

Vindicating Bankruptcy Rights

Kara J. Bruce

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Articles

VINDICATING BANKRUPTCY RIGHTS

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Hundreds of thousands of consumer debtors pass through the bankruptcy process each year.¹ Although these cases are legally complex, the bankruptcy system handles them in a routinized manner.² This streamlined process allows consumer debtors to obtain a discharge of their debts at relatively low financial cost,³ yet the system leaves open avenues for abuse. Repeat players can take advantage of the bankruptcy process—its complexity, the limited savvy of many debtors, and the likelihood that small-scale misbehavior will go unnoticed or unaddressed—to extract undue benefits.⁴

In November 2014, for example, national news media reported allegations that large national lenders, including JPMorgan Chase, Bank of Amer-

1. See NATIONAL BANKRUPTCY RESEARCH CENTER, <https://www.nbkrc.com> (last visited Aug. 24, 2015) (aggregating bankruptcy filing data); AMERICAN BANKRUPTCY INSTITUTE, *Bankruptcy Statistics*, <http://www.abi.org/newsroom/bankruptcy-statistics> (last visited Aug. 24, 2015).

2. See, e.g., HENRY J. SOMMER ET AL., CONSUMER BANKRUPTCY LAW AND PRACTICE 81 (John Rao ed., 8th ed. 2006) (“Once it has been decided that bankruptcy is appropriate in a particular case, most of the remaining work is relatively routine. A good deal of it involves preparation of the necessary papers for the initial filing . . .”). But see Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 121–22 (2012) (noting that, especially after enactment of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act, “there are ever fewer seemingly simple cases”).

3. William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 406 (1994) (“Routine, uncontested cases allow [consumer bankruptcy attorneys] to charge low fees, which in turn makes it easier to attract a sufficiently large clientele to justify investment in routinized procedures.”).

4. See generally Kara Bruce, *The Debtor Class*, 88 TUL. L. REV. 21, 25–42 (2013) (describing the gap between bankruptcy’s requirements and creditor action in consumer bankruptcy cases).

ica, and Citigroup, refused to remove debt that had been discharged in bankruptcy from borrowers' credit reports.⁵ This tactic is believed to pressure borrowers into repaying debts they no longer owe.⁶ Six years earlier, Katherine Porter brought to light pervasive problems in proofs of claim filed by mortgage lenders and servicers.⁷ Her study of 1744 chapter 13 bankruptcy cases revealed rampant errors in bankruptcy mortgage claims, most of which negatively affected debtors or competing creditors, and nearly all of which passed through the bankruptcy process unchecked.⁸ In the late 1990s, the Sears Corporation faced criminal liability and the largest fine ever assessed for bankruptcy fraud, based on a widespread program to collect debt using unenforceable reaffirmation agreements.⁹ This type of behavior has affected thousands of debtors in bankruptcy.¹⁰ It not only violates federal law and bankruptcy court orders, but also undermines the fundamental goals of consumer bankruptcy: treating creditors fairly and providing debtors a fresh financial start.¹¹

This Article is part of the first comprehensive study examining the use of class action adversary proceedings¹² to curb systematic overreaching by creditors in bankruptcy.¹³ Class actions have long been promoted as a solution to the problem of small value consumer claims, as they permit litigants to bring claims that are uneconomical to litigate on an individual basis.¹⁴ These actions not only compensate individuals for harm suffered, but also

5. Jessica Silver-Greenberg, *Debts Canceled by Bankruptcy Still Mar Consumer Credit Scores*, N.Y. TIMES, (Nov. 12, 2014), <http://dealbook.nytimes.com/2014/11/12/debts-canceled-by-bankruptcy-still-mar-consumer-credit-scores/>. More recently, *The New York Times* reported that Bank of America has sought credit under a settlement with the Justice Department for forgiving mortgage loans that were no longer owed because they had already been eliminated by the bankruptcy discharge. See Gretchen Morgenson, *Bank of America's Relief for Mortgage Borrowers Is Questioned*, N.Y. TIMES, (May 10, 2015), http://www.nytimes.com/2015/05/10/business/bank-of-americas-relief-for-mortgage-borrowers-is-questioned.html?_r=0.

6. Silver-Greenberg, *supra* note 5.

7. Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121 (2008).

8. See *id.* at 144–63.

9. See Bruce, *supra* note 4, at 28–29 (describing the Sears Corporation's reaffirmation practices and the criminal liability and penalties that resulted); Barnaby J. Feder, *The Harder Side of Sears*, N.Y. TIMES (July 20, 1997), <http://www.nytimes.com/1997/07/20/business/the-harder-side-of-sears.html> (same).

10. See Bruce, *supra* note 4, at 25–30 (collecting examples).

11. See *id.* at 31–32 (discussing consumer bankruptcy's goals); Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1047 (1987) (describing the fresh-start policy of consumer bankruptcy).

12. Adversary proceedings are civil actions brought in connection with a bankruptcy case. See FED. R. BANKR. P. 7001; 10-7001 COLLIER ON BANKRUPTCY 7001.01. I refer to class action adversary proceedings brought by debtor classes as “debtor class actions” throughout this Article.

13. The first article in this series, *The Debtor Class*, considered threshold jurisdictional concerns that have troubled courts and perhaps deterred debtors from pursuing aggregate claims in bankruptcy. See Bruce, *supra* note 4.

14. *Id.* at 40 (collecting authority).

force defendants to internalize some of the costs of their misconduct.¹⁵ In this way, class actions can serve as a valuable complement to bankruptcy's broader regulatory efforts.¹⁶ Class actions also increase transparency, preserve judicial resources, and encourage uniformity and consistency in the application of law.¹⁷ Moreover, bankruptcy courts are well-suited to handle debtor class actions, based on their institutional capacity for handling aggregate claims and addressing consumer protection's goals.¹⁸

Nevertheless, the class action has steadily lost traction in the civil justice system. In a series of recent cases, the Supreme Court has bolstered businesses' ability to limit their exposure to class litigation through class action waivers contained in consumer arbitration agreements.¹⁹ In particular, the Supreme Court has rejected two equitable challenges to class arbitration waivers,²⁰ indicating that the strong federal policies underlying the Federal Arbitration Act ("FAA") "trump[] any interest in ensuring the prosecution of low-value claims."²¹ In another series of cases, the Supreme Court and lower federal courts have heightened the requirements of class certification, limiting the window of cases that can be brought on a class-wide basis.²²

This Article clarifies a path for debtor class actions in the modern, anti-class action framework. First, no matter how powerful class arbitration waivers may be outside of bankruptcy, courts have broad discretion to prohibit bankruptcy claims from being resolved in arbitration if arbitration would create an inherent conflict with bankruptcy law or necessarily jeop-

15. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("A class action . . . aggregat[es] the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997))). Absent such aggregation, "defendant firms are in a position to spread the litigation costs over the entire class of . . . claims, while plaintiffs . . . can not . . ." David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 564 (1987); see also *In re Am. Reserve Corp.*, 840 F.2d 487, 489 (7th Cir. 1988) ("[T]he class action provides compensation that cannot be achieved in any other way; although the costs of litigation may consume much of the benefit, the device still serves a deterrent function by ensuring that wrongdoers bear the costs of their activities.").

16. See Bruce, *supra* note 4, at 40 (discussing the regulatory benefits of private litigation). For a brief discussion and response to predominant critiques of class actions, see *id.* at 40–42.

17. See *id.*

18. See *infra* text accompanying notes 47–50.

19. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309–10 (2013) (rejecting "effective vindication of statutory rights" challenge to class arbitration waivers); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding unconscionability challenge to class arbitration waiver was preempted by the Federal Arbitration Act ("FAA")); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010) (holding arbitration clause that was silent on the issue of class arbitration could not be construed to permit class arbitration).

20. I use the term "class arbitration waivers" to describe any waivers of class action rights that appear in an arbitration agreement.

21. *Italian Colors Rest.*, 133 S. Ct. at 2312 n.5.

22. See *infra* Part IV.

ardize the objectives of the Bankruptcy Code.²³ As a descriptive matter, arbitration of many debtor class action proceedings will likely present an inherent conflict with the Bankruptcy Code.²⁴ As a normative matter, courts should consider class-killing arbitration clauses as probative evidence of an inherent conflict whenever the clause would preclude debtor classes from effectively vindicating their bankruptcy rights.²⁵ Second, although the requirements for class certification are rigorous, some of the most troubling debtor class action cases are prime candidates for certification.²⁶

To be sure, the window of debtor class action cases that can survive these modern challenges is narrow. Nevertheless, in light of the regulatory benefits of class actions, debtors' attorneys, case trustees, and courts should embrace debtor classes to the extent permissible under applicable law. In addition, scholars and lawmakers should consider ways to encourage greater levels of compliance with applicable bankruptcy law and procedure, whether by reviving aspects of the class device or advancing non-class methods of private litigation.²⁷

Part II begins by describing debtor class actions and the challenges they face. It then focuses on the rise of class action waivers in consumer arbitration agreements, the Supreme Court's embrace of these waivers, and the impact this case law has on small value claims.²⁸ Part III places these developments in the context of a debtor class action proceeding, arguing that courts can, through application of the "inherent conflict" test, preserve debtor class actions in the face of a class arbitration waiver.²⁹ In Part IV, this Article argues that modern class certification standards do not completely foreclose debtor class action relief.³⁰ This Article concludes by observing that class actions can serve as a valuable component of consumer bankruptcy's regulatory structure, and looks forward to additional reforms to encourage compliance with consumer bankruptcy law.³¹

23. *See infra* Part III.B.

24. *See infra* Part III.C.

25. *See infra* Part III.D.

26. *See infra* Part IV.

27. A subsequent article discusses additional options to address lender noncompliance in bankruptcy. *See* Kara Bruce, *Closing Consumer Bankruptcy's Enforcement Gap*, forthcoming (2016).

28. *See infra* Part II.

29. *See infra* Part III.A–D.

30. *See infra* Part IV.

31. *See infra* Part V.

I. DEBTOR CLASS ACTIONS AND THE CHALLENGES THEY FACE

A. *Debtor Class Actions*

This series of articles seeks to address a rift between the norms of bankruptcy law and the realities of bankruptcy practice. As noted above, large institutional lenders—some with thousands of borrowers in bankruptcy—may routinely fail to comply with consumer bankruptcy law and procedure.³² The alarming prevalence of this behavior came to the fore in the wake of the Great Recession, along with the “robo-signing” scandal that exposed similar misconduct in mortgage foreclosure cases.³³ Yet high profile examples preceding and following the foreclosure crisis indicate that this problem is not limited to mortgage lenders and servicers and likewise has not been resolved.³⁴

Some cases of lender noncompliance in bankruptcy arise from understaffing, institutional sloppiness, or the use of bookkeeping software that is not designed to accommodate the bankruptcy process.³⁵ Others suggest a more calculated departure from the requirements of bankruptcy law and procedure.³⁶ Whatever their origin, the actions or inactions of creditors in bankruptcy can disadvantage competing claimants to the debtor’s limited pool of assets, or may jeopardize the debtor’s pursuit of a fresh start.³⁷ Moreover, although some of these issues have been highly publicized and have resulted in enforcement³⁸ and law reform³⁹ efforts, lender noncompliance persists.⁴⁰

32. See *supra* notes 5–9 and accompanying text; Bruce, *supra* note 4, at 25–30 (collecting additional examples).

33. See Bruce, *supra* note 4, at 25–28 (describing pervasive under-compliance with bankruptcy and foreclosure law by mortgage lenders and servicers).

34. See *supra* note 5 (highlighting recent examples); Bruce, *supra* note 4, at 28–30 (highlighting examples not related to the Great Recession).

35. See, e.g., Bruce, *supra* note 4, at 28; Alan M. White, *Losing the Paper—Mortgage Assignments, Note Transfers and Consumer Protection*, 24 LOY. CONSUMER L. REV. 468, 469–70 (2012) (describing mortgage lenders’ documentation shortcuts, such as “assembly-line signing and notarizing of affidavits for foreclosure cases, mortgage assignments, note allonges and related documents” known generally as “robo-signing”).

36. See, e.g., *In re Stewart*, 391 B.R. 327, 355–57 (Bankr. E.D. La. 2008) (sanctioning mortgage servicer for inflating proofs of claim with fees for excessive drive-by property inspections, inspections on property other than the debtor’s, and two broker price opinions that were allegedly conducted when the property was inaccessible to civilians in the wake of Hurricane Katrina).

37. See Bruce, *supra* note 4, at 34.

38. See *id.* at 35 (discussing efforts by the U.S. Trustee Program, federal and state agencies, and individual bankruptcy judges to address such abuse).

39. See, e.g., FED. R. BANKR. P. 3001 (amending the proof-of-claim filing rules to require, among other things, an itemization of interest, fees, expenses, and other charges claimed, as well as the amount necessary to cure a default and, if the lien is on the debtor’s principal residence, provide an escrow statement as of the petition date); *id.* at 3002.1 (requiring holders of mortgage claims to provide notice before a change in the amount of mortgage payments, as well as notices

In the first article in this series, *The Debtor Class*, I explored the use of class action adversary proceedings as a complement to bankruptcy's regulatory structure and an added check on lender conduct.⁴¹ As other scholars have observed, the evidence of sloppiness and overreaching in the bankruptcy arena suggests that large consumer lenders may lack sufficient incentives to comply with bankruptcy law and procedure in consumer bankruptcy cases.⁴² Consumer bankruptcy features numerous layers of protection from abuse—including the presence of a case trustee, the oversight of a United States Trustee Program, and the bankruptcy courts' statutory and inherent powers to address wrongdoing⁴³—but each of these entities is poorly positioned to discover small but pervasive incidences of lender misconduct.⁴⁴ Moreover, even if a debtor or her attorney discovers the abuse, it might not be economically feasible to challenge the practices.⁴⁵ A robust threat of class actions may provide a deterrent stopgap at a lower institutional cost, fill in the gaps that remain from existing enforcement efforts, and deter future wrongful conduct.⁴⁶

In many ways, bankruptcy is an ideal forum for consumer class actions to flourish. First, the bankruptcy system has a long history of furthering the goals of consumer financial protection. William Whitford has argued that

of the fees, expenses, or charges incurred post-petition that the claimant asserts are recoverable from the debtor).

40. To date, the national mortgage settlement is the most significant enforcement effort of bankruptcy misconduct. *See About the Settlement*, JOINT STATE-FEDERAL NATIONAL MORTGAGE SETTLEMENTS, <http://www.nationalmortgagesettlement.com/about> (last visited Aug. 24, 2015). Yet it has become increasingly clear that violations of bankruptcy law remain, and the mortgage lenders and servicers subject to the settlement have not followed it to the letter. *See* Danielle Douglas, *Some Big Banks Are Still Violating the National Mortgage Settlement, Report Says*, WASH. POST (Dec. 4, 2013), http://www.washingtonpost.com/business/economy/some-big-banks-are-still-violating-the-national-mortgage-settlement-report-says/2013/12/04/02b4091a-5d1b-11e3-95c2-13623eb2b0e1_story.html; Bruce, *supra* note 4, at 35 (cataloguing early evidence of non-compliance with new Bankruptcy Rules). Moreover, reports of lenders' failure to clean credit reports and other foreclosure practices suggest that these problems will continue. *See* Silver-Greenberg, *supra* note 5; Gretchen Morgenson, *Borrowers, Beware: The Robo-Signers Aren't Finished Yet*, N.Y. TIMES, (Nov. 15, 2014), <http://nyti.ms/1uwZU34>.

41. Bruce, *supra* note 4, at 34–42.

42. *See id.* at 23; *see also* Porter, *supra* note 7, at 171 (“[T]he current system suggests that creditors can operate with the knowledge that their claims will not be reviewed or challenged.”).

43. Law v. Siegel, 134 S. Ct. 1188, 1194 (2014) (discussing bankruptcy courts' statutory and inherent powers).

44. *See* Bruce, *supra* note 4, at 37 (highlighting the limitations of many current methods to combat lender misconduct); Anne E. Wells, *Not in My House: Combating Unethical Mortgage Lender Practices and Related Attorney Misconduct in the Bankruptcy Courts*, 32 CAL. BANKR. J. 483, 509 (2013) (same).

45. *See* Bruce, *supra* note 4, at 37; *see also* *In re Henry*, 311 B.R. 813, 816 (Bankr. W.D. Wash. 2004) (“[B]ecause the cost of pursuing an objection frequently exceeds the distribution the claim will receive under the plan, [debtors] are forced by the economics of the process just to pay the claim even if they have valid defenses to it.”).

