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Doing Equity in Bankruptcy

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DOING EQUITY IN BANKRUPTCY

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INTRODUCTION

Bankruptcy law has long struggled with specific performance and other equitable remedies.[1] Confusion in the caselaw abounds.[2] Bankruptcy policies favoring equality of treatment, maximizing values, and reorganization all suggest that, in bankruptcy, the non-debtor party's right to specific relief, like money damage remedies, should be treated as "claims," monetized, given pro rata treatment (unless otherwise entitled to priority) and discharged.[3] Notwithstanding those policies, and the text of the Bankruptcy Code (the Code),[4] many courts, particularly Article III appellate courts, have concluded that an injunction or other equitable remedy is not a "claim" unless the court's decree can be satisfied by the payment of money under nonbankruptcy law.[5]

This Article argues that consistent with the Code's text and policy, injunctions or other forms of equitable relief should be presumptively treated as "claims," even if nonbankruptcy law does not permit the enjoined party to satisfy the injunction by the payment of money. This presumption, however, should be rebuttable. No categorical rule can determine when equitable remedies should be monetized and discharged. Consistent with a chancery tradition of flexibility and discretion in the employment of equitable remedies stretching back for

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1 *See generally* 3 COLLIER ON BANKRUPTCY ¶¶ 365.10, 365.11, 365.12, 365.15 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2017); Timothy B. Matthews, *The Scope of Claims Under the Bankruptcy Code* (pt. 2), 57 AM. BANKR. L.J. 339 (1983); Jay Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227 (1989).

2 *See* Jonathan H. Moss, *Has Bankruptcy Forgotten the Restrictive Covenant? A Disturbing Trend for Franchise Systems*, 10 BANKR. DEV. J. 237, 259 n.140 (1994) ("As *Chateaugay* unfortunately indicates, the confusion over treatment of equitable remedies in bankruptcy is far from over."); Ashley S. Hohimer, *Constructive Trusts in Bankruptcy: Is an Equitable Interest in Property More Than Just a "Claim"?*, 19 BANKR. DEV. J. 499, 500 (2003) ("A constructive trust is perhaps the most visible example of bankruptcy courts' confusion regarding treatment of equitable interests in a bankruptcy proceeding."); Alec P. Ostrow, *The Equitable Claim in Bankruptcy, or What's in a Claim? That Which We Call an Equitable Remedy?*, 2008 ANN. SURV. OF BANKR. L. 3, 4–5 (2008) (noting confusion in case law over availability of equitable remedies establishing an alternative right to damages as claims).

3 *See infra* notes 94–95 & 140–41 and accompanying text.

4 11 U.S.C. §§ 101(5)(B), 502(b)–(c) (2012) discussed *infra* text at notes 100–105.

5 *See In re* Udell, 18 F.3d 403, 406 (7th Cir. 1994); Kennedy v. Medicap Pharmacies, Inc., 267 F.3d 493, 497–98 (6th Cir. 2001); *infra* text at notes 126-43 and cases cited therein.

centuries,[6] however, a balancing approach can appropriately determine the availability of equitable relief.

The following circumstances all weigh in favor of Code-imposed monetization:

i. promotion of bankruptcy policies favoring collective value maximization, equality of treatment among similarly situated creditors, and rehabilitation of the debtor;
ii. the source of the equitable right is contractual;
iii. Coasean bargaining is otherwise feasible;
iv. only the private interests of the parties rather than third party or public interests support the issuance of injunctive relief;
v. if the debtor is an individual rather than an entity, a monetary claim based on the same breach of performance would be dischargeable;
vi. the availability of injunctive relief is tied to insolvency under the otherwise applicable nonbankruptcy law; and
vii. the injunction at issue is not a means for simply preserving from an avoidance a conveyance of property that otherwise would be a final non-avoidable transfer under bankruptcy law.

When these factors tilt against equitable relief then monetization and discharge is the correct result absent compelling countervailing nonbankruptcy policies.

The argument in support of this balancing approach is developed below. Part I discusses the availability of equitable relief under nonbankruptcy law, including the tradition of discretion that historically governs the availability of such relief. It also notes the increasing availability of such relief under both statute and common law in the past 30 years, a trend that only heightens the importance of getting the treatment in bankruptcy right. Part II critiques the confused state of the authorities regarding treatment of equitable remedies in bankruptcy and argues that the existing Code, properly construed, carries forward nonbankruptcy tradition by conferring discretion on bankruptcy judges to monetize nonbankruptcy entitlements to equitable relief by weighing bankruptcy as well as nonbankruptcy equities. Part III lays out special insolvency-related factors that should govern that exercise of discretion in bankruptcy. A short conclusion follows.

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[6] *See infra* notes 31–51 and accompanying text. *But see* Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 210 (2012).

I. EQUITABLE RELIEF UNDER NONBANKRUPTCY LAW

Equitable relief may be available to both private and governmental parties under contract law and a wide variety of statutes. Even if nonmonetary equitable relief is available, typically the injured party may elect monetary relief in lieu of, or in addition to, equitable relief. And even if equitable relief is the usual remedy for a particular contractual or statutory breach of duty, courts generally have discretion to deny equitable relief based on equitable or public policy considerations, even when the adequacy of monetary relief is doubtful.[7] Bankruptcy equities or policies, however, are commonly ignored by nonbankruptcy courts faced with a question of whether to make equitable relief available. Indeed, perversely from the point of view of bankruptcy policy, nonbankruptcy courts sometimes view the obligee's insolvency as a relevant, or even sufficient, equitable basis to substitute specific relief for monetary relief that would otherwise be afforded.[8]

A. Contractual Rights

Contract law generally seeks to place an injured party in as good a position as it would have enjoyed had the breaching counterparty performed: the injured party's "expectancy" interest.[9] Both specific and substitutionary "expectancy" remedies exist. Substitution will involve some effort to measure what was lost in money terms (subject to problems of proof and other limitations on contract recovery). Such damages compensate the injured party for the expected gain the promised performance would have generated.

A legal system that has only compensatory, substitutionary remedies does not regulate conduct directly.[10] If circumstances render monetary relief inadequate, a second "expectancy" remedy, a court decree requiring the party in breach to perform its original obligations under the contract on pain of contempt,

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[7] EMILY SHERWIN & THEODORE EISENBERG, AMES, CHAFEE AND RE ON REMEDIES 410 (2012) ("[Courts] weigh the plaintiff's need for an injunction against the hardship an injunction will impose on the defendant; they inquire with particular care into the conduct of both parties leading up to the dispute; they consider the burden an injunction will place on the court and the effects it may have on third parties or the public. The sum of these considerations, compared to the shortcomings of a damage remedy, is probably the best way to understand the modern meaning of the phrases 'irreparable injury' or 'adequacy of legal remedies.'").

[8] Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 716–17 (1989). *But see infra* notes 91–93, and accompanying text.

[9] RESTATEMENT (SECOND) OF CONTRACTS §§ 344(a), 347 (AM. LAW INST. 1981).

[10] *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 539 (2012) ("[N]o society can long tolerate a legal system that lacks the power to grant specific remedies.").

may be available.[11] Equitable remedies under nonbankruptcy law that may be invoked to remedy a breach of contract include specific performance,[12] injunction,[13] accounting for profits,[14] constructive trusts,[15] equitable liens,[16] subrogation,[17] equitable rescission,[18] quiet title,[19] and reformation.[20]

1. *Historical Preference for Damages*

Historically, money damages is the preferred mode of legal enforcement at common law. Equitable remedies are said to be available only when damages are "inadequate," and, moreover, remain subject to the court's consideration of the equities of the parties, third party interests, administrative burdens in framing and overseeing decrees, and public policy. Courts regularly invoke those limitations to resist deploying equitable remedies.[21] Damages may be deemed inadequate if (1) damages are too speculative; (2) the injured party cannot obtain a substitute good or benefit; (3) money judgments cannot be collected against the breaching party; or (4) third party or public interests are implicated.[22] Specific performance may also be preferred where money damages would fail

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[11] For a thorough treatment of traditional equitable remedies, *see* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 563–72 (2016). Historically, most but not all specific relief was only available in chancery court. But the law courts did have power to order specific relief in some instances, for example, by issuing writs of replevin and ejectment. *See* Samuel Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091 (2014). In most American jurisdictions, separate courts of equity have been long abolished, or never existed, and the surviving courts of general jurisdiction may place little weight on whether an action for specific relief is at law or in equity except to the extent that jury trial rights may be at stake. In some situations, declaratory judgments can also operate as a kind of specific relief.

[12] *See, e.g.*, Humble v. Wyant, 843 N.W.2d 334, 340 (S.D. 2014) (specific performance).

[13] *See, e.g.*, Smith v. Brumfield, 133 So. 3d 70, 80 (La. Ct. App. 2014) (injunction).

[14] *See, e.g.*, Rye Police Ass'n v. Chittenden, 980 N.Y.S.2d 728, 731 (N.Y. Sup. Ct. 2014) (accounting).

[15] *See, e.g.*, Evergreen W. Bus. Ctr., LLC v. Emmert, 323 P.3d 250, 255 (Or. 2014) (constructive trust).

[16] *See, e.g.*, Nat'l Bank of Ark. v. River Crossing Partners, LLC, 385 S.W.3d 754, 760 (Ark. 2011) (equitable lien).

[17] *See, e.g.*, Homecomings Fin. Network, Inc. v. Brown, 343 S.W.3d 681, 684 (Mo. Ct. App. 2011) (subrogation).

[18] *See, e.g.*, Moffitt v. Moffitt, 341 P.3d 1102, 1104–05 (Alaska 2014) (equitable rescission or reformation).

[19] *See, e.g.*, Nicholson v. Upland Indus. Dev. Co., 422 S.W.3d 108, 114 (Ark. 2012) (quiet title).

[20] *See, e.g.*, Wells Fargo Bank, N.A. v. Coleman, 768 S.E.2d 604, 611 (N.C. Ct. App. 2015) (reformation).

[21] *See generally* Bray, *supra* note 11, at 563–72 (Enforcement of equitable decrees may require such managerial devices as ex post revision, contempt, equitable helpers, right/remedy relationships, and appointment of referees and masters. To limit resort to these devices, courts will typically only order equitable remedies when certain criteria are met.).

[22] *See* RESTATEMENT (SECOND) OF CONTRACTS § 359 (1981) (Specific performance or injunctions are generally not available if damages are adequate to protect the interests of the injured party.); RICHARD A. LORD, WILLISTON ON CONTRACTS § 67:8 (4th ed. 1990) ("The [remedy at law] must be plain and adequate, and as certain, prompt, complete and efficient to attain the ends of justice and its prompt administration as the remedy in equity.").

to provide the injured party either the means to obtain a substitute performance in the market or the expected financial gains from the promised performance.[23]

Precluding equitable relief if monetary remedies are adequate preserves the hierarchy between legal and equitable remedies. Equitable remedies accordingly remain "exceptional" and discretionary. This doctrine has been criticized by some scholars,[24] but remains standard fare in the courts and has also long been codified by many state and federal statutes, including the Judiciary Act of 1789.[25]

Notably, under the Uniform Commercial Code specific relief in connection with personalty is "no longer limited to goods which are already . . . ascertained at the time of contracting."[26] Most recent cases favor enforcing exclusive dealing arrangements, such as contracts to buy and sell all or some specified fraction of the output of a manufacturer's business during a specified period, through affirmative specific performance or negative injunction, or both. In these situations, the buyer's business may be peculiarly dependent upon a prompt and continuing supply of the promised goods.[27]

Other circumstances where injured parties have been commonly afforded specific relief include arbitration clauses, environmental clean-up obligations,

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[23] *See id.* (Generally, legal remedies are inadequate and support the grant of specific performance when damages would be insufficient or an unjust substitute to the injured party or where calculating a specific damage amount would be impracticable or impossible.); 71 AM. JUR. 2D *Specific Performance* § 12 (database updated August 2017) ("Because the remedy at law for breach of a contract is generally compensatory damages, specific performance is normally available only when the complaining party cannot be fully compensated through the legal remedy of damages or when damages may not be accurately ascertained."); Stephen L. Ascher & Andrew J. Lichtman, *Availability of Specific Performance to Jilted M&A Parties*, LAW360 (July 22, 2016), https://www.law360.com/articles/820267/availability-of-specific-performance-to-jilted-m-a-parties (noting availability and necessity of specific relief in the context of a corporate merger or acquisition).

[24] *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4(2) cmt. *e*, Rep.'s Note *e* (2011); 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 165-68 (2d ed. 1993); OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 6, 38–40 (1978); 1 GEORGE E. PALMER, THE LAW OF RESTITUTION 36, 427–34 (1978); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 306 n.96 (1979); Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063, 1073 n.59, 1086 (2003).

[25] Bray, *supra* note 11, at 581; *see, e.g.*, Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73; ALA. CODE § 12-11-31 (2012); DEL. CODE ANN. tit. 10, § 342 (2013); GA. CODE ANN. § 9-5-1 (2007); *id.* § 23-1-4 (2007 & Supp. 2015); ME. REV. STAT. ANN. tit. 14, § 6051 (2003). *See* Matthews v. Rodgers, 284 U.S. 521, 525 (1932) (discussing Judiciary Act of 1789).

[26] U.C.C. § 2-716, cmt. 2 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

[27] Loy v. Madison & H. Gas Co., 58 N.E. 844, 847 (Ind. 1900) (natural gas for house); Spielman v. Sigrist, 72 N.Y.S.2d 861, 862 (N.Y. Sup. Ct. 1947) (cigarettes); Ctr. Chem. Co. v. Avril, Inc., 392 F.2d 289, 290 (5th Cir. 1968) (commercial cleaning products); Feld v. Henry S. Levy & Sons, Inc., 335 N.E.2d 320, 323 (N.Y. 1975) (bread crumbs).

and non-compete covenants in franchise agreements, sales of businesses and (in some jurisdictions) employment agreements.[28]

Equitable relief has long been typically granted in cases where the subject matter of the contract is "unique property," or involves interests in real property. "Unique property" typically encompasses contracts for the sale of paintings, antiques, patents, franchises, licenses and equity interests in non-public companies. Money damages are hard to assess in these cases because the buyer may have subjective preferences not reflected in market values, the specific property at issue may only be obtained from the party in breach and only imperfect substitutes are available on the market. With respect to real estate, whether or not this is factually true in a specific case, it is generally presumed to be so because no two parcels have identical location, natural resources, pre-existing structures and other elements.[29]

2. *Inherently Discretionary Nature of Specific Relief*

As noted above, equitable remedies are not a matter of right. Accordingly, nonbankruptcy courts may withhold or condition equitable relief pursuant to balancing the equities of the parties and the possible effects of specific relief on the rights and interests of third parties and the public at large.[30] In Judge Friendly's words, a trial court has "discretion . . . to withhold a permanent injunction as unnecessary even when the plaintiff has made out all the other elements of [its] case."[31] A court may use this residual negative discretion to resist what would constitute an abusive or costly deployment of its equitable

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[28] *See* Christina L. Fugate, Elizabeth N. Timme & Erin A. Webley, *Specific Performance: A Maverick Remedy Post-*Ebay *and* Winter, 34 FRANCHISE L.J. 199, 204, 211 (2014) (Specific performance is typically available in franchise law for enforcing a variety of covenants as well as rights concerning real property); *see also* Matthew J. Burne, *The Effect of Franchisor Bankruptcy on Executory Supply Contracts: Does the Franchisee Have a Remedy?*, 18 BARRY L. REV. 191, 208–09 (2012) (noting that franchisee, as intended third party beneficiary of a supply contract may obtain specific performance depending on whether: the goods are unique, "cover" is available, money damages are adequate, and the supplier may potentially be harmed).

