’s business would get priority over Pennzoil.\footnote{11 U.S.C. § 507(a) (1988) (priority for administrative expenses, including new credit to operate business during bankruptcy).} but the bankruptcy court could supervise new credit and refuse to allow it if necessary.\footnote{11 U.S.C. § 364 (1988) (obtaining credit for bankrupt estate).} The bankruptcy code creates a set of specialized courts with experience in such matters, and there is a body of case law applying these provisions.

Texaco’s request for an injunction was an attempt to get the key benefit of a bankruptcy filing while depriving Pennzoil of all the benefits of a bankruptcy filing. Texaco attempted to get the equivalent of a bankruptcy stay, directed only against Pennzoil, and without being exposed to any of the burdens, limitations, or exceptions under the bankruptcy code—to bypass a carefully balanced and much interpreted statutory scheme with an ad hoc injunction derived from the Constitution. Texaco apparently
feared the burdens of bankruptcy enough to forgo another major benefit that the federal injunction could not provide. A bankruptcy petition would have stopped interest from accruing on the judgment,\(^\text{110}\) a benefit worth approximately $3 million per day.\(^\text{111}\)

Texaco's due process argument necessarily entailed the claim that its bankruptcy remedy was constitutionally inadequate. State collection law and federal bankruptcy law are a single system.\(^\text{112}\) The two subsystems are only partly integrated, but both debtors and creditors have ready access to either subsystem. The due process protections for Texaco's property included all options available in either subsystem. Neither subsystem could violate the due process clause unless the system as a whole violated it.

Texaco was therefore attacking the constitutionality of federal law as well as Texas law, although it never stated so explicitly. Rather, Texaco argued that bankruptcy was an irreparable injury, and that the Texas collection laws were unconstitutional if they forced it into bankruptcy.\(^\text{113}\) This argument fails for three related reasons.

First, Texaco's argument confused the financial distress that leads to bankruptcy with the bankruptcy filing. It is commonly and accurately said that bankruptcy is irreparable injury.\(^\text{114}\) But this is shorthand; the real injury is the financial distress associated with bankruptcy. Cases holding that bankruptcy is irreparable injury do not address whether a bankruptcy filing might have been the best remedy for the problems Texaco faced.

Second, irreparable injury is not necessarily unconstitutional injury. To say that bankruptcy is an irreparable injury means only that bankruptcy inflicts losses that cannot be perfectly replaced with money.\(^\text{115}\) Even very small injuries are irreparable if they are

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\(^{112}\) For thorough analysis of state collection law and federal bankruptcy law, see LoPucki, supra note 106. See also Howlett v. Rose, 110 S. Ct. 2430, 2438-39 (1990) ("The laws of the United States are the laws in the several States . . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State." (quoting Claflin v. Houseman, 93 U.S. 130, 136-37 (1876))).

\(^{113}\) Texaco, 784 F.2d at 1153-54.


\(^{115}\) See D. Laycock, supra note 62, at 37-72.
difficult to value.116 Irreparable injury is found every day in routine cases involving property, tort, and contract that raise no constitutional issues. Third, the character of the injury does not determine the legality of the acts that caused the injury. Death from natural causes is an irreparable injury, but it is not illegal. Thousands of bankruptcies every year result from lawful misfortunes. Thus, the irreparable consequences of bankruptcy are irrelevant unless Pennzoil's judgment or the Texas bonding rules violated federal law. If Pennzoil or the State of Texas violated federal law, and if that violation threatened to force Texaco into bankruptcy, then the irreparable injuries suffered in bankruptcy might be grounds for a federal injunction. But the likelihood of irreparable injury in bankruptcy does not answer the question on the merits: did anyone violate federal law in the first place?

The essential point is that a bankruptcy filing would have given Texaco immediate relief from the Texas bonding rules. Thus, to prevail on the merits, Texaco had to demonstrate that the balance of costs and benefits in bankruptcy would have been unconstitutional as applied to Texaco. To state that claim explicitly is to show how tiny were the chances that the Supreme Court would accept it.

Even a bankruptcy petition was probably unnecessary to solve Texaco's problem. If Pennzoil had levied while the appeal was pending, and if the judgment had eventually been reversed, Pennzoil would have been liable for the market value of all the property it had taken117 and perhaps for consequential damages.118 Thus, as-

116. Id. at 73-75.

117. See Tex. Civ. Prac. & Rem. Code Ann. § 34.022 (Vernon 1986). See also Drake v. Trinity Universal Ins. Co., 600 S.W.2d 768, 771 (Tex. 1980) ("Where a judgment for debt is reversed after it has been enforced by execution, and the case is finally decided in favor of the defendant, he is certainly entitled to restitution." (quoting Petricolas v. Carpenter, 53 Tex. 23, 29 (1880))); Texas Trunk Ry. Co. v. Jackson, 85 Tex. 605, 606, 22 S.W. 1030, 1031 (1893) ("In this state a judgment may be enforced during pendency of appeal, unless it be superseded by such a bond as the statute requires; but in case of reversal the opposite party will have to restore what he received through the judgment.").

118. See Cleveland v. Tufts, 69 Tex. 580, 7 S.W. 72 (1888). In Cleveland, the creditor levied on property worth $665, the judgment was reversed, and the owner recovered $1042.90, based on the value of the property, plus "damages and costs paid by him . . . " Id. at 582, 7 S.W. at 73. It is not clear what these "damages" were; they may have been the costs of the appeal. For more on the measure of damages for wrongful execution, see Southwest Bank & Trust Co. v. Executive Sportsman Ass'n, 477 S.W.2d 920, 928-29 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (damages for wrongful execution include "damages to a business such as loss of profits or loss of good will,"
suming that Pennzoil could have irretrievably destroyed Texaco by aggressive collection efforts, the liability for consequential damages if the judgment were reversed would have destroyed Pennzoil.

