



**PennState**  
Dickinson Law

**DICKINSON LAW REVIEW**  
PUBLISHED SINCE 1897

---

Volume 124 | Issue 1

---

Fall 2019

## Bankruptcy's Class Act: Class Proofs of Claim in Chapter 11

Tori Remington

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlr>



Part of the [Bankruptcy Law Commons](#), [Civil Law Commons](#), [Civil Procedure Commons](#), [Courts Commons](#), [Jurisprudence Commons](#), [Legal Writing and Research Commons](#), [Legislation Commons](#), and the [Litigation Commons](#)

---

### Recommended Citation

Tori Remington, *Bankruptcy's Class Act: Class Proofs of Claim in Chapter 11*, 124 DICK. L. REV. 203 (2019). Available at: <https://ideas.dickinsonlaw.psu.edu/dlr/vol124/iss1/7>

This Comment is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact [lja10@psu.edu](mailto:lja10@psu.edu).

# Bankruptcy’s Class Act: Class Proofs of Claim in Chapter 11

Tori Remington\*

## ABSTRACT

When a business files for protection under Chapter 11 bankruptcy, it must begin to pay off its debt by reorganizing or liquidating its assets. Oftentimes, both processes include terminating employees to reduce the business’s expenditures. As a result of these terminations, former employees might file a “class proof of claim” against the business to preserve any claims of unpaid wages or violations of federal law.

Whether a group may file a class proof of claim against a debtor in bankruptcy remains unclear. The Tenth Circuit has rejected the class proof of claim in bankruptcy. The remaining circuit courts that have addressed the issue agree that the class proof of claim exists within bankruptcy law. However, the concept’s lack of clarity is actually two-fold because courts within the latter group disagree about *when* a court may use its discretion to allow the class proof of claim.

This Comment argues that the class proof of claim exists in bankruptcy law. This Comment further proposes that all courts should use the same discretionary factors to determine when the class proof of claim is appropriate. Congress must modify the Bankruptcy Code to implement both. This Comment argues that modification will ensure the class proof’s uniform and consistent application, maintain fair balance between debtors and creditors, and achieve bankruptcy’s other goals.

## TABLE OF CONTENTS

I. INTRODUCTION.....	204
II. BACKGROUND .....	206
A. <i>Bankruptcy Basics</i> .....	206
1. <i>Purpose of Bankruptcy</i> .....	206

---

\* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2020. Thank you to my mother, father, and grandmother for their infinite love and support. A sincere thank you to Griffin for his thorough and thoughtful input throughout the editing process.

2.	<i>Structure of the Code</i> .....	208
3.	<i>Mechanics of Chapter 11</i> .....	209
B.	<i>Class Proofs of Claim in Chapter 11</i> .....	210
1.	<i>Claims and Proofs of Claim</i> .....	210
2.	<i>Rule 23's Role in Filing Proofs of Claim</i> .....	211
C.	<i>Development of the Circuit Split</i> .....	212
1.	<i>The Stand-Alone Court: The Tenth Circuit Decision</i> .....	213
2.	<i>The Silent Courts</i> .....	215
3.	<i>Majority Approach</i> .....	216
4.	<i>Discretionary Factors</i> .....	219
III.	PROPOSED MODIFICATIONS TO THE BANKRUPTCY CODE .....	221
A.	<i>Resolving the Circuit Split</i> .....	221
B.	<i>Proposed Discretionary Factors</i> .....	224
IV.	CONCLUSION .....	225

## I. INTRODUCTION

Chapter 11 bankruptcies create a sophisticated web of contested proceedings within bankruptcy courts. Practitioners familiar with bankruptcy law's nuances may work with and restructure businesses that hold millions, if not billions, of dollars in assets and liabilities.<sup>1</sup> But even the most valuable empires are susceptible to insolvency and must seek protection under bankruptcy law.<sup>2</sup> For example, when the Enron Corporation filed for Chapter 11 bankruptcy protection in December 2001, it reported approximately \$62 billion in assets.<sup>3</sup> In early 2018, Remington, the gun manufacturer, filed for bankruptcy in Delaware with \$950 million in debt.<sup>4</sup> In late 2018, Sears filed for bankruptcy listing \$11.3 billion in liabilities and \$7 billion in assets.<sup>5</sup> Of course, the Lehman Brothers bankruptcy, the biggest reorganization ever, included assets totaling more than

---

1. See Alex Howe, *The 11 Largest Bankruptcies in American History*, BUS. INSIDER (Nov. 29, 2011), <https://bit.ly/2m57dDA> [<https://perma.cc/84AV-GWQV>].

2. *Id.*

3. David Barboza, *Enron's Many Strands: The Finances; Its Assets May Have Been Overstated by \$24 Billion, Enron Discloses*, N.Y. TIMES (Apr. 23, 2002), <https://nyti.ms/2GeVXvF> [<https://perma.cc/2SFJ-CCWY>]. A later report stated that Enron overstated the values of its assets by approximately \$24 billion dollars. *Id.* Instead, Enron had around \$38 billion dollars in assets. See *id.*

4. David Meyer, *Remington, The U.S. Oldest Gunmaker, Just Filed for Bankruptcy*, FORTUNE (Mar. 26, 2018), <https://bit.ly/30w7vlZ> [<https://perma.cc/7LZT-BZCU>].

5. Michael Corkery, *Sears, the Original Everything Store, Files for Bankruptcy*, N.Y. TIMES (Oct. 14, 2018), <https://nyti.ms/2yjow7r> [<https://perma.cc/K938-PVBB>].

\$600 billion.<sup>6</sup> Attorneys who handle big business bankruptcies must creatively maneuver through the complex subtleties of bankruptcy law.<sup>7</sup>

Terminating employees as a result of filing complicates the bankruptcy process.<sup>8</sup> Businesses occasionally terminate thousands of employees as an expense-reducing mechanism.<sup>9</sup> In response to massive layoffs, groups of employees may want to file a class proof of claim<sup>10</sup> (“class proof”) against the business.<sup>11</sup>

Unfortunately, whether a group may file a class proof pursuant to the Bankruptcy Code<sup>12</sup> (“Code”) remains unclear.<sup>13</sup> Some courts do not permit the class proof.<sup>14</sup> And the courts that permit the class proof disagree on which discretionary factors to use to determine when it is appropriate.<sup>15</sup>

---

6. Robert J. Samuelson, *The Lehman Brothers Lesson, Five Years Later*, WASH. POST (Oct. 1, 2014), <https://wapo.st/30ukip5> [<https://perma.cc/7E6N-NB2E>].

7. ELIZABETH WARREN ET AL., *THE LAW OF DEBTORS AND CREDITORS* 359–60 (7th ed. 2014) (explaining that the combination of procedural differences and more complicated debt in Chapter 11 permits creative lawyering and financial maneuvering).

8. *See, e.g., In re United Healthcare Sys. Inc.*, 200 F.3d 170, 173 (3d Cir. 1999) (discussing that a hospital, the debtor-in-possession, laid off approximately 1,300 employees while reorganizing during bankruptcy), *cert. denied*, 530 U.S. 1204 (2000).

9. *Bankrupt Restaurant Chain Lays Off 1,260 Overnight*, FOX BUS. (Oct. 6, 2011), <https://fxn.ws/2YQJTI9> [<https://perma.cc/9YZF-JJQB>] (noting Friendly’s Ice Cream Corporation terminated 1,260 employees after filing for bankruptcy in 2011); *see also* Shawn Young, *Getting Laid Off Hurts Worse When Employer Is Bankrupt*, WALL ST. J., <https://on.wsj.com/32o8zdo>, [<https://perma.cc/WQV2-TSMZ>] (last updated Sept. 30, 2002) (explaining that WorldCom fired thousands of employees once it filed bankruptcy).

10. FED. R. BANKR. P. 3001(a) (defining a “proof of claim” as a “written statement setting forth a creditor’s claim”); *see also infra* notes 64–66 and accompanying text (explaining the parameters of the definition of a claim).

11. *See, e.g., In re MF Global Inc.*, 512 B.R. 757, 760 (S.D.N.Y. 2014) (explaining that former employees of MF Global Inc. filed a putative class proof for damages under federal law).

12. 11 U.S.C. §§ 101–1532 (2012).

13. *Compare In re Am. Reserve Corp.*, 840 F.2d 487, 488 (7th Cir. 1988) (construing the Code to allow the class proof), *with In re Standard Metals Corp.*, 817 F.2d 625, 630 (10th Cir. 1987) (rejecting the class proof in bankruptcy proceedings); *see also infra* Part II.C.