[29] The presumption of uniqueness of land, however, is not irrebuttable. *See* Centex Homes Corp. v. Boag, 320 A.2d 194 (N.J. Super. Ct. Ch. Div. 1974) (finding condominium unit not sufficiently special nor unique to justify equitable remedies.).

[30] *See* Van Wagner Advert. Corp. v. S&M Enters., 492 N.E.2d 756, 761 (N.Y. 1986); Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 873–75 (N.Y. 1970).

[31] Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 778 n.116 (1982); *see also* Evangelical Lutheran Church of the Ascension of Snyder v. Sahlem, 172 N.E. 455, 457 (N.Y. 1930) (Cardozo, C.J.); *but see* Andrew Kull, *Ponzi, Property, and Luck*, 100 IOWA L. REV. 291, 300 (2014) ("There are equity problems that depend on the length of the Chancellor's foot, but the basic rules validating and invalidating ownership of property are not among them.").

powers.[32] Moreover even after an injunction issues, enforcement of specific relief by contempt is not automatic and subject to further balancing.

Equitable remedies may be denied to a plaintiff who acts unjustly.[33] The claimant's conduct might give the court several grounds for precluding or narrowing the requested injunction: the plaintiff has unclean hands, an injunction would conflict with the public interest, or supervision of compliance would be more difficult. The plaintiff may have unduly delayed its suit to aggravate the harm to the defendant resulting from an injunction (e.g., because a building has now been constructed, or because investments in a film's distribution have now been made).[34]

The court will also consider whether equitable relief would impose costs on the defendant that greatly exceed the benefits to the plaintiff and whether the defendant has acted equitably.[35] After considering the equities of both parties, the court must then weigh the detriment that will be suffered by the plaintiff if left without an equitable remedy and determine whether this outweighs the hardship that may be suffered by the defendant.

Courts also consider the interests of persons not parties to the contract in determining whether to grant specific performance or other equitable relief. For example, a court granted specific performance that might not otherwise have been available where a seller breached the contract for its sale upon learning that the buyer had contracted to sell the equipment to a third party at a substantial increase in price.[36] On the other hand, courts have on occasion granted specific performance of a contract to sell personal property notwithstanding the seller's prior disposition of the property to a third party.[37] But the existence of a good faith purchaser for value will generally limit an injured buyer's right to specific

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32 *See* Avitia v. Metro. Club of Chi., 49 F.3d 1219, 1231 (7th Cir. 1995) ("The effect of equitable remedies on third parties, not to mention on the courts that must take the time to supervise them, is the practical reason why there is no 'right' to an equitable remedy, why the plaintiff's claim to such a remedy may have to yield to competing considerations."); *see also* John M. Golden, *Injunctions as More (or Less) Than "Off Switches": Patent-Infringement Injunctions' Scope*, 90 TEX. L. REV. 1399, 1460 (2012) (noting that the district court in *eBay v. MercExchange* declined to give an injunction for fear that it would lead to "'contempt hearing after contempt hearing,'" and also expressing concern that administrative costs inappropriately discourage judges from granting injunctions).

33 *See* Bray, *supra* note 11, at 581.

34 *Id.* at 585.

35 Boomer, 257 N.E.2d at 872 (withholding injunctive relief abating a nuisance based on disproportionate economic harm to the defendant).

36 Ace Equip. Co. v. Aqua Chem., Inc., 73 Pa. D. & C.2d 300, 302–03 (Pa. C.P. 1975).

37 *See* Schweber v. Rallye Motors, Inc., 12 UCC REP. SERV. 1154 (N.Y. Sup. Ct. 1973), (granting specific performance of a contract for the sale of an automobile under U.C.C § 2-716(1), notwithstanding the fact that it had already been sold to a third party).

performance. In *Joneil Fifth Ave.*, a collectibles retailer sought a preliminary injunction to restrain a wholesale distributor from disposing of promised porcelain figures.[38] The court held that although the retailer established a prima facie right to specific performance, the distributor could not perform without violating the rights of its prior good-faith purchasers.[39] The court stated the rule that specific enforcement will not be decreed if the performance sought is impossible or is in violation of the rights of a third person which are superior to those of a plaintiff.[40] Further, the court held that whatever injuries the retailer would suffer were more than counterbalanced by the significant inconvenience and disruption of business operations of the defendants and third parties that would result if the court granted the injunction.[41]

Public policy concerns may also outweigh or reinforce any traditional inclination to limit the injured party to damages. For example, courts sometimes impose specific performance where noncompliance with environmental policies would negatively and imminently effect public health and safety.[42] On the other hand, courts decline to award affirmative specific relief for personal services contracts since compelling parties to continue an employment relationship, where one of them is unwilling, is against public policy.[43] Likewise, courts will deny specific relief where factors analogous to unconscionability exist in the contract. Still, nonbankruptcy law routinely enforces many rights by providing the injured party specific relief rather than a judgment for money damages.

Courts can be flexible in how they use equitable remedies to restore the injured party to its expected position. For example, a court may decide to delay

[38] Joneil Fifth Ave., Ltd. v Ebeling & Reuss Co., 458 F. Supp. 1197, 1198 (S.D.N.Y. 1978) (applying New York law).

[39] *Id.* at 1200–01 (S.D.N.Y 1978).

[40] *Id.*

[41] *Id.*

[42] Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 57 (1993) ("Injunctions are routine in all environmental litigation, including litigation over air and water pollution, endangered species and destruction of habitat, and environmental impact statements.")

[43] Although specific performance will be unavailable in these circumstances, court can and do enforce personal services contracts through negative injunctions. Am. Broad. Cos. v. Wolf, 420 N.E.2d 363, 366–67 (N.Y. Ct. App. 1981) (a properly limited negative injunction can be obtained under New York law to enforce reasonable express covenant not to compete in an employment contract.).

the start of an injunction,[44] to phase it out after a period of time,[45] or broaden or narrow injunctions as may be appropriate under the circumstances of the case.[46] Moreover, courts may condition equitable relief upon an action by the claimant. For example, when awarding a constructive trust, a court may require the plaintiff to reimburse certain costs incurred by the constructive trustee.[47] Courts can employ these tactics to constrain opportunistic behaviors by the plaintiff or defendant,[48] or contrive a compromise remedy when transaction costs between the parties are high,[49] or account for concerns about judicial administrability and other public interests.[50]

3. *Modern Trend of More Liberal Use of Equitable Remedies*

Notwithstanding the historical preference for monetary relief, modern nonbankruptcy courts have increasingly provided injured parties greater access to equitable relief across a wide variety of claims and circumstances.

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[44] Brown v. Plata, 563 U.S. 493, 541–42 (2011) (approving injunction that gave the state two years to comply); Broadcom Corp. v. Emulex Corp., 732 F.3d 1325, 1331–32, 1338–39 (Fed. Cir. 2013) (approving injunction against patent infringement that gave infringer an eighteen-month "sunset period" to avoid disruptions to customers (citation omitted)); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 1008 (N.D. Cal. 2014) (issuing injunction that would "not take effect until the start of [the next football and basketball] recruiting cycle"); *cf.* Martian v. Martian, 399 N.W.2d 849, 854 (N.D. 1987) ("[T]here may be circumstances which justify imposing an implied trust or lien for amounts to become due in the future."). Among scholars, delayed injunctions have been analyzed especially with respect to intellectual property litigation. *See* Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 489 (2010); John M. Golden, *"Patent Trolls" and Patent Remedies*, 85 TEX. L. REV. 2111, 2148–49 n.136 (2007); Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2035–39 (2007).

[45] *See* EEOC v. AutoZone, Inc., 707 F.3d 824, 844 (7th Cir. 2013) (remanding for the imposition of "a reasonable time limit" on a provision of an injunction requiring compliance with the Americans with Disabilities Act); APC Filtration, Inc. v. Becker, No. 07-CV-1462, 2010 WL 4930688, at *7–8 (N.D. Ill. Nov. 30, 2010) (extending injunction so that it expired in nine months because of defendant's contempt).). *See also* Georgia v. Brailsford, 2 U.S. 415, 419 (1793) (opinion of Jay, C.J.) (affording plaintiff Georgia temporary limited injunctive relief pending adjudication of dispute over ownership of money funds).

[46] *See* United States v. Vend Direct, Inc., No. 06-CV-02423-MSK-MEH, 2007 WL 3407357, at *6 (D. Colo. Nov. 13, 2007) (noting that an injunction may go "beyond the specific violations . . . in order to 'fence in' the Defendants").

[47] *See* RESTATEMENT *supra* note 24, at § 55 illus. 5.

[48] *See* Henry E. Smith, *Why Fiduciary Law Is Equitable, in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 261, 262–71 (Andrew S. Gold & Paul B. Miller eds., 2014).

[49] *Cf.* Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing A Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1030–31 (1995); Louis Kaplow & Steven Shavell, *Do Liability Rules Facilitate Bargaining? A Reply to Ayres and Talley*, 105 YALE L.J. 221, 222 n.5 (1995).

[50] *See* Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (plurality opinion) ("[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable."); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500–01 (1941).

a. Sale of Goods

A modern trend towards more liberal availability of equitable remedies can be discerned in any number of substantive areas of law. [51] One example of this liberalization that comes readily to mind is in the area of sale of goods. Generally, before the Uniform Commercial Code, specific performance of contracts in relation to goods was rarely available. The buyer's remedy by way of an action at law for damages was usually regarded as fully adequate. Consistent with the more modern attitude toward equitable relief, the Uniform Commercial Code provides for equitable relief where the contracted performance is "unique in character and cannot be duplicated," or in "other proper circumstances a substantial equivalent involves difficulty, delay, and inconvenience."[52] "Specific performance is no longer limited to goods that are already specific or ascertained at the time of contracting," since "[t]he test of uniqueness . . . must be made in terms of the total situation which characterizes the contract."[53] Moreover, the UCC provides that specific performance may be

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51 *See e.g.*, RESTATEMENT, *supra* note 22, at § 359 cmt. *a* ("There is, however, a tendency to liberalize the granting of equitable relief by enlarging the classes of cases in which damages are not regarded as an adequate remedy. This tendency has been encouraged by the adoption of the Uniform Commercial Code, which 'seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.' Comment 1 to Uniform Commercial Code § 2-716. In accordance with this tendency, if the adequacy of the damage remedy is uncertain, the combined effect of such other factors as uncertainty of terms (§ 362), insecurity as to the agreed exchange (§ 363) and difficulty of enforcement (§ 366) should be considered. Adequacy is to some extent relative, and the modern approach is to compare remedies to determine which is more effective in serving the ends of justice. Such a comparison will often lead to the granting of equitable relief. Doubts should be resolved in favor of the granting of specific performance or injunction."); *id*. at Ch. 16, Topic 3, Intro. Note ("Courts have been increasingly willing to order performance in a wide variety of cases involving output and requirements contracts, contracts for the sale of a business or of an interest in a business represented by shares of stock, and covenants not to compete."). More generally, following in the footsteps of Professor Laycock, Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1989), a broad scholarly consensus has developed in favor of relaxing equity's traditional "inadequacy of remedy at law" requirement and adopting a more functionalist approach to making equitable relief available. *See* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1001–02 (2015) (discussing scholarly consensus and its tension with recent Supreme Court caselaw while noting that even the more restrictive approach of the Supreme Court appears to make equitable remedies more readily available in certain instances); *see generally* Doug Rendleman, *The Triumph of Equity Revisited: The States of Equitable Discretion*, 15 NEV. L. J. 1397, 1426–31 (2015) (indicating that equitable remedies have been considered or granted in a variety of cases, including injunctions for nuisance, discrimination, patent infringement, and environmental statute violations).

52 U.C.C. § 2-716 (Am. Law Inst. & Unif. Law Comm'n 1977); *id.* at cmt. 2; *see also* Harold Greenberg, *Specific Performance Under Section 2-716 of the Uniform Commercial Code: "A More Liberal Attitude" in the "Grand Style,"* 87 COM. L.J. 583 (1981).

53 U.C.C. § 2-716 at cmt. 2.

decreed where the goods are unique, or "in other proper circumstances," and an "inability to cover is strong evidence of 'other proper circumstances.'"[54]

b. Caselaw Trend Toward General Balancing

The modern trend towards greater access to equitable remedies in applicable nonbankruptcy law has been supported by a willingness to generally balance the pluses and minuses of damages and nonmonetary relief based on the circumstances of the particular case.[55] A well-known example of this more liberal approach to equitable relief is *Sara Creek Property Co. v. Walgreen Co.*[56]

A commercial tenant operating a pharmacy in a shopping center sought an injunction to prevent the landlord from letting other premises in the center to a competing pharmacy in derogation of the exclusivity provisions in its lease.[57] Judge Posner noted that "injunctions are not granted as a matter of course, but only when the plaintiff's damages remedy is inadequate," while also recognizing that in certain "categories of case[s] . . . injunctive relief is . . . the norm."[58] While noting that the court should not have a starting presumption against specific relief,[59] the judge clarified that:

> The choice between remedies requires a balancing of the costs and benefits of the alternatives.[60] The task of striking the balance is for the trial judge, subject to deferential appellate review in recognition of its particularistic, judgmental, fact-bound character.[61]

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[54] *Id*. As to "cover," *see generally* U.C.C. § 2-712 (Am. Law Inst. & Unif. Law Comm'n 1977); William A. Logan, *A Comparison of the Rights and Remedies of Buyers and Sellers under the Uniform Commercial Code and the Uniform Sales Act,* 49 KY. L.J. 270, 285–86 (1960). The enforcement of output and requirements contracts through equitable remedies is further encouraged by U.C.C. § 2-306 (Am. Law Inst. & Unif. Law Comm'n 1977), and the official comments thereon.

