RESTITUTIONARY TOOLS IN NATURAL RESOURCES LITIGATION: CONFRONTING THE COASIAN CORPORATION

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I. Introduction

In the United States today the public is faced with a series of problems having to do in one way or another with corporate and in some cases governmental abuse of common assets in natural resources and the environment. Private and government malefactors will be insulated from effective challenge in many of these cases especially where, (1) the loss to individual members of the public is small (even though the aggregate loss may be large), (2) the questioned activity involves a small risk of a large potential loss; (3) litigation costs are high; and (4) where the activity complained of can be defended in the terminology of economic development.

Two of the traditional legal tools for dealing with problems where corporations are either unjustly appropriating common resources directly, or damaging them through the planned creation of external impacts, are individual plaintiff nuisance actions, and class actions. Unfortunately both of these responses suffer from serious

weaknesses in practice, and each have been under procedural or substantive attack.

For private nuisance this attack has infested and transmogrified the traditional balancing elements found in nuisance into a rule that in essence allows a private corporate appropriator of common resources a right of eminent domain with an obligation to pay compensation only to those who litigate, and can prove up damages, a close to empty class of plaintiffs where though aggregate damages are large, individual damages, and thus willingness to support litigation, are small.

The class action approach, which springs readily to mind given what was has just been said about the problems with private nuisance, or tort actions for damages in general, has been substantially undercut in the federal courts by the Supreme Court decisions in Zahn v. International Paper Co.[1], and Eisen v. Carlisle[2] and their progeny Zahn stands for the proposition that federal diversity jurisdiction over the class in an action brought under FRCP 23(b)(3) will not exist unless each and every member of the class meets the $10,000 jurisdictional limit

[1] 414 US 291 (1973).

[2] 417 US 156 (1974).

under 28 USC 1332(a). In Eisen, on the other hand, the Court held that in a Rule 23(b)(3) action "individualized notice be sent to all members of the proposed class who can be identified through reasonable effort."[3] Taken together these two cases have seriously undermined the class action approach in the federal courts.[4]

It will be argued below that these nuisance-damages and class actions problems are not only of significance to the law and lawyers, but also, and more importantly, are significant as data to be fed into the corporate profit maximizing calculus which determines how corporations will conduct their operations.

This paper undertakes three tasks. The first is to provide a simple economic model of the legal and economic system of incentives facing corporations to counterpose to the Coasian model currently the rage among economic dilettantes in the legal profession. The second task is to provide a detailed analysis of the structure of the class action as a tool to use in approaching certain sorts of

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[3] 417 US at 173-5 (1974).

[4] Access to the federal courts is particularly important for class action purposes because so many environmental and natural resource related cases involve litigants from more than one state with small or relatively small individual claims. See Mark P. Denbeaux, "Restitution and Mass Actions: A Solution to the Problems of Class Actions," 10 Seton Hall Law Review 273, (1979).

natural resource related problems. In a reversal of the usual process we will find that the taxonomical discussion of class actions provides a significant insight into our understanding of the different types of economic and resource problems we are dealing with in the real world. Finally, section IV elaborates a litigation design which sidesteps both the nuisance-damages problem and the class action problem, through a strategy based on unjust enrichment instead of on tort damages, which at the same time meets our requirements for an approach consistent with a sound system of incentives for corporations.

II. Corporate Incentives, The Rights of Citizens and Economism: The Incentive/Litigation Model and Boomer v. Atlantic Cement

Borrowing a page from the economists, we know that the profit maximizing corporation will undertake any activity that promises to return an adequate return over cost. We also know that in determining what qualifies as a cost in arriving at a decision as to whether to engage in any particular activity, costs to third parties are counted only in, and to the extent that, they can be brought home to the corporation. Corporate irrigators in Indiana rapidly

drawing down the surrounding water table see the costs to their neighbors of having to drill new and substantially deeper wells as economically relevant only in that the neighbors can impose countervailing costs on the corporation, either through damage awards or through other means. In the Reserve Mining case on Lake Superior, Reserve was more than willing to continue to dump millions of tons of asbestiform fiber tailings into the lake, notwithstanding what it knew about the likely health impacts to residents of cities like Duluth, as long as water drinkers in Duluth, and other lake related interests were unable to make it more cost effective for Reserve to stop the appropriation of the lake resource than to continue. To the extent, then, that recourse to the legal system to bring home these costs to the wrongful appropriators of public or common resources becomes more costly, more difficult, and/or less likely to be fruitful, the corporations are given an economic signal that society would view a continuation and expansion of their perverse activities in a positive light.

