The mesh of bankruptcy and class action law has not been seamless. Bankruptcy solves some problems that arise in “aggregate lawsuits,” but it raises some very interesting issues as well. There has been no definitive answer to many of the questions raised. This is true of both class actions involving debtor-plaintiff classes and those involving creditor classes. This paper discusses some of the issues that arise in each type of class action in bankruptcy cases.

DEBTORS-AS-PLAINTIFF CLASSES

Class actions that involve debtors as plaintiffs are the most commonly written about type of class action in bankruptcy today. There is a definite disagreement among judges and legal scholars as to the propriety of debtors-as-plaintiff classes. Authors have described the split in case law in different ways. A recent article by Professor Kara Bruce describes the various theories used by courts to explain their views as to jurisdiction and other issues as follows:

(1) the nexus cases, which prohibit debtor classes entirely; (2) the home court and contempt power cases, which limit classes to debtors within the representative’s district; and (3) nationwide jurisdiction cases, which exercise jurisdiction over nationwide debtor classes.1

Another author has divided the cases according to whether the court treats the words “arising in,” “arising under,” and “related to” in 28 U.S.C. § 1334(a) as conjunctive or disjunctive. Brian V. Otero, Jurisdictional Uncertainties Complicate Debtor Class Actions In Bankruptcy Court, N. Y. L.J. (August 19, 2013). Still another article classifies the cases by categories of federal law claims made: (1) violations of the Fair Debt Collection Practices Act; (2) violations of the automatic stay; and (3) violations of the discharge injunction. Elizabeth Warren & Jay Westbrook, Class Actions for Postpetition Wrongs: National Relief Against National Creditors, 22 AM. BANKR. INST. J. 14 (March 2003).

Since about 2000, there have been numerous cases decided on the issue of whether debtors can seek relief as a class against creditors. Most of these cases arose in the context of alleged abuses by mortgage lenders or servicers, although a few cases have dealt with unsecured debts2 and reaffirmed debts.3 Over the years, the legal arguments of both sides have evolved based upon each new decision issued.

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1 Kara Bruce, The Debtor Class, 88 TUL. L. REV. 21, 51 (November 2013).
2 E.g., Gilliland v. Capital One Bank, 474 B.R. 482 (Bankr. N.D. Miss. 2012) (involving discharged credit card debt as to which Capital One filed a proof of claim in second case of debtor).
3 Cox v. Zale Delaware, Inc., 239 F.3d 910 (7th Cir. 2001) (unfiled reaffirmations).
JURISDICTION ISSUES

In the beginning, many courts and commentators (and certainly the defendants) expressed shock at attempts to certify any class of bankruptcy debtors of any kind, even in a single district.\(^4\) Looking at the state of recent case law, it would appear that the fight to oppose all class actions is lost. At least district-wide injunctive relief only classes have been sanctioned several times by the Fifth Circuit.\(^5\) The Ninth Circuit Bankruptcy Appellate Panel recently approved a limited relief nationwide class action case.\(^6\) Whereas numerous pre-2010 cases dismissed debtor-as-plaintiff class action suits in their entirety,\(^7\) those rulings are virtually non-existent now.

How did this happen? Let’s look at the cases as they developed. As Professor Bruce describes them, the early cases were the “nexus cases.” Then came the “home court” cases and finally the contempt power and nationwide jurisdiction cases. This paper discusses the case law development using Professor Bruce’s labels for ease of discussion.

However, first a look at the basic law. Bankruptcy court jurisdiction is found in title 28 of the United States Code. Section 1334(a) states that “district courts shall have original and exclusive jurisdiction of all cases under title 11.” No state courts or other federal courts can have jurisdiction over a bankruptcy case. Section 1334(b) states, with an exception not important to this discussion, that district courts have “original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.” This is true notwithstanding Congress’ passage of laws that may give other courts exclusive jurisdiction over an area of law or type of case. Section 1334(e) establishes that the district court “in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction . . . of all property, wherever located, of the debtor as of the commencement of . . . [a] case, and of property of the estate.” Under 28 U.S.C. § 157(a), each district court may refer all bankruptcy cases and/or any proceedings in bankruptcy cases “arising under title 11, or arising in or related to a case under title 11” to the bankruptcy court for the district in which the case is venued. Section 157(b)(2) allows bankruptcy judges to “hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11,” referred from the district court. These are the jurisdictional provisions with which all of the debtor-as-plaintiff class actions wrestle. How are they to be read? How do they mesh with Bankruptcy Rule 7023 which incorporates Rule 23 of the Federal Rules of Civil Procedure into the Bankruptcy Rules? Rule 7023 states that Rule 23 “applies in adversary proceedings” in bankruptcy courts.

