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UnStayed Non-Default State Judgments And The Bona Fide Dispute Language

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ABSTRACT

This Note begins by discussing involuntary bankruptcy generally, the 1984 amendment made to the code affecting this issue, the relative legislative history, and the development of a definition for bona fide dispute. Second, both approaches for dealing with unstayed non-default state judgments as they relate to the requirements of involuntary bankruptcy will be examined. Third, this Note investigates the persuasiveness and negativities behind both approaches. Finally, in an attempt to resolve the ambiguity and solidify Delaware and Pennsylvania courts and the Circuits courts themselves, a suggestion will be made that the Third Circuit, and eventually the Supreme Court, adopt the Drexler approach, discussed infra. This is a per se rule that unstayed non-default state judgments are not subject to a bona fide dispute regarding liability or amount.
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I. INTRODUCTION

“Among the important rights provided under the Bankruptcy Code to unsecured creditors is the ability in certain situations to force a debtor into bankruptcy.”¹ This ability is known as involuntary bankruptcy and is an important tool for creditors. Once debtors are placed into involuntary bankruptcy, they are prevented from liquidating assets, which may give rise to circumstances where a debtor can unfairly prefer a single creditor, or group of creditors, over others.²

“A case under the Bankruptcy Code is a very serious matter both to debtors and creditors, it should not be... too easily available to creditors in an involuntary case.”³ Furthermore, involuntary bankruptcy has been defined as an extreme remedy.⁴ As a result, there are a number of requirements for forcing a business or individual into bankruptcy.⁵ One such requirement is the commencement of the action when “the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount.”⁶ Whether or not liability is subject to a bona fide dispute has been a focus of litigation resulting in inconsistent decisions among circuits.⁷ More specifically, courts are split over whether a claim based on an unstayed state judgment pending appeal, is subject to a bona fide dispute.⁸ One approach is a per se rule that unstayed non-default state judgments are never the


⁴ In re Norris, 144 F.3d 1182, 1185 (5th Cir. 1997).

⁵ See 11 U.S.C. § 303. (requiring that a petition be filed by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder. Also requiring that the petition is timely controverted, the debtor file a bond to indemnify the debtor for such amounts as the court may later allow, and requiring that the person against whom enforcement is sought is not a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial cooperation”).


⁷ See In re AMC Investors, LLC, 406 B.R. 478, 487 (Bkrtcy. D. Del. 2009), hereinafter “In re AMC Investors”, (“The Court holds that the existence of a judgment by a court (other than a default judgment) that has not been stayed is, in and of itself, sufficient to establish that the claim underlying the judgment is not in bona fide dispute), but see In re Graber, 319 B.R. at 377-78 (“I am not persuaded that(...) an unstayed [non-default] judgment, even if being challenged by appeal or as here by a motion to open or strike, can never be the subject of a bona fide dispute. Rather the burden then shifts to the Debtor to demonstrate the existence of a bona fide dispute.”).

⁸ Id.
subject of a bona fide dispute. The other approach is that such judgments do not automatically preclude a bona fide dispute from existing but rather the debtor has the opportunity to demonstrate that a dispute exists.

Recently, this issue arose in a fiercely contested chapter 11 case, *In re Marciano.* The focus of this opinion was whether to adopt a per se rule that an un-stayed non-default state judgment is a claim not subject to bona fide dispute as to liability or amount under § 303(b)(1), or whether the debtor is given the opportunity to demonstrate the existence of a bona fide dispute. In other words, the court was considering whether to hold that a non-default state judgment automatically precludes the existence of a bona fide dispute or whether the debtor can show the existence of such a dispute. Ultimately, the Marciano court adopted a per se rule that an unstayed non-default state judgment is a claim not subject to a bona fide dispute.

This recent opinion highlights the uncertainty surrounding requirements of involuntary bankruptcy. Specifically, it highlights a circuit split between the Ninth and Fifth on the one hand and the Fourth Circuit on the other. This issue is especially concerning for parties in Delaware, as the Third Circuit has yet to decide on which approach it favors, leaving a split between Delaware and Pennsylvania bankruptcy courts.

To provide context, this Note begins by discussing involuntary bankruptcy generally, the 1984 amendment made to the code affecting this issue, the relative legislative history, and the development of a definition for bona fide dispute. Second, both approaches for dealing with unstayed non-default state judgments as they relate to the requirements of involuntary

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9 *See In re Drexler*, 56 B.R. 960, 967 (Bkrtcy. S.D.N.Y. 1986), hereinafter “*In re Drexler*”, (“As to the first issue, the court has concluded that a general answer may be given that a claim based upon an un-stayed [non-default] judgment as to which an appeal has been taken by the debtor is not the subject of a bona fide dispute.”).

10 *See In re Byrd*, 357 F.3d 433, 441 (4th Cir. 2004), hereinafter “*In re Byrd*”, (holding that a Debtor can raise any substantial factual or legal questions about the continued viability of judgments entered against them to determine if a bona fide dispute exists or not).

11 *In re Marciano*, 708 F. 3d 1123, 1126 (9th Cir. 2013). Hereinafter “*In re Marciano*”.

12 Id.

13 Id.

14 Id. at 1126, 1128 (accordingly, this opinion was followed by a vigorous dissent).

15 *In re Marciano*, 1126.

16 *See In re Marciano*, 438 (providing an example of the Ninth Circuit adopting an opposing view to that of the Fourth Circuit); see also *In re Norris*, 144 F.3d at 1186 (adopting the Ninth Circuit’s view which opposite that of the Fourth Circuit); *In re Byrd*, 441 (proving an example of a Fourth Circuit court which holds an opposing view to that of the Ninth and Fifth Circuit).

17 *See supra* note 7.

18 *See infra* Part II.
bankruptcy will be examined. Third, this Note investigates the persuasiveness and negativities behind both approaches. Finally, in an attempt to resolve the ambiguity and solidify Delaware and Pennsylvania courts and the Circuits courts themselves, a suggestion will be made that the Third Circuit, and eventually the Supreme Court, adopt the Drexler approach, discussed infra. This is a per se rule that unstayed non-default state judgments are not subject to a bona fide dispute regarding liability or amount.

II. BACKGROUND

When corporations or individuals face financial woes they often have trouble paying back their debts. Creditors have a number of different solutions available in order to recover money that they have lent to their debtors. One such solution is to file an involuntary bankruptcy action against a debtor, forcing them into bankruptcy, and thus preserving what assets they do have in order to partially recover the debt. Involuntary bankruptcy cases, however, have a number of pitfalls that are “concerning enough to make this action a creditor's last resort.” Therefore, in some situations, creditors faced with debtors not repaying their debt should consider other possibilities before filing for involuntary bankruptcy actions. However, such other remedies are outside the scope of this Note, which instead focuses on the troubles of filing involuntary bankruptcy.

