The Interpretative Approach to Bankruptcy Law: Remedying the Theoretical Limitations in the Traditionalist and the Proceduralist Perspectives on Corporate Insolvency

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Abstract

The field of bankruptcy legal theory is mainly dominated by two theoretical schools. These are the Traditionalist and the Proceduralist theoretical schools. Extant insolvency theories and corporate insolvency laws, policies and processes of most jurisdictions are modelled on the jurisprudence of either of the two theoretical schools. The tension between employment protection policy objectives and corporate rescue objectives are to a large extent dictated by the theoretical perspectives of either of the theoretical schools. This article examines both theoretical schools' perspectives and limitations on the subject of corporate insolvency. The article proposes that both theoretical schools fail to provide a satisfactory approach to balancing the policy objectives of corporate rescue and employment protection. The article proposes that the best way of unlocking and remedying the limitations in these theoretical schools is through interpretation. That is, by adopting an interpretative approach as posited by Dworkin in his Interpretative Theory of Law.

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1. Introduction

The tension between corporate rescue policy objectives inherent in insolvency laws and employment protection policy objectives inherent in employment laws both in the US and the UK has existed for decades. This tension is to a large extent, influenced by the traditionalist and proceduralist perspectives on what the role or ultimate aim of insolvency is or ought to be in a legal system.[2]These theoretical perspectives influence the policies and practices underlying the passing of the laws that govern the debtor-creditor relationship during corporate insolvency. This tension further transcends into judicial interpretation and application of the laws (both insolvency laws and employment laws).

Professor Baird is of the view that engaging debates on insolvency law's legitimate goal are mainly contested between the traditionalists and the proceduralists.[3] These two theoretical schools offer differing conceptual perspectives on the role that insolvency law should, or ought to play in the reorganisation and rescue of insolvent but viable businesses, the substantive law that is or ought to be applied in a bankruptcy process, the role of judges in interpreting insolvency disputes and whether judges should be afforded a certain degree of judicial discretion during insolvency proceedings where the subject matter of adjudication is not covered by relevant judicial precedents.[4]

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[2]Hamiisi J. Nsubuga, 'Corporate Insolvency and Employment Protection: A Theoretical Perspective' (2016) 4(1) NIBLeJ 4; Elizabeth Warren, 'Bankruptcy Policy' (1987) 54 U. Chi. L. Rev. 775, 797; Douglas G. Baird, 'Bankruptcy's Uncontested Axioms' (1998) 108 Yale L. J. 573, 578.

[3] Douglas G. Baird, 'Bankruptcy's Uncontested Axioms' (1998) 108 YALE L. J. 573, 578.

[4] See for example, Thomas H. Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements and the Creditors' Bargain' (1982) 91 Yale L. J. 857; Elizabeth Warren, 'Bankruptcy Policy' (1987) 54 Uni. Chi. L. Rev. 775; D. R Korobkin, 'Contractarianism and the normative foundations of bankruptcy law' (1993) 71 Tex. L. Rev. 554; E Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92 Mich. L. Rev. 336, 387; Paul F. Kirgis, 'Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis' (2009) 17 Am. Bankr. Inst. L. Rev. 503, 544.

While traditionalists advocate for a more inclusive approach to stakeholder interest consideration during corporate insolvency, on the other hand, proceduralists look at insolvency law's main objective as a means of maximisation of value for creditors.[5] Traditionalists believe that all stakeholder interests should be given equal weight of consideration on corporate insolvency.[6] They are against the notion that insolvency law exists to only serve the interests of creditors.[7] However, proceduralists contend that insolvency law should focus on addressing issues that only arise within bankruptcy. They believe that non-insolvency creditor claims or entitlements should not be protected by insolvency law unless doing so maximises value for creditors.[8]

In light of these varying perspectives, it may be argued that there is a theoretical deadlock between the two theoretical schools on the proper approach to be adopted in addressing the debtor-creditor concerns during corporate insolvency in a balanced manner.

This article analyses corporate insolvency through a theoretical perspective. The article sets out the traditionalist and proceduralist perspectives and ideologies on the role of insolvency law in a legal system and how these perspectives affect insolvency proceedings in both the US and the UK. This chapter highlights the fact that the traditionalist perspectives on insolvency law identify factors that should be taken into account during corporate insolvency proceedings but do not say how these factors should be balanced.

The article argues that although the proceduralists provide clear answers as to the factors to be taken into account during corporate insolvency, they do so in an unsatisfactory way to the

[5] Alan Schwartz, 'A Contract Theory Approach to Business Bankruptcy' (1998) 107 Yale L. J. 1807, 1851.
[6] D. R Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1993) 71 Tex. L. Rev. 554.
[7] E Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92 Mich. L. Rev. 336, 387.
[8] Alan Schwartz, 'A Contract Theory Approach to Business Bankruptcy' (1998) 107 Yale L. J. 1807, 1851.

interests of overlapping stakeholders. Therefore, the article analyses Dworkin's Interpretative Theory of Law to explore how the theory could be applied to both the traditionalists' and the proceduralists' theoretical perspectives as a remedy to the limitations that these theoretical schools present. The article will argue that this lack of clarity from the traditionalists and an unsatisfactory approach from the proceduralsists may arguably, be remedied through an interpretative approach as posited by Dworkin.

2. The Theoretical Divide Analysed

A. *The Role of a Legal System in an Insolvency Setting*

Modern insolvency regimes have provisions or models that deal with the debtor-creditor relationship during corporate insolvency. However, these insolvency regimes restrict the coordination of the debtor-creditor relationship to one particular collective approach. This is the insolvency regime that is prescribed by that particular legal system in place of individual bargaining. Subsequently, parties to a contractual agreement are restricted by state insolvency laws from inserting clauses in their contractual agreements that prescribe using alternative insolvency regimes to address their contractual rights and obligations upon the commencement of formal proceedings.

These insolvency laws are influenced by governmental policies that dictate the way the debtor-creditor relationship is resolved.[9] These may include for example, policy goals of boosting corporate rescue or policies designed to curb rising levels of unemployment in a given state which could be jeopardised by individual creditor actions.[10]

[9] See for example, Alan Schwartz, 'A Contract Theory Approach to Business Bankruptcy' (1998) 107 Yale L. J. 1807, 1851.
[10] Robert K. Rasmussen, 'An Essay on Optimal Bankruptcy Rules and Social Justice' (1994) U. Ill. L. Rev. 1, 43.

Therefore, when bankruptcy strikes, the dictates of the debtor-creditor relationship that arise outside bankruptcy settings are overshadowed by state bankruptcy laws in coordinating their resolution, yet the same bankruptcy laws of course do not play a part in regulating these debtor-creditor arrangements pre-bankruptcy.[11]These bankruptcy laws are designed to address these coordination problems during corporate insolvency, rather than regulating substantive contractual transactions that lead businesses to bankruptcy in the first place.[12]

This has led to questions being asked by different actors in the bankruptcy field, such as business owners, employees, bankruptcy scholars and commentators[13] on the role that a state or legal system should or ought to play in coordinating the debtor-creditor relationship during corporate insolvency. How far should a legal system strive to keep a financially struggling company continuing trading as a going concern? How should bankruptcy policies be implemented in a legal system and what role should judges play in balancing overlapping stakeholder interests during corporate insolvency and bankruptcy?

