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Lecture

The Objectification of Debtor-Creditor Relations

Steve H. Nickles*

Being named the Roger F. Noreen Professor is the high point of my career, and I am nervous about being there — at the high point. One of the reasons is that I am afraid of heights. Part of that, of course, is actually a fear of falling. Another part is that the higher a person climbs, the larger is the group that can view the climber's backside.

Another reason for my nervousness results from having become a Minnesotan. When life goes well for Minnesotans, they suspect that their good fortune is undeserved, that it is a mistake soon to be discovered and corrected.

Well, I am a Minnesotan now. I own a snowblower and a roof rake, and I drive a winter-beater. So I fear this whole affair must be a mistake. It is a very happy mistake, however, to be named the Roger Noreen Professor, and I hope it is a mistake that long goes undiscovered to anyone in a position to correct it.

Being named to a professorship is, in a tiny way, like a very traditional marriage. You take the name of the person in whose honor the professorship is established. Forever after, that name accompanies yours for professional purposes. I am very happy to wed my name to Roger Noreen's because, as I have already privately explained to Roger, his name represents extraordinary kindness, success, and loyalty that are rarely combined in such large doses in a single person. So it is truly an honor for me to hold his professorship.

INTRODUCTION

It is true that much of what I teach is not naturally appealing to most people. They are not fascinated, as I am, by the intricate details of priority battles between creditors claiming the remains of a bankrupt business, or by the fights among banks to determine which of them finally must bear the loss of yet another check-kiting scheme. These contests, and many com-

mmercial law problems, involve the application of specialized rules addressing needs and interests of business and banking that are foreign to almost everyone else. Moreover, the typical combatants are finance companies, insurance companies, banks, and large corporations fighting among themselves. The effects of these battles on real people usually are too indirect to get the public's attention, or to cause interest and debate in the popular press, or to raise passions even among law students in my own classes.

Frankly, to most people commercial law is like plumbing: you need and must have it, but you don't understand or care how it works. You don't want to see it, and hide it in the walls. When you are forced to think about it, it costs you money. So you hope to avoid having to think about it.

Commercial law teachers, then, often are treated as plumbers or some other kind of mere technician on the law school stage, hidden in the shadows of the spotlight that shines on colleagues who teach more glamorous subjects. Center stage usually is occupied by the constitutional law teachers. They get all the attention, and the Supreme Court appointments, arguing such fundamentally human "people" issues as whether the government can regulate the bedroom activities of consenting adults. Constitutional law teachers can freely showboat, unrestrained as they are by law.

In less "sexy" ways, every commercial law case affects real people no matter how obscure the issue or rule of law, or how impersonal the parties. Whenever a bank or other business loses a commercial law dispute, it loses money, and this loss affects real people. Investors lose money. Employees lose jobs. Farmers lose a way of life, and in some cases, lose life itself.

Determining risks and losses in business and banking may be less glamorous than deciding constitutional rights, but the process of shifting wealth through finance and commerce is hardly less important to the real people behind the enterprises that are on the losing side. And the fairness of the process is an important factor in measuring the fairness of the society.

Commercial law has its most direct effect on real people, and its fairness is most often publicly debated, in the law's regulation of the bilateral relationship between a creditor and a debtor. This regulation mostly concerns the limits that creditors must observe in dealing with the debtor herself and with the debtor's property for the purpose of insuring that the credit is repaid.
Debtor-creditor relations is the topic of my lecture today. I will focus on what I term the "objectification" of the debtor-creditor relationship. First, I will define the concept. Then I will illustrate it by describing three recent cases in which it has occurred. Next, I will explain the reasons for objectifying debtor-creditor relations in those cases. The reasoning is incessuous and is powered by a single concern. Finally, I will consider the desirability of objectification as it has occurred in the cases described.

I. BACKGROUND

To a very large extent, the law has delegated to the debtor and creditor themselves the job of regulating their relationship. That is to say, the parties define, by contract between them, when and what the creditor can do in order to secure repayment. The standards or rules they must follow to avoid civil sanctions are those that the parties have legislated for themselves. Whether the creditor or debtor acts illegally, so as to justify the state coming to the other's aid, depends on whether there has been compliance with, or breach of, the contract. In short, the law that governs the debtor-creditor relation traditionally has been the law of the parties' contract.

