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Why In re Omegas Group Was Right: An Essay on the Legal Status of Equitable Rights

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TOPIC II: THE AVAILABILITY AND JUSTIFICATION OF PROPERTY-BASED REMEDIES IN RESTITUTION

WHY *IN RE OMEGAS GROUP* WAS RIGHT: AN ESSAY ON THE LEGAL STATUS OF EQUITABLE RIGHTS

BY EMILY SHERWIN*

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INTRODUCTION

The *Restatement (Third) of Restitution and Unjust Enrichment* is, in my view, an ideal Restatement. It faithfully reports the existing, mostly decisional, law of restitution. It does not presume to remake the law from an academic point of view; instead, its black letter provisions attempt to clarify, rationalize, and incrementally improve the doctrine that has evolved in judicial decisions. For the most part, it respects the value of legal rules: rather than referring directly to the seductive but indeterminate idea of unjust enrichment, it articulates relatively concrete rules of law.¹ It also provides a wealth of examples to verify the rules it states.

Nevertheless, I believe that on one issue – the effect of constructive trusts in insolvency – the *Restatement (Third)* should have engaged more aggressively in law reform. In section 60, the *Restatement (Third)* takes the position that constructive trust claimants have automatic priority over unsecured creditors.² The priority described in the *Restatement (Third)* works in this way: assume

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¹ Professor John Dawson wrote that unjust enrichment, “formulated as a generalization, . . . has the peculiar faculty of inducing quite sober citizens to jump right off the dock.” JOHN P. DAWSON, UNJUST ENRICHMENT 8 (1951). For criticism of approaches to restitution that treat unjust enrichment as an open-ended source of decision-making authority, see Emily Sherwin, *Restitution and Equity*, 79 TEX. L. REV. 2083, 2104-08, 2113 (2001).

² RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 60(1) (2011).

that *B*, an insolvent debtor, holds title to an asset, *X*.³ *A* establishes that *B*'s acquisition of *X* was an unjust enrichment of *B* at *A*'s expense, as defined by any of the substantive rules of unjust enrichment set out in the *Restatement (Third)*.⁴ At this point, *A* is entitled to a constructive trust against *B*.⁵ The constructive-trust remedy treats *A* as the equitable owner of *X* – or, as the *Restatement (Third)* puts it, declares that *B*'s legal title is subject to *A*'s superior equitable right.⁶ A bona fide purchaser of *X* from *B* prevails over *A*; but unsecured creditors, or creditors holding judgment liens on property of the debtor, do not qualify as bona fide purchasers.⁷ It follows that *A*'s restitution claim to *X* takes priority over the claim of *C*, an ordinary creditor.⁸

Doctrine, as traditionally stated, supports this description.⁹ In my view, however, traditional doctrine rests on an overly literal application of the notion of equitable title and a failure to appreciate the remedial nature of constructive trusts.¹⁰ If, as the *Restatement (Third)* assumes,¹¹ a constructive trust is a vehicle for prevention of unjust enrichment, equitable title should be a conclusion rather than a premise of the decision to impose a trust. In presenting my arguments, I will detour into discussion of titles, equity, and the distinction between right and remedy.

I. CONSTRUCTIVE TRUSTS

A constructive trust is a very strong remedy for correction of unjust enrichment. The remedy is historically equitable: it relies on the concept of divided ownership that supports the law of express trusts and was first used to capture gains by trustees who misappropriated trust property.¹² Over time, the

³ *Id.* § 60 cmt. b.

⁴ *Id.*

⁵ *Id.* § 55(1).

⁶ *Id.* § 55 cmt. b (stating that a constructive trust is “a declaration (i) that *B*'s acquisition of *X* leads to the unjust enrichment of *B* (or *B*'s successors) at the expense of *A*, and moreover (ii) that *B* acquired legal title to *X* subject to *A*'s superior equitable claim”).

⁷ *Id.* § 60(1); *id.* § 60 cmt. b.

⁸ *Id.* § 60(1).

⁹ See *id.* § 55; *id.* § 60 reporter's note cmt. b. But see *infra* notes 24-27 and accompanying text (describing several contrary decisions in the bankruptcy courts).

¹⁰ I have written on this subject before. See Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297 [hereinafter Sherwin, *Constructive Trusts in Bankruptcy*]; Emily Sherwin, *Unjust Enrichment and Creditors*, 27 REV. LITIG. 141 (2007) [hereinafter Sherwin, *Unjust Enrichment and Creditors*]. In this Article, I will attempt to clarify the logic of my position.