B. *Encouraging Corporate Reorganisations and Rescue*

Traditionalists believe that affording a financially struggling company a chance to reorganise is one of the essential aims of insolvency law.[14] This is a form of maintaining the going concern value of the business and the company itself is preserved. Traditionalists believe that corporate liquidations create grave effects for employees and other unintended and

[11] Douglas G. Baird, 'The Uneasy Case for Corporate Reorganisations' (1986) 15 J. Legal Stud. 127, 147; Omeri Kimhi & Arno Doebert, 'Bankruptcy Law as a Balancing System: Lessons from a Comparative Analysis of the Intersection between Labor and Bankruptcy Law' (2015) 23 Am. Bankr. Inst. L. Rev. 491, 529.
[12] Ibid.,
[13] See for example, Donald R. Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Colum. L. Rev. 717; Elizabeth Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92 Mich. L. Rev. 336, 367; Robert K. Rasmussen, 'An Essay on Optimal Bankruptcy Rules and Social Justice' (1994) U. Ill.L. Rev. 1, 43; Alan Schwartz, 'A Contract Theory Approach to Business Bankruptcy' (1998) 107 Yale L. J. 1807, 1851; Paul F. Kirgis, 'Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis' (2009) 17 Am. Bankr. Inst. L. Rev. 503, 544.
[14] Douglas G. Baird, 'Bankruptcy's Uncontested Axioms' (1998) 108 Yale L. J. 573, 578 at 577.

accidental creditors, such as the community[15] and governmental bodies, such as tax authorities. Therefore, liquidation should be avoided as much as possible, by aiming to enact legislation to support financially struggling companies to reorganise and continue trading as going concerns.[16]

Proceduralists however, view the role of insolvency in a legal system from a different dimension to that of the traditionalists. Proceduralists are of the view that the substantive goal of insolvency law is to maximise the value of the debtor's bankruptcy estate for the benefit of creditors.[17] They believe that a business entity should be able to 'live or die' in the market.[18] They believe that the only aim of insolvency law in this regard is to avoid premature liquidations arising out of uncoordinated creditor actions through the adoption of a collective debt collection regime.[19]

According to the proceduralists, it is the collective nature of the debt collection procedure that governs how insolvency law deals with overlapping creditor interests. Therefore, insolvency law should exclusively and procedurally aim to address debt collection problems arising out of overlapping creditor interests and avoid addressing issues, such as

[15] A community may lose its interests from a company if liquated. For example, a community may lose a retail store such as Tesco which arguably, offered affordable prices to local residents and the store is replaced arguably, by Waitrose, which may be slightly expensive to local and community residents. On this aspect, see for example, a short article, titled, 'Today's Woman: OAP who fights for the Rights of Others' in the Sheffield Star published on 8 February 2010 where a 'local community champion' described a local Waitrose store as an expensive 'posh' supermarket where residents from an impoverished local estate in Sheffield would be challenged to go shopping, at <http://www.thestar.co.uk/lifestyle/features/today-s-woman-oap-who-fights-for-rights-of-others-1-312507> <accessed November 2016). A community may also face increasing levels of unemployment due to local business closures or liquidations. Generally, see, Karen Gross, 'Taking Community Interests into Account in Bankruptcy An Essay' (1994) 72 Wash. Univ. L. Q. 1031; Ronald J. Mann, 'Bankruptcy and the Entitlements of the Government: Whose Money is it Anyway' (1995) 70 (5) N.Y.U L. Rev. 1040; Karen Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System*, (New Haven: Yale University Press, 1997).

[16] Donald R. Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Colum. L. Rev. 717; Elizabeth Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92 Mich. L. Rev. 336, 367.

[17] Thomas H. Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements and the Creditors' Bargain' (1982) 91 Yale L. J. 857.

[18] Ibid., at 578.

[19] Ibid.,

redistribution or modifications to non-insolvency creditor interest that are beyond collective imperatives.[20]

C. *A Company Should Die or Live in the Market*

Proceduralists are of the view that the role of insolvency law in a legal system is neither to support the liquidation nor the reorganisation of a financially struggling company. Rather, insolvency law should be used to ensure that a struggling company's assets are put to their best use.

According to the proceduralists, insolvency law should have a bias towards liquidation and reorganisation of financially struggling companies in economic distress. This is because a market economy functions well if companies that cannot compete for their market place are allowed to fail.[21] However, traditionalists are of the view that keeping a company intact through insolvency is an independent goal of insolvency law.

A company is not a pool of assets for stakeholders to collect or sell piecemeal, but a collection of diverse interests that may be severely affected by a company's liquidation.[22] Therefore, if a company in financial distress is not supported by a legal system through its reorganisation process, it may be forced into liquidation by a selfish debt collection regime that secured creditors adopt to recuperate their debts or interests. This would have grave consequences for all interested stakeholders.[23]

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[20] Alan Schwartz, 'A Contract Theory Approach to Business Bankruptcy' (1998) 107 Yale L. J. 1807, 1851; Paul F. Kirgis, 'Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis' (2009) 17 Am. Bankr. Inst. L. Rev. 503, 544.

[21] Franco Modigliani & Merton H. Miller, 'The Cost of Capital, Corporation Finance and the Theory of Investment' (1958) 48 Am. Econ. Rev. 261.

[22] Donald R. Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Colum. L. Rev. 717, at 745.

[23] Karen Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (New Haven: Yale University Press, 1997) 253.

However, it should be noted that choosing rehabilitation of the company over liquidation curtails secured creditor's security and recovery options.[24] Although giving a debtor company a chance and time to execute a reorganisation plan may seem reasonable, there is no guarantee that such a company will utilise its reorganisation plan effectively and emerge out of insolvency successfully.[25] There is a possibility that the costs of reorganisation may result into lower returns to creditors.