Concern is growing, however, especially among lenders, that the freedom of creditors and debtors to regulate their conduct by their own contract is narrowing. The worry is not about debtor-creditor relationships involving consumers. Consumer credit transactions have long been heavily regulated by statute and judicial rules so as to limit substantially the kinds of creditor conduct that can be contractually sanctioned. Moreover, to most lenders, consumer credit transactions are relatively unimportant compared to commercial lending and lending services, so that limits on creditor conduct toward consumer debtors that might increase risks and costs are not seriously threatening.

The lenders’ worry is about growing limits on contractually privileged creditor conduct in commercial transactions involving business debtors: from farmers to other small businesses to large manufacturing enterprises. Creditors and debtors in commercial transactions have, until now, generally been left alone to regulate their relationship however they wish through mutual agreement, within limits that are so broad that they seldom abridge contractual power in the typical situation.

The worry about a narrowing of this power is not caused by
legislatures enacting new statutes, nor by the courts developing new legal theories of judge-made law. Rather, the worry is caused by the courts applying old law in new ways: refining and redefining the substance or application of established legal principles — some statutory, some common law — so that there is creditor liability for conduct — or an appreciably increased risk of it — where before there was no liability or only a small risk of it. This liability has resulted notwithstanding that the creditor's conduct apparently was sanctioned by the contract with the debtor. This reworking of the law therefore has seemingly reduced the extent to which contractual standards, determined by agreement of the debtor and creditor, govern the parties' relationship. In place of these contractual standards are external standards — sometimes found in the lending industry and sometimes in the wider community as a whole — against which creditor conduct is measured.

Resorting to external standards for this purpose, and thereby displacing contractual standards in the process, is what I mean by objectifying debtor-creditor relations. It is judging creditor conduct by community standards in disregard of a contractual privilege to engage in the conduct. It is a lessening of the immunity from liability provided by contract. It is another instance of tort swallowing contract.

II. THREE RECENT CASES

Let me briefly describe three recent cases of objectification that are particularly worrisome to creditors, especially commercial lenders. I will describe them in an ascending order of concern, and thereafter will address two main questions they pose, namely: what is the cause of objectification in the cases, and is it desirable?

The first case is *Peoples Bank & Trust Co. v. Lala.*¹ In this case Peoples Bank extended substantial sums of money to Leo and Donna Lala individually and to a couple of farm related corporations they controlled.² The Bank found itself undersecured, mainly on Leo's debts, and asked for more collateral. The Lalas obliged. The additional collateral they gave included their homestead, on which both Leo and Donna executed a mortgage.³

The court held, however, that the mortgage on Donna's

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¹. 392 N.W.2d 179 (Iowa Ct. App. 1986).
². *Id.* at 181.
³. *Id.*
homestead interest was invalid. The stated reason was the Bank’s failure to fully educate Donna on what she was doing in encumbering the homestead: in effect, giving up her home primarily for debts on which she herself was not personally liable. The law generally allows a person to use property, even otherwise exempt property, to secure another person’s debts. The law does not generally require a contracting party to educate the other party to any extent. One is bound by what she signs, especially in a business setting, which includes farming.

In the Lala case, however, the court found that a confidential relationship existed between the Bank and Donna, and that the Bank thus owed extraordinary duties to her, including the duty to ensure that she was fully informed about the consequences of her actions. In fact, the mortgage contained a clear notice of homestead waiver as required by enacted law. The real reason the court invalidated the homestead mortgage as against Donna was the “unfairness” of the transaction. Generally, a deal between parties in a confidential relation is subject to review for substantive fairness. The law is clear that no such relation exists between parties to a contract simply because they are related as creditor and debtor, and this absolute rule applies to a bank and a borrower even when collateral is given.

Any relation can become confidential, however, if a situation of trust develops between the parties to the extent that one of the parties justifiably comes to depend on the other to such an extent as to allow the other party’s judgment to control her own actions. Such a situation had developed between Donna and the Bank, because the Bank’s president was a long time friend and financial advisor to Donna, who was unschooled in matters of finance. She trusted and relied on him, and depended on him to protect her interests. He therefore had great influence and control over her.