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19 See infra Part III.
20 See infra Part IV.
21 See infra Part III.
22 See infra Part V.
23 See, e.g., In re Byrd, 436.
24 See 11 U.S.C. § 303 (providing involuntary bankruptcy as an option for creditors faced with debtors not paying their debts when they come due); see also Miehls Donald, Receivership as an Alternative Remedy to Involuntary Bankruptcy in Ohio, Dmiehls.com (Oct. 4, 2011); available at https://dmiehls.wordpress.com/article/receivership-as-an-alternative-remedy-10zaqwt3vlygk-10/ (explaining that receivership may be a viable option for creditors who are faced with debtors not paying their debts as they come due).
A. The Good and the Bad of Involuntary Bankruptcy

Generally, the benefit of filing for involuntary bankruptcy is that the creditor can “stop the clock, allowing the avoidance of: [1] insider transfers made within 2 years prior to filing; [2] fraudulent transfers made within 1 year prior to filing under the Federal Code, but up to 4 to 7 years under certain state codes; and [3] non-insider preferences made within 90 days prior to filing.”29 In other words, “involuntary bankruptcy procedures are commenced when the debtor has transferred, or is likely to transfer, assets that will diminish the creditors’ likelihood of being paid.”30

Along with the positive results from forcing a debtor into involuntary bankruptcy, creditors must be aware of the possible downsides to filing such an action.31 These downsides result when a court dismisses a petition, other than with the consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment.32 In such cases, a court may grant judgment against the petitioners and in favor of the debtors for costs and reasonable attorney’s fees.33 In addition, any petitioner that filed in bad faith may face a judgment against them for any damages proximately caused by such filing, or punitive damages.34

B. The 1984 Amendment: Adding “Bona Fide Dispute”

The consequences of courts dismissing an involuntary bankruptcy petition become even more troublesome given the amendment made to the involuntary bankruptcy code in 1984.35 “Congress amended the Reform Act’s requirements for involuntary bankruptcy by inserting identical language in sections 303(b) and 303(h)(1) which excludes for both purposes claims and debts subject to a ‘bona fide dispute.’”36 In adding these amendments, the legislative history makes it clear that Congress was reacting to a concern that the threat of involuntary bankruptcy

29 Id. at 2.
32 Id.
33 Id.
34 Id.
36 Id.
might be used as a tool to bully a debtor into making payments of a questionable claim or debts subject to a legitimate question.\textsuperscript{37}

Generally, courts agree on how to analyze whether a bona fide dispute exists: “the bankruptcy court must ‘determine whether there is an objective basis for either a factual or legal dispute as to the validity of the debt.’”\textsuperscript{38} In determining whether a factual dispute exists, “the petitioning creditor must establish a prima facie case that no bona fide dispute exists. Once this is done, the burden shifts to the debtor to present evidence demonstrating that a bona fide dispute does exists.”\textsuperscript{39}

On the other hand, courts are split on what affect unstayed non-default judgment plays in their analysis of where a bona fide dispute exists.\textsuperscript{40} It has been noted that this split resulted because the bankruptcy code does not define the bona fide dispute.\textsuperscript{41} Since the code does not define it, courts do not agree on what exactly the definition is, however determining the true definition is outside the scope of this Note.\textsuperscript{42} As a result of the split, concerning unstayed non-default state court judgments and the affect they have on whether a claim is subject to a bona fide dispute, creditors may be even more reluctant to bring involuntary bankruptcy actions against debtors, setting aside the negative aspects of involuntary bankruptcy discussed \textit{supra},\textsuperscript{43}

\textsuperscript{37} \textit{Id.} at 316, 334 (“I believe this amendment, although a simply [sic] one, is necessary to protect the rights of debtors and to prevent misuse of the bankruptcy system as a tool of coercion. I also believe it corrects a judicial misinterpretation of existing law and congressional intent as to the proper basis for granting involuntary relief.”) (citing 130 Cong.Rec.S7618 (daily ed. June 19, 1984) (statement of Sen. Baucus)); see also \textit{In re Byrd}, 438 (“After all, the purpose of the ‘bona fide dispute’ provision is to prevent creditors from using involuntary bankruptcy ‘to coerce a debtor to satisfy a judgment even when substantial questions may remain concerning the liability of the debtor.’”) (citing \textit{In re Prisuta}, 121 B.R. 474, 476 (Bankr. W.D. Pa. 1990)).

\textsuperscript{38} \textit{Matter of Sims}, 994 F.2d 210, 221 (5th Cir. 1993).

\textsuperscript{39} \textit{Id.} (“Because the standard is objective, neither the debtor’s subjective intent nor his subjective belief is sufficient to meet this burden. The court’s objective is ascertain whether a dispute that is bona fide exists; the court is not to actually resolve the dispute.”).

\textsuperscript{40} See \textit{In re Drexler}, 967 (“As to the first issue, the court has concluded that a general answer may be given that a claim based upon an un-stayed [non-default] judgment as to which an appeal has been taken by the debtor is not the subject of a bona fide dispute.”); \textit{but see In re Byrd}, 441 (holding that a Debtor can raise any substantial factual or legal questions about the continued viability of judgments entered against them to determine if a bona fide dispute exists or not).

\textsuperscript{41} \textit{In re Marciano}, at 1126; \textit{see also} 11 U.S.C. § 303.

\textsuperscript{42} See \textit{In re Johnston Hawks, Ltd.}, 49 B.R. 823, 830 (Bankr. D. Hawaii 1985) (“a bona fide dispute is a conflict in which an assertion of a claim or right made in good faith and without fraud or deceit on the other side.”); \textit{but see In re Stroop}, 51 B.R. 210, 212 (D. Colo. 1985) (“If the defense of the alleged debtor to the claim of the petitioning creditor raises material issues of fact or law so that a summary judgment could not be rendered as a matter of law in favor of the creditor on a trial of the claim, the claim is subject to a bona fide dispute.”); \textit{In re Lough}, 57 B.R. 993, 997 (Bankr. E.D. Mich. 1986) (“whenever there is any legitimate basis for the debtor not paying the debt, whether the basis is factual or legal”).

\textsuperscript{43} \textit{See supra} text accompanying notes 31-34.
as there is uncertainty in the governing law.\textsuperscript{44} In addition, uncertainty is “especially worrisome in the context of bankruptcy, where uniformity is sufficiently important that our Constitution authorizes Congress to establish ‘uniform laws on the subject of bankruptcies throughout the United States.’”\textsuperscript{45} Thus, it is imperative that the Third Circuit and the Supreme Court resolve this uncertainty to harmonize the Circuits and lower courts and allow involuntary bankruptcy to function as it was intended to.

III. ANALYSIS

A. The Two Approaches

Courts use two different approaches when determining if a claim subject to an unstayed non-default state judgment on appeal is subject to bona fide dispute or not.\textsuperscript{46} The majority view - the “Drexler”\textsuperscript{47} rule - is that they are not subject to bona fide dispute for the purposes of § 303.\textsuperscript{48} Whereas, the minority approach - the “Byrd”\textsuperscript{49} rule - states, “although it will be the unusual case in which a bona fide dispute exists in the face of claims reduced to state court judgments, such judgments do not guarantee the lack of a bona fide dispute.”\textsuperscript{50} In other words, the Drexler\textsuperscript{51} approach is a per se rule that unstayed non-default judgments on appeal are not subject to a bona fide dispute, therefore ending the analysis. On the other hand, the Byrd approach gives the debtor the opportunity to demonstrate the existence of a bona fide dispute as to liability or amount.\textsuperscript{52}

\footnotesize
\textsuperscript{44} See infra Part II.A.

\textsuperscript{45} In re Marciano, 1135 (citing U.S. Const. Art. I, § 8, cl. 4).

\textsuperscript{46} See In re Marciano, 1126 (noting a split among courts in interoperating “bona fide dispute.”).

\textsuperscript{47} In re Drexler, 967 (providing the key decision for one approach to whether un-stayed non-default state judgments are subject to a bona fide dispute).

\textsuperscript{48} Id. (citing In re Norris, 114 F.3d 1182 (5th Cir. 1997); In re Euro-Am. Lodging Corp., 357 B.R. 700, 712 (Bankr. S.D. N.Y. 2005); In re Raymark Indus., Inc., 99 B.R. 298, 300 (Bankr. E.D. Pa. 1989); In re Caucus Distribrs., Inc., 83 B.R. 921, 929 (Bankr. E.D. Va. 1988)).

\textsuperscript{49} In re Byrd, 433 (proving the key opinion for one approach to whether un-stayed non-default state judgments are subject to a bona fide dispute).

\textsuperscript{50} Id. (citing In re Byrd, 438. Although it is unlikely or “unusual” that a bona fide dispute would exist “in the face of claims reduced to state court judgment” it is not unheard of. See In re Briggs, 2008 WL 190463 *2 (Bankr. N.D. Tex. 2008).