To the traditionalists, saving an insolvent but viable company is the very essence of insolvency law, as the company is allowed to continue trading as a going concern and employees may keep their jobs, however, to proceduralists, this as a form of prolonging the life of a bad company with no guarantees that such a company would emerge out of reorganisation successfully.[26]

D. *Uniform Application of Laws Inside and Outside Bankruptcy*

The US Supreme Court's decision in *Butner v. United States*[27] observed that a uniform application of the law inside and outside bankruptcy 'serves to reduce the uncertainty' and prevents a party from receiving a windfall merely by reason of the happenstance of bankruptcy.[28] Therefore, unless a federal interest requires a different result, there is no reason why such an interest should be analysed differently simply because an interested party is involved in a bankruptcy proceeding.[29] This is a point of view supported and

[24] Ibid., at 129.
[25] J. Berry, 'Different Playing Fields: What Affect Does Chapter 11 Bankruptcy Have on Employees of the Debtor and Why Do These Affects Drive Companies to Bankruptcy?' (2012) Social Sciences Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2139062> accessed 10 December 2016.
[26] See, Franco Modigliani & Merton H. Miller, 'The Cost of Capital, Corporation Finance and the Theory of Investment' (1958) 48 Am. Econ. Rev. 261.
[27] *Butner v. United States*, 440 U.S. 48 (1978).
[28] Ibid., at 55.
[29] Ibid., at 55.

advocated for by the proceduralists as they believe that law, be it inside or outside bankruptcy, should uniformly be applied.[30]

Proceduralists believe that bankruptcy law should mirror and replicate substantive stakeholder interests and entitlements of the non-insolvency setting and avoid insolvency specific changes, such as redistribution or expropriation of non-insolvency entitlements into insolvency.[31] Insolvency should preserve the absolute priority rules of the non-insolvency setting according to the proceduralists.[32]

It is the contention that in a non-insolvency setting, secured creditors have absolute priority of distribution over the proceeds from the sale of the company assets or collateral. Proceduralists contend that secured creditors should have the same absolute priority in a insolvency setting. However, this right is affected where calls for fairness or equality of distribution, such as to employees and other constituent stakeholders are invoked as normatively advocated for by the traditionalists. Proceduralists are of the view that questions of fairness, equity of treatment and minimum right of compensation should have no place in insolvency unless they are given effect outside bankruptcy.[33]

This contention is however not supported by traditionalists. Traditionalists believe that as part of the rehabilitation and reorganisation processes, modifications to stakeholder non-insolvency interests and rights that are involved in the insolvency process may be desirable, where it would serve the interests of all stakeholders and preserve the company from

[30] Douglas G. Baird & Thomas H. Jackson, 'Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 U. Chi. L. Rev. 97, 102.
[31] Thomas H. Jackson, 'Translating Assets and Liabilities to the Bankruptcy Forum' (1985) 14 J. Legal Stud. 73, 114.
[32] Thomas H. Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements and the Creditors' Bargain' (1982) 91 Yale L. J. 857. Alan Schwartz, 'A Contract Theory Approach to Business Bankruptcy' (1998) 107 Yale L. J. 1807, 1851.
[33] For example, see, Paul F. Kirgis, 'Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis' (2009) 17 Am. Bankr. Inst. L. Rev. 503, 544.

liquidation.[34] Traditionalists support changes to the law outside insolvency, where such changes enhance the prospects of rehabilitation of financially struggling companies enabling them to avoid liquidation.[35]

Per Professor Elizabeth Warren;

> "When dealing with redistributive issues, it is necessary and inherent to bankruptcy policy to define moral choices. Bankruptcy is not merely procedural or derivative in nature; to the contrary, it also reflects a deliberate decision to pursue different distributional objectives from those the *de facto* scheme of general collection law embodies"[36]

For traditionalists, effecting insolvency specific modifications to employment protection provisions would moderate the rigidity of labour protection laws, to allow debtor employers to reorganise their businesses, which would benefit employees as a group. This is because insolvency is a vehicle for reorganisation that may help a struggling company to restructure its business.

Proceduralists however, see insolvency and reorganisation changes as a gateway of using bankruptcy filing for strategic gains. Proceduralists are of the view that moderating certain labour protection laws and policies may incentivise some debtor companies to file for bankruptcy to gain the advantages and protection that bankruptcy filings afford that debtor

[34] Elizabeth Warren, 'Bankruptcy Policy' (1987) 54 U. Chi. L. Rev. 775, 793 – 797.
[35] Ibid.,
[36] See, Elizabeth Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92 Mich. L. Rev. 336, 367 (Citing Duncan Kennedy, 'Cost-Benefit Analysis of Entitlement Problems: A Critique' (1981) 33 Stan. L. Rev. 387).

company. Proceduralists are of the view that this would amount to bankruptcy abuse and it would be a form of weakness within a legal system.[37]

E. *The Role of Judges in an Insolvency Setting*

Legal systems may bestow powers onto courts to regulate insolvency proceedings. These courts may make strategic decisions, such as deciding whether a company faced with financial difficulties is worthy of a chance to reorganise or be liquidated and whether a petition for rejection of executory contracts, such as employment contracts and collective bargaining agreements by the debtor employer may be granted or declined. In the US, this power is bestowed onto bankruptcy courts[38] by the US Congress through provisions in the Bankruptcy Code[39] to regulate the bankruptcy process.[40] However, in the UK the legislation tends to place such factors in the hands of insolvency practitioners, subject to court oversight if needed.[41]

Proceduralists view the role of a judge in bankruptcy proceedings as that of a disinterested arbiter.[42] Proceduralists believe that the judge's role during insolvency proceedings should be to direct and control competing stakeholders' collection processes but that they should not be committed to any particular outcome.[43] To proceduralists, judges should allow creditors

[37] Douglas G. Baird, 'Bankruptcy's Uncontested Axioms' (1998) 108 Yale L. J. 573, 599 at 591.
[38] Bankruptcy courts include federal district courts and state bankruptcy courts. However, federal district courts have broader jurisdiction over state courts in deciding matters that arise under the Bankruptcy Code or matters related to a bankruptcy case. See, 29 U.S.C. s.1334(b).
[39] See provisions, such as, 11 U.S.C. s.105(a), s.305(a) and s.1129(a) of the US Bankruptcy Code.
[40] Christopher W. Frost, 'Bankruptcy Redistributive Policies and the Limits of the Judicial Process' (1995) 74 N. C. L. REV. 75.
[41] IA 1986, Sch.1 and IA 1986, Sch.B1, particularly, see, IA 1986, Sch.B1, para.59 that sets out the powers of administrator as an insolvency practitioner.
[42] Douglas G. Baird, 'Bankruptcy's Uncontested Axioms' (1998) 108 Yale L. J. 573, 580.
[43] Ibid., at 579.

to make their own decisions and destinies.[44] The judge's task is to control parties' conflicting interests and to ensure transparency and integrity in the bankruptcy process.[45]

However, on the other hand, traditionalists view the judges' role in the interpretation and enforcement of insolvency laws as a paramount aspect. Traditionalists believe that a judge should implement insolvency's equity goals on a case by case basis and that judges should exhibit broader discretionary powers[46] in discharging their roles. Traditionalists support the view that a judge should be afforded broader discretionary powers while presiding over insolvency cases. This is to ensure that bankruptcy goals are justifiable, fairly and reasonably used to meet the interests of competing stakeholders such as employees.[47]

Traditionalists believe that because each case is different with different facts and stakeholders, a legal system should not have a specific or particular system or standard that fits into every legal question at hand.[48] This is because, it may be difficult to ascertain or predict with certainty, competing and underlying diverse values and policy dimensions that may necessitate or inform a legal decision.[49] However, for employees, the presence of a judge in the bankruptcy process may reassure them that their interests are fairly considered.[50]

Proceduralists do not support the idea of judicial discretion. According to the proceduralists, judicial use of discretion is only useful if a judge is well positioned to use such discretion to