[55] The growth of free form balancing in place of the use of traditional equitable presumptions, counter-presumptions and safe harbors is sharply critiqued in Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions,* 112 COLUM. L. REV. 203, 214–19 (2012). Gergen et al., argue strongly that free-form balancing (which they perceive to be a trend driven by the Supreme Court's 2006 decision in *eBay*), by ignoring traditional presumptions and safe harbors that have structured the exercise of discretion by courts of equity, undermines the stability of the law and gives too little weight to historical understandings about the appropriate use of equity. *Id*. at 242–49. Nevertheless, they also demonstrate how equity and its presumptions and safe harbors have evolved over time to address varying circumstances. *Id*. at 219–32.

[56] Walgreen Co. v. Sara Creek Prop. Co., 966 F.2d 273 (7th Cir. 1992).

[57] *Id*. at 274.

[58] *Id.* at 274, 278.

[59] *Id.* at 275.

[60] *Id.* (citing Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) and Yakus v. United States, 321 U.S. 414, 440 (1944)).

[61] *Id.* (citing K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 915 (1st Cir. 1989)).

The court considered the costs of a damages remedy: "Diminished accuracy in the determination of value" lost from a breach, increased litigation expenditures for the parties in terms of "preparing and presenting evidence of damages, and the time of the court in evaluating the evidence."[62]

In contrast, the court considered that a permanent injunction remedy would require the continuing supervision by a court or third party, as well as force the litigants into a "bilateral monopoly" in which they must negotiate, creating a bargaining range between the price demanded by the winner-seller of the injunctive right and the price that the loser-buyer is willing to pay for the right.[63] The court held that since it was difficult to determine the monetary damages associated with lost profits and good will, and Walgreen rightly objected that its sales figures and financial projections for use in calculating damages was proprietary and confidential, a permanent injunction was the more efficient and cost-effective remedy.[64] There were few costs associated with imposing a permanent injunction beyond the potential bilateral monopoly problem that the court viewed as manageable under the circumstances.[65]

B. Statutory Rights

Modern regulatory regimes affording injured parties nonmonetary remedies also prominently provide for judicial flexibility and discretion. When a plaintiff sues under a statute that authorizes equitable remedies, courts exercise discretion in enforcing the statutory right. The existence of such a discretion is often express in the statute itself. One example is the Employee Retirement Income Security Act, which authorizes certain suits for "appropriate equitable relief."[66] Other typical regulatory areas with statutes providing for discretionary equitable remedies alongside money damage alternatives include intellectual property law, antitrust law, and environmental law.

Faced with many state and federal statutes authorizing equitable relief, courts have looked to history and tradition to determine what counts as an

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62 *Id*. at 276.

63 *Id*. at 275–76.

64 *Id*. at 278–79.

65 *Id*.

66 Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1132(a)(3) (2012). For an example of classification under this statute, *see* Sereboff v. Mid Atl. Med. Servs. Inc., 547 U.S. 356, 363, 368 (2006) (holding that Mid Atlantic's action to enforce the "acts of third parties" provision of § 502(a)(3)(B) of ERISA qualifies as an equitable remedy); National Foundation of Fitness, Sports, and Nutrition Establishment Act, Pub. L. No. 111-332, § 6, 124 Stat. 3576, 3580 (2010) (authorizing U.S. Attorney General to sue "for such equitable relief as may be necessary or appropriate" to ensure foundation acts consistently with its statutory purpose).

equitable remedy and also to determine the circumstances in which equitable relief should be given. The U.S. Supreme Court has underscored the distinction between legal and equitable remedies in cases ranging from copyright, employee benefits, national security, immigration, patents, and environmental law.[67]

The Court's most important recent decision on the standards for a permanent injunction is *eBay v. MercExchange*.[68] The Court admonished the Federal Circuit for departing from traditional principles of equity in evaluating the need for permanent injunctions and overruled the Federal Circuit's longstanding "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances."[69] The Court made clear that "a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief," showing:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[70]

The Court has continued and extended its campaign against the use of relaxed standards for injunctive relief. In *Winter v. Natural Resources Defense Council, Inc.* and *Monsanto Co. v. Geertson Seed Farms*, the Supreme Court made evident that the issuance of a preliminary injunction, far from being automatic or even favored, "is a drastic and extraordinary remedy, which should not be granted as a matter of course" and should issue only if the traditional legal standard is strictly satisfied.[71] It became absolutely clear in those cases that the *eBay* test should not be limited to patent law.[72] Accordingly, the test has been widely applied by the lower federal courts to requests for permanent injunctions

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[67] *E.g.*, Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014) (copyright); Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010) (environmental law); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) (patent); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) (employee benefits).

[68] eBay Inc., 547 U.S. 388.

[69] *Id.* at 390.

[70] *Id.* at 391.

[71] *See* Winter v. Nat. Res. Def. Council, Inc., 555, U.S. 7, 22 (2008); Monsanto Co., 561 U.S. at 165–66; *see also* Eric J. Murdock & Andrew J. Turner, *How "Extraordinary" is Injunctive Relief in Environmental Litigation? A Practitioner's Perspective*, 42 ENVT'L L. REP. NEWS & ANALYSIS 10,464 at 10,465 (2012).

[72] *See* Monsanto, 561 U.S. at 155–58 (2010) (quoting *eBay*).

in a huge variety of cases,[73] though it is not applied in every case.[74] Notwithstanding *Winter*, some of the lower federal courts continue to apply more relaxed or "flexible" standards in considering requests for preliminary injunctive relief, while others go through the motions of applying the standards under *Winter* and *Monsanto*, but without giving genuine effect to the principle that injunctive relief should be limited to truly extraordinary circumstances.[75] But no court generally views injunctive relief as a matter of right rather than judicial discretion, however liberally that discretion may be exercised.

1. *Discretion in Affording Nonmonetary Relief under Statutes*

The first two parts of the *eBay* test—the irreparable injury rule and the requirement of no adequate remedy at law—traditionally have served to maintain the line between legal and equitable remedies. In assessing irreparable harm, courts have found certain types of evidence to be compelling, including: a showing that the loss cannot be measured or is one that nobody would expect to suffer; specific instances of marketplace confusion; harm to a plaintiff's reputation, goodwill or brand; demonstrated inability to reign in the infringing acts; in a preliminary injunction case, the loss of a short window to exploit a work; or other significant business injury.[76] However, unlike previously, a plaintiff must be prepared to back these injuries up with proof. Unexplained delay can negatively impact the likelihood of injunctive relief, both by undercutting the stated need for emergency relief and by increasing the hardships to a defendant that may have incurred more expense as the plaintiff waited to enforce its rights.

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[73] *See, e.g.*, Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 422–23 (2d Cir. 2013) (applying test when deciding whether to enjoin a state's enforcement of a preempted state statute); Curtis v. Alcoa, Inc., 525 F. App'x 371, 380 (6th Cir. 2013) (applying test to claim for injunction under ERISA and the Labor Management Relations Act); Yowell v. Abbey, 532 F. App'x 708, 710 (9th Cir. 2013) (reversing district court for failure to apply test to claim against the Bureau of Land Management); Global NAPs, Inc. v. Verizon New Eng., Inc., 706 F.3d 8, 13 (1st Cir. 2013) (per curiam) (applying test to injunction against interference with sale of assets by receiver); United States v. City of New York, No. 07-CV-2067 (NGG)(RLM), 2010 U.S. Dist. LEXIS 111064, at *28 (E.D.N.Y. Oct. 19, 2010) (applying test to Title VII claim); *see also* Salinger v. Colting, 607 F.3d 68, 78 n.7 (2d Cir. 2010) ("[A]lthough today we are not called upon to extend *eBay* beyond the context of copyright cases, we see no reason that *eBay* would not apply with equal force to an injunction in any type of case.").

[74] *See, e.g.*, Meyer v. Portfolio Recovery Assocs., LLC, 707 F.3d 1036, 1044 (9th Cir. 2012) (noting that the Ninth Circuit "has not yet determined whether irreparable harm must be shown in order to obtain injunctive relief in all types of cases," and noting division in post-*eBay* cases in the circuit); O'Sullivan v. City of Chi., 478 F. Supp. 2d 1034, 1043 (N.D. Ill. 2007) (declining to apply *eBay* to a request for an injunction under Title VII).

[75] *See* O'Sullivan, 478 F. Supp. 2d at 1043.

[76] *See generally* Ronald T. Coleman Jr. et al., *Applicability of the Presumption of Irreparable Harm After* eBay, 32 FRANCHISE L.J. 3, 5–6 (2012) (in trademark infringement cases injunction may be appropriate remedy).

Courts have declined to find irreparable harm if the injury could be remedied by money damages (in some cases, even when the defendant cannot in fact pay those damages); if the harm is hypothetical, minor or uncertain; or if all that is shown is that the defendant intends to continue infringing.[77] Courts may prefer damages over equitable relief where a self-help remedy such as buying replacement goods is available.[78]

The second part of the *eBay* test appears to simply restate the first factor; injuries are "irreparable" if money damages are not an adequate remedy under the circumstances.[79]

The third part of the test, the "balance of hardships," is also traditional in equity. It refers to an inquiry into how the injunction will affect each of the parties, including a consideration of each party's fault.[80] This traditional equitable inquiry is often called "balancing the equities" and generally has two main principles. The first is that a court should not grant an equitable remedy if the costs to the defendant greatly exceed the benefits to the plaintiff; the second is that a court should show this forbearance only if the defendant acted in good faith. Both principles distinguish the inquiry from standard cost-benefit analysis.

The final part of the *eBay* test, the public interest, is also a longstanding concern of equity. The Court has said that "[t]he history of equity jurisdiction is

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[77] Eleanor Lackman, *Shifting Injunction Standards in Copyright, Trademark Cases*, LAW360: EXPERT ANALYSIS (Dec. 17, 2014), https://www.law360.com/ip/articles/602587?nl_pk=e843bcfb-0f4d-43e3-8f0a-37f651f42590&utm_source=newsletter&utm_medium=email&utm_campaign=ip.

[78] Laycock *supra* note 42, at 58–59.

[79] *See* DAVID SCHOENBROD ET AL., REMEDIES: PUBLIC AND PRIVATE 81–82 (3d ed. 2002) (irreparable injury results when there is no adequate remedy at law); Gergen et al., *supra* note 55, at 207–08 ("the [*eBay*] test redundantly states requirements of irreparable injury and inadequacy of legal remedies"); *cf.* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. REV. 543, 548–49 (1985) (requirement of no adequate remedy at law was jurisdictional, whereas existence of irreparable injury was a factor for the court to consider in exercising its discretion to award equitable relief). *Contra* Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 392–93 (1983) (finding that courts frequently collapse irreparable injury and the lack of an adequate remedy at law, but suggesting differences in timing and scope: adequacy is a question about the fairness of giving an injunction to a plaintiff who could instead have sought "a less onerous remedy," such as damages; irreparable injury is a question about other proceedings, including criminal proceedings, and whether they "are likely to repair, in a rough sense, the harm plaintiff seeks to avert by injunction"); *see* Monsanto, 561 U.S. at 162–63 (finding no irreparable injury at the permanent injunction stage because in a future suit an equitable remedy could protect plaintiffs' rights—a point that could not be made under the heading of "no adequate remedy at law"); California v. Latimer, 305 U.S. 255, 258–59 (1938) ("For we are of the opinion that there was adequate opportunity to test at law the applicability and constitutionality of the Acts of Congress; and that no danger is shown of irreparable injury if that course is pursued.").

[80] Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1990). *Cf.* eBay, 547 U.S. at 394 (holding that when a court issues an injunction its "discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards").

the history of regard for public consequences in employing the extraordinary remedy of the injunction."[81] Here, too, the Court took a traditional concern of equity and presented it as something the plaintiff must demonstrate in order to receive an injunction. However, in suggesting that "[a] plaintiff must demonstrate . . . that the public interest would not be disserved by a permanent injunction,"[82] the Court constructs a test that in practice allows the plaintiff to generally shift the burden to the defendant, third party intervenors, or the trial judge to make out any public interest objection to injunctive relief.

2. *Increasing Scope of Statutory Rights*

Consistent with the diminishing bias against equitable remedies in enforcing contracts, statutory rights to specific relief that affect administration of bankruptcy estates and insolvent debtors have also proliferated. Moreover, such statutes may provide parties broader standing to seek nonmonetary than monetary relief.[83] While this does not remove the limitation traditionally placed on such relief, it does alter judicial attitudes towards the availability of equitable relief and make such relief more likely.[84] For example, preliminary injunctions have been granted without a showing of irreparable injury when the injunction is requested pursuant to statutory authorization[85] in cases alleging violations of

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[81] R.R. Comm'n of Tex., 312 U.S. at 500–01. The Court usually (though certainly not always) points to the public interest as a reason for restraint, that is, as a justification for either declining to give an equitable remedy or carefully delimiting its scope. For invocations of the public interest, *see*, *e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2538 (2014); Salazar v. Buono, 559 U.S. 700, 714 (2010) (plurality opinion); Weinberger, 456 U.S. at 312–13; Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955); Yakus v. United States, 321 U.S. at 440–41 (1944); Hecht Co. v. Bowles, 321 U.S. at 329–30 (1944); Virginian Ry. Co. v. Sys. Fed'n, 300 U.S. 515, 552 (1937).

[82] eBay, 547 U.S. at 391.

[83] *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49 (1987) (superseded by the amendments of the Clean Air Act of 1990, however demonstrating statutes can provide for monetary relief); Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n, 840 F.2d 653, 661 (9th Cir. 1988); Mid-West Paper Prods. Co. v. Cont'l Grp., 596 F.2d 573, 591–92 (3d Cir. 1979).

[84] *See generally* MANUAL OF FEDERAL PRACTICE § 7.100 (5th ed. 2015).