46. Bruce, *supra* note 4, at 24. Class actions, of course, are not without their limitations. My previous article addresses some of the predominant criticisms of the class action. *See id.* at 41–42.

consumer bankruptcy has accomplished more than other reforms—small claims courts and low-cost legal assistance, for example—to help consumers obtain relief with respect to disputed debts.⁴⁷ Indeed, because of bankruptcy’s relative affordability and effectiveness, Whitford dubbed consumer bankruptcy “a primary vehicle for delivering the elusive goal of consumer justice.”⁴⁸ Relatedly, bankruptcy’s layers of oversight, while insufficient to target all bankruptcy abuse, have been fairly effective at catching egregious lender misconduct. For example, the United States Trustee Program’s investigation of bankruptcy misconduct played a central role in bringing to light the abuses of mortgage lenders and servicers during the worst of the foreclosure crisis.⁴⁹ Second, in addition to consumer bankruptcy’s role in furthering consumer protection, bankruptcy courts have the procedural capacity to handle aggregate actions. Troy McKenzie recently referred to bankruptcy law as “the oldest, most enduring, and most far-reaching form of procedural aggregation in use in the United States.”⁵⁰

Although debtor classes have attempted to challenge lender misconduct at various points in the last thirty years,⁵¹ the debtor class action remains a relatively obscure phenomenon. The following sections detail two primary hurdles that class action adversary proceedings have faced: bank-

47. Whitford, *supra* note 3, at 398.

48. *Id.* at 401.

49. See Clifford J. White III & Ramona D. Elliott, *\$25 Billion Mortgage Servicer Settlement—Implications for the United States Trustee Program and the Bankruptcy System*, http://www.justice.gov/sites/default/files/ust/legacy/2012/04/30/abi_201203.pdf (describing the role of the U.S. Trustee Program in achieving a \$25 billion dollar settlement with major mortgage lenders and servicers).

50. Troy A. McKenzie, *Bankruptcy and the Future of Aggregate Litigation: The Past as Prologue?*, 90 WASH. U. L. REV. 839, 842 (2013).

51. Retail lenders were an early target of debtor class action cases, once evidence came to light that many retailers were disregarding bankruptcy law governing the reaffirmation of debt in consumer bankruptcy cases. See Bruce, *supra* note 4, at 29 (describing this scandal); Conley v. Sears, Roebuck & Co., 222 B.R. 181, 182 (D. Mass. 1998) (describing Sears’ reaffirmation practices); Feder, *supra* note 9 (noting that “May Department Stores and Montgomery Ward have . . . been hit with class action lawsuits over their reaffirmation practices”); *In re Singleton*, 284 B.R. 322, 323–24 (D.R.I. 2002) (outlining plaintiffs’ claims against Wells Fargo based on the collection under an invalid reaffirmation agreement); *Bessette v. Avco Fin. Servs., Inc.*, 279 B.R. 442, 445 (D.R.I. 2002) (same with respect to Avco Financial Services); *In re Aiello*, 231 B.R. 693, 699 (Bankr. N.D. Ill. 1999) (noting that debtor alleged that lender had a practice of sending intimidating communications to debtors to coerce them to sign reaffirmation agreements in violation of the automatic stay), *aff’d sub nom. Aiello v. Providian Fin. Corp.*, 257 B.R. 245 (N.D. Ill. 2000), *aff’d*, 239 F.3d 876 (7th Cir. 2001). More recently, widespread noncompliance by mortgage lenders and servicers has resulted in a number of new class action proceedings in the bankruptcy arena. See, e.g., *In re Brannan*, 485 B.R. 443, 448 (Bankr. S.D. Ala. 2013) (alleging robo-signing violations); *In re Rojas*, No. 07–70058, 2009 WL 2496807 at *1 (Bankr. S.D. Tex. Aug. 12, 2009) (alleging mortgage lenders filed false proofs of claim); *In re Rodriguez*, 396 B.R. 436, 439 (Bankr. S.D. Tex. 2008) (alleging mortgage lenders failed to properly apply plan payment and assessed post-petition charges in violation of bankruptcy rules); *In re Cano*, 410 B.R. 506, 518 (Bankr. S.D. Tex. 2009) (same); *In re Alcantara*, 389 B.R. 270, 273 (Bankr. M.D. Fla. 2008) (alleging lender sent misleading mortgage statements in violation of the automatic stay).

ruptcy courts' subject matter jurisdiction of a class of debtors and motions to compel arbitration of the proceedings.⁵²

B. Jurisdictional Challenges to Debtor Class Actions

The very concept of a debtor class action may seem, at first blush, to be fundamentally at odds with bankruptcy's debtor-focused jurisdictional scheme.⁵³ Indeed, many courts have balked at asserting jurisdiction over a nationwide class of debtors, based on bankruptcy's policy of centralizing all claims of or against a single debtor in bankruptcy court.⁵⁴ In *The Debtor Class*, I explain how many such initial reactions to debtor class actions are misplaced.⁵⁵ While a strong policy of centralization indeed forms the heart of bankruptcy jurisdiction, adversary proceedings are treated with a greater amount of flexibility. In contrast to federal courts' exclusive jurisdiction over bankruptcy cases and property of the estate,⁵⁶ jurisdiction over proceedings that arise in bankruptcy is *nonexclusive*⁵⁷ and subject to transfer to state or federal courts in a variety of circumstances.⁵⁸

Courts that have rejected debtor class actions based on jurisdictional concerns fall largely into three categories. The first category reads into bankruptcy's jurisdictional framework a requirement that an adversary proceeding bear some relationship or "nexus" to the representative debtor's case.⁵⁹ The second category focuses on bankruptcy courts' exclusive juris-

52. A third challenge, related to the second, is the difficulty of certifying a debtor class. Part IV discusses this issue.

53. See Bruce, *supra* note 4, at 43.

54. *Id.*

55. See Bruce, *supra* note 4, at 50–67.

56. 28 U.S.C. § 1334(a), (e) (2012).

57. *Id.* at § 1334(b).

58. See Richard H. Gibson, *Home Court, Outpost Court: Reconciling Bankruptcy Case Control with Venue Flexibility in Proceedings*, 62 AM. BANKR. L.J. 37, 38 (1988) ("[Bankruptcy] proceedings are discrete pieces of litigation which can involve parties, issues and fact patterns having little to do with the other aspects of the case and little connection with the home court. Recognizing this, Congress provided that venue over proceedings always is transferable to 'outpost courts.'" (footnotes omitted)); see also Bruce, *supra* note 4, at 59–60 (discussing bankruptcy's abstention and venue rules, which define circumstances in which matters may, or must, be heard in other courts).

59. See *Knox v. Sunstar Acceptance Corp. (In re Knox)*, 237 B.R. 687, 693 (Bankr. N.D. Ill. 1999) ("[C]lass claims for monetary recovery could only benefit the class members, but could not affect the amount of property available for distribution in Knox's case and thus could not affect allocation of property among Knox's creditors."); *Lenior v. GE Capital Corp. (In re Lenior)*, 231 B.R. 662, 668 (Bankr. N.D. Ill. 1999) ("This Court is not a forum for recovery of money that would not be part of the bankruptcy estate or of this Debtor."); *Simmons v. Ford Motor Credit Co. (In re Simmons)*, 237 B.R. 672, 676 (Bankr. N.D. Ill. 1999) ("The only case before this court is debtor's chapter 13 proceeding. The class claims will not affect the amount of property available for distribution in debtor's case, nor will they affect the allocation of property among debtor's creditors. As a result, 'related to' jurisdiction does not support jurisdiction over the class claims alleged herein."); *Wiley v. Mason (In re Wiley)*, 224 B.R. 58, 64 (Bankr. N.D. Ill. 1998) (same);

diction over property of the debtor's estate,⁶⁰ finding this language requires the "home court" to handle any proceedings that arise in the debtor's case.⁶¹ The third category concerns cases in which the court must exercise its contempt power, typically to punish violations of the automatic stay or discharge injunction.⁶² Under those circumstances, some courts conclude that the dispute at issue must be resolved by the court that issued the relevant injunction.⁶³

The Debtor Class considers and rejects each of these challenges to class action adversary proceedings. It concludes that the first category misanalyzes relevant law.⁶⁴ While the second and third categories of cases reach more plausible conclusions under the bankruptcy jurisdictional statutes, either the analysis is problematic, or it is equally or more compelling to interpret bankruptcy's jurisdictional provision to permit jurisdiction over a nationwide debtor class.⁶⁵ In sum, *The Debtor Class* finds few meaning-

see also *Cline v. First Nationwide Mortg. Corp. (In re Cline)*, 282 B.R. 686, 692–94 (W.D. Wash. 2002) (invoking aspects of the early "nexus" cases).

60. See 28 U.S.C. § 1334(e).

61. See, e.g., *Williams v. Sears, Roebuck & Co. (In re Williams)*, 244 B.R. 858, 866 (S.D. Ga. 2000) ("If the claims raised by Plaintiff on behalf of the putative members of the debtor class are 'property' of each individual debtor's bankruptcy estate, § 1334(e) prohibits this Court—or any court other than '[t]he district court in which [the] case under title 11 is commenced or pending' for that matter—from exercising jurisdiction over that property." (alterations in original)), *aff'd*, 34 F. App'x 967 (11th Cir. 2002); see also *Guetling v. Household Fin. Servs., Inc.*, 312 B.R. 699, 704 (M.D. Fla. 2004) (same); *In re Cline*, 282 B.R. at 695–96 (same).

62. For a description of these cases, see Bruce, *supra* note 4, at 62–64.

63. See, e.g., *In re Death Row Records, Inc.*, No. 06-11205, 2012 WL 952292, at *12 (B.A.P. 9th Cir. Mar. 21, 2012) (finding that the bankruptcy court had jurisdiction over a nationwide class for claims *other than* claims punishable by contempt); *Montano v. First Light Fed. Credit Union (In re Montano)*, Nos. 7-04-17866 SL, 7-1026 S, 2007 WL 2688606, at *2 (Bankr. D.N.M. Sept. 10, 2007) ("As a general rule, only the court that issues the disobeyed order or injunction has jurisdiction to hold a violator in contempt."); *Guetling*, 312 B.R. at 704 ("To the extent those alleged out-of-district class members have claims arising from their bankruptcy proceedings in other districts, those districts are the proper locations to bring those claims or to potentially pursue actions for contempt of any court orders."); *Barrett v. Avco Fin. Servs. Mgmt. Co.*, 292 B.R. 1, 8 (D. Mass. 2003) ("The court believes that it lacks jurisdiction over the claims of putative class members whose bankruptcies were discharged outside the District of Massachusetts."); *Singleton v. Wells Fargo Bank (In re Singleton)*, 284 B.R. 322, 325 (D.R.I. 2002) ("Subject matter jurisdiction in this case is determined by the . . . legal principle that only persons subject to a court's authority may be found in contempt by that court."); *Bessette v. Avco Fin. Servs., Inc.*, 279 B.R. 442, 449 (D.R.I. 2002) ("[T]he Court only has jurisdiction over claims that are related to bankruptcy estates in the District of Rhode Island."); *In re Williams*, 244 B.R. at 867 ("The Court . . . has no jurisdiction to grant declaratory relief for members of the putative class unless the specific discharge injunction . . . was entered by the Southern District of Georgia."); *Nelson v. Providian Nat'l Bank (In re Nelson)*, 234 B.R. 528, 534 (Bankr. M.D. Fla. 1999) ("[T]he bankruptcy court has no jurisdiction to entertain a private cause of action for damages by debtors who obtained their discharge in a court other than this one.").

64. Bruce, *supra* note 4, at 51–56.

65. *Id.* at 57–72. This is not to say that a nationwide class always is desirable. Class counsel may find that smaller classes might be easier to manage or bring other strategic advantages.

ful jurisdictional limitations on debtor class action adversary proceedings in bankruptcy.

C. Arbitration Agreements as a Shield to Class Action Liability

The typical debtor class action adversary proceeding features a class of debtors seeking relief against a common creditor. If the underlying debtor-creditor relationship is governed by an agreement containing an arbitration clause, a creditor might seek to compel arbitration of the proceeding.⁶⁶ Creditors may seek arbitration because they believe that the arbitral forum will be more convenient or produce a more favorable result.⁶⁷ As discussed in this Part, however, creditors may instead rely on arbitration clauses as a tool to avoid class action liability.

1. The Liberal Federal Policy in Favor of Arbitration

Over the last thirty years, the Supreme Court has repeatedly underscored that the FAA creates a “liberal federal policy” in favor of arbitration.⁶⁸ Although the FAA originally governed negotiated agreements between sophisticated business parties,⁶⁹ over time, the Supreme Court has interpreted the FAA to hold that it applies to consumer adhesion contracts and employment agreements, that it affects statutory rights, that it applies in state courts, and that it preempts conflicting state laws.⁷⁰ Buoyed by the

66. See, e.g., *Belton v. GE Capital Consumer Lending, Inc.* (*In re Belton*), No. 12-23037 (RDD), 2014 WL 5819586 (Bankr. S.D.N.Y. Nov. 10, 2014) (motion to compel arbitration of class action proceeding); *Rivers v. Green Tree Servicing, LLC* (*In re Rivers*), No. 03-05671-NPO, 2010 WL 5375950, at *2 (Bankr. S.D. Miss. Dec. 22, 2010) (same); *Cavanaugh v. Consecro Fin. Servicing Corp.* (*In re Cavanaugh*), 271 B.R. 414, 415–16 (Bankr. D. Mass. 2001) (same); *Knepp v. Credit Acceptance Corp.* (*In re Knepp*), 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999) (same).

67. See, e.g., *Arentson v. A.G. Edwards & Sons, Inc.* (*In re Arentson*), 126 B.R. 236, 238 (Bankr. N.D. Miss. 1991) (“It is extremely doubtful that the plaintiff, a Chapter 7 bankrupt, has the financial means to fairly compete with the defendant in an arbitration format. Indeed, the Court suspects that this is one of the predominant reasons that the defendant would like to see this matter submitted to arbitration.”).

68. See, e.g., *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (noting that the FAA “establishes ‘a liberal federal policy favoring arbitration agreements’” (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (same); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (same); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475 (1989) (same); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (same); *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24 (same). For an extensive discussion of the development of the FAA, as well as early Supreme Court construction of the FAA, see Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006).

69. See, e.g., *Moses*, *supra* note 68, at 111–12 (“The FAA was a bill of limited scope, intended to apply in disputes between merchants of approximately equal economic strength to questions arising out of their daily relations.”).

70. See *id.* at 114–55 (describing the Supreme Court’s gradual expansion of arbitration policy through 2006). A rough chronology of this expansion includes the following cases: *Moses H.*

Supreme Court's strong support of arbitration agreements, contracting parties have embraced arbitration agreements in a variety of previously unimaginable contexts, including consumer contracts of adhesion.⁷¹ Many such clauses attempt to adjust a broad range of contractual or statutory rights, such as statutes of limitation, discovery procedures, forum selection, and available remedies.⁷² Courts have approved these types of terms even in consumer contracts, despite the fact that such agreements are typically imposed on the party with the weaker bargaining position and might contain provisions strongly favoring the drafter.⁷³

Cone Memorial Hospital, 460 U.S. at 24 (holding the FAA governs in both state or federal court); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (holding the FAA preempts state law); *Mitsubishi Motors Corp.*, 473 U.S. at 6338 (holding the FAA applies not only to contract matters, but also to statutory claims involving antitrust law); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (holding securities fraud claims under the Securities Exchange Act of 1934 are arbitrable); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996) (holding arbitration agreements may be revoked only by generally applicable contract defenses and not by state laws applicable only to arbitration provisions); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (expanding the FAA to apply to most employment agreements, despite language in the FAA that it should not “apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce”); *Preston v. Ferrer*, 552 U.S. 346, 349–50 (2008) (holding the FAA preempts state laws requiring certain disputes to be resolved by state administrative agencies); *Stolt-Nielsen SA v. AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1776 (2010) (holding that contracts silent on the issue of class arbitration cannot be read to permit class arbitration); *Concepcion*, 131 S. Ct. at 1748 (2011) (invalidating California laws that prohibited class litigation and arbitration waivers); and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 (2013) (holding that a contractual waiver of class arbitration is enforceable even if arbitration is economically infeasible as a result).

71. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1639 (2005) (collecting examples). Arbitration clauses now appear in shrinkwrap licenses and mail inserts, product websites, cell phone contracts, checking account agreements, and at least once on the doorstep of a restaurant. *Id.*; Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 464 (2011) (collecting examples); J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1736–37 (2006) (same); see also Stephanie Strom, *When “Liking” a Brand Online Voids the Right to Sue*, N.Y. TIMES, (Apr. 16, 2014), <http://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html> (discussing newer initiatives to include binding arbitration clauses on store websites and social media). For an example of a doorway arbitration clause, see Stephanie Mencimer, *Eat Burger, Waive Right to Sue*, MOTHER JONES, (Jan. 31, 2008), <http://www.motherjones.com/mojo/2008/01/eat-burger-waive-right-sue>.

72. Glover, *supra* note 71, at 1742; see also Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1005 (1996) (“[P]arties are largely free to specify by contract the procedures governing their arbitration. The Court has even suggested that they may be free to specify by contract the remedies the arbitrator may award, specifically, whether punitive damages are available in arbitration.”).

73. Glover, *supra* note 71, at 1743; see also CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS 6 (2013) [hereinafter “CFPB STUDY”] (“[C]ourts regularly enforce pre-dispute arbitration clauses in consumer, employment, and other contexts in which the relevant contract is not subject to negotiation between the contracting parties.”).

2. Class Arbitration Waivers

Since the late 1990s, consumer arbitration clauses have increasingly contained waivers of the right to aggregate claims into a class action proceeding.⁷⁴ Such waivers can be very expansive, foreclosing any aggregation of claims, whether inside or outside the arbitral forum.⁷⁵ Some scholars believe the avoidance of aggregate proceedings is a primary reason companies include arbitration provisions in consumer financial contracts.⁷⁶ Professors Theodore Eisenberg, Geoffrey P. Miller, and Emily Sherwin studied a sample of twenty-six consumer and 164 nonconsumer contracts used by large public corporations, finding that “large companies [in the study’s sample] overwhelmingly selected arbitration as the method for resolving consumer disputes [but] permitted litigation as the method for resolving business disputes.”⁷⁷ Indeed, seventy-five percent of the consumer contracts in the study’s sample contained arbitration provisions, while arbitration provisions appeared in only around six percent of negotiated business contracts.⁷⁸ Moreover, class arbitration waivers in consumer contracts seemed essential to the existence of these arbitration agreements.⁷⁹ Of the consumer contracts with arbitration clauses, one hundred percent prohibited class arbitration, and eighty percent contained a waiver of other class litigation rights.⁸⁰ Sixty percent of these waivers contained non-severability

74. Trade journal articles published around this time encouraged corporate counsel to include waivers of collective action in form contracts and often recommended that these waivers be drafted as part of an arbitration clause to take advantage of the strong judicial support of FAA. For a thorough discussion of this development of collective action waivers, see Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 396–99 (2005). For recent data on the incidence of these clauses in consumer contracts, see CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) 2:6-27 (2015) [hereinafter “CFPB FINAL REPORT”].

75. See, e.g., CFPB STUDY, *supra* note 73, at 13 (noting that the terms of arbitration clauses studied “effectively preclude all class proceedings, in court or in arbitration”).

76. See, e.g., Glover, *supra* note 71, at 1736–37 (“Corporations . . . have increasingly sought to channel [consumer] claims to arbitration, while at the same time denying claimants the right to proceed through class actions.”); Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 150 (2010) (concluding “companies use arbitration clauses to limit their vulnerability to consumer claims, especially class actions”).

77. Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REF. 871, 881, 883 (2008).

78. *Id.* at 882–83.

79. *Id.* at 883.

80. *Id.* at 884. These findings align with the CFPB’s study on consumer arbitration clauses. CFPB STUDY, *supra* note 73, at 37 (“Almost all of the arbitration clauses studied contained terms limiting class proceedings.”); CFPB FINAL REPORT, *supra* note 74, at 2:45 (“[C]lass arbitration was unavailable for 99.9% of arbitration-subject credit card loans outstanding, 97.1% of arbitration-subject insured deposits, essentially 100.0% of arbitration-subject prepaid card loads, 98.2%

clauses, which voided the arbitration clause if class procedures were allowed.⁸¹ Based on these findings, the authors observed that “[t]he growth of mandatory consumer arbitration clauses appears to be part of a broader initiative by corporations to preclude or limit aggregate litigation.”⁸² This conclusion finds further support in the Consumer Financial Protection Bureau’s recent study of consumer arbitration clauses, which found that corporations rarely seek to enforce arbitration agreements in individual suits, but commonly move to compel arbitration to block a class action.⁸³

3. *The Supreme Court’s Rejection of Equitable Challenges to Class Arbitration Waivers*

The proliferation of arbitration agreements in consumer contracts has drawn the attention of many scholars and commentators, who hotly debate the impact of a strong pro-arbitration policy on the vindication of consumer rights.⁸⁴ Critics of consumer arbitration agreements highlight, in particular, the impact of class arbitration waivers on negative-value consumer claims.⁸⁵ The class action process has historically been used as a means for individuals to pursue claims that are too small to litigate on an individual basis.⁸⁶ If the right to aggregate claims in a class-wide procedure is unavailable, small-value claimants may not have the resources to challenge wrongful conduct.⁸⁷ As Judge Posner memorably quipped, “[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero indi-

of arbitration-subject payday loan storefronts, and 99.7% of arbitration-subject mobile wireless subscribers”).

81. Eisenberg et al., *supra* note 77, at 884.

82. *Id.* at 895.

83. See Richard Cordray, *Prepared Remarks of CFPB Director Richard Cordray at the Arbitration Field Hearing*, <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-arbitration-field-hearing/> (last visited Aug. 24, 2015) (summarizing the CFPB FINAL REPORT).

84. Compare, e.g., Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 766 (2002) (“‘[M]andatory’ arbitration—arbitration imposed by pre-dispute clauses in contracts of adhesion which, as a practical matter, the non-drafting parties have no real power to avoid or disapprove—will, if allowed to continue unchecked, largely deprive American courts of the ability to play the important social role they played so effectively throughout the last century.”), with Cole, *supra* note 71, at 469 (“[N]umerous empirical studies of arbitration demonstrate that consumer arbitration agreements typically provide consumers with fair and affordable access to justice.”).

85. See Glover, *supra* note 71, at 1737 (“[W]here the expected recovery does not justify the cost of a stand-alone claim . . . corporations have the greatest incentive to write class action waivers into mandatory arbitration provisions.”).

86. See Bruce, *supra* note 4, at 40.

87. See, e.g., Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 *PENN. ST. L. REV.* 165, 184–85 (2003) (“Forestalling class litigation in many instances is tantamount to eliminating disputes altogether.”).

vidual suits, as only a lunatic or a fanatic sues for \$30.”⁸⁸ Thus, class arbitration waivers could provide businesses the opportunity to violate consumers’ rights with impunity.⁸⁹ Critics also argue that arbitration may eliminate the procedural protections of a judicial forum, decrease transparency, and obscure the development of precedent.⁹⁰

Some consumers have attempted to challenge the enforceability of class arbitration waivers based upon the barriers to litigation that they create. Two primary theories have emerged: first, that these provisions are unconscionable under applicable state law; and second, that they preclude the “effective vindication of statutory rights.”⁹¹ While these challenges met with some success in the lower courts, the Supreme Court’s recent decisions in *AT&T Mobility LLC v. Concepcion*⁹² and *American Express Co. v. Italian Colors Restaurant*⁹³ sharply limit their continued vitality.

a. Unconscionability Challenges and AT&T v. Concepcion

The FAA provides that arbitration agreements are enforceable, except to the extent that “grounds . . . exist at law or in equity for the revocation of any contract.”⁹⁴ The Supreme Court acknowledged in *Doctor’s Associates, Inc. v. Casarotto* that common law unconscionability doctrines could provide a defense to an arbitration agreement’s enforceability.⁹⁵ After that case, some courts began to “blow[] the dust off their largely dormant unconscionability jurisprudence [to] invalidate[] class action waivers.”⁹⁶

In *Discover Bank v. Superior Court*, for example, the California Supreme Court applied California’s unconscionability doctrine⁹⁷ to class action waivers in consumer contracts of adhesion, holding that “to the extent [such waivers] operate to insulate a party from liability that otherwise would be imposed under California law,” they are unenforceable.⁹⁸ The

88. *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

89. *Cf.* Colin P. Marks, *The Irony of AT&T v. Concepcion*, 87 IND. L.J. SUPP. 31, 32 (2012) (“If [*Concepcion*] is read broadly, . . . every corporation will be inserting class action waivers into their arbitration clauses (if they have not already), and may be emboldened to go much further.”).

90. *See* CFPB STUDY, *supra* note 73, at 7–8 (summarizing criticism).

91. *See* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 632–37 (2012).

92. 131 S. Ct. 1740 (2011).

93. 133 S. Ct. 2304 (2013).

94. 9 U.S.C. § 2 (2012).

95. 517 U.S. 681, 687 (1996).

96. Gilles & Friedman, *supra* note 91, at 632.

97. 113 P.3d 1100 (Cal. 2005). California permits a court to refuse to enforce a contract it finds “to have been unconscionable at the time it was made” and further to “limit the application of any unconscionable clause.” Cal. Civ. Code § 1670.5(a) (West 2014).

98. *See Discover Bank*, 113 P.3d at 162–63 (Cal. 2005) (holding “when [a class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the par-

court's ruling underscored that the class action device is a vital mechanism to vindicate small claims and ensure compliance with the law.⁹⁹ Following the California Supreme Court's lead, a number of courts around the country similarly invalidated class action waivers on unconscionability grounds.¹⁰⁰

The Supreme Court took a decisive stance against California's unconscionability doctrine in *AT&T Mobility LLC v. Concepcion*.¹⁰¹ *Concepcion* involved claims for false advertising and fraud based on AT&T's alleged practice of advertising a cell phone as "free" with a two-year contract.¹⁰² When AT&T moved to compel individual arbitration of the dispute, the plaintiffs argued that the arbitration agreement was unconscionable under California law because it disallowed class-wide procedures.¹⁰³ The district court held that the class action waiver was invalid under *Discover Bank*, and the Court of Appeals for the Ninth Circuit affirmed.¹⁰⁴

In a 5-4 decision authored by Justice Scalia, the Supreme Court reversed the Ninth Circuit's judgment, holding that *Discover Bank* "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" and is thus preempted by the FAA.¹⁰⁵ The Court drew a sharp distinction between bilateral arbitration and arbitration on a class-wide basis, finding the latter ill-suited to the arbitral forum:

Class-wide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.¹⁰⁶

ty with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . such waivers are unconscionable under California law").

99. *Id.* at 156–58.

100. *See* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (collecting cases).

101. *Id.* at 1746–48.

102. *Id.* at 1744. Vincent and Liza Concepcion argued, on behalf of similarly situated plaintiffs, this advertisement disguised the reality that a sales tax of \$30.22 (in the Concepcion's case) would be assessed. *Id.*

103. *Id.* at 1745.

104. *Laster v. T-Mobile USA, Inc.*, No. 05CV1167 DMS (AJB), 2008 WL 5216255, at *14 (S.D. Cal. Aug. 11, 2008), *aff'd sub nom. Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) and *amended in part*, No. 05CV1167 DMS WVG, 2012 WL 1681762 (S.D. Cal. May 9, 2012).

105. *Concepcion*, 131 S. Ct. at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

106. *Id.* at 1750. This language closely tracks the Court's reasoning in *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, in which the Court held that an arbitration agreement that was silent on the issue of class arbitration could not be construed to permit arbitration on a class-wide basis. 130 S. Ct. 1758, 1764 (2010). In so holding, the court underscored the "fundamental changes" wrought by class arbitration on the traditional arbitration process, concluding that "the differences between

Accordingly, the Court found that doctrines that require the availability of class-wide arbitration would “interfere[] with fundamental attributes of arbitration and . . . create[] a scheme inconsistent with the FAA.”¹⁰⁷

In a dissenting opinion, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, argued that the principles advanced in *Discover Bank* align with both the language and the purpose of the FAA.¹⁰⁸ The dissent challenged the majority’s support of bilateral arbitration to the exclusion of class arbitration, noting that “neither the history nor present practice suggests class arbitration is fundamentally incompatible with arbitration itself.”¹⁰⁹ The dissent then highlighted the function of the *Discover Bank* rule in preventing the manipulation of consumer contracts to insulate corporate actors from fraud and argued the state’s decision should be respected.¹¹⁰

b. “Effective Vindication” Challenges and American Express Co. v. Italian Colors Restaurant

Other plaintiffs have attempted to challenge class arbitration waivers using what has been termed an “effective vindication of statutory rights” theory.¹¹¹ In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court held that the FAA permitted arbitration of federal statutory claims, but imposed a limitation: Such claims were arbitrable “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.”¹¹² In a subsequent case, the Court acknowledged that if the costs of arbitration were excessive, such costs might be sufficient to “preclude a litigant . . . from effectively vindicating her federal statutory rights.”¹¹³ Some plaintiffs have used this line of reasoning to mount an attack on class arbitration waivers, arguing that the cost of bring-

bilateral and class action arbitration are too great for arbitrators to presume . . . that the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.” *Id.* at 1776. *But see* *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2069–70 (2013) (distinguishing *Stolt-Neilson* and holding that an arbitrator did not exceed its authority by ruling that an arbitration agreement that did not expressly mention class arbitration nevertheless “expresses the parties’ intent that class arbitration can be maintained”).

107. *Concepcion*, 131 S. Ct. at 1748.

108. *See id.* at 1757 (Breyer, J., dissenting).

109. *Id.* at 1759.

110. *Id.* at 1760, 1762.

111. *See* Gilles & Friedman, *supra* note 91, at 633–35 (describing the development of this theory).

112. 473 U.S. 614, 637 (1985).

113. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (acknowledging that “the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum”).

ing an individual arbitration action prevents the effective vindication of statutory rights.¹¹⁴

A class of merchants mounted such a challenge against American Express Company (“American Express”), arguing the company violated the Sherman Act by forcing the merchants to accept credit cards at rates approximately thirty percent higher than the fees for competing credit cards.¹¹⁵ American Express sought to compel individual arbitration of the class members’ claims based on a class arbitration waiver in American Express’s agreements with the merchants.¹¹⁶ In response, the merchants asserted the estimated costs for expert analysis to prove the antitrust claims would be “at least several hundred thousand dollars, and might exceed \$1 million,” most of which was non-recoupable, whereas an individual plaintiff’s maximum treble-damages recovery would be \$38,549.¹¹⁷ The arbitration costs, the merchants argued, were “plainly prohibitive” of the effective vindication of the merchants’ rights.¹¹⁸ The district court granted American Express’s motion to compel arbitration and dismissed the lawsuits.¹¹⁹ The Second Circuit reversed, holding that because the merchants “would incur prohibitive costs if compelled to arbitrate under the class action waiver,” the waiver was unenforceable.¹²⁰

The Supreme Court considered this appeal in *American Express Co. v. Italian Colors Restaurant*.¹²¹ In a 5-3 decision,¹²² the Court rejected the plaintiffs’ arguments and held that the class arbitration waiver was enforceable. The Court emphasized that arbitration agreements must be “rigorous-

114. Gilles & Friedman, *supra* note 91, at 633–34 (dubbing this the “second wave” attack on class action waivers); *see also* Kristian v. Comcast Corp., 446 F.3d 25, 61 (1st Cir. 2006) (“If the class mechanism prohibition here is enforced, Comcast will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law. Plaintiffs will be unable to vindicate their statutory rights.”).

115. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013).

116. *Id.*

117. *Id.*

118. Brief for Respondents at 17, *Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133).

119. *In re Am. Express Merchs. Litig.*, No. 03 CV 9592(GBD), 2006 WL 662341, at *10 (S.D.N.Y. Mar. 16, 2006), *rev’d and remanded*, 554 F.3d 300 (2d Cir. 2009), *cert. granted, judgment vacated sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010), *rev’d and remanded sub nom.* *In re Am. Express Merchs. Litig.*, 634 F.3d 187 (2d Cir. 2011), *rev’d*, 667 F.3d 204 (2d Cir. 2012).

120. *In re Am. Express Merchs. Litig.*, 554 F.3d 300, 315–16 (2d Cir. 2009), *cert. granted, judgment vacated sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010), *rev’d and remanded sub nom.* *In re Am. Express Merchs. Litig.*, 634 F.3d 187 (2d Cir. 2011), *rev’d*, 667 F.3d 204 (2d Cir. 2012).