Economism is the belief that the economic goals and principles espoused by the neoclassical economic paradigm ought to be the major determinant *of* public policy and

legal decision making. The structure of this position is laid upon a foundation of several major methodological and factual assumptions. The first of these is that the unit of analysis is the individual economic actor; economism's "economic man" includes both individuals and corporations, but notably does not include communities, families or similar "sociological" entities. Thus while the preferences of individuals qua individuals bulk large within the neoclassical system (at least in theory), the needs and desires of communities are irrelevant.

Second, central to economism is the belief, derived initially from Adam Smith, but hardened by the admixture of social darwinism, that the market system is indigenous to mankind, and that the unimpaired operation of the modern economy's markets for goods and services will produce the best of all possible worlds (defined as that situation where the wealth of those participating in the market system is maximized).

> The only kind of preference that counts in a system of wealth maximization is thus one that is backed up by money--in other words that is registered in a market.[5]

[5] Richard Posner, "Utilitarianism, Economics and Legal Theory," 8 Journal of Legal Studies 103, 119 (1979).

Third, since it is clear to most observers that the U.S. economic system diverges in some particulars from that which Adam Smith had in mind, or which has been articulated with such mathematical finesse and nicety in the learned journals of the economics profession, it has been necessary to assume further that the economy as it stands, though lamentably riddled with imperfections, is not so far from its theoretical norm as to noticeably affect the result.

If these assumptions are accepted at face value it is an easy step to the conclusion that since the economic system will produce the best of all possible worlds (as defined above), the goal of public policy ought to be the attainment of economic efficiency within the productive system, the legal system, and the nation as a whole. From this adoption of economic efficiency as the standard, it follows that economic method is the only legitimate method to be used for the development and testing of proposed policies at all levels of government, and in all cases which relate to the operation of the economic activities of actors in the economy. A corollary of this is that if economic method is to be used to determine the legitimacy of public policy as well as the outcome of cases, then it also follows that economists, with due modesty, are better

suited to decide cases than are unreconstructed lawyers, and better suited to make decisions about public policy that is the lay citizenry.

Finally, to make such a system operable in a nation of people by and large without economics degrees, who have an unfortunate proclivity to concern themselves, more or less irrationally and troublesomely, with a variety of aesthetic, sentimental, communitarian (especially in the case of minorities like the American Indians), and other "sociological" values, it is necessary to assert that all such values can be made commensurable with purely economic variables through the assignment of dollar magnitudes to them, such magnitudes being arrived at through a combination of arcane mathematics and the basic cleverness of economists in managing just this sort of thing.

Applied to cases this means that the only values that should be accepted as cognizable by the legal system would be values denominable in dollars and valued in the marketplace. "The value of a thing, is the price it will bring" is the rock of legal decision making in the Posnerian world; the only cognizable values are made by markets and not subjectively by a jury poorly steeped, if at all, in the science of economic computation; objet

d'litigation which the market has not gotten around to valuing as of the time of decision are then assumed to be of zero value; speculative damages are not compensable.

With respect to corporate decision making this approach leads us to the conclusion that corporations ought to be allowed to do whatever the market leads them to want to do as long as they are willing to pay the market determined economic costs entailed in those activities. The corporation in this framework will then naturally limit its activities to those for which the revenue stream exceeds the direct costs plus the consequential costs brought home to it through the system of litigation.