[85] *See* South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n, 744 F.2d 1107, 1120 (5th Cir. 1984) (preliminary injunction was properly granted, even in absence of showing of irreparable harm, because statutory conditions are met); *see also* Illinois Bell Tel. Co. v. Illinois Com. Comm'n, 740 F.2d 566, 571 (7th Cir. 1984) (preliminary injunction was properly granted, even in absence of irreparable injury, when federal statute expressly authorizes such relief); Burlington N. R.R. Co. v. Dep't of Revenue, 934 F.2d 1064, 1074 (9th Cir. 1991) (tax preliminarily enjoined under Railroad Revitalization Act and Regulatory Reform Act notwithstanding absence of traditional equitable criteria); United States v. Odessa Union Warehouse Co-Op, 833 F.2d 172, 175 (9th Cir. 1987) (reversing denial of preliminary injunction, and holding that FDA was not required to show irreparable injury in enjoining sale and movement of moldy, insect-contaminated wheat under 21 U.S.C. § 332(a)). *But see* United States v. Nutri-Cology, Inc., 982 F.2d 394, 398 (9th Cir. 1992) (holding that when government had not shown undisputed statutory violation of food and drug laws, but only colorable evidentiary showing, no presumption of irreparable injury).

environmental and conservation statutes,[86] postal regulations,[87] wire and mail fraud statutes,[88] securities laws,[89] the Food, Drug and Cosmetic Act,[90] and the River and Harbors Appropriation Act.[91]

C. Insolvency under Nonbankruptcy Law

Under nonbankruptcy law, a debtor's insolvency may sometimes support a finding of inadequacy of the remedy at law leading to equitable relief.[92] Most nonbankruptcy courts, naturally focusing on the equities of the plaintiff and defendant before them, view debtor insolvency as a factor (sometimes a necessary and sufficient factor) supporting equitable relief.[93] After all, how can

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86 *See* Gov't of the Virgin Islands, Dep't of Conservation & Cultural Affairs v. Virgin Island Paving, Inc., 714 F.2d 283, 286 (3d Cir. 1983).

87 *See* United States Postal Serv. v. Beamish, 466 F.2d 804, 806 (3d Cir. 1972).

88 *See* United States v. William Savran & Assocs., 755 F. Supp. 1165, 1179 (E.D.N.Y. 1990).

89 *See* SEC v. Mgmt. Dynamics, Inc., 515 F.2d 801, 808–09 (2d Cir. 1978).

90 21 U.S.C. § 301 et seq. (2012); *see* United States v. Kasz Enters., 855 F. Supp. 534, 543 (D.R.I. 1994), *modified on other grounds*, 862 F. Supp. 717 (D.R.I. 1994) (alleging FDCA violation); United States v. Sene X Eleemosynary Corp., 479 F. Supp. 970, 980–81 (S.D. Fla. 1979) ("Where an injunction is authorized by statute, it is proper to issue such an order to restrain violations of the law if the statutory conditions are satisfied.").

91 33 U.S.C. § 403 (2012); *see* United States v. Schmitt, 734 F. Supp. 1035, 1048–52 (E.D.N.Y. 1990) (government was not required to demonstrate irreparable harm since the Rivers and Harbors Appropriation Act expressly authorized entry of injunction for violation).

92 *See* RESTATEMENT *supra* note 22, at § 360 ("Even if damages are adequate in other respects, they will be inadequate if they cannot be collected by judgment and execution."); RESTATEMENT (SECOND) OF TORTS § 944 (1979) ("To the extent that the damages awarded cannot be realized upon execution, the damage remedy is proportionately inadequate."). See 25 RICHARD A. LORD *supra*, note 22 at § 67:10 ("[I]nsolvency of the defendant affords a sufficient reason of itself or in connection with other facts for the specific enforcement of a contract . . . ."); Shockley v. Davis, 17 Ga. 177, 178–79 (1855) (where A agreed with B that B would be C's surety, A would turn over to B choses in action and when A is insolvent, a court of equity could decree specific performance of the contract); Glades Cty. v. Detroit Fidelity & Sur. Co., 57 F.2d 449, 452 (5th Cir. 1932) (a preliminary injunction is warranted to enforce a surety's right if the principal is insolvent); Jamison Coal & Coke Co. v. Goltra, 143 F.2d 889 (8th Cir. 1944) (insolvency is a factor in determining whether to grant specific performance); Consolidated Fuel Co. v. St. Louis Sw. Ry. Co. of Tex., 250 F. 395, 398–99 (8th Cir. 1918) ("There is no allegation in the complaint that the appellant is insolvent, and insolvency is a very material question in cases where the damages in money are easily ascertainable."); Miller v. LeSea Broadcasting, 87 F.3d 224, 230–31 (7th Cir. 1996) (insolvency renders a remedy at law inadequate).

93 A much-cited early authority in this line of cases is Clark v. Flint, 39 Mass. [22 Pick.] 231 (1839) which in turn relied heavily on 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 31. This position has become recognized as the majority position in the modern caselaw and commentary. *See* Matthew J. Lavisky, *Behind the Times: Florida's Failure to Recognize Insolvency as Satisfying the Inadequate Remedy at Law Requirement for Injunctive Relief*, 10 FLA. COASTAL L. REV. 119, 125 (2008) ("the majority of federal courts recognize that an injunction can be issues, assuming the other elements are met, upon a showing that the defendant is insolvent . . . ."); Laycock, *supra* note 8, at 716 ("Damages are no remedy at all if they cannot be collected, and most courts sensibly conclude that a damage judgment against an insolvent defendant is an inadequate remedy" but noting that some courts find an uncollectible judgment to be an adequate remedy based on the policy of fairness to other creditors). *See also* Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation), 25 F.3d 1467, 1480 (9th Cir. 1994) ("We join the majority of circuits in concluding

monetary relief calculated so as to compensate the injured party be fully adequate to redress the harm when the debtor's insolvency will preclude or limit the collection of a money judgment to a lesser amount or even zero? The aid of equity thus becomes "necessary to prevent the vendee from losing both the goods and money."[94]

An older line of authority, now a minority position that persists in such states as Pennsylvania and Florida, however, eschews reliance on insolvency as a justification for, or a factor favoring, specific performance.[95] This minority position while neither explicitly weighing the bankruptcy equities nor denying equitable relief in a situation where it would otherwise be available on grounds of debtor insolvency, seems more sensitive to the third party equities implicated

that a district court has authority to issue a preliminary injunction where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant or that defendant has engaged in a pattern of secreting or dissipating assets to avoid judgment."); Deckert v. Independence Shares Corp., 311 U.S. 282, 285 (1940); Airlines Reporting Corp. v. Barry, 825 F.2d 1220, 1227 (8th Cir. 1987) ("[In a civil RICO, fraud, and conversion case] [t]he authority of a trial court to issue a preliminary injunction to ensure the preservation of an adequate remedy is well established." Plaintiff showed that the defendants would not fulfill an award of damages and was "entitled to a preliminary injunction to protect its remedy."); Tri-State Generation & Transmission Ass'n, v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986) (a preliminary injunction was warranted where the inability to collect a money judgment would lead to irreparable harm); Feit & Drexler, Inc.v. Drexler (*In re* Feit & Drexler, Inc.), 760 F.2d 406, 416 (2d Cir. 1985) ("[E]ven where the ultimate relief sought is money damages, federal courts have found preliminary injunctions appropriate where it has been shown that the defendant intended to frustrate any judgment on the merits by transfer[ring its assets] out of the jurisdiction . . . . [T]his is an appropriate case for the issuance of injunctive relief to prevent [the defendant] from making uncollectible any judgment . . . .") (second alteration in original) (citations omitted) (internal quotation marks omitted); Foltz v. U.S. News & World Rep., 760 F.2d 1300, 1309 (D.C. Cir. 1985) ("[A]n equitable remedy designed to freeze the status quo . . . would be entirely in keeping with the principles that undergird equity jurisprudence."); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 386 (7th Cir. 1984) (damages remedies are inadequate where "[d]amages may be unobtainable from the defendant because he may become insolvent before a final judgment can be entered and collected."); Jay Cty. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, 692 N.E.2d 905, 910 (Ind. Ct. App. 1998) (holding that an injunction was proper where plaintiffs were unable to collect a damages judgment and were thus irreparably harmed); Van Loan v. Van Loan, 895 P.2d 614, 618 (Mont. 1995) ("If [a defendant] disperses his assets, rendering a judgment against him worthless, [the plaintiff] will suffer irreparable injury absent the issuance of a preliminary injunction."); Tanguy v. Laux, 259 S.W.3d 851, 857 n.5 (Tex. App. 2008) (citing Tel. Equip. Network, Inc. v. TA/Westchase Place, Ltd., 80 S.W.3d 601, 611 (Tex. App. 2002)).

[94] H.C. Horack, *Insolvency and Specific Performance*, 31 HARV. L. REV. 702, 714–15 (1918).

[95] *See* Heilman v. Union Canal Co., 37 Pa. 100, 104 (1860) ("The fact, if it be so, that this remedy may not be successful in realizing the fruits of a recovery at law, on account of the insolvency of the defendants, is not of itself a ground of equitable interference."); Willing v. Mazzocone, 482 Pa. 377, 383 (1978) ("the insolvency of a defendant does not create a situation where there is no adequate remedy at law. In deciding whether a remedy is adequate, it is the remedy itself, and not its possible lack of success that is the determining factor."); St. Lawrence Co., N.V. v. Alkow Realty, Inc., 453 So.2d 514, 514 (Fla. 4th DCA 1984) ("The test of the inadequacy of a remedy at law is whether a judgment could be obtained, not whether, once obtained it will be collectible."). Some commentators take the view that the Pennsylvania authorities are properly read to adopt an intermediate position making insolvency a relevant factor favoring equitable relief but not a sole basis for awarding equitable relief that would not otherwise be available. *See* Lavisky, *supra* note 93, at 128.

by insolvency.[96] In doing so the minority rule is a faint echo from a time before there were specialized bankruptcy courts, when courts of equity routinely administered insolvency law as a branch of the equitable jurisdiction.

Nevertheless, the dominant position today is that nonbankruptcy courts either ignore the adverse effect their decree will have on bankruptcy policies, or, even more perversely, view insolvency as a factor, sometimes a decisive factor, favoring equitable relief. This only can make sense to courts oblivious to the rights of unidentified and absent creditors whose own collection rights will be adversely affected by the equitable decrees they render. In our modern debtor-creditor law, state courts of general jurisdiction wielding equitable jurisdiction administer nonbankruptcy individual creditor debt collection procedures while specialized federal courts administer insolvent estates under collective bankruptcy debt-collection procedures.[97] The right hand does not know what the left hand is doing, or, even if knows, pursues its own policy without regard to that of the competing regime.

II. BANKRUPTCY COURTS MAY MONETIZE NONBANKRUPTCY ENTITLEMENTS TO EQUITABLE RELIEF

A. Bankruptcy and Nonbankruptcy Equities Must Be Balanced to Determine Whether a Nonbankruptcy Right to Specific Relief Is a Claim

The basic thesis of this Article is that the bankruptcy court must engage in a fresh balancing of interests in order to determine whether a nonbankruptcy right to equitable relief is to be treated as claim, monetized, fit within the bankruptcy distribution scheme, and then discharged. This balance will differ, in a way that

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96 Note, *Specific Performance for Insolvency*, 18 HARV. L. REV. 454, 454–55 (1905) ("specific performance . . . during the defendant's insolvency is [in] violation of the spirit of our bankruptcy legislation, in that it creates a preference."); *cf.* Marblegate Asset Mgmt. v. Educ. Mgmt. Fin. Corp., 846 F.3d 1, 617 (2d Cir. 2017) (debtor insolvency not a basis for injunctive relief under Trust Indenture Act of 1939 in suit to enjoin release of parent corporation guarantee).

97 *See, e.g.*, Union Bank v. Wolas, 502 U.S. 151, 160–62 (1991) (discussing bankruptcy policy of controlling state law race of diligence); 5 COLLIER ON BANKRUPTCY ¶ 547.01 (16th ed. 2017) (same); David A. Skeel, Jr., *The Empty Idea of "Equality of Creditors"* 30 (U. Pa. L School, Pub. L. Res., Working Paper No. 17-7) (2017) ("The traditional explanation for preference law does indeed have a second theme: preserving the value of a troubled debtor's assets by discouraging a race to the courthouse."); CHARLES J. TABB, LAW OF BANKRUPTCY 483 (3d ed. 2013) ("The difficulty, then, that preference law addresses is making the *transition* from the state law regime of 'grab law' [, 'first in time is first in right'] to the bankruptcy norm of equality of distribution."); *see also* KENNETH N. KLEE & WHITMAN HOLT, BANKRUPTCY AND THE SUPREME COURT: 1801–2014 at 258 & n.1258 (citing cases); *cf.* CAL. CIV. CODE § 3432 (Deering 2005) ("A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another.") (first enacted 1872).

systematically disfavors equitable relief, from the balance drawn under otherwise applicable nonbankruptcy law. Bankruptcy policies favoring monetization of equitable remedies are typically and understandably ignored by most nonbankruptcy courts because those policies are not implicated in the great majority of their cases. Moreover, because nonbankruptcy courts have naturally focused on the equities of the plaintiff and defendant before them, debtor insolvency has been viewed as a factor, sometimes even a necessary or sufficient one, supporting equitable relief.

Bankruptcy courts often come to a different conclusion when bankruptcy policies and third-party equities (those of the other creditors of the insolvent debtor) are presented squarely before them. The debtor's insolvency, far from being a factor supporting equitable relief, becomes a powerful reason to deny it since awarding equitable relief in favor of one injured party against an insolvent debtor will obstruct achievement of the goals of aggregate wealth maximization, equitable loss-sharing[98] and debtor rehabilitation.

Although the rebalancing in regard to the equities relating to equitable relief that is done in bankruptcy will therefore create discontinuities between the non-debtor's rights to such relief outside of bankruptcy and those inside bankruptcy, that discontinuity is fully justified by the new equities that arise by virtue of the bankruptcy itself. Were there a unitary system such that courts customarily dispensing equitable relief outside of bankruptcy dealt with debtors whose assets were being administered in insolvency proceedings, the law likely would have evolved generally in those courts that bankruptcy policies (when implicated by debtor insolvency) must be taken into account in the general weighing of equities as a matter of course.

But we have specialized bankruptcy courts, not a unitary system. So a full weighing of bankruptcy and nonbankruptcy equities in those specialized courts appears to create a discontinuity between bankruptcy and nonbankruptcy rights. A broader view of the matter would see the constricted availability of equitable relief in bankruptcy as an application of a more general rule taking all equities into account when exercising discretion to afford equitable relief in a particular context (e.g., debtor insolvency) that implicated those interests. The observed discontinuity disfavoring specific relief in bankruptcy represents only a special case of the general principle that all third party and public policy interests must

98 *But see* Skeel, *supra* note 97.

be taken into account in exercising the court's discretion to afford a party specific relief. The observed discontinuity is therefore illusory.[99]

In any event, as set forth below, whether illusory or real, the discontinuity requiring a reweighing of equities to determine discretionary availability of specific relief in bankruptcy is required by the plain meaning of the text of the Code, is supported by one strand of the caselaw developed under the Code, and is necessary to achieve the policy objectives of the Code.[100]

1. *Statutory Analysis*

The Code's text suggests that those with access to equitable relief under nonbankruptcy law should participate in and be subject to the same collective loss-sharing as everyone else.