\textsuperscript{51} In re Drexler, 967.

\textsuperscript{52} In re Byrd, 438 (allowing expert witnesses to be called to testify about the likelihood of whether an appeal will be successful).
B. The Drexler Approach

Currently, courts have endorsed the Drexler approach in the Ninth, Fifth, and some bankruptcy courts in Delaware, New York, and Virginia. This approach is the original method for determining whether an unstayed non-default judgment is subject to a bona fide dispute. Again, this approach constructs a per se rule that unstayed non-default judgments are never subject to a bona fide dispute.

1. Purpose, Intent, and Legislative History

Proponents of the Drexler approach emphasize that their analysis serves the central purpose of bankruptcy in general, the legislative intent to include the bona fide dispute language in the 1984 Reform Act, and that it is supported by the legislative history of the Reform Act. To begin with, the central purpose of bankruptcy is “to protect the threatened depletion of assets or to prevent the unequal treatment of similarly situated creditors.” When an unstayed non-default judgment subjects a petition to a bona fide dispute, the only alternative is exactly what the code sought to avoid, “creditors ‘racing to the courthouse to dismember the debtor.’” Therefore, a per se rule for un-stayed non-default judgment’s not being subject to a bona fide dispute.

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53 See In re Marciano, 1128 (holding that an unstayed non-default state judgment is not subject to bona fide dispute for purposes of § 303(b)(1)).
54 See In re Norris, 114 F.3d at 1186 (adopting a per se rule that a state judgment does not subject to a bona fide dispute).
55 See In re AMC Investors, 487 (adopting a per se rule that an a judgment by a court other than a default judgment that has been stayed is not subject to a bona fide dispute).
56 See In re Drexler, 967 (“As to the first issue, the court has concluded that a general answer may be given that a claim based upon an un-stayed judgment as to which an appeal has been taken by the debtor is not the subject of a bona fide dispute.”).
58 See In re Drexler, 967. This case represents the first time a court declared that an un-stayed non-default judgment was no subjected to a bona fide dispute.
59 See supra notes 45, 46.
60 See In re Marciano, 1128 (preventing a “race to the court house” and an unequal distribution of assets among creditors).
61 See id. at 1127 (preventing involuntary bankruptcy to be used as a tool of coercing debtors to pay questionable claims).
62 Id. at 1128 (lighting the burden of creditors seeking to file involuntary bankruptcy actions against debtors not paying their debts as they come due.)
63 Id. (citing In re Manhattan Indus., Inc., 224 B.R. 195, 200 (Bankr. M.D. Fla. 1997).
64 Id. at , 1128 (citing In re Bullion Reserve of N. Am., 836 F.2d 1214, 1217 (9th Cir. 1988).
dispute satisfies the central purpose of bankruptcy law in general, by preventing a “race to the courthouse.” 65

Furthermore, the Drexler approach is supported by the legislative intent for including the bona fide dispute language in the code. 66 Advocates point out that the purpose of the inclusion of the language was to “to protect the rights of debtors and to prevent misuse of the bankruptcy system as a tool of coercion.” 67 Advocates of this approach believe that “[where] (…) the amount and validity of the claims of the [p]etitioning [c]reditors have been established by non-default state judgments and the debtor’s immediate liability cannot be disputed under governing state law, there can be no such concerns [of coercion]” 68 In other words, an unstayed non-default judgment fulfills the legislative intent, to avoid coercion on the part of the creditors, for the inclusion of the bona fide dispute language into the code. 69

Additionally, proponents of the Drexler approach point to the 1984 Reform Act itself, which “totally abandoned the earlier requirement that the debtor be adjudicated as having committed an act of bankruptcy. Instead, Section 303(h)(1) permitted proof of equity insolvency – defined as the debtor’s general failure to pay its debts as they become due – as alone a sufficient basis for involuntary bankruptcy.” 70 Then, based on the legislative history of the 1984 Reform Act, the conclusion was drawn that the Act was “designed to lighten the burden for creditors seeking to file an involuntary bankruptcy petition.” 71 Therefore, the per se rule properly lowers the burden of creditors and it is in agreement with the legislative history of the act. 72

2. Federalism: The Full Faith and Credit Act

Proponents look to the realities of obtaining an unstayed judgments stating that, “[o]nce entered, an un-stayed final judgment may be enforced in accordance with its terms and with applicable law or rules, even though an appeal is pending(…) [t]he filing of an involuntary petition is but one of many means by which a judgment creditor may seek to attempt collection

65 Id.

66 The language was included “to prevent creditors from using involuntary bankruptcy to coerce a debtor to satisfy a judgment even when substantial questions may remain concerning the liability of the debtor.” In re Marciano, 1127 (citing In re Byrd, 438).


68 In re Marciano, 1127.

69 Id.

70 Ponoroff, 315, 323-24.


72 Id. (drawing this conclusion based on congress’s hearing concerning the amendment to this statute).
of something upon its judgment.” The judgments entered do not “hang in limbo pending appeal” and as a result, a consideration of the debtor’s belief that his appeal was filed in good faith is ultimately beside the point. This argument was further bolstered by the Marciano court, which determined that any other approach “runs counter to principles of federalism.” The Marciano court pointed to the principle of Full Faith and Credit stating it “would be of little consequence if a federal court treated a non-default unstayed state judgment differently than it would be treated in its state of origin.” In other words, the Marciano court held that creditors, under the Full Faith and Credit doctrine, are not entitled to have bankruptcy courts question a state court judgment where the judgment would be valid in state courts.

3. An Objective Analysis

Supporters of the Drexler approach emphasize that there is no better determination that a claim is not subject to a bona fide dispute, than a state judgment. In doing so, proponents point out, “it is difficult to imagine a more ‘objective’ measure of the validity of a claim than an un-stayed judgment entered by a court of competent jurisdiction.” In other words, a state court judgment on a claim is the best approach in determining whether there is in fact a question of validity, given that there has already been a trial on the matter.

4. Difficulties and Unnecessary

In support of the Drexler approach, advocates argue, by allowing bankruptcy courts to question unstayed non-default judgments, the bankruptcy courts have effectively become “an odds maker of appellate decision-making.” In support of this argument, proponents argue this

73 In re Drexler, 967 (citing 11 Wright & Miller, Federal Practice & Procedure, §§ 2902-2903; United States v. Verlinsky, 459 F.2d 1085, 1089 (5th Cir. 1972); Fed.R.Civ.Pro. 62(a); Bankruptcy Rule 7062; N.Y.C.P.L.R. § 5519).
74 Id. (citing United States v. Verlinsky, 450 F.2d 1085 (5th Cir. 1972).
75 In re Marciano, 1128.
77 Id.
78 Id.
79 See In re Marciano, 1127 (arguing that the court has already held a hearing and made a determination on the matter through the adversarial process).
80 Id.
81 Id., 1128.
82 Id. at 1127 (citing In re AMC Investors, 485) (arguing that by determining whether a bona fide dispute exists, courts are acting as an appellate court by examining the merits of a decision by a trial court).
is inherently difficult and lacks necessity. In doing so, they point to Byrd itself which made an examination into a pending appeal only to find that the alleged debtor presented no evidence to support its likelihood of success on appeal, and therefore did not raise any substantial factual or legal questions about the validity of the judgments. As a result, Byrd is a good example of the lack of necessity in determining the validity of such a claim. The Byrd court could just have easily reached the same conclusion by “respecting the trial court’s determination of this matter on the merits and the absence of a stay pending appeal.”