\(^5\) *Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn)*, 609 F.3d 748 (5th Cir. 2010); *Rodriguez v. Countrywide Home Loans (In re Rodriguez)*, 695 F.3d 360 (5th Cir. 2012).
\(^6\) *Chiang v. Neilson (In re Death Row Records, Inc.)*, 2012 WL 952292 (Bankr. 9th Cir. 2012).
The case of Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn), 609 F.3d 748 (5th Cir. 2010) laid out the recent view of class action jurisdiction in bankruptcy. If a claim is alleged that arises in a case under title 11 or arises under title 11, then a district court clearly has jurisdiction over the claims.\(^8\) If the claims are core proceedings, then the district court may refer those matters to the bankruptcy court for “full determination.”\(^9\) When a referral is made (which is automatic due to the standard order issued in all districts), “the bankruptcy judges may exercise the full authority allowed them by law.”\(^10\)

The case also states that Fed. R. Bankr. P. 7023 allows class actions in bankruptcy courts. “If bankruptcy court jurisdiction is not permitted over a class action of debtors, Rule 7023 is virtually read out of the rules. This would ascribe to Congress the intent to categorically foreclose multi-debtor class actions arising under the Bankruptcy Code without a clear indication of such intent.”\(^11\)

**The Nexus cases.** The nexus cases arose in the late 1990s in the United States Bankruptcy Court for the Northern District of Illinois.\(^12\) These cases hold that a claim that an auto lender inflated its secured claims in bankruptcy cases in violation of state law and federal bankruptcy law was a “related to” non-core matter—at least as it related to debtors other than the named plaintiff. The court stated that the claim as to Knox, the named plaintiff, was “related to” her case and was a core proceeding but

> [t]he same cannot be said . . . about the claims which Knox asserts on behalf of class members asserted to be similarly situated who are debtors in other bankruptcy cases in this and other judicial districts. No core jurisdiction lies in this bankruptcy case over such claims.\(^13\)

The court held that that Ms. Knox’s federal law claim under section 506 of the Bankruptcy Code arose in her case. It also arose under title 11. However, section 506 provided no private right of action. Therefore, Ms. Knox individually had no viable federal claim. To the extent she had state law claims, they were clearly outside the “arising under” or “arising in” parameters. They were not within the court’s jurisdiction.

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\(^8\) “‘Core’ proceedings are those that ‘arise under’ title 11 insofar as they involve a cause of action created by a statutory provision therein, and those that ‘arise in’ cases under title 11, which by their nature can only arise in bankruptcy cases.” Wilborn, 609 F.3d at 752. From this quote, it seems likely that the Fifth Circuit reads “arising in,” “arising under,” and “related to” as separate and distinct terms, not to be viewed solely conjunctively.

\(^9\) *Wilborn*, 609 F.3d at 752.

\(^10\) Id. at 753.

\(^11\) Id. at 754.


\(^13\) In re Knox, 237 B.R. at 693.
As to other bankruptcy debtors, the court’s opinion assumed that any debtor’s claim other than Ms. Knox’s was a “related to” proceeding. A “related to” proceeding is one that does not arise in a bankruptcy case and does not arise under title 11. A “related to” proceeding has been held to be jurisdictionally proper for a bankruptcy court to handle if “the outcome of . . . [a] proceeding could conceivably have any effect on the estate being administered in bankruptcy.”\(^\text{14}\) Since other debtors’ claims could have no conceivable effect on Knox’s bankruptcy estate, they were outside the court’s jurisdiction. The case did not discuss the “arising under title 11” issue. Only another debtor’s claim with a “nexus” to a claim of a debtor in a particular judge’s court could be heard by that judge. Since that scenario was virtually impossible to imagine, there was no class jurisdiction for any kind of claim—even district-wide or judge-wide.\(^\text{15}\)

**The Home-court Cases.** The next cases to appear took the position that, even if the cases were brought raising solely bankruptcy law issues and no state law claims, and the court had jurisdiction under arising in or arising under grounds, a bankruptcy court still could not deal with any cases outside the district of the named plaintiff—the home court.\(^\text{16}\) The courts that ruled in this way relied upon section 1334(e) which states:

> [t]he district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

The *Williams* case, without much discussion, similar to the *Knox* case and other nexus cases, assumed that jurisdiction over the cases of debtors outside the district could be found solely in a bankruptcy court’s “related to” jurisdiction.

The *Williams* court found no way around the explicit language of section 1334(e).

The function of § 1334(e) is clear—to insure that only one court administers the bankruptcy estate of a debtor . . . A procedural rule such as Rule 23 authorizing class actions, of course, cannot be read as enlarging the limited jurisdictional grant of § 1334.\(^\text{17}\)

However, as the cases below explain, this theory only dealt with part of the puzzle.

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\(^\text{14}\) *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n. 6 (1995) (citing *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3rd Cir. 1984) and stating that the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have adopted the test).