The statutory definition of "claim" includes the "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured"[101]

The Code's claim allowance procedures then contemplate that to the extent that any such claim is contingent, unmatured, or disputed the bankruptcy judge "shall determine the amount of such claim in lawful currency of the United States."[102] "Claims" are reduced to a specific money amount through the claims allowance or estimation[103] processes. They then receive pro rata distributions out of the bankruptcy estate in accordance with the statutory priority scheme or the terms of a confirmed plan of reorganization, and are (usually) discharged. The mandatory nature of the claims allowance and estimation procedures makes clear that an amount is to be determined or estimated for all claims, and the statute makes express provision for estimation of equitable remedies.[104]

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[99] Indeed, wholly apart from insolvency considerations, in enforcing their own injunctions, nonbankruptcy courts themselves will sometimes reweigh equities at the contempt stage and effectively modify, release or monetize previously ordered injunctive relief in exercising discretion to grant or withhold contempt sanctions.

[100] Of course, if the non-debtor party has obtained a final court order specifically enforcing its rights prior to the commencement of the bankruptcy case, the rebalancing that occurs in bankruptcy may be subject to general principles of issue preclusion. But to the extent that the nonbankruptcy court failed to consider the bankruptcy equities, the bankruptcy court should not be bound to treat the prior court order of specific performance as precluding its independent assessment of whether the non-debtor party's rights against the debtor fall within the statutory definition of "claim" under § 101(5).

[101] 11 U.S.C. § 101(5)(B) (2012).

[102] *Id.* § 502(b).

[103] *Id.* § 502(c).

[104] *Id.* § 502(c)(2).

How can a court determine, in the language of the statute "if such breach gives rise to a right to payment"?[105] In a world where nonmonetary relief is inherently discretionary in nature, only by doing what courts of equity have always done, that is by weighing all the relevant equities to determine whether under the circumstances it is appropriate to substitute monetary relief for an equitable remedy that would otherwise be available. And surely since the debtor is in bankruptcy and it is a bankruptcy court charged with doing that weighing, the relevant equities include the interests of other creditors and public policies supporting aggregate wealth maximization, pro rata loss-sharing and debtor rehabilitation embodied in the Code. Consistent with the basic approach suggested by the history of equitable jurisdiction and the text of the Code itself, the legislative history of these sections emphasizes not only the all-encompassing breadth of the definition of "claim"[106] but that the claim allowance and estimation process contemplates that "all claims against the debtor be converted into dollar amounts."[107]

Thus, whenever it is possible to frame a monetary alternative to remedy a breach of a legal right also subject to nonmonetary remedies, bankruptcy law limits the non-debtor party to a "claim" denominated in monetary terms as best the bankruptcy judge can determine or estimate that claim, at least to the extent that bankruptcy policies of aggregate wealth maximization, creditor equality and rehabilitation are reasonably implicated.

2. *Policy Basis*

As noted above, bankruptcy is a regime for collectively minimizing and distributing losses arising from a common debtor's insolvency and rehabilitating financially distressed debtors. Equitable relief necessarily creates significant externalities within such a regime. By awarding specific relief, the court removes an asset from the common pool available to satisfy creditor claims and awards it to the party entitled to specific relief, thus favoring it over others similarly situated. Equitable relief effectively exempts the beneficiary from the

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105 *Id.* § 101(5)(B).

106 S. REP. NO. 95-989, at 22 (1978) ("all legal obligations of the debtor, no matter however remote or contingent, will be able to be dealt with in the bankruptcy case"); *see* Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1408, 1412 (2017) (Congress intended to adopt the broadest available definition of "claim."). *E.g.,* Pa. Dept. of Pub. Welfare v. Davenport, 495 U.S. 552, 558 (1990) ("to the extent the phrase 'right to payment' is modified in the statute, the modifying language ('whether or not such right is . . .') reflects Congress's broad rather than restrictive view of the class of obligations that qualify as a 'claim'").

107 S. REP. NO. 95-989, at 65 (1978); H.R. REP. NO. 95-595 (1977).

loss-sharing imposed on the rest, further increases the losses those others must bear, and hampers rehabilitation efforts.

Therefore, from the perspective of bankruptcy policy monetization makes perfect sense: monetary claims can be easily fitted into the bankruptcy priority scheme, paid an appropriate pro rata amount, and then discharged. Bankruptcy's goals of equality of distribution, collective value maximization, rehabilitation and fresh start are all advanced by so limiting the rights of the non-debtor party.

These policies collectively suggest that powerful third party interests (those of other creditors in maximizing the value of the debtor's estate and in distributing equitably to all claimants) and the public (in wealth maximization and fair loss-sharing rules, but also in debtor rehabilitation and fresh start) are present in the bankruptcy context that are absent or invisible when a nonbankruptcy court weighs equities to determine whether it should exercise discretion to afford an injured party nonmonetary relief under nonbankruptcy law. Because the equities are different in bankruptcy, the balance drawn will generally and properly differ from the nonbankruptcy balance, systematically disfavoring specific relief.[108]

3. *Supporting Caselaw*

Some courts are already groping toward the balancing of bankruptcy and nonbankruptcy equities that I advocate in this Article. Several cases take a free-form balancing approach in determining the scope of the Code's definition of claim based on the facts and circumstances of the case.

Thus, in *TransAmerican Natural Gas*,[109] the court balanced bankruptcy and nonbankruptcy policies to reason that allowing specific performance to one creditor would result in inequity for all other general unsecured creditors, noting that this should be the common or usual result in bankruptcy. In another, the Ninth Circuit Bankruptcy Appellate Panel held that even if the purchasers had a

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108 *See* XL/Datacomp, Inc. v. Wilson (*In re* Omegas Grp., Inc.), 16 F.3d 1443, 1452 (6th Cir. 1994) ("The equities of bankruptcy are not the equities of the common law. Constructive trusts are anathema to the equities of bankruptcy since they take from the estate, and thus directly from competing creditors . . . ."). *See also* Superintendent of Ins. v. Ochs (*In re* First Cent. Fin. Corp.), 377 F.3d 209, 218 (2d Cir. 2004) ("In [a] . . . non-bankruptcy case, a constructive trust claim is intended to prevent one who failed to meet an obligation or committed fraud or other misconduct from becoming unjustly enriched. [In bankruptcy, it] . . . is fundamentally different. The trustee marshals the assets of the estate under judicial supervision, for distribution according to federal law, under circumstances in which unsecured creditors receive fair but not full returns.").

109 *See In re* TransAmerican Nat. Gas Corp., 79 B.R. 663, 667–68 (Bankr. S.D. Tex. 1987); *see also* Bride v. Wicklund (*In re* Wicklund), Nos. WW-07-1209-JuKMo, WW-07-1231-JuKMo, 2008 Bankr. LEXIS 4744, at *6 (B.A.P. 9th Cir. Jan. 17, 2008) (optionee of realty had a prepetition claim subject to discharge).

right to specific performance under Washington law, money damages would be an alternative right that would adequately satisfy their claim.[110]

In *Venoco*, a recent bankruptcy case involving a local environmental clean-up order, the Delaware Bankruptcy Court[111] ruled that pure economic injury compensable in money damages is not irreparable harm supporting specific performance in the balancing of the equities. Venoco, the operator of an oil and gas-producing well site, had not discharged toxins on the site. Moreover, no continuing discharge was occurring.[112] Venoco was liquidating and lacked the capacity to monitor the site much longer.[113] Thus, the court held that plaintiffs' request for specific performance requiring Venoco to remain on the site is not feasible.[114] The court further held the plaintiffs must hire replacement firm to monitor and decommission the site, and the plaintiffs can bring claims against the estate for such funds. The court correctly applied a balancing approach in holding that monetization is the correct result.[115]

In *Route 21*,[116] the court refused to order specific performance compelling the debtor to clean up a contaminated site emphasizing that the source of the claimant's equitable right was contractual rather than statutory. Weighing the bankruptcy equities, the court said, "the remedy of specific performance is typically converted into a damages claim, to be considered alongside the monetary claims of other creditors as against the bankruptcy estate."[117]

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[110] *See* Bride, 2008 Bankr. LEXIS 4744, at *14–18 (optionee of realty had a prepetition claim subject to discharge).

[111] City of Beverly Hills v. Veneco, LLC (*In re* Venoco, LLC), No. 17-10828 (KG), Adv. Pro. No. 17-50483 (KG), 2017 Bankr. LEXIS 1457, at *30 (Bankr. D. Del. May 31, 2017).

[112] *Id.* at *8–15.

[113] *Id.* at *16–17.

[114] *Id.* at *30.

[115] At least one North Carolina bankruptcy court has adopted a balancing approach that considers bankruptcy and nonbankruptcy equities when considering whether to enforce a specific relief or monetize it into a dischargeable claim. *Cf.* Sound Rivers, Inc. v. Taylor (*In re* Taylor), No. 15-02730-5-SWH, Adv. Pro. No. 15-00099-5-SWH, 2017 Bankr. LEXIS 1461, at *17–18 (Bankr. E.D.N.C. May 31, 2017) (citing Ohio v. Kovacs, 469 U.S. 274 (1985)). *Chateaugay I* and *Chateaugay III* also identified three factors relevant to whether an environmental injunction was properly deemed a "claim." *See generally In re* Chateaugay Corp., 112 B.R. 513 (S.D.N.Y. 1990) ("*Chateaugay I*"); *In re* Chateaugay Corp., 944 F.2d 997, 1010 (2d Cir. 1991) ("*Chateaugay III*"). These factors are: (1) whether the debtor capable of executing a decree or can he only comply by paying money to someone; (2) whether continuing environmental discharge poses an ongoing threat to public safety; and (3) whether the relevant regulatory authority may itself remove the hazard and seek reimbursement. *See generally* Mark IV Indus. v. N.M. Env't Dep't (*In re* Mark IV Indus..), 438 B.R. 460 (Bankr. S.D.N.Y. 2010).

[116] Route 21 Assoc. of Belleville v. MHC, Inc., 486 B.R. 75 (S.D.N.Y. 2012).

[117] *Id.* at 89.

In *In re Sabine Oil & Gas Corp.*,[118] the court dealt with the important and vexing issue of the boundary between a long-term commercial services agreements and conveyances of interests in real estate in the context of severed minerals.[119]

Sabine, the owner of natural gas producing lands, and Nordheim Eagle Ford Gathering, LLC ("Nordheim") which operated pipelines and treatment facilities for natural gas and liquid hydrocarbons, entered into a long term agreement that contemplated that Sabine would convey pipeline and electrical easements to Nordheim upon which Nordheim would construct a gas gathering system to treat and transport Sabine's gas for a fixed fee.[120] Sabine obligated itself to deliver a minimum quantity of gas each year or make a deficiency payment. Texas law governed the contract.

Sabine also entered into a similar gathering agreement with HPIP Gonzalez Holdings, LLC ("HPIP") also governed by Texas law. HPIP was to construct gathering facilities for the products Sabine "dedicated" to HPIP that were extracted from the land.[121]

Both sets of agreements proved burdensome for Sabine as oil and gas prices fell.[122] It became uneconomic for Sabine to deliver the minimum quantities promised to Nordheim and HPIP, and similar gathering and treatment services could be negotiated at lower market rates with third parties.[123] Accordingly, Sabine sought to reject the contracts with Nordheim and HPIP in bankruptcy and leave Nordheim and HPIP with an unsecured money damages claim.[124]

Nordheim and HPIP claimed that their rights remained specifically enforceable in bankruptcy as equitable servitudes or real covenants running with the land in accordance with Texas law.[125] The bankruptcy court, however, disagreed, finding that as a matter of Texas law the covenants relating to the transportation and treatment of severed minerals for a fee were not interests in real property under Texas law because they did not "touch and concern"

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118 *In re* Sabine Oil & Gas Corp., 547 B.R. 66 (Bankr. S.D.N.Y. 2016) ("*Sabine I*") and 550 B.R. 59 (Bankr. S.D.N.Y. 2016) ("*Sabine II*").

119 For more detail regarding oil and gas real covenants, *see generally* Michael P. Pearson, *Covenants Running with the Land*, 34 STATE BAR OF TEX. Oil, GAS & ENERGY RES. L. (Sept. 29, 2016), https://www.jw.com/wp-content/up-loads/2016/03/Pearson_CRWTL-Paper.pdf.

120 *In re* Sabine Oil & Gas Corp., 547 B.R. at 69 (*Sabine I*).

121 *Id.* at 70–71.

122 *Id.* at 72.

123 *Id.*

124 *Id*.

125 *Id*.

Sabine's real property, and were not related to a conveyance of an interest in real property creating "horizontal privity" between Sabine on the one hand, and Nordheim and HPIP, on the other.[126]

Sabine's close examination of the history and traditional requirements for determining whether a particular contractual obligation constitutes a "real covenant" or an "equitable servitude" or is otherwise an "estate in land," makes clear that the question has always been subject to an equitable balancing that ties specific enforcement against subsequent owners of the property to a balancing test. This test implicitly struggles to classify a particular contractual obligation as an integral part of a conveyance of property, that operates as a limitation on an estate in land conveyed or retained, or a "mere" personal promise.[127] If the latter, then only ordinary remedies against the promisor are available. If the former, then the burden of the covenant "runs with the land."[128] As a general matter, the law has not favored burdens running with the land and affirmative obligations are particularly disfavored in the balancing process.[129] Perhaps to the extent that third party interest of adjoining landowners and other upstream and downstream parties are implicated, the balance might come out differently than it did in *Sabine* itself.

Harmonizing and making sense of the caselaw regarding the bankruptcy treatment of the multifarious types of covenants and restrictions that purport to benefit or burden land is probably impossible.[130] Balancing seems to be the order of the day under both state court cases and in bankruptcy courts. But the central issue seems to be whether the covenanting party has in some effective sense intended to permanently part with a right or interest in specific land by allowing its grantor to retain that interest or by conveying the interest itself to a third-party grantee. Thus, a developer who records CC&Rs and then conveys lots burdened

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126 *Id.* at 74–79.

127 *Id.*

128 *Id.* at 75.