5. Bankruptcy Law Generally and Statutory Language

Proponents of the Drexler approach note that the Byrd approach “runs counter to the Butner principle, which provides that in the absence of specific provision to the contrary, bankruptcy courts take non-bankruptcy rights and laws as they find them.” Based on this principle, proponents argue that by making a determination that a bona fide dispute exists, after a state court judgment has been entered, it “differs [from a conclusion that] a court would hold outside of bankruptcy.” As a result, they point out that in order to do so, the party needs to identify a specific bankruptcy rule that requires this result, and further note that one does not exist. Lastly, those who have adopted the Drexler approach point to statutory definitions in order to emphasize the strength of their conclusion. As noted in In re AMC Investors, LLC, “[t]he definition of ‘claim’ under the Bankruptcy Code includes a ‘right to payment, whether or not such right is reduced to judgment.’” Proponents argue that the Byrd court incorrectly reads this definition as permitting “some creditors who have not reduced their claims to judgment to file involuntary petitions, just as it prevents other creditors who have reduced their claims to judgment from filing.” Although Drexler advocates agree that a right of payment may exist even if it has not been reduced to judgment, they disagree that a judgment does not necessarily constitute a right of payment, but rather that it is a right of payment. In other words, Drexler

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83 In re AMC Investors 485.
84 Id. at 485-86 (providing an example of why the examination is unnecessary).
85 Id. at 486.
86 Id.
87 In re AMC Investors, 487.
88 Id. (arguing this is the only way to be consistent with the Butner approach).
89 See intra text accompanying notes 87-90 (examining statutory definitions to support the countervailing approach).
90 Id. (citing 11 § U.S.C. 101(5)).
91 In re AMC Investors, 486 (citing In re Byrd, 438).
92 Id. at 486.
supporters argue that once a claim is reduced to judgment, the judgment becomes a right of payment that is not subject to dispute, because an unstayed state court judgment is immediately enforceable.93

6. Summary of the Drexler Approach

In short, those who adopt the Drexler approach believe that it meets the legislative purpose behind bankruptcy law in general.94 It also fulfills the legislative history behind the 1984 Reform act95 and satisfies the legislative intent for adding the “bona fide dispute” language to the code.96 Furthermore, advocates believe that the Drexler approach is appropriate as it accounts for the requirements of federalism, namely the Full Faith and Credit doctrine,97 that judgments are the best “objective” way of determining whether a bona fide dispute exists,98 and their approach removes inherent difficulties and un-necessities that come with the Byrd approach.99 Lastly, proponents believe that the Drexler approach properly takes into account statutory definitions when reaching their conclusion.100

C. The Byrd Approach

Currently, the Byrd approach has been adopted by courts in the Fourth101 Circuit and by some bankruptcy courts in Texas,102 and Pennsylvania.103 Again, this approach gives the debtor the opportunity to demonstrate the existence of a bona fide dispute as to liability or amount.104 The Byrd court pointed out that this rule does not require that “a debtor’s assets be dissipated while frivolous or hopeless appeals wend their way through the courts.” Instead, it requires the

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93 Id.
94 See supra Part III.B.1.
95 Id.
96 Id.
97 See supra Part III.B.2.
98 See supra Part III.B.3.
99 See supra Part III.B.4.
100 See supra Part III.B.5.
101 See In re Byrd, 441 (holding that a Debtor can raise any substantial factual or legal questions about the continued viability of judgments entered against them to determine if a bona fide dispute exists or not).
102 See In re Henry S. Miller Commercial, LLC, 418 B.R. 912, 921 (Bkrtcy. N.D. Tex. 2009) (Hereinafter “In re Henry S. Miller Commercial”), (“an unstayed [non-default] judgment does not create an irrebuttable presumption of no bona fide dispute, just a presumption”)
103 See In re Graber, 319 B.R. at 377 (holing that the burden to prove a bona fide dispute shifts to the Debtor when an un-stayed non-default judgment, even if being challenged by appeal or by a motion to open or strike, is subject to a bona fide dispute).
104 In re Byrd, 438.
debtor to “raise any substantial factual or legal questions about the continued viability of those judgments.”

In other words, advocates of this approach argue that an unstayed non-default state judgment should not “create an irrebuttable presumption of no bona fide dispute, just a presumption.”

1. Central Purpose, Legislative Intent and History

Proponents for the Byrd approach reject the arguments that the central purpose of bankruptcy, the legislative intent behind involuntary bankruptcy, and the act itself support a per se rule. To begin with, advocates reject that the prevention of a “race to the courthouse” supports a per se rule. In doing so, proponents point out, “the code does not instruct courts to purse this goal at all costs.” Alternatively, the Byrd approach satisfies this purpose by preventing frivolous or hopeless appeals winding through the courts to permit a dismissal of a creditor’s petition. Therefore, by allowing some claims to be the basis of involuntary bankruptcy and preventing others, namely those subject to a bona fide dispute, a middle ground has been struck between the central purpose of bankruptcy law and involuntary bankruptcy itself.

In addition, supporters of the Byrd approach reject the argument that the intent behind the “bona fide dispute” language, that creditors should be preventing from using involuntary bankruptcy to coerce debtors into paying disputed claims, supports a per se rule. In doing so, proponents note, “substantial questions may remain about a debtor’s liability, notwithstanding judgments in a creditor’s favor.” In making this argument, advocates have pointed out a number of different situations in which substantial questions may still remain even after a judgment has been ruled in their favor. Namely:

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105 Id. at 441.
106 In re Henry S. Miller Commercial, 921.
107 Id; see In re Marciano, 1134 (Ikuta, J., dissenting).
108 In re Marciano, 1134 (Ikuta, J., dissenting) (arguing against the majorities opinion that preventing a race to the courthouse supports a determination of whether a bona fide dispute exists even though an un-stayed non-default judgment has been entered).
109 Id.
110 Id.
111 Id. (arguing that this middle ground supports a per se rule that unstayed non-default state court judgments are not subject to a bona fide dispute).
112 In re Henry S. Miller Commercial, 921-22.
113 In re Byrd, 438.
114 In re Henry S. Miller Commercial, L921-22.
“A judgment inadvertently entered against a non-party, where subsequent events cast doubt upon the judgment’s enforceability, such as due to a payment of the judgment debt or posting of a bond, or even some sort of appellate court holding in another case that changes the law and suggests it is inevitable that the unstayed judgment will be reversed.”

In pointing out these situations, advocates have shown that even after judgment, creditors would still have the possibility of coercing debtor’s to pay claims, which are questionable. Thus, a per se rule is not supported by the intent for the addition of the “bona fide dispute” language.

Additionally, proponents of the Byrd approach also reject that the 1984 Reform Act itself supports a per se rule. In doing so, proponents argue “different portions of the same legislative history point in other direction[s].” The 1984 Reform Act abandoned the requirement that the debtor be adjudicated as having committed an act of bankruptcy and, instead, permitted proof of equity insolvent as alone sufficient basis for involuntary bankruptcy. Additionally, other portions of the legislative history suggest the reason for adding the language was to protect debtors from threats of involuntary bankruptcy by creditors in possession of questionable claims. As a result, proponents come to the conclusion that “[a]t best, the evidence we have about Congress’s intentions and purposes with respect to the ‘bona fide dispute’ language is limited and ambiguous.” Thus, supporters of the Drexler approach have “allowed ambiguous legislative history to muddle clear statutory language.”