Recognizing a confidential relation in this case, or using any other device to invalidate the mortgage, was made easier by the fact that the president got the mortgage on the homestead when Leo, Donna’s husband, was hospitalized due to an appar-

4. Id. at 190-91.
5. Id. at 189.
6. Id. at 186.
7. Id. at 188-89 (citing IOWA CODE § 561.13 (1985)).
8. Id. at 186.
9. Id. at 185-86.
10. Id. at 189.
ent heart attack.\textsuperscript{11}

Judged by the gut, even a banker's gut, the \textit{Lala} case is correctly decided. It nevertheless is unsettling to lenders because the courts rarely, even in extreme cases like this one, put creditors in the role of confidants and thereby subject their contracts to the test of "fairness" according to external standards.

The second case, \textit{K.M.C. Co. v. Irving Trust Co.},\textsuperscript{12} is harder and more worrisome to creditors. Irving Trust agreed to lend K.M.C., a grocery wholesaler, as much as $3.5 million. At a time when K.M.C.'s debt to Irving Trust was only about $2.5 million, K.M.C. asked for an additional $800,000. The loan officer was honestly convinced that even with the additional $800,000, K.M.C. could not meet its debts to suppliers and that the company was doomed to financial collapse.\textsuperscript{13} Because of this belief, and because the loan agreement explicitly allowed Irving Trust to terminate financing at will, the loan officer denied the additional $800,000 loan. K.M.C. thus had no cash to pay suppliers, and the suppliers stopped delivery. Consequently, K.M.C. collapsed.\textsuperscript{14}

K.M.C. sued Irving Trust, arguing that in refusing the additional loan the lender had violated an obligation of good faith, resulting in K.M.C.'s collapse.\textsuperscript{15} Relevant statutory law defines "good faith" in purely subjective terms as "honesty in fact,"\textsuperscript{16} which existed on the facts of this case. The lender had acted honestly in these terms and thus had met the enacted law's subjective definition of good faith.

The trial court nonetheless instructed the jury to consider whether Irving Trust acted reasonably according to an objective standard of good faith defined by the industry or community of lenders. There was evidence that a reasonable lender would have made the $800,000 loan.\textsuperscript{17}

Surprise! Surprise! The jury found for K.M.C., assessing damages of $7.5 million, an amount equaling the company's value as a going concern just before the collapse.\textsuperscript{18} The Court of Appeals for the Sixth Circuit affirmed, even though the contract between K.M.C. and Irving Trust purportedly authorized

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\textsuperscript{11} \textit{Id.} at 187.  \\
\textsuperscript{12} 757 F.2d 752 (6th Cir. 1985).  \\
\textsuperscript{13} \textit{Id.} at 762.  \\
\textsuperscript{14} \textit{Id.} at 754.  \\
\textsuperscript{15} \textit{Id.}  \\
\textsuperscript{16} U.C.C. § 1-201(19).  \\
\textsuperscript{17} \textit{K.M.C.}, 757 F.2d at 761-62.  \\
\textsuperscript{18} \textit{Id.} at 766.
\end{flushleft}
the lender's conduct. Once again, the parties' contractual standards were seemingly replaced by external standards.

The third and last case, which is the hardest and most worrisome, is *State National Bank v. Farah Manufacturing Co.* Farah is a very large publicly-owned corporation that manufactures men's clothing. The company had annual sales exceeding $100 million. In 1976, its chief executive officer, Willie Farah, whose family started the company, was forced from office because the company had losses exceeding $40 million during the preceding four-year period.

Farah is a very large publicly-owned corporation that manufactures men's clothing. The company had annual sales exceeding $100 million. In 1976, its chief executive officer, Willie Farah, whose family started the company, was forced from office because the company had losses exceeding $40 million during the preceding four-year period.