¹¹ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55; *id.* § 55 cmt. b (“A court has the power to reassign title . . . as a means of rectifying unjust enrichment.”).

¹² On the history and operation of constructive trusts, see generally DAN B. DOBBS, *LAW OF REMEDIES* 590 (2d ed. 1993), GEORGE E. PALMER, *THE LAW OF RESTITUTION* 9-20 (1978), and James B. Ames, *Following Misappropriated Property into Its Product*, 19 HARV. L.

courts expanded the constructive-trust remedy to cover a wide variety of situations in which the legal title to property is deemed to be misplaced.¹³ Equity courts also developed a companion remedy, the equitable lien, which relies on a similar notion of divided title borrowed from the law of consensual liens.¹⁴ I will focus here on constructive trusts, although my analysis of priority applies equally to equitable liens.

A constructive trust treats the recipient of title as if he or she were a true trustee, holding legal title for the benefit of the restitution claimant.¹⁵ The fictitious trust relationship relates back to the time of the initial transfer, so that any profits the trustee may have realized in the interim also belong to the claimant.¹⁶ Once the parties' rights have been adjudicated, however, the trust is simply a vehicle for reassignment of title: the sole duty of the constructive trustee is to convey legal title immediately to the claimant.¹⁷ The primary objective of the remedy is to provide a powerful deterrent against wrongful acquisition of property by removing any potential profit from the transaction.¹⁸

To qualify for a constructive trust, the claimant must establish a substantive claim of unjust enrichment, show that the enrichment took the form of title to a specific asset, and trace the asset, or proceeds received in exchange for the asset, to property currently owned by the defendant.¹⁹ For a claimant who meets these requirements, the constructive-trust remedy has significant advantages over an ordinary claim to restitution measured in money.²⁰ It allows the claimant to recover specific property and thus avoids the need to prove the monetary value of the enrichment; it captures any appreciation in the value of the property; and as noted, it elevates the trust claimant to a position

REV. 511, 513-14 (1905).

¹³ PALMER, *supra* note 12, at 12.

¹⁴ Rather than awarding a particular asset to the claimant, an equitable lien gives the claimant a lien on the asset in the amount of his or her money claim to restitution. *See id.* at 20.

¹⁵ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. b.

¹⁶ *See id.* § 55 cmt. e (suggesting that a constructive trust recognizes property interests that come into existence at the time of the enrichment, and its effect relates back to that time); 5 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 462.4, at 322-324 (4th ed. 1989) (suggesting that constructive trusts arise at the time of enrichment).

¹⁷ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55(2).

¹⁸ *See* PALMER, *supra* note 12, at 180. Equitable liens are useful in unwinding mistaken transfers or unenforceable bargains that involve no wrongdoing but produce results that are unfair and possibly inefficient. SCOTT & FRATCHER, *supra* note 16, § 463, at 332.

¹⁹ The asset may be the thing originally acquired or the product of one or more exchange transactions; the defendant may be the original recipient, a donee from the recipient, or a purchaser with notice of the unjust enrichment. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 58-59 (discussing tracing); Ames, *supra* note 12, at 516.

²⁰ Sherwin, *Constructive Trusts in Bankruptcy*, *supra* note 10, at 304.

of priority over ordinary creditors who have not bargained for a lien on the assets claimed.²¹

In *XL/Datacomp, Inc. v. Wilson (In re Omegas Group)*, the Sixth Circuit rejected this last incident of the constructive trust remedy in federal bankruptcy proceedings.²² The court reasoned that a constructive trust is simply a judicial remedy, which takes effect when awarded by a court; therefore, under state law, the claimant has no equitable ownership interest before the entry of a decree.²³ It also indicated that, whatever position state courts might take about the time when the claimant's interest accrues, bankruptcy policies favoring proportional division of assets override the claim of priority: "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, not from the offending debtor."²⁴ Accordingly, the court held that a claimant who has not obtained a state court decree imposing a constructive trust on particular assets before the filing of a bankruptcy petition cannot remove those assets from the pool available to creditors.²⁵ As a precedent, *In re Omegas Group* has its difficulties: the constructive trust claim was weak,²⁶ and the Sixth Circuit appears to have backpedaled in a later decision.²⁷ Yet it raises significant questions about a common bankruptcy maneuver that takes advantage of a traditional, but arguably misguided, piece of restitution doctrine.