14. *In re Standard Metals Corp.*, 817 F.2d at 630; *Kahler v. FirstPlus Fin., Inc. (In re FirstPlus Fin.)*, 248 B.R. 60, 71 (Bankr. N.D. Tex. 2000); *In re Allegheny Inter., Inc.*, 94 B.R. 877, 878 (Bankr. W.D. Pa. 1988); *see In re Cont’l Airlines Corp.*, 64 B.R. 874, 881 (Bankr. S.D. Tex. 1986).

15. *See In re Bally Total Fitness of Greater New York, Inc.*, 402 B.R. 616, 619–20 (S.D.N.Y. 2009) (explaining that there is no absolute right to file a class proof but that courts use different discretionary powers to determine the applicability of a class proof in the specific case before the court); *see also infra* Part II.C.4.

This Comment examines those inconsistencies and calls for Congress to modify the Code to allow the class proof<sup>16</sup> and to enumerate the factors courts should use to determine when the class proof is appropriate.<sup>17</sup> Modifying the Code to include these provisions would achieve bankruptcy's objectives of fairness, consistency, and uniformity.<sup>18</sup>

Part II of this Comment begins with an overview of the Code's structure and purpose,<sup>19</sup> including a description of the class proof,<sup>20</sup> and explores the circuit split on whether the Code permits the class proof and what discretionary factors courts should use to make this determination.<sup>21</sup> Part III addresses the circuit split and argues that modifying the Code is necessary to achieve bankruptcy's goals.<sup>22</sup> Finally, Part IV concludes by summarizing the issues presented in this Comment.<sup>23</sup>

## II. BACKGROUND

### A. *Bankruptcy Basics*

#### 1. *Purpose of Bankruptcy*

The struggle for balance between the interests of debtors<sup>24</sup> and creditors<sup>25</sup> is not a twenty-first century invention.<sup>26</sup> Paradoxically, “[t]he payment of debts is necessary for social order. The non-payment of debts is equally necessary for social order. For centuries humanity has oscillated, serenely unaware, between these two contradictory necessities.”<sup>27</sup> Bankruptcy courts, as courts of equity, reflect this debtor-creditor dyad.<sup>28</sup>

---

16. See *infra* Part III.A.

17. See *infra* Part III.B.

18. See *infra* Part III.A.

19. See *infra* Part II.A.

20. See *infra* Part II.B.

21. See *infra* Part II.C.

22. See *infra* Part III.A–B.

23. See *infra* Part IV.

24. 11 U.S.C. § 101(13) (2012) (defining “debtor” as a “person or municipality concerning which a case under this title has been commenced”). In this Comment, the debtor is the business that files for bankruptcy protection.

25. *Id.* § 101(10)(a)(1) (defining a “creditor” as an “entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor”).

26. See, e.g., DAVID A. SKEEL, *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 23 (2003) (explaining that the struggle between the interests of debtors and creditors has existed for years).

27. RICHARD H. BELL & SIMONE WEIL, *THE WAY OF JUSTICE AS COMPASSION* 59 (1998) (citations omitted).

28. *In re Briggs Transp. Co.*, 780 F.2d 1339, 1343 (8th Cir. 1985) (citations omitted) (“Essential to any analysis of the meaning of and policy behind any sec-

Congress drafted Code sections<sup>29</sup> to balance creditors' and debtors' protections and abilities.<sup>30</sup> For individual debtors,<sup>31</sup> bankruptcy exists fundamentally to provide a "fresh start."<sup>32</sup> This fresh start gives "the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."<sup>33</sup> At the same time, creditors enjoy some protections in the Code to ensure they receive money owed when a debtor is capable of paying.<sup>34</sup>

The purpose of Chapter 11 bankruptcy is to "assist financially distressed business enterprises by providing them with breathing space in which to return to a viable state."<sup>35</sup> The debtor's "viable state" should include the debtor's ability to "operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders."<sup>36</sup> On the other hand, Chapter 11 bankruptcy safe-

---

tion of the Code is the recognition that a bankruptcy court is a court of equity . . . [they] operate under the overriding consideration that equitable principles govern the exercise of bankruptcy . . .").

29. 11 U.S.C. §§ 101–1532 (2012).

30. *Compare* 11 U.S.C. § 522 (2012) (providing a debtor with exemptions for property to prevent the sale and distribution of that property to creditors), *with* 11 U.S.C. § 362(d) (giving a creditor the ability to lift the automatic stay and seize a debtor's property in certain instances).

31. The Bankruptcy Code provides individuals and entities six options for relief. The Code includes provisions for each Chapter. Chapter 7 offers most debtors a discharge, which releases the debtor from personal liability for certain dischargeable debts. 11 U.S.C. §§ 701–84 (2012). Chapter 13 allows a debtor to remain in possession of his or her property and provides relief to a debtor after he or she makes payments to creditors pursuant to a three or five-year plan. *Id.* §§ 1301–30. Chapter 9 provides for reorganization; however, only "municipalities," which includes cities, towns, school districts, and counties, may file under this Chapter. 11 U.S.C. §§ 901–46 (2012). Chapter 11 bankruptcies typically consist of corporate debtors attempting to reorganize and restructure both the business and its existing debt. *Id.* §§ 1101–74. Chapter 12 is devoted to debt relief for family farmers and fishermen who qualify. *Id.* §§ 1201–32. The final type of bankruptcy, commonly called "Cross-Border Insolvency" or "Chapter 15," provides special mechanisms for when the debtor or his property is subject to both United States law and at least one foreign country. *Id.* §§ 1501–32. Most of the six Chapters are odd-numbered to leave room for expansion in the Code, an example of which occurred when Chapter 12 was added for family farmers and fishermen. COLLIER ON BANKRUPTCY ¶ 1.01(2) (Richard Levin & Henry J. Sommer eds., 16th ed. rev. 2018).

32. *E.g.*, *Schneiderman v. Bogdanovich (In re Bogdanovich)*, 292 F.3d 104, 107 (2d Cir. 2002).

33. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (citations omitted).

34. 11 U.S.C. §§ 361–64 (2012) (requiring debtors to provide adequate protection to creditors, thereby protecting creditor's interests); *see also In re Briggs Transp. Co.*, 780 F.2d 1339, 1343–44 (8th Cir. 1985).

35. *In re Encore Prop. Mgmt.*, 585 B.R. 22, 29 (W.D.N.Y. 2018) (citing *In re C-TC 9th Ave. P'ship*, 113 F.3d 1304, 1310 (2d Cir. 1997)).

36. *In re Martin*, 761 F.2d 472, 475 (8th Cir. 1985) (citing *In re Am. Mariner Indus.*, 734 F.2d 426, 431 (9th Cir. 1984)).

guards creditors as it aims to protect the “equality of distribution among creditors of the debtor.”<sup>37</sup> In a bankruptcy case, creditors and debtors, as well as other groups such as bank lenders, the trustee, or employees, attempt to leverage their positions to maximize their interests and protect themselves from loss.<sup>38</sup>

## 2. *Structure of the Code*

The Constitution grants Congress the power to enact laws concerning bankruptcy’s rules and procedures.<sup>39</sup> Congress used this power to create the Code and Federal Rules of Bankruptcy Procedure (“Federal Rules”).<sup>40</sup> The Code outlines bankruptcy’s substantive processes.<sup>41</sup> It delineates six types of bankruptcy Chapters,<sup>42</sup> but this Comment focuses solely on Chapter 11 bankruptcy. The Federal Rules list the procedural and regulatory components that govern all bankruptcy proceedings.<sup>43</sup> Together, the Code and Federal Rules create a distinct body of bankruptcy law.<sup>44</sup>

---

37. COLLIER, *supra* note 31, ¶ 1.01(1) (quoting *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991)).

38. See Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 352–54 (1992) (discussing how the power that bankruptcy law grants competing parties allows each to negotiate more favorable terms).

39. U.S. CONST. art. I, § 8, cl. 4.

40. FED. R. BANKR. P. 1001–9037.

41. See generally 11 U.S.C. §§ 101–1532 (2012). The Code, which contains the uniform federal law governing all bankruptcy cases, is codified as Title 11 in the United States Code. *Id.* Congress enacted the Code through the Bankruptcy Reform Act in 1978. COLLIER, *supra* note 31, ¶ 2.01(c). In its last major renovation of the Code, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 199 Stat. 23 (modifying the rules that govern whether one may file for protection under a certain chapter of the Code).