Even liability for the market value of Texaco's assets could have destroyed Pennzoil, because execution sales bring inadequate prices, and the execution sale price is inadmissible as evidence of market value.\(^{119}\) If Pennzoil could have been sure that liability was limited to market value, it could have tried to reduce its risk by

but only where “the levying creditor had notice or reason to foresee that damage to the business would probably result from the sale”); Deleshaw v. Edelen, 31 Tex. Civ. App. 416, 72 S.W. 413 (1903, writ ref'd) (wrongful execution on property of saloon where saloon owner recovered lost profits); Jarvis, Creditor's Liability in Texas for Wrongful Attachment, Garnishment, or Execution, 41 Tex. L. Rev. 692, 711-15 (1963). It is arguable that Cleveland is no longer good law, that the common-law liability for consequential damages no longer applies to a levy on a judgment that is later reversed, and that the statutory liability for market value is exclusive. Southwest Bank & Trust and Deleshaw do not address this question. In those cases, the creditor mistakenly levied on property belonging to a person other than the judgment debtor, without first obtaining a judicial determination of ownership.

Other cases point in different directions, and none are on all fours. In Merrell v. Fanning & Harper, 597 S.W.2d 945, 949-50 (Tex. Civ. App.—Tyler 1980, no writ), the court held that a creditor is entitled to levy pending appeal, and that he has no liability if the judgment is later reversed. This decision is plainly wrong, because it denies even the liability for market value. In York Div., Borg-Warner Corp. v. Security Sav. & Loan Ass'n, 485 S.W.2d 327 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.), a creditor executed on a judgment later vacated by the trial court, and the court of appeals held the creditor liable. However, the opinion relies on the fact that the judgment was interlocutory, even though it appeared to resolve the dispute between the parties, because the trial court had not yet resolved other disputes among other parties to the same case. \(\textit{Id.}\) at 333.

In King v. Rubinsky, 253 S.W.2d 937 (Tex. Civ. App.—Waco 1952, writ ref'd n.r.e.), defendant was dispossessed of land pursuant to a writ of execution. The judgment was reversed, and on remand, the court again held that plaintiff was entitled to the land. At the second trial, defendant counterclaimed for damages from the wrongful dispossession after the first trial. The court recognized “the general rule that on reversal of an erroneous judgment, a party who has received a benefit from such judgment is obligated to make restitution to the other party for what the latter has lost under the erroneous judgment.” \(\textit{Id.}\) at 940. But the court found the rule inapplicable where the technically erroneous judgment eventually turned out to be correct in its result. In McKay v. Irion, 15 S.W. 123 (Tex. Civ. App. 1890, no writ), the creditor was held liable for levying on a judgment that was reversed on appeal. But the opinion does not clearly state whether the levy came before or after the reversal. A Texas practitioner reads McKay as imposing liability for a levy pending appeal. See Jarvis, \textit{supra} at 708.

\(^{119}\) See Southwest Bank & Trust Co. v. Executive Sportsman Ass'n, 477 S.W.2d 920, 926 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.); Edwards v. Mayes, 136 S.W. 510 (Tex. Civ. App.—Galveston 1911, no writ); see also Cleveland v. Tufts, 69 Tex. 580, 7 S.W. 72 (1888) (property sold at execution sale for $215 where jury found value to be $665).
buying Texaco’s property at the execution sale. But if the judgment were reversed, Pennzoil would then face the same problem Texaco faced: Pennzoil’s massive but illiquid assets would not enable it to pay an immediate cash judgment for the market value of those assets, and an execution sale of those assets would not bring market value. Besides, Pennzoil could not be sure that its liability was limited to market value. Finally, if Pennzoil invented some strategem to maximize pressure on Texaco while minimizing risk to itself, Pennzoil would still have to worry about the expanding Texas law of liability for abusive credit collection techniques.\textsuperscript{120}

Thus, both sides faced potential destruction if Pennzoil’s collection efforts were too aggressive. Because both sides faced substantial risks, each side had substantial bargaining leverage. If the federal courts had not become involved, the parties probably would have negotiated a contract in which Pennzoil agreed to delay any potential levy in exchange for a mortgage or lien on selected assets and Texaco’s agreement not to convey or encumber assets except in the ordinary course of business. Indeed, the parties reached a short-term agreement of this sort\textsuperscript{121} and had strong incentives to reach a longer-term agreement.

Even if Pennzoil threatened to break off negotiations and plunge recklessly into levies on Texaco’s property, Texaco still had the threat of bankruptcy as a bargaining chip, and the actual filing of bankruptcy as a place of refuge. Texaco’s constitutional claim depended on the risk that it would be destroyed before its appeal could be heard, and this risk was in fact rather small. This risk placed a far smaller burden on Texaco’s litigation rights than


\textsuperscript{121} For a description of the agreement, see Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1137-38 (2d Cir. 1986), \textit{rev’d}, 481 U.S. 1 (1987). The agreement did not include a lien on selected assets.
other burdens that the Supreme Court had sustained in earlier cases.

2. *The Supreme Court's Precedents.*—The Supreme Court has always carefully refrained from holding that any defendant has a right to an appeal. Even in criminal cases, the Court has required only that appeals not be conditioned on ability to pay. It has held that if a state makes appellate review available to those who can pay for transcripts and lawyers, then the state must provide transcripts and lawyers for those who cannot afford them.\(^ {122} \)

The Court has refused to apply even this principle to civil appeals. A unanimous opinion by Justice Holmes, *Louisville & Nashville Railway v. Stewart*,\(^ {123} \) says that there is no right to a stay of execution pending appeal in a civil case, and that a stay of execution can be conditioned upon the posting of a bond.\(^ {124} \) In 1972, in *Lindsey v. Normet*,\(^ {125} \) the Court struck down a discriminatory rule that required evicted tenants to post double bond as a condition of appeal.\(^ {126} \) But that opinion said repeatedly that a nondiscriminatory requirement of a bond, in the amount of the judgment plus the rent that would accrue pending appeal, would “raise no serious constitutional questions.”\(^ {127} \) No justice suggested otherwise, even though a nondiscriminatory bond requirement would undoubtedly eliminate the right to appeal for most tenants. If supersedeas bonds raise no serious issue when applied to impoverished tenants, it is hard to see how they are unconstitutional when applied to Texaco.