II. PRIORITY AND EQUITABLE TITLE

The formal explanation of priority for constructive trust claimants over unsecured creditors rests on the premise that the constructive trust claimant has

²¹ *Id.* at 304-06. Section 66 of the *Restatement (Third)* defines "purchase" as including consensual secured loans. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 66 cmt. c.

²² 16 F.3d 1443 (6th Cir. 1994); *see also* *Torres v. Eastlick (In re N. Am. Coin & Currency, Ltd.)*, 767 F.2d 1573, 1576 (9th Cir. 1985) (finding no "actual fraud" to support a constructive trust claim when a constructive trust would give priority to customers who could trace their claims to a fund over customers who could not), *amended by* 774 F.2d 1390 (9th Cir. 1985).

²³ *In re Omegas Grp.*, 16 F.3d at 1449-50.

²⁴ *Id.* at 1452.

²⁵ *Id.* at 1451.

²⁶ *Datacomp, Inc.* was engaged in a rather shady venture with *Omegas Group, Inc.*, involving resale of customized IBM computers. *Id.* at 1445. *Datacomp's* constructive-trust claim was based on *Omegas Group's* breach of a supposed duty to disclose its inability to perform its part in the venture. *See id.* at 1445-46.

²⁷ *See Newpower v. Boyd*, 233 F.2d 922, 934 (6th Cir. 2000) (lifting the Bankruptcy Code's automatic stay to permit an embezzlement victim to press a constructive trust claim in state court). For reasons not germane to this Article, it is difficult to tell how much of *In re Omegas Group* remains in force after this decision.

a property interest in the assets subject to the claim.²⁸ *A*'s claim of unjust enrichment against *B* gives *A* an interest in *X*, variously described as an "equitable interest,"²⁹ a "superior equitable claim,"³⁰ or simply an "equity"³¹ – the terms are equivalent in effect.³² *C* has no property interest in *X* and has not given value to *B* in exchange for a transfer of *X*.³³ Therefore, *A*'s equitable interest in *X* prevails over *C*'s claim to be paid from proceeds of *X*.³⁴ Moreover, the result is just because *C* ought not be paid from property belonging to *X*.³⁵

A's interest in *X*, however, is not an ordinary property right; at best, it is a very soft form of ownership. As an initial point, I assume that title to property is a sensible legal concept: it denotes legal ownership of a thing.³⁶ The thing owned may be a physical object, defined by its physical properties; or it may be a legal thing (such as a share of stock), defined by a set of rules that are sufficiently determinate to settle most disputes over what is owned.³⁷ Ownership of the thing normally depends on similarly determinate rules that assign title of title to a person or entity; ownership, for example, might be established by a deed, record of purchase, or a fixed period of active possession.³⁸ These two features of property rights – definite rules governing what can be owned and definite rules governing who owns them – are the minimum components of property rights that are capable of operating in rem and supporting transactions between owners and the rest of the world.³⁹

²⁸ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. d (2011).

²⁹ *Id.*

³⁰ *Id.* § 55 cmt. b.

³¹ *Id.* § 55 cmt. g.

³² *Id.* § 55 cmt. b.

³³ *Id.* § 55 cmt. d.

³⁴ *Id.*; *id.* § 60 cmt. a & b.

³⁵ *Id.* § 55 cmt. d ("[A] debtor should not be allowed to rob Peter to pay Paul.").

³⁶ My understanding of property rights, outlined briefly in the text, is described in more detail in Emily Sherwin, *Three Reasons Why Even Good Property Rights Cause Moral Anxiety*, 48 WM. & MARY L. REV. 1927 (2007) [hereinafter Sherwin, *Three Reasons*], and Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075 (1997) [hereinafter Sherwin, *Property Rights*].

³⁷ Sherwin, *Three Reasons*, *supra* note 36, at 1930.

³⁸ Sherwin, *Property Rights*, *supra* note 36, at 1076.

³⁹ See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 24-58 (2000); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 385-97 (2001) (discussing the in rem nature of property rights); see also WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 72 (Walter Wheeler Cook ed., 1919) (describing property rights as "multititle" rights, or legal relations operating in rem against a large or indefinite number of people).

