The Debtor Class

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ABSTRACT

In recent years, individuals seeking bankruptcy protection have encountered an unexpected harm: their lenders have misrepresented the amounts they owe, lost or misapplied their loan payments, and violated clear requirements of bankruptcy law and procedure. Recent investigations of consumer bankruptcy cases reveal widespread abuse of the bankruptcy code, ranging from the filing of unsupported or overinflated proofs of claim to violations of the automatic stay and discharge injunction. Such practices undermine consumer bankruptcy’s central goals to provide consumer debtors a fresh financial start and to achieve the fair treatment of and distribution of assets to creditors.

Because many debtors affected by lender misconduct may not have the resources or the financial incentives to fight back individually, class actions may serve a valuable remedial role. Class litigation may additionally create a deterrent effect that institutional checks have failed to provide. The primary impediment to widespread class litigation in bankruptcy has been jurisdictional. The concept of a debtor class appears to present substantial conflicts with fundamental principles of bankruptcy jurisdiction. This article untangles the complex framework for bankruptcy jurisdiction, presenting a clear statutory and theoretical basis for permitting consumer class actions in bankruptcy.

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THE DEBTOR CLASS

I. INTRODUCTION

II. THE GAP BETWEEN BANKRUPTCY LAW AND CREDITOR ACTION IN CONSUMER BANKRUPTCY CASES
   A. CREDITOR ACTION AND INACTION IN BANKRUPTCY CASES
   B. THE IMPACT OF CREDITOR OVERREACHING ON THE BANKRUPTCY PROCESS
   C. BRIDGING THE GAP BETWEEN BANKRUPTCY LAW AND CREDITOR ACTION

III. A JURISDICTIONAL PERSPECTIVE ON DEBTOR CLASS ACTIONS
   A. FEDERAL BANKRUPTCY JURISDICTION
      1. Jurisdiction of the District Court over Bankruptcy Matters
      2. Referral of Bankruptcy Matters to the Bankruptcy Courts
   B. COURTS’ RESPONSE TO DEBTOR CLASS ACTIONS
      1. The Nexus Cases
      2. The Home Court Cases
      3. The Contempt Power Cases
      4. The Outer Limits of the Courts’ Constitutional Authority
      5. The Nationwide Jurisdiction Cases

IV. A FRAMEWORK FOR APPROACHING DEBTOR CLASS ACTIONS
   A. CLASS CERTIFICATION CONCERNS
   B. CLASS ANTIPATHY

V. CONCLUSION
THE DEBTOR CLASS

I. INTRODUCTION

Between 2007 and 2010, the default rates on consumer loans skyrocketed.\(^1\) The high rates of loan defaults stretched the capacity of the court system, bloating dockets with an excess of foreclosure and collection actions. Mortgage lenders and servicers struggled to keep up with the paperwork and litigation relating to their many borrowers in default, adopting “assembly-line” methods of managing cases.\(^2\) In 2010, the mortgage industry drew national attention for “robo-signing” affidavits and other procedural abuses.\(^3\) This scandal revealed lenders’ disregard for the legal requirements of the foreclosure process and the details of individual homeowners’ mortgage obligations. Further inquiry ultimately established that these abusive foreclosure practices were only one aspect of the deep and pervasive problems affecting the mortgage industry.\(^4\)

As homeowners facing foreclosure may seek to save their homes through bankruptcy,\(^5\) it is not surprising that lenders’ sloppiness and overreaching carry over from foreclosure filings into consumer bankruptcy cases. In recent years, large institutional lenders have systematically violated bankruptcy law and procedure in consumer bankruptcy cases.\(^6\) These violations range from the filing of unsupported or overinflated proofs of claim to abuses of the automatic stay and

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\(^3\) In early 2012, five major banks and mortgage servicers reached a settlement with the 50 state attorneys general, the Federal Department of Housing and Urban Development, and a number of other agencies on these matters. See Jim Puzzanghera & Alejandro Lazo, Mortgage settlement is also housing relief package, L.A. TIMES, Feb. 10, 2012, http://articles.latimes.com/2012/feb/10/business/la-fi-mortgage-settlement-20120210.

