

1989

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Recommended Citation

Robert E. Scott, *Sharing the Risks of Bankruptcy: Timbers, Ahlers, and Beyond*, 1989 COLUM. BUS. L. REV. 183 (1989).

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SHARING THE RISKS OF BANKRUPTCY: *TIMBERS, AHLERS, AND BEYOND*

ROBERT E. SCOTT[†]

INTRODUCTION

Bankruptcy policy appears to be in disarray. Recent decisions by the United States Supreme Court have only served to reinforce the uncertainties that mar the bankruptcy process. In *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*,¹ the Court held that an undersecured creditor was not entitled to interest on its collateral as compensation for the opportunity costs of delay caused by the bankruptcy process.² *Timbers* thus supports the argument that secured creditors should be forced to share the burdens of bankruptcy with other claimants. Conversely, in *Norwest Bank Worthington v. Ahlers*,³ the Court held that the proposed contribution of future labor on the family farm could not trump the

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A version of this paper was presented at the National Conference of Bankruptcy Judges (Oct. 3-5, 1988).

¹ 484 U.S. 365 (1988).

² Section 362(d)(1) of the Bankruptcy Code authorizes the bankruptcy court to grant relief from the automatic stay whenever a secured creditor is denied adequate protection for its interest in the collateral. Section 361, in turn, provides that adequate protection includes such relief as will result in the "indubitable equivalent" of the creditor's "interest in [the debtor's] property." 11 U.S.C. §§ 362(d)(1), 361(3) (1982 & Supp. V 1988). Undersecured creditors had argued that since the state law interest in the collateral includes the right to foreclose upon default, U.C.C. § 9-503 (1987), they were denied adequate protection unless they received interest payments equal to the opportunity costs of the delay in foreclosure brought on by bankruptcy. Justice Scalia, writing for a unanimous Court, held that various other provisions of the Bankruptcy Code (specifically, 11 U.S.C. §§ 506(b), 552(b), 362(d)(2), 1129(b)(2) (1982 & Supp. V 1988)) negated any inference that undersecured creditors were entitled to interest on their collateral during the automatic stay in order to assure adequate protection. *Timbers*, 484 U.S. at 369.

³ 485 U.S. 197 (1988).

absolute priority rule that bars a debtor's retention of an equity interest over the objections of senior creditors.⁴ Thus, *Ahlers* rejects the claim that secured creditors should be forced to share the burdens of bankruptcy through a liberalized contribution rule. Can these decisions be reconciled? And what light do they shed on the future of bankruptcy sharing?

There are a number of ways to rationalize the results in *Timbers* and *Ahlers* through careful statutory and doctrinal analyses. The fact that this article does not address them does not belittle the value of careful allegiance to the Bankruptcy Code and prior case law in seeking to predict the future of bankruptcy law.⁵ Neverthe-

⁴ Section 1129(b) of the Bankruptcy Code, 11 U.S.C. § 1129(b) (1982 & Supp. V 1988), authorizes the bankruptcy court to confirm a reorganization plan, notwithstanding the objections of an impaired class of creditors, if the plan does not discriminate unfairly and is "fair and equitable" to the dissenting classes. The "fair and equitable" language has been held to incorporate the judicially created absolute priority rule. *Case v. Los Angeles Lumber Prods. Co., Ltd.*, 308 U.S. 106, 115-19 (1939)(interpreting comparable language in § 77B of the Bankruptcy Act, 48 Stat. 912 (1934)).

The absolute priority rule, in turn, prohibits a class of interests from participating in a reorganization unless all superior classes have been compensated in full. *Northern Pacific Ry. Co. v. Boyd*, 228 U.S. 482, 502-05, 507 (1913); see 5 Collier on Bankruptcy ¶ 1125.02 (L. King 15th ed. 1988); see also *Ahlers*, 794 F.2d at 401. Because debtors usually do not have sufficient assets to compensate outstanding claims fully, and because equity claims rank at the bottom, the absolute priority rule seems to exclude most equity holders from sharing in any reorganization.