[44] Ibid., at 580.
[45] Ibid., at 579.
[46] Judicial discretion arises where during the course of their adjudication, if faced with legal questions (sometimes referred to as hard cases thesis) that cannot be decided on existing laws and precedents, judges may be able to draw on their discretion to fill the gap.
[47] Harvey R. Miller, 'The Changing Face of Chapter 11: A Re-emergence of the Bankruptcy Judge as a Producer, Director and Sometimes Star of the Reorganization Passion Play' (1995) 69 Am. Bankr. L. J. 439.
[48] Donald R. Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Colum. L. Rev. 717, 722.
[49] Elizabeth Warren, 'Bankruptcy Policy' (1987) 54 U. Chi. L. Rev. 775, 811.
[50] Karen Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System*, (New Haven: Yale University Press, 1997) 238.

make informed decisions. Proceduralists believe that judges have no magical powers to make business decisions or predict market behaviour that may enhance the going concern value of a company.[51]

3. *Theoretical Limitations Analysed*

From the discussion above, it may established that proceduralists provide clear answers as to the factors to be taken into account during corporate insolvency.[52] However, proceduralists' perspectives give more primacy to maximising creditors' returns during insolvency yet these returns are arguably most enjoyed by secured creditors who may have preferential rights over other stakeholders, such as employees. This may arguably, be perceived as being unsatisfactory and unfair to the interests of overlapping stakeholders as group.

In addition, proceduralist perspectives on issues, such as the role of judges in an insolvency setting and the judicial use of discretion further supports the contention that this theoretical school prescribes approaches that are not inclusive to the interests of all stakeholders as a group during corporate insolvency. For example, proceduralist perspectives of equating a judge's role to that of a disinterested arbiter[53] during insolvency proceedings, and the contention that judges should allow creditors to make their own decisions and destinies,[54] would be seen as an unsatisfactory way of dealing with the interests of overlapping stakeholder as a group.

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[51] Christopher W. Frost, 'Bankruptcy Redistributive Policies and the Limits of the Judicial Process' (1995) 74 N. C. L. Rev. 75.

[52] For example, proceduralists' argument that companies should be allowed to live or die in the market clearly aligns with the notion that a competitive market structure or economy is controlled by market forces. Therefore, if a firm cannot fight for its market place, it should be allowed to die out of business which would enable competitors to take up that market place. Consequently, the cycle of jobs to employees, revenue to government tax authorities and community interests and services would arguably continue to flow. This is opposed to prolonging the life of a bad company through reorganisation with no assurances that such a company would come out of reorganisation successfully. Hence, the contention that a free market approach is to the benefit of businesses and employees.

[53] Douglas G. Baird, 'Bankruptcy's Uncontested Axioms' (1998) 108 Yale L. J. 573, 580.

[54] Ibid., at 580.

It should be remembered that during corporate insolvency proceedings, the main centre of contention revolves around negotiations between creditors on how to recover their debt or interests, but not what insolvency policy is or ought to be, as this is the role of the legislature. It is the role of the judge to determine the application of the law by ensuring that laws and policies are adhered to, to avoid abuse of the rule of law by some stakeholders[55] but not for the creditors to make their own decisions.

In addition, it may be argued that proceduralists' insistence that insolvency should aim to solve debt collection and coordination issues among creditors, rather than rehabilitating insolvent but viable companies may limit bankruptcy law to being a debt collection tool or a remedial tool for mitigating bad investment decisions.

Traditionalist perspectives on insolvency law in a legal system, however, may be seen as more inclusive in approach than those of the proceduralists. Traditionalists consider the interests of stakeholders as a whole and they support mechanisms that may ensure fairness in distributive imperatives in insolvency. The traditionalist approach is therefore, flexible and can be adopted for different circumstances. However, traditionalist do not provide how these factors or perspectives may be balanced despite the fact that they are identified. The approach fails to provide clear answers and this may be regarded as a weakness to this theoretical school's perspectives and approaches.

Therefore, the lack of clear answers from the traditionalist approach as discussed above and the fact that the proceduralist approach would arguably, create unfairness among stakeholders creates a form of limitation on both theoretical schools' perspectives on the role of insolvency law and how insolvency law ought to be applied during corporate

[55]Donald R. Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Colum. L. Rev. 717, at 770 – 72.

insolvencies. This form of limitation may arguably, be remedied through interpretation, that is, by adopting Ronald Dworkin's interpretative approach to law as posited in his Interpretative Theory of Law.

4. The Interpretative Theory of Law – Ronald Dworkin

Throughout most of his writings on legal theory,[56] Professor Dworkins devised an interpretative approach to law through theory as the best way to interpret and apply law in a legal system. This theory is known as the Interpretative Theory of Law.[57] Throughout this theory, Dworkin bases his arguments on three main ideals, which if analysed, support his interpretative approach to law as they offer normative perspectives on how law ought to be seen and interpreted in a given legal system. These ideals comprise of the right answer thesis (that centres upon his dissent to judicial discretion and Judge Hercules), law as integrity and constructive interpretation (law as principles and rules).[58]

Through his Interpretative Theory of Law, Dworkin posits that law as practice and law as legal theory are best understood as a process of interpretation.[59] Dworkin opines that constructiveness and integrity in interpretation leads to a right answer to the question before the judge.[60] Dworkin states that;

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[56] R. Dworkin, *Taking Rights Seriously* (Duckworth, London, 1977); R. Dworkin, *Laws Empire* (Cambridge, MA: HUP,1986); R. Dworkin, *Laws Empire* (Cambridge, MA: HUP, 1986) 46, 48; R. Dworkin, 'Pragmatism, Right Answers and True Benality' in *Pragmatism in Law and Society* (M. Brint and W. Weaver ed., Westview Press, Boulder, Colo., 1991) 365.

[57] R. Dworkin, *Taking Rights Seriously* (Duckworth, London, 1977); R. Dworkin, *Laws Empire* (Cambridge, MA: HUP,1986).

[58] R . Dworkin, *Laws Empire* (Cambridge, MA: HUP, 1986), pp 46 – 48; R. Dworkin, 'Pragmatism, Right Answers and True Benality' in *Pragmatism in Law and Society* (M. Brint and W. Weaver ed., Westview Press, Boulder, Colo., 1991) at 365.

[59] R. Dworkin, *Laws Empire* (Cambridge, MA: HUP, 1986) 46, 48.

[60] R. Dworkin, 'Pragmatism, Right Answers and True Benality' in *Pragmatism in Law and Society* (M. Brint and W. Weaver ed., Westview Press, Boulder, Colo., 1991) at 365.

> "every time a judge is confronted with a legal problem, that judge should construct a theory of what the law is, that is, a theory that must adequately fit the past relevant governmental actions, such as policy underlying the passing of that law to make the law the best it can be."[61]

Therefore, the judge must interpret the law in a manner that fits the legal context at hand because constructiveness in interpretation is the proper approach to artistic and literal interpretation as it coheres with the need to make the law the best it can be, carrying with it, the principles of moral value.[62]

Where constructiveness and integrity are applied in the interpretation of laws, policies and practices, it makes the laws of that society more like a product of a single moral vision. After all, a judge who accepts the interpretative ideal of integrity, decides cases by trying to find, in some coherent set of principles, about peoples' rights and duties drawing on the political and legal doctrines embedded in that community or field[63] to find a unique right answer to the legal question before him, rather than using his discretion to fill the gap – a legal positivist notion that Dworkin greatly criticises.