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124. *Id.* at 263.
125. 405 U.S. 56 (1972).
126. *Id.* at 74-79.
127. *Id.* at 76. The Court also said: “[A] State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession.” *Id.* at 77. “We do not question here reasonable procedural provisions to safeguard litigated property.” *Id.* at 78. “[A] State has broad authority to provide for the recovery of double or treble damages . . . even though posting an appeal bond by an appellant will be doubly or triply more difficult than it otherwise would be . . . .” *Id.* The requirement of a double bond for single damages was invalid because, and apparently only because, “the State has not sought to protect a damage award or property an appellee is rightfully entitled to because of a lower court judgment”). *Id.* at 78-79.
The Lindsey opinion could be dismissed as dictum, but Texaco faced a bigger problem in the cases on filing fees. Some litigants are denied access even to trial courts because they cannot pay the filing fee. In Kras v. United States, the Court found no constitutional right to a waiver of the $50 filing fee for a bankruptcy petition, thus creating a class of persons too poor to go bankrupt. The Kras family was unemployed, on welfare, hopelessly in debt, with a child suffering from cystic fibrosis, and a father unable to find work because of an outstanding indebtedness to a former employer. If an insurmountable filing fee is constitutional as to them, it is very hard to see how an insurmountable bond requirement is unconstitutional as to Texaco.

The Court in Kras had to distinguish an earlier opinion striking down the filing fee for a divorce suit. The Court said that divorce suits are unique because only a court can dissolve a marriage. The judiciary has no comparable monopoly on debt adjustment; Kras could negotiate a deal with his creditors or wait for the statute of limitations to expire. Of course, Kras had almost no hope of a successful negotiation, because he had almost nothing to offer in exchange for a release of his debts. Texaco’s negotiating position was vastly stronger—as close to infinitely stronger as one ever sees in the real world. If negotiations without judicial relief were constitutionally adequate for Kras, it follows a fortiori that negotiations without judicial relief were constitutionally adequate for Texaco. Inexplicably, none of the Pennzoil opinions cited Kras.

As the facts of these earlier cases suggest, there was nothing unusual about Texaco’s plight. Every day, American courts enter thousands of judgments against civil defendants who are unable to post a supersedeas bond. Most consumers and many small businesses are unable to post bond in more than nominal sums. Most civil litigation would be affected by a decision that the rules on supersedeas bonds are unconstitutional whenever a defendant cannot post the bond. Substantial bargaining advantage and inertia would shift from successful plaintiffs to unsuccessful defendants.

129. Id. at 437.
130. Id. at 443-50 (distinguishing Boddie v. Connecticut, 401 U.S. 371 (1971)).
Whatever the merits of a poverty exception to the requirement of supersedeas bonds, the Rehnquist Court is quite unlikely to create such an exception as a matter of constitutional law. As Justice Marshall noted, if Texaco’s claim had been presented by a corner grocery store, it would have been rejected out of hand.\textsuperscript{132}

3. The Logic of Texaco’s Argument.—Texaco sought to distinguish itself from these thousands of routine cases, and presumably from \textit{Stewart, Lindsey}, and \textit{Kras}, with its argument that a bond was unnecessary because Texaco could pay the judgment.\textsuperscript{133} This argument conceals a set of assumptions that the court of appeals indulged on Texaco’s behalf. It could not be literally true that Texaco could pay the judgment but was unable to post the bond.\textsuperscript{134} To pay the judgment means to write a check for $11 billion and deposit cash to pay the check. If Texaco chose to pay the judgment instead of posting the bond, then Pennzoil was entitled to the payment within thirty days. But if Texaco could pay in thirty days, it could obviously pay the check into the registry of the court, or to a consortium of insurance companies, and thus post the bond. The fact was that Texaco could not pay the judgment.

What Texaco meant was that it owned valuable properties that it believed could eventually be converted into cash and used to pay the judgment at some time in the indefinite future. Texaco argued that Pennzoil should be content to rely on the value of these properties—that $23 billion in net worth was as good as $11 billion in cash.

But if the properties were really as good as $11 billion in cash, then Texaco could convey or mortgage the properties to a consortium of insurance companies and post the bond. To say that it was impossible to post the bond is to say that the insurance market would not accept the exchange that Texaco sought to force on Pennzoil. Texaco in effect argued that the worldwide insurance industry and its regulators would not have viewed even the strongest possible interest in Texaco’s properties as an equal ex-

\footnotesize{134.} I am indebted to Jay Westbrook for the core of the insight that Texaco could not pay the judgment.
change for a contingent obligation to pay $11 billion in cash at the conclusion of Texaco’s appeals. But if that is true, then it is also true that an interest in Texaco’s properties would not have been an equal exchange for Pennzoil’s entitlement to receive $11 billion in cash.

Note also that Texaco was not offering Pennzoil the strongest possible interest in its properties, or even any interest at all. The federal injunction deprived Pennzoil of any interest whatever in Texaco’s properties. Pennzoil was left as an unsecured creditor, with no right to acquire any interest in Texaco’s properties until the final judgment of the court of last resort. Texaco and the lower federal courts offered Pennzoil vastly less than the amount the insurance industry would have found not equivalent to $11 billion in cash.

This comparison between Pennzoil’s transaction and the insurance industry’s hypothetical transaction is not perfect, because it is distorted by wealth effects. We can usefully think of Texaco asking both Pennzoil and the insurance industry to pay $11 billion for a claim on Texaco’s properties. Pennzoil could pay with its $11 billion judgment, a brand new accretion to its wealth and an accretion that could be converted into liquid form only with difficulty and risk. The insurance industry had no such entitlement and would have to raise $11 billion in cash from its existing resources.

In practical terms, Pennzoil was already caught up in this litigation and had no choice but to risk its $11 billion entitlement on the outcome of the appeals. The insurance industry was not in the litigation, and thus was perfectly free to stay out of it and avoid risk. In voluntary bargaining between the parties, it is much more likely that Pennzoil would trade part of its entitlement for an interest in Texaco’s properties, and much less likely that the insurance industry would commit $11 billion of its reserves for an interest in Texaco’s properties.