The contribution rule, however, puts a well-established gloss on absolute priority and thus softens the impact of § 1129(b) on equity holders. Under the contribution rule, equity interests are permitted to participate in a reorganization so long as they make a fresh contribution in "money or money's worth" to the firm's capital, provided that the contributions are proportionate in value to the equity holders' share of the reorganized company. See *Case*, 308 U.S. at 117 (noting *Kansas City Terminal Ry. Co. v. Central Union Trust Co.*, 271 U.S. 445, 455 (1926)). For a further discussion of the redistributive effects of the contribution rule, see Jackson & Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 Va. L. Rev. 155, 194-97 (1989).

In *Ahlers*, the Court reversed an opinion by the Eighth Circuit approving a reorganization plan in which the equity interests promised to contribute future labor on the family farm. *In re Ahlers*, 794 F.2d 388 (8th Cir. 1986), *rev'd*, 485 U.S. 197 (1988). Justice White, writing for a unanimous Court, held that the contribution of future labor was not within the scope of the "money or money's worth" exception to absolute priority recognized in *Case*. The promise of such future services is "intangible, inalienable, and, in all likelihood, unenforceable. [Thus] [i]t 'has no place in the asset column of the balance sheet of the new [entity].'" 108 S.Ct. at 967 (quoting *Case*, 308 U.S. at 122-23). Unlike "money or money's worth," the promise to contribute personal services cannot be presently traded in any market for value. *Id.*

⁵ Despite the importance of statutory analysis, it cannot be done in a vacuum. The perils of undertaking an unfocused or non-purposive statutory analysis are revealed

less, few would doubt that the Court could have written carefully reasoned opinions justifying the opposite result in each case.⁶ Thus, it seems probable that unacknowledged and unexpressed policy considerations may have influenced the Court. This article examines precisely what those policy goals are and what they imply for the future of federal bankruptcy.⁷ Part I of the article analyzes the

in the Court's opinion in *Timbers*. Justice Scalia's "holistic interpretation" of the Bankruptcy Code is problematic in several respects, see, e.g., the interpretation of 11 U.S.C. §§ 361, 362(d) (1982 & Supp. V 1988), *Timbers*, 484 U.S. at 369. Moreover, the Court's failure to appreciate the property rights of secured creditors under Article 9 of the UCC, UCC §§ 9-101 to -507 (1987), is similarly distressing. As a consequence, the opinion ignores the crucial distinction between the restraint on pre-bankruptcy rights that inevitably results from bankruptcy, and a reduction in the *relative value* of those rights.

Perhaps most importantly, by failing to confront the policy choices directly, *Timbers* merely invites the predictable avoidance response from secured creditors. Although the Court held that an undersecured creditor is not entitled to adequate protection against the loss of the use value of its collateral, the Court recognized a secured creditor's right to post-petition "rents" under 11 U.S.C. § 552(b) (1982 & Supp. V 1988), where the security agreement specifically provides for an interest in post-petition rents or profits and that interest is perfected. The bankruptcy law has always permitted undersecured creditors to accrue post-petition interest to the extent that the security produces post-petition income. *Sexton v. Dreyfus*, 219 U.S. 339, 346 (1911). The opinion in *Timbers* thus invites secured creditors to include contractual "wrap-around" clauses providing for a perfected security interest in post-petition rental value of the collateral. By transforming lost opportunity into explicit economic rents, the secured creditor may be able to escape the *Timbers* rule.

⁶ The opinions of the Ninth Circuit in *In re American Mariner Indus., Inc.*, 734 F.2d 426 (9th Cir. 1984) (construing strict adequate protection requirement in 11 U.S.C. §§ 361, 362 (1982 & Supp. V 1988) on the basis of amendments to similar language in 11 U.S.C. § 1129 (1982 & Supp. V 1988), to allow undersecured creditor to obtain compensation for period of delay in exercise of foreclosure rights between initiation of petition for, and confirmation of plan of reorganization) and of the Eighth Circuit in *In re Ahlers*, 794 F.2d 388 (8th Cir. 1986) (finding farm management and operation services an essential contribution to a reorganization, measurable in money or money's worth, and thus sufficient to trump the absolute priority rule to the extent of the contribution, despite the failure to provide full compensation to more senior creditors), are ample evidence of the plausibility of the application of the contrary view to *Timbers* and *Ahlers*.