121. 133 S. Ct. 2304 (2013).

122. Justice Scalia delivered the opinion of the Court, which Justices Roberts, Kennedy, Thomas, and Alito joined. *Id.* at 2307. Justice Kagan, joined by Justices Ginsburg and Breyer, dissented. *Id.* Justice Sotomayor took no part in the decision, as she served on the panel that decided the case in the Second Circuit. *Id.*

ly enforce[d]”¹²³ and found nothing within the antitrust or class action laws to undermine the strong federal policy in favor of arbitration.¹²⁴ It acknowledged the existence of an effective-vindication exception but held that the exception applied only to cases in which an arbitration clause amounts to a “prospective waiver of a party’s *right to pursue* statutory remedies.”¹²⁵ The Court made clear that “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”¹²⁶ Accordingly, the Court held that arbitration of the matter would not prevent the effective vindication of statutory rights.¹²⁷

Justice Kagan, joined by Justices Ginsburg and Breyer, mounted a forceful dissent that characterized the majority opinion as a “betrayal of our precedents, and of federal statutes like the antitrust laws.”¹²⁸ The dissent found the rejection of the effective-vindication defense improper, as “the principle we have established fits this case hand in glove.”¹²⁹ Important to the dissent’s reasoning was the text of the arbitration agreement, which broadly prohibited not only class aggregation but also “other forms of cost-sharing . . . that could provide effective vindication.”¹³⁰ The dissent expressed concern that the majority’s holding creates avenues through which a company might, through strategic drafting of arbitration agreements, eliminate any meaningful recourse for its misconduct.¹³¹

4. *The Current State of Class Arbitration Waiver Jurisprudence*

Taken together, *Concepcion* and *Italian Colors Restaurant* may sharply restrict the availability of class action relief when a class arbitration waiver is present. These cases, along with other recent decisions heighten-

123. *Id.* at 2309 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

124. *Id.* at 2309–10 (“The antitrust laws do not guarantee an affordable procedural path to the vindication of every claim. . . . Nor does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights.”).

125. *Id.* at 2310 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

126. *Id.* at 2311.

127. *Id.*

128. *Id.* at 2313 (Kagan, J., dissenting).

129. *Id.*

130. *Id.* at 2320.

131. *Id.* at 2314 (“On the front end: The agreement might set outlandish filing fees or establish an absurd (e.g., one-day) statute of limitations, thus preventing a claimant from gaining access to the arbitral forum. On the back end: The agreement might remove the arbitrator’s authority to grant meaningful relief, so that a judgment gets the claimant nothing worthwhile. And in the middle: The agreement might block the claimant from presenting the kind of proof that is necessary to establish the defendant’s liability—say, by prohibiting any economic testimony (good luck proving an antitrust claim without that!). Or else the agreement might appoint as an arbitrator an obviously biased person—say, the CEO of Amex.”).

ing the standards for certifying a class,¹³² underscore an antipathy to the class device held by a majority of Justices on the Supreme Court. In the few years since *Concepcion* and *Italian Colors Restaurant* were decided, many lower courts have applied this precedent expansively,¹³³ but some have interpreted the cases in ways that preserve some vitality in the unconscionability and effective-vindication challenges.¹³⁴ The reactions of scholars and commentators to this precedent are similarly mixed: some believe that businesses will now flock to arbitration clauses, effectively killing the consumer class action, while others argue that the effects of these decisions will be more muted.¹³⁵

The following Part analyzes these issues in the context of debtor class action cases and argues that the effect of this case law should be minimal in the bankruptcy arena. While the FAA's pro-arbitration mandate is strong, it is not absolute, and it must at times give way to countervailing federal interests.¹³⁶ The federal interests underlying the Bankruptcy Code have long provided bankruptcy courts substantial discretion to avoid arbitration of matters if arbitration would conflict with bankruptcy's objectives. As such, bankruptcy courts should adjudicate matters subject to a class arbitration waiver when granting arbitration would prevent the vindication of bankruptcy rights.

III. THE FAA AND CONSUMER CLASS ACTIONS IN BANKRUPTCY

The prior Part explored the strong federal policies underlying arbitration and the increasing power of class arbitration waivers as a shield to class

132. See *infra* Part IV.

133. Georgene Vairo, *Is the Class Action Really Dead? Is That Good or Bad for Class Members?*, 64 EMORY L.J. 477, 489–94 (2014) (discussing early application of *Concepcion* and *Italian Colors Restaurant*); Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 770–93 (2012) (describing *Concepcion*'s impact).

134. See James Dawson, *Contract After Concepcion: Some Lessons from the State Courts*, 124 YALE L.J. 233, 234 (2014) (describing “innovative, narrow readings of *Concepcion*” adopted by certain lower courts); Tina Wolfson & Bradley King, *Even After Concepcion and Italian Colors, Some Arbitration Agreements Are Not Enforceable*, 62 FED. LAW. 19, 20–21 (2015) (discussing means to challenge arbitration agreements after *Concepcion* and *Italian Colors Restaurant*).

135. See, e.g., Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 727 (2012) (“*Concepcion* has caused a tsunami wave that is threatening to eliminate many consumers’ and employees’ abilities to enforce their substantive rights by participating in class actions. We must look primarily to Congress to take corrective action . . .”); Ian Millhiser, *Supreme Court Nukes Consumers’ Rights in Most Pro-Corporate Decision Since Citizens United*, THINK PROGRESS (Apr. 27, 2011), <http://thinkprogress.org/justice/2011/04/27/176997/scotus-nukes-consumers/> (“After *Concepcion*, it is only a matter of time before nearly every credit card provider, cell phone company, mail-order business or even every potential employer requires anyone who wants to do business with them to first give up their right to file a class action.”). But see Brian J. Murray, *I Can’t Get No Arbitration: The Death of Class Actions That Isn’t, at Least So Far*, FED. LAW., September 2013, at 62, 63 (“[T]he obituary for consumer and employee class actions remains to be written.”).

136. See *infra* Part III.B.

action liability. This Part argues that this trend should have little relevance to class actions brought in consumer bankruptcy cases. First, class arbitration waivers may not govern the matters at issue in many debtor class action proceedings.¹³⁷ Second, even if a class arbitration waiver does apply, bankruptcy courts have discretion to refuse arbitration of many such matters under a well-established (but poorly defined) inherent conflict standard.¹³⁸ Finally, the “effective vindication of statutory rights” challenge, which the Supreme Court constrained in its *Italian Colors Restaurant* decision, can find new life as part of bankruptcy courts’ inherent conflict analysis.¹³⁹ Under this view of the inherent conflict analysis, it is appropriate for bankruptcy courts to refuse to compel arbitration of matters that would prevent debtor classes from vindicating their bankruptcy rights.

The analysis in this Part, although technical, necessarily paints with a broad brush. Debtor class action cases can present a host of claims, involving bankruptcy law, state or federal consumer protection laws, or other legal rights. Moreover, as discussed below, the standard for determining whether these proceedings are unsuitable for arbitration is fact intensive and highly discretionary. This analysis thus suggests how courts could approach typical or common patterns in debtor class action cases. Considering the role bankruptcy courts have historically played in achieving consumer justice, as well as the salutatory effects that class actions might have on the enforcement of consumer bankruptcy laws, courts should construe their discretion in a manner that enhances the debtor class action.

A. *The Limited Force of Class Arbitration Waivers in Bankruptcy*

As a preliminary matter, in order for class arbitration waivers to stand as a bar to debtor class action relief, the dispute at issue must be governed by an arbitration agreement that contains a class arbitration waiver. While arbitration clauses are prevalent in a broad range of consumer contracts,¹⁴⁰ they are not pervasive. For example, much standard home loan documentation has historically not included arbitration provisions, given the unwillingness of Fannie Mae and Freddie Mac to buy certain mortgages loans with arbitration clauses on the secondary market.¹⁴¹ In addition, statutes

137. See *infra* Part III.A.

138. See *infra* Part III.B–C.

139. See *infra* Part III.D.

140. See CFPB FINAL REPORT, *supra* note 74, at 2:9-27, 45–46 (describing the incidence of arbitration agreements and class arbitration waivers, respectively).

141. *Banking—Mortgages: Fannie Mae Will Not Buy Home Mortgages with Mandatory Arbitration Clauses*, 72 U.S.L.W. 2463 (2004); *Banking—Mortgages: Freddie Mac Will Not Buy Subprime Loans that Contain Mandatory Arbitration Clauses*, 72 U.S.L.W. 2342 (2003); see also R. Wilson Freyermuth, *Foreclosure by Arbitration?*, 37 PEPP. L. REV. 459, 480 (2010) (“[S]tandard mortgage forms do not contain arbitration clauses at all, or, if they do, they “carve out” foreclosure from their scope.”).

such as the Military Lending Act and the Truth in Lending Act have limited the use of arbitration clauses in a number of consumer contracts.¹⁴² Finally, at the time of this writing, the Consumer Finance Protection Bureau (“CFPB”) has just completed a major empirical study of the use of arbitration agreements in consumer contracts.¹⁴³ The agency is expected to promulgate new regulations on arbitration agreements, which may further reduce the prevalence of class arbitration waivers and curtail the long-term impact of *Concepcion* and *Italian Colors Restaurant*.¹⁴⁴

Even if an arbitration agreement is invoked in a debtor class action case, the scope of the agreement might not be broad enough to encompass bankruptcy-specific harms that debtor classes allege. Although arbitration agreements generally are enforceable in bankruptcy,¹⁴⁵ even when the claims are founded on statutory rights,¹⁴⁶ many bankruptcy-related causes of action are distinct from the underlying contract. The Bankruptcy Court for the Southern District of New York acknowledged as much in *In re Hostess Brands, Inc.*¹⁴⁷ In that case, the court found that issues relating to a corporate debtor’s use of cash collateral¹⁴⁸ were not subject to arbitration.¹⁴⁹ Although the underlying contract featured an arbitration agreement that broadly covered “[a]ny controversy, dispute, claim, or question arising out of or relating to this agreement,”¹⁵⁰ the court found that the use of cash collateral was a matter “not at all rooted in a right that exists pre-bankruptcy” and was therefore beyond the scope of the arbitration clause.¹⁵¹

Debtor class action proceedings might present similar scope issues. Consider, for example, class action claims premised on violations of the discharge injunction. Section 524 of the Bankruptcy Code provides that a

142. The Military Lending Act prohibits arbitration clauses in connection with certain loans made to members of the armed services. See 10 U.S.C. § 987 (2012). As of June 1, 2013, the Truth in Lending Act bans mandatory arbitration provisions in all consumer contracts that are secured by a dwelling. 12 C.F.R. § 1026.36 (2014).

143. CFPB FINAL REPORT, *supra* note 74.

144. A number of state attorneys general have urged the agency to place additional regulations on the use of pre-dispute mandatory arbitration clauses for financial products or services, stating that they “are concerned about such clauses and the class action prohibitions often associated with them.” Letter from Joseph R. Biden, III, Del. Att’y Gen. et al., to Richard Cordray, Dir., CFPB 1 (Nov. 19, 2014), http://www.attorneygeneral.delaware.gov/documents/20141119-AGs_Ltr_to_CFPB_re_Arb_Clauses_Final.pdf.

145. See *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1154 (3d Cir. 1989) (holding that, for claims derivative of the debtor, the trustee is bound by the debtor’s pre-petition agreement to arbitrate).

146. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

147. No. 12-22052-RDD, 2013 WL 82914 (Bankr. S.D.N.Y. Jan. 7, 2013).

148. The Bankruptcy Code defines cash collateral as “cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents . . . subject to a security interest.” 11 U.S.C. § 363(a) (2012).

149. *In re Hostess Brands, Inc.*, 2013 WL 82914 at *4.

150. *Id.* at *1.

151. *Id.* at *3.

discharge in bankruptcy “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor.”¹⁵² Certainly, a debt that has been discharged may have originated from a contract, and the relevant contract might indeed contain an expansive arbitration clause with a class arbitration waiver.¹⁵³ But a court might well conclude that the terms of the arbitration clause are not broad enough to encompass the bankruptcy-based claims alleged.¹⁵⁴

B. The FAA’s Goals Must, at Times, Yield to Bankruptcy Policy

If an arbitration clause in fact governs issues raised in a debtor class action proceeding, the creditor-defendant might move for the dispute to be resolved in arbitration.¹⁵⁵ As detailed above, many such motions are designed to give effect to class arbitration waivers,¹⁵⁶ and particularly after *Concepcion* and *Italian Colors Restaurant*, moving to compel arbitration might successfully prevent a debtor class from aggregating their claims.¹⁵⁷ Nevertheless, debtor classes have a unique means to challenge arbitration clauses based on the strong federal policies underlying the Bankruptcy Code.

The Supreme Court has acknowledged that the FAA’s pro-arbitration mandate, while strong, “may be overridden by a contrary congressional command.”¹⁵⁸ Courts have long viewed matters central to the bankruptcy process to provide such a command. Indeed, bankruptcy courts have broad discretion to refuse to compel arbitration when arbitration of a matter would inherently conflict with bankruptcy law or policy.¹⁵⁹ Courts have exercised this type of discretion in cases in which the interests of other parties to the

152. 11 U.S.C. § 524(a)(3) (2012).

153. Some courts have found that arbitration clauses are unenforceable after the underlying claim is discharged in bankruptcy. See *Harrier v. Verizon Wireless Pers. Commc’ns LP*, 903 F. Supp. 2d 1281, 1283–84 (M.D. Fla. 2012); *Jernstad v. Green Tree Servicing, LLC*, No. 11 C 7974, 2012 WL 8169889, at *2 (N.D. Ill. Aug. 2, 2012).

154. See, e.g., *In re Rivers*, No. 03-05671-NPO, 2010 WL 5375950, at *4 (Bankr. S.D. Miss. Dec. 22, 2010) (“[T]he Purported Class Action Waiver, even if applicable in litigation, is too narrow to cover the [bankruptcy-based] claims at issue in this Adversary.”); cf. *In re Belton*, No. 12-23037 (RDD), 2014 WL 5819586, at *6 (Bankr. S.D.N.Y. Nov. 10, 2014) (“[G]iven the broad language of the arbitration provision here, it cannot be said that the parties clearly did not contemplate arbitration of all disputes related to the debt, including whether GE Capital has violated the discharge of that debt.”).

155. See, e.g., *In re Belton*, 2014 WL 5819586, at *1 (creditor moved to compel arbitration); *In re Cavanaugh*, 271 B.R. 414, 418 (Bankr. D. Mass. 2001) (same); *In re Knepp*, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999) (same).

156. See *supra* Part II.B.; see also *In re Rivers*, 2010 WL 5375950, at *2 (creditor sought to enforce only the class action waiver).

157. See *supra* Part II.B.3.

158. *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

159. See *infra* Part III.C.2.a–b.

bankruptcy would not be served by arbitration, where arbitration of a matter would undermine a debtor's reorganization or affect the court's ability to distribute assets to creditors, and where the proceeding involves substantive rights created by the Bankruptcy Code and central to the bankruptcy process.¹⁶⁰

The process of determining whether a bankruptcy dispute is unsuitable for arbitration relies on a framework first established in *Shearson/American Express Inc. v. McMahon*.¹⁶¹ That case, which dealt with the intersection of the FAA, the Securities Exchange Act, and the Racketeer Influenced and Corrupt Organizations Act, established a test to determine whether "Congress intended to preclude" parties from waiving judicial remedies in favor of arbitration.¹⁶² If Congress intended to deny the availability of arbitration of a statutory claim, such intent would "be deducible from [the statute's] text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes."¹⁶³ Courts that have applied *McMahon* to the intersection of bankruptcy and arbitration have found little guidance in the Bankruptcy Code's text or legislative history that would foreclose operation of arbitration clauses.¹⁶⁴ Thus, courts' analyses center on whether arbitration of the dispute creates an "inherent conflict" with the purpose or policies of the Bankruptcy Code.¹⁶⁵

160. See *infra* Part III.C.2.b.

161. *Shearson*, 482 U.S. 220.

162. *Id.* at 227.

163. *Id.* (alteration in original) (citation omitted) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

164. See, e.g., *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1157 (3d Cir. 1989) ("Hays has pointed to no provisions in the text of the bankruptcy laws, and we know of none, suggesting that arbitration clauses are unenforceable in a non-core adversary proceeding in a district court to enforce a claim of the estate. . . . Similarly, Hays has identified no legislative history indicating that this kind of proceeding was intended to be an exception to the mandate of the Arbitration Act."); see also *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1020 (9th Cir. 2012) (collecting cases).