\(^\text{15}\) Other nexus cases include *Simmons v. Ford Motor Credit Co. (In re Simmons)*, 237 B.R. 672 (Bankr. N.D. Ill. 1999) and *Wiley v. Mason (In re Wiley)*, 224 B.R. 58 (Bankr. N.D. Ill. 1998).


\(^\text{17}\) *In re Williams*, 244 B.R.at 866.
The Contempt Cases. To get around the cases finding no private right of action to deal with discharge violations and other violations of sections 506 and 362, some debtor classes began to allege that creditors violated section 105 of the Bankruptcy Code and/or the statutory or inherent contempt powers of courts. Most courts held that contempt is a very individualized remedy that only the court issuing an order can address.\(^\text{18}\) For example, “The Court that issued the discharge order is in a better position to adjudicate the alleged violation, assess its gravity, and on the basis of that assessment formulate a proper remedy.”\(^\text{19}\) Also, “it is a well-established principle that only the court that issued an order or injunction has subject matter jurisdiction to hold in contempt a violator of that order or injunction.”\(^\text{20}\) Most cases also held that section 105 did not provide for a private cause of action.\(^\text{21}\) Another code section had to provide the right to sue. At best, a single judge’s cases might be able to be a class.

In the past few years, a bankruptcy judge in Texas has directly contradicted this theory and allowed section 105 to serve as a basis for a lawsuit in Cano v. GMAC Mortgage Corporation (In re Cano), 410 B.R. 506 (Bankr. S.D. Tex. 2009) and Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez), 396 B.R. 436 (Bankr. S.D. Tex. 2008). He found that section 105 of the Bankruptcy Code did provide a means of enforcing debtors’ rights against creditors. Section 105 states:

The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. No provisions of this title providing for the raising of any issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent abuse of process.

The court stated:

A prohibition against creating new substantive rights is not a direction to gut § 105 in a manner that precludes enforcement of substantive rights. Allowing debtors to seek damages for violations of Court orders confirming chapter 13 plans and the Bankruptcy Code provisions implemented by the court enforces the rights. This use of § 105 creates no rights. Rather, this use is a


\(^\text{19}\) Cox v. Zale Delaware, Inc., 239 F.3d 910, 916 (7th Cir. 2001).


remedy to enforce rights explicitly provided for in the Bankruptcy Code and the promised fresh start. Consistent with § 105, the remedy may take the form of a private cause of action.22

The Court further stated:

Any judgment would include any remedy available in a private cause of action. Moreover, § 105 does not require a court to use the least restrictive means to carry out the requirements of the bankruptcy code. Section 105(a) does not say that the Court’s authority is limited to orders or judgments necessary to carry out the Code. Rather, Congress explicitly added to the statute deferential, discretionary language with “or appropriate.”23

This view was upheld by the Fifth Circuit Court of Appeals when it affirmed a later Rodriguez opinion that certified a district-wide class of debtors.24 The case allowed very broad use of section 105 to enforce the Bankruptcy Code or court requirements on creditors.

The Constitutional Question cases. Several early cases attacked the class action issue from a different viewpoint, questioning the propriety of bankruptcy courts exercising nationwide jurisdiction on constitutional grounds. This view is explained in an article by Corinne Ball and Michele J. Meises entitled “Current Trends in Consumer Class Actions in the Bankruptcy Arena.” 56 Business Lawyer 1245 (2001). A representative case utilizing this view is Cline v. First Nationwide Mortgage Corporation (In re Cline), 282 B.R. 686 (Bankr. W.D. Wash. 2002).

The issue raised revolved around the referral of bankruptcy cases from the district court under 28 U.S.C. § 1334(a). “The integrity and finality of bankruptcy cases throughout the country could be threatened, as well, if bankruptcy courts in other jurisdictions could address alleged violations of the automatic stay in cases pending in other courts.”25 A bankruptcy court can only be referred cases from its own district.

These cases, according to Professor Bruce, lose sight of the fact that, in a class action lawsuit, there is never a referral of bankruptcy cases from other districts by a district court to a bankruptcy court for that district.26 What is referred to the bankruptcy court is the claims of a class action class. The jurisdiction in the district court over the claims is grounded in the district court’s jurisdiction over “civil proceedings ‘arising under title 11’” in section 1334(b). If the bankruptcy court does not have jurisdiction over all of the claims, as it does in other instances,

22 Rodriguez, 396 B.R.at 460.
23 Id. at 458.
26 Kara Bruce, The Debtor Class, 88 Tulane L. Rev. 21, 66-67 (November 2013).
then it will make a report and recommendation to the district court, or, recommend withdrawal of
the reference. This issue goes not to a constitutional argument, but rather the argument of the
breadth of a class. If there is danger that a broad class might result in an order contradicting
another court’s rulings, then those cases or districts can be excluded from the class.