In estimating the expected value of the damages likely to be brought home via litigation, economically rational corporations will utilize a calculus of the following sort: There is some probability that an injury will result to innocent parties as a result of the proposed activity and that those injured will become cognizant of their injury at some point in time, some outside the applicable statute of limitation, and some not.[6] Of those aware of having live

[6] Sheldon Engelmayer & Robert Wagman, Lord's Justice, Garden City, 1985, Doubleday, on Robbins and the Dalkon Shield is a good case study well presented of a corporation acting purposively along these lines.

claims, some will sue and some will not. Of those suing some will prevail and some will not. Those who prevail will on the average receive an average award of ‘M’. In mathematical terms we have the following:

Let:

p(1t)	=	The probability that the injury done will be recognized at time t.
T+1	=	The year at which the statute of limitation comes into effect.
p(2)	=	The probability that those identifying the injury will sue.
p(3)	=	The probability that those that sue will prevail.
I	=	The relevant interest rate for discounting purposes.
X	=	Corporate litigation related expenses (except judgements)
E(LC)	=	The expected cost to the corporation of litigation related expenditures.

Combining all this in economicaly reasonable fashion we can write:

$$E(LC) = \sum_{t=0}^{t=T} \{p(1t)p(2)p(3)L(t) + X\} \ [1+I]^{-t}$$

This equation says that the corporation's liability related expenses will be less than the total losses imposed on society by several amounts'

1. The value of injuries imposed but never identified as being attributable to the corporation by the victim.

2. The involuntary "loan" of the "value" of the injury by the victim before discovery to the corporation (in a just world the liability for the injury inflicted would begin at the point in time when the injury was inflicted, with the corporate tortfeasor becoming a constructive trustee at that point).

3. The value of injuries discovered after the statute of limitations has run or the corporation has rendered itself immune in some other way, for example, via bankruptcy as with Robbins and Johns-Manville.[7]

4. The reduction in the present value of any future award due to the delaying impact of the litigation on the date that the damages will be paid.

[7] See Paul Brodeur's, Outrageous Misconduct: The Asbestos Industry on Trial, New York, 1985, Pantheon, chapter ten on the Manville bankruptcy.

5. The windfall to the corporation of the actual losses of those who are unable or unwilling to litigate their injuries.

6. The windfall to the corporation of those who are injured, litigate, and don't prevail for whatever reason.

To lend a numerical flavor to the situation assume a corporation pursuing a conscious corporate policy of "cost effectively" dumping uranium tailings into arroyos subject to flash flooding, knowing that this policy will result in radioactive contamination of a downstream community water supply in the southwest. By dumping the tailings in this fashion the corporation has saved $20 million over the relevant period compared to what it would have had to pay to "dispose" of its wastes in a safe manner. As a result ten people sicken and die with the loss to society of at least $1 million each. In the jurisdiction in question the last day of the third year after injury is the hypothetical statue of limitation. (Refer to the table).

Of the ten injuries seven are discovered before the statute of limitations intervenes. The discoveries in years 4, 5 and 6 are thus not actionable resulting in a three million dollar windfall to the corporation. Of the seven

Table 1

Year	Discovery of Injury	Suit # & Year	Wins # & Year	Awards Year & Amt
1	1	1		
2	3	2		
3	3	2		
----------	Statute of Limitations			----------
4	1		1	$1 M
5	1		1	1 M
6	1			
7			1	1 M
8				
9				
10				

who discover their injury in time, five file actions. Of the five actions three result in awards resulting in payments in the years 5, 6 and 7. In terms of present value these awards are worth an aggregate of:

Aggregate Present Value of Awards $= \$1m[1.10]^{-4} + \$1m[1.10]^{-5} + \$1m[1.10]^{-7}$
$= \$1,817,093$

Thus to achieve $20 million at a loss to the community of at least $10 million the corporation only had to pay out less than $2 million in damages. Notice as well that any change in the rules that makes it more difficult for those injured to litigate and prevail will provide a greater incentive to the corporation to engage in those socially destructive activities causing the injuries. Finally, notice that in the illustration even if the full value of the injuries were to be brought home immediately to the

corporation the tailings dumping policy would still be optimal. This is one of the critical flaws[8] in the tort/damages approach which will be addressed below.