42. See *supra* note 31 and accompanying text.

43. FED. R. BANKR. P. 1001–9037. In addition to the Federal Rules, the Federal Rules of Civil Procedure are often incorporated for litigation. *Pham v. Golden (In re Pham)*, 536 B.R. 424, 432 (B.A.P. 9th Cir. 2015). Bankruptcy courts also have the authority to designate their own “Local Rules” that provide additional, but limited, regulations. *Id.* at 434. For example, local rules may not “enlarge, abridge, or modify any substantive right.” *Anwar v. Johnson*, 720 F.3d 1183, 1189 (9th Cir. 2013) (internal quotation marks omitted).

44. See U.S. CONST. art. I, § 8, cl. 4; 11 U.S.C. §§ 101–1532 (2012); FED. R. BANKR. P. 1001–9037.

### 3. *Mechanics of Chapter 11*<sup>45</sup>

Chapter 11 bankruptcy encourages the debtor to continue business operations<sup>46</sup> because “[t]he hallmark of [C]hapter 11 is flexibility.”<sup>47</sup> A business’s act of filing a bankruptcy petition creates an “estate.”<sup>48</sup> The business, now the debtor,<sup>49</sup> essentially takes the place of the trustee, receiving all the rights and powers a trustee would have.<sup>50</sup> The automatic stay,<sup>51</sup> a special protection afforded to debtors in all Chapters, protects the debtor by prohibiting creditors from collecting items or monies from the estate during the bankruptcy.<sup>52</sup> The debtor begins to negotiate a plan<sup>53</sup> with its major creditors to decide how the business can restructure its debt.<sup>54</sup> Meanwhile, the debtor may attempt to obtain additional financing from creditors or lenders to continue operations.<sup>55</sup>

A debtor must confirm a plan in which it promises to pay its creditors a certain percentage of their claims over a period of time.<sup>56</sup> Within 120 days of the bankruptcy filing, the debtor must introduce the reorganization plan.<sup>57</sup> The contents of the plan vary depending on what components the debtor and creditors agree to.<sup>58</sup> However, the plan must satisfy sixteen statutory requirements.<sup>59</sup>

45. For an in-depth look into the processes and procedures of Chapter 11, see generally COLLIER, *supra* note 31, ¶ 1100.

46. COLLIER, *supra* note 31, ¶ 1100.01 (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983)) (explaining that reorganization could operate successfully in the future and that it was Congress’s intent to provide a mechanism of business rehabilitation).

47. *Id.* ¶ 1100.01.

48. *Id.* The Code defines “estate” as both the debtor’s tangible and intangible property. 11 U.S.C. § 541(a) (2012). “Property” is not defined in the Code, but courts have held that Congress intended a broad definition. *E.g.*, *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 202–04 (1983).

49. Stepping into the role of trustee, the debtor becomes the “debtor in possession,” who has the power to, for example, sell assets with the court’s approval. COLLIER, *supra* note 31, ¶ 1100.

50. 11 U.S.C. § 1107 (2012). But this power has limitations. *Id.*

51. *Id.* § 362. Exceptions to the automatic stay exist. *Id.* § 362(b).

52. COLLIER, *supra* note 31, ¶ 1.05(1).

53. The Code reserves an entire subchapter to the “plan.” 11 U.S.C. §§ 1121–29 (2012) (explaining the contents and procedure for approving the plan). The debtor proposes a plan, but a creditor may also propose a plan. WARREN, *supra* note 7, at 365.

54. WARREN, *supra* note 7, at 365. A group of creditors, called a creditor committee, negotiates on the group’s behalf to ensure adequate representation of the creditors’ claims. 11 U.S.C. § 1102(a)(1)–(2) (2012).

55. 11 U.S.C. § 364 (2012).

56. WARREN, *supra* note 7, at 366.

57. 11 U.S.C. § 1121(b) (2012).

58. *See id.* § 1123. However, all plans must include certain specifications. *Id.*

59. *Id.* § 1129(a).



After the debtor formulates the plan, certain classes of creditors vote to confirm or reject the plan.<sup>60</sup> After the plan's confirmation, the court discharges the debtor's pre-petition debts, freeing the business from personal liability for those debts not included in the plan.<sup>61</sup> Therefore, a debtor should ensure that the plan includes treatment for all classes of claims, including the class proof.<sup>62</sup>

## B. *Class Proofs of Claim in Chapter 11*

### 1. *Claims and Proofs of Claim*

A "claim" is the right to payment or the right to an equitable remedy.<sup>63</sup> The Federal Rules define a "proof of claim" as a "written statement setting forth a creditor's claim."<sup>64</sup> Congress intended "claim" to have the broadest possible meaning, and the Supreme Court's interpretation of that term has accorded with Congress's intention.<sup>65</sup> The expanded interpretation contemplates future changes in the forms of legal obligations.<sup>66</sup>

Creditors use the proof of claim to assert their claims against debtors.<sup>67</sup> The act of filing a valid proof of claim reserves a creditor's position in the debtor's reorganization plan.<sup>68</sup> Certain creditors *must* file proofs of claim to obtain their place in the reorganization plan.<sup>69</sup> Any creditor *may* file a proof of claim under

---

60. FED. R. BANKR. P. 3017 (outlining which creditor classes can vote on the plan).

61. 11 U.S.C. § 1141(d) (2012).

62. *See id.*

63. *Id.* § 101(5) (explaining that a claim is a right "whether or not such right . . . is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured").

64. FED. R. BANKR. P. 3001(a). A creditor, or its authorized agent, must execute the proof of claim. *Id.* § 3001(b).

65. *JELD-WEN, Inc. v. Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114, 121 (3d Cir. 2010) (collecting cases); *see also* H.R. REP. NO. 95-595, at 309 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6266.

66. *In re Remington Rand Corp.*, 836 F.2d 825, 829 (3d Cir. 1988) (citing H.R. REP. NO. 95-595, at 309) ("By this *broadest possible definition* and by use of the term throughout the title 11 . . . the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in [sic] the bankruptcy case.").

67. FED. R. BANKR. P. 3001(a).

68. *See id.*

69. *Id.* § 3003(c)(2) (mandating that any creditor or equity security holder with a non-scheduled or disputed claim must file a proof of claim).

the Federal Rules.<sup>70</sup> The proof of claim is automatically allowed if the debtor or other authorized party raises no objections.<sup>71</sup>

## 2. Rule 23's Role in Filing Proofs of Claim

Filing claims is not unique to bankruptcy law.<sup>72</sup> Indeed, a class proof is analogous to a class action in civil lawsuits.<sup>73</sup> Similar to bankruptcy, the class action's goals are to provide efficiency, promote consistency, and maintain fairness.<sup>74</sup> Federal Rule 7023 is evidence of the parallel between class proofs in bankruptcy and class actions in civil litigation.<sup>75</sup> The rule states that Federal Rule of Civil Procedure 23 applies in adversarial<sup>76</sup> bankruptcy proceedings.<sup>77</sup>

Certification of a class action requires four elements:

- (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the repre-

70. *Id.* § 3003(c)(1). Absent some exceptions, for voluntary Chapter 7, Chapter 12, and Chapter 13, a proof of claim is timely filed when “it is filed not later than 70 days after the order for relief . . . .” *Id.* § 3002(c). The order for relief is the commencement of the bankruptcy case under the particular Chapter. 11 U.S.C. § 301 (2012).

71. 11 U.S.C. § 502 (2012).

72. *See, e.g.,* Kyriazi v. W. Elec. Co., 647 F.2d 388, 392–94 (3d Cir. 1981) (explaining that individuals file claims in class actions outside of bankruptcy law).

73. Paul C. Wohlmuth, *The Class Action and Bankruptcy: Tracking the Evolution of a Legal Principle*, 21 UCLA L. REV. 577, 588 (1973) (explaining that Federal Rule of Civil Procedure 23, the rule governing class actions in civil suits, is at the “very heart” of bankruptcy).

74. *See* Am. Pipe & Cons. Co. v. Utah, 414 U.S. 538, 553 (1974); *see also* 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1754 (3d ed. 2005). The goals of class actions include:

[E]fficient resolution of the claims or liabilities of many individuals in a single action, the elimination of repetitious litigation and possibly inconsistent adjudications involving common questions, related events, or requests for similar relief, and the establishment of an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits.