129 *See In re* Midsouth Golf, LLC, 549 B.R. 156, 164–65 (Bankr. E.D.N.C. 2016) ("[T]he requirements for a covenant to run are more strictly applied to affirmative covenants than negative covenants.") (quoting Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n, Inc., 652 S.E.2d 378, 385 (N.C. Ct. App. 2007) (quoting Raintree Corp. v. Rowe, 248 S.E.2d 904, 908 (N.C. Ct. App. 1978))). *Cf. Sabine I*, 547 B.R. at 75 (noting that English courts do not allow affirmative covenants to run with the land and that American courts apply the requirements more strictly for affirmative than negative covenants).

130 *See, e.g.*, Hannaford Bros., Co. v. Ames Dep't Stores (*In re* Ames Dep't Stores), 316 B.R. 772 (Bankr. S.D.N.Y 2004) (use covenant runs with the land); *In re* 523 E. Fifth St. Hous. Pres. Dev. Fund Corp., 79 B.R. 568, 575 (Bankr. S.D.N.Y. 1987) ("Since the Debtor's legal rights flowing from the ownership of the property are substantially curtailed as a result of the covenant, and equitable considerations weigh in favor of the City, the covenant touches and concerns the land."); *In re* Midsouth Golf, LLC, 549 B.R. 156 (obligation to furnish recreational amenities does not run with land).

by restrictions to third party purchasers, so long as the value of parcels conveyed to different third parties remains interdependent in a practical sense, has probably succeeded in creating covenants that run with the land. Homeowner's associations whose restrictions and dues purport to burden individual unit owners in condominium buildings or similar developments are probably similarly situated. When one buys a condominium unit the ownership interest of the unit holder (and that of his successors) is necessarily limited by and burdened with the financial and other duties necessary to the maintenance and operation of the building by the collective as well as the agreed-upon restrictions of record in the use of the tenancy of the unitholder.[131] The gathering agreements at issue in *Sabine* lack this tie to the conveyancing of interests in land, making the non-debtor parties' rights there seem more like an ordinary commercial contract than a final conveyance of an interest in property, and therefore more readily susceptible to being monetized.

B. Role of Debtor Insolvency in Bankruptcy

Even though a debtor's insolvency may support a finding of inadequacy of the remedy at law leading to equitable relief under nonbankruptcy law,[132] in bankruptcy the mere fact of insolvency cannot provide a basis for converting a money damage remedy into equitable relief. Otherwise, except in the rare solvent debtor case, all creditors would be entitled to equitable relief, a race to obtain that relief would ensue, and a collective bankruptcy proceeding becomes an impossibility. The same bankruptcy policy that voids ipso facto and financial condition clauses should prevent substitution of equitable relief for money damages solely on the basis of insolvency.[133]

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[131] *See e.g.*, River Place E. Hous. Corp. v. Rosenfeld (*In re* Rosenfeld), 23 F.3d 833, 837 (4th Cir. 1994); Foster v. Double R Ranch Ass'n (*In re* Foster), 435 B.R. 650, 660–61 (B.A.P. 9th Cir. 2010); *In re* Montalvo, 546 B.R. 880, 886 (Bankr. M.D. Fla. 2016) (dues obligation not a claim and nondischargeable); Otter Creek Homeowners' Ass'n v. Davenport (*In re* Davenport), 534 B.R. 1, 5–6 (Bankr. E.D. Ark. 2015) (HOA fees nondischargeable because covenant ran with the land); Liberty Cmty. Mgmt. v. Hall (*In re* Hall), 454 B.R. 230, 241 (Bankr. N.D. Ga. 2011) (debtor's postpetition COA fees were not "claims" and so are not dischargeable); Beeter v. Tri-City Prop. Mgmt. Servs. (*In re* Beeter),173 B.R. 108, 114, 123–24 (Bankr. W.D. Tex. 1994) (condominium declaration not an executory contract that could be rejected but a covenant running with the land and so postpetition COA fees were not "claims" that could be discharged); *In re* Lopez, 512 B.R. 663, 671 (Bankr. D. Colo. 2014) (Covenants do "run with the land." Debtor's obligation to pay postpetition fees continues.). *But see, e.g.*, *In re* Rosteck, 899 F.2d 694 (7th Cir. 1990); *In re* Wasp, 137 B.R. 71 (Bankr. M.D. Fla. 1992).

[132] *See supra* notes 92–97 and accompanying text.

[133] *See, e.g.*, 11 U.S.C. §§ 365(e), 541(c)(1)(B), 1124(2)(A) (2012); 3 COLLIER *supra* note 1, at ¶ 365.08[1].

Indeed, as indicated above, the Code goes further than this. It provides that all equitable relief is a "claim" if it arises out of a breach of performance that also gives rise to a right to payment, not just equitable remedies that arise out of the debtor's insolvency.[134]

C. *Critique of Alternative Approaches*

As noted,[135] a handful of case authorities from the bankruptcy courts follow something like the approach I advocate here by incorporating bankruptcy policy into the general balancing of equities when asked to determine whether a specific equitable remedy in a specific case constitutes a "claim." Most courts, however, have sought to impose bright-line tests on the question of the availability of equitable relief in bankruptcy. These bright-line tests lead to either too much or too little deference to the balance drawn under nonbankruptcy law in exercising the court's equitable discretion to issue equitable relief. These competing bright-line tests are discussed and critiqued below.

1. Udell

Under one current view, a non-debtor party's right to an equitable remedy that is not itself a right to payment cannot be monetized in bankruptcy without the non-debtor party's consent. The leading case associated with this view is the Seventh Circuit's *In re Udell*.[136]

In *Udell*, the court held that an otherwise enforceable covenant not to compete in a rejected franchise agreement effectively precluded the chapter 11 debtor from continuing its business in derogation of the terms of the non-compete.[137] The franchise agreement contemplated that both monetary and equitable remedies would be available to enforce the covenant not to compete on a cumulative basis.[138] *Udell* nevertheless found the franchisor's right to an injunction under the agreement and applicable state law was not a "claim," and therefore was not subject to discharge in chapter 11.[139]

Under this view, bankruptcy courts do not balance bankruptcy and nonbankruptcy policies in determining whether specific relief should be monetized based on the circumstances of the particular case. The existence of a

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134 *See* 11 U.S.C. § 101(5)(B) (2012).
135 *See supra* notes 109–117 and accompanying text.
136 *In re* Udell, 18 F.3d 403 (7th Cir. 1994).
137 *Id.* at 408–10.
138 *Id.* at 405.
139 *Id.* at 408–10.

nonbankruptcy right to specific relief is dispositive, regardless of bankruptcy policy. This lack of discretion sharply contrasts with traditional equitable principles pursuant to which courts balance all the equities of the case before granting or withholding specific relief. The *Udell* view assumes that bankruptcy courts should defer to the balance drawn by nonbankruptcy law between specific relief and substitutionary relief, even though nonbankruptcy law would not otherwise consider the policies and equities implicated by the debtor's bankruptcy.

Theoretical support for this view is grounded on the *Butner* principle,[140] which holds that in the absence of a specific statutory directive to the contrary, bankruptcy generally defers to a baseline of legal entitlements established by otherwise applicable nonbankruptcy law. But *Udell* goes even further than subordinating federal bankruptcy policy to state law remedial choices; it implicitly (and counterfactually) assumes that state law rigidly distinguishes between rights that are protected by "property" rules and those that are protected by "liability" rules, placing them in separate watertight compartments.

Udell has drawn significant criticism both as a matter of statutory construction and as a matter of policy. *Udell's* reading of § 101(5)(B) takes a clause, "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment," and reads it as if it were "right to an equitable remedy for breach of performance if such equitable remedy gives rise to a right to payment."[141] It is highly implausible that the drafters of the statute intended the statute to be read this way.[142] For one thing that is simply not what § 101(5)(B) says. For another thing, equitable remedies that directly are rights to payment are already defined to be "claims" in § 101(5)(A) of the statute.[143] Section 101(5)(B) is entirely superfluous on *Udell's* reading. Finally, more substantively, equitable remedies are generally non-monetary in nature. Constricting the definition of claim to the tiny class of equitable remedies that

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140 Butner v. United States, 440 U.S. 48 (1979); Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 444 & 450–51 (2007).

141 *In re* Udell, 18 F.3d, 408.

142 Judge Flaum acknowledged the self-evident forced nature of *Udell*'s construction of 101(5)(B) in concurrence. *Udell*, 18 F.3d at 411 (Flaum, J., concurring) ("Rather than appearing not to do what we must, let us grant that this statute needs fixing, and that under some exceedingly limited circumstances, we are actually permitted, within the law, to do what is normally the exclusive domain of Congress, that is, mend an otherwise implausible statute. Despite the primacy of the plain language canon, there is a legitimate, albeit very narrow, exception to our duty to follow the unambiguous text of a statute—where the plain language of the statute would lead to 'patently absurd consequences,' then we need not so apply the language.").

143 Section 101(5)(A) defines claim to include all rights to payment "whether or not such right to payment is . . . legal [or] equitable . . . ." 11 U.S.C. § 101(5)(A) (2012). If the equitable remedy at issue is an equitable right to payment it clearly is a "claim" within the meaning of § 101(5)(A) without regard to § 101(5)(B).

are monetary in nature is inconsistent with the basic thrust of § 101(5) which is to draw into bankruptcy all manner of obligations owed to non-debtors and deal with them in the bankruptcy forum according to bankruptcy law. For the Code to achieve this objective it defines "claim" in the broadest possible way. *Udell's* reading of § 101(5)(B) effectively exempts all obligations that a state chooses to enforce through nonmonetary equitable remedies from restructuring or discharge in bankruptcy.[144]

Notwithstanding these telling criticisms of *Udell*, the *Udell* test has been adopted and followed by many courts within and outside the Seventh Circuit.[145] The view of these courts generally is that the availability of equitable relief in bankruptcy depends on applicable nonbankruptcy law.[146]

2. "Always Monetize"

Udell competes with, and, even within the Seventh Circuit, has not been successfully reconciled with, a second view of the proper scope of § 101(5)(B), that emphasizes the plain language of the statute. Under this view, the question of whether an equitable remedy will be monetized in bankruptcy is also answered by a bright-line test, albeit one that gives the casting vote to bankruptcy policy. Whenever an alternative right to payment might be available under nonbankruptcy law, equitable relief is not available in bankruptcy. Since equitable relief is almost always an alternative to money damages, equitable relief is almost never available in bankruptcy under this competing view.

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144 *In re* Ward, 194 B.R. 703, 714 (Bankr. D. Mass. 1996) ("[T]he [*Udell*] test makes no sense because equitable remedies are typically designed to provide nonmonetary relief. Having thus created a virtually unpassable test, the court ruled it was flunked by the facts before it because the right to obtain liquidated damages arose from the contract, not from an equitable remedy under it.").

145 *See, e.g.*, Kennedy v. Medicap Pharmacies, Inc., 267 F.3d 493 (6th Cir. 2001); *In re* Hurvitz, 554 B.R. 35 (Bankr. D. Mass. 2016); *In re* Ben Franklin Hotel Assocs., 186 F.3d 301, 305 (3d Cir. 1999); *In re* The Ground, Inc., 335 B.R. 253, 263 (B.A.P. 1st Cir. 2005); *In re* Printronics, Inc., 189 B.R. 995 (Bankr. N.D. Fla. 1995); United States. v. Apex Oil Co., Inc., 579 F.3d 734 (7th Cir. 2009) Gouveia v. Tazbir, 37 F.3d 295 (7th Cir. 1994); U.S. Commodity Futures Trading Comm'n v. NRG Energy, Inc., 457 F.3d 776 (8th Cir. 2006); *In re* Kmart Corp., 297 B.R. 525 (N.D. Ill. 2003); *In re* Nyren, 187 B.R. 424 (Bankr. D. Conn. 1995); *In re* Altegrity, Inc., 562 BR. 253 (Bankr. D. Del. 2016); *In re* Gacharna, 480 B.R. 909 (Bankr. N.D. Ill. 2012); *In re* Mark IV Indus., Inc., 438 B.R. 460; Crafts v. Pitts, 162 P.3d 382 (Wash. 2007); *In re* Reppond, 238 B.R. 442, (Bankr. E.D. Ark. 1999); *In re* Overview Equities, Inc., 240 B.R. 683 (Bankr. E.D.N.Y. 1999); *In re* Privett 557 B.R. 580 (2016); *In re* Hruby, 512 B.R. 262 (Bankr. D. Colo. 2014); *In re* Little, 335 B.R. 376 (Bankr. N.D. Ohio 2005).

146 *In re* Solokoff, 200 B.R. 300, 301 (Bankr. E.D. Pa. 1996) (finding that the possibility of specific performance from rejection is determined by state law rights); *see also In re* West Chestnut Realty of Haverford Inc., 177 B.R. 501 (Bankr. E.D. Pa. 1995) (finding that if applicable nonbankruptcy law permits, a non-debtor party to a rejected executory contract may be able to obtain specific performance).

For example, in *Continental Airlines*,[147] the Third Circuit held that employees seniority integration rights laid out in a collective bargaining agreement could be satisfied by a monetary award, notwithstanding the fact that equitable relief would ordinarily be available (and sufficient) as well.[148] In another case, *Midway Motor Lodge*, the Seventh Circuit stated that a debtor's rejection "avoids specific performance but that the debtor assumes a financial obligation equivalent of the breach."[149] Similarly, the First Circuit has ruled that an employee's ADA suit against U.S. Airways seeking the equitable relief of reinstatement was a dischargeable claim because the employee could have chosen an alternative remedy of money damages.[150]

Similarly, in a purely contractual setting, in *In re Aslan*,[151] rejection of an executory land sale contract did not entitle the non-debtor buyer to specific performance in bankruptcy, even though specific performance would be the usual remedy outside of bankruptcy because a damages alternative existed. Under these cases, in distinction to *Udell* and its progeny, the existence of cumulative monetary and nonmonetary remedies will preclude enforcement of equitable remedies in bankruptcy.

The literal view of § 101(5)(B) leading to liberal monetization is clearly closer to the mark than the *Udell* approach which implicitly consigns the statute to irrelevance. Nevertheless, it is apparent that in some circumstances this approach gives too little weight to nonbankruptcy policies supporting equitable relief that may outweigh competing bankruptcy policies.

In particular, rigorously following the logic of this literal reading of § 101(5)(B) led to the heavily criticized[152] and (largely) legislatively

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147 *In re* Cont'l Airlines, 125 F.3d 120 (3d Cir. 1997).

148 *Id.* at 135–36.