The new management immediately sought financing, and a group of banks made millions of dollars in loans secured by the company's assets. The security agreement between Farah and the banks included a management clause that said, in essence, that the banks could declare a default if the company installed new management personnel unacceptable to the banks. The purpose, which everyone understood and accepted, was to keep Willie Farah from returning to power. This was understandable since under his leadership the company had substantially declined.

Within a year, however, Willie began a campaign to be returned as chief executive officer, and he had enough votes among the company's board of directors to succeed. The banks were not amused. They informed the board that they would declare a default if Willie was elected chief executive officer. The Board realized that a default would put the company in bankruptcy, so they did not elect Willie. They elected other individuals that the banks approved of, and the Board was reconstituted to include several people connected with the banks.

During the next year, the company performed poorly, losing by some estimates more than $50 million. The banks were facing such large losses on the loans that they restructured Farah's debt in a deal that eliminated the management clause. Willie then returned to power, and one of his first acts was to

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19. *Id.*
21. *Id.* at 667.
22. *Id.*
23. *Id.*
24. *Id.* at 668.
25. *Id.* at 671, 676.
26. *Id.* at 679.
27. *Id.*
cause Farah to sue one of the banks — State National.\textsuperscript{28}

Farah won $19 million for losses supposedly suffered during the year Willie was not chief executive officer.\textsuperscript{29} The losses were found to be the legal result of the banks threatening to invoke the management clause to declare a default, which caused the Board to elect management other than Willie, which led to the election of managers who were inept leaders, which inept leadership caused bad marketing and other decisions, which explains the poor sales during the year, which produced the loss.\textsuperscript{30}

Liability was technically bottomed on a tiny lie. When the banks told the Farah Board that a default would be declared if the company returned Willie to power, the banks had not actually made that decision. They clearly could have decided to declare a default if Willie was elected and, in that event, could have enforced their decision or changed their minds and waived the default. Either course would have been legally acceptable.\textsuperscript{31} The banks' wrong was in saying they had decided to declare a default — which they were contractually free to do — when, in fact, no such decision had been made.\textsuperscript{32} This lie in itself was technically a fraudulent misrepresentation — a tort. This tort, however, was a slim basis for the kind and amount of damages Farah sought.

The court also decided that the banks were guilty of duress for threatening to invoke the management clause. The threat in itself was not wrongful for purposes of duress because the contract allowed the banks to do what they had threatened. The threat was wrongful for purposes of duress, however, because the banks violated the duty of good faith that is implied in every contract.\textsuperscript{33} The banks violated that duty, which the court defined according to an objective, external standard, because the banks' threat constituted fraudulent misrepresentation.\textsuperscript{34}

So the tiny lie bred both fraud and duress, but duress ordinarily is not thought of as a tort; rather, it usually is a contract defense. In Texas, however, people do things their own way.

\textsuperscript{28} Id. at 668.
\textsuperscript{29} Id. at 667 (stating that actual losses were estimated at $18,947,348.77).
\textsuperscript{30} Id. at 691-92.
\textsuperscript{31} Id. at 672.
\textsuperscript{32} Id. at 681-82.
\textsuperscript{33} See TEX. BUS. & COM. CODE ANN. § 1.203 (Vernon 1968) (imposing an obligation of good faith in the performance or enforcement of contracts).
\textsuperscript{34} Farah, 678 S.W.2d at 683-87.
The court said duress is a tort, but that still is small support for the outcome of the case.

The tiny lie was not yet exhausted. The court decided that the banks had committed the tort of interference with prospective economic advantage. The whole purpose of this tort essentially is to allow the recovery of the kinds of damages that Farah sought and won. The interference tort is not clearly defined or bounded. It is committed when a person improperly interferes with another's business activities and loss proximately results. Interference is improper when it occurs by improper means or with improper motive. In this case there was improper means because the banks had made a fraudulent misrepresentation and committed duress.

That tiny lie certainly was a fertile thing.

The lie itself, of course, was not the first link in the chain. Rather, it was the management clause in the security agreement that gave meaning and force to the banks' threat. So the Farah case is viewed by many lenders, and perhaps properly so, as invalidating management clauses and the like.