Are there Stern v. Marshall implications to this issue? Stern held that bankruptcy
courts could not enter final judgments on compulsory counterclaims that are outside the
bankruptcy court’s core jurisdiction. If pled well, most bankruptcy class actions now plead only
bankruptcy law violations or bankruptcy rule or order violations. These are not nonbankruptcy
claims that can be dealt with in other courts. The issues are clearly federal ones that a district
court cannot let a state court hear. Therefore, class action bankruptcy cases must be dealt with
by the district court or bankruptcy court.

Can the district court refer such cases to the bankruptcy courts? As long as there is any
question the bankruptcy court can handle all matters up to trial by report and recommendation
and have the district court hold the final trial and enter all final judgments.

The Nationwide Jurisdiction cases. In 2000, the Noletto decision was rendered
holding that a bankruptcy court could have jurisdiction over a nationwide class of debtor-
plaintiffs under the proper circumstances. The court determined that the terms in 28 U.S.C. §
1334(b) were disjunctive and not conjunctive. The ‘arising under,’’ ‘arising in,’’ and “related to”
terms were joined by an “or,” not an “and.”

The court also considered the “home court” argument that the Williams case raised. If
the Williams court view of the limitations of section 1334(e) were correct, then the venue,
abstention and remand provisions of the Bankruptcy Code could not be implemented. For
example, how could a court abstain from hearing a case or matters within a case if all matters
pertaining to a bankruptcy case had to be dealt with by the home court?

Since the Noletto decision, most cases decided have found that debtor class actions are
appropriate. The most recent cases have, however, created district-wide and not nationwide
classes.

30 The Otero article states “it is not necessary to distinguish between” the three heads of jurisdiction because they
operate conjunctively to define the scope of jurisdiction.” Brian V. Otero, Jurisdictional Uncertainties Complicate
Debtor Class Actions In Bankruptcy Court, N. Y. L.J. (August 19, 2013) (quoting Wood v. Wood (In re Wood), 825
F.2d 90, 93 (5th Cir. 1987)).
(In re Krause), 414 B.R. 243 (Bankr. S.D. Ohio 2009); Rojas v. Citi Corp Trust Bank FSB (In re Rojas), 2009 WL
2009).
CREDITOR AND CLASS CLAIMS

JURISDICTION ISSUES

The issue of whether a class of creditors that files a class proof of claim is viable in a bankruptcy case is no less contentious than the issue of plaintiff debtor classes. There are competing opinions on their use of class claims.

Older cases clearly looked with disfavor on class claims. In fact, under the Bankruptcy Act of 1898, class claims were not allowed at all. Early cases under the Bankruptcy Code also ruled that such claims were not allowed. In In re Standard Metals Corporation, the court ruled that section 501(a) of the Bankruptcy Code and Rule 3001(b) of the Rules only allow claims to be filed by a “creditor,” except for section 501(a)’s exception for the filing of claims by an indenture trustee. A class is not a “creditor.”

In re Ephedra Products Liability Litigation, 329 B.R. 1 (S.D.N.Y. 2005) states that a line of cases in the Southern District of New York from 1989-1992 “make[s] clear that bankruptcy significantly changes the balance of factors to be considered in determining whether to allow a class action and that class certification may be ‘less desirable in bankruptcy than in ordinary civil litigation.’” Today, however, even most judges who do not approve class proofs of claim do not deny that they are allowed. Several cases have allowed class proofs of claim where the size of the class or the lack of sophistication of the class members required it. Other cases have held that class claims should be allowed, as consistent with the goals of bankruptcy “where the class has been certified pre-petition by a nonbankruptcy court, and the class members were not given actual or constructive notice of the bankruptcy case bar date.” One author in particular is an advocate of class claims. He has written several articles advocating for them that provide in depth insights.

The case of In re American Reserve Corporation, 840 F.2d 487 (7th Cir. 1988), was the seminal case of the modern view. American Reserve Corporation, whose only asset was the stock of Reserve Insurance, filed bankruptcy. A policy holder of Reserve Insurance filed a