*Id.*

75. *See* FED. R. BANKR. P. 7023 (importing Federal Rule of Civil Procedure 23, the rule governing class actions, into bankruptcy law).

76. *Id.* Adversary proceedings are not part of bankruptcy cases. *Jordan v. D’Amico (In re D’Amico)*, 507 B.R. 804, 806 (Bankr. W.D.N.Y. 2014). Adversary proceedings are like civil lawsuits, but the bankruptcy court governs them. *Id.* The Federal Rules enumerate a list of adversary proceedings. FED. R. BANKR. P. 7001. Anything not considered an adversary proceeding is a contested matter, which is part of a bankruptcy case. *In re Dynege, Inc.*, 770 F.3d 1064, 1069 (2d Cir. 2014).

77. FED. R. BANKR. P. 7023.

sentative parties will fairly and adequately protect the interests of the class.<sup>78</sup>

In addition, a court will not maintain a class action unless the class has satisfied at least one of the requirements of Federal Rule of Civil Procedure 23(b).<sup>79</sup> Once the court certifies the class, the class representatives must provide notice to each class member.<sup>80</sup> Members may opt out of joining the class.<sup>81</sup> Certifying a class proof in bankruptcy mirrors certifying a class action.<sup>82</sup> Though using the class action device is not disputed in civil litigation, debate exists regarding the class proof's applicability in bankruptcy.<sup>83</sup>

### C. *Development of the Circuit Split*

The Code does not contain any express provisions pertaining to the class proof.<sup>84</sup> The absence of any explicit rule forces the courts to interpret the Code and Federal Rules.<sup>85</sup> As a natural result, the class proof is not uniformly applied.<sup>86</sup>

Because the class proof lacks clarity, circuit courts fall into three groups: (1) courts that disallow the class proof, (2) courts that have not addressed the class proof, or (3) courts that allow the class

78. FED. R. CIV. P. 23(a). The party hoping for class certification holds the burden of proof. *In re Livaditis*, 122 B.R. 330, 336 (N.D. Ill. E. Div. 1990) (citing *Trotter v. Kliner*, 748 F.2d 1177, 1184 (7th Cir. 1984)).

79. FED. R. CIV. P. 23(b). The rule states:

A class action may be maintained if Rule 23(a) is satisfied and if: (1) prosecuting separate actions by or against individual class members would create a risk . . . (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class . . . or (3) the court finds that the questions of law or fact commons to class members predominate over any questions affecting only individual members.

*Id.*

80. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (explaining that due process fundamentally requires notice reasonably calculated to apprise those parties involved in the action).

81. FED. R. CIV. P. 23(c)(2)(A) (allowing class members the opportunity to opt out once they have received notice). Some courts have construed this rule to require potential members to take affirmative action, showing their desire for ultimate recovery. *See, e.g., Robinson v. Union Carbide Corp.*, 544 F.2d 1258, 1260 (5th Cir. 1977).

82. Wohlmut, *supra* note 73, at 588.

83. *Id.*; *see also infra* Part II.C.

84. *See Nicholas A. Mirsky III, Bankruptcy and Class Actions: The Continuing Conflict over Class Proofs of Claim*, 56 MO. L. REV. 749, 749, 749 n.5 (1991).

85. *In re Am. Reserve Corp.*, 840 F.2d 487, 488 (7th Cir. 1988) (holding that class proofs exist in bankruptcy law). *But see In re Standard Metals Corp.*, 817 F.2d 625, 630 (10th Cir. 1987) (stating that bankruptcy law does not allow the class proof).

86. *Compare In re Am. Reserve Corp.*, 840 F.2d at 488 (allowing the class proof), *with In re Standard Metals Corp.*, 817 F.2d at 630 (denying the class proof).

proof. Which group a court falls into depends on whether the court has held it can construe the Code and Federal Rules to allow the class proof. As of 2019, the Tenth Circuit is the only circuit court that has rejected the class proof.<sup>87</sup> All other courts that have addressed the issue allow the class proof in bankruptcy.<sup>88</sup> Therefore, the third group represents the most common perspective.<sup>89</sup> However, further disagreement exists within the majority approach.<sup>90</sup> Courts must decide when the class proof is appropriate but disagree about which discretionary factors to use in making that determination.<sup>91</sup> The disagreements among and within the groups prevent courts from achieving bankruptcy's goals.<sup>92</sup>

### 1. *The Stand-Alone Court: The Tenth Circuit Decision*

In *In re Standard Metals Corp.*,<sup>93</sup> the Tenth Circuit definitively stated that the class proof violates the Code and Federal Rules.<sup>94</sup> Standard Metals Corporation ("Standard") owned 50 percent of the shares of National Smelting and Refining Company.<sup>95</sup> Through NSR's wholly owned subsidiary, National Smelting of New Jersey, the companies raised \$6 million for a project<sup>96</sup> by selling tax-exempt industrial revenue bonds.<sup>97</sup> All three companies succumbed to financial difficulties; and, when a default on the bonds occurred, all three companies filed Chapter 11 petitions.<sup>98</sup>

Dan Sheftelman ("Sheftelman") purchased six of the bonds, each worth \$5,000, but Standard did not include any of the bond

87. *In re Standard Metals Corp.*, 817 F.2d at 630; see also *infra* Part II.C.1.

88. *Gentry v. Siegel*, 668 F.3d 83, 88–90 (4th Cir. 2012); *Birting Fisheries v. Lane (In re Birting Fisheries)*, 92 F.3d 939, 939 (9th Cir. 1996); *In re Charter Co.*, 876 F.2d 866, 869 (11th Cir. 1989); *Reid v. White Motor Corp.*, 886 F.2d 1462, 1469–70 (6th Cir. 1989); *In re Am. Reserve Corp.*, 840 F.2d at 488.

89. See *infra* Part II.C.3.

90. See, e.g., *In re Bally Total Fitness of Greater N.Y., Inc.*, 402 B.R. 616, 620 (Bankr. S.D.N.Y. 2009) (citations omitted) (explaining that courts use different factors to determine when the class proof is appropriate); see also *infra* Part II.C.4.

91. Compare *In re Bally Total Fitness of Greater N.Y., Inc.*, 402 B.R. at 620 (citations omitted) (outlining three factors to look at to determine whether the judge has discretion in allowing the class proof), with *Gentry v. Circuit City Stores, Inc. (In re Circuit City Stores, Inc.)*, 439 B.R. 652, 658 (Bankr. E.D. Va. 2010) (outlining five factors to analyze for the permissibility of the class proof).

92. *Mirkay*, *supra* note 84, at 755–56.

93. *In re Standard Metals Corp.*, 817 F.2d 625 (10th Cir. 1987).

94. *Id.* at 630.

95. *Id.* at 627.

96. The project was to acquire, renovate, and operate a smelting plant in New Jersey. *Id.*

97. *Id.* The New Jersey Economic Development Authority issued the bonds. *Id.*

98. *Id.*

purchasers as creditors in its bankruptcy petition.<sup>99</sup> Later, Sheftelman filed a proof of claim in Standard's bankruptcy on behalf of those who had purchased bonds.<sup>100</sup> Standard asserted, in part, that a class proof was not allowed in bankruptcy.<sup>101</sup> The bankruptcy court prohibited the class proof because neither the Bankruptcy Reform Act of 1978 nor the 1983 Federal Rules expressly allowed the class proof.<sup>102</sup>

In affirming the bankruptcy court's decision, the Tenth Circuit addressed the class proof.<sup>103</sup> The Tenth Circuit stated that "the Act and the Rules do not expressly permit or expressly prohibit class proofs of claim."<sup>104</sup> The court noted that Federal Rule 3001 requires that "a proof of claim shall be executed by the creditor or the creditor's authorized agent."<sup>105</sup> The court then restricted Federal Rule 3001 to its plain meaning and denied the interpretation that a class representative was an authorized agent.<sup>106</sup> Referencing the historical motivation for the class action, which included avoiding multiple similar suits, the court stated that "class proofs of claim are unnecessary in a bankruptcy proceeding."<sup>107</sup>

The court's decision in *In re Standard Metals Corp.* to disallow the class proof has remained a stronghold within the Tenth Circuit.<sup>108</sup> Some bankruptcy courts follow the Tenth Circuit's reason-

---

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 627–28. At the time of this decision, the Tenth Circuit was the first circuit to address the question of whether a class proof is allowable in a Chapter 11 proceeding under the 1978 Act and the 1983 Rules. *Id.* at 630.