165. For a comprehensive study of the inherent conflict test, see Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 183, 202 (2007). A recent Supreme Court case, which dealt with the intersection of the FAA and the Credit Repair Organization Act, might appear to condense *McMahon*'s three-prong inquiry to a single, plain language test. See *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012) ("Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms."). One bankruptcy court has interpreted this case in a way that subverts *McMahon*'s inherent conflict test and finds arbitration agreements broadly enforceable in bankruptcy. See *Blackburn v. Capital Transaction Grp., Inc.*, No. 2:13-CV-98, 2014 WL 923316, at *4 (E.D. Tenn. Mar. 10, 2014) ("Likewise in this case, because the Bankruptcy Code is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA also requires the arbitration agreement to be enforced according to its terms, and there is no need to apply an 'inherent conflict' test."). While *CompuCredit Corp.* was drafted in expansive terms, it does not directly speak to *McMahon*'s three-prong test or exhibit an intent to overrule it. Moreover, since *CompuCredit Corp.* was decided, the Supreme Court has declined to grant certiorari in a matter involving application of the *McMahon* test to a bankruptcy issue. See *Cont'l Ins. Co. v. Thorpe Insulation Co.*, 133 S. Ct. 119 (2012). If the Court were eager to over-

Many bankruptcy courts begin *McMahon*'s inherent conflict analysis by distinguishing between core and non-core claims.¹⁶⁶ Non-core bankruptcy claims typically have too limited of a connection to the bankruptcy case to present an inherent conflict under *McMahon*. Thus, courts often hold that the parties' agreement to arbitrate should be respected.¹⁶⁷ Core bankruptcy claims are closely related to the goals of bankruptcy, yet most courts have rejected a *per se* rule governing arbitration of core proceedings.¹⁶⁸ Rather, courts consider on a case-by-case basis whether arbitrating

rule *McMahon*'s inherent conflict test or limit its applicability in the bankruptcy context, it might well have taken this opportunity to do so.

166. See Resnick, *supra* note 165, at 205–06. “Core” and “non-core” are jurisdictional terms used to describe Article I bankruptcy judges’ authority to enter final judgments. See *Stern v. Marshall*, 131 S. Ct. 2594, 2603–04 (2011). “Core” bankruptcy proceedings are considered to be matters of substantive bankruptcy law, matters which would only come to light in a bankruptcy case. “Non-core” proceedings are proceedings that could have been brought in a state or federal court if the bankruptcy petition had not been filed. *Cont’l Nat’l Bank v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1348–49 (11th Cir. 1999); *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987). It bears noting that the distinction between core and non-core matters has blurred as a result of the Supreme Court’s 2011 ruling in *Stern v. Marshall*. See 131 S. Ct. at 2603–04. In *Stern*, the Court held that some matters falling within the bankruptcy court’s core jurisdiction were not within the court’s constitutional authority to resolve to final judgment. *Id.* at 2620. Following *Stern*, some courts applying *McMahon*’s inherent conflict test have treated such unconstitutionally core matters as if they were non-core. See, e.g., *In re Edwards*, No. 13-02217-8-ATS, 2013 WL 5718565, at *2 (Bankr. E.D.N.C. Oct. 21, 2013) (finding that when a matter is unconstitutionally core, “the arbitration agreement should control”). Other courts have used the *Stern* decision as a justification to rely less on the core/non-core distinction when applying the inherent conflict test. See, e.g., *In re Trinity Comm’ns, LLC*, No. 09-13154, 2012 WL 1067673, at *14 (Bankr. E.D. Tenn. Mar. 14, 2012) (“Although the parties spend considerable effort debating whether the issues raised by the parties are core or non-core . . . the court finds it more productive to follow the lead of other courts . . . and conclude that the core/non-core distinction is not dispositive.”).

167. See, e.g., *Hays*, 885 F.2d at 1161 (finding arbitration of non-core adversary claims would not “seriously jeopardize the objectives of the code,” and that the court did not have the discretion to refuse to compel arbitration); see also *Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc. (In re Elec. Mach. Enters., Inc.)*, 479 F.3d 791, 796 (11th Cir. 2007) (citing *Hays*); *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 165–66 (2d Cir. 2000) (same); *Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat’l Gypsum Co.)*, 118 F.3d 1056, 1066 (1997) (holding that the *Hays* ruling makes “eminent sense” and has been “universally accepted”). But see *Mintze v. Am. Gen. Fin. Servs. (In re Mintze)*, 434 F.3d 222, 229 (3d Cir. 2006) (“The core/non-core distinction does not . . . affect whether a bankruptcy court has the discretion to deny enforcement of an arbitration agreement.”); *Henderson v. Legal Helpers Debt Resolution, L.L.C. (In re Huffman)*, 486 B.R. 343, 358 (Bankr. S.D. Miss. 2013) (“The Fifth Circuit . . . has not foreclosed the possibility . . . that a bankruptcy court could deny arbitration of a noncore proceeding if the opposing party could show it would cause an inherent conflict of interest with the Bankruptcy Code.”); *AmeriCorp, Inc. v. Hamm*, No. 2:11-CV-677-MEF, 2012 WL 1392927, at *5 (M.D. Ala. Apr. 23, 2012) (“Although classified as a non-core proceeding, the unique set of facts presented in this case, when considered in the aggregate, compel the Court to the conclusion that arbitration of this dispute would seriously disturb the objectives of the Chapter 7 bankruptcy.”).

168. See, e.g., *In re Nat’l Gypsum Co.*, 118 F.3d at 1067 (“Cognizant of the Supreme Court’s admonition that, in the absence of an inherent conflict with the purpose of another federal statute, the Federal Arbitration Act mandates enforcement of contractual arbitration provisions, we refuse to find such an inherent conflict based solely on the [core] jurisdictional nature of a bankruptcy

the dispute would inherently conflict with bankruptcy's aims. The inherent conflict test is a fact-specific inquiry, and the standard has developed raggedly among the various circuits.¹⁶⁹ Despite well-reasoned calls to reform this standard, neither Congress nor the Court has clarified the proper balance between bankruptcy and arbitration.¹⁷⁰

The Third and Fifth Circuit Courts of Appeals focus their inherent conflict inquiry largely on the legal basis of the asserted claims.¹⁷¹ In these circuits, when a cause of action is derivative of a litigant's bankruptcy rights, "the importance of the federal bankruptcy forum provided by the Code is at its zenith," and the bankruptcy court has "significant discretion to assess whether arbitration would be consistent with the purpose of the [Bankruptcy] Code."¹⁷² In contrast, where a cause of action derives from a debtor's pre-bankruptcy contractual rights, the parties' agreement to arbitrate generally should be respected.¹⁷³ In the Fifth Circuit, this standard has

proceeding."). *But see In re Brown*, 354 B.R. 591, 603 (D.R.I. 2006) ("The 'core/non-core' distinction represents the best approach for resolving conflicts between the FAA and the Bankruptcy Code because it locates arbitration agreements precisely upon the same footing as other forms of contracts, while at the same time heeding *McMahon's* dictate that a waiver of judicial forum may only be prohibited where, inter alia, an inherent conflict is present between arbitration and the conflicting statute's underlying purpose.").

169. *See In re Brown*, 354 B.R. at 599 (noting the "widely-divergent" application of precedent and "equally divergent" outcomes); Marianne B. Culhane, *Limiting Litigation over Arbitration in Bankruptcy*, 17 AM. BANKR. INST. L. REV. 493, 494 (2009) (noting that despite courts having considered these topics for over twenty years, "[n]o clear directions or bright line rules have emerged").

170. *See, e.g.*, Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503, 541 (2009) (arguing to replace the inherent conflict analysis with a standard based on bankruptcy litigants' ability to effectively vindicate statutory rights); Robert M. Lawless, *Core and Not-So-Core Rhetoric About the Intersection of Arbitration and Bankruptcy*, 28 No. 7 BANKRUPTCY LAW LETTER 1 (2008) (arguing for a functional approach to resolving inherent conflict questions); Resnick, *supra* note 165 (arguing for legislative change to clarify the arbitrability of bankruptcy matters).

171. *See In re Mintze*, 434 F.3d at 231; *In re Gandy*, 299 F.3d 489, 495 (5th Cir. 2002); *Nat'l Gypsum*, 118 F.3d at 1066. This standard has been adopted by courts in other circuits. *See, e.g.*, *In re Merrill*, 343 B.R. 1, 9–11 (Bankr. D. Me. 2006) (applying *Nat'l Gypsum* and *Mintze*); *In re Cavanaugh*, 271 B.R. 414, 424–26 (Bankr. D. Mass. 2001) (same); *In re Transp. Assocs., Inc.*, 263 B.R. 531, 535 (Bankr. W.D. Ky. 2001) (same). *But see In re Payton Constr. Corp.*, 399 B.R. 352, 362 (Bankr. D. Mass. 2009) (declining to adopt the Fifth Circuit's analysis).

172. *Nat'l Gypsum*, 118 F.3d at 1068–69. In *National Gypsum*, for example, the Fifth Circuit held that the bankruptcy court had discretion to resolve a declaratory judgment action regarding whether collection efforts violated section 524(a)'s discharge injunction or the confirmation of the debtor's plan. *Id.* at 1071. The court noted that the action sought to be arbitrated "was restricted entirely to the adjudication of federal bankruptcy issues" and permitting arbitration of these claims "would be inconsistent with the Bankruptcy Code." *Id.* at 1070–71; *see also In re Gandy*, 299 F.3d at 498 (applying the *National Gypsum* standard to uphold the bankruptcy court's decision to deny arbitration in case where bankruptcy issues predominated and their resolution "implicates matters central to the purposes and policies of the Bankruptcy Code").

173. In *In re Mintze*, for example, the Third Circuit held that the debtor's claims under The Truth in Lending Act ("TILA") and various federal and state consumer-protection laws should be arbitrated. 434 F.3d at 233. In so holding, the Third Circuit reversed the decisions of the bank-

developed into a two-part test: whether “the underlying nature of a proceeding derives exclusively from the provisions of the Bankruptcy Code” and whether “arbitration of the proceeding conflicts with the purpose of the Code.”¹⁷⁴

The Second, Fourth, and Ninth Circuits have taken a more fluid and policy-driven approach to the inherent conflict test. These circuits look beyond the origin of claims to determine whether the substance of the dispute mandates resolution in the bankruptcy arena.¹⁷⁵ The Second Circuit, for example, has emphasized that bankruptcy courts must “carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause” based on a “consider[ation of] conflicting policies.”¹⁷⁶ The Bankruptcy Court for the Southern District of New York recently described the court’s task as determining whether core bankruptcy matters are “‘substantially’ core or truly a function of the bankruptcy process.”¹⁷⁷

Courts in these circuits have found a variety of factors relevant to the inherent conflict analysis. These factors principally include bankruptcy’s strong policies in favor of centralization,¹⁷⁸ protecting constituents from piecemeal litigation,¹⁷⁹ and permitting the court to enforce its own orders.¹⁸⁰

ruptcy court and district court, which found bankruptcy resolution proper because the matter would affect other creditors with claims against the debtor’s estate. *Id.* at 227. “With no bankruptcy issue to be decided by the Bankruptcy Court,” the Third Circuit reasoned, “we cannot find an inherent conflict between arbitration of Mintze’s federal and state consumer protection issues and the underlying purposes of the Bankruptcy Code.” *Id.* at 231–32.

174. *In re Gandy*, 299 F.3d at 495.

175. *See In re Thorpe Insulation Co.*, 671 F.3d 1011 (9th Cir. 2012); *MBNA Am. Bank v. Hill*, 436 F.3d 104 (2d Cir. 2006); *Phillips v. Congelton, L.L.C. (In re White Mountain Mining Co.)*, 403 F.3d 164, 169 (4th Cir. 2005). Each of these circuits takes a slightly different approach to this analysis. For example, the Fourth Circuit appears more willing than the Second and Ninth Circuits to adopt a bright line rule that would permit judges to refuse to enforce arbitration clauses in all core proceedings. *See In re White Mountain Mining Co.*, 403 F.3d at 169 (“The Second Circuit . . . did not deduce from the statutory text a congressional intent to prohibit entirely the arbitration of core issues There is the counter argument, however, that the statutory text giving bankruptcy courts core-issue jurisdiction reveals congressional intent to choose those courts in exclusive preference to all other adjudicative bodies, including boards of arbitration, to decide core claims.”).

176. *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass’n (In re U.S. Lines, Inc.)*, 197 F.3d 631, 640–41 (2d Cir. 1999) (quoting *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1161 (3d Cir. 1989)).

177. *In re Hostess Brands, Inc.*, No. 12-22052-RDD, 2013 WL 82914, at *3 (Bankr. S.D.N.Y. Jan. 7, 2013).

178. *See, e.g., In re White Mountain Mining Co.*, 403 F.3d at 170 (finding an inherent conflict in an adversary proceeding involving the determination whether pre-petition cash advances were debt or equity, based on the need to centralize proceedings in a chapter 11 reorganization).

179. *See, e.g., In re Thorpe Insulation Co.*, 671 F.3d at 1023 (“Arbitration of a creditor’s claim against a debtor, even if conducted expeditiously, prevents the coordinated resolution of debtor-creditor rights and can delay confirmation of a plan of reorganization.”); *In re U.S. Lines*, 197 F.3d at 641 (“[T]he bankruptcy court is the preferable venue in which to handle mass tort actions involving claims against an insolvent debtor.”).

But courts have also found relevant whether the outcome of the proceeding would affect other creditors of the estate¹⁸¹ or impair the reorganization process;¹⁸² whether the proceedings at issue implicate some central purpose or purposes of the Bankruptcy Code;¹⁸³ and whether a bankruptcy court might be better suited to handle the claim expeditiously¹⁸⁴ or bring to the

180. *MBNA Am. Bank*, 436 F.3d at 108 (listing, among the objectives of bankruptcy to consider in an inherent conflict analysis, “the undisputed power of a bankruptcy court to enforce its own orders” (quoting *In re Nat’l Gypsum Co.*, 118 F.3d 1056, 1069 (5th Cir. 1997)); see also *Hooks v. Acceptance Loan Co.*, No. 2:10-CV-999-WKW, 2011 WL 2746238, at *5 (M.D. Ala. July 14, 2011) (“[I]t would seem anomalous to allow an arbitrator to construe a court’s order in a contempt setting.”)).

181. See, e.g., *MBNA Am. Bank*, 436 F.3d at 110 (holding that claims for violation of the automatic stay could be arbitrated because the estate had been fully administered and the debtor had received a discharge from chapter 7); see also *Sternklar v. Heritage Auction Galleries, Inc. (In re Rarities Grp., Inc.)*, 434 B.R. 1, 11 (D. Mass. 2010) (permitting arbitration of fraudulent transfer claim and noting that “[t]here do not appear to be any other creditors or third parties in these proceedings whose interests might be affected if the claims are resolved by arbitration”); *In re Martin*, 387 B.R. 307, 322 (Bankr. S.D. Ga. 2007) (finding an inherent conflict because the debtor’s chapter 13 plan was “entirely contingent” on whether the claim at issue was secured or unsecured and the case was “dead in the water” until that issue was resolved).

182. See, e.g., *In re White Mountain Mining Co.*, 403 F.3d at 170 (lower court finding that international arbitration would make it difficult for the debtor to obtain funding, undermine creditor confidence in the reorganization, affect the debtor’s business relationships, and add unnecessary costs and distractions not clearly erroneous); *Ford Motor Cred. Co. v. Roberson*, No. WDQ-10-1041, 2010 WL 4286077, at *3 (D. Md. Oct. 29, 2010) (concluding that because the outcome of the proceeding will affect the debtor’s resources available to pay her debts, “[a]rbitration of the claims against Ford would ‘substantially interfere with [her] efforts to reorganize’ efficiently” (quoting *In re White Mountain Mining Co.*, 403 F.3d at 170)).