35 817 F.2d 625 (10th Cir. 1987).
36 Ephedra Products, 329 B.R. 1, 5 (quoting In re American Reserve Corp., 840 F.2d 487, 493 (7th Cir. 1988)).
37 “Only a few circuits expressly allow class claims... Reid v. White Motor Corp., 886 F.2d 1462 (6th Cir. 1989), cert. denied, 494 U.S. 1080 (1990); In re American Reserve Corp., 840 F.2d 487 (7th Cir. 1988); Birting Fisheries v. Lane (In re Birting Fisheries, Inc.), 92 F.3d 939 (9th Cir. 1996); In re Charter Co., 876 F.2d 566 (11th Cir. 1989, cert. dismissed, 496 U.S. 944 (1990).” Michael Frishberg, et al., Allowance of Class Claims in Bankruptcy Starts with Discretion, 29 Am. Bankr. Inst. J. 26 (March 2010).
40 Leonard H. Gerson, Another Look at Treatment and Use of Class Proofs of Claim and Class Actions In Bankruptcy, 27 AM. BANKR. INST. J. 16 (Sept. 2008); Leonard H. Gerson, Class Proofs of Claim and Class Actions In Bankruptcy: Clarifying the Law, Improving the Process and Expanding the Use of Class Actions, 17 J. BANKR. L. & PRAC. 6, Art.2 (Sept. 2008).
proof of claim in American Reserve’s case on his behalf and on behalf of all members of a class of people who had purchased policies between 1977 and 1979. The bankruptcy judge held that the class claim was allowed but the district court reversed.

The Seventh Circuit held that a class claim was allowed under the Bankruptcy Code. Bankruptcy Rule 7023 can be applied in adversary proceedings and contested matters pursuant to Rule 9014. The court recognized that class actions have ‘procedural and substantive advantages” as well. Class actions allow many small suits to be consolidated in a single forum. They provide a mechanism to compensate counsel who would not otherwise bring such suits. They deter bad acts. Bankruptcy also consolidates many suits in a single forum, that, without class actions, cannot provide the same compensation to counsel.

The problems we have discussed could lead people to conclude that the Bankruptcy Rules should not authorize class actions. But they do, and these considerations do not show that it is always such a bad idea to allow class actions in bankruptcy that courts should deny these Rules their ordinary meaning. Suits for very small stakes may hold out little prospect of either compensation or deterrence; the bankruptcy court may exercise discretion to reject these, for both Rule 9014 and Rule 23 give the court substantial discretion to consider the benefits and costs of class litigation. Suits for larger stakes, based on sound legal theories, may hold out substantial prospects of compensation or deterrence without unduly complicating or delaying the case. Our benchmark—that bankruptcy courts exist to marshal assets and make awards justified by non-bankruptcy entitlements—calls for employing the class device in such cases.

After American Reserve, courts did not follow its lead, and, the majority of cases have refused to certify classes of claims. In Ephedra Products Liability Litigation, the district court refused to certify six consumer class claims in the Twin Laboratories, Inc. bankruptcy case and the court actually expunged the claims. The classes asserted losses in connection with the marketing and sale of ephedra supplements. When Twin Labs filed bankruptcy in 2003, it had sixty-five suits pending against it. It sold its assets in bankruptcy and confirmed a liquidating plan to distribute the assets in July 2005. With the third-party settlements with other defendants also completed, unsecured creditors were receiving about 49-65% of their claim amounts. The class action claims were not specifically presented to the Court until after creditors were already voting on Twin Laboratories’ plan. The court disallowed the claims for two reasons: (1) “the granting of class action claims at this late juncture would wholly disrupt and undercut the

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41 In re Am. Reserve Corp., 840 F.2d 487, 489 (7th Cir. 1988).
42 Id. at 492.
43 Ephedra Products, 329 B.R. 1.
expeditious execution of the Plan of Reorganization;” 44 (2) “[E]ven if the class claimants had made a prompt Rule 9014 motion or were excused from so doing, and even if the Court had applied Rule 23, the Court would still deny class certification and would still expunge the class claims for failure to meet the requirements of Rule 23 for class certification.” 45

The court concluded that, besides the fact that class claims were not warranted under Rule 7023, the class claims were “pushed” by the class claimants too late in the bankruptcy. If a class claim is to be allowed in a case, that decision needs to be made early so that the debtor and other creditors can deal with it. The court believed that a proposed class of claimants should make a motion under Bankruptcy Rule 9014 to have the class claim approved.

From the moment the Chapter 11 petition was filed, . . . the [] class claimants had the right to move for class certification by virtue of 11 U.S.C. § 1109(b), which provides: ‘A party in interest, including . . . a creditor, . . . may raise and may appear and be heard on any issue in a case under this chapter.’ They could have requested class certification even before they filed their proofs of claim. If a party in interest asks the bankruptcy court to certify a class, the class claim becomes a ‘contested matter’ at least as of the time that the request is opposed, and even before if opposition is known or reasonably foreseeable—in the words of the Advisory Committee, ‘whenever there is an actual dispute.’ Objection to the class proofs of claim was not a necessary prerequisite to a motion for class certification. 46

The court disagreed with language in an Eleventh Circuit Court of Appeals opinion, The Certified Class in the Charter Securities Litigation v. The Charter Company (In re The Charter Company), 47 that stated