2. Federalism: The Full Faith and Credit Act

Those who have adopted the Byrd approach, counter the argument that the Byrd approach is inappropriate as it does not account for the requirements of federalism, namely the Full Faith

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115 Id.
116 Id.
117 See id. at 921-22; In re Byrd, 438 (arguing that given a bona fide dispute may still exist, creditors may still be able to coerce debtors into paying questionable claims).
118 In re Marciano, 1134 (Ikuta, J., dissenting) (noting that the Act itself points in different directions and is therefore ambiguous, making it impractical to be the basis for either approach).
119 Id.
120 In re Marciano, 1134 (Ikuta, J., dissenting); see also Ponoroff, 315, 323-24 (explaining the sub silentio lowering the status of un-stayed state court judgments).
121 In re Marciano, 1134 (Ikuta, J., dissenting) (pointing to the congressional hearings that determined the addition of the bona fide dispute language was warranted).
122 Id.
123 Id.
and Credit doctrine. Instead, *Byrd* advocates argue that the courts are not re-litigating liability or amount but rather they are simply determining whether a bona fide dispute exists. In determining this, bankruptcy courts do not resolve any disputed questions of law or fact, instead they simply determine if there are such questions. Therefore, the *Byrd* approach “is entirely consistent with the Full Faith and Credit Act.”

3. **An Objective Analysis**

Advocates counter the argument that judgments are the best “objective” way of determining whether a bona fide dispute exists, discussed supra. In doing so, proponents argue, since courts have adopted the *Sims* approach, an objective test for determining whether a bona fide dispute exists, courts should not simply find no bona fide dispute exists based on unstayed non-default judgments. Proponents argue, “It would be ‘un-objective’ or not ‘reasonable’ to simply stop, upon learning that there is an unstayed judgment.” Furthermore, the “objective standard” historically means using the hypothetical “reasonable man” standard and therefore “there has to be some analysis of what the post-judgment circumstances are.” In essence, advocates argue that a per se rule is inconsistent with an objective standard, as it leaves no determination whether there is a basis for either a factual or legal dispute as to the validity of the debt after a judgment has been entered.

4. **Statutory Language**

Proponents of the *Byrd* approach argue that those who adopt the *Drexler* approach have “conflated the concept of ‘enforceable judgment’ with the concept of there being a claim that is

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124 See supra Part III.B.2. (discussing the argument that the Full Faith and Credit Clause prevents bankruptcy courts from treating unstayed non-default state court judgments differently than a different state court is required to do, namely enforce the judgments).

125 In re Marciano, 1133 (Ikuta, J., dissenting) (basing this argument on the fact that they are not acting as an appellate court, but rather doing their job by determine whether a bona fide dispute exists).

126 See id. (emphasizing that this is the reason for the addition of the bona fide dispute language).

127 Id. at 1134.

128 See supra Part III.B.3 (arguing that an unstayed non-default state court judgment is the most objective way in determining whether a bona fide dispute exists).

129 See Matter of Sims, 994 F.2d 210, 221 (5th Cir. 1993).

130 In re Henry S. Miller Commercial, 912, 921.

131 Id.

132 Id.

133 “The Vortex test does not require courts to be ‘objective’ in some unspecified manner, but rather to ‘determine whether there is an objective basis for either a factual or a legal dispute as to the validity of the debt.’ In other words, Vortex requires a particular objective approach, and one which is inconsistent with the majority’s approach.” In re Marciano, 1132-33 (Ikuta, J., dissenting) (citing In re Vortex Fishing Systems, Inc., 227 F.3d 1057 (9th Cir. 2002) (quoting In re Busick, 831 F.2d 745, 750 (7th Cir. 1987)).
not subject to a bona fide dispute.”\footnote{134} Instead, a “judgment” is not a “claim” and the immediate enforceability is irrelevant in the determination of whether a bona fide dispute exists.\footnote{135} Proponents note, the term claim as defined by Section 101(5) of Title 11 states, “a right to payment, whether or not such right is reduced to judgment.”\footnote{136} Based on this definition, “a claim is a ‘right of payment,’ not a ‘judgment.’” As a result, the determination is not whether a judgment is subject to a bona fide dispute, but rather whether the right to payment is subject to a bona fide dispute.\footnote{137} Therefore, a judgment is irrelevant in this determination.\footnote{138} Lastly, courts adopting this approach argue that the \textit{Drexler} approach is “inconsistent with the literal wording of the statute.”\footnote{139} This argument is grounded in the fact that the statute used an “amorphous and flexible concept by referring to claims not subject to a bona fide dispute as to liability or amount.”\footnote{140} Advocates further point out that congress could have referred to holders of judgments in Section 303(b) but did not.\footnote{141}

\textbf{5. Summary}

In short, those who support the \textit{Byrd} approach argue that the central purpose of bankruptcy,\footnote{142} the legislative intent for adding “bona fide dispute” to the code,\footnote{143} and the Reform itself, supports their approach.\footnote{144} Furthermore, the concept of federalism, namely the Full Faith and Credit clause, are consistent with this approach.\footnote{145} Additionally, the \textit{Byrd} approach properly applies the \textit{Sim’s} approach for determining whether a bona fide dispute exists.\footnote{146} Lastly, it properly takes into account statutory definitions\footnote{147} and literal wording.\footnote{148}

\begin{footnotes}
\item[134] \textit{In re Henry S. Miller Commercial, LLC}, 922.
\item[135] \textit{Id}. In doing so proponents point to the definition of “claim.” \textit{In re Marciano}, 1131-32 (Ikuta, J., dissenting).
\item[136] \textit{Id}.
\item[137] \textit{Id}.
\item[138] \textit{Id}.
\item[139] \textit{In re Henry S. Miller Commercial, LLC}, 921.
\item[140] \textit{Id}.
\item[141] \textit{Id}.
\item[142] See supra Part III.C.1.
\item[143] \textit{Id}.
\item[144] \textit{Id}.
\item[145] See supra Part III.C.2.
\item[146] See supra Part III.C.3.
\item[147] See supra Part III.C.4.
\item[148] \textit{Id}.
\end{footnotes}
D. The Third Circuit Split

As discussed above, this split is particularly concerning to those practicing within the Third Circuit as the court has yet to weigh in on where it stands, causing bankruptcy courts in Delaware and Pennsylvania to adopt differing approaches.149 The leading case in Delaware bankruptcy courts is In re AMC Investors, LLC.150 The AMC court adopted a per se rule that unstayed non-default state judgments are not subject to a bona fide dispute, explicitly rejecting Byrd.151 The court was persuaded by some of the justifications outlined above.152 Namely, the court relied on concepts of federalism, more specifically the Full Faith and Credit doctrine.153 Furthermore, the AMC court noted that it would be inherently difficult and it lacks necessity for the court to examine pending appeals.154 The AMC court also relied on the argument that a judgment is a right of payment by looking at the definition of claim found in the statute.155 The court went further, interjecting that the Byrd analysis is based on a faulty premise of what a claim is.156 Lastly, the AMC court notes that the Byrd approach runs counter to the Butner principle that “bankruptcy courts take non-bankruptcy rights and laws as they find them.”157 On the other hand, Pennsylvania courts take a different approach, adopting the Byrd approach.158 The leading case for Pennsylvania bankruptcy courts is In re Graber, which found a federalism argument to be unpersuasive. The Graber court further noted that there was “no ‘hard and fast’ rule embodied in the text of the Bankruptcy Code which dictates that an unstayed non-default judgment on appeal can never be the subject of a bona fide dispute.”159 The court further noted that the definition of “claim” supports a finding that no per se rule should exist.160

149 See supra text accompanying notes 43-45 (explaining why this split is so troubling).

150 In re AMC Investors, 478.

151 Id. at 484.

152 See supra Part III.B.

153 In re AMC Investors, 484 (“It would be contrary to the basic principles respecting, and would effect a radical alteration of, long-standing enforceability of unstayed final judgments to hold that the pendency of the debtor’s appeal created a ‘bona fide dispute’ within the meaning of Code 303.”) (citing Drexler, 967).

154 Id.

155 Id. at 486.

156 Id.

157 In re AMC Investors, 486.

158 In re Graber, 319 B.R. at 377-78 (“[A]n un-stayed [non-default] judgment, even if being challenged by appeal or as here by a motion to open or strike(...) shifts [the burden] to the Debtor to demonstrate the existence of a bona fide dispute.”).