These wealth effects are relevant to voluntary bargaining, but they are insufficient to salvage Texaco’s argument for an injunction forcing Pennzoil into an involuntary exchange of entitlements. Texaco’s strongest argument was that the bonding requirement was arbitrary and irrational because Pennzoil would not be hurt by a waiver of the bond. But Pennzoil would be hurt, because
Texaco's properties were not equivalent to a bond. Texaco's inability to post a bond proves the point.

Once we understand that Pennzoil would be hurt, Texaco's argument must be that the bond requirement would hurt Texaco more than a bond waiver would hurt Pennzoil, and that the balance of harms was so disproportionate that the Constitution forbids Texas to strike the balance in the way that it did. A court could conceivably decide that argument either way, but it is vastly weaker than Texaco's version. If Pennzoil would not be injured at all, then Texaco's proposal is Pareto optimal and it is irrational not to adopt it. But once the Court understands that someone will be hurt either way, it is likely to defer to the state's balancing of interests.

The Second Circuit ignored the potential harm to Pennzoil in its treatment of the merits. It treated harm to Pennzoil as going only to whether the balance of hardships favored a preliminary injunction. In effect, it held that Pennzoil's rights pending appeal were irrelevant as long as Pennzoil could collect the judgment after appeal. The court was confident that Pennzoil could collect, because Texaco was worth $23 billion and because there was no evidence that Texaco would try to conceal its assets or put them beyond Pennzoil's reach.

The court applied an obvious double standard to the balance of harms. In assessing the risk to Texaco, the court assumed that Pennzoil would act aggressively and irrationally, destroying Texaco at the risk of destroying itself. But in assessing the risk to Pennzoil, the court assumed that Texaco would behave in a way that fully protected Pennzoil. After all, Texaco was "a publicly held corporation."

What could Texaco have done to reduce Pennzoil's prospects for recovery? Keep in mind that the judgment gave Pennzoil no interest whatever in a single piece of Texaco's property. Pennzoil could acquire a claim on particular assets only by filing a judg-

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135. A proposal is Pareto optimal if it would make at least one person better off and no one worse off. For further explanation, see R. Posner, supra note 44, § 1.2, at 12-14.
136. Texaco, 784 F.2d at 1155.
137. Id.
138. For further analysis of the point at which a judgment creditor acquires a property right, see Carlson & Shupack, Judicial Lien Priorities Under Article 9 of the Uniform Commercial Code: Part I, 5 Cardozo L. Rev. 287, 290-99 (1984).
ment lien on real estate or by levying on personal property. Until Pennzoil took these steps, any mortgage, any security interest, any lien acquired pursuant to another creditor’s judgment, or any purchase of a Texaco asset would create a competing claim that would have priority over Pennzoil’s claim.\textsuperscript{139} Three levels of appellate review could take two to three years, during which time Texaco would be operating under great financial stress. Its suppliers, lenders, and joint venturers would predictably withhold further unsecured credit for as long as Pennzoil’s judgment was outstanding. Thus, Texaco could grant mortgages and security interests to many people and quite plausibly claim that, under the circumstances, these interests were granted in the ordinary course of business.

If Texaco wanted to deliberately evade the judgment, it could convey assets to subsidiaries, affiliates, or insiders at bargain prices, or exchange assets in the United States for assets in distant corners of the third world. Many of these transactions could be set aside as fraudulent conveyances, but that would require tracing and litigating each transaction. It seems unlikely that Texaco could make $23 billion disappear in three years, but it could certainly alienate or encumber the most accessible assets and greatly increase the cost and difficulty of collecting the judgment.

The one way to make all the assets disappear at once would have been a leveraged buyout of the company. The standard leveraged buyout of the mid-1980s would have left Texaco with little or no net worth, heavily encumbered by the junk bonds used to finance its own purchase. Such a transaction seems plainly to be a fraudulent conveyance. Texaco would have received no consideration for its promise to pay massive new debts; all the consideration would have run to the insiders who acquired ownership of the company; and Texaco’s earlier creditors would have suffered a severe loss in their ability to collect. Thus, Pennzoil should have been able to prevent or set aside such a transaction. But eminent scholars argue that leveraged buyouts should not be treated as fraudulent conveyances and that other creditors should have no remedy except through their loan covenants.\textsuperscript{140} As an unsecured judgment creditor, Pennzoil had no loan covenants. And

\textsuperscript{139} For a discussion of priorities among competing creditors, see id. at 299-370.
the federal injunction against efforts to collect the judgment took away all the bargaining leverage that it might have used to negotiate the equivalent of loan covenants. The Second Circuit did say that if Texaco began concealing its assets, Pennzoil could move to modify the injunction. But that left Pennzoil unsecured and at risk, with the burden of monitoring Texaco's transactions and moving for modification after there was evidence that assets were disappearing and before they had actually disappeared. Given Texaco's financial straits, many assets could easily disappear in ordinary business transactions. The purpose of a supersedeas bond, or a negotiated mortgage on particular assets in lieu of a bond, is to avoid these problems. So even though it remained likely that Pennzoil would collect after all appeals had been exhausted, it was not certain, and the federal injunction greatly increased the cost and risk to Pennzoil.

The risk that assets might disappear highlights the legitimate function of a supersedeas bond and the most fundamental defect in Texaco's argument. Texaco distinguished the thousands of routine cases involving insolvent defendants by arguing that a bond is useless with respect to wealthy defendants who can pay the judgment. But, as Gregory Gelfand has explained, that is backwards. The bond is useful only for defendants with assets. For those defendants, the bond protects against the risk that the assets might disappear or be encumbered by other creditors. But if there are no assets, there is no risk of assets disappearing. For defendants without assets, the creditor has nothing to lose and the bond has nothing to protect. Thus, the requirement of a supersedeas bond should be for the amount of the judgment or the net value of defendant's assets, whichever is less.