⁷ Analysts of bankruptcy theory have recently come under attack for reducing a rich and complex environment to a few grossly oversimplified propositions. See, e.g., Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987) (proposing "a dirty, complex, elastic, interconnected" loss-distributing model for resolution of creditors' disputes, in contrast with the purportedly coherent, rational, unified and value neutral welfare-maximizing economic analysis of Professor Douglas Baird). Indeed, one prominent commentator concludes an exhaustive analysis of absolute priority and *Ahlers* with the following observation:

Congress seems to have felt comfortable imposing results that are at least

traditional objectives of the bankruptcy process in terms of the techniques of contemporary legal analysis. This exercise is principally one of translation, the time-honored task of pouring old wine into new bottles. By attempting to recharacterize old truths in contemporary terms, I mean to clarify what those truths "really mean." Thereafter, Part II sketches a theory that rationalizes the apparently conflicting objectives of bankruptcy law. The theory suggests that the Court's decisions in *Timbers* and *Ahlers* are, in fact, entirely consistent and complementary. This approach thus provides a convenient benchmark for assessing how the burdens of bankruptcy ought best to be shared between various claimants of different classes.

I. THE GOALS OF THE BANKRUPTCY PROCESS

Federal bankruptcy law has long been characterized by two normative objectives: equality of treatment for creditors and other claimants, and rehabilitation of overburdened debtors. Articulating the goals of bankruptcy is one thing, but understanding what they mean is a much more problematic exercise.

superficially inconsistent. Thus [there seems to be] a lack of controlling theory in [bankruptcy law]. On the other hand, I have not tried to supply any such theory nor do I lament the possible absence of one. . . . Congress and the courts have proven uniquely resistant to pressures to organize their work under any grand design. [This] may bespeak a conviction that bankruptcy law is too complex for facile categorization.

Ayers, *Rethinking Absolute Priority Rules After Ahlers*, 87 MICH. L. REV. 963, 1025 (1989).

This skepticism results, I believe, from a fundamental misunderstanding of the nature and function of legal theory. The question for any theory is not whether the particular stories or abstractions approximate reality. Of course they do not. Rather, the question is whether the theory tells us something about the reality that is useful to know. In other words, is this highly artificial scheme an aid in understanding what happens in the real world, where all its very special assumptions are only crude oversimplifications? Bankruptcy lawyers must engage in theory, therefore, not because academics like it, but simply because theory works.

To be sure, pure theory without careful allegiance to the "legal terrain" — the case law, the statutes, and the facts — is not helpful. But it is no more useless than the other extreme — extensive knowledge of the cases and the statutes without any conceptual framework. For example, one can analyze *Timbers* solely in terms of the Court's careful statutory exegesis, and thus conclude that interest payments for delay in foreclosure are not mandated by the Bankruptcy Code. But unless the analyst develops a clearer conception of the bankruptcy process, he or she will not discover the themes or patterns that underlie the legal rules.

A. Equality as Collectivization

The equality goal of bankruptcy is unhelpful without further elaboration. The question, of course, is by what standard is equality to be judged? If equality means that a claimant should be treated exactly the same as another who enjoys identical non-bankruptcy status, then the concept is trivial. No one seriously doubts that similar claims should be treated similarly. But clearly equality means something more. I suggest that it embodies the central concept of collectivization. Because the interests of various classes of claimants differ, the tensions among the different classes (secured creditors, unsecured creditors, and equity) are unlikely to be resolved successfully without legal intervention. In bankruptcy, therefore, individual rights are withdrawn so that the interests of the claimants as a group can be advanced.⁸