159 Id. at 379.

160 Id.
As a result of the code’s shortfall of not defining “bona fide dispute”, bankruptcy courts in the Third Circuit and other Circuit courts are divided on how to apply unstayed non-default states judgments to the bona fide dispute language. Since involuntary bankruptcy is an extreme measure and it is imperative that bankruptcy laws are uniform, it is important that the Supreme Court determines a single solution to this issue and re-stores uniformity amount bankruptcy courts. The approach that the Supreme Court and the Third Circuit should adopt is the Drexler approach and the reasons for this solution are addressed below.161

IV. THE EVALUATION

As shown above, both the Byrd and Drexler approaches have their respective strengths and weaknesses.162 Both sides, however, rely on practically the same justifications for the adoption of their approach.163 This section will examine each justification explaining the weaknesses and strengths for each side, but will ultimately conclude that the Drexler approach better fulfills the reasoning.164

A. The Central Purpose, Intent, and Legislative History

Both approaches argue that their solution satisfies the central purpose behind bankruptcy, the legislative intent for including the “bona fide dispute” language, and the legislative history of the 1984 Reform Act.165

The central purpose behind bankruptcy law in general is to prevent creditors from racing to the courthouse to dismember debtors.166 This central purpose is served by both approaches, as this is exactly what involuntary bankruptcy in effect does, by freezing the debtor’s assets so each creditor gets a fair portion of the debtor’s assets.167 Therefore, since both approaches ultimately determine the ability of creditors to force a debtor into bankruptcy, they both have the effect of preventing creditors from racing to the courthouse.168 However, it follows that if the effect of involuntary bankruptcy serves this purpose, then the more often this solution is available, the

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161 See infra Part IV.
162 See supra Part III.A, III.B, and III.C.
163 Id.
164 See infra Part IV.A-E; see infra Part V.
165 See supra Part III.B.1; see supra Part III.C.1.
166 In re Marciano, 1128 (citing In re Bullion Reserve of N. Am., 836 F.2d at 1217).
167 See supra Part III.B.1; see supra Part III.C.1; see In re Marciano, 1128 (citing In re Manhattan Indus., 224 B.R. at 200).
168 See supra Part III.B.1; see supra Part III.C.1.
more cases in which this central purpose will be served. This tends to support the Drexler approach over the Byrd approach, as creditors who have unstayed non-default state judgments will have involuntary bankruptcy available to them.\(^{169}\) Whereas creditors who have such judgments, under the Byrd approach, may still not have involuntary bankruptcy available.\(^{170}\)

With that being said, the legislative intent for adding the language “bona fide dispute” to the code was to prevent creditors from coercing debtors to pay questionable claims.\(^{171}\) This intent is supported by both approaches, in that each strives to avoid coercion by determining if a claim is questionable. This Author believes however, that this does not serve as a justification for either approach over the other. Instead, coercing debtors to pay questionable claims would have been achieved or avoided through the original litigation rather than at a later point. The initial filing of a claim by the creditor against the debtor would have provided the coercive environment the legislator intended to avoid, given that the debtor would have to consider the costs of litigation. The minimal amount of additional coercion that exists, after a judgment has been entered, in the face of an involuntary bankruptcy petition, provides little to no justification for either approach. Furthermore, even if a coercive environment does exist after the costs of litigation have been exhausted, there are few instances in which a questionable claim will exist given an unstayed non-default state judgment. As a result, both approaches avoid coercion by the creditors to receive payments on questionable claims, as those creditors who have litigated the issue and obtained a judgment will be unlikely to believe their judgment is questionable. The additional ability of the debtor to prove a bona fide dispute does exist, given an unstayed non-default state judgment, it will be unlikely to act differently given either approach.

Additionally, proponents of the Drexler approach argue the legislative history of the 1984 Reform Act points to lightening the burden for creditors seeking to file an involuntary bankruptcy petition.\(^{172}\) This Author believes that in some respects the legislative history does in fact lighten the burden for filing involuntary bankruptcy.\(^{173}\) Namely, the 1884 Reform Act abandoned the requirement that the debtor be adjudicated as having committed an act of

\(^{169}\) See In re Marciano, 1128 (citing In re Bullion Reserve of N. Am., 836 F.2d at 1217.

\(^{170}\) See supra Part III.B.1.

\(^{171}\) In re Marciano, 1127 (“The language was included ‘to prevent creditors from using involuntary bankruptcy to coerce a debtor to satisfy a judgment even when substantial questions may remain concerning the liability of the debtor.”).

\(^{172}\) Ponoroff, 315, 323-24 (“[The 1984 Reform Act] totally abandoned the earlier requirement that the debtor be adjudicated as having committed an act of bankruptcy. Instead, section 303(h)(1) permitted proof of equity insolvency – defined as the debtor’s general failure to pay its debts as they become due – as alone sufficient basis for involuntary bankruptcy.”).

\(^{173}\) Id.
bankruptcy and, instead, permitted proof of equity insolvency as along sufficient. However, on the same note, the Act increased the burden for creditors seeking involuntary bankruptcy by requiring that claims not be subject to a bona fide dispute. Thus, advocates of the Byrd approach were correct when stating that “at best, the evidence we have about Congress’s intentions and purposes with respect to the ‘bona fide dispute’ language is limited and ambiguous.” As a result, this argument is moot, as it provides no support for either approach, given that the legislative history is ambiguous.

In short, the central purpose of bankruptcy law is best served by a per se rule that an unstayed non-default judgment is not subject to a bona fide dispute. Additionally, the legislative intent and history behind the 1984 Reform Act neither support nor contradict either approach and are therefore, irrelevant to the determination of which approach the Supreme Court and the Third Circuit should adopt.

B. Federalism: The Full Faith and Credit Act

Supporters of the Drexler approach argue that the Byrd approach does not account for the requirements of federalism, namely the Full Faith and Credit Act. In doing so, proponents argue, an unstayed non-default state judgment is enforceable even though it is on appeal and involuntary bankruptcy, being one way to enforce the judgment. On the other hand, proponents of the Byrd approach believe that their attitude is entirely consistent with the Full Faith and Credit Act. They argue, bankruptcy courts are not re-litigating liability or amount but rather determining whether a bona fide dispute exists.

The Full Faith and Credit Act states, “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be

174 Id., 315, 323-24 (explaining the sub silentio lowering of the status of un-stayed state court judgments).
176 In re Marciano, 1134 (Ikuta, J., dissenting).
177 See In re Marciano, 1128 (citing In re Bullion Reserve of N. Am., 836 F.2d at 1217).
178 See infra text accompanying notes 165-175.
180 In re Drexler, 56 967 (citing 11 Wright & Miller, Federal Practice & Procedure, §§ 2902-2903; United States v. Verlinsky, 459 F.2d at 1089; Fed. R. Civ. Pro. 62(a); Bankruptcy Rule 7062; N.Y.C.P.L.R. § 5519.
181 In re Marciano, 1133 (Ikuta, J., dissenting).
182 Id.
proved, and the Effect thereof.”\textsuperscript{183} This Author believes that the proponents of the Drexler approach raise an important issue when pointing to the Full Faith and Credit Act. The United States Constitution Article IV Section 1 specifically states, “Full Faith and Credit shall be given in judicial proceedings of every other State.”\textsuperscript{184} As a result, judgments obtained in state courts are entitled to be enforced in bankruptcy courts.\textsuperscript{185} This Author notes the Act does not state anything about re-litigating the issue or deciding questions of fact or law, as Byrd advocates point out for their justification.\textsuperscript{186} Instead, it simply states that judicial proceedings shall be enforceable in other courts.\textsuperscript{187}