The Farah opinion tends to support this view by suggesting that fraud and duress really were not critical to the finding of interference liability. The court said: even though "the lenders may have been acting to exercise legitimate legal rights or to protect justifiable business interests [which is usually a defense to the tort of interference] . . . the social benefits derived from permitting the lenders' interference are clearly outweighed by the harm to be expected therefrom." This statement may be the second most significant part of the Farah opinion. It implies that a creditor's interference with the debtor's business may be improper and thus wrongful even when the creditor's conduct is not otherwise tortious and is contractually permitted and the motive is pure — if, on balance in the wider economic and social context, the benefits of absolutely prohibiting the conduct outweigh the costs of allowing the conduct. In such a case, once more, external standards of conduct displace the parties' own contractual standards.

The most significant aspect of the Farah case is that any of the banks' torts honestly could be said to be the proximate cause of the damages recovered.

35. Farah, 678 S.W.2d at 690.
36. Id. at 681-82.
III. ANALYSIS

If you consider how these three very different cases are really very much alike, you will see the root cause of objectification in the cases: the outcome in each instance is based, fundamentally, on the creditor's abuse of control over the debtor. By this abuse the creditor forfeited the protection of contract, and thereby lost the contractual privilege that shielded the creditor's conduct. Thus, each result is largely consistent with contract doctrine, not opposed to it.

The confidential relation in Lala, which was founded on the debtor's dependency on the creditor,³⁷ meant that the lender effectively dominated the debtor so as to rob her of free and independent will in the transaction between them. There was agreement in form, but not in substance. There was missing the kind of real, deliberate, considered consent that is essential for an agreement to be recognized as a contract. So the legality of the deal between them — the mortgage on Donna's homestead — was not determined by their contract. In this situation, the law imposes greater duties. It expects the confidant to abandon self-interest, which is furthered by the usual contract, and to act instead in the interest of the other person.³⁸ The lender in Lala, however, played Donna like a puppet in getting her to hand over her homestead for the lender's benefit, not Donna's own.

In K.M.C., as the court there observed, the financing relationship was such that, as the lender knew, the debtor was totally dependent on the lender.³⁹ The lender's control was complete to the extent that the debtor's receivables were regularly impounded by the bank and kept in a "lock-box" account as further security.⁴⁰ When the bank stopped lending and declared a default, the receivables were applied to the debt. So not only was the debtor denied loan funds, it also was denied its own cash balances, which were essential to keep operating.

So K.M.C. can be explained in terms of Lala: dependency and control created duties that transcended the contract.

There is a further explanation of K.M.C. The purpose of the lender's control in K.M.C. was to insure its loans. In fact, however, there was ample security for the loans that had been

³⁷. Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179, 190 (Iowa Ct. App. 1986).
³⁸. Id. at 188.
⁴⁰. Id.
made and also for the additional loan the debtor sought.\footnote{Id. at 762.} The reason for enforcing contracts is to give effect to the purposes of the parties' agreement. By foreclosing when the security was adequate, the lender went beyond the purposes of the agreement and so went beyond the legitimate boundaries of contractual immunity from liability.

The same is true of the lenders in \textit{Farah}. The purpose of the management clause was to allow the lenders to realize on their collateral should a change in management jeopardize the value of the property. They used the clause, however, to dictate the internal affairs of the company. This conduct exceeded the purposes of the lenders' contract rights and they thereby forfeited their contract protection. Moreover, because of the lenders' control over the company, there was accompanying dependency, so that \textit{Farah}, like \textit{K.M.C.}, can be explained in terms of \textit{Lala}: when there is dependency there are higher duties that transcend the contract between the parties.

There is, however, something more about \textit{Farah}. The lenders' illegitimate use of their contract rights gave them such control over the debtor that the lenders crossed the boundary that separates creditor from owner. Creditor and owner are basically alike in that both put money into the enterprise. Yet, there is a basic difference in how the law treats them. Although a creditor's ability to recoup its investment is naturally tied to the debtor's success, the creditor's right to recover from the debtor is not conditioned on the debtor's success. A debtor cannot avoid repaying a debt to a creditor because the enterprise failed.