183. *In re Thorpe Insulation Co.*, 671 F.3d at 1022 (finding congressional intent that the bankruptcy court manage all aspects of a § 524(g) reorganization); *In re Eber*, 687 F.3d 1123, 1130–31 (9th Cir. 2012) (“[A]llowing an arbitrator to decide issues that are so closely intertwined with dischargeability would ‘conflict with the underlying purposes of the Bankruptcy Code.’”); *In re Huffman*, 486 B.R. 343, 363 (Bankr. S.D. Miss. 2013) (highlighting that “Congress clearly contemplated the regulation of debt relief agencies . . . through the BAPCPA [Bankruptcy Abuse Prevention and Consumer Protection Act]” and refusing to compel arbitration of related matters); *In re Hostess Brands, Inc.*, No. 12-22052-RDD, 2013 WL 82914, at *3–4 (Bankr. S.D.N.Y. Jan. 7, 2013) (finding cash collateral issues to be unique to bankruptcy and invoking substantial bankruptcy rights that are central to the bankruptcy process); *In re Arentson*, 126 B.R. 236, 238 (Bankr. N.D. Miss. 1991) (“[T]his cause of action is exclusively related to a bankruptcy statute, 11 U.S.C. § 525(b), which provides an avenue of redress for discrimination solely because an individual has filed for bankruptcy relief. It is a cause of action that literally begs for resolution in a bankruptcy forum.”).

184. *In re U.S. Lines, Inc.*, 197 F.3d at 641 (“The need for a centralized proceeding is further augmented by the complex factual scenario, involving multiple claims, policies and insurers.”); *In re Thorpe Insulation Co.*, 671 F.3d at 1023 (“Arbitration of a creditor’s claim against a debtor, even if conducted expeditiously, . . . can delay confirmation of a plan of reorganization.”); *In re White Mountain Mining Co.*, 403 F.3d at 170 (highlighting in particular the potential harm of a protracted international arbitration on the debtor’s pending reorganization, the ability of the bankruptcy court to resolve the matter expeditiously, and the ability of other parties to participate at minimal cost). But see *In re Bailey*, No. 07-41381, 2009 WL 8592798, at *5 (Bankr. S.D. Ga. Oct. 8, 2009) (“The delay, expense, or inefficiency of bifurcated or piecemeal litigation is not sufficient Rather, the conflict must rise to the level of substantial interference with the reorgani-

case a particular legal expertise or familiarity with the facts.¹⁸⁵ The impact any of these factors might have on the analysis varies greatly from case to case.

C. Debtor Class Actions Under the Inherent Conflict Test

Debtor classes have brought a variety of causes of action against their creditors, alleging violations of the Bankruptcy Code, federal and state consumer protection laws, or a blend of bankruptcy and non-bankruptcy claims. Some of the most common bankruptcy-based allegations are that (1) creditors violated Section 524's discharge injunction through improper practices involving reaffirmation agreements or other post-discharge debt-collection activities;¹⁸⁶ (2) creditors routinely filed proofs of claim that were inaccurate,¹⁸⁷ contained unlawful fees,¹⁸⁸ or failed to include necessary

zation, violation of substantive bankruptcy principles . . . or some other extraordinary interference with or evisceration of bankruptcy policy.”).

185. See, e.g., *In re Eber*, 687 F.3d at 1131 (noting that the bankruptcy court has “special expertise” to determine dischargeability and familiarity with the case at hand); *In re Huffman*, 486 B.R. at 364 (“Of most concern to the Court is that arbitrators on the roster of the American Arbitration Association (“AAA”) need not be attorneys, much less attorneys experienced in bankruptcy law. . . . Here, the Court finds that arbitration is not an adequate and accessible substitute to litigation in this forum, given the nature of the bankruptcy issues involved.”); *AmeriCorp, Inc. v. Hamm*, No. 2:11-cv-677-MEF, 2012 WL 1392927, at *5 (M.D. Ala. Apr. 23, 2012) (refusing to compel arbitration of non-core proceedings based on a fear that the defendant would have an unfair advantage in arbitration); *In re Arentson*, 126 B.R. at 238 (expressing concern that the New York Stock Exchange and the National Association of Securities Dealers, who presided over the arbitration, would not view the matter to be high priority and that the plaintiff may not have the means to fairly compete with the defendant).

186. See, e.g., *In re Padilla*, 389 B.R. 409, 413 (Bankr. E.D. Pa. 2008) (alleging that lender demanded payment of pre-petition and pre-confirmation attorney’s fees in violation of the discharge injunction); *In re Cline*, 282 B.R. 686, 687 (W.D. Wash. 2002) (alleging lender collected debts in violation of the automatic stay and discharge injunction); *In re Beck*, 283 B.R. 163, 165 (Bankr. E.D. Pa. 2002) (alleging that lender sought to collect discharged debt); *In re Aiello*, 231 B.R. 693, 699 (Bankr. N.D. Ill. 1999) (alleging that lender strong-armed debtors into reaffirming debts), *aff’d sub nom. Aiello v. Providian Fin. Corp.*, 257 B.R. 245 (N.D. Ill. 2000), *aff’d*, 239 F.3d 876 (7th Cir. 2001); *In re Wiley*, 224 B.R. 58, 62–63 (Bankr. N.D. Ill. 1998) (alleging that lenders knowingly pursued discharged debts using an unfiled reaffirmation agreement); *Nelson v. Providian Nat’l Bank (In re Nelson)*, 234 B.R. 528, 532 (Bankr. M.D. Fla. 1999) (alleging improper reaffirmation practices).

187. *In re Simmons*, 237 B.R. 672, 674 (Bankr. N.D. Ill. 1999) (alleging lender has a practice of filing proofs of claim that improperly characterize an undersecured loan as secured); *In re Lenoir*, 231 B.R. 662, 665–66 (Bankr. N.D. Ill. 1999) (alleging that defendants knowingly overvalue claims); *In re Knox*, 237 B.R. 687, 691 (Bankr. N.D. Ill. 1999) (same).

188. *In re Rojas*, No. 07–70058, 2009 WL 2496807, at *1 (Bankr. S.D. Tex. Aug. 12, 2009) (arguing that proofs of claim included improper fees); *In re Tate*, 253 B.R. 653, 658 (Bankr. W.D.N.C. 2000) (alleging lender routinely filed proof of claim with an improper “bankruptcy fee” in violation of the contract, the Bankruptcy Code, and other consumer protection law); *In re Sims*, 278 B.R. 457, 461 (Bankr. E.D. Tenn. 2002) (same); *Bank United v. Manley*, 273 B.R. 229, 231 (N.D. Ala. 2001) (same); *In re Noletto*, 280 B.R. 868, 870 (Bankr. S.D. Ala. 2001) (same); *In re Sheffield*, 281 B.R. 24, 28 (Bankr. S.D. Ala. 2000) (same).

documentation;¹⁸⁹ and (3) lenders misapplied plan payments or assessed secret fees for collection after discharge.¹⁹⁰ The variety of legal claims, combined with courts' divergent and fact-intensive inherent conflict standards, makes a thorough analysis of the arbitrability of debtor class action claims difficult. Nevertheless, some useful generalizations can be drawn with respect to a prototypical debtor class action case—a case in which a class of consumer debtors sues a common lender for widespread violations of bankruptcy law.¹⁹¹

Under the Third and Fifth Circuits' inherent conflict analysis, when debtor class action claims involve violations of bankruptcy law, bankruptcy courts' discretion to refuse arbitration is “at its zenith.”¹⁹² These courts are almost certain to find an inherent conflict in the typical debtor class action case. In addition, debtor class action claims tend to implicate central bankruptcy policies, which may lead courts in other circuits toward an inherent conflict finding. Consumer bankruptcy is designed to further two policies: to give “the honest but unfortunate debtor” a fresh start and to provide for the fair treatment and distribution of assets to creditors.¹⁹³ The conduct in many debtor class actions violates these policies in significant ways. For example, creditors filing inaccurate proofs of claim or collecting undisclosed fees might receive a greater share of the debtor's limited assets vis-à-vis other creditors, in contravention of bankruptcy's distributional policies. This conduct might also undermine the discharge—a hallmark of bankruptcy's fresh-start policy—by leaving debtors in a vulnerable position after bankruptcy. Lenders that misuse reaffirmation agreements, carry hidden costs for collection after bankruptcy, or fail to remove discharged debt on a credit report likewise undermine the discharge by prolonging the debtor's financial instability after the successful conclusion of a bankruptcy case. Congress likely intended these claims, which run to the heart of the bankruptcy process, to be resolved by a bankruptcy court. Many courts have

189. See, e.g., *Patrick v. Dell Fin. Servs., L.P. (In re Patrick)*, 344 B.R. 56, 58 (Bankr. M.D. Pa. 2005) (arguing that Dell Financial Services listed proofs of claim as secured without attaching documentation required by Official Form 10).

190. *In re Cano*, 410 B.R. 506, 518 (Bankr. S.D. Tex. 2009) (arguing lender misallocated plan payments and assessed undisclosed fees for collection post-discharge); *In re Rodriguez*, 396 B.R. 436, 439 (Bankr. S.D. Tex. 2008) (same).

191. Debtor class actions based on bankruptcy code violations are likely more prevalent, as they have a greater likelihood of passing threshold jurisdictional challenges. While subject matter jurisdiction over debtor classes is becoming less controversial in core matters, courts have acknowledged that non-core, state-law claims present a more difficult case. See, e.g., *In re Nolletto*, 244 B.R. at 857 (distinguishing cases premised on state law because it “changes the issues and jurisdictional posture”).

192. *In re Nat'l Gypsum Co.*, 118 F.3d 1056, 1068 (5th Cir. 1997).

193. *Burlingham v. Crouse*, 228 U.S. 459, 473 (1913) (“It is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched.”).

reached precisely this conclusion and refused to compel arbitration of these matters.¹⁹⁴

A variety of factors might be present in a debtor class action case that could lend additional support to a court's inherent conflict finding. For example, parties in interest have broad rights of intervention in bankruptcy, but would be ineligible to participate in an arbitration proceeding between debtor and creditor.¹⁹⁵ Thus, permitting arbitration could, in some cases, eliminate legal rights that would be available to third parties in bankruptcy.¹⁹⁶ Additionally, the arbitrators appointed might not be attorneys, let alone attorneys with knowledge of bankruptcy law, and might not have the experience to apply the law in a manner consistent with broader bankruptcy policies.¹⁹⁷

One group of debtor class action proceedings—proceedings involving Bankruptcy Code provisions where no express private right of action exists—is particularly ill-suited for arbitration. Courts typically find these claims remediable either through civil contempt sanctions¹⁹⁸ or enforceable by operation of the court's equitable authority under Section 105 of the Bankruptcy Code.¹⁹⁹ In either case, the means of punishing the alleged

194. See, e.g., *supra* note 183 (collecting cases where arbitration of matters central to the bankruptcy process would give rise to an inherent conflict).

195. FED. R. BANKR. P. 7024 (right to intervene in adversary proceedings); John T. Hansen, *Pushing the Envelope of Creditors' Committee's Powers*, 80 AM. BANKR. L.J. 89, 100–02 (2006) (discussing intervention rights in adversary proceedings).

196. *In re Belton*, No. 12-23037-RDD, 2014 WL 5819586, at *4 (Bankr. S.D.N.Y. Nov. 10, 2014) (“Bankruptcy cases are predominantly collective, multi-party proceedings” and “thus, a prepetition agreement between the debtor and a creditor that includes an arbitration provision may not be said to cover disputes in a bankruptcy case that involve multiple new parties who did not agree, pre-bankruptcy to arbitration and who have a statutory right to intervene under section 1109(b) of the Code.”).

197. *In re Hermoyian*, 435 B.R. 456, 465 (Bankr. E.D. Mich. 2010) (“[D]ischargeability and other issues relating to the ‘fresh start’ [should be] determined in one forum with particularized expertise to do so.” (quoting *Holland v. Zimmerman (In re Zimmerman)*, 341 B.R. 77, 79–80 (Bankr. N.D. Ga. 2006)); *In re Oakwood Homes Corp.*, No. 02-13396PJW, 2005 WL 670310, at *5 (Bankr. D. Del. Mar. 18, 2005) (“[C]ertain fact situations may be expected to bring about fairly consistent results, wherever they are tried. To subject these matters to arbitration, before individuals or tribunals with little or no experience in bankruptcy law or practice, and with little or no concern for the rights and interests of the body of creditors, of which the particular defendant is only one, would introduce variables into the equation which could potentially bring about totally inconsistent results.”).

198. *Cox v. Zale Del., Inc.*, 239 F.3d 910, 916 (7th Cir. 2001) (suit for violation of section 524 may be brought as a contempt action); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 422–23 (6th Cir. 2000) (same). But see *In re Joubert*, 411 F.3d 452, 457 (3d Cir. 2005) (dismissing case because no private right of action exists). Although courts diverge on the extent of Article I bankruptcy courts' inherent powers, most courts acknowledge that bankruptcy judges possess some form of civil contempt authority, whether inherent or statutorily granted. See generally 2 COLLIER ON BANKRUPTCY P. 105.02 (collecting cases).

199. See, e.g., *Rojas v. Citi Corp Trust Bank FSB (In re Rojas)*, No. 07-70058, 2009 WL 2496807, at *10 (Bankr. S.D. Tex. Aug. 12, 2009) (holding statutory contempt power under Section 105 permits courts to order monetary relief for violations of discharge injunction); *In re Pa-*

conduct is directly linked with the exercise of judicial authority. It is either vested in the courts by statute, as is the case with Section 105,²⁰⁰ or is deemed an inherent component of the judicial role.²⁰¹ Courts and commentators have widely recognized that it would be improper to vest an arbitrator with this degree of judicial authority.²⁰² Indeed, “the ability of a bankruptcy court to enforce its own orders” is an oft-cited factor in an inherent conflict analysis.²⁰³ As such, for claims that seek remedies based on courts’ statutory or inherent powers, an inherent conflict is highly likely to be found.

The fact that these claims are brought on a class-wide basis should, in many instances, add further support to the finding of an inherent conflict. In recent debtor class action cases, the allegations of systemic harm are supported by the staggering incidence of such behavior. In some cases, discovery reveals corporate policies or communications that either permitted or encouraged the alleged violations of bankruptcy law.²⁰⁴ Compelling arbitration of each individual proceeding would fail to capture the broader harms of such conduct on the bankruptcy system as a whole.²⁰⁵ As such,

dilla, 389 B.R. 409, 433 (Bankr. E.D. Pa. 2008) (holding Section 105 remedies violations of Section 1327); *In re Harris*, 297 B.R. 61, 70 (Bankr. N.D. Ala. 2003) *aff’d*, 312 B.R. 591 (Bankr. N.D. Miss. 2004) (holding Section 105 permits monetary relief for violations of Section 1322(b)(5)).

200. 11 U.S.C. § 105(a) provides, “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”

201. *See supra* notes 198–199 and accompanying text.

202. *See, e.g.*, *Hooks v. Acceptance Loan Co.*, No. 2:10-CV-999-WKW, 2011 WL 2746238, *5 (M.D. Ala. July 14, 2011) (“[A]llowing arbitration of contempt proceedings would effectively strip the courts of their primary enforcement mechanism.”); *In re Cavanaugh*, 271 B.R. 414, 426 (Bankr. D. Mass. 2001) (“Enforcement of the arbitration clause under these circumstances would be an abrogation of this Court’s obligation to construe and enforce the injunction issuing under its authority and to determine the parties’ rights and obligations under bankruptcy law.”).

203. Michael D. Sousa, *A Morass of Federal Policy: Enforcing Arbitration Agreements in Bankruptcy Proceedings*, 15 J. BANKR. L. & PRAC. 3 Art. 2 (2006) (collecting cases that find relevant to an inherent conflict analysis “the undisputed power of a bankruptcy court to enforce its own orders”).

204. *See, e.g.*, *In re Harris*, 280 B.R. 876, 880 (Bankr. S.D. Ala. 2001) (“It was First Union’s policy not to disclose the proof of claim fees on the proofs of claim and its attorneys have been so instructed in writing.”); Mark J. Balthazard, *The Criminal Side of Sears*, U.S. ATTORNEYS’ BULL., Aug. 1999, at 71, <http://www.justice.gov/sites/default/files/usao/legacy/2006/06/30/usab4704.pdf> (noting that an internal manual used by Sears’ employees advised that reaffirmation agreements should not be filed before bankruptcy judges that regularly rejected such agreements based on a belief that they were not in the debtor’s best interest).