In sum, the Full Faith and Credit Act supports a \textit{per se} rule that unstayed non-default judgments are not subject to a bona fide dispute as they are entitled to be enforced in bankruptcy courts under the Full Faith and Credit Act.\textsuperscript{188} To hold otherwise, it would not be to enforce state judgments and thus, it would circumvent the Full Faith and Credit Act by not applying the act to bankruptcy courts, a holding that is entirely inconsistent with the Act itself.\textsuperscript{189} Thus, the Full Faith and Credit Act supports a \textit{per se} rule.\textsuperscript{190}

\textbf{C. The Objectiveness Argument}

Advocates for both approaches agree that an objective test is used to determine if a bona fide dispute exists.\textsuperscript{191} However, they also believe that their approach is the most objective way of determining whether a bona fide dispute exists.\textsuperscript{192} Drexler advocates argue that an unstayed

\textsuperscript{183} U.S. Const. Art. IV, § 1.
\textsuperscript{184} \textit{Id}.
\textsuperscript{185} \textit{In re Marciano}, 1128 (citing Matsushita Elec. Indus. Co. v. Esptein, 516 U.S. at 373) (“The Full Faith and Credit Act requires federal courts to give state court judgments the same ‘Full Faith and Credit’ they would receive in courts of that state.”).
\textsuperscript{186} \textit{In re Marciano}, 1133 (Ikuta, J., dissenting).
\textsuperscript{187} U.S. Const. Art. IV, § 1.
\textsuperscript{188} \textit{See In re Drexler}, 968 (citing United States v. Verlinksy, 450 F.2d at 1085); \textit{see In re Marciano}, 1128.
\textsuperscript{189} \textit{See U.S. Const. Art. IV, § 1.}
\textsuperscript{190} \textit{See In re Drexler}, 968 (stating this very proposition).
\textsuperscript{191} \textit{See In re Drexler}, 966 (“This standard appears to require (...) an objective appraisal of the merits.”); \textit{see In re Byrd}, 437 (internal citations omitted) (“We agree, however, with the unanimous view of our sister circuits that a bona fide dispute requires ‘an objective basis for either a factual or a legal dispute as to the validity of [the debt].’”).
\textsuperscript{192} \textit{In re Marciano}, 1127 (“Indeed, it is difficult to imagine a more ‘objective’ measure of the validity of a claim than an un-stayed [non-default] judgment entered by a court of competent jurisdiction.”); \textit{In re Henery S. Miller Commercial}, 921 (“[I]t would be ‘un-objective’ or not ‘reasonable’ to simply stop, upon learning that there is an un-stayed [non-default] judgment.”).
non-default state judgment is the most objective way of determining whether a bona fide dispute exists.\textsuperscript{193} Whereas, proponents of the \textit{Byrd} approach believe that it is entirely un-objective to stop at an unstayed non-default state judgment when determining if a bona fide dispute exists.\textsuperscript{194}

This Author believes that both approaches are being objective in their analysis of whether a bona fide dispute exists.\textsuperscript{195} However, given that the \textit{Byrd} approach delves deeper into the analysis rather than stopping at an unstayed non-default state judgment, this Author believes that the \textit{Byrd} approach is more objective than the \textit{Drexler} approach.\textsuperscript{196}

An objective analysis requires that the court determines, using a reasonable man standard, whether a bona fide dispute exists.\textsuperscript{197} Given that a judgment is determined either by a judge or a jury, a reasonable man has already determined if a dispute exists by ruling on the issue. However, advocates for the \textit{Byrd} approach, raise a good point, namely that there has to be some analysis of whether the post-judgment circumstances subject the claim to a bona fide dispute.\textsuperscript{198} Given that a \textit{per se} rule does not account for post-judgment circumstances, this Author believes that the \textit{Byrd} approach is more reasonable and therefore more objective.\textsuperscript{199} However, given that both approaches are themselves objective,\textsuperscript{200} this does not automatically dictate that the \textit{Byrd} approach is the right solution.

\textbf{D. Difficulties and Unnecessary}

Advocates for the \textit{Drexler} approach support their analysis by stating, “The \textit{Byrd} approach turns bankruptcy courts into an odds maker of appellate decision-making.”\textsuperscript{201} They further note

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\item \textsuperscript{193} \textit{In re Marciano}, 1127.
\item \textsuperscript{194} \textit{In re Henry S. Miller Commercial}, 921.
\item \textsuperscript{195} \textit{See In re Marciano}, 1127; \textit{see In re Henery S. Miller Commercial}, 921.
\item \textsuperscript{196} \textit{In re Byrd}, 440 (delving into the factual and legal disputes to determine whether a bona fide dispute exists as to liability or amount).
\item \textsuperscript{197} \textit{In re Henry S. Miller Commercial}, 921 (“The ‘objective standard’ in the law has historically meant using the hypothetical ‘reasonable man’ standard.”).
\item \textsuperscript{198} \textit{Id}. (“So, in this court’s view, there has to be some analysis of what the post-judgment circumstances are.”).
\item \textsuperscript{199} \textit{In re Drexler}, 967 (“[T]he court has concluded that a general answer may be given that a claim based upon an un-stayed [non-default] judgment as to which an appeal has been taken by the debtor is not the subject of a bona fide dispute.”).
\item \textsuperscript{200} \textit{See In re Henry S. Miller Commercial}, 921; \textit{In re Drexler}, 967.
\item \textsuperscript{201} \textit{Supra} note 82.
\end{itemize}
this is inherently difficult and unnecessary.\textsuperscript{202} This Author believes that it is not so overly difficult to determine whether there is a factual or legal question concerning a judgment, which would make the Byrd approach unworkable.\textsuperscript{203} This is clear from cases that have adopted the Byrd approach, as they have been able to explore and reach a conclusion as to whether a factual or legal question exists, revealing that this approach is workable.\textsuperscript{204} Further, an analysis as to whether a question exists surrounding an unstayed non-default judgment can be determined by calling an expert witness to testify as to the likelihood of a successful appeal.\textsuperscript{205} As a result, this Author believes that it is not so inherently difficult as to render the Byrd approach unworkable.\textsuperscript{206}

In addition, this Author does not believe that it is \textit{per se} unnecessary to dive into an analysis as to whether a bona fide dispute exists in the face of an unstayed non-default judgment. As cases adopting the Byrd approach have held, a bona fide dispute may still exist although an unstayed non-default state judgment has been given.\textsuperscript{207} However, whether this analysis is necessary or not, given the law surrounding involuntary bankruptcy, is the topic of this Note. This Author believes that this argument is irrelevant in determining the issue, as it provides little analysis about the law itself. Instead, this argument simply makes an unnecessary conclusory statement by pointing to Byrd itself,\textsuperscript{208} while ignoring other cases, which found a bona fide dispute existing even though an unstayed non-default judgment had been entered against the debtor.\textsuperscript{209}

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\textsuperscript{202} \textit{In re AMC Investors}, 485 ("This approach [the Byrd approach] is unnecessarily intrusive into the trial court’s ruling and undermines the objective analysis of bona fide disputes (…). The inherent difficulty and lack of necessity in engaging in such analysis is borne out by Byrd itself").
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\textsuperscript{203} \textit{See, e.g., In re Briggs, 2008 WL 190463 *2} (Bankr. N.D. Tex. 2008) (finding a bona fide dispute existed as to liability in the face of an un-stayed non-default state judgment).
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\textsuperscript{204} \textit{Id}.
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\textsuperscript{205} \textit{In re Briggs}, 2008 WL 190463 *2 (Bankr. N.D. Tex. 2008) (using expert testimony in determining that a bona fide dispute existed in the face of an unstayed non-default state judgment).
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\textsuperscript{206} \textit{See, e.g., Id.} (providing an example that the Byrd approach is not unworkable).
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\textsuperscript{207} \textit{Id}.
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\textsuperscript{208} \textit{In re AMC Investors}, 485 ("This approach [the Byrd approach] is unnecessarily intrusive into the trial court’s ruling and undermines the objective analysis of bona fide disputes (…). The inherent difficulty and lack of necessity in engaging in such analysis is borne out by Byrd itself").
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\textsuperscript{209} \textit{See, e.g., In re Briggs, 2008 WL 190463 *2} (Bankr. N.D. Tex. 2008) (finding a bona fide dispute existed in the face of a unstayed non-default state judgment).
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E. Claim v. Judgment: Statutory Language