An owner's ability \textit{and} right to recoup her investment in an enterprise is, on the other hand, clearly tied to the success of the enterprise. Ordinarily, a company is not accountable to a stockholder when the market value of her stock declines. The owner's investment is at risk in this sense, while the creditor's is not, because the owner is empowered to share in the direction and management of the enterprise and thus must bear the consequences of her control.

When a creditor exercises control over a debtor's enterprise in such a way as to assert the powers of an owner, there is good reason to treat the creditor as an owner by tying rights to recovery to the success of the enterprise. Contract law does not allow the form of the contractual relationship to obscure the
real substance of the relationship. If the enterprise fails under the creditor's owner-like control, the creditor should bear that loss as an owner, not as a wrongdoer, so that there is no need to show a proximate link between the creditor's control and loss. This would justify the damages in *Farah* notwithstanding that causation was very weak or altogether lacking in that case.

In sum, *Lala, K.M.C.*, and *Farah* really are about creditors having control that breeds dependency that, in turn, produces an extraordinary level of responsibility and accountability to debtors; and the cases also are about creditors using their control over debtors in ways that exceed the legitimate purposes of the control.

Creditors do have lots of control, usually not through personal confidential relations with the debtor as in *Lala*, but through contracts, as in *K.M.C.* and *Farah*, that give them the right to grab the debtor's property — and thus collapse the debtor's enterprise — upon default. Default is defined in the contract, which always is drafted by the creditor. Indeed, the largest part of typical financing agreements is devoted to defining default to mean everything and anything, including whenever the creditor feels like it.

With such a wide definition of default, the creditor is contractually free to cash out at any time. This invites — seemingly even permits — arbitrary action, as in *K.M.C.*, and gives creditors the power to meddle in the debtor's affairs, as in *Farah*. But collateral is not intended to be used as leverage for controlling the debtor's enterprise; rather, it is designed as insurance that can be collected when there is a real likelihood that the debtor's ability to pay, or the collateral's value, is less than the secured debt.

Cases like *K.M.C.* and *Farah* are simply saying that creditors must use collateral according to its real purpose; must use the control accompanying collateral in line with that purpose; and, factoring in *Lala*, that creditors must not abuse control — use it beyond its purposes — whatever the source of the control and without regard to how it is achieved.

Lenders worry that these three cases — *Lala, K.M.C.*, and *Farah* — and others like them, in objectifying debtor-creditor relations, are limiting creditor conduct and creditor control designed to reduce creditors' risks. Objectification thus increases creditors' risks, which will have the effect, ultimately, of increasing the cost of credit and reducing its availability.

There is no empirical evidence, but the law-and-economics
types will tell you that this effect is *indisputably intuitively inevitable*; and then they will flash in front of your eyes an incomprehensible chart or graph that, they say, linearly proves the probable reliability of economic intuition.

I have four responses that lead ultimately to the conclusion that objectifying debtor-creditor relations so as to limit creditor control is, to a point, desirable.

First, I am not sure that *Lala, K.M.C.*, or *Farah* is a true case of objectification in the sense that the parties' rules are replaced by external rules, or — put more generally — that the cases are further examples of tort trumping contract. The reason I am not sure is that these cases might be explained as instances in which there was no true contractual agreement between the parties giving the lender the rights and powers that the lender exercised. I already have explained that this lack of true agreement is behind the decision in *Lala*.

In *K.M.C.*, although the security documents empowered the lender to stop lending and declare a default, the scope and substance of this contractual provision is properly determined by reference to the meaning that the parties gave it. In light of the reason for the power, which was to protect the lender's secured position, it is fair to interpret the language as conditioning the power on a genuine threat to the lender's position. In other words, the power would not be invoked as long as there was adequate collateral. Evenly construed, therefore, the *K.M.C.* contract did not empower the lender to act for any reason, or arbitrarily for no reason, without regard to the true state of the threat to the lender's collateral. So *K.M.C.* may be, in truth, nothing more than a simple breach of contract case in which the parties' own standards were violated.

*Farah* can be explained in the same way. Indeed, the court noted that the evidence in the case reflected that the parties never anticipated that the management clause would be used, as the lenders used it, to work their will with respect to the internal affairs of the debtor.42

Both *K.M.C.* and *Farah* would be clear instances of objectification only if the conduct engaged in by the lenders had been explicitly authorized by the contract through clear agreement by the parties. But they were not such cases.