What the designated owner can do with the designated thing is a separate question, which I will not take up here. GREGORY S. ALEXANDER & EDUARDO M. PENALVER, AN

Without them, there is no line demarcating property from any other category of legal rights and duties.⁴⁰

Within the understanding of property rights just described, equitable title is also a sensible, though limited, legal concept. A beneficiary's interest in an express trust is a common example of a genuine equitable title.⁴¹ Both the thing equitably owned and its owner are defined by determinate rules.⁴² The thing is a set of rights against the trustee, typically embodied in a document and supplemented by a long line of decisions on the content and enforcement of fiduciary duties.⁴³ Most often, beneficiaries are named explicitly in the document or transaction establishing the trust.⁴⁴ The title is equitable because it originally was enforced only in equity.⁴⁵ It coexists with the trustee's legal title and, consequently, is not fully effective against third parties: if the trustee transfers legal title to a bona fide purchaser, the beneficiary's interest in the specific asset transferred comes to an end.⁴⁶ Yet, by the criteria set out above, the beneficiary's interest qualifies as a form of title to property: questions about who owns what can be answered readily in advance of a dispute, by reference to settled and fairly objective rules.

A constructive trust draws on the same idea of divided ownership to provide a remedy against unjust enrichment.⁴⁷ *B* has legal title, but the imposition of a constructive trust makes *B*'s title a bare legal title with the equitable interest belonging to *A*.⁴⁸ The source of this equitable interest, however, is not a formal transaction undertaken for the purpose of creating a well-known form of equitable right, but any one of a wide variety of situations that may be characterized as unjust enrichment: a fraud, a mistake, or something more

INTRODUCTION TO PROPERTY THEORY (forthcoming 2012); see Sherwin, *Property Rights*, *supra* note 36, at 1092-1102.

⁴⁰ For examples of property theory that reject the possibility of determinate doctrinal rules, see Thomas C. Grey, *The Disintegration of Property*, in PROPERTY: NOMOS XXII 69 (J. Roland Pennock & John W. Chapman eds., 1987), and Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 61 (1964) ("Property is the end result of a process of competition among inconsistent and contending economic values. . . . [It is] the value which each owner has left after the inconsistencies between . . . two competing owners have been resolved.").

⁴¹ 1 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 2.7, at 49 (4th ed. 1987).

⁴² *Id.* at 48.

⁴³ RESTATEMENT (THIRD) OF TRUSTS § 2 reporter's note cmt. b (2007); SCOTT & FRATCHER, *supra* note 41, § 2.7, at 48-49.

⁴⁴ Traditionally, the validity of a trust depends on the existence of at least one ascertainable beneficiary, capable of enforcing the duties of the trustee. See, e.g., *Nichols v. Allen*, 130 Mass. 211, 212 (1881).

⁴⁵ SCOTT & FRATCHER, *supra* note 41, § 2.7, at 49.

⁴⁶ SCOTT & FRATCHER, *supra* note 16, § 470, at 363.

⁴⁷ *Id.* at 310-11.

⁴⁸ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. a (2011).

subtle such as violation of an implied understanding between unmarried cohabitants.⁴⁹

The *Restatement (Third)* takes the position that in all such cases, if *A*, the claimant, can point to specific assets representing unjust enrichment, *A* has a form of ownership from the time of the enrichment, with or without the intervention of a court and subject only to the rights of a bona fide purchaser.⁵⁰ The reason given is that the law of unjust enrichment (that is, the law of fraud, the law of mistake, or the law of implied understandings between cohabitants) limits the effect of the transfer from *A* to *B*.⁵¹ Because the transfer is incomplete, *B*'s title is nominal from the outset, and *A* never parts with equitable ownership.⁵² The effect of a constructive-trust remedy is simply to recognize this state of affairs.⁵³ Nothing changes with the entry of the decree, except that *A* can now invoke the machinery associated with enforcement of judicial decisions to reconcile the legal and equitable ownership.⁵⁴

From these assumptions about the property rights of *A* and *B*, the conclusion that *A* has priority over *C* follows as a matter of course: *C*, as *B*'s creditor, can reach only the nominal title belonging to *B*.⁵⁵ The explanation the *Restatement (Third)* provides – that *A*'s transfer to *B* is defective, leaving *A* with residual equitable ownership – allows the *Restatement (Third)* to add the more substantive assertion that *B*'s creditors will be unjustly enriched if they are allowed to share in *X*, the asset identified to *A*'s claim.⁵⁶ In a situation of insolvency, when the contest over *X* is no longer between *A* and *B* but between *A* and *B*'s creditors, the relevant enrichment is not enrichment of *B*, but enrichment of *B*'s creditors.⁵⁷ Given the *Restatement (Third)*'s view of *A*'s rights, however, this does not present a problem: *A* is and always has been the real owner of *X*; therefore using *X* to pay *C* is an unjust enrichment of *C* at *A*'s expense.⁵⁸

⁴⁹ SCOTT & FRATCHER, *supra* note 16, § 462.1, at 311.