Through his right answer thesis,[64] Dworkin claims that all or almost all legal questions have a unique right answer, even the hardest of cases. To achieve that unique right answer, Dworkin

[61] See R. Dworkin, *Laws Empire* (Cambridge, MA: HUP, 1986) 52.
[62] The principle of moral value highlight the importance of the role of principles in judicial interpretation in that, the Judge may weigh up principles to establish which principles have better weight over the others as some principles may be applied in different dimensions.
[63] R. Dworkin, *Laws Empire* (Cambridge, MA: HUP, 1986) 255.
[64] R. Dworkin, 'Pragmatism, Right Answers and True Benality' in *Pragmatism in Law and Society* (M. Brint and W. Weaver ed., Westview Press, Boulder, Colo., 1991) at 365.

devises the idea of a model judge in Hercules who is seen as super judge that can find an answer to every legal question before him.[65]

A. Application of Dworkin's Interpretative theory to Insolvency: The UK Context

It may be argued that in the UK, particularly, in the field of insolvency law, there have not been specific hard cases that are analogous to Dworkin's hard case thesis that would warrant the application of the Hercules theory. This is because in the UK, as opposed to other jurisdictions like the US where there is a level of skill set for bankruptcy judges to consider, judges in the UK insolvency proceedings, do not have to ask themselves, whether, a company faced with financial difficulties, can or should be rescued.

Judges in the UK do not rule on administration proposals as US bankruptcy courts do with Chapter 11 reorganisation plans. The UK judges do not consider economic and business decisions as part of their role in adjudication. They are willing to leave these matters to experts in these particular fields, such as insolvency practitioners and business experts.[66] However, UK judges may be called upon to interpret contentious issues during insolvency proceedings, such as the meaning of the term 'wages or salary' during insolvency proceedings involving business sales and transfers, where proceedings are brought via court.[67]

In addition, Dworkin's hard case theory is more judge-focused and insolvency law is more insolvency practitioner-focused and therefore, there is a high level of contrast. However, what can be drawn from Dworkin's Hercules and hard case theses is the ability to analyse the

[65] R. Dworkin, *Taking Rights Seriously* (London: G. Duckworth, 1977) 85.
[66] See the House of Lords debate to this effect; Hansard, HL Deb, vol. 638, col.768 (29 July 2002).
[67] See, *Re Huddersfield Fine Worsteds Ltd and Re Ferrotech Ltd & Granville Technology Ltd* [2005] EWCA Civ. 1072.

administrator's role and capacity to discharge his duties in a manner that is analogous to that of a judge. This is supported by the fact that the IA 1986, Sch. B1 that deals with administration procedure, is about how the administrator 'thinks'.[68]

The administrator therefore, has the same level of expectation, especially in deciding, which rescue objective would serve the interests of creditors as a whole, during insolvency proceedings that is analogous to that of Hercules presiding over a hard case as posited by Dworkin.

Because the administration procedure is largely controlled and driven by the administrator, upon appointment, the administrator is tasked to perform his duties in the interest of all creditors of the company as a whole.[69] Among the hierarchy of objectives to be pursued, the main objective is to rescue the company as a going concern.[70] It may be submitted that this amounts to a high level of decision making power afforded to the administrator, which analogously places him within the ambit of judge Hercules as posited by Dworkin.

Moreover, the administrator, being the person in charge of the rescue proceedings, it may be argued, is well positioned to judge as to whether a particular objective, if pursued, would be successful and in the interest of all stakeholders. This may be partly based on his level of expertise in that particular field and his professional judgement. What this implies is that, the threshold or test applicable in this situation is what the administrator 'thinks' as opposed to what he 'reasonably believes'.[71]

[68] IA 1986 Sch.B1, para 3(3) (a). This provision gives the administrator power to exercise discretion in deciding which rescue objective would best serve the interests of creditors as a whole.
[69] IA 1986, Sch. B1, Para.3(2).
[70] IA 1986, Sch. B1, Para. 3(1)(a).
[71] R. Mokal and J. Armour, 'The New UK Rescue Procedure – The Administrator's Duty to Act Rationally' (2004) 1 International Corporate Rescue 136.

With such decision making powers and a high level of expectation, if an administrator decides for example, that disposing of business assets or laying off some employees would achieve a better outcome for company creditors as a whole, or preserve the going concern value of the business, such a decision will stand. Although there exists some scope to aggrieved creditors for challenging an administrator's judgment[72] and sometimes such challenges are upheld by courts,[73] it should be noted that an administrator's judgment formed in good faith, may be very difficult to challenge, due to the level of regard accorded him by the law and judges.[74]

1. A Hard Case Analogy

Re Huddersfield Fine Worsteds Ltd and Re Ferrotech Ltd & Granville Technology Ltd

The need for constructiveness and integrity in interpretation on the part of the administrator may be illustrated by the Court of Appeal (CA) decision in *Re Huddersfield Fine Worsteds Ltd and Re Ferrotech Ltd & Granville Technology Ltd*.[75] In that case, the Court of Appeal was tasked to determine whether, liabilities for protective awards and payments in lieu of notice, to employees of a company in administration, whose contracts of employment have been adopted by the administrator, would be interpreted within the scope of 'wages or salary' pursuant to paragraph 99(4) – (6) of Schedule B1 to the Insolvency Act 1986.

Although this case may not be categorised as a hard case per se, it may be argued that, the level of technicalities encountered in interpreting legal and policy provisions around paragraph 99 above, draws it closer to what Dworkin would term as a hard case upon which

[72] IA 1986, Sch. B1, Paras.74 and 88.
[73] See for example, *Clydesdale Financial Services v Smailes* [2009] EWHC 1745 (Ch.)
[74] V. Finch, 'Re-Invigorating Corporate Rescue' [2003] J.B.L 527, 546.
[75] [2005] EWCA Civ. 1072.

an administrator's and a judge's ability to adopt a novel interpretative approach to finding a fair and balanced answer may be drawn.

In *Re Huddersfield Fine Worsteds Ltd*[76], Peter Smith J had given judgment on 27/07/2005 that protective awards and payments in lieu of notice were paid in priority to administration expenses. However, on 09/08/2005, Etherton J, gave a judgment that both protective awards and payments in lieu of notice were not payable in priority to administration expenses in respect of two different companies in the *Re Ferrotech Ltd and Granville Technology case*[77] that led to two conflicting first instance decisions and led to this appeal.

By virtue of paragraph 99(5), sub paragraph 99(4) applies priority status to liabilities arising under a contract of employment which was adopted by the former administrator or predecessor. However, paragraph 99(5)(C) states that no action is taken of a liability to make a payment other than for wages and salaries. Interestingly, under paragraph 99(6), wages and salaries include among other things, holiday pay and sick pay. However, the challenge in interpretation, mainly centred on the interpretation of paragraph 99(6)(d) and paragraph 99(5)(c).