It is indeed irrational to require a bond from poor defendants who have no assets to dissipate. For them, the bond prevents appeal and serves no purpose. Texaco's argument fits their case. Perhaps the bond rules are unconstitutional as applied to poor defendants, although the present Supreme Court is not likely to

141. Texaco, 784 F.2d at 1155.
142. See supra text accompanying note 133.
say so. The bonding rules were not unconstitutional as applied to Texaco.

Finally, Texaco got no help on the merits from the precedent enjoining enforcement of a judgment against the NAACP.144 Texaco’s constitutional claim was that the bonding rules violated due process.145 The NAACP’s constitutional claim had been that the state judgment on the merits violated the first amendment.146 The Fifth Circuit had relied on the difficulty of posting the bond only to show that the state judgment was immediately enforceable.147 Immediate enforceability was thought necessary to show that the judgment was state action.148 There was no due process holding in the case.

B. The Abstention Arguments

Even if the bond requirements were unconstitutional as applied to Texaco, Texaco could not present that claim in federal court. Pennzoil relied on the Younger and Pullman abstention doctrines, and on the Rooker-Feldman doctrine to establish a lack of federal jurisdiction. At least one of these doctrines barred Texaco’s claim.

1. Younger Abstention.—Texaco’s claim was plainly barred by the doctrine of Younger v. Harris.149 Texaco was a party to the pending state litigation in Texas; therefore, it was required to present all its federal claims in that litigation.150 The Second Circuit rejected this conclusion, holding that Younger does not apply to ordinary civil litigation in which the state has no substantial interest.151 It is true that the modern Younger doctrine originated in suits to enjoin criminal prosecutions, that the Supreme Court has emphasized the importance of the state’s interest in cases sub-

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145. Texaco, 784 F.2d at 1153-54.
146. Henry, 595 F.2d at 299, 302-04.
147. Id. at 299-300.
148. Id.
150. Id. at 45.
j ect to the Younger doctrine, and that it has always refrained from holding that Younger applies to all civil litigation between private parties. But it is also true that the Court has never found a case in which the state’s interest is not strong enough to trigger the doctrine.

The Court had already applied Younger to state collection proceedings in *Juidice v. Vail*. The federal plaintiffs in *Juidice* were consumers who borrowed small sums from loan companies and failed to repay the loans. The loan companies obtained state judgments against the debtors, and then subpoenaed the debtors to appear at depositions to testify about their assets. When the debtors failed to appear, the court cited them for contempt. The debtors were eventually arrested and imprisoned for contempt. Those who paid an alternative fine were released, and the fines were apparently used to pay the creditors.

A class of such debtors sued to enjoin this use of the contempt power. They alleged as due process violations that none of the notices they received had warned of potential imprisonment, that the state rules did not guarantee them a hearing prior to imprisonment, and that they were entitled to appointed counsel at any hearing that might result in their imprisonment.\(^{153}\)

The Supreme Court held these claims barred by *Younger*.\(^{154}\) The debtors were required to raise their due process claims in the state proceedings, as a defense to the contempt charge. *Juidice* thus holds that the state’s interest in enforcing judgments is sufficient to trigger the Younger doctrine, and that challenges to state collection procedures must be brought in the state collection proceedings.\(^{155}\) The bottom line on *Younger* is the same as with Texaco’s claim on the merits: if these low-income debtors have no right to present their due process claims to a federal judge, it is hard to see why Texaco should get a different rule.

The Second Circuit—and the Fifth Circuit in the NAACP’s case—distinguished *Juidice* on the ground that it extended only to

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153. *Juidice*, 430 U.S. at 340 n.3 (Stevens, J., concurring) (describing the debtors’ claims).
154. *Id.* at 337.
155. *Id.* at 336 n.12.
the state’s interest in the contempt power. These courts thought the state’s interest in enforcing court orders with contempt sanctions was greater than its interest in enforcing money judgments. They reached this conclusion even though the contempt sanctions in *Juidice* were merely a means of enforcing money judgments, and even though the contempt power was invoked to enforce discovery orders that were part of the state’s effort to enforce small money judgments for private creditors.

The Second Circuit also thought that if *Younger* applied to the collection process, then it would apply to all civil litigation. The court apparently offered this implication as a *reductio ad absurdum*. However, *Juidice* had broadly hinted that *Younger* does indeed apply to all civil litigation, and although the Court had formally reserved the issue, the dissenters treated that reservation as a sham.

Whatever the merit of some line between *Pennzoil* and all civil litigation, speculation about the difficulty of drawing such a line did not justify a line between *Pennzoil* and *Juidice*. When *Pennzoil* reached the Supreme Court, the majority reversed on the authority of *Juidice*. Justice Brennan, concurring on other grounds but resisting the application of *Younger*, relied on his dissent in *Juidice*.

The Second Circuit also held *Younger* inapplicable on the ground that Texaco had no reliable way to present its constitutional

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157. Texaco, 784 F.2d at 1149.

158. In *Juidice*, the court stated that:

> the "more vital consideration" behind the *Younger* doctrine of nonintervention lay not in the fact that the state criminal process was involved but rather in "the notion of "comity," that is, a proper respect for state functions, . . . the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."


160. *Id.* at 345 n.* (Brennan, J., dissenting).


162. *Id.* at 19 (Brennan, J., concurring).
claim to the Texas courts.\textsuperscript{163} Lawyers with the imagination to think of Texaco’s federal claim—and to think of filing it in White Plains—surely could have imagined a document entitled something like “Motion to Stay Execution of Judgment, Without Bond, on Grounds of the Federal Right to Due Process.” If they were not sure whether to file this motion in the state trial court or the state court of appeals, they could have filed in both. Indeed, they did file such a motion in both courts on April 6, 1987, immediately after losing in the United States Supreme Court. They got immediate relief from the Texas Court of Appeals, which stayed execution of the judgment to permit time to consider Texaco’s claims.\textsuperscript{164} Shortly thereafter, Texaco abandoned these proceedings and filed for bankruptcy.