How then are we to understand the rights of individual claimants in a collective forum? Where do the rights of individual claimants end and the interests of the group begin? In seeking to understand how bankruptcy law implements a general objective of collectivization (or maximization of group welfare), one can usefully imagine "bankruptcy as a system designed to mirror the agreement one would expect the creditors to form among themselves were they to negotiate such an agreement from an *ex ante* position."⁹ Over the past decade, my colleague, Thomas Jackson, has developed this conceptual paradigm of the hypothetical bargain among creditors as a means of understanding the meaning and implications of the collectivization norm.¹⁰ The basis of the creditors' bargain approach is the claim that pre-bankruptcy entitlements should be impaired in bank-

⁸ Maximizing the value of the debtor's assets requires a collectivization process. Collectivization solves a classic "prisoner's dilemma" that confronts the creditors of an insolvent debtor. If maximizing total creditor welfare is desirable, bankruptcy law must provide incentives for individual creditors so that each of them finds it optimal to wait rather than to collect immediately. By requiring creditors to disgorge payments received shortly before bankruptcy, the voidable preference rules of the Bankruptcy Code, 11 U.S.C. § 547 (1982 & Supp. V 1988), reduce the incentives of creditors to grab assets through individual collection efforts and thus force piecemeal liquidation. See A. Schwartz & R. Scott, *COMMERCIAL TRANSACTIONS: PRINCIPLES AND POLICIES* 776-77 (1982); Scott, *A Relational Theory of Secured Financing*, 86 Colum. L. Rev. 901, 966 n.242 (1986); Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857, 861-64 (1982).

⁹ Jackson, *Creditors' Bargain*, *supra* note 8, at 860.

¹⁰ See generally T. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986); Jackson, *Creditors' Bargain*, *supra* note 8; Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725 (1984).

ruptcy only when necessary to maximize net asset distributions to the creditors as a group and never to accomplish purely distributional goals.¹¹

One of the touchstones of this model is that, while a collective system such as bankruptcy is sometimes necessary as a device to induce cooperative behavior, redistribution in the collective regime only induces self-interested action by particular claimants that may be inconsistent with the interests of the claimants as a group. Thus, the creditors' bargain conception suggests that in order for the collective system to work, concerns over distributing the burdens of bankruptcy must not be allowed to interfere with the central goal of maximizing the pool of assets for all the claimants.¹²

One method of accomplishing this objective is to minimize distinctions in the treatment of individual claimants between state law and bankruptcy debt-collection rules. Thus conceived, the equality norm argues for the preservation of the value of pre-bankruptcy rights even when those rights are preempted by a collective scheme of distribution. From this perspective, therefore, the Court's decisions in *Timbers* and *Ahlers* appear hopelessly and irreducibly in conflict. While *Ahlers* appears to affirm the principle that pre-bankruptcy rights should be respected in bankruptcy, *Timbers* seems to reject the very same principle.

Notwithstanding the statutory analysis offered by the Court, the result in *Timbers* is plainly inconsistent with equality as collectivization. A denial of the secured creditor's right to recover for the opportunity cost of delay ignores the fact that the automatic stay has withdrawn the secured creditor's state law rights of foreclosure.¹³ While bankruptcy policy might sensibly require the secured creditor to leave the asset in place for the greater good of the claimants as a group, nothing in that policy requires the secured creditor to bear any of the costs of the bankruptcy proceeding. Thus, the result in *Timbers* is at odds with the notion that the relative value of entitlements in bankruptcy should not deviate from those outside of bankruptcy, except insofar as necessary to implement the collec-

¹¹ *But see* Jackson & Scott, *On the Nature of Bankruptcy*, *supra* note 4 (expanding the original creditors' bargain conception to embrace certain risk-sharing features).

¹² Jackson & Scott, *On the Nature of Bankruptcy*, *supra* note 4, at 156 & n.2.

¹³ Under U.C.C. § 9-503 (1987), the secured creditor has the right upon default to take possession of the collateral. Thereafter, the creditor can either dispose of the collateral by sale, UCC § 9-504 (1987), or propose a strict foreclosure, retaining the collateral in full satisfaction of the debt, UCC § 9-505 (1987). In either case, the creditor's choices are constrained only by the general norm of commercial reasonableness, UCC § 9-504(3) (1987).

tive proceeding.