[T]he first opportunity a claimant has to move under Bankruptcy Rule 9014, to request application of Bankruptcy Rule 7023, occurs when an objection is made to a proof of claim. Prior to that time, invocation of Rule 23 procedures would not be ripe, because there is neither an adversary proceeding nor a contested matter. 48

A recent case on class claims, In re Computer Learning Centers, Inc., 49 discusses several issues in regard to class claims. “Is filing a class proof of claim a matter of right?” 50 The court

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44 Id. at 4.
45 Id. at 8.
46 Id. at 7 (cites omitted).
47 876 F.2d 866 (11th Cir. 1989).
48 Id. at 874.
concludes that whether a class proof of claim is allowed to be filed is discretionary with the court. The Computer Learning Centers court looked at several factors to determine what to do: (1) What are the benefits and costs of class litigation? (2) Would a class proof of claim unduly complicate or delay the administration of the bankruptcy case? (3) Was the motion to apply Rule 7023 to the proof of claim timely? Other courts have considered several other factors. (1) Is there a need for a class claim? (2) What is the likelihood that each class member will receive only a de minimis distribution? (3) What is the potential prejudice to class members who timely filed an individual claim?  

The most recent case on class claims is In re Blockbuster Inc., 441 B.R. 239 (Bankr. S.D.N.Y. 2011). While refusing to allow a class claim in the case, the court acknowledged that the law did allow such claims. The court followed a two-step process in considering the issue. First, a court must determine whether to apply Rule 7023 to the claim. Second, if Rule 7023 is to be applied, a court must determine if the class meets the requirements of Rule 23(a) and (b).

While a bankruptcy court may, in its discretion, allow the filing of class proofs of claim, “class certification is often less desirable in bankruptcy than in ordinary litigation,” as class based claims have the potential to adversely affect the administration of a case by “adding layers of procedural and factual complexity . . . siphoning the Debtors’ resources and interfering with the orderly progression of the reorganization.” In re Bally Total Fitness of Greater New York, Inc. (In re Bally), 402 B.R. 616, 620-21 (Bankr. S.D.N.Y. 2009) . . . Therefore, in determining whether to permit the filing of a class claim, bankruptcy courts must determine not only that (1) the class claimant has moved to extend application of Rule 23; and (2) that the claims sought to be certified fulfill the requirements of Rule 23, but also (3) that the benefits to be gained from the use of a class claim device are consistent with goals of bankruptcy.

Leonard Gerson believes that use of factor six is inappropriate, or, is overused by courts in light of the U.S. Supreme Court’s decision in Pioneer Investment Services Co. v. Brunswick Associates, Ltd. The case dealt with a late-filed bankruptcy claim. In determining which factors should be considered by courts in weighing what constitutes excusable neglect, the court stated that the factors to be considered include “the danger of prejudice to the debtor, the length

\[50\] Id. at 85.
\[51\] Leonard H. Gerson, Another Look at Treatment and Use of Class Proofs of Claim and Class Actions In Bankruptcy, 27 AM. BANKR. INST. J. 16, 57 (Sept. 2008). “Allowing a class claim effectively extends the bar date for class members, but not for others, so “putative members of an uncertified class who received actual notice of the bar date did not file timely claims are the least favored candidates for class action treatment.” Michael Frishberg, Allowance of Class Claims in Bankruptcy Starts with Discretion, 29 Am. Bankr. Inst. J. 26 (March 2010).
of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.”

In In re Enron Corporation, the court stated

While Pioneer itself “gives us little guidance as to what prejudice actually is,” . . . we agree with the observation that the Court must have had more in mind than “a simple dollar-for-dollar depletion of assets otherwise available for timely filed claims.” . . . “[O]therwise, virtually all late filings would be condemned by this factor [because] they seek to share, with timely filed claims, in the bankrupt’s limited resources.”

However, the courts that use this factor assert that use of a class claim process extends the bar date for one class of creditors who had the same opportunity to file a timely proof of claim as any other claimant.

The Computer Learning case also considers the question of the procedure that should be followed in dealing with a class claim. The best course is as follows:

1. File a motion to allow the filing of a class proof of claim.
2. If the bar date is approaching, file a motion to extend the bar date as well.
3. If the motion to allow a class claim is granted, file a proof of claim.

The case also holds that there is no deadline for filing a Rule 7023 motion under Rule 9014. “This is not, however, license to procrastinate.” Of course, the problem with any delay in seeking permission to file a class claim is that the claimants run the risk of the court denying the motion because the case is too far along, or, because other creditors will be prejudiced.

OTHER ISSUES

There are other issues raised by class claims that should concern debtors and other creditors in cases. The biggest issue is that a class claim likely insures that more of the creditor class will ultimately opt in to the class than might otherwise go to the trouble of filing a claim. This, of course, limits the distribution to other creditors. A diligent class claim counsel, representing a number of claimants, may have more power than individual claimants at the negotiating table. He or she may be on a par with an official creditors’ committee counsel.