The Second Circuit assumed that because the Texas procedural rule was clear on its face, the Texas courts “would in all probability deny relief sought on constitutional grounds or leave the constitutional issues undecided.”\textsuperscript{165} This is an obvious non sequitur; the clarity of one issue predicts nothing about a court’s ruling on a different issue. But even if the Second Circuit’s reasoning made sense, it was assuming precisely what the Younger doctrine says that federal judges cannot assume. The Younger doctrine rests on the almost irrebuttable presumption that constitutional rights are as safe in the hands of state judges as in the hands of federal judges. The Court has indulged that presumption with respect to civil rights litigants from the deep South in the 1960s\textsuperscript{166} and with respect to political radicals,\textsuperscript{167} poor people,\textsuperscript{168} and sellers of explicit sexual entertainment.\textsuperscript{169} Whatever the merits of the

\begin{footnotesize}
\begin{enumerate}
\item[164.] These proceedings are described in Mnookin & Wilson, Rational Bargaining and Market Efficiency: Understanding Pennzoil v. Texaco, 75 Va. L. Rev. 295, 327 (1989).
\item[165.] Texaco, 784 F.2d at 1150-51.
\item[167.] See Younger v. Harris, 401 U.S. 37 (1971).
\end{enumerate}
\end{footnotesize}
Court’s presumption, there is no reason to invoke the opposite assumption for Texaco.

The Supreme Court’s precedents also foreclosed Texaco’s claim that there was no clear procedural mechanism to present its due process claim in the pending litigation. The claim in *Juidice* was that neither the subpoena nor the contempt citation gave adequate notice that the debtors risked imprisonment if they failed to appear at their deposition. If they did not know that they risked imprisonment, how were they to raise the claim that they had not been told? If they were constitutionally entitled to counsel, how could a pro se opportunity to request counsel be a sufficient remedy? Justice Stevens, concurring on other grounds, argued that a procedure that allegedly violated due process could not provide an adequate opportunity to raise the claim that it violated due process.

But the majority rejected this argument. These unsophisticated debtors could have raised their claims pro se after they were cited for contempt, or after they were arrested, and that would have constituted sufficient opportunity. *Younger* litigants have been required to file counterclaims, and to present claims that had already been rejected by the relevant state supreme court. The Court applied *Younger* to welfare recipients subjected to state attachment proceedings, despite serious doubts about their ability to present their constitutional claim in the state proceedings. Serious doubts were not enough; the federal claim was allowed to proceed only when the federal trial court determined on remand that it was in fact impossible to raise the federal claim in the state attachment proceedings. Whatever the merits of these decisions as an original matter, they make *Pennzoil* an easy case. Texaco

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171. See *supra* text accompanying note 153.
173. *Id.* at 330, 337 n.14.
had ample opportunity to present its federal claims to the state courts, and it was required to do so.

This analysis also suggests that the NAACP's case was probably wrongly decided under the Supreme Court's precedents. Like Texaco, the NAACP should have moved in state court to stay execution without requiring a supersedeas bond, alleging that otherwise the judgment would be enforced without appellate review and that its first amendment rights would be violated. Assuming that such a motion was denied, the NAACP could have appealed the motion to the Supreme Court of Mississippi.

If the Supreme Court of Mississippi had affirmed, or held the motion under advisement without issuing a stay, the NAACP would have had to attempt an appeal to the United States Supreme Court. The United States Supreme Court has jurisdiction only over appeals from final judgments of state courts of last resort.178 Because the judgment on the merits would not yet be final, the NAACP would have had to argue that the failure to grant the motion was in effect a final judgment on a matter separable from the merits.179 Alternatively, if the state courts held the motion under advisement while the state plaintiff began executing the judgment, the NAACP might sue in federal district court, alleging that experience now showed that it was impossible to present its claim in state court. Perhaps an opinion could be written that would rescue the NAACP from the tangles of the Younger doctrine.

Or the NAACP could have sought temporary refuge in the bankruptcy courts. But in 1976, when the NAACP got its first federal injunction in the case,180 bankruptcy was a much less attractive haven. The 1978 revision made it possible to file for bankruptcy without losing control of the organization and without

179. See Local No. 438 Constr. & Gen. Laborers’ Union, AFL-CIO v. Curry, 371 U.S. 542, 549 (1963) (Supreme Court can review interlocutory orders falling “in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” (quoting Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1949)); see also Nebraska Press Ass’n v. Stuart, 423 U.S. 1327, 1329-30 (1975) (Blackmun, Circuit Justice) (Supreme Court has jurisdiction where state supreme court defers review of prior restraint, because “delay itself is a final decision”).
being insolvent. These amendments led lawyers to explore bankruptcy as a temporary solution for financial distress arising from a single extraordinary claim. The resulting experience was available to Texaco in 1986, but not to the NAACP in 1976.

The realist explanation seems to fit the NAACP case best: no one explored the bankruptcy solution, and the Burger Court would not permit the state courts of Mississippi to destroy the NAACP. The Second Circuit apparently thought a parallel theory applied to the Texas courts and Texaco. But Texaco’s history in Texas bore no resemblance to the NAACP’s history in Mississippi. Texaco’s case was governed by the ordinary rules of law.

2. Pullman Abstention.—Pennzoil also relied on other abstention doctrines that were less clearly applicable. Pullman abstention authorizes federal courts to dismiss constitutional challenges to ambiguous state laws, because a clarification of the state law might change or even eliminate the federal constitutional question. Texaco’s claim should not have been subjected to Pullman abstention as a matter of first principle, and probably not as a matter of precedent, but there are precedents to support almost any result in Pullman cases.

The biggest cost of Pullman abstention is extraordinary delay as the parties first litigate the state issue in state court and then the federal issue in federal court. But if there were merit to Texaco’s federal claim, time was of the essence. And unlike Younger, Pullman abstention is a discretionary doctrine. The need for prompt resolution weighs heavily against Pullman abstention.