149 Midway Motor Lodge of Elk Grove v. Innkeeper's Telemanagement & Equip. Corp., 54 F.3d 406, 407 (7th Cir. 1995).

150 Rederford v. U.S. Airways, Inc., 589 F.3d 30 (1st Cir. 2009).

151 *In re* Aslan, 65 B.R. 826 (Bankr. C.D. Cal. 1986).

152 The academic criticism began most forcefully with Jay Westbrook and Michael T. Andrew in a wonderful series of law review articles: Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding Rejection*, 59 COLO. L. REV. 845 (1988); Jay Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227 (1989); Michael Andrew, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 COLO. L. REV. 1 (1991). Nevertheless, *Lubrizol* continues to exert an influence on cases outside the scope of intellectual property licenses expressly protected by section 365(n). *See In re* Crumbs Bake Shop, Inc., 522 B.R. 766, 771 (Bankr. D.N.J. 2014) ("Some courts have reasoned by negative inference that the omission of trademarks from the definition of intellectual property [pursuant to 11 U.S.C. § 101(35A)] indicates that Congress intended for the decision in *Lubrizol* to control when a debtor-licensor rejects a trademark license."); Sunbeam Prods., Inc. v. Chicago Am. Mfg., 686 F.3d 372, 375 (7th Cir.), *cert. denied*, 568 U.S. 1076 (2012) ("11 U.S.C. § 101(35A) provides that 'intellectual property' includes patents, copyrights, and trade secrets. It

overruled[153] results in such cases as *Lubrizol*.[154] Even settled and otherwise final transfer of possessory property rights in real estate, personalty, and intellectual property can be avoided if the transferor's rejection of the underlying agreement pursuant to which the completed transfer occurred can allow the transferor to divest the transferee of its property subject only to the creation of a "claim" in bankruptcy. Each time courts followed this logic to that place, however, Congress has intervened to protect the present possessory right of the good faith buyer. The interest of finality in conveyancing, and the equities of a good faith purchaser of an interest in property that would not otherwise be avoidable under the bankruptcy avoiding powers generally outweigh countervailing policies favoring equal treatment, value maximization, and reorganization.[155] While it would perhaps advance some of these bankruptcy policies to do so in particular circumstances, as an overall matter of policy, good faith purchasers' non-avoidable interests in their property takes priority.

Similarly, public health and safety may be threatened in some instances by an inability to order specific enforcement of injunctions prohibiting environmental discharges or other public hazards.[156] Such threats may outweigh

does not mention trademarks. Some bankruptcy judges have inferred from the omission that Congress codified *Lubrizol* with respect to trademarks . . . ."); *In re* HQ Global Holdings, Inc., 290 B.R. 507, 513 (Bankr. D. Del. 2003) ("[S]ince the Bankruptcy Code does not include trademarks in its protected class of intellectual property, *Lubrizol* controls and the Franchisees' right to use the trademarks stops on rejection."); Raima UK Ltd. v. Centura Software Corp. (*In re* Centura Software Corp.), 281 B.R. 660 (Bankr. N.D. Cal. 2002) (finding that because the plain meaning of § 101(35A) does not explicitly reference trade names, trademarks and other proprietary marks, these are excluded from the meaning of "intellectual property" and do not get the § 365(n) protection). *But see In re* Exide Techs., 607 F.3d 957, 966–69 (3d Cir. 2010) (Ambro, J., concurring) (Reasoning by negative inference in the context of trademark licenses and § 365(n) is improper; "Courts may use § 365 to free a bankruptcy trademark licensor from burdensome duties that hindered its reorganization. They should not . . . use it to let a licensor take back trademark rights it bargained away. This makes bankruptcy more a sword than a shield, putting debtor-licensors in a catbird seat they often do not deserve.").

153 *See* 11 U.S.C. § 365(h)(1) (2012) (real property leaseholds); *id.* at § 365(h)(2), (i) (time-share interests in real property); *id.* at § 365(i) (contracts for deed); *id.* at § 365(n) (intellectual property licenses).

154 Lubrizol Enters. v. Richmond Metal Finishers, 756 F.2d 1043 (4th Cir. 1985); *See also In re* Select-A-Seat, 625 F.2d 290 (9th Cir. 1980); *see supra* note 152 (citing cases).

155 *See* BFP v. Resolution Trust Co., 511 U.S. 531 (1994).

156 Apex Oil Co., 579 F.3d at 735 (injunction enforceable and not monetized into a dischargeable claim as "millions of gallons of oil . . . are contaminating groundwater and emitting fumes that rise to the surface and enter houses in Hartford and . . . are creating hazards to health and the environment."); *In re* Torwico Elecs., Inc., 8 F.3d 146, 148 (3d Cir. 1993) (New Jersey Department of Environmental Protection and Energy's order to force debtor cleanup hazardous waste is an enforceable specific remedy because it was "imposed pursuant to the police powers of the State of New Jersey, intended to protect the public health, safety, welfare, and environment."); *In re* Mark IV Indus., Inc., 459 B.R. at 178 (New Mexico's Water Quality Act authorizes the New Mexico Environment Department to obtain injunctive relief against a responsible party to abate and prevent future water pollution); Pub. Int. Res. Grp. of New Jersey, Inc. v. Rice, 774 F. Supp. 317, 329 (D.N.J. 1991) (injunctive relief is necessary to prevent defendant from discharging toxic pollutants in an amount exceeding the allowed level specified in the permit to protect the public interest of ensuring a cleaner environment); Oregon

any bankruptcy policies at stake. Always monetizing such orders whenever monetary alternatives exist is not a sensible balancing of the interests implicated. On the other hand, monetary relief may be appropriate in bankruptcy even if it would not be available absent an assessment of bankruptcy policy.

For example, in *Apex Oil Co.*,[157] the Resource Conservation and Recovery Act (RCRA)[158] authorized the federal Environmental Protection Agency to compel the debtor, Apex Oil, to clean-up environmental hazards on its property. RCRA does not provide EPA an alternative right to monetary relief. EPA sought to exercise its RCRA authority by obtaining an injunction to compel Apex to clean-up the site. Apex argued that in order to comply with the EPA order it would have to hire a third-party clean-up firm at a cost of $150 million and EPA therefore should be limited to asserting a dischargeable claim in like amount in the bankruptcy case. The Seventh Circuit found that since RCRA afforded EPA no right to money damages, the equitable remedy could not be monetized and treated as a claim in bankruptcy.

In contrast, in *Ohio v. Kovacs*,[159] an Ohio state agency obtained an injunction prior to the debtor's bankruptcy compelling him to clean up environmental pollution on a site for which he was responsible. The debtor failed to comply. Ohio sought and obtained a receiver to take possession of the debtor's assets and then sought to have those assets liquidated and applied to the clean-up costs. The Supreme Court held that Ohio held a "claim" for bankruptcy purposes.[160]

In truth, monetary relief was equally an alternative (or not) in *Apex* and in *Kovacs*. Had Apex failed to do the clean-up, monetary sanctions for failure to comply with the clean-up order could have been levied under the contempt power. Apex, no more or less than Kovacs, had no independent ability to clean up the mess itself. Both cases were about who was going to pay for the clean-up, and, if it was going to be the bankruptcy estate, the priority and treatment of that monetary obligation under bankruptcy law. The correct resolution in

State Pub. Int. Res. Grp. v. Pac. Coast Seafoods Co., 374 F. Supp. 2d 902 (D. Or. 2005) (injunction granted to prevent defendant from further discharging toxic organic and chemical pollutants in violation of the Clean Water Act causing harm to aquatic life and humans); Penn Terra Ltd. v. Dep't of Envtl. Res., 733 F.2d 267, 269 (3d Cir. 1984) (injunction congruent with environmental policies of state to "preserve and protect natural resources and to rectify damage to the environment."). Note that during the course of the proceeding itself, the bankruptcy code provides government agencies explicit public safety and regulatory exceptions to the bankruptcy stay. 11 U.S.C. § 363(b)(4) (2012); 28 U.S.C. § 959(b) (2012).

157 Apex Oil Co., 579 F.3d at 734.

158 42 U.S.C. § 6973 (2012).

159 Ohio v. Kovacs, 469 U.S. 274 (1985).

160 *See* Douglas Baird, *A World Without Bankruptcy*, 50 L. & CONTEMP. PROBS. 173 (1987) (analyzing *Kovacs* from the perspective of the dischargeability of the monetary claim at issue).

environmental clean-up cases requires a balancing of bankruptcy and nonbankruptcy policies in light of the specific circumstances of the case, understanding that in cases where public health and safety is directly threatened by continuing noncompliance, nonbankruptcy environmental policy may have the casting vote.[161]

On the other hand, to achieve bankruptcy policy goals, it may be proper to afford monetary relief in the form of a claim even if no monetary alternative is available under nonbankruptcy law. *TOUSA*[162] is a case in point. The debtor, TOUSA, was a home builder. It entered into a contract with Superior, to construct and sell homes to Superior. Both TOUSA and Superior filed petitions in bankruptcy. In its contract with TOUSA, Superior as buyer expressly waived buyer's right to monetary remedies, and only retained any right it might have to specific performance. TOUSA resold the properties to a third-party in a bankruptcy sale. Superior received notice of the sale but did not object.[163] The court found that Superior was not entitled to a claim in TOUSA's bankruptcy based on its failure to deliver the homes promised to Superior because of its waiver of monetary relief in the underlying contract. One is left to wonder what would have happened had Superior tried to block the sale by claiming an interest in the property on account of its nonbankruptcy equitable remedy of specific performance[164] or demanded adequate protection of that interest.[165] From a bankruptcy perspective, it makes little sense to give these rights to a buyer under an executory land-sale contract.[166] The proper response is to treat the equitable remedy as a claim regardless of the waiver, and allow Superior to share pro rata in the estate to the extent of its damages, but not to block the sale or to promote Superior to the rank of a secured creditor.

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161 Karen Gross & Matthew S. Barr, *Bankruptcy Solutions in the United States: An Overview,* 17 N.Y.L. SCH. J. INT'L. & COMP. L. 215 (1997) (recognizing that conflicts between environmental policy and bankruptcy policy must be resolved by balancing interests); *see also* RONALD MANN, BANKRUPTCY AND THE SUPREME COURT 125–45 (2017) (discussing the Court's decision in Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection which balanced the interests implicated by the trustee's abandonment power and the public interest in health and safety implicated by environmental hazards).

162 *In re* TOUSA, Inc., 503 B.R. 499 (Bankr. S.D. Fla. 2014).

163 *See* Precision Indus., LLC v. Qualitech Steel SBQ, LLC, 327 F.3d 537 (7th Cir. 2003); *In re* Spanish Peaks Holdings II LLC, No. 15-35572, 2017 WL 2979660 (9th Cir. Jul. 13, 2017).

164 11 U.S.C. § 363(f) (2012).

165 *Id.* §§ 361, 363(e); *In re* Spanish Peaks Holdings II LLC, 2017 WL 2979660.

166 *See supra* text accompanying note 151 (discussing *In re* Aslan, 65 B.R. 826); *In re* Wicklund, 2008 WL 8462959, at *6 (land purchasers who were given option to purchase Lot A could not enforce that option because they merely had a prepetition claim that was discharged).

III. FACTORS INFORMING BANKRUPTCY COURT DISCRETION

Since a debtor in bankruptcy may treat specific performance rights as bankruptcy "claims" when the facts and circumstances of the case make it appropriate to substitute a monetary right to payment for specific relief, it is important to identify the considerations factoring into that exercise of discretion likely to arise in the bankruptcy context. One side of the balance clearly must take into account the nonbankruptcy policies supporting specific over substitutionary relief. The bankruptcy court must take into account the strength of those policies and the extent to which monetization undercuts them in the particular circumstances of the case. At the extreme, if dishonoring an entitlement to equitable, as opposed to monetary, relief poses an imminent risk to life, limb, or public safety, rather than merely economic harm, the balance is likely to tilt decisively against monetization.

But most equitable relief is directed in large measure, or wholly, at protecting economic interests and expectancies rather than public safety. In those cases, the bankruptcy court may give decisive weight to other factors favoring monetization. No list of factors can anticipate all possibly relevant factors in all types of future cases. So the following considerations are illustrative and non-exclusive. Nevertheless, it is helpful at this point to identify factors likely to support a determination that a particular nonbankruptcy entitlement to equitable relief is nevertheless properly treated as a claim in bankruptcy.

A. *The Bankruptcy Policies*

I noted at the outset of this Article that at least in the abstract, equitable relief may impair the bankruptcy policies that seek to preserve and maximize the value of the bankruptcy estate for the collective good (value-maximizing), treat similarly situated parties similarly (pro rata loss-sharing), and rehabilitate debtors (fresh start). Equitable relief has the effect of removing assets from the bankruptcy estate to honor in full the nonbankruptcy entitlement of a particular creditor. In doing so, the value of the estate is diminished not only by the value of the specific asset removed from the common pool, but also, to the extent successful reorganization or rehabilitation is impaired, by the amount of going concern surplus that is tied to the debtor's access to that asset.

At the simplest level, if an insolvent wage-earner needs his car to get to work, a creditor's nonbankruptcy right to repossess that car not only removes the value of the car itself from debtor's estate, but also impairs the debtor's future earning power. Upon repossession, the repossessor obtains its full nonbankruptcy entitlement, other creditors' losses are increased, and the debtor's prospects of successful rehabilitation and fresh start are diminished.

In a commercial context, injunctions and other equitable relief may similarly impair the debtor firm's ability to operate and therefore the going concern value of the firm while preferring the holder of the specific performance right to other creditors, running up those others' losses, and diminishing the likelihood of successful reorganization.

But these bankruptcy policies are not equally implicated in all cases. In some cases, no successful reorganization is in prospect no matter what happens to parties holding rights to equitable relief. Other creditors may be in a position in which they will be paid in full, or receive no distribution at all, regardless, or there may be no other creditors of otherwise similar rank who will be adversely affected by the specific enforcement sought. Perhaps the debtor is solvent and in a position to honor in full all nonbankruptcy rights to all constituents.

A bankruptcy court may permissibly evaluate and weigh the extent to which specific enforcement implicates these bankruptcy policies of value-maximization, loss-sharing, and fresh start on the facts of the specific case it is administering. If viewed pragmatically, those policies are not materially advanced by monetization, then perhaps equitable relief remains appropriate.