103. *In re Standard Metals Corp.*, 817 F.2d at 631–34.

104. *Id.* at 631.

105. *Id.* (brackets omitted) (quoting Federal Rule 3001(b)). The court went on to say that this rule requires that "each individual claimant . . . file a proof of claim or expressly authorize an agent to act on his or her behalf." *Id.*

106. *Id.* Sheftelman filed a class action suit in federal district court three weeks before he filed the class proof. *Id.* at 627 n.1. Both filings raised the same allegations. *Id.* The court recognized that, although an agent may file a class proof only on behalf of those individuals who provide consent, "consent to being a member of a class in one piece of litigation is not tantamount to a blanket consent to any litigation the class counsel may wish to pursue." *Id.* at 631 (quoting *In re Baldwin-United Corp.*, 52 B.R. 146, 148–49 (Bankr. S.D. Ohio 1985)).

107. *Id.* at 632. The court reasoned that bankruptcy governs all claims against a debtor in one proceeding and, therefore, already avoids similar suits. *Id.*

108. Sarah R. Borders & Jeffrey R. Dutson, *Order's Up! Navigating Complex Restaurant Restructurings*, 37 AM. BANKR. INST. J., July 2019, at 26, 52 n.11 (identifying that *In re Standard Metals Corp.* represents the Tenth Circuit's position regarding the class proof).

ing that congressional silence on the issue equates to denying the court's authority to allow the class proof.<sup>109</sup>

## 2. *The Silent Courts*

Though literature<sup>110</sup> and caselaw<sup>111</sup> exist regarding the class proof in bankruptcy law, some circuit courts have not ruled on the issue.<sup>112</sup> For example, the First and Eighth Circuits have not addressed the class proof at all.<sup>113</sup> The Second Circuit had the opportunity to address the issue in *Chateaugay Corp. v. Iles*<sup>114</sup> but for other reasons did not decide the issue.<sup>115</sup> The Third Circuit has acknowledged that bankruptcy courts regularly uphold class proofs but has not directly decided whether the Code includes the class proof.<sup>116</sup> The Fifth Circuit has recognized that it “has not addressed whether a class proof of claim even is permissible”<sup>117</sup> but decided to forego review of the issue.<sup>118</sup> Modifying the Code would provide the silent courts with uniformity and consistency.<sup>119</sup>

109. *E.g.*, *Kahler v. FirstPlus Fin., Inc.* (*In re FirstPlus Fin., Inc.*), 248 B.R. 60, 72 (Bankr. N.D. Tex. 2000); *In re Allegheny Inter., Inc.*, 94 B.R. 877, 879 (Bankr. W.D. Pa. 1988); *see In re Cont'l Airlines Corp.*, 64 B.R. 874, 880 (Bankr. S.D. Tex. 1986).

110. *See* Mirkay, *supra* note 84, at 755–58. *See generally* Luisa Kaye, *The Case Against Class Proofs of Claim in Bankruptcy*, 66 N.Y.U. L. REV. 897 (1991) (discouraging the class proof in bankruptcy); Jonathan M. Weiss, *Filing and Defending Class Proofs of Claim in Bankruptcy Cases*, 34 CAL. BANKR. J. 165 (2017) (explaining the advantages and disadvantages of the class action).

111. *See, e.g.*, *Kahler v. FirstPlus Fin., Inc.*, 248 B.R. at 72 (rejecting the class proof); *see also infra* Part II.C.3.

112. *See infra* notes 114–120 and accompanying text (identifying courts that have not decided the existence or applicability of the class proof).

113. *In re Trebol Motors Distrib. Corp.*, 220 B.R. 500, 502 (B.A.P. 1st Cir. 1998) (explaining that the Bankruptcy Appellate Panel of the First Circuit believes that class proofs are permissible while the First Circuit has not ruled on the class proof); *see also* Mirkay, *supra* note 84, at 766 (“The Eighth Circuit has not yet determined its position on this issue.”). There have been no updates on this issue in either circuit.

114. *See generally* *Chateaugay Corp. v. Iles* (*In re Chateaugay Corp.*), 930 F.2d 245 (2d Cir. 1991). There have been no updates regarding the class proof in the Second Circuit.

115. *Id.* at 248. The court's reluctance to decide related to a jurisdictional matter. *Id.*

116. *See In re Whittaker*, 882 F.2d 791, 793 n.1 (3d Cir. 1989). The court did not decide the issue because the party had failed to raise the issue of the class proof in the appeal. *Id.* There have been no updates regarding the class proof in the Third Circuit.

117. *Teta v. Chow* (*In re TWL Corp.*), 712 F.3d 886, 892 (5th Cir. 2013).

118. *Id.* at 900 (“[B]ecause . . . [the] class proof of claim currently is not before us, we need not resolve these matters.”). There have been no updates regarding the class proof in the Fifth Circuit.

119. *See infra* Part III.A.

### 3. Majority Approach

Construing the Code and Federal Rules to permit the class proof, the Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits comprise the majority approach.<sup>120</sup> These courts have combined several rules within the Code and Federal Rules to create their authority to allow the class proof.<sup>121</sup>

In *In re American Reserve Corp.*,<sup>122</sup> the Seventh Circuit applied the majority approach.<sup>123</sup> Plaintiffs in that case filed a class action in state court against Reserve Insurance Co., averring that the latter had defrauded its policyholders when it issued policies against insufficient reserves.<sup>124</sup> Before the state court decided to certify the class action, American Reserve Corporation (“American Reserve”), whose assets included all of Reserve Insurance Co.’s stock, filed for bankruptcy.<sup>125</sup> In response, Plaintiffs filed a class proof in American Reserve’s bankruptcy for both themselves and everyone who purchased similar policies.<sup>126</sup> The court held that the class proof was permissible<sup>127</sup> in this context.<sup>128</sup>

To do so, the court had to construe the ordinary meaning of several Federal Rules together. Federal Rule 7023 incorporates Federal Rule of Civil Procedure 23 into adversary proceedings.<sup>129</sup> Federal Rule 9014 applies to contested matters<sup>130</sup> and states that “the court may at any stage in a particular matter direct that one or more of the other rules . . . shall apply.”<sup>131</sup> Accordingly, Federal

120. *Gentry v. Siegel*, 668 F.3d 83, 88–91 (4th Cir. 2012); *Birting Fisheries v. Lane* (*In re Birting Fisheries, Inc.*), 92 F.3d 939, 939 (9th Cir. 1996); *In re Charter Co.*, 876 F.2d 866, 869 (11th Cir. 1989); *Reid v. White Motor Corp.*, 886 F.2d 1462, 1469–70 (6th Cir. 1989); *In re Am. Reserve Corp.*, 840 F.2d 487, 488 (7th Cir. 1988).

121. *Gentry v. Siegel*, 668 F.3d at 88–90; *Birting Fisheries v. Lane*, 92 F.3d at 940 (affirming the district court’s holding in *In re Birting Fisheries, Inc.*, 178 B.R. 849, 850–52 (W.D. Wash. 1995)); *In re Charter Co.*, 876 F.2d at 869–70; *Reid v. White Motor Corp.*, 886 F.2d at 1469–70; *In re Am. Reserve Corp.*, 840 F.2d at 488.

122. *In re Am. Reserve Corp.*, 840 F.2d 487 (7th Cir. 1988).

123. *Id.*

124. *Id.* at 488.

125. *Id.*

126. *Id.*

127. *Id.* (“So the right to file a proof of claim on behalf of a class seems secure, at least if the bankruptcy judge elects to incorporate Rule 23 via Rule 7023 via Rule 9014, as the judge did in this case.”).

128. *Id.* at 493 (“Although we conclude that a representative may file a proof of claim on behalf of a class of similarly-situated persons, this does not necessarily mean that the [Plaintiffs] may represent a class of policyholders. . . . [The bankruptcy judge] has decided only that Rule 23 is applicable.”).

129. *Id.* at 488.

130. *Id.*

131. *Id.* (quoting FED. R. BANKR. P. 9014).