Paragraph 99(6)(d) states:

> "in respect of a period, a sum which would be treated as earnings for that period for the purposes of an enactment about social security."

Interesting to note, the Court of Appeal had to consider four versions of interpreting this sub paragraph, which all yielded different meanings which had been put forward by the legal teams and the Attorney General during this case. However, more interesting is the fact the

[76] [2005] EWCA Civ. 1682 (Ch).
[77] [2005] EWCA Civ. 1072.

Court of Appeal was not prepared to accept the submission of the Attorney General that the problem of interpretation before the court was as a result of a drafting error. Therefore, it may be argued that this is the sort of a hard case that Dworkin would help to guide the judge to choose the best approach to interpreting the subsection that was the subject of interpretation.

Secondly, the test to ascertain whether protective awards or payments in lieu of notice are payable in priority to administration expenses centred on two conditions being satisfied in paragraph 99(5):

- That the liability arises out of a contract of employment.
- That the liability falls within the category of 'wages and salaries.'

In the judgment handed down by the judges – delivered by Neuberger J, the judges allowed the appeal of the administrators against the decision of Peter Smith J in *Re Huddersfield* holding that protective awards and payments in lieu of notice were not payable in priority to administration expenses. Interestingly, they upheld the decision of Etherton J in the *Re Ferrotech Ltd and Granville Technology* which was in conflict with Peter Smith J's decision.

The judges opined that analysing both issues involved a gateway, that is, a consideration of two issues in paragraph 99(5) that gave rise to difficulties on any view and if the gateway was correct, protective awards would not enjoy super priority because they cannot be described as liabilities arising under a contract of employment, but liabilities that no doubt, arise because of the existence of a contract of employment.[78] Notably, the judges opined that;

[78] [2005] EWCA Civ. 1072. Para.17.

> "[t]he argument involved giving the words 'arising under' in paragraph 99(5), their ordinary and natural meaning, the notion that such expression should not be given an artificially wide meaning…"[79]

Therefore, it may be argued that benefits and interests such as wages, salaries, protective awards et cetera, are given recognisance by the existence of a contract of employment. There is sense in the argument that policy consideration (especially, of the need to promote the rescue culture during corporate insolvencies) were pivotal in overruling Peter Smith J's judgment in *Re Huddersfield* by the Court of Appeal. There is even more sense in the argument that, allowing protective awards and payments in lieu of notice to be paid in priority over administration expenses would make adoption of employment contracts by administrators substantially costly and burdensome to rescue attempts. However, Peter Smith's judgment would be favourable to employees.

Therefore, this case highlighted the extent to which the courts may be prepared to analyse what the legislature intended in passing this legislation. This is the interpretative approach that carries with it, the integrity and novelty in exploring extant legal rules and principles to derive at a unique right answer that Dworkin posits, the manner of which Hercules and by extension, an administrator should arguably adopt. This would in turn remedy the inconsistencies that may arise out of a static rule-based interpretative approach as opposed to using legal principles to aid judges in their interpretation to arrive at a right answer to the legal question before them that would lead to a fair outcome for overlapping stakeholders.

B. Application of Dworkin's Interpretative theory to Insolvency: The US Context

[79] Ibid.,

When the debtor company files for bankruptcy in the US, the main area of concern to employees is whether their employment contracts and collectively bargained agreements would be modified, adopted or rejected. After filing for bankruptcy, a US debtor employer is afforded powers to modify, assume, or reject employment contracts or collective bargaining agreements.[80]

The power to reject, adopt or modify employment contracts and collective bargaining agreements by the employer has been one of the most contestable areas of the theoretical divide between the proceduralists and traditionalists. Proceduralists support the use of s.365 and s.1113 by the debtor employer to reject or amend executory contracts where doing so would augment the value of the bankruptcy estate for the benefit of creditors.[81] Traditionalists however, look at the debtor's rejection and modification of executory contracts as pure creditor value maximisation fundamentalism and question the fairness and integrity sometimes applied in the rejection and modification processes.[82]

1. Analysing the Judicial Interpretative Approaches to s.1113 Proceedings

Section 1113 of the US Bankruptcy Code[83] was enacted by the US Congress as a form of mitigating the effects of the Supreme Court's ruling in *NLRB v. Bildisco & Bildisco*.[84] In this case, the debtor employer had filed a voluntary petition in bankruptcy for reorganisation

[80] Via 11 U.S.C. s.365 and 11 U.S.C. s.1113 respectively.
[81] See for example, Thomas H. Jackson, 'On the Nature of Bankruptcy Law: An Essay on Bankruptcy Sharing and the Creditors' Bargain' (1989) 75 Va. L. Rev. 155; Barry E. Adler, 'Finance's Theoretical Divide and the Proper Role of Insolvency Rules' (1994) 67 S. Cal. L. Rev. 1107; Alan Schwartz, 'A Contract Theory Approach to Business Bankruptcy' (1998) 107 Yale L. J. 1807, 1851.
[82] Donald R. Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Colum. L. Rev. 717; Elizabeth Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92 Mich. L. Rev. 336, 367 (Citing Duncan Kennedy, 'Cost-Benefit Analysis of Entitlement Problems: A Critique' (1981) 33 Stan. L. Rev. 387); Karen Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (New Haven: Yale University Press, 1997); William T. Bodoh & Beth Buchanan, 'The Future of Labour Through the Prism of Bankruptcy: Ignored Consequences – The Conflicting Policies of Labor Law and Business Reorganization and Its Impact on Organized Labor' (2007) 15 Am. Bankr. Inst. L. Rev. 395.
[83] 11 U.S.C. s.1113.
[84] NLRB v. Bildisco & Bildisco, 465 U.S. 523 (1984).

under Chapter 11 of the US Bankruptcy Code. The debtor employer had entered into a collective bargaining agreement with the labour union representing some of its employees. The debtor employer had failed to meet some of its obligations under the collective agreement, such as meeting employees' health and pension payments. Therefore, the debtor employer sought permission from the court to reject this collective agreement. The court had to decide whether a collective bargaining agreement, like any other contract of the debtor company, could be rejected by the debtor, by showing that, its rejection would be to the benefit of the bankruptcy estate.

The Supreme Court held that a debtor employer can reject a CBA in circumstances where the court finds that 'equities balance in favour of rejecting such a contract'.[85] The Supreme Court also held that a debtor employer can unilaterally alter the terms of a collectively bargained agreement, during the interim period that runs between the period of filing of the bankruptcy petition, and the time during which the order authorising rejection is entered.[86]

Following this decision by the Supreme Court, there were growing concerns that employees' rights to bargain collectively with their employers that are bestowed upon them by the NLRA 1935[87] would be affected and rendered meaningless, if the debtor employer could reject collective agreements where rejection would augment the reorganisation plans of the debtor company during bankruptcy. Therefore, the US Congress enacted s.1113 of the Bankruptcy Code, as a move that would restrict the debtor employer's ability and flexibility to reject or modify collective bargaining agreements.