Indeed, in reaching its result in *Timbers*, the Court was at pains to reaffirm its earlier statement in *Vanston Bondholders Protective Committee v. Green*,¹⁴ that reimbursing secured creditors for the costs of delay would be “inequitable to unsecured creditors.”¹⁵ Taken together, therefore, these cases represent a strong vision of the bankruptcy process: secured creditors are not entitled to the full rights granted them by state law since protecting their interests in full will necessarily reduce the share awarded to unsecured creditors and equity interests.

B. Rehabilitation as Risk Sharing

Thus far, I have focused only on the central bankruptcy goal of maximizing group welfare through collectivization. But bankruptcy has never purported to be influenced by only a single objective. In addition, the bankruptcy process has historically reflected a seemingly competing objective: the rehabilitation of overburdened debtors. The rehabilitation norm is necessarily redistributive. It purports to redistribute some of the burdens of insolvency from the debtor (or equity holders) to creditors. This effect can be seen most clearly in the case of the financial “fresh start” notions that are often preeminently relevant for individuals who seek bankruptcy to discharge past debts. The fresh start norm insulates future income (and certain other assets) from the claims of past indebtedness.¹⁶ Thus, the policy requires creditors to relinquish certain state law rights and share some of the burdens of bankruptcy that otherwise would fall entirely upon the debtor.

Of course, at least formally, the fresh start policy has no relevance for corporate debtors. Corporate debtors get no discharge in ordinary bankruptcy proceedings,¹⁷ and the “discharge” in Chapter 11¹⁸ is best seen as consummating the exchange of old claims for new claims that occurs in a reorganization. Nevertheless, the link between the fresh start notion and certain corporate insolvencies seems evident, especially in cases such as *Ahlers*, where the debtor is

¹⁴ 329 U.S. 156 (1946).

¹⁵ *Id.* at 164.

¹⁶ Bankruptcy Code § 727 authorizes the bankruptcy court to grant a discharge to individual debtors who have not fraudulently concealed or transferred their assets or otherwise acted in bad faith. Furthermore, § 524(2) renders any contractual waivers of discharge unenforceable. 11 U.S.C. §§ 524(2), 727(a) (1982 & Supp. V 1988).

¹⁷ 11 U.S.C. § 727(a)(1) (1982 & Supp. V 1988).

¹⁸ 11 U.S.C. § 1141 (1982 & Supp. V 1988).

a small, closely-held firm in which a single owner-manager has the entire equity interest.

For many of these firms, the owner-manager will have made substantial firm-specific, human capital investments in the enterprise. These investments are reflected in common metaphors such as "it's my life's work" and "my name is over the door." Furthermore, the owner-manager, just as the individual seeking a fresh start, has made an investment that is essentially non-diversifiable. Thus, few would argue with the proposition that certain debtors, such as the family farmer, make capital investments in their enterprises that are not entirely valued in money or money's worth.

Thus conceived, the rehabilitation norm (whether embodied in the fresh start policy for individuals or the liberal contribution rule urged by the Eighth Circuit in *Ahlers*) can be seen as serving a critical insurance function; a device for sharing certain insolvency risks in bankruptcy. Assume, for example, that in a hypothetical creditors' bargain, the various claimants are asked to deal explicitly with the problem of non-pecuniary investments. There is good reason to believe that, even if the creditors were motivated by self-interest, they would agree in this supposed bargain to modify their exclusive focus on collectivization in order to authorize a form of rehabilitation insurance in bankruptcy. This is because those debtors who anticipate making substantial firm-specific capital investments in their enterprises would be willing to buy from the creditors additional "insurance" coverage to protect these investments.¹⁹

Obviously, the insurance protection could be provided in several different ways. But standard devices, such as monetary payments, would be subject to false claims. A less costly alternative would simply be for the equity owners to pay in advance for a more generous opportunity for rehabilitation. This form of prepaid insurance would reduce the risk of liquidation induced by the fact that, but for the debtors' idiosyncratic or non-pecuniary investment (such as the farmer's emotional attachment to the land), the insolvent firm may well be worth more dead than alive.²⁰

It is quite sensible to suppose that the non-pecuniary value that underlies the rehabilitation norm can only be protected adequately through the bankruptcy process. Such value is not easily protected by third party insurance. Rather, it is best provided for as part of the conditions for collectivization itself. As such it becomes a form of risk sharing that modifies the initial single-minded commitment

¹⁹ Jackson & Scott, *supra* note 4, at 174-76.