Rule 9014 allows courts to apply Federal Rule 7023—and Federal Rule of Civil Procedure 23—to “any stage” in contested matters.<sup>132</sup> Filing a proof of claim is a “stage,” so the class action rule applies to proofs of claim.<sup>133</sup> Interpreting the rules together allowed the court to permit the class proof.<sup>134</sup> The Seventh Circuit explained its innovative reasoning by discussing the class action’s procedural and substantive advantages.<sup>135</sup>

In addition, the Seventh Circuit explored § 501 of the Code.<sup>136</sup> The court acknowledged that § 501 does not expressly include class representatives in the list of authorized filings.<sup>137</sup> The Seventh Circuit then rejected a strict interpretation of § 501.<sup>138</sup> In doing so, the court abandoned the maxim *unius est exclusio alterius*<sup>139</sup> and instead stated that “[n]either the legislative history nor the structure of the 1978 Code suggests that the list in § 501 is exclusive.”<sup>140</sup> Analyzing bankruptcy’s purpose and the interplay among Federal Rule 7023, Federal Rule 9014, and § 501 of the Code, the court concluded that “there may be class proofs of claims in bankruptcy.”<sup>141</sup>

In 1989, one year after the Seventh Circuit’s decision, the Eleventh and Sixth Circuits followed suit, allowing the class proof in *In re Charter Company*<sup>142</sup> and *Reid v. White Motor Corporation*,<sup>143</sup> respectively. The Eleventh Circuit in *In re Charter Company* noted the circuit split between the Tenth Circuit in *In re Standard Metals*

---

132. *In re Am. Reserve Corp.*, 840 F.2d at 488.

133. *Id.*

134. *Id.*

135. *Id.* at 489. Procedurally, bankruptcy court collects and constrains litigation into a single forum. *Id.* (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 528, 553–54 (1974)). Substantively, the class action provides small claims an opportunity to play an active role within the bankruptcy proceeding rather than lay dormant. *Id.* In addition, the court recognized the stakes per claimant might be lower in a bankruptcy proceeding because the estate’s distribution of funds may result in only ten percent of each claim going towards creditor repayment. *Id.* at 490–91; see also *infra* Part III.A.

136. *In re Am. Reserve Corp.*, 840 F.2d at 492 (citing 11 U.S.C. § 501).

137. *Id.* Section 501 allows a representative to file in three contexts: an indentured trustee on behalf of a creditor, a co-debtor on behalf of a creditor, or a debtor or trustee on behalf of a creditor. 11 U.S.C. § 501 (2012).

138. *In re Am. Reserve Corp.*, 840 F.2d at 492.

139. *Id.* at 492 (explaining the maxim that the expression of one thing is the exclusion of the other thing).

140. *Id.* The Court goes on to say that both Federal Rule 3001 and Federal Rule 7023’s effectiveness would cease to exist if Congress *did* intend section 501 as an exclusive list of authorization. See *id.* at 493.

141. *Id.* at 492–93.

142. *In re Charter Co.*, 876 F.2d 866, 869 (11th Cir. 1989). Originally, the bankruptcy court disallowed the class proof, in part because the Eleventh Circuit had denied the class proof seven years prior in 1982. *Id.* at 868 (citations omitted).

143. *Reid v. White Motor Corp.*, 886 F.2d 1462, 1469–70 (6th Cir. 1989).



and the Seventh Circuit in *In re American Reserve Corporation*.<sup>144</sup> Finding the Seventh Circuit's reasoning more persuasive, the Eleventh Circuit reasoned that the Code's legislative history evinced Congress's intent to provide bankruptcy proceedings space for a wide range of players.<sup>145</sup>

Moreover, the Eleventh Circuit stated, "Given that Congress indisputably intended to make procedures related to *prosecuting* a class action available to bankruptcy claimants [under Federal Rule of Civil Procedure 23], there is a strong indication that procedures related to *initiating* a class action should be available."<sup>146</sup> The Eleventh Circuit noted that this interpretation would help accomplish bankruptcy's goals of creditor compensation and the estate's equitable distribution.<sup>147</sup>

Likewise, the Sixth Circuit in *Reid v. White Motor Corporation* held that the Code does not "preclude the application of the class actions rules . . . during a bankruptcy proceeding."<sup>148</sup> The court interpreted § 501 as a non-exhaustive list of circumstances in which a person can file a claim on another's behalf.<sup>149</sup> Echoing the Seventh Circuit's reasoning regarding § 501's interpretation, the Sixth Circuit stated that neither the 1978 Bankruptcy Code nor its legislative history suggested the list in § 501 is exclusive.<sup>150</sup> Instead, the existence of both Federal Rule 7023 and Federal Rule 3001 implied that Congress had intended bankruptcy courts to read § 501 as non-exhaustive.<sup>151</sup>

The Ninth Circuit's decision in *In re Birting Fisheries, Inc.*<sup>152</sup> followed the majority trend.<sup>153</sup> The court agreed with the reasoning of the Seventh, Eleventh, and Sixth Circuits and allowed the class proof.<sup>154</sup>

The most recent court to join the majority approach was the Fourth Circuit with its *Gentry v. Seigel*<sup>155</sup> opinion in 2012.<sup>156</sup> Rob-

---

144. *In re Charter Co.*, 876 F.2d at 869.

145. *Id.* at 870. Particularly, the 1978 revision expanded the definition of the claim to "permit[ ] the broadest possible relief in the bankruptcy court." *Id.* (citation omitted).

146. *Id.*

147. *Id.* at 871.

148. *Reid v. White Motor Corp.*, 886 F.2d at 1470.

149. *Id.*

150. *Id.*

151. *See id.* at 1470–71.

152. *Birting Fisheries v. Lane (In re Birting Fisheries, Inc.)*, 92 F.3d 939 (9th Cir. 1996).

153. *Id.* at 940.

154. *Id.*

155. *Gentry v. Siegel*, 668 F.3d 83 (4th Cir. 2012).

ert Gentry and three others filed a class proof on behalf of a class of former Circuit City employees, alleging the company owed the group almost \$150 million in unpaid overtime wages.<sup>157</sup> In determining whether to allow the class action, the court acknowledged the procedural ambiguities within the Code and Federal Rules regarding class proofs.<sup>158</sup> The court explored the same rules previous courts had interpreted, namely, Federal Rule 3001 and Federal Rule 7023.<sup>159</sup> The Fourth Circuit held that the trustee's strict interpretation of the Federal Rules and Code, which would forbid creditors from filing a class proof on behalf of others similarly situated, was "unduly cramped and unsuited for application by a court in equity . . . ."<sup>160</sup> Agreeing with the majority approach, the Fourth Circuit concluded that, "[i]n the absence of some prohibiting rule or principle, the Bankruptcy Rules should be construed to facilitate creditors' pursuit of legitimate claims and to allow Civil Rule 23 to be applied if doing so would result in a more practical and efficient process for the adjudication of claims."<sup>161</sup>

#### 4. *Discretionary Factors*

Courts that follow the majority approach disagree about how to determine when the class proof is appropriate. A court may hold that the class proof is not absolute under the Code even if it exists under the Code and Federal Rules.<sup>162</sup> Neither the Code nor the Federal Rules expressly delineate when a court may use its discretion to allow the class proof, but courts interpret the same Federal Rules analyzed above to rationalize their authority.<sup>163</sup>

Because courts have the discretion to allow the class proof, courts apply factors to decide whether it is appropriate in the matter before the court.<sup>164</sup> For example, a court may look at the factors the United States Bankruptcy Court for the Southern District of New York identified:

---

156. *Id.* at 90.

157. *Id.* at 85.

158. *Id.* at 88.

159. *Id.* at 89.

160. *Id.*

161. *Id.* at 90.

162. *See, e.g., In re Bally Total Fitness of Greater N.Y., Inc.*, 402 B.R. 616, 621 (Bankr. S.D.N.Y. 2009) (quoting *In re Musicland Holding Corp.*, 362 B.R. 644, 650 (Bankr. S.D.N.Y. 2007)) (internal quotation marks omitted) ("[W]hile class proofs of claim in bankruptcy are not prohibited, the right to file one is not absolute.")

163. *Id.* at 620; *see also supra* Part II.C.1-3.