A second reason to refuse Pullman abstention was that the Texas rules unambiguously required a bond in the full amount of the judgment. The Court generally holds that Pullman abstention is inappropriate unless the state law is “fairly,” “obviously,” or “reasonably” susceptible of a construction that would eliminate

181. See 11 U.S.C. § 109 (1988) (provisions on who may be a debtor in bankruptcy; insolvency is not a requirement); 11 U.S.C. § 1104 (1988) (trustee in bankruptcy to be appointed only for cause or when appointment is in the best interests of creditors or the estate).
184. See supra note 92.
or sharply change the federal question.\textsuperscript{185} It is always conceivable that the state court might distort a clear provision to avoid constitutional doubt, but that should not be sufficient. If that were sufficient, \textit{Pullman} abstention would be required in every case in which a constitutional challenge is made to a state rule or statute.

Finally, the inflexible Texas bond requirement might violate the open courts clause of the Texas Constitution.\textsuperscript{186} As a matter of first principle, the open courts claim is as plausible as Texaco's due process claim. And unlike the due process claim, the open courts claim is not barred by adverse federal precedents. Should Texaco's possible claim under the open courts clause trigger \textit{Pullman} abstention?

\textit{Pullman} does not apply where the only uncertainty is whether the state court will hold the challenged law invalid under the federal constitution or a parallel state constitutional provision.\textsuperscript{187} But \textit{Pullman} abstention is sometimes required where the state court might hold the challenged law invalid under a more specific state constitutional provision.\textsuperscript{188} Thus, the question is how to characterize the open courts clause.

The open courts clause appears to be a state analogue of the due process clause. It is a general mandate for judicial hearings on claims of right, with no more specific guidance in constitutional text or history. Courts must decide on a case-by-case basis what hearing is required. Indeed, the open courts clause appears to be part of a guarantee of due process for plaintiffs and for parties in private disputes,\textsuperscript{189} clarifying the parallel guarantee of due process


\textsuperscript{186} Tex. Const. art. I, \S 13. For an analysis of the open courts clause in this context, see Carlson, supra note 102, at 39-49.

\textsuperscript{187} See Midkiff, 467 U.S. at 237 n.4; Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 597-98 (1976).

\textsuperscript{188} See Harris County Comm'rs v. Moore, 420 U.S. 77, 84-85 (1975); Reetz v. Bozanich, 397 U.S. 82 (1970). For analysis of this distinction, see 17A C. Wright, A. Miller & E. Cooper, supra note 185, at 47-50.

\textsuperscript{189} The open courts clause provides:

All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

before deprivations by the state.\textsuperscript{190} State courts deciding Texaco's claim under the open courts clause should consider substantially the same competing interests as federal courts deciding Texaco's claim under the due process clause. Thus, \textit{Pullman} abstention should not be required, especially in light of the need for speedy resolution. But the Court could have reached the opposite conclusion, viewing the open courts clause as a specialized provision subject to its own different body of precedent.

Justice Blackmun would have required \textit{Pullman} abstention, citing the briefs as evidence of unexplained ambiguities in state law.\textsuperscript{191} He apparently included the state constitutional claim as one of the ambiguities.\textsuperscript{192} He also apparently assumed that a "possibility" of a state-law resolution was sufficient to justify abstention.\textsuperscript{193} General application of these propositions would expand \textit{Pullman} abstention unmanageably.

3. \textit{The} Rooker-Feldman Doctrine.—Finally, there is the so-called \textit{Rooker-Feldman} doctrine.\textsuperscript{194} This doctrine holds that federal trial courts may not relitigate matters already decided in state courts, because that would be functionally equivalent to an appeal, and federal appellate jurisdiction over state courts is exclusively in the United States Supreme Court.\textsuperscript{195} The doctrine's boundaries are relatively undeveloped, because other doctrines do all or nearly all of its work. It is hard to believe that the Court needs to proliferate yet another doctrine for keeping federal claims out of federal court.

\textit{Rooker-Feldman} is basically an application of claim and issue preclusion; the federal claim is barred by the preclusive effect of the earlier judgment. But we need no new judge-made law to provide for preclusion between state and federal courts. The full faith

\textsuperscript{190} The due process clause of the Texas Constitution provides:

\textit{No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.}

\textit{TEX. CONST.} art. I, § 19.

\textsuperscript{191} \textit{Pennzoil Co. v. Texaco, Inc.}, 481 U.S. 1, 29 (1987) (Blackmun, J., concurring).

\textsuperscript{192} \textit{id.} ("[N]umerous Texas statutes and constitutional provisions are at issue here.").

\textsuperscript{193} \textit{id.}

\textsuperscript{194} \textit{See} District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

\textsuperscript{195} \textit{Feldman}, 460 U.S. at 482; \textit{Rooker}, 263 U.S. at 416.
and credit act does the job, providing that state judgments shall have the same effect in federal court that they would have in state court.\footnote{196}

\textit{Rooker-Feldman} emerged as a doctrine in a suit to enjoin a local court’s exercise of discretion over bar admissions.\footnote{197} The principal issue was whether the challenged decision was judicial rather than administrative or legislative. In that odd context, the usual doctrines of preclusion may have seemed ill-fitting. But once the decision was classified as judicial, the usual doctrines fit, and the fit is no better and no worse with a different name. In more conventional contexts, the Court applies the full faith and credit act to cases that it could have treated as \textit{Rooker-Feldman} cases.\footnote{198} Adding to this redundancy, the Court has also applied the \textit{Younger} doctrine to bar federal suits that would prevent enforcement of completed state court proceedings.\footnote{199} It is not clear that \textit{Rooker-Feldman} adds anything other than an alternate label, and it is not clear when the alternate label can be applied.

Pennzoil may have turned to \textit{Rooker-Feldman} because the usual preclusion doctrines once again seemed ill-fitting. There was a final judgment in the state case, and Texaco was challenging the enforceability of that judgment. But Texaco’s challenge went to the procedures for appealing, bonding, and collecting the judgment, which were matters that could not have been litigated before the judgment was entered. So Pennzoil might have been uncertain whether Texaco’s claim was barred by the preclusive effects of the state judgment.