Proponents for both approaches use the definition of claim to bolster support for their respective approach.\(^{210}\) *Drexler* advocates believe that a judgment is a right of payment not subject to a bona fide dispute rather than a claim.\(^{211}\) On the other hand, supporters of the *Byrd* approach believe those who adopt the *Drexler* approach have improperly conflated the concepts of right of payment and claim, therefore reaching an incorrect determination.\(^{212}\)

This Author agrees with those arguments made by *Byrd* advocates. The statutory definition of claim, makes clear that a it is “a right of payment, whether or not such right is reduced to judgment.”\(^{213}\) Given that the definition of claim does not hinge on whether or not a right of payment has been reduced to judgment, it is ultimately irrelevant whether it has.\(^{214}\) However, given the legal analysis to determine whether a claim is subject to a bona fide dispute hinges on the objectivity of the dispute, an unstayed non-default state judgment does play into the analysis of whether a bona fide dispute exists.\(^{215}\) In other words, an unstayed non-default state judgment is irrelevant in the determination of whether or not the right of payment is a claim;\(^{216}\) however, it is extremely relevant in determining whether the right of payment, or claim, is subject to a bona fide dispute.\(^{217}\) With that being said, neither argument is probative in determining which approach best meets the statutory requirements for involuntary bankruptcy.

Proponents of the *Drexler* approach further point out, bankruptcy law in general supports their approach.\(^{218}\) They note bankruptcy courts take non-bankruptcy rights and laws as they find them.\(^{219}\) This Author believes that this is another point, along the same line as the full faith and

\(^{210}\) See *In re AMC Investors*, 487 (using the definition of claim to bolster support for the *Drexler* approach); see *In re Henry S. Miller Commercial*, 922 (using the definition of claim to argue the *Drexler* improperly conflates the concept of enforceable judgment with a claim being subject to a bona fide dispute).

\(^{211}\) See *In re AMC Investors*, 487.

\(^{212}\) See *In re Henry S. Miller Commercial*, 922.

\(^{213}\) 11 § U.S.C. 101(5).

\(^{214}\) See id.

\(^{215}\) See *In re Drexler*, 966 (“This standard appears to require (...) an objective appraisal of the merits.”); see *In re Byrd*, 437 (internal citations omitted) (“We agree, however, with the unanimous view of our sister circuits that a bona fide dispute requires ‘an objective basis for either a factual or a legal dispute as to the validity of [the debt].’”).

\(^{216}\) See *In re Henry S. Miller Commercial*, 922.


\(^{218}\) *In re AMC Investors*, 485 (citing Butner v. United States, 440 U.S. at 55, 99) (“[T]he analysis in *Byrd* runs counter to the *Butner* principle, which provides that, in the absence of a specific provision to the contrary, bankruptcy courts take non-bankruptcy rights and laws as they find them.”).

\(^{219}\) Id.
credit issue, which supports the *Drexler* approach. In essence, *Drexler* advocates are arguing that bankruptcy courts must enforce an unstayed non-default state judgment against the debtor to take non-bankruptcy laws as they find them.\(^{220}\) However, this is another way of arguing that the Full Faith and Credit doctrine supports their approach, as it is simply stating that since state courts would have to enforce these judgments, so do bankruptcy courts.\(^{221}\) As a result, this Author lumps this argument together with the Full Faith and Credit argument in determining which approach is the most appropriate.

Lastly, those who support the *Byrd* approach argue that their analysis is consistent with the literal wording of the statute.\(^{222}\) Namely, they argue that the statute used “an amorphous and flexible concept by referring to claims not subject to a bona fide dispute” and the legislator could have referred to holders of judgments but refrained from doing so.\(^{223}\) This Author finds this argument non-persuasive. It is just an artful way of saying that a claim reduced to judgment may still be subject to a bona fide dispute.\(^{224}\) This is the over-arching argument for those who support the *Byrd* approach and this Author is not persuaded by a justification, which simply restates the ideas behind the approach.\(^{225}\) Further, the second argument that the legislator did not include judgment in their statutory language is unpersuasive. Legislators are not required to, nor should they include every possible situation that may arise from drafting a statute. If legislators omit a situation, it does not follow that they wanted to include it or not in their regulation. Instead, it provides the ability for the judiciary to interpret the law and determine if a given situation falls inside or outside of the regulation. As a result, both of these arguments are irrelevant in the determination of which approach best meets involuntary bankruptcy requirements.

### F. Additional Considerations

At this point, this Author believes it is necessary to provide additional considerations, not mentioned by courts that have reviewed this issue. However, it is important to note the *Byrd* approach is more time consuming than the *Drexler* one, as it gives debtors the ability to call in witnesses to testify as to whether a bona fide dispute exists in the face of an unstayed non-
default judgment. This additional time is more costly on both the litigants and the courts themselves and thus raises public policy considerations, namely judicial expenditures of involuntary bankruptcy proceedings. As is so often the case, courts are overwhelmed with litigation that takes, in this Author’s opinion, too long to discuss a case. Additionally, litigation is a costly endeavor and an ability to limit costs would be beneficial to both the creditors, who potentially could be forced to cover the cost of litigation for both sides, and to the debtors who are already facing financial troubles.

V. CONCLUSION

It is imperative that the Third Circuit and the Supreme Court resolve this uncertainty and allow involuntary bankruptcy to function as it was intended to. First, creditors may be reluctant to use involuntary bankruptcy against creditors, even though it would be in their best interest to do so. Secondly, uncertainty is “especially worrisome in the context of bankruptcy, where uniformity is sufficiently important that our Constitution authorizes Congress to establish ‘uniform laws on the subject of bankruptcies throughout the United States.’” As a result, the Third Circuit and the Supreme Court should resolve this uncertainty and adopt the Drexler approach.

This Author finds irrelevant, or non-persuasive, the following arguments: (1) the legislative intent behind the approaches supports both of them; (2) the legislative history of the 1984 Reform act supports either approach; (3) an objective analysis requires the adoption of either approach; (4) the difficulty or un-necessity of determining whether a bona fide dispute exists, in the face of an unstayed non-default judgment, supports either approach; or (5) the statutory language supports either approach.

On the other hand, the federalism argument, that the Full Faith and Credit Act supports both the Drexler and the Byrd approach, is inconsistent with this Act, is persuasive as it ultimately will render the Byrd approach unconstitutional. Further, the central purpose of bankruptcy

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229 See supra Part IV.A.
230 Id.
231 See supra Part IV.C.
232 See supra Part IV.F.
233 See supra Part IV.E.
234 See supra Part IV.B.
law itself, to prevent a race to the courthouse by creditors seeking to recover from debtors, is persuasive, as more creditors will have bankruptcy available to them and will be able to freeze the debtor's assets.\textsuperscript{235} Lastly, this Author finds comfort in noting that the \textit{Drexler} approach provides less cumbersome litigation than the \textit{Byrd} one and provides a more economical option to both litigants in involuntary bankruptcy proceedings.\textsuperscript{236} As a result, the Supreme Court, and more specifically the Third Circuit, should adopt the \textit{Drexler} approach and end uncertainty surrounding unstayed non-default judgments and the bona fide dispute language.

\textsuperscript{235} \textit{See supra} Part IV.A.

\textsuperscript{236} \textit{See supra} Part IV.F.