164. *In re Bally*, 402 B.R. at 620 (citing *In re Musicland Holding Corp.*, 362 B.R. at 651).

a) whether the class claimant moved to extend the application of Rule 23 to its proof of claim; b) whether “the benefits derived from the use of the class claim device are consistent with the goals of bankruptcy”; and c) whether the claims which the proponent seeks to certify fulfill the requirements of Rule 23.<sup>165</sup>

The *In re Bally* court used these factors to determine that the class proof was not applicable in the specific matter before it.<sup>166</sup> The plaintiffs in *In re Bally* filed a class action on behalf of thousands of employees against approximately 65 fitness clubs for various violations of federal law.<sup>167</sup> The court concluded that the plaintiffs had not satisfied two factors: (1) the class claim device was not consistent with bankruptcy’s goals and (2) the plaintiffs failed to satisfy the elements of Federal Rule of Civil Procedure 23.<sup>168</sup> The court reasoned that class certification would disrupt the orderly bankruptcy process with “procedural and factual complexit[ies]” because class actions are often less desirable and efficient in bankruptcy than in ordinary civil litigation.<sup>169</sup> Furthermore, remedies for creditors in a bankruptcy would consolidate all individual claims at virtually no cost, rendering a class proof unnecessary.<sup>170</sup>

The Eastern District of Virginia stated that a court may consider other factors:

[whether] (1) the benefits of proceeding as a class outweighs the costs; (2) the class litigations causes undue delay or complication in administering the bankruptcy estate; (3) the bankruptcy court’s control over the debtor and its property render class certification unnecessary; (4) the Rule 7023 motion was timely; and (5) proceeding as a class is superior to the ordinary bankruptcy proceeding.<sup>171</sup>

Noting these factors, the district court did not rule on whether the Code and Federal Rules allowed the class proof.<sup>172</sup> Instead, it

---

165. *Id.* (quoting *In re Musicland Holding Corp.*, 362 B.R. at 651).

166. *Id.* at 620–23.

167. *Id.* at 618–19.

168. *See id.* at 618–20.

169. *Id.* at 621 (citation omitted) (“Further, class certification would adversely affect the administration of these cases adding layers of procedural and factual complexity that accompany class-based claims, siphoning the [d]ebtors’ resources and interfering with the orderly progression of the reorganization.”).

170. *Id.* at 622.

171. *Gentry v. Circuit City Stores, Inc. (In re Circuit City Stores, Inc.)*, 439 B.R. 652, 658 (E.D. Va. 2010) (citing *In re Computer Learning Ctrs., Inc.*, 344 B.R. 79, 92 (Bankr. E.D. Va. 2006)).

172. *Id.* at 658.

held that the bankruptcy court below “did not abuse its discretion in finding that the proposed class litigation would be inferior to the individual bankruptcy claims resolution process.”<sup>173</sup>

A court may acknowledge a combination of these considerations and the rationales behind them.<sup>174</sup> Additionally, a court may recognize that any court-made list is non-exhaustive because both the Code and Federal Rules are silent on the issue.<sup>175</sup> Until the courts can agree on which factors to use to determine the permissive use of the class proof, haphazardly using different factors will continue to cause disagreements and inconsistencies.

### III. PROPOSED MODIFICATIONS TO THE BANKRUPTCY CODE

A thorough analysis of the circuit split demonstrates a need to modify the Code. Courts should construe the Code and Federal Rules to include the class proof.<sup>176</sup> In addition, the Code and Federal Rules should specify the factors courts must use to determine when the class proof is appropriate.<sup>177</sup> Modifying the Code to allow the class proof would promote uniformity, consistency, and fairness among the bankruptcy courts.<sup>178</sup>

#### A. *Resolving the Circuit Split*

As the discussion above indicates, most courts have flexibly construed the Code and Federal Rules to allow the class proof.<sup>179</sup> This majority position represents the better interpretation. This interpretation promotes uniformity and consistency among the courts, fulfills bankruptcy's goals, and promotes a fair balance be-

---

173. *Id.*

174. *See, e.g., In re Musicland Holding Corp.*, 362 B.R. 644, 653–55 (Bankr. S.D.N.Y. 2007). The Court outlined three factors: (1) whether the class was certified pre-petition, (2) whether the members of the putative class received notice of the bar date, and (3) whether class certification will adversely affect the administration of the estate. *Id.* at 654 (citation omitted). The last factor centers on timing of the motion. *Id.* at 655 (citation omitted).

175. *See supra* notes 137–141 and accompanying text (explaining the Seventh Circuit's position that silence does not equate to congressional denial of the court's authority).

176. *See* Mirkay, *supra* note 84, at 764–67.

177. *See infra* Part III.B.

178. *See* Mirkay, *supra* note 84, at 765–67.

179. *Gentry v. Siegel*, 668 F.3d 83, 88–90 (4th Cir. 2012); *Birthing Fisheries v. Lane (In re Birthing Fisheries, Inc.)*, 92 F.3d 939, 939 (9th Cir. 1996); *In re Charter Co.*, 876 F.2d 866, 869 (11th Cir. 1989); *Reid v. White Motor Corp.*, 886 F.2d 1462, 1469–70 (6th Cir. 1989); *In re Am. Reserve Corp.*, 840 F.2d 487, 488 (7th Cir. 1988); *see also supra* Part II.C.3.

tween the rights of a creditor and debtor.<sup>180</sup> These advantages cut sharply against the Tenth Circuit's and bankruptcy courts' theories opposing the flexible interpretation.<sup>181</sup>

The breadth of caselaw and the combination of Federal Rule 7023, Federal Rule 9013, and Code § 501 make evident the flexible interpretation's superiority.<sup>182</sup> Were courts to construe § 501 narrowly and only authorize class proofs in the three situations enumerated, Federal Rule 3001 would be meaningless.<sup>183</sup> Federal Rule 3001 allows a creditor's authorized agent to execute a proof of claim.<sup>184</sup> Yet "authorized agent" is not one of § 501's three options.<sup>185</sup> Were a court to use the narrow interpretation, § 501 and Federal Rule 3001 would directly conflict.<sup>186</sup> Furthermore, Federal Rule 7023 does not indicate that it only applies to § 501 or Federal Rule 3001.<sup>187</sup> Therefore, because Federal Rule 7023's applicability is silent, courts should interpret it as applying to all the Federal Rules.<sup>188</sup>

Because the legislative history is silent on this specific issue, the legislature does not "tie up every knot in every statutory subsection."<sup>189</sup> The legislative history and its silence may suggest that "Congress has not grappled with the problem."<sup>190</sup> Nonetheless, congressional intent favors ensuring that the bankruptcy court deals with all the claims against a debtor, a position that the flexible interpretation embraces.<sup>191</sup> Congressional intent necessitates an

---

180. *In re Am. Reserve Corp.*, 840 F.2d at 489; *see also* Mirkay, *supra* note 84, at 765–67.

181. *In re Standard Metals Corp.*, 817 F.2d 625, 630 (10th Cir. 1987); Kahler v. FirstPlus Fin., Inc. (*In re FirstPlus Fin., Inc.*), 248 B.R. 60, 71 (Bankr. N.D. Tex. 2000); *In re Allegheny Inter., Inc.*, 94 B.R. 877, 878 (Bankr. W.D. Pa. 1988); *In re Cont'l Airlines Corp.*, 64 B.R. 874, 875 (Bankr. S.D. Tex. 1986).

182. 11 U.S.C. § 501 (2012); FED. R. BANKR. P. 7023; *In re Am. Reserve Corp.*, 840 F.2d at 488–90.

183. *See In re Am. Reserve Corp.*, 840 F.2d at 488; *see also supra* notes 132–141 and accompanying text (arguing that the combination of Federal Rules and § 501 allow the class proof).

184. FED. R. BANKR. P. 3001.

185. 11 U.S.C. § 501 (2012).

186. *See In re Am. Reserve Corp.*, 840 F.2d at 488.

187. FED. R. BANKR. P. 7023.

188. *In re Am. Reserve Corp.*, 840 F.2d at 488–89.

189. *Id.* at 492.

190. *Id.*

191. *See* H.R. REP. NO. 95-595, at 309 (1977), *as reprinted in* 1978 U.S.C.A.N. 5963, 6266 (explaining that, in expanding the definition of a "claim," the bill contemplates that "all legal obligations of the debtor . . . will be able to be dealt with in the bankruptcy case").

open field so the widest possible range of players can initiate and engage in bankruptcy proceedings.<sup>192</sup>

In addition to the statutory and legislative arguments, a host of bankruptcy policies and objectives supports the flexible interpretation of the Code and Federal Rules.<sup>193</sup>

First, large claims in bankruptcy often “squeeze” out smaller claims.<sup>194</sup> Creditors with smaller claims may lack the resources to assert their claims.<sup>195</sup> Because of such cost considerations, creditors with smaller claims may be unable to participate in bankruptcy proceedings.<sup>196</sup> If allowed, the bankruptcy court would “serve as a haven of reprieve for debtors evading pending class action suits.”<sup>197</sup> Including the class proof suggests to creditors that small claims can be just as powerful a tool as large claims.<sup>198</sup>

Second, the flexible approach maintains the balance among the different creditors. For example, under the flexible approach, an individual claim does not hold more weight than a class proof.<sup>199</sup> In addition, allowing a class proof does not disadvantage the creditors holding individual claims.<sup>200</sup> Thus, the class proof does not upset

192. *See id.*; *In re Charter Co.*, 876 F.2d 866, 870 (11th Cir. 1989) (explaining that courts believe congressional intent mandates a liberal interpretation of the Federal Rules even though legislative history is silent on the issue).