⁵⁰ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. a.

⁵¹ *See id.* § 55 cmt. b (“The trust metaphor persists because it conveys . . . the central feature of the remedy in every setting: namely, the determination by the court that *B*'s legal title to particular property must yield to *A*'s superior (and equitable) right of ownership.”).

⁵² *See id.*

⁵³ *See* SCOTT & FRATCHER, *supra* note 16, § 462.4, at 323.

⁵⁴ *See id.*

⁵⁵ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. d (“Because *B*'s general creditors are not bona fide purchasers, their rights in *X* . . . cannot exceed *B*'s interest: namely, the ‘voidable’ or ‘bare legal’ title that is subject to *A*'s rights in restitution.”). Comments to section 60 add that *A*'s property right in *X* must be superior to *C*'s rights, because an unsecured creditor such as *C* has no right to any specific asset. *Id.* § 60 cmt. b.

⁵⁶ *See id.*

⁵⁷ *Id.* § 55 cmt. c.

⁵⁸ *Id.* § 55 cmt d; *id.* § 55 reporter's note cmt. d (“[T]he attempt to enforce a constructive trust in a three-party context resolves itself into (and ultimately depends upon) the

The *Restatement (Third)*'s position on priority can be stated more formally as follows:

1. *A*'s transfer to *B* is defective.
2. Therefore *B*'s title is nominal and *A* retains equitable ownership of *X*.
3. A constructive trust is a remedy based on unjust enrichment.
4. In case of *B*'s insolvency, *A* is entitled to a constructive trust if *C* would be unjustly enriched by sharing in *X*.
5. *C* has no interest in *X* and has not given value to *B* in reliance on *B*'s title to *X*.
6. Because *A* is the equitable owner of *X* and *C* has no interest in *X* and has not given value to *B* in reliance on *B*'s title to *X*, payment of any portion of *X* to *C* will enrich *C* unjustly at *A*'s expense.
7. Therefore, priority of *A* over *C* in the distribution of *X* is necessary to avoid unjust enrichment of *C* at *A*'s expense.

The key assumption in this argument is, of course, the second assumption, that *A* retains equitable ownership after a defective transfer. The alternative view I will defend holds that divided ownership is not a background legal fact recognized by the declaration of a constructive trust, but a remedial conclusion settling a dispute about unjust enrichment. *A* has a restitution claim from the time of the initial enrichment, but this claim does not share the typical – and, in my view, necessary – features of a property right. *A* has transferred legal title to *B*, in compliance with the formal rules of property law that assign assets such as *X* to an owner. There has been no intentional division of legal and equitable ownership by recognized procedures in the manner of an express trust.⁵⁹ The transfer from *A* to *B* is defective in some way, but the defect is not a breach of conventions for transfer of ownership; it is the presence of some set of circumstances in which courts have recognized unjust enrichment. Some of these circumstances, such as a mistaken payment, fall into well-defined categories. But others, such as benefits conferred on a cohabitant on the unstated condition that cohabitation will continue, are highly dependent on background facts.⁶⁰ When *A* is *B*'s domestic partner, it is very hard to say, with the certainty associated with property rights, that *A* retains a residual property interest in an item of value *A* bestows on *B*.⁶¹ An entitlement that

contention that the debtor's general creditors stand to be unjustly enriched at the expense of the restitution claimant.”).

⁵⁹ SCOTT & FRATCHER, *supra* note 41, § 2.7, at 48-49.

⁶⁰ As elaborated in the *Restatement (Third)*, unjust enrichment is not an amorphous moral notion, but a term of art developed over time by the courts. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (rejecting the equation of unjust enrichment with natural justice). Nevertheless, the doctrine of unjust enrichment is diverse and largely fact-specific.

⁶¹ See *id.* § 28 cmt. c (acknowledging that “[b]ecause a conclusion about unjust enrichment is potentially influenced by all of the circumstances both of the parties’

takes its content from this substantive background is not ownership as I understand it: what *A* has, from the time of enrichment, is a legal argument that someone else's enjoyment of *X* is an unjust enrichment at *A*'s expense.

It may be tempting to say that *A*'s claim is a claim of ownership because *A* has identified a thing, *X*, that represents the claim. This argument is misleading for several reasons. First, the asset *A* transferred to *B* may not be the same *X* that *A* and *B*'s creditors are fighting over at the time of the decree. *X* can be the product or proceeds of the original thing, as long as *A* can link the original to *X* through a process of exchange.⁶² Second, exchange tracing is causally arbitrary: *B* might just as well have sold what he received from *A* and exchanged or retained something else.⁶³ Thus, although *A*'s identification of a particular asset as the subject of his claim is a fact to consider in assessing unjust enrichment at the remedial stage, it does not establish that *A* owns the asset.