²⁰ *Id.*

to collectivization.²¹

Visualizing rehabilitation as risk sharing seems to offer a dramatically different perspective on *Timbers* and *Ahlers*. Under this conception, *Timbers* appears to be a useful mechanism for advancing risk sharing goals. Providing secured creditors protection against depreciation but not delay is a convenient method of spreading the risk of certain classes of insolvencies across the population of parties who use the bankruptcy process. Indeed the result is, in effect, a form of mandatory bankruptcy insurance. Secured creditors in the future will simply assess a premium for assuming this additional burden of bankruptcy. If there are significant numbers of bankruptcies where risk sharing is appropriate, secured creditors, unsecured creditors, and equity would all agree to strike a bargain and insure against these risks through a risk sharing scheme. Imposing delay costs on secured creditors, so as to enhance the return for the others, seems a plausible means of administering such a scheme.

On the other hand, at first glance, *Ahlers* appears to reject the rehabilitation norm. Labor-intensive firms offer the strongest case for approving the contribution of future services. This is especially true for activities such as farming, where labor is an important asset and cash contributions are not feasible. Thus, the Court's decision seems to restrict the contribution gloss on absolute priority in precisely the sort of case where the rehabilitation goal (as recharacterized) would embrace it.

In sum, we seem to confront an intractable puzzle. The two central goals of bankruptcy, reflected in the decisions in *Timbers* and *Ahlers*, appear to be at war with each other. Each norm justifies a decision that the other would criticize. The challenge, then, is what to make of this conundrum.

II. TOWARD A GENERAL THEORY OF BANKRUPTCY — HARMONIZING THE EQUALITY AND REHABILITATION GOALS

The apparent paradox that seems to pervade bankruptcy policy can be resolved. To do so, we must confront a common fallacy in legal analysis: the tendency to confuse ideal and pragmatic objec-

²¹ It has been previously suggested that a variety of risk-sharing explanations for bankruptcy rules can be devised, simply by conceiving of certain bankruptcies as a "common disaster" affecting all claimants. See generally Scott, *A Relational Theory of Secured Financing*, *supra* note 8, at 965-68 (1986); Scott, *Book Review*, 53 U. CHI. L. REV. 690, 700-07 (1986) (reviewing D. G. BAIRD & T. H. JACKSON, *CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY*, (1985)).

tives.²² This "Nirvana fallacy" occurs whenever a legal analyst, or policymaker (or judge) compares the real world problems of a functioning (and therefore imperfect) system against the idealized (and therefore perfect) objectives of that system. By resisting this temptation and remembering to distinguish between the goals of the bankruptcy system and the operational compromises necessary to implement the system in an imperfect world, the puzzle of bankruptcy policy largely disappears. Furthermore, viewed through this more realistic lens, the decisions in *Ahlers* and *Timbers* can be harmonized as well.

The argument sketched above suggests that the equality and rehabilitation goals are, in theory, complementary: that is, rehabilitation through risk sharing is not incompatible with the central objective of maximizing group welfare through collectivization. This point is confirmed by simply imagining a hypothetical bargain in which both objectives are seen as desirable. From this perspective, bankruptcy sharing can be visualized as a kind of "bankruptcy tax" imposed on the participants in the collective proceeding.²³ To the extent that the "tax revenues" are used to support the welfare of the claimants as a group, one can easily imagine the parties agreeing to so burden themselves in any hypothetical *ex ante* bargain.