The stereotypical case used as a model for illustrating the operation of economist in a nuisance context is Boomer v. Atlantic Cement.[9] In that case a large cement plant was dumping its dusty and dangerous effluent on its residential neighbors, who then sued asking for an injunction protecting their right to the quiet enjoyment of their health and property. In its decision the New York court held that the residents were entitled only to damages and not an injunction, as the cement plant was an enterprise valuable to its owners and the region.

The decision in Boomer, as commonly interpreted, stands for two things. First, that enterprises engaged in economic development activities are entitled to an implicit power of eminent domain subject only to the much diminished compensation developed in the model above:

> "Thus it seems fair to both sides to grant permanent damages to plaintiffs which will terminate this private litigation. The theory of damage is the

[8] Of course Posner and the Coasians would claim that no flaw was involved and that any policy which resulted in more gains than losses results in a Pareto Improvement for society and should be preferred.

[9] 257 N.E. 2d 870 (1970).

'servitude on land' of plaintiffs imposed by defendant's nuisance."[10]

Second, it stands for the proposition that when injured parties are forced to become unwilling participants in the economic activities of these privileged corporations they are not entitled to bargain for a share of the net benefits derived from the perverse activity, but instead must accept a maximum compensation for their losses limited to the amount of the loss, regardless of the amount to be made by the corporation. Thus were Atlantic Cement able to save $20 million by dumping, while the actual injuries to property holders was $5 million, property holders would be limited to $5 million in compensation under the holding in the case. This notwithstanding the usual economists' regard for the sanctity of free market processes under which the to-be-injured homeowners would be allowed to bargain with the corporation for the rights to use their properties as a dumping ground. Under the free market model the resource owners should be able to strike a bargain for at least $5 million but also up to the total of the $20 million in total savings, with the probable outcome somewhere in between. Failure to structure resolution to allow this

[10] Id at 873.

bargaining to occur (i.e. via an injunction) is equivalent to granting corporations like Atlantic Cement the power to do as they please with other peoples rights to resources knowing that at most they will have to pay no more than compensation and most normally much less.

III. Federal Class Actions: Increasing the Likelihood of Successful Litigation of Injuries

One of the more significant problems in providing for recoupment of losses of injured parties and the vindication of citizen rights in common resources is that individual losses may not be large enough to support litigation under the American Rule. One way to get around this problem in situations where a substantial segment of the public is damaged is to combine the many potential individual actions into an energetically litigated and professionally managed class action. Since our concern here is with natural resource and environmental problems which will, often, if not universally, involve diverse plaintiffs and defendants, where jurisdiction may not exist for all plaintiffs in one or more state courts, the need for a federal class action option is evident, and consequently the focus of our

discussion will be on Rule 23 of the Federal Rules of Civil Procedure.[11]

Rule 23(a) requires that before a class action can be certified it must meet four requirements: (1) The proposed class must be so large that joinder of all members is impractical; (2) The suit must involve questions of law or fact common to the class; (3) The claims or defenses of the representative parties must be typical of the claims or defenses of the class; and (4) The representative parties must fairly and adequately protect the interests of the class.[12]

In addition, for diversity actions 28 U.S.C. 1332(a) requires that the amount in controversy be at least $10,000. In the class action context the Supreme Court in Snyder v. Harris[13] refused to allow the aggregation of small claims in order to meet the $10,000 requirement, holding that no jurisdiction existed over the class when none of the individual plaintiffs asserted a $10,000 claim. In Zahn the Court went further, holding that each and every member of a class asserting jurisdiction under 1332(a) must

[11] "Note: Class Actions and the Need for Legislative Reappraisal," 50 Notre Dame Lawyer 285, 288-9 (1974).