[85] Ibid., at 526.
[86] Ibid., at 532 , 533.
[87] NLRA (1935) s.8(a)(5) and s.8(a)(1)

This provision imposes both procedural and substantive conditions that a debtor employer must meet before rejecting or modifying a CBA. The provision requires the debtor to make proposals to the union that provide for necessary modifications before initiating negotiations and to ensure that all creditors, the debtor and all affected parties are treated fairly and equitably.[88] However, the judicial approach to the interpretation and application of this provision during CBA rejection petitions filed under s.1113 has been met with differing standards and approaches from different judges.[89]

The rationale behind my choice of s.1113 of the Bankruptcy Code as a case study is to highlight the differences in the judicial handling of CBA rejection motions during bankruptcy and how these different approaches would be reconciled through integrity and constructiveness in interpretation as posited by Dworkin in his Interpretative Theory of Law. This is because most bankruptcy courts' decisions in this area can be regarded as having been somewhat in favour of the debtor employer as the courts have tended on more occasions to approve CBA rejections than they have favoured employment protection and continuity.[90]

It should remembered that the policies underpinning the US Congress' enactment of s.1113 were mainly to remedy the effects of the *Bildisco* decision. This was achieved by placing limitations on the debtor employer's ability and flexibility toward CBA rejection and modifications. However, it is through the same provision that Congress left the door open to a debtor employer to apply to court to seek court approved rejection or modifications to CBAs courtesy of s.1113(e).

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[88] 11 U.S.C. s.1113(b)(I)(A).

[89] For instance, see the different approaches in *Brotherhood of Railways, Airline and Steamship Clerks v. REA Express, Inc*., 523 F. 2d 164 (2nd Cir. 1975); *Wheeling-Pittsburgh Steel Corp. v United Steel Workers of Am.*, 791 F. 2d 1074, 1091 (3rd Cir. 1986) and *Truck Drivers Local 807 v. Carey Transportation*, 816 F. 2d 82 (2nd Cir. 1987).

[90] See cases, such as *In re* Nw. Airlines Corp., 346 B.R 307, 322 (Bankr. S.D.N.Y. 2006); *In re* Delta Air Lines, 359 B.R 468, 473 (Bankr. S.D.N.Y. 2006).

Per s.1113(e), a CBA rejection may be approved by the court where its rejection is essential to the continuation of the debtor's business, or where rejection and unilateral changes to the terms and conditions of a CBA would prevent irreparable damage to the debtor's bankruptcy estate. Moreover, after notice and hearing processes, a court may authorise interim changes to employee terms and conditions, wages, benefits or working conditions covered by a CBA under the 'business judgment rule'[91]

2. The 'Necessary' and 'Fair and Equitable' Standards

During s.1113 rejection proceedings, bankruptcy courts apply two standards in analysing whether the debtor employer has fulfilled the procedural and substantive requirements under s.1113 before deciding whether or not to grant a debtor company's rejection petition. These standards are the 'necessary' and the 'fair and equitable' standards. Through the 'necessary' standard, judges base their examination of the debtor employer's rejection application on whether the proposed rejections to employee contracts of employment or CBAs are necessary for the successful reorganisation of the debtor company, to avoid liquidation.

However, where bankruptcy courts apply the 'necessary' and 'fair and equitable' standard, they analyse whether the debtor employer's rejection application is not only necessary for the successful reorganisation of the debtor employer, but whether, the rejection proposals are also fair and equitable to all affected parties with interests in the debtor company.

[91] The business judgment rule derives from the notion that bankruptcy courts recognise that they are not better equipped to make subjective business decisions for insolvent businesses. They therefore vest faith in the business expertise of the debtor / DIP to effect decisions that are in the best interests of the business. See, *In re Pomona Valley Medical Group, Inc*., 476 F.3d 665, 670 (9th Cir. 2007). Therefore, a debtor may reject an executory contract provided that debtor shows that the rejection of such executory contract is to benefit the bankruptcy estate in its reorganisation endeavours. However, the debtor is required to obtain court approval before rejection under 11 U.S.C. s.365(a).

The 'necessary' and 'fair and equitable' standards are better analysed by examining how these standards were applied by both the Second and Third Circuit Courts of Appeal in the cases of *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*[92] and *Truck Drivers Local 807 v. Carey Transportation Inc*.,[93] where each court gave a conflicting ruling on how both the 'necessary' and 'fair and equitable' standard ought to be applied in bankruptcy proceedings involving motions by debtor employees to reject employee collective bargaining agreements.

In *Wheeling-Pittsburgh*, the debtor employer sought authorisation from the bankruptcy court to reject all of its CBAs with United Steel Workers of America on the ground that the rejection was necessary to achieving its five year reorganisation plan. The court was to deliberate on whether the proposed rejections were necessary for Wheeling-Pittsburgh's reorganisation success.

After examining Wheeling-Pittsburgh's submissions, the court found that Wheeling-Pittsburgh had satisfied the requirements and conditions in s.1113 and in light of the then critical state of the US Steel industry and the company's deep financial difficulties, the rejections were necessary for Wheeling-Pittsburgh to maintain its labour stability during the proposed five year reorganisation plan.[94] The court further found that, although Wheeling-Pittsburgh did not provide clauses to upward labour rate adjustment in case it rebounded financially during the reorganisation period, all parties were treated fairly and equitably.[95]

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[92] *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am.*, 791 F.2d 1074 (3rd Cir. 1986). (hereafter referred to as *Wheeling-Pittsburgh).*

[93] *Truck Drivers Local 807 v. Carey Transportation., Inc.*, 816 F.2d 82, 89 (2d Cir. 1987) (hereafter referred to as *Carey Transportation*)

[94] *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am.*, 791 F.2d 1074, 1088-89 (3rd Cir. 1986) 977, 79.

[95] Ibid., at 979-80.

However, more notably, in reaching its conclusion, the court drew significantly on the legislative history, the language of the statute and the sequence of events leading to the final version of the statute. This included examining the statements from the legislators that were most involved in the passing of the statute.[96] This was to prohibit the rejection of CBAs merely, because the court deemed the rejection to be equitable to other affected parties, particularly creditors.[97] The court therefore defined the term 'necessary' during the proceedings to mean that the proposed rejections were 'essential' to preventing the debtor company from requiring liquidation.[98]

The court concluded that the 'necessary' element of the standard was 'conjunctive' with the requirement that the proposals for CBA rejection treated all of the affected parties fairly and equitably, otherwise, it would defeat the Congressional policy of remedying the *Bildisco* standard which was not sensitive to the national policy goals of favouring collective bargaining between employers and employees.

In *Truck Drivers Local 807 v. Carey Transportation Inc.,*[99] Carey Transportation filed a proposal to modify its collective bargaining agreements pursuant to 11 U.S.C. 1113(b)(1)(A) post-petition. The proposal was designed to achieve annual savings of $1.8 million for each of the next three fiscal years in light of its reorganisation plan. However, the central issue in the court of appeal was whether the proposed modifications were necessary to Carey Transportation's reorganisation success.