These different assumptions about the nature of *A*'s right to *X* help to explain the difference between my own view of priorities in insolvency and the view expressed in the *Restatement (Third)*. If, as I have argued, *A* has no property right from the time of enrichment, a constructive trust is not a declaration of pre-existing rights but a remedy that protects *A* if and only if *A* can make a case of unjust enrichment in the circumstances of the dispute. In a bankruptcy proceeding, the circumstances of the dispute include the fact that *B*'s creditors, rather than *B*, are the parties who stand to benefit if the court denies priority to *A*, and the question is whether allowing *C* to share is an unjust enrichment of *C* at *A*'s expense. The argument for *A* cannot assume its own conclusion: *A* must argue, without relying on equitable ownership, that the nature of the transfer gives *A* a superior claim against *X*.

If this view is correct, the formal argument for priority must be modified as follows:

1. *A*'s transfer to *B* is defective.
2. As against *B*, *A* is entitled to a constructive trust declaring that *B*'s title is nominal and *A* retains equitable ownership of *X*.
3. A constructive trust is a remedy based on unjust enrichment.
4. In case of *B*'s insolvency, *A* is entitled to a constructive trust if *C* would be unjustly enriched by sharing in *X*.

cohabitation and of its termination, outcomes cannot be safely predicted apart from the facts of a particular case").

⁶² *Id.* § 58; *id.* § 58 cmt. a.

⁶³ See Dale A. Oesterle, *Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC § 9-36*, 68 CORNELL L. REV. 172, 190 (1982). The *Restatement (Third)* defends exchange tracing as "a rough proxy test . . . for the direct inquiry into but-for causation." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 cmt b; see also *id.* § 59 (describing the even more causally arbitrary rules for tracing into and out of commingled funds).

5. *C* has no interest in *X* and has not given value to *B* in reliance on *B*'s title to *X*.

6. Because *A* is the equitable owner of *X* and *C* has no interest in *X* and has not given value to *B* in reliance on *B*'s title to *X*, payment of any portion of *X* to *C* will enrich *C* unjustly at *A*'s expense.

7. Therefore, priority of *A* over *C* in the distribution of *X* is necessary to avoid unjust enrichment of *C* at *A*'s expense.

Adjusted in this way, the argument is no longer valid. If, as stated in (2), equitable title is the consequence of a constructive trust rather than a premise on which the constructive trust is based, then equitable title cannot be the basis for a conclusion of unjust enrichment.

Thus, on my understanding of *A*'s rights, equitable title enters the picture only at the remedial stage. If *A* can establish that creditors will be enriched by sharing in *X*, then the constructive-trust remedy assigns equitable ownership to *A*. Typically, the decree will provide, or doctrine governing constructive trusts will imply, that *A*'s title relates back to the time of the initial transfer and is effective from that date against all but a bona fide purchaser for value.⁶⁴ But the pre-dated trust is only a remedial device by which the court confers priority on *A* to prevent unjust enrichment.⁶⁵ The source of *A*'s title is state law, but the applicable state law is the state's law of unjust enrichment and remedies for unjust enrichment, not the state's law of property.

III. THE CASE FOR REMEDIAL PRIORITY

Ultimately, therefore, questions about the relative priority of constructive-trust claimants and unsecured creditors depend on competing assumptions about property rights. The *Restatement (Third)* treats priority as the consequence of a property right that arises directly from the law of unjust enrichment.⁶⁶ According to the alternative I have outlined, the law of unjust enrichment supports a remedy that confers priority as the solution to particular disputes.⁶⁷ For simplicity, I will refer to the priority described in the *Restatement (Third)* as entitlement-based priority and to the alternative as remedial priority.

The principal advantage of remedial priority is that it promotes a cleaner and more effective conception of property rights. The notion of title is not clouded by "equities" that have property-like consequences but lack the determinacy

⁶⁴ See *id.* § 55 cmt. e.

⁶⁵ See *id.* § 55 cmt. b.

⁶⁶ *Id.* § 60 cmt. a.