[12] F.R.C.P. 23(a).

meet the $10,000 requirement.[14] Thus under the facts of Zahn, where International Paper was dumping its waste into a creek flowing into Lake Champlain which resulted in the pollution of the waters of the lake, and damage to surrounding properties, and where approximately two hundred of the affected property owners formed a class and brought an action for damages, the Supreme Court upheld the district court's decision to refuse certification based on its (the district court's) gut feeling "to a legal certainty" that not all members of the class met the $10,000 requirement.[15]

It is significant that Zahn was brought as a 23(b)(3) class action, and that two other types of class actions, based on rule 23(b)(1) and (2), are provided for. The structuring of the rule in this way was the result of the way the pre-1966 rule 23 was understood. Under the old rule there existed,

> three distinct types of class actions: true, hybrid, and spurious. A true class action existed where there was a joint and common claim among the members of the class. It entailed a unity of interest, such as a trust fund, between the members of the class. In fact,

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[13] 394 U.S. 332 (1969).

[14] 414 U.S. 291, 294-5 (1973).

[15] 414 U.S. at 292.

> the courts often determined whether true class actions existed depending upon the "presence of a fund." Where the cause of action encompassed a series of separate and distinct claims on behalf of individual class members, it was denominated either hybrid or spurious. A hybrid class action required a mutuality of interest in the questions involved. The rights of individual class members, however, were several. The spurious class suit was often viewed as a permissive joinder device wherein numerous persons held claims or defenses grounded in a common question of law or fact. The ability to differentiate between these classifications was essential since significant procedural consequences attached to each. The matter of aggregation continued to be governed by the Pinel doctrine. Therefore, only in the true class action was aggregation permissible. In both hybrid and spurious class suits, the claim of each class member appearing on record as an original party had to equal or exceed the amount in controversy requirement.[16]

In 1966 Rule 23 was amended to clarify the categories involved.[17] Under the amended rule two types of class actions emerged.[18] The first, under subdivision 23(b)(1)(B), was analogous to the old "true" class action where a "fund" of some sort could be imagined out of which the claims of the class members had to be settled in a zero-sum game environment.

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[16] Denbeaux, supra at 286.

[17] Id at 286.

[18] Rule 23(b)(2) class actions are not significant for our purposes.

> Rule 23(b)(1)(B) ... is intended primarily to facilitate situations where class members have interests in a common organization, fund or contract.[19]

The second type, under subsection 23(b)(3), is used in situations where there are many separate claims revolving around some common issue in law or fact. In Zahn there were two hundred separate claims for damages all stemming from the same activities of International Paper, and this common ground in the polluting activities of the corporation arguably was of greater significance than the individual characteristics of the plaintiffs. "Satisfaction of this criterion normally turns on the answer to one basic question: is there an essential common factual link between all class members and the defendant for which the law provides a remedy?"[20](Emphasis added).

Even though in the factual dimension it is not clear that any bright line exists between classes of one sort and the other, in terms of procedural requirements the distinctions are startling. A 23(b)(1)(B) class may aggregate claims, for example, when "two or more plaintiffs unite to enforce a single title or right in which they have

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[19] Kekich v. Travelers Indem. Co. 64 F.R.D. 660,667 (W.D.Pa. 1974). See also Oneida Indian Nation of Wisconsin v. New York, 85 F.R.D. 701, 706 (N.D.N.Y. 1980).

a common and undivided interest. **** The court is of the opinion that where, as in this case, the defendant's liability may be based on the amounts of profits..., the interests of the class members are so integrated that their claims should be aggregated."[21] On the other hand, after Zahn a 23(b)(3) class may not aggregate. Since Eisen a 23(b)(3) class will be held to strict notice under Rule 23(c)(2), where this will not be the case, or at least will be within the discretion of the district court to require or not require, in 23(b)(1)(B) actions.[22]

In sum, it is clear that for the type of actions we have in mind--involving many potential plaintiffs with small individual claims--it behooves us, if we can, to formulate the class action under a 23(b)(1)(B) common fund theory in order to escape being ploughed under by Zahn, Eisen and their progeny in the sere fields of 23(b)(3).

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[20] Halverson v. Convenient Food Mart, Inc. 69 F.R.D. 331, 334 (N.D.Ill. 1974).