[96] *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am.*, 791 F.2d 1074, 1088-89 (3d Cir. 1986) 1082, 86.
[97] Ibid., at 1081.
[98] Ibid., at 1089.
[99] *Truck Drivers Local 807 v. Carey Transportation.. Inc.*, 816 F.2d 82, 89 (2d Cir. 1987).

In addition, the court had to deliberate as to whether the proposed modifications treated all parties fairly and equitably, and whether the balancing of the equities clearly favoured rejection of the collective bargaining agreements. The court approved *Carey Transportation's* application to reject the CBAs by holding that Carey Transportation had met its burden of proving compliance with the procedural and substantive standards set forth in the statute.[100]

On appeal to the Court of Appeal, the Second Circuit Court of Appeal affirmed the Southern District of New York bankruptcy court's ruling that all parties were participating "fairly and equitably" in the attempt to save the debtor company from liquidation.[101] However, interesting to note, is the fact that the Second Circuit Court of Appeal departed from applying the 'necessary' element of the rejection standard on its own and instead, adopted the 'necessary' and 'fair and equitable' standards conjunctively. The court did not support the view of interpreting the term 'necessary' as in *Wheeling-Pittsburgh* as meaning that the proposed rejections were 'essential' to preventing the liquidation of the debtor company.

The court based the interpretation of the term 'necessary' on the statutory text itself and interpreted the terms 'necessary' and 'fair and equitable' separately. The court's reasoning was that the requirement that the rejection proposals were necessary to prevent the debtor company from facing liquidation placed on the debtor company, the burden of proving that its proposals for rejection were made in good faith and contained necessary but not minimal changes that would enable the debtor company to complete the reorganisation process successfully.[102]

[100] *In re* Carey Transportation, Inc., 50 B.R. 203 (Bankr. S.D.N.Y. 1985)
[101] *In re* Carey Transportation, Inc., 50 B.R. 203 (Bankr. S.D.N.Y. 1985)
[102] Ibid., at 90.

C. In Light of Dworkin – Remedying the Divergent Interpretative Approaches above

From the discussion above, it may be concluded that there exists no definitive and binding standard to guide bankruptcy judges in applying the required standard in s.1113 rejection proceedings. Judges in s.1113 rejection proceedings may arguably, be guided by the evidence adduced by the parties to the litigation beforehand, in deciding whether to apply the 'necessary' standard on its own, as was the case in *Carey Transportation* by the Second Circuit Court of Appeal, or, to apply the 'necessary' and 'fair and equitable' standards conjunctively as the Third Circuit Court of Appeal did in *Wheeling-Pittsburgh*.

By analysing the court's application of the 'necessary' test on its own as was the case in *Carey Transportation*, it could be concluded that decisions on whether a proposal for rejection is 'necessary' to the successful reorganisation of the debtor employer may be determined by the court without considering whether, it is 'fair and equitable' to employees and their affiliated labour unions.

In *Wheeling-Pittsburgh* above, the court interpreted the term 'necessary' as being conjunctive with the requirement that the proposal for rejection treated all of the affected parties fairly and equitably.[103] The court drew significantly on the legislative history, the language of the statute and the sequence of events leading to the final version of s.1113.

It may be noted, this approach by the Third Circuit Court of Appeal would arguably, fit into Dworkin's ideals of constructiveness and integrity in interpretation to reach the right answer. By the court interpreting the term 'necessary' as 'essential' , it was to ensure that the rejection was not only necessary but essential to its successful reorganisation, otherwise, the

[103] *Wheeling-Pittsburgh Steel Corp. v United Steel Workers of Am*., 791 F. 2d 1074, 1091 (3rd Cir. 1986) at 1089.

debtor employer would be liquidated and apart from having CBA rejected, employee jobs would also be lost permanently.

However, in *Carey Transportation*, the court departed from this standard on the ground that the term 'necessary' should not be construed as essential by adding elements of fairness and equity as established in *Wheeling-Pittsburgh*. The court based its interpretation of the term 'necessary' on the statutory text itself and interpreted the terms 'necessary' and 'fair and equitable' separately.[104]

The court's reasoning was that the requirement that the rejection proposals were necessary to prevent the debtor employer from liquidation placed on the debtor company the burden of proving that its proposals for rejection were made in good faith and contain necessary but not minimal changes that would enable the debtor company to complete the reorganisation process successfully.[105] However, it should be remembered that this is the very essence of the policy underlying the enactment of s.1113. Part of the requirement of the debtor employer's rejection application is to show that negotiations have been held with employee representatives and unions in a fair and equitable manner.[106]

The difference between interpreting the term 'necessary' in conjunction with the elements of 'fairness and equity' as articulated in *Wheeling-Pittsburgh* may mean that both the debtor employer's interests and the employees' interests are balanced on the principles of fairness and equity which may be seen as a form of a balanced approach – an approach that would be achieved through applying constructiveness and integrity to the judicial approaches in interpreting rejection motions.

[104] *Truck Drivers Local 807 v. Carey Transportation*, 816 F. 2d 82 (2nd Cir. 1987) at 88 – 90.
[105] Ibid., at 90
[106] See, 11 U.S.C. s.1113(b)(1)(A).

5. Conclusion

As discussed above, it may be concluded that while traditionalists identify factors that should be taken into account during corporate insolvency, they do not say how these factors ought to be applied. The proceduralists on the other hand, provide clear answers to the factors to be taken into account during corporate insolvency, however, these perspectives if applied to insolvencies, would cause unfair outcomes for overlapping stakeholders with interests in the debtor company.

There is therefore, a lack of clear answers from the traditionalists and a degree of potential unfairness from the proceduralist perspectives which present a form of limitation on the adoption and application of both theoretical schools' perspectives to insolvency. This is the form of limitation that Dworkin's Interpretative theory of law, if adopted may remedy such that a fair and balance approach is adopted.

It is the notion that when the US Congress and the UK Parliament pass new legislation, they do not prescribe how these laws ought to be interpreted and applied in a judicial context. This job is tasked onto judges. Therefore, it is the role of the judge to interpret and apply the law in a manner that is guided by legal rules and principles, and the policies underlying the passing of the law to devise an interpretative approach that would command a fair and justifiable outcome or policy objective sought. Otherwise, without a balanced interpretative approach built on constructiveness and integrity, judges may continue to find varying decisions during corporate insolvency proceeding which may further exacerbate the tension between insolvency policy objectives and employment policy objectives.

According to Dworkin, a judge guided by legal principles and policies underlying the passing of that law, would constructively achieve a right answer that would not only conform to

fairness but would also uphold the integrity of the law. This would arguably, help to remedy the tension between insolvency law policy objectives and employment law policy objectives and would also remedy the lack of clarity from the traditionalist perspectives on corporate insolvency law and the unfairness inherent in the proceduralist theoretical perspectives on corporate insolvency.