205. *See, e.g.*, *In re Bethlehem Steel Corp.*, 390 B.R. 784, 794–95 (Bankr. S.D.N.Y. 2008) (“Facts common to many or most of the many hundreds of remaining adversary proceedings being prosecuted by the Liquidating Trust are likely to control the outcomes of these four adversary proceedings. Uniformity in application of the law to the facts in these federal statutory claims is furthered by federal court litigation and not arbitration.”).

bankruptcy courts will likely find arbitration unsuitable for claims alleging systematic bankruptcy abuse.²⁰⁶

One of the few courts to have considered debtor class actions in the context of an inherent conflict analysis, *MBNA American Bank v. Hill*, improperly found the class-wide nature of the action to weigh against an inherent conflict.²⁰⁷ In *Hill*, the Court of Appeals for the Second Circuit found arbitration appropriate because, among other things, the debtor's estate had been fully administered, resolution of her claim would not affect other creditors of the estate, and the debtor had received a fresh start in bankruptcy and was no longer under the protection of the automatic stay.²⁰⁸ The court then added, "as a purported class action, Hill's claims lack the direct connection to her own bankruptcy case that would weigh in favor of refusing to compel arbitration."²⁰⁹

This statement misconstrues the inherent conflict standard. The inherent conflict test examines conflicts between bankruptcy *law* and arbitration, not conflicts between a bankruptcy *debtor* and her individual case. Moreover, as noted above, debtor class action claims frequently will involve questions of systemic abuse, which demand a comprehensive resolution that likely is not available outside of bankruptcy. The facts of *Hill* may well have been insufficient to create an inherent conflict. Yet, to the extent *Hill* stands for the premise that debtor class claims undermine a finding of an inherent conflict, it is wrongly decided.

In sum, a number of factors suggest that courts may find the typical debtor class action case to be unsuitable for arbitration under the inherent conflict test. Although the foregoing discussion focused on debtor classes that allege violations of bankruptcy law, courts have the discretion to find, in appropriate cases, that arbitration of non-bankruptcy causes of action would likewise give rise to an inherent conflict.²¹⁰ Yet the outcome of any inherent conflict analysis is uncertain, as courts exercise considerable discretion when applying this test. As one commentator noted, the inherent conflict test is "so vague and malleable that [it] give[s] courts license to do almost anything they want."²¹¹ Moreover, in light of the Supreme Court's strong embrace of the FAA in disputes covered by class arbitration waivers,

206. See, e.g., *In re Belton*, No. 12-23037-RDD, 2014 WL 5819586, at *10 (Bankr. S.D.N.Y. Nov. 10, 2014) ("[C]omplete and consistent relief is more likely to occur if it is determined by—and with the possible remedial supervision of—a bankruptcy court than on an arbitration-by-arbitration basis of separate alleged violations of the discharge.").

207. See *MBNA Am. Bank v. Hill*, 436 F.3d 104 (2d Cir. 2006).

208. *Id.* at 109.

209. *Id.*

210. See, e.g., *AmeriCorp, Inc. v. Hamm*, No. 2:11-CV-677-MEF, 2012 WL 1392927, at *5 (M.D. Ala. Apr. 23, 2012) (highlighting how the trustee's non-core breach-of-contract claim bears such impact on the debtor's bankruptcy case that arbitration would give rise to an inherent conflict).

211. Kirgis, *supra* note 170, at 520.

bankruptcy courts might feel pressured to construe the inherent conflict test more narrowly in debtor class action cases than in other contexts.

In light of this uncertainty, the following Section makes the affirmative case that courts should consider debtor classes' ability to vindicate bankruptcy rights as a central factor of *McMahon's* inherent conflict analysis. If permitting a claim to be resolved in arbitration would eliminate an affordable procedural path for debtor classes to remedy violations of bankruptcy law or otherwise achieve consumer bankruptcy's goals, bankruptcy courts should refuse to compel arbitration of the dispute.

D. Ensuring the Effective Vindication of Bankruptcy Rights Through the Inherent Conflict Analysis

Ordering arbitration of a debtor class action could make it financially infeasible for a class of debtors to find recourse for conduct that violates their bankruptcy rights. Although this reality is most pronounced when compelling arbitration would give effect to a class arbitration waiver, it could conceivably be present if the debtors' up-front costs to a class-wide arbitration proceeding are prohibitive. This Section argues that when ordering arbitration would impede a debtor class's ability to vindicate bankruptcy rights, courts should find that an inherent conflict exists.

As noted above, courts construing the inherent conflict test in bankruptcy must balance the competing federal policies underlying the Bankruptcy Code and the FAA. Although the test varies from jurisdiction to jurisdiction, at its base the inquiry focuses on how arbitrating a matter might interfere with bankruptcy's goals.²¹² For example, courts have refused to compel arbitration if arbitration would "make it very difficult for the debtor to attract additional funding . . . , undermine creditor confidence . . . , impose additional costs on the estate, and divert the attention and time of the debtor's management."²¹³ Conversely, courts have found arbitration appro-

212. This focus is clear in the more policy-driven analyses of the Second, Fourth, and Ninth Circuits, but it likewise motivates, at least in part, courts' analyses in the Third and Fifth Circuits. See, e.g., *In re Gandy*, 299 F.3d 489, 499 (5th Cir. 2002) (finding an inherent conflict, in part, because the remedy of substantive consolidation "may be out of reach in arbitration"); *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1161 (3d Cir. 1989) ("[W]e must carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause and that we should enforce such a clause unless that effect would seriously jeopardize the objectives of the Code."); see also *In re Brown*, 354 B.R. 591, 599 (D.R.I. 2006) (summarizing several circuit-level decisions on this issue by noting that "each [court] looks to what kind of dispute is at issue and how arbitration of the dispute will affect the objectives of the Bankruptcy Code and the FAA").

213. *Phillips v. Congleton, L.L.C. (In re White Mountain Mining Co.)*, 403 F.3d 164, 170 (4th Cir. 2005); see also *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (In re U.S. Lines, Inc.)*, 197 F.3d 631, 641 (2d Cir. 1999) ("[A]rbitration of the disputes raised in the Complaint would prejudice the Trust's efforts to preserve the Trust as a means to compensate claimants." (quoting *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n*, 169 B.R. 804, 825 (Bankr. S.D.N.Y. 1994))); *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1023 (9th Cir. 2012) ("Ar-

priate when it “would not interfere with or affect the distribution of the estate.”²¹⁴ As part of this ends-focused inquiry, courts naturally must consider the financial ramifications of ordering a class of consumer debtors to pursue their claims in arbitration.²¹⁵

In *Italian Colors Restaurant*, the Supreme Court rejected similar financial considerations in the context of an effective vindication challenge to a class arbitration waiver.²¹⁶ In so doing, the Court refused to “tally[] the costs and burdens” of resolving claims in arbitration when deciding whether to enforce an arbitration clause.²¹⁷ This holding should not, however, have any bearing on bankruptcy courts’ inherent conflict analysis. *Italian Colors Restaurant* involved the intersection of the FAA and the Sherman Act, which courts have long held does not present a conflict with the FAA under any prong of *McMahon*.²¹⁸ Moreover, the effective vindication-exception is a functional test; it considers only whether arbitration would impede a litigant’s ability to assert her statutory rights.²¹⁹ The inherent conflict test is a broader and more nuanced inquiry,²²⁰ balancing the underlying purposes of competing federal statutes to determine whether arbitration or a conflicting federal policy should prevail.²²¹ When balancing the competing policies of

bitration of a creditor’s claim against a debtor, even if conducted expeditiously, prevents the coordinated resolution of debtor-creditor rights and can delay the confirmation of a plan of reorganization.”).

214. *MBNA Am. Bank v. Hill*, 436 F.3d 104, 109 (2d Cir. 2006).

215. *Compare In re Knepp*, 229 B.R. 821, 845 (Bankr. N.D. Ala. 1999) (“A debtor who has filed a bankruptcy petition generally cannot afford arbitration fees. . . . Monies used to pay for arbitration will mean less money to fund the plan and pay creditors. The existence of these actual conflicts permit this Court to exercise its discretion and deny arbitration.”), with *In re Durango Ga. Paper Co.*, 309 B.R. 394, 402 (Bankr. S.D. Ga. 2004) (finding arbitration appropriate where debtor failed to show that it would impose greater expense or delay than a bankruptcy-court resolution).

216. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).

217. *Id.* (“The regime established by the Court of Appeals’ decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure.”).

218. *See id.* at 2310. Indeed, before the *Italian Colors* Court rejected challenges to class arbitration waivers based on the effective-vindication theory, the Court first held that Congress had not demonstrated its intent that claims should be non-arbitrable based on a competing federal policy. *Id.*

219. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000).

220. *See Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 936 (9th Cir. 2013) (“The effective vindication and inherent conflict exceptions are two sides of the same coin—the former turning on the ability to vindicate a statute, and the latter turning on the underlying purposes of a statute.”).

221. *See AmeriCorp, Inc. v. Hamm*, No. 2:11-cv-677-MEF, 2012 WL 1392927, at *3 (M.D. Ala. Apr. 23, 2012) (“Although not explicitly stated in the case law, it is self-evident that the ‘inherent conflict’ test requires a balancing of the legislative interests in play in a particular case.”); Kirgis, *supra* note 170, at 516 (noting that courts applying the inherent conflict test “essentially

bankruptcy and arbitration, courts naturally have considered—and should continue after *Italian Colors Restaurant* to consider—how the cost to the debtor of ordering arbitration might affect bankruptcy policy.

Applying the inherent conflict test in this manner is consistent with the Supreme Court's pro-arbitration jurisprudence. Although the Supreme Court has repeatedly emphasized that "courts must rigorously enforce arbitration agreements according to their terms,"²²² this principle has limited applicability in the bankruptcy arena, where the very purpose is to adjust pre-bankruptcy contractual rights to reach a global resolution of a debtor's financial distress.²²³ Relatedly, the FAA's policies are designed to protect the interests of parties that have contracted for arbitration, but bankruptcy is a multi-party enterprise involving a variety of interests beyond the interests of parties to a given arbitration clause.²²⁴ Although the FAA's freedom-of-contract principles have been strongly supported by the Supreme Court, the Court also developed the inherent conflict test to address precisely these types of policy conflicts. Properly applied, the inherent conflict test should permit arbitration to prevail over issues that are essentially two-party disputes and that do not affect the bankruptcy case, and find that bankruptcy trumps the FAA for matters that bear directly on bankruptcy's goals.

In both *Concepcion* and *Italian Colors Restaurant*, however, the majority of the Court not only promoted arbitration, but derided class-wide arbitration as slower and less efficient than traditional arbitration.²²⁵ Yet it does not follow that bankruptcy court resolution of debtor class claims will be similarly inefficient. The bankruptcy process, like traditional arbitration, is well-suited to handle claims quickly and with minimal litigation costs.²²⁶

balance the policy in favor of arbitration against the policy in favor of consolidated and expedited bankruptcy resolution").

222. *Italian Colors Rest.*, 133 S. Ct. at 2309 (quoting *Dean Willer Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)); see also *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

223. See Mette Kurth, *Comment: An Unstoppable Mandate and an Immovable Policy: The Arbitration Act and the Bankruptcy Code Collide*, 43 U.C.L.A. L. REV. 999, 1030 (1996). Bankruptcy's effect on contract rights can be observed in a number of instances, such as the avoidance of prepetition transfers, the assumption or rejection of executory contracts, the invalidation of *ipso facto* clauses, and the discharge itself. See 11 U.S.C. §§ 324, 365(e), 544, 727 (2012).

224. See, e.g., Jay Lawrence Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy*, 67 MINN. L. REV. 595, 607–09 (1983) (explaining how bankruptcy policy avoids the diminution of the debtor's assets through judgments obtained in other forums during the pendency of the bankruptcy case).

225. *Italian Colors Rest.*, 133 S. Ct. at 2312 ("[T]he switch from bilateral to class arbitration . . . sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." (quoting *Concepcion*, 131 S. Ct. at 1751)).

226. Stephen J. Ware, *Similarities Between Arbitration and Bankruptcy Litigation*, 11 NEV. L.J. 436, 438 (2011) (noting bankruptcy litigation "tends to move more quickly than non-bankruptcy litigation, with a shortened discovery process and an earlier hearing," leading to lower process costs).

Moreover, unlike arbitration panels, bankruptcy courts have extensive experience dealing with massive cases and may have some expertise with class certification standards.²²⁷ Thus, to the extent businesses contract for arbitration to realize the benefits of efficiency and speed, these goals may be satisfied in bankruptcy class action adversary proceedings.

In sum, it is consistent with both the language and the spirit of Supreme Court precedent to revive effective vindication's financial considerations in the context of *McMahon*'s inherent conflict analysis. In so doing, if arbitration would undermine a debtor class's ability to vindicate bankruptcy rights, an inherent conflict should be found. Although determining whether bankruptcy rights would be undermined by arbitration is a fact-intensive consideration, the presence of a class arbitration waiver, prohibitive arbitration costs, or other impediments that affect bankruptcy's aims would seem to indicate that an inherent conflict exists.

IV. CERTIFYING A DEBTOR CLASS

The prior Part argued class arbitration waivers should be unenforceable in bankruptcy under *McMahon*'s inherent conflict test when arbitration of a matter would preclude the vindication of bankruptcy rights. But even if debtor class actions survive challenges based on class arbitration waivers, class litigants must still face the rigors of class certification. Bankruptcy Rule 7023 incorporates Rule 23 of the Federal Rules of Civil Procedure in adversary proceedings.²²⁸ Accordingly, purported classes must satisfy Rule 23's requirements of numerosity,²²⁹ commonality,²³⁰ typicality,²³¹ and adequacy of representation,²³² as well as one or more of Rule 23(b)'s requirements,²³³ to be certified. Over the last several years, federal courts have ratcheted up the evidentiary standards for class certification, requiring more

227. Rule 23 of the Federal Rules of Civil Procedure is incorporated into the Federal Rules of Bankruptcy Procedure. See FED. R. BANKR. P. 7023.

228. *Id.*

229. FED. R. CIV. P. 23(a)(1) (The potential class must be "so numerous that joinder of all members is impracticable.").

230. *Id.* at 23(a)(2) (requiring the potential class to raise common questions of law or fact).

231. *Id.* at 23(a)(3) ("[T]he claims and defenses of the representative parties [must be] typical of the claims or defenses of the class.").

232. *Id.* at 23(a)(4) (requiring that class representatives "fairly and adequately protect the interests of the class").

233. Rule 23(b)(1) is appropriate if prosecuting the actions separately would create a risk of inconsistent results that would establish incompatible standards of conduct for the party opposing the class or absent class members. Rule 23(b)(2) is appropriate when the claimants seek primarily declaratory or injunctive relief in cases where "the party opposing the class has acted or refused to act on grounds that apply generally to the class." *Id.* at 23(b)(2). Rule 23(b)(3) applies when common questions of law or fact predominate and the class action is a superior method of adjudication. Typically, consumer claims are asserted under subsection (b)(2) or (b)(3).

proof at the class certification stage than previously required.²³⁴ In addition, a line of recent decisions has made various elements of certification markedly more difficult to achieve.²³⁵ As a result, lenders' attorneys have multiple avenues to prevent certification in debtor class action cases.²³⁶

But despite these trends, many debtor class actions may be able to run the gantlet of modern class certification.²³⁷ Indeed, the most troubling examples of lender behavior in bankruptcy involve violations of debtors' rights as a general business practice or matter of policy.²³⁸ Quite frequently, examples of overreaching take the form of a routine assessment of fees, form agreement, or other standardized practice or procedure.²³⁹ These types of claims are well-suited to satisfy even the stringent certification standards of modern class actions.

A thorough analysis of the certification of debtor class claims, particularly in light of the variety of potential debtor class causes of action, exceeds the scope of this Article. This Part instead addresses, in general terms, how debtor class actions may fare under modern class certification requirements. First, few debtor class action cases will have trouble meeting the numerosity requirement of Rule 23(a).²⁴⁰ Large lenders often have hundreds of customers in bankruptcy proceedings at any given time,²⁴¹ and abusive practices might go on for years before they are discovered or class

234. See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (describing these trends).

235. See *id.*

236. *Id.*

237. See, e.g., *In re Rodriguez*, 695 F.3d 360, 366–67 (5th Cir. 2012) (affirming bankruptcy court's certification of debtor class); *Order Granting Plaintiffs' Motion for Class Certification*, *In re Brannan*, 485 B.R. 443 (Bankr. S.D. Ala. 2013) (certifying a class of debtors alleging robo-signing violations).