This anomaly does not require a new doctrine. Either the case was sufficiently over to invoke claim preclusion, or the case was still pending and Texaco’s claim was barred by \textit{Younger}. Once a state case begins, it must be either pending or over—either subject to \textit{Younger} or subject to preclusion law. But the lingering possibility that \textit{Younger} might not apply to all civil litigation threatened a gap in that coverage, and Pennzoil presumably turned to \textit{Rooker-Feldman} to help cover that gap.

\footnote{196}{28 U.S.C. § 1738 (1988).}
\footnote{197}{See Feldman, 460 U.S. at 462.}
\footnote{199}{See Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).}
Justice Scalia thought *Rooker-Feldman* inapplicable because Texaco's claim did not require review of anything "actually litigated in the Texas courts or inextricably intertwined with issues so litigated." This implicitly treats the doctrine as one of issue preclusion only. Claim preclusion normally bars claims that *could* have been raised in the earlier litigation as well as claims that actually were raised. More important, the scope of preclusion would be determined by state law under the full faith and credit act, and the Court should not make up its own body of claim preclusion rules under the *Rooker-Feldman* label. In addition, *Younger* has been applied to bar claims that could have been raised in earlier state court proceedings. Justice Scalia's narrow interpretation of *Rooker-Feldman* is irrelevant unless he interprets these other doctrines just as narrowly.

Nor was it clear that Texaco's federal claims were separable from the issues that had been litigated in state court. The federal district judge set the amount of the preliminary injunction bond based on his assessment of the highest damage award that could be sustained on appeal; the Second Circuit thought that Texaco had no federal claim unless its state court appeal was not frivolous. Both of these decisions required partial review of the merits of the state court judgment.

Justice Marshall thought that *Younger* did not bar Texaco's claim but that *Rooker-Feldman* did. The apparent motive for this distinction is that *Rooker-Feldman* applies only after a state court judgment, but *Younger* applies to those cases and also to pending state proceedings before judgment. Thus, *Younger* is much more often applicable than *Rooker-Feldman*. Further expansion of *Younger* would bar more claims of the sort that Marshall would allow in federal court. Once he decided to vote against

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201. See Restatement (Second) of Judgments §§ 17-18 (1980).
Texaco's claim, *Rooker-Feldman* was a ground that did less damage to other issues that he cared about.

VI. Conclusion

One of the most dramatic points in the *Pennzoil* trial came when New York lawyer Martin Lipton, testifying for Texaco, said that the rules that apply to ordinary contracts do not apply to billion-dollar transactions.206 The jury was not amused. But Lipton's view that the ordinary rules did not apply to Texaco permeated Texaco's strategy and tactics with respect to remedies issues.

If you convert a valuable asset, the rule is that you have to pay for it. If you grab the asset out from under someone else's contract to buy it, the rule is that you have to pay the benefit of the bargain. If the asset is large, and the victim bought it at a discount, the benefit of the bargain may be a very large sum. If you deprive a little oil company of its only chance to be a major oil company, the damages may be billions of dollars.

If you inflict damages greater than your ability to pay, your creditors will begin taking your assets, you will be driven into bankruptcy, or you will have to reach some agreement that satisfies your principal creditors. If you want to appeal, you will have to file a bond. You will have to appeal in the same court system that rendered the judgment; "there is no 'Court of Appeals for Texas of the Southern District of New York.'"207

The outstanding judgment may interfere with your ordinary lines of credit and restrict your ordinary course of business. No clause of the Constitution guarantees that your business can continue unaffected even if an $11 billion judgment is entered against you. Many a smaller business has suffered the consequences of a judgment it could not pay. There was truth in Laurence Tribe's claim that the Second Circuit had created a unique rule—"the Rule in Texaco's Case."208 But the Texas Supreme Court and the United States Supreme Court both held that Texaco was bound by the same rules as everybody else.

Texaco was ultimately rescued because, at the very end, Pennzoil blinked first. Pennzoil had a judgment for $10.5 billion: the original $10.5 billion, less the $2 billion remittitur of punitives, plus interest through the day the petition for bankruptcy was filed. The judgment had been affirmed by the court of last resort on all state law issues. The contract issues, the tort issues, and the damage issues were over. Texaco had finally and authoritatively lost on the heart of the case.

Nothing was left but discretionary review on certiorari, limited to federal issues. Some of these federal issues were desperate efforts to convert alleged state-law errors into violations of due process or full faith and credit. Others were collateral securities law challenges, fairly debatable on the merits but not well preserved, and unlikely to arise again on similar facts. It was hard to claim that these issues deserved review on certiorari under the principles that ordinarily guide the Court's discretion. Unnamed Texaco lawyers were quoted as predicting a one-in-five chance of success. That estimate may have been optimistic, but let us accept it.

The settlement value of a $10.5 billion judgment with an eighty percent chance of affirmance should be $8.4 billion. Pennzoil settled for $3 billion. Why? Partly to discount to present value the prospect of a long, slow collection process, delayed by Texaco's efforts to reorganize in the bankruptcy courts. But mostly, I suspect, because $3 billion was simply too much money to risk losing, even when the odds of winning were very good. Perhaps because an $8.4 billion settlement would have destroyed Texaco, so that the full $10.5 billion judgment was not enough worse to give Pennzoil any bargaining leverage in the range of the litigation's expected value. Thus, wealth effects on both sides may have determined the range of possible settlements. It has also been argued that agency problems and information problems distorted the bargaining process.

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209. See Mookin & Wilson, supra note 164, at 298 n.16.


211. For much more extensive analyses of agency costs and information problems, see Bundy, Commentary on "Understanding Pennzoil v. Texaco": Rational Bargaining and Agency Problems, 75 Va. L. Rev. 335 (1989); Lax, Commentary on "Understanding Pennzoil v. Texaco": Market Expectations of Bargaining Inefficiency and Potential Roles
For whatever reasons, Texaco was more prepared than Pennzoil to run the risks of further litigation. As a result, the case settled for far less than its value on the day of settlement. Pennzoil acquired its extraordinary expectancy by hard bargaining, and in the end, Pennzoil lost most of it to hard bargaining. The rules of hard bargaining are also rules that apply to everybody.