193. *See, e.g., In re Am. Reserve Corp.*, 840 F.2d at 492. The court stated: Suits for very small stakes may hold out little prospect of either compensation or deterrence; the bankruptcy court may exercise discretion to reject these, for both Rule 9014 and Rule 23 give the court substantial discretion to consider the benefits and costs of class litigation. Suits for larger stakes, based on sound legal theories, may hold out substantial prospects of compensation or deterrence without unduly complicating or delaying the case. Our benchmark—that bankruptcy courts exist to marshal assets and make awards justified by non-bankruptcy entitlements—calls for employing the class device in such cases.

*Id.*

194. Anthony M. Sabino, *In a Class by Itself: The Class Proof in Bankruptcy Proceedings*, 40 DEPAUL L. REV. 115, 160 (1990) (explaining that larger claims tend to mask the smaller claims in a bankruptcy).

195. *In re Am. Reserve Corp.*, 840 F.2d at 489 (“[T]he opportunity costs of the time needed to investigate and decide whether to file [a claim] may be substantial . . . . [T]he effort needed to decide whether to pursue an identified claim means that for many small claims, it is class actions or nothing.”).

196. Mirkay, *supra* note 84, at 766–67.

197. *Id.* at 766.

198. *In re Am. Reserve Corp.*, 840 F.2d at 489 (“Substantively, the class action permits the aggregation and litigation of many small claims that otherwise would lie dormant.”).

199. *See In re Zenith Laboratories, Inc.*, 104 B.R. 661, 664 (D.N.J. 1989) (explaining that designating one claim as an individual claim does not give it special advantages over a class claim).

200. Sabino, *supra* note 194, at 163.

the balance among the different creditors.<sup>201</sup> Not only does the class proof maintain fairness among creditors but it also maintains fairness between debtors and creditors by ensuring that debtors' bankruptcies account for all creditors.<sup>202</sup>

Third, the class proof promotes the efficient use of judicial resources.<sup>203</sup> Consolidating claims "prevent[s] bankruptcy courts from becoming overburdened with complicated and prolonged litigation."<sup>204</sup>

Finally, the class proof reduces discovery costs because it consolidates related claims.<sup>205</sup> Creditors in the class proof can submit the same proof for the debt obligation.<sup>206</sup>

The class proof's advantages mirror the class action's advantages.<sup>207</sup> Furthermore, the class proof's uniform and consistent application among the circuits would ensure fairness and accomplish bankruptcy's goals.

### B. Proposed Discretionary Factors

The Federal Rules should catalog the factors that a court should use to determine when the class proof is appropriate. Congress should add those factors in Federal Rule 7023 to ensure transparency. The factors should include: (1) whether the claims that the proponents seek to certify fulfill the requirements of Federal Rule of Civil Procedure 23, (2) whether proceeding as a class is superior to filing individual claims, and (3) whether the class proof is consistent with the bankruptcy case's goals. Delineating these three factors would create the uniformity that has been absent among the circuit courts.<sup>208</sup>

The first factor is fundamental to bankruptcy proceedings because "[t]he decision of whether to certify the class has direct bearing on the allowability of the class proof."<sup>209</sup> Rejecting the class

201. *See id.*

202. *In re Am. Reserve Corp.*, 840 F.2d at 489–90 ("The class proof of claim may be essential to discover what the bankrupt's entire debts are, and therefore who should be paid what.").

203. Jennifer Lipinski, *Class Actions in Bankruptcy*, 64 TEX. L. REV. 791, 815 (1985).

204. Mirkay, *supra* note 84, at 766.

205. Lipinski, *supra* note 203, at 804.

206. *Id.*

207. Sabino, *supra* note 194, at 163 ("The class proof is a natural, indeed necessary, companion to the class action. The filing of the class proof is itself the first step in accomplishing many of the goals of bankruptcy, and in fact achieves some of them outright.").

208. *See supra* Part II.C.

209. Sabino, *supra* note 194, at 172.

certification necessitates rejecting the class proof because Federal Rule 7023 expressly dictates that Federal Rule of Civil Procedure 23 applies to adversary proceedings.<sup>210</sup> Thus, excluding the first factor from the modification would render Federal Rule 7023 meaningless.<sup>211</sup>

Various courts have advocated for the remaining two factors.<sup>212</sup> These factors include the bankruptcy goals previously mentioned as well as the class proof's timeliness.<sup>213</sup> Similar to the first factor, these factors are necessary in any proposed modification because their absence would disrupt bankruptcy proceedings.<sup>214</sup>

Applying the Federal Rules and Code should result in uniform, consistent, and fair decisions.<sup>215</sup> Presently, the Code and the Federal Rules fail to fulfill such goals with respect to the class proof's existence and applicability.<sup>216</sup> The proposed modification to the Code and Federal Rules, however, would ensure fairness between the parties, provide uniformity and consistency in class proof's application, and achieve bankruptcy's other goals.<sup>217</sup>

#### IV. CONCLUSION

Businesses continue to file for protection under Chapter 11 bankruptcy, but the class proof question remains unanswered. Its inconsistent application has provided no framework to guide courts or practitioners on the issue.<sup>218</sup> Despite lacking this framework,

---

210. FED. R. BANKR. P. 7023; *In re Am. Reserve Corp.*, 840 F.2d 487, 490–92 (7th Cir. 1988). Therefore, the requirements listed in Federal Rule of Civil Procedure 23 still need to be satisfied in bankruptcy proceedings. *In re Am. Reserve Corp.*, 840 F.2d at 490–92.

211. *In re Am. Reserve Corp.*, 840 F.2d at 490–92.

212. *E.g.*, *Gentry v. Circuit City Stores, Inc.* (*In re Circuit City Stores, Inc.*), 439 B.R. 652, 658 (Bankr. E.D. Va. 2010) (advocating for the third element proposed); *In re Musicland Holding Corp.*, 362 B.R. 644, 653–55 (Bankr. S.D.N.Y. 2007) (encouraging the second element proposed).

213. *E.g.*, *Gentry v. Circuit City Stores, Inc.* (*In re Circuit Stores, Inc.*), 439 B.R. at 658–59 (mandating that the claimants must file the class proof within the specified time period and meet all the requirements).

214. *See, e.g.*, *In re Am. Reserve Corp.*, 840 F.2d at 489 (explaining that the claimants must properly file and provide notice for the certification of the class because disruption would occur without proper notice).

215. Daniel A. Austin, *Bankruptcy and the Myth of "Uniform Laws,"* 42 SETON HALL L. REV. 1081, 1135 (2012) (“Lack of uniformity in national bankruptcy law is bad policy . . . . There are sound reasons why bankruptcy law in the United States should be uniform.”).

216. *Supra* Part II.C.

217. *See* Mirkay, *supra* note 84, at 765–67.

218. *Supra* Part II.C.



courts should not, and cannot, reject the class proof.<sup>219</sup> It must remain a viable procedural mechanism that creditors can wield against the debtor.

This Comment has contended that bankruptcy should provide uniform and consistent decisions to ensure fairness between debtors and creditors.<sup>220</sup> Modifying the Code is a critical step in fulfilling bankruptcy's goals and providing the courts with clarity. Congress should take the opportunity to pursue such modifications.

---

219. Leonard H. Gerson, *Another Look at Treatment and Use of Class Proofs of Claim and Class Actions in Bankruptcy*, 27 AM. BANKR. INST. J., Sept. 2008, at 16, 59 (“Ultimately, the extent to which a class action or class proof of claim can play a useful role in bankruptcy is a matter which requires a determination on a case-by-case basis. What is important is that such potential for the use of a class action device not be ignored.”).

220. *Supra* Part III.C.3–4.