But the further problem that the law must resolve is that the bankruptcy sharing tax is not purely a fixed cost that parties can adjust to in advance. Rather, the magnitude of any distributional tax is a function of the bankruptcy law itself. If the rules for bankruptcy sharing were perfectly definable and enforceable, the theoretical appeal of the twin goals of bankruptcy could be fully realized. However, bankruptcy sharing rules will be necessarily ambiguous since they require an after-the-fact evaluation of particular circumstances in order to trigger a contingent agreement to share. Under these inherent constraints, individual claimants have an incentive to escape the tax, and if this self-seeking behavior is unchecked, it will reduce the value of the assets available for distribution to the group. Thus, the reality is that bankruptcy proceedings designed to accomplish these more complex goals invite dissipation of the common pool of assets by parties motivated to secure individual advantage at group expense.²⁴

²² See Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 S. CAL. L. REV. 329, 342-47 (1986).

²³ See Goldberg, Comment, *Economic Aspects of Bankruptcy Law*, 141 J. INST. & THEORETICAL ECON. 99, 101-02 (1985).

²⁴ This argument is advanced more formally in Jackson & Scott, *supra* note 4, at

CONCLUSION

This focus on the problems of implementation provides the best means of harmonizing the decisions in *Timbers* and *Ahlers*. The central challenge for the bankruptcy law is to devise legal rules that better advance both collectivization and distributional objectives. At this level, the analysis offers specific prescriptive guidance. Rules that attempt to redistribute assets in particular cases, such as the contribution gloss on absolute priority, are peculiarly susceptible to exploitation. The case for contribution in *Ahlers* simply does not survive close scrutiny. In order to justify redistribution, the contribution rule must operate as an effective *screen*. The courts must safely be able to distinguish “deserving” debtors from those who are not. In *Ahlers*, for example, the only basis for confirming the plan would be to preserve the Ahlers’ idiosyncratic investment. But, in that case, since there were only two principal parties, they should have negotiated a sharing rule independently of bankruptcy.²⁵ In short, the rule the Eighth Circuit embraced in *Ahlers* ran a significant risk of implementing neither of the goals of bankruptcy.

The problems raised by a case-by-case approach suggest that across-the-board redistributions — such as *Timbers*’ denial of post-petition interest for undersecured creditors — are preferable to the individualized distributional policies reflected in the Eighth Circuit’s decision in *Ahlers*. Thus, the seemingly contradictory policy choices underlying the Supreme Court’s decisions may simply reflect the most sensible accommodation to the objectives of bankruptcy given the inherent limitations of the bankruptcy system.²⁶

To the extent that the inability to screen effectively for desirable distributions is systematic, courts will tend invariably to misapply those bankruptcy rules that are designed, whether deliberately or

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²⁵ The principal justification for mandating a sharing rule in bankruptcy is the claim that most parties would prefer to contract for such a rule but are unable to resolve the multi-party bargaining problems that confront them outside of bankruptcy. Obviously, that argument for risk-sharing does not fit the facts of *Ahlers*, *supra* note 3.

²⁶ There are, of course, other means of rationalizing the policy implications of *Timbers* and *Ahlers*. One possible explanation for the differences in treatment may be a preference for risk sharing between classes of creditors (redistribution from secured creditors to unsecured creditors) over risk sharing between creditors and equity (the result approved by the Eighth Circuit in *Ahlers*). While this is a plausible descriptive theory, it is hard to justify a preference for redistribution to unsecured creditors over the similarly appealing claims of equity interests for rehabilitation insurance.

through inadvertence, to advance bankruptcies' distributional goals in particular cases. The uncertainty with respect to cases such as *Ahlers* is symptomatic of the underlying uncertainty generated by any ad hoc distributional principle. In short, attempting to implement bankruptcy sharing rules on a case-by-case basis, even where those rules may in theory reflect the goals of the bankruptcy process, may undermine rather than advance those goals. On the other hand, the broad-based effect of cases such as *Timbers* serves to spread the costs of rehabilitation insurance across the population of parties who use the bankruptcy process. Thus, a prepaid insurance scheme which effects a partial across-the-board reduction in the returns to secured creditors is a simple form of risk-spreading that is likely to be more effective than a case-by-case attempt to distinguish between contingencies that may trigger individualized risk sharing rules.