[21] Hughes Construction Co. v. Rheem Mfg. Co., 487 F.Supp. 345, 350-1 (N.D.Miss. 1980). See as well Eliasen v. Green Bay & W.R.R., 93 F.R.D. 408, 414-15 (E.D.Wis. 1982), aff'd without opinion, 705 F.2d 461 (7th Cir. 1983), cert. denied, 104 S. Ct. 206 (1983).

[22] See Denbeaux, supra at 309-10 for a discussion of notice requirements. Redhail v. Zablocki, 418 F.Supp. 1061, 1066-67 (E.D. Wis. 1976, aff'd, 434 U.S. 374, 380 & .6(1978) is also relevant.

IV. Restitution, Unjust Enrichment, and the Common Fund

As we have seen, there are four problems which need to be confronted: (1) the corporate incentives problem, (2) the related problem that tort damages are structurally inadequate in every case where a wrong is being committed and even full payment of compensation would not change corporate policy, (3) the problem of allowing corporations the equivalent of an enhanced power of eminent domain through the application of our injunction and nuisance rules, and finally, (4) the problem with the use of the class action device as a tool for strengthening the disincentive impact public activity can have on socially destructive corporate behavior.

The discussion in section II was devoted to showing that there will be many situations where a reliance on a damages approach will be insufficient both in structural and practical terms to control perverse corporate behavior. Injunctions, on the other hand, while potentially more powerful prospectively, are not a rememdy which the courts are willing to use in the bulk of the situations where assistance is required. Less well known among the great classifications of the law, however, is restitution whose

invocation opens the gates to a variety of remedies which may be useful to us in confronting our four problems. Restitution is neither law nor equity, though it contains elements of both. Nor do money remedies in restitution depend on the logic of damages. The unique characteristic of the restitutionary family of remedies is that they focus on the right of injured parties not to compensation for their injuries, but on their right to require that the corporate tortfeasor disgorge the value of the "unjust enrichment" which was the goal and/or result of the corporation's tortious conduct.

The General Principle: Unjust Enrichment

> A person who receives a benefit by reason of an infringement of another person's interest, or of a loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment.[23]

Notice that this purpose is not to make the plaintiff as well off economically as he was before being injured; but rather to relieve the tortfeasor of any benefit it might have received as a result of its wrongful acts.

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[23] The American Law Institute, Restatement of the Law Second: Restitution, Philadelphia, 1983, ALI. p. 8.

Restitution thus appears to fit conceptually with respect to our requirements in the area of corporate incentives. The use of a restitutionary approach would also resolve at least the conceptual inadequacy of the damage-injunction family of remedies in dealing with the Boomer v. Atlantic Cement variety of corporate eminent domain cases. In a situation like Boomer instead of asking for damages, the relief sought would be the total amount of the gain the corporation received by engaging in the tortious conduct. In incentive terms Atlantic would be prevented from reaping any of the costs savings from its tortious conduct injuring its neighbors; and, as we know, in the world of economic decision making remove the incentive, and you remove the problem.

It needs to be emphasized that the right of the plaintiff(s) to collect the entire amount by which the corporation was enriched does not depend in any way on the magnitude of the damages suffered by the plaintiffs as long as they were in fact wronged "unjustly." So, for example, there is no conceptual problem within the logic of restitution with a plaintiff injured in the amount of $100, say, to collect, say, all $1 billion in the resultant

savings to the corporation if such there be.[24] The restitutionary approach would thus overcome the structural inadequacy of damages problem in cases like Boomer and our illustrative case presented in section II above.

This leaves for discussion the utility of the restitutionary approach in providing a solution to our class action conundrum in cases like Zahn, and others in the natural resource context, where there are large numbers of injured potential plaintiffs, all with generally small individual claims (for example in a public trust doctrine case where a corporation unjustly monopolizes a fishery to the detriment of many fisherfolk[25]).

Returning to the illustrative case presented in section II, let us adjust the assumptions as follows: Assume that the state is New Mexico, the corporation is Mogul Conglomerate of Denver Colorado, and that the tailings are dumped just over the Colorado border. All the injuries occur in New Mexico, as it was foreseen that they would (i.e. there is no Palsgraff problem). Total damages

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[24] Denbeaux, supra at 300-302 and 301 n183.