54 Id. at 395.
55 419 F.3d 115 (2nd Cir. 2005).
56 Id. at 130 (citations omitted).
57 Burgio v. Protected Vehicles, Inc. (In re Protected Vehicles, Inc.), 397 B.R. 339 (Bankr. D.S.C. 2008). In this case, the court approved a class claim, but allowed into the class only employees who filed timely proofs of claim. Otherwise, opening the class to all employees “would render proof of claim deadlines in bankruptcy cases meaningless.” Id. at 347.
59 Id. at 89.
Conversely, a class claim may be able to insure an accepting vote in a class of creditors. A class claim may be the leverage needed to obtain contributions from nondebtor parties as well as to resolve chapter 11 issues that a debtor alone might not be able to demand.

**CLASS SETTLEMENTS IN DEBTOR AND CREDITOR CLASSES**

Settlements in class action litigation raise many of the same issues raised in class actions in general. How can parties insure that any settlement made will “stick” and not be subject to a viable challenge?

Class actions by plaintiff-debtor classes, if a bankruptcy court has jurisdiction over the case, may be settled and settlements finalized by the bankruptcy court. However, as has been done in some cases, a bankruptcy court may do a report and recommendation to the district court or have the district court withdraw the reference of the case from the bankruptcy court and handle final resolution itself. The same standards would apply no matter which court handled the matter. Withdrawal of the matter should resolve the *Stern v. Marshall* jurisdical questions that could arise.

Class claims for a creditor class should be clearly within the province of the bankruptcy court, so no jurisdictional impediments should arise in a bankruptcy judge handling the settlement of a class claim. Again, however, if the court or parties questioned jurisdiction, the reference could be withdrawn or a report and recommendation submitted.

Class claims have been the subject of appeals. The issues raised were not jurisdiction. The issue was whether the bankruptcy and/or district court had properly allowed a class under Rule 23(b)(1)(B). Rule 23(b)(1)(B) is the part of the rule that authorizes “limited fund” classes. In asbestos cases, the question raised was whether a proposed settlement with the debtor and two insurers at a capped amount was proper. The U.S. Supreme Court held that the district court had insufficient evidence that the proposed settlement amount represented all of the assets available. It also questioned the method of allocating the assets which was not being done on a pro rata basis.

The *Johns-Manville Corporation* case discussed the issue of the breadth of a bankruptcy court’s power to approve a settlement of insurance coverage to cover a class of asbestosis victims. The bankruptcy court had approved a settlement with insurance that provided that, in exchange for cash payments, the insurers would be released from all liability relating to the policies. A “channeling injunction” was issued that required all asbestosis claims against Manville be dealt with by a trust established with the settlement monies. The settlement also barred claims against the settling insurers arising out of or related to the insurance policies termed “Policy Claims.”

62 600 F.3d 135 (2nd Cir. 2010).
Chubb Indemnity Insurance Corporation was not a settling insurer and was not given notice of the settlement although publication notice was given. Long after the 1986 plan confirmation and orders were entered, Chubb was sued by asbestosis claimants for alleged injuries not caused by Manville. Chubb was sued by states for failure to disclose asbestosis information. Some of the insurers settled these claims, but not Chubb. Chubb wanted to pursue its right to contribution and indemnity against some of the Manville insurers who had settled. The settling insurers asserted that the Manville settlement orders and confirmation shielded them from liability.

The Court held that the Manville orders did not bind Chubb.

Chubb . . . does not seek to collect from the proceeds of the policies that [the settling insurers] issued to Manville. Rather, Chubb seeks to preserve its ability to collect from Travelers itself—through state law claims for contribution and indemnity. . .

A bankruptcy court only has jurisdiction to enjoin non-debtor claims that affect the bankruptcy estate res.

Thus, in establishing a fund to pay class claims, any settlement must be limited by its effect on the debtor’s property, absent agreement by the non-debtor parties to bind themselves to a further agreement. Of course, the class claimants must also agree.

A settlement of a class action requires a court to examine the settlement under Federal Rule of Bankruptcy Procedure 9019. Cases have considered many factors. The fairness of the settlement must be gauged. The factors considered are

(1) The complexity, expense and likely duration of the litigation;
(2) The reaction of the class to the settlement;
(3) The stage of the proceedings and the amount of discovery completed;
(4) The risks of establishing liability;
(5) The risks of establishing damages;
(6) The risks of maintaining the class through the trial;
(7) The ability of the defendants to withstand a greater judgment;
(8) The range of reasonableness of the settlement fund in light of the best possible recovery; and
(9) The range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

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63 Id. at 152.
64 Id.
CLASS ACTION REQUIREMENTS

To prove that a class action is appropriate under Federal Rule of Civil Procedure 23, four elements must be proven.