238. See, e.g., *In re Rodriguez*, 432 B.R. 671, 701 (Bankr. S.D. Tex. 2010) (holding lender's practice of assessing fees ignored Bankruptcy Rule 2016(a)), *aff'd*, 695 F.3d 360; *In re Noletto*, 281 B.R. 36, 42 (Bankr. S.D. Ala. 2000) (finding commonality because "counsel charged a set fee in the cases and followed a pattern or several patterns in dealing with postpetition/preconfirmation actions in chapter 13 bankruptcy cases").

239. See, e.g., *In re Harris*, 280 B.R. 876, 880 (Bankr. S.D. Ala. 2001) ("It was First Union's policy not to disclose the proof of claim fees on the proofs of claim and its attorneys have been so instructed in writing.").

240. FED. R. CIV. P. 23(a)(1). While more than forty class members is often found to be sufficient to establish numerosity, bankruptcy courts may require a higher threshold due to their experience handling large numbers of litigants. See, e.g., *In re TWL Corp.*, 712 F.3d 886, 895 (5th Cir. 2013) (noting that numerosity might be more difficult to satisfy for a class of employee creditors because normal bankruptcy procedures are designed to deal with large numbers of claims).

241. See, e.g., *In re Rodriguez*, 432 B.R. at 693 n.29 (certifying a 125-person class from a pool of approximately 750 debtors in the Southern District of Texas who might have been subject to the alleged wrongdoing); *In re Harris*, 280 B.R. at 880 (finding numerosity is satisfied because "[t]here will be hundreds or thousands of potential class members in all states"); *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181, 183 (D. Mass. 1998) (describing Sears affidavit listing 2,733 bankruptcy cases in Massachusetts in which it used unfiled reaffirmation agreements between 1995 and 1997).

action remedies are sought.²⁴² These classes are also ascertainable, as bankruptcy court dockets are publically available, and counsel can easily search for cases in which a certain lender was a party.²⁴³ The typicality and adequacy of representation requirements of Rule 23(a) present no unique issues in debtor class action cases.

The commonality requirement may pose challenges for certain debtor classes, particularly in the wake of *Wal-Mart Stores, Inc. v. Dukes*.²⁴⁴ In *Dukes*, the Supreme Court found that a class of 1.5 million current and former female Wal-Mart employees, who alleged violations of Title VII of the Civil Rights Act of 1964, failed to establish commonality.²⁴⁵ The Court noted that “[w]hat matters to class certification . . . is not the raising of common “questions”—even in droves—but, rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.”²⁴⁶ After *Dukes*, courts tend to look for a common conduct, policy, or practice that underlies the claims of putative class members in order to find the commonality factor satisfied.²⁴⁷ As noted above, in many debtor class action cases, the harm alleged is premised on standard forms, routine practices, or other systematic conduct by large, institutional lenders.²⁴⁸ In some cases, policy manuals or written instructions delineate the abusive conduct.²⁴⁹ For matters premised on federal bankruptcy laws, choice-of-law issues will infrequently arise.²⁵⁰

242. See, e.g., *In re Brannan*, 485 B.R. at 448 (certifying a class of Wells Fargo defendants alleging bankruptcy abuse that occurred from 1996 to 2008). Moreover, courts may find the small value of many debtor class action claims to weigh in favor of numerosity, as individual class members might lack the resources or motivation to file a separate action. *Id.*; see also *In re Rodriguez*, 432 B.R. at 693–94 (finding numerosity satisfied based on the number of plaintiffs, the existence of small claims, and considerations of judicial economy).

243. See *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); MOORE’S FEDERAL PRACTICE 23.21 (stating the implied condition to certification that an identifiable class must exist); see also Pacer Case Locator, <https://pcl.uscourts.gov/search> (last visited Aug. 9, 2015) (allowing for searches by party name).

244. 131 S. Ct. 2541 (2011).

245. *Id.* at 2552.

246. *Id.* at 2551 (alteration in original) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

247. 5-23 MOORE’S FEDERAL PRACTICE—CIVIL § 23.23 (“Some courts have concluded that *Wal-Mart* heightened the standards for establishing commonality.”).

248. See *supra* note 238 and accompanying text.

249. See *supra* note 239 and accompanying text.

250. *In re Sheffield*, 281 B.R. 24, 28 (Bankr. S.D. Ala. 2000) (“There is no choice of law issue involved since the only issues raised by the potential class are federal bankruptcy law issues.”); *In re Noletto*, 281 B.R. 36, 42 (2000) (same). *But see* *Peterson v. Wells Fargo Bank, N.A. (In re Peterson)*, 281 B.R. 685, 689 (Bankr. E.D. Cal. 2002) (finding class certification inappropriate because of differences in jurisdictions recognizing the right to allow debts to “ride through” the bankruptcy case); *In re Walls*, 262 B.R. 519, 525–26 (Bankr. E.D. Cal. 2001) (same).

Even in cases in which individualized issues exist,²⁵¹ a flawed process for handling cases might provide the necessary commonality. In *In re Brannan*, for example, the Bankruptcy Court for the Middle District of Alabama certified a class of debtors who sought to enjoin Wells Fargo from preparing unreliable affidavits to support relief from stay motions.²⁵² Although the impact of this behavior varied across the class—notably, many affidavits, although “robo-signed,” were factually correct—the court found common issues to be present.²⁵³ “If every affidavit was prepared pursuant to a tainted process, every affidavit was untrustworthy at the time the court and debtors relied on it.”²⁵⁴ For these reasons, even under *Dukes*’ “rigorous” standard, commonality in debtor class actions may be found.

Most debtor class action cases that have achieved class certification have done so under Rule 23(b)(2), which requires that the defendant “has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate.”²⁵⁵ Cases that allege systematic misconduct have achieved certification under this standard when they seek a broad injunction that covers a common conduct in a wide range of cases.²⁵⁶ While money damages are theoretically

251. See, e.g., *In re Powe*, 278 B.R. 539 (Bankr. S.D. Ala. 2002) (decertifying class for remaining issue of the reasonableness of fees because the class lacked commonality); *In re Harris*, 280 B.R. 876, 885 (Bankr. S.D. Ala. 2001) (finding the issue of reasonableness of fees to fail commonality and typicality grounds); see also *In re Aiello*, 231 B.R. 693, 712 (Bankr. N.D. Ill. 1999) (“There is no commonality . . . in the issue of compensation for actual damage For example, some letter recipients may claim no damage, some may claim attorney’s fees incurred in responding to the letter, some may seek to recover payments made under invalid reaffirmation agreements, some . . . may claim emotional distress, and still others may claim some combination of such damages.”), *aff’d sub nom. Aiello v. Providian Fin. Corp.*, 257 B.R. 245 (N.D. Ill. 2000), *aff’d*, 239 F.3d 876 (7th Cir. 2001).

252. *In re Brannan*, 485 B.R. 443, 450–51 (Bankr. S.D. Ala. 2013) (“The facts alleged are that affidavits were not reviewed carefully by affiants and notarization was done in a manner that flaunted state law regarding notaries public. What the court relied on—the affiant’s word and the notary’s attestation—are untrue on a consistent basis. One or both parts of the affidavit process—affiant swearing of his/her personal knowledge to the truth of the facts in an affidavit and affiant doing such swearing in the presence of a notary public who signed according to state law—did not occur.”).

253. *Id.* at 457. The court also rejected Wells Fargo’s contention that no policy applicable to all class members existed and that commonality was therefore not present. “This production of affidavits without proper supervision and oversight and in numbers too large to allow due care is the policy at issue.” *Id.* at 457–58.

254. *Id.* at 457.

255. FED. R. CIV. P. 23(b)(2).

256. See, e.g., *In re Brannan*, 485 B.R. at 459 (holding, on motion for reconsideration, that injunctive class may be certified to enjoin Wells Fargo from profiting from longstanding misconduct); *In re Death Row Records, Inc.*, No. 06-11205, 2012 WL 952292, at *12 (B.A.P. 9th Cir. Mar. 21, 2012) (certifying a (b)(2) class to determine trustees’ rights to escheated funds); *In re Rodriguez*, 432 B.R. 671, 710 (Bankr. S.D. Tex. 2010) (certifying (b)(2) class to enjoin Countrywide’s bankruptcy practices), *aff’d*, 695 F.3d 360 (5th Cir. 2012); *In re Harris*, 280 B.R. at 883 (certifying class seeking primarily injunctive relief—to have an improper fee “wiped off their account balances”).

available under this provision, *Dukes* makes clear that they must be incidental to the injunctive or declaratory relief sought.²⁵⁷ Many such litigants have declined to seek individualized damages or disgorgement, as measuring such damages complicates the certification inquiry.²⁵⁸

Debtor classes may seek damages under Rule 23(b)(3), which permits money damages in cases in which “questions of law or fact common to class members predominate over any questions affecting only individual members,” and a class-wide resolution is “superior to other available methods for fairly and efficiently adjudicating the controversy.”²⁵⁹ After the Supreme Court’s recent decision in *Comcast Corp. v. Behrend*, however, it has arguably become more difficult to certify cases in which individual questions of damages predominate.²⁶⁰ In *Comcast*, a class of cable service subscribers sought damages for alleged antitrust violations by their cable provider.²⁶¹ The plaintiffs’ model for calculating damages was based, in part, on theories of liability that had been rejected at the lower court level.²⁶² The Court underscored that courts must undertake a “rigorous analysis” of Rule 23’s standards and indicated the predominance requirement cannot be satisfied where “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.”²⁶³ Because the plaintiffs did not demonstrate that damages were “susceptible of measurement across the entire class,” the Court reversed the lower courts’ orders permitting certification.²⁶⁴ Four dissenting Justices took pains to underscore that “the opinion breaks no new ground on the standard for certifying a class action . . . [and] should not be read to require . . . that damages attributable to a classwide injury be measurable on a class-wide basis.”²⁶⁵ Yet courts have struggled to define the reach of *Comcast*, particularly outside the context of antitrust suits.²⁶⁶

257. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

258. *See, e.g., In re Rodriguez*, 695 F.3d at 366–67 (affirming bankruptcy court’s certification of (b)(2) class that avoided individualized damages, and noting “[t]he focus is properly upon Countrywide’s fee assessment and collection practice, not on the individualized manner in which each class member may have been affected by the practices”).

259. FED. R. CIV. P. 23(b)(3). The court, when measuring these predominance and superiority factors, should consider “the class members’ interests in individually controlling . . . separate actions”; “the extent and nature of any litigation . . . begun by or against class members”; “the desirability or undesirability of concentrating the litigation of the claims in the particular forum”; and “the likely difficulties in managing a class action.” *Id.*

260. *See* 133 S. Ct. 1426, 1432–33 (2013).

261. *Id.* at 1429–30.

262. *Id.* at 1430.

263. *Id.* at 1432–33.

264. *Id.* at 1433.

265. *Id.* at 1436 (Ginsburg, J., and Breyer, J., dissenting).

266. *Compare* *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (distinguishing *Comcast*), *with* *Roach v. T.L. Cannon Corp.*, No. 3:10–CV–0591 (TJM/DEP), 2013 WL 1316452, at *3 (N.D.N.Y. Mar. 29, 2013) (applying *Comcast* to find predominance element unsatisfied).

Many debtor class action cases, particularly those that involve the improper assessment of fees, seek damages that can easily be calculated using lenders' accounting programs and software. In this context, courts may distinguish *Comcast* and find the predominance inquiry satisfied.²⁶⁷ For example, in *Leyva v. Medline Industries, Inc.*, the Ninth Circuit noted that "unlike in *Comcast* . . . , damages will be calculated based on the wages each employee lost due to Medline's unlawful practices."²⁶⁸ Because the lost wages were easily tallied using defendant's computerized payroll and timekeeping database, the court found the class could be certified.²⁶⁹

In cases in which damages inquiries are more individualized, courts might instead use Rule 23(c)(4) to certify a class with respect to the issue of liability only.²⁷⁰ This Rule provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."²⁷¹ Some courts and commentators have speculated that such a bifurcated approach might become a primary means to preserve the class action model in the wake of *Comcast*.²⁷² In the debtor class action context, the Fifth Circuit has recently affirmed the use of Rule 23(c)(4) to certify a class of debtors seeking injunctive relief, leaving the issue of damages to be resolved separately.²⁷³

when no common formula for calculating damages exists), and *In re Motor Fuel Temperature Sales Practices Litig.*, 292 F.R.D. 652, 676 (D. Kan. 2013) (certifying a class as to liability only); see also *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578, 581 (S.D.N.Y. 2013) (collecting cases).

267. See, e.g., *Leyva*, 716 F.3d at 514; *In re High-Tech Emp. Antitrust Litig.*, 289 F.R.D. 555, 582 (N.D. Cal. 2013) (characterizing *Comcast* as requiring that the methodology of proving damages must be tied to liability).

268. 716 F.3d at 514.

269. *Id.*; see also *Parra v. Bashas', Inc.*, 291 F.R.D. 360, 393 (D. Ariz. 2013) (holding grocery store employees' calculation of back pay met the predominance element because "through a computer program, and relying on 'objective factors' . . . the plaintiffs will be able to calculate back pay losses for 'each eligible class member'"). In contrast, in *Cowden v. Parker & Associates, Inc.*, the plaintiffs' claims that the employer withheld commissions and charged excessive fees were found unsuitable for certification because "[p]laintiffs have offered no manageable way to calculate damages across the entire class and the individual damages calculations that would be required will inevitably overwhelm any questions common to the entire class." No. CIV.A. 5:09-323-KKC, 2013 WL 2285163, at *7 (E.D. Ky. May 22, 2013).

270. See, e.g., *In re Motor Fuel*, 292 F.R.D. at 676 (certifying the liability aspects of plaintiffs' claims only); *Miri v. Dillon*, 292 F.R.D. 454, 456 (E.D. Mich. 2013) (same).

271. FED. R. CIV. P. 23(c)(4).

272. See *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578, 585 (S.D.N.Y. 2013) (collecting authority). The Supreme Court recently denied certiorari of two cases involving certification under Rule 23(c)(4). *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), cert. denied 134 S. Ct. 1277 (2014); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013), cert. denied sub nom. *Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014). Thus, the availability of Rule 23(c)(4) remains open for application by lower courts.

273. *In re Rodriguez*, 695 F.3d 360, 369 n.13 (5th Cir. 2012) ("Rule 23(c)(4) explicitly recognizes the flexibility that courts need in class certification by allowing certification with respect to particular issues and division of the class into subclasses." (quoting *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000))).

Recent court decisions have changed the landscape of certification, but have not eliminated the need for relief from widespread lender noncompliance in consumer bankruptcy cases. Class actions can compensate affected debtors and serve as a valuable regulatory check on lender behavior. Moreover, debtor class action claims appear well-suited to survive under modern certification standards.²⁷⁴ In light of the regulatory benefits of class litigation, as well as the role of bankruptcy courts in furthering consumer financial protection, debtors' attorneys should embrace class-wide litigation in bankruptcy. Courts should likewise apply the certification standards as liberally as precedent permits.

V. CONCLUSION

Addressing lender overreaching in consumer bankruptcy cases is no easy task. Despite the existence of clear legal and procedural rules, as well as the oversight of the bankruptcy judge, case trustee, and a variety of bankruptcy professionals, large lenders persist in violating the bankruptcy law and debtors' rights in consumer bankruptcy cases. Debtor class actions, if used expansively, might provide a threat sufficient to alter lenders' decision making, encouraging greater levels of compliance than currently exists. Looking forward, as class action precedent increasingly bars consumers from asserting small value claims outside of the bankruptcy arena, bankruptcy could conceivably rise in prominence as a potential outlet for these consumer harms to be addressed.²⁷⁵

Bankruptcy class actions are an attractive solution to the problems identified in this Article principally because they require no new institutional resources or law reform measures to be effective. As such, bankruptcy attorneys, case trustees, and courts can embrace the debtor class action to encourage greater levels of compliance with bankruptcy and related consumer protection law than currently exists. Nevertheless, the debtor class action should not be pursued to the exclusion of other solutions. In particular, the work of the United States Trustee Program, individual bankruptcy judges, and case trustees has been essential to bringing past lender and servicer misconduct to light. This work should continue. In addition, scholars and lawmakers should explore new law reform measures, including addressing the prudence of modern barriers to class actions and advancing non-class forms of private litigation, to further close consumer bankruptcy's enforcement gap.

274. See Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 532 (2013) (“[S]everal indicia suggest that class actions are alive, well, and thriving as usual, if, in some quarters, in somewhat modified forms.”).

275. This will be discussed in a forthcoming piece. See Bruce, *supra* note 27.