⁶⁷ The remedy takes the form of a "property rule" in the terminology proposed by Judge Calabresi and Mr. Melamed. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1094 (1972). The underlying entitlement, however, is not what I would call a property right.

that enables property rights to support transactions and operate in rem; instead, property ownership is confined to standardized and fairly well-defined situations. Unavoidably, there are ambiguities in the rules governing title; and even when title is clear, ownership is subject to a wide variety of restrictions and obligations that create uncertainty about the value of the thing owned. In general, however, courts attempt to maintain clarity about who owns what. In contrast, the law of restitution relies on relatively indeterminate standards of reasonableness and fair dealing.⁶⁸ Standards of this kind are appropriate for judging the strength of a claim based on unjust enrichment, but when used as criteria for assignment of title, they greatly complicate the locus of ownership.

A remedial approach to priority for constructive trust claimants is also consistent with the supposition that constructive trusts are grounded in and dependent on the principle of unjust enrichment. To repeat the key point: when *B*, the original recipient, is insolvent, granting or denying priority to *A* no longer affects *B*; the parties potentially enriched are *B*'s creditors. This is an important change, because there are significant differences between *B* and *B*'s creditor *C*. *B* is a liar, a cheat, a thief, or an advantage taker, whose behavior in the transaction with *A* should be deterred by eliminating potential profit. Presumably, *C* is not a liar, cheat, or thief, at least in the pertinent transaction. At most, *C* has assumed the risk of *B*'s default, by giving value on the strength of *B*'s unsecured promise to pay. If *C* is a tort creditor, *C* has taken only the risks inherent in interacting with other human beings. If *C* is asserting an unjust enrichment claim similar to *A*'s claim against *B*, the only difference between *A* and *C* is that *A* has, perhaps fortuitously, identified specific products of the property *A* transferred to *B*.

In most cases, *A*, too, has taken risks in transacting with *B*. *A* hired a potential embezzler, made a careless mistake, believed a liar, fell for a scheme too good to be true, or put blind faith in a domestic partner who resisted marriage. Some of these acts are less foolish than lending money on credit; some are not. If we shift from personal comparisons to social policy, the outcome is similarly debatable and sensitive to context: we want to protect innocents who make mistakes or act from misplaced trust and to ensure that transfers are voluntary; but we also want to encourage credit and secure compensation for victims of wrongs.

Ideally, a full assessment of unjust enrichment should take all of these considerations into account, as they apply to the parties who actually stand to gain or lose by the imposition of a constructive trust. In other words, a court deciding *A*'s constructive trust claim should compare the positions of *A* and *C*, in all their complexity. Alternatively, in a proceeding involving multiple creditors, the court might compare *A*'s position with that of a typical creditor, such as a business creditor who gave value to *B* in exchange for *B*'s promise to pay an agreed price.

⁶⁸ See, e.g., RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a.

Remedial priority is also consistent with the special priority rule set out in section 61 of the *Restatement (Third)*. Section 61 limits the priority of constructive-trust claimants over creditors to the amount the constructive claimant lost in his or her transaction with the debtor, thus excluding appreciation or gains from exchange.⁶⁹ If *X* is worth more than *A* lost in dealing with *B*, *A*'s priority over *C* is limited to the amount of *A*'s loss.⁷⁰ When the *Restatement (Third)* qualifies priority in this way, it places an important qualification on the notion of equitable ownership: the transfer from *A* to *B* is no less defective, but *A*'s equitable ownership is limited because treating *A* as an owner would result in enrichment of *A* at the expense of *C*. Remedial priority, therefore, is more conducive to a well-defined legal notion of ownership, and more faithful to the objective of preventing unjust enrichment, than the entitlement-based priority endorsed in the *Restatement (Third)*. Yet, it has disadvantages as well, which ultimately may justify a simpler approach. One of these disadvantages is theoretical: the arguments offered above for remedial priority rely on distinctions between concepts that may in fact differ only in degree. Title to property (what *B* has) stands in contrast to a claim against property (what *A* has), although the difference between the two is only a difference in the relative determinacy of governing rules. Rights (such as *A*'s right to relief based on unjust enrichment) stand in contrast to remedies (such as the constructive trust *A* requests) – a common distinction but one that also reduces to a question of degree.⁷¹ Remedies can be described as an aspect of rights: to have a right against unjust enrichment at one's expense is to have access to a set of legal remedies if certain conditions are met. The difference between a right, so described, and a remedy is only a difference in the extent to which courts tailor their conclusions to the particular circumstances of the parties to a dispute. Theoretical difficulties of this kind, however, are not of great concern. The concepts of right and remedy, title and claim, determinate and indeterminate are sustainable for the same reasons that

⁶⁹ See *id.* § 61(a) (“[T]he portion of the restitution claim exceeding the claimant’s loss is subordinated to the claims of the recipient’s creditors . . .”).