My second response to the warning that reducing creditor control as in *Lala, K.M.C.*, and *Farah* will increase the costs of

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42. *Farah*, 678 S.W.2d at 686.
credit is that I am not sure that chilling the kinds of conduct involved in these cases increases risks that are meaningful and important to lenders. *Lala* limits overreaching in circumstances involving vulnerable, individual debtors where risks were miscalculated. It does not limit the ability of lenders to take collateral before they make loans, at the time risks are calculated. Nor does it limit the ability of lenders in regular, arms length transactions to contract for more collateral if the risks increase. The *Lala* case simply forbids lenders from unilaterally grabbing property that the lender knew, from the inception of the deal, would not be available as security because of its exempt status.

*K.M.C.* says, at most, that a lender cannot abruptly exercise its power over the debtor when the lender's secured position is, in fact, not endangered. It does not limit the lender's right to exercise its contractual power when the risks the lender sought to protect against actually occur.

*Farah* simply adds that the power must be exercised for the purposes for which it was designed: to allow the lender to realize on collateral when there is a default. It does not limit that fundamental right, which is the lender's basic and best insurance against loss.

Further — and this is my third response — even if these cases do tend to increase credit risks and thus credit costs by limiting creditor control, it may be that allowing creditor control involves a greater economic cost by stifling debtor freedom to make entrepreneurial decisions. Preachers of economic analysis in commercial law, who are conservative in the sense of protecting creditor power and position, have conceded — and I now quote two of these preachers — that creditors should not:

place too many restraints on their debtor. Creditors lend money in the first instance because the debtor has entrepreneurial skills that they do not have. To take advantage of the debtor's skills, creditors must give their debtor a certain amount of freedom. To give the debtor the power to make correct decisions, creditors must to some extent give him the power to make wrong decisions.43

I would add that creditor control that stifles debtor decision-making, and that effectively puts creditors in charge of debtors' enterprises, may well rob the economy of wealth that creditors lack the expertise to generate. Also, paradoxically, control that is intended to reduce creditors' risks actually may

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increase their risks by preventing debtors from putting their greater expertise to full use.

Furthermore — and this is my final response — if I am wrong and these cases that threaten creditor control do have a net economic cost, that alone is not sufficient reason to disapprove of them. Balanced against the economic costs of limiting creditor control is the social cost of allowing it: subjecting debtors to an overt form of economic slavery or, put more mildly, transforming debtor-creditor relations into investment robotization where the debtor's will is subjugated, willy-nilly, to that of the creditor, and the debtor is used like a sponge to absorb the losses for enterprises that really are run by the creditors. It is undemocratic; it is exploitation; it ensures the concentration of wealth; it is wrong.

It is not wrong, however, for a creditor to end credit and seize the debtor's property in satisfaction of secured claims when there is a real risk of loss of the security. Objectification or other means to curb creditor control should not go so far as to dilute that basic right of creditors. The true and proper goal of objectification should be to ensure that creditor control is not used arbitrarily or to manipulate the debtor. The line between proper and improper exercises of control should be drawn so that a creditor is deemed to have acted rightfully whenever its actions toward the debtor are authorized by a true agreement and are directly related to preserving the creditor's collateral against a genuine risk to that property.

CONCLUSION

You will have noticed that, in the end, my analysis becomes a weighing and balancing of economic, social, and human concerns and values not controlled by specific and detailed legal rules characteristic of commercial law. It appears that, alas, commercial law teachers are like constitutional law teachers: unrestrained by law.

In fact, law teachers of all subjects, practicing lawyers, legislators, and judges — the whole legal community — do the same thing in the end: we argue the priority of competing interests, and those in power decide the matter. That, in the end, is law.

My goals as a teacher are to urge students to see and appreciate a wide range of interests, concerns, and values; to train them so that they can reliably interpret decided law to determine how those interests presently are accommodated; and to
show them how that law can be reshaped to respond to changes that argue for a different, fairer, more just accommodation.