(1) The class is so numerous that joinder of all members is impracticable (numerosity);
(2) There are questions of law or fact common to the class (commonality);
(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and
(4) The representative parties will fairly and adequately protect the interests of the class (adequacy of representation). 66

If a class meets these requirements, a class must still meet the requirements of Rule 23(b)(1), (2), or (3) as well for certification. There have been, as seen above, numerous instances where courts found debtor or creditor classes were appropriate but the courts dismissed the certification actions because the claims did not meet the requirements of Rule 23 (a) or (b). These cases include:

Gilliland v. Capital One Bank (In re Gilliland), 474 B.R. 482 (Bankr. N.D.Miss. 2012). The court refused to certify a nationwide or district-wide class of debtors. Gilliland asserted that Capital One Bank filed proofs of claim in cases for debts already discharged in prior bankruptcy cases. The debtor sought to pursue a Rule 23(b)(2) class, seeking injunctive relief and sanctions. The court held that the monetary relief sought would not be “capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member’s circumstances.” Id. at p. 494 (citing In re Wilborn, 609 F.3d 748 (5th Cir. 2010). The relief sought also overlapped relief already granted in a class action case in Massachusetts.

In re TWL Corporation, 712 F.3d 886 (5th Cir. 2013). The Fifth Circuit reversed a bankruptcy court denial of certification of a creditor class due to the bankruptcy court’s failure to sufficiently articulate grounds for denial. The court stated:

Rule 23 does not necessarily apply, however, to a class proof of claim. First, our circuit has not addressed whether a class proof of claim is permissible. Second, Rule 9014, which governs contested matters, provides that only certain procedural rules automatically apply when an objection is lodged to a proof of claim . . . Rule 7023 is not designated as one of these automatically applicable rules, but Rule 9014 does state that “[t]he court may at any stage in a

particular matter direct that one or more of the other rules in Part VII shall apply.\textsuperscript{67}

A bankruptcy court has discretion to determine whether to apply Rule 7023 to a class claim due to Rule 9014 and due to the fact that an objection to a proof of claim is a contested matter. In an adversary proceeding, Rule 7023 automatically applies. Therefore, for class claims, courts must articulate a reason to apply Rule 23. The case discussed the requirements of Rule 23(a)(1), numerosity, and Rule 23(b)(3), superiority, in detail.

\textit{Gentry v. Siegel}, 668 F.3d 83 (4th Cir. 2012). The Fourth Circuit upheld a bankruptcy court’s denial of treatment of certain creditor proofs of claim as class claims. The creditors had not filed any motions under Rule 9014 to make Rule 7023 applicable to their claims until one year after the bar date. The court also found that a class claim would result in a process inferior to the claims resolution process of the court and would complicate administration of the estate.

\textit{Schuman v. The Connaught Group, Ltd. (In re The Connaught Group, Ltd.)}, 491 B.R 88 (Bankr. S.D.N.Y. 2013). A bankruptcy court certified a class of creditor/employee claims. An employee filed an adversary proceeding (not a proof of claim) five days after the commencement of the bankruptcy case and moved to certify the class. Then he filed a proof of claim. The court discussed this unusual procedure, but allowed it, stating “[i]t would be anomalous to certify the class in the adversary proceeding but refuse to allow the representative to file a class proof of claim.”\textsuperscript{68} The court held that the class met the requirements of Rule 23(a) and also Rule 23(b)(3)’s requirements of predominance and superiority.

The court addressed the issue of prejudice to other creditors as well.

[The debtor asserts that] \textit{[e]xtending the bar date through class certification will allow creditors that did not file claims to receive a distribution and significantly increase the amount of administrative and priority debt.}\textsuperscript{69}

* * * * *

[\textit{I}f the court denies a motion to certify the class, it should set a reasonable bar date to allow the members of the putative class to file individual claims.}\textsuperscript{70}

\textit{Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)}, 432 B.R. 671 (Bankr. S.D. Tex. 2010). The court held that the class met the requirements of Rule 23(a) with an extensive analysis of the four requirements. The court found that the class met the requirements

\textsuperscript{67} \textit{In re TWL Corp.}, 713 F.3d 886, 892 (5th Cir. 2013).
\textsuperscript{69} \textit{Id.} at 96-97 (cites omitted).
\textsuperscript{70} \textit{Id.} at 97.
for Rule 23(b)(2) injunctive relief as well, but denied class certification for disgorgement claims under Rule 23(b)(2) and (3). Again, the court extensively discusses the elements of Rule 23 (b)(2) and (3) claims.

CONCLUSION

Class litigation of any kind in bankruptcy cases is very rare and the case law is difficult to negotiate. However, under the proper circumstances, class litigation can be very rewarding and useful.