[25] See Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 Michigan Law Review 471 (1970), generally, but 528, 529 and 529n176, especially. A more aggressive treatment is Mark E. Sullivan, Legal Issues in Public Trust Enforcement, Washington, D.C., 1977, Environmental Protection Agency(?) (Author's copy), p. 27.

to the New Mexico community suffering the harm were (at least) $1 million, which we will assume here was broken down into $1000 losses of 1000 individuals. The corporation, on its side, gained $20 million through its policy of dumping knowingly and unsafely in the arroyos instead of safely disposing of the tailings at much higher cost.

Instead of going after damages on an individual basis, with the resultant "success" of receiving a present value of, say, roughly $180,000 total in judgements, a majority of those injured form a class and file a class action in New Mexico federal district court under 1332(a) as a subsection 23(b)(1)(B) class. The claim is for $20 million in restitution based on unjust enrichment, with the $20 million saved by the corporation conceptualized as the "common fund" which would allow the suit to be brought as a subsection 23(b)(1)(B) class action. The amount in controversy limitation would then not be a problem as the amount in controversy would be the "common and undivided" interest of the plaintiffs as a group in the $20 million pot "held" by the corporation.[26] With the shift out of the

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[26] For a parallel and more detailed exposition of the theory of the approach see Denbeaux, supra at 300-314. With respect to

subsection 23(b)(3) framework into the subsection 23(b)(1)(B) framework the strict notice requirements of Eisen and subsection 23(c)(2) would be avoided and any notice requirements would rest in the sound discretion of the district court.

V. Summary

This paper has been addressed to an investigation of several problems which have arisen in the general context of protecting our natural resources, the environment, and people from the profit maximizing activities of corporations which pose a threat to them. Philosophically the perspective of the paper has been that democratic decision-making, for the most part best manifested on the community level, creates the context in which economic decision-making ought to operate. Economics as a "science" provides no objective measure of what is more efficient and what not. These things are determined only with respect to

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the particulars of the restitutionary remedy used see the old but useful article by John P. Dawson, "Restitution or Damages," 20 Ohio State Law Journal 175 (1959); Dan D. Dobbs, Remedies, St. Paul, 1973, West, chapter 4, is a good, relatively current treatment. Without going too far into the details, a starting point might be had in investigating a waiver of the tort in favor of a claim in assumptsit based on money had and received, though it may also possible to frame the issue as one of quasi-contract with the corporation seen as having implicitly contracted for the right to pollute the wells, or something similar.

goals, and goals are derived from culture, history, a sense of justice, and a variety of other "sociological" values, which are not uniform and may even vary from locality to locality, notwithstanding the advances of economic education. Nevertheless, economic analysis, as the hand maiden of both business people and economists, is on the move in the law these days, and if basic values are to be protected the good guys need to be up and about.

What this paper has done is to begin to develop a response to elements in the law that encourage business activity regardless of its impact on people and resources. Four problem areas were identified: the systematic protection by the legal system of corporate incentives to do the wrong thing with respect to people, the environment, and natural resources; the associated problem of the implicit grant of eminent domain powers to corporations; the inability of the damage remedy to constrain corporate decision-making in too many cases of broad impact; and finally, the difficulty of getting a diversity-based class action certified in federal court when class claims are large but individual claims are below the $10,000 jurisdictional limit.

In response to these problems it was suggested that restitutionary remedies might prove to be useful. Section IV was devoted to an explanation of how claims based on unjust enrichment, as opposed to tort, would allow the use of Rule 23 class actions in many situations where they would otherwise be disallowed. It was demonstrated that claims brought in unjust enrichment would strengthen positive incentives by removing the entire gain from the tortious activity from the tortfeasor, which would be especially pleasing in cases where the gains of the corporation exceeded the losses of the injured parties.

In sum, restitutionary remedies hold the promise of being more productive in confronting certain types of litigation problems than more traditional approaches. Certainly restitution is worth being familiar with, and keeping in mind in the days ahead.