⁷⁰ *Id.* § 61 cmt. b.

⁷¹ This distinction is built into the language of law and has practical legal consequences. An example is the special set of rules on modification of injunctions, which rest on the assumption that injunctions are remedies rather than rights. See, e.g., *Ladner v. Siegel*, 148 A. 699, 701 (Pa. 1930) (“While the decree . . . is an adjudication of the facts . . . , it is none the less executory and continuing as to the purpose or object to be attained . . .”). Consider also *Producers Lumber & Supply Co. v. Olney Building Co.*, 333 S.W.2d 619 (Tex. Civ. App. 1960), in which a mistaken improver who took back the improvement by self-help was liable to the landowner for damages, although state precedents authorized an equitable remedy allowing mistaken improvers to reclaim their improvements. *Id.* at 626 (Barrow, J., dissenting) (“Regardless of what the law may be in other jurisdictions, it is well settled in this State, that a person who has in good faith made improvements upon the land of another may obtain relief either in a suit in trespass to try title in an independent action for the purpose, or in defense of a suit for removing the improvement.”).

it is possible to call a person bald without specifying the exact number of missing hairs that makes the statement true.⁷²

The more worrisome problem is practicability: Can courts sensibly judge, in the case of each *A* who may come before them, whether creditors will be unjustly enriched by sharing in *X*? An inquiry of this kind is not only complex but unguided. Most precedents on the question of priority between constructive-trust claimants and creditors of the constructive trustee simply assume equitable ownership, in the manner of the *Restatement (Third)*, and hold for the claimant.⁷³ Consequently, a court willing to embark on a full remedial assessment of unjust enrichment in insolvency has no point of reference other than the principle of unjust enrichment itself. This is not a satisfactory state of affairs – unjust enrichment is far too vague an idea to impose discipline on adjudication.⁷⁴ Over time, courts might develop more concrete rules governing the comparative strength of various classes of restitution claims in relation to creditors: claims based on embezzlement or believable misrepresentation or minimally careless mistake might prevail over creditors; claims more easily amenable to self-protection might not.⁷⁵ But no such rules exist at present.

CONCLUSION: NO PRIORITY

Assuming that case-by-case assessment of the relative strength of claims to *X* by *A* and *C* is not practicable, and in the absence of a set of rules mapping out a middle ground, the only viable option is a simple rule in one direction or another. The choice, in other words, is between the *Restatement (Third)*'s rule of automatic priority for constructive-trust claimants and the Sixth Circuit's rule eliminating constructive trust priority in cases of insolvency.⁷⁶ Averaging across possible contexts (different types of constructive-trust claimants and different types of creditors), the choice between these rules is not obvious. Tradition favors the *Restatement (Third)*, but the applicable tradition was

⁷² For discussion of Sorites Paradox, see Dominic Hyde, *Sorites Paradox*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/sorites-paradox/> (last updated Dec. 6, 2011).

⁷³ A possible exception is *Torres v. Eastlick (In re North American Coin & Currency, Ltd.)*, 767 F.2d 1573 (9th Cir. 1985), amended by 774 F.2d 1390 (9th Cir. 1985), where the court denied a constructive trust and commented, "A constructive trust is not the same kind of interest in property as a joint tenancy or a remainder. It is a remedy, flexibly fashioned in equity to provide relief where a balancing of interests in the context of a particular case seems to call for it." *Id.* at 1575.

⁷⁴ I have made this argument at length elsewhere. Sherwin, *supra* note 1, at 2084.

⁷⁵ For a mainly unsuccessful attempt to formulate rules of this kind, see Sherwin, *Constructive Trusts in Bankruptcy*, *supra* note 10, at 340-61.

⁷⁶ Under the analysis presented here, the rule adopted in *XL/Datacomp, Inc. v. Wilson (In re Omegas Grp.)*, 16 F.3d 1443, 1451 (6th Cir. 1994), would not be applied as a rule of federal bankruptcy law but would be duly recast as a feature of the state law of constructive trusts.

shaped by a remedial fiction and has never been fully articulated in terms of unjust enrichment. The no-priority option, although no more or less true to the principle of unjust enrichment, promotes equality in the division of scarce assets in insolvency. It also has the important advantage of avoiding a soft-property notion of equitable title. In my view, the benefits of clarity about property ownership should carry the day: in the context of insolvency, constructive-trust claimants are just a species of creditors, with no special "equity" on their side.