B. Contractual Rights

Claims typically arise out of a debtor's failure to perform duties imposed by tort law, contracts, or statutes.[167] As a general proposition, duties imposed by tort law and statutory law are more likely than contract claims to implicate broad public interests or involve personal injuries. Contract law is mostly about protecting the parties' economic expectancies in most cases. Consistent with the general preference in American contract law for substitutionary over specific relief in the protection of such interests, bankruptcy courts should be especially inclined to monetize equitable remedies arising out of contract breach.[168]

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[167] Less commonly, criminal law may also give rise to bankruptcy claims. Fines, penalties, and restitution orders are all examples. *See, e.g.*, Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990); Kelly v. Robinson, 479 U.S. 36 (1986).

[168] Route 21 Assoc. of Belleville, Inc., 486 B.R. 75 (distinguishing contractual and statutory environmental clean-up obligations); *In re* Spoverlook, LLC, 560 B.R. 358 (Bankr. D.N.M. 2016) (HOA could be forced to accept money damages claim when Debtor rejected settlement agreement); *In re* Young, 214 B.R. 905, 912 (Bankr. D. Idaho 1997) (executory land sale contract); *In re* A.J. Lane & Co., Inc., 115 B.R. 738 (Bankr. D. Mass. 1990) (denying specific relief requiring bankruptcy debtor to execute documents supporting draw upon letter of credit because creditor had an alternative right to payment); *In re* Nickels Midway Pier, LLC, 341 B.R. 486 (D.N.J. 2006) (oral sale contract); *In re* Aslan, 65 B.R. 826 (executory land sale contract); *In re* Cont'l

C. Coasean Bargaining

In some situations, nonbankruptcy courts and scholars rely on the "Coase Theorem" to justify the availability of specific relief.[169] These authorities suggest that the risk of economic waste or inefficient allocation of resources implicit in specific relief is less of a concern if the parties are positioned to easily monetize the specific performance right themselves by "bargaining around the decree." If specific performance is more costly to the defendant than it is of value to the plaintiff, the parties have a strong economic incentive to agree on a price at which the resource is reallocated to the higher-value party regardless of what the decree provides.[170] But a right to equitable relief supported by confidence that the right, if it leads to inefficiency, will be easily reallocated by the parties and should be monetized in the insolvency context, because the debtor's insolvency will preclude voluntary monetization by the parties notwithstanding resulting inefficiency. While the non-debtor plaintiff can bargain with a solvent debtor to release a specific performance right worth more to the debtor than to

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Airlines, 125 F.3d 120 (contractual seniority rights constitute a claim in bankruptcy); *In re* Worldcom Inc., No. 02-13533 (AJG), 2006 WL 898027, at *2 (Bankr. S.D.N.Y. Mar. 28, 2006) ("[T]he Brunsons have an available alternative payment right, and thus, the claim for injunctive relief is a 'claim' under the Bankruptcy Code.").

[169] *See, e.g.*, Walgreen Co. v. Sara Creek Prop. Co., 966 F.2d 273, 276 (7th Cir. 1992); John D. Saba, Jr., *Internet Property Rights: E-Trespass*, 33 ST. MARY'S L.J. 367, 396–97 (2002) ("After the court granted eBay an injunction against Bidder's Edge . . . the two disputing parties actually entered into an agreement for Bidder's Edge to continue to list eBay's auction products on its site, subject to eBay's terms . . . . The Coase Theorem predicts that even though the court gave eBay a property right, the companies still bargained to arrive at the most efficient solution."). *See* eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000)); Ward Famsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 377 (1999) ("Writers subsequent to Coase have followed suit in using nuisance cases as paradigmatic examples of the role that bargaining after judgment might play in the law."); United States v. One Rural Lot Identified as FINCA No. 5991 Located in Barrio Pueblo, Puerto Rico, 726 F. Supp. 2d 61, 74–76 (D. P.R. 2010) (Weighing the benefits and costs of ordering damages against those of imposing injunction by citing to *Walgreen*, which cited to the Coase Theorem: "[M]andating the United States' adoption and registration of Petitioner's lease is preferable to ordering restitution, which would require, at this late stage, recalculation of the amounts payable to the claimants in the civil case and the claimants' consent to a new settlement agreement."). *See* Boomer, 257 N.E.2d 870; *with* Michael Faure & Andri Wibisana, *Liability for Damage Caused by GMOS: An Economic Perspective*, 23 GEO. INT'L ENVT'L L. REV. 1, 57 (2010) ("If the value of GM crops exceeds the harms suffered by non-GM farmers, then permanent damages are a preferable remedy . . . . [E]fficiency means that the winner still gains after compensating the loser, and because GM crops, which are highly beneficial to society, are too important to be permanently stopped. An injunction to stop the use of GM crops may in that case be inefficient.").

[170] R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 2–6, 15–19 (1960); GEORGE STIGLER, THE THEORY OF PRICE (1966); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts*, 99 YALE L.J. 87, 87–91, 97–101 (1989). The Coase Theorem suggests that legal entitlements are irrelevant to efficient allocation of resources in a world of perfect information, zero transaction costs and perfectly competitive markets. If the entitlement is given to a lower valuing user theory predicts the parties will transact to reallocate this right to the higher valued user. Of course, all recognize that the assumptions stated rarely, if ever, hold outside the arcane world of economists' models. Nevertheless, Coasean bargaining can occur even if the assumptions do not hold if the gains from trade can overcome the transactions costs present in the particular circumstances.

itself in exchange for a payment from the debtor equal to the value of the right, it cannot be expected to transact in this way with a bankruptcy estate which can only offer cents on the dollar claim payable in accordance with bankruptcy distribution rules rather than present payment in full. Efficient Coasean bargaining that might otherwise occur in a nonbankruptcy context will not occur in bankruptcy, suggesting that involuntary substitution of a money claim is the proper treatment for a nonbankruptcy specific performance right that might otherwise have been monetized privately through Coasean bargaining.[171]

D. Private Interests Only

For centuries, chancellors have considered the extent to which third party and public interests may be positively, or adversely, affected by injunctive relief in determining whether to make such relief available. Typically, in an insolvency context, third parties are adversely affected by equitable relief. Removing value from the common pool impairs the pro rata recoveries of other creditors left behind, and the debtor's fresh start as well. If only the private economic interest of the non-debtor party is furthered by the grant of equitable relief, then these adverse third-party and public interest effects of specific enforcement suggest that monetization is the correct response. On the other hand, to the extent that a public or third-party interest is advanced by equitable relief, that fact too must be weighed in determining whether the non-debtor party should be required to accept an alternative right to payment.

E. Dischargeability

Although monetization of equitable relief generally advances the bankruptcy policy of fresh start, certain kinds of money claims[172] and certain kinds of debtors[173] do not benefit from the bankruptcy discharge. In general, in cases concerning individual debtors (i.e., natural persons), the question of discharge involves a moral and policy driven balancing of the bankruptcy fresh start against the nonbankruptcy equities of the non-debtor party holding the claim. When the Code draws that balance against discharge, there is less reason from a

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171 Jesse M. Fried, *Executory Contracts and Performance Decisions in Bankruptcy*, 46 DUKE L.J. 517 (1996).

172 11 U.S.C. §§ 523(a), 1141(d)(5)–(6), 1328 (2012).

173 Section 727 provides that debtors engaged in certain kinds of abuse of the bankruptcy process, 11 U.S.C. § 727(a)(2)–(12), and all debtors that are not natural persons in liquidation proceedings, *id.* at §§ 727(a)(1) & 1141(d)(3), may be denied access to the bankruptcy discharge. Note in contrast that in chapter 11 a *reorganizing* corporate debtor is entitled to an all-encompassing discharge without reference to the exceptions to discharge laid out in section 523. *See* 11 U.S.C. § 1141(a), (d)(2–3) (2012).

bankruptcy perspective to force monetization of rights to equitable relief. Substituting a nondischargeable money claim, rather than an ordinary dischargeable one, for a specific performance right is not as meaningful from a bankruptcy perspective, and, moreover, with respect to claims (or debtors) of that kind, the Code itself, by limiting the scope of the discharge, implicitly gives primacy to competing nonbankruptcy policies.

F. Equitable Relief Linked to Insolvency

Finally, to the extent that nonbankruptcy law grounds an entitlement to equitable relief on the debtor's financial inability to satisfy a money judgment, equitable relief is inappropriate in bankruptcy. Longstanding bankruptcy policy refuses to honor provisions in otherwise applicable nonbankruptcy law (or in contracts) that diminish or adversely modify the debtor's rights on account of its bankruptcy filing or financial condition.[174] Such provisions are direct attempts to alter or escape from the bankruptcy distribution scheme, directly undermine bankruptcy policy as well as access to bankruptcy relief, and are preempted by the Code. A nonbankruptcy court's decision to award equitable relief because of the debtor's insolvency and resulting inability to fully collect a money judgment runs afoul of this same policy. If the debtor's insolvency or bankruptcy filing is the reason that a right to a money judgment becomes a right to specific performance under non-bankruptcy law, then the non-debtor holds a "claim" that should be allowed or estimated in money terms under the Code.

G. Conveyancing

One persistent source of controversy, confusion, academic criticism, and legislative correction regarding specific performance in bankruptcy has been the use of equitable relief as a means of protecting a property owner's title to property.[175] Short of cases where non-bankruptcy law or the bankruptcy statute itself provides for avoidable title (such as unperfected transfers, preferences, and fraudulent transfers), a non-debtor should not be divested of title to property acquired from the debtor pre-bankruptcy as a means of mitigating the losses of creditors or promoting rehabilitation. Good faith purchasers who have taken possession of the property in question pursuant to a properly consummated and final transaction should be able to rely upon non-avoidable title to property so

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[174] *See, e.g.*, 11 U.S.C. §§ 365(e), 541(c)(1), 1124(2)(A) (2012). *See also* Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 AM. BANKR. L. J. 663, 702–05 (2009) (discussing judicial enforcement of policy against waiver of bankruptcy rights). *But see* 11 U.S.C. §§ 555, 556, 559, 560, 561, 362(o) (2012).

[175] *See supra* notes 152–55 and accompanying text.

acquired from a debtor, notwithstanding their transferor's subsequent bankruptcy.[176] With respect to outright transfers of full ownership of property, this principle has never seriously been in question. The problem arises, however, when the conveyance is of an interest in property less than full ownership, for example a tenancy for years under a real property lease, or a transfer of ownership subject to a disguised security interest in favor of the seller (as in a contract for deed transaction), or property interests in intellectual or real property typically conveyed by means of license rather than deed. Equitable remedies in this context are simply a means of quieting the title previously acquired by the non-debtor party pursuant to a non-avoidable transfer. Monetizing these equitable remedies makes no more sense in bankruptcy than out.

CONCLUSION

The central problem with equitable relief in bankruptcy has been the fruitless quest for a bright-line analytic test that resolves all cases (i.e., distinguishing "property" rights from "contract" rights), or in the absence of such a test deferring to state law that fails to take into account the bankruptcy equities. Even when state law does consider the effect of insolvency it manages somehow to conclude that insolvency is actually a factor favoring equitable relief rather than the other way around. The view taken here is that no bright-line test exists, that determining the treatment of non-bankruptcy rights to specific relief requires a consideration of all the equities, that all the equities includes the bankruptcy equities, and finally that experience has shown us that certain factors that I have identified (non-exclusive to be sure) are often particularly salient. I have been particularly hard on *Udell* and its progeny which mangle the applicable statutes to achieve a result that ignores all the bankruptcy equities.[177] The result in *Udell* is wrong and the sharp criticism from *Ward* and other bankruptcy courts and commentators fully justified.[178] Failing to monetize the covenant not to compete in that case led to an inequitable result and dishonored both the language of the statute and the equities of the debtor and the other creditors by precluding a value-maximizing reorganization to enforce an onerous covenant hindering an individual's freedom to make his living by continuing to ply his trade in his community.

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176 *See* BFP, 511 U.S. at 544 ("It is beyond question that an essential state interest is at issue here: We have said that 'the general welfare of society is involved in the security of titles to real estate' and the power to ensure that security 'inheres in the very nature of [state] government.'").

177 *See supra* text accompanying notes 143–144.

178 *See supra* text accompanying notes 141–142.

But it underscores the larger point of this Article to note that specific enforcement of ***all*** covenants not to compete is not wrong, even in bankruptcy. For many years Bill Warren, David Skeel, and I have asked our students to consider a different kind of covenant not to compete case, one that arises in the context of a sale of the goodwill of a business:[179]

> Likeable Phil, who had built his pricey fish market, "Phil's Phish," on his sparkling personality over the years, sold to Dull Don who was willing to pay three times the value of the tangible assets for the business if Phil would sign an ironclad ten-year, 25-mile non-compete covenant and go away. Phil took the money and ran. Within a year he had lost everything investing in subprime mortgage loans, filed in chapter 7, scheduled the non-compete covenant obligation as a debt owing to Don, received a discharge, obtained new financing and opened a fish store down the street from Don which he named "Phresh Phish." Assume that any claim for damages against Phil is valueless and that Don's business was sinking fast. Should Don be able to enjoin Phil from operating his new store?

Here the equities are quite different than in *Udell*. Phil has sold the goodwill associated with his fish market to Dull Don for a price, and the covenant not to compete in this context is simply the legal mechanism that makes the transfer of that goodwill final and complete, and indeed real. Even California law, notoriously averse to covenants not to compete,[180] would honor such a sale of goodwill by specifically enforcing the covenant.[181] Phil has disposed of an asset through an otherwise non-avoidable prepetition transfer to a good faith purchaser for value. Bankruptcy equities do not support upsetting that non-avoidable transfer. So a bankruptcy court should be able, like the California legislature has, to distinguish *Udell*-type covenants from Dull Don-type covenants so as to reach a just and socially desirable result—by appropriately balancing bankruptcy and non-bankruptcy equities bared on the facts of the case before it.

Balancing tests do confer discretion on judges, and judges will make mistakes in exercising that discretion. But bright-line rules that fail to capture all the relevant considerations also misclassify, operate arbitrarily, and work injustice in specific cases. Nevertheless, if we knew how to frame a reasonably sound bright-line rule, the values of simplicity, certainty, and ease of

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[179] DANIEL J. BUSSEL & DAVID A. SKEEL, JR., BANKRUPTCY 89 (10th ed. 2015).

[180] CAL. BUS. & PROF. CODE § 16600; Edwards v. Arthur Anderson LLP, 189 P.3d 285 (Cal. 2008).

[181] CAL. BUS. & PROF. CODE § 16601; Vacco Indus., Inc. v. Van Den Berg, 6 Cal. Rptr. 2d 602 (Cal. Ct. App. 1992).

administration would push us towards such a solution. But hundreds of years of experience in the exercise of equitable remedies shows us that we do not know how to craft such a rule even while it points us in the direction of how to exercise discretion in individual cases soundly.

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