\(^4\) See Raymond H. Brescia, Leverage: State Enforcement Actions in the Wake of the Robo-Sign Scandal, 64 ME. L. REV. 17, 19-27 (2011) (outlining problems affecting the origination, securitization and foreclosure of mortgages); see also White, supra note 3 (studying recent processes of assigning and transferring mortgage loans and the doubts cast on the validity of recent foreclosure sales).

\(^5\) See Katherine Porter, Misbehavior and Mistake in Bankruptcy Mortgage Claims, 87 TEXAS L. REV. 121, 123 (2008) (“Bankruptcy offers . . . families one last chance to save their homes.”).

\(^6\) See infra Part II(A).
discharge injunction. It is not clear whether these violations arise from institutional sloppiness or instead from a calculated departure from the Bankruptcy Code’s requirements. What is clear is that these failures are widespread, and that they pass through the bankruptcy process largely unchecked.

This phenomenon reveals an inconsistency between the norms of the Bankruptcy Code and the realities of consumer bankruptcy practice. The Bankruptcy Code contains a variety of rules and procedures calculated to provide the debtor a fresh financial start and ensure that creditors are treated fairly. But judging from the evidence of lender overreaching, existing law and procedure fail to provide sufficient incentives to achieve parties’ compliance. Lenders’ non-compliance undermines the fresh start and distributional policies of consumer bankruptcy and may disadvantage other creditors who choose to follow the law.

This Article examines the potential of class actions to hold corporate actors accountable and thus bridge the gap between bankruptcy law and creditor behavior. “Class actions promote efficiency and economy in litigation. Their design permits numerous parties to collectively litigate claims that might be uneconomical to litigate individually.” This litigation forces lenders to internalize the costs of their misconduct and may deter future wrongdoing. The positive social benefits of class actions carry great weight when considering the limited resources of chapter 7 and 13 debtors and the heavy caseloads of bankruptcy courts.

Rule 23 of the Federal Rules of Civil Procedure is incorporated into the Federal Rules of Bankruptcy Procedure, providing a clear procedural basis for class actions in bankruptcy. But while bankruptcy courts have allowed class relief in other circumstances, many courts have rebuffed requests to certify nationwide debtor classes. Aggregation of claims held by disparate consumer debtors seems incompatible with the fundamentally individualized and debtor-centric nature of the bankruptcy process. Bankruptcy jurisdiction is a notoriously “complex and convoluted” system, and little appellate case law exists to guide

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7 See infra Part II(A).
9 Porter, supra note 5, at 124 (“Although infractions are frequent and irregularities are sometimes egregious, the bankruptcy system routinely processes mortgage claims that . . . cannot be validated and are not, in fact, lawful.”).
10 See infra Part II(B).
12 See infra Part IV(B).
14 Lawrence P. King, Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984, 38 Vand. L. Rev. 675, 676 (1985) (statement of the Editor in Chief of Collier on Bankruptcy); see also Ralph Brubaker, On the Nature of Federal Bankruptcy Jurisdiction: A
courts handling debtor class actions. Nor have scholars provided a clear road map for courts to approach debtor class actions in bankruptcy. Unsurprisingly, debtor class jurisdiction decisions vary widely from court to court.

This Article provides the first reconciliation of the divergent case law and comprehensive framework for approaching the debtor class. It establishes that many of the limitations that courts have placed on debtor classes are inconsistent with the statutory grant of bankruptcy jurisdiction. Courts generally should not hesitate, on jurisdictional grounds, to certify nationwide classes of consumer debtors. Still, the debtor class action is no panacea. Certification requirements will limit the availability of class relief in many cases, and additional law reform efforts will be needed to protect fully the interests of injured debtors.

This Article proceeds as follows: Part II describes the recent pattern of misuse of the bankruptcy process by lenders and describes how this pattern frustrates consumer bankruptcy’s normative aims. Part II introduces the debtor class as a potential means to bridge the gap between bankruptcy law and creditor action in consumer bankruptcy cases. Part III outlines the statutory framework for jurisdiction over bankruptcy matters, evaluates existing case law, and presents a strong statutory and theoretical basis for the federal courts to exercise bankruptcy jurisdiction over a nationwide class of debtors. Part IV outlines a framework for approaching jurisdiction over class-action cases and considers realistic limitations on the use of class claims. Part V concludes by suggesting that courts should encourage class actions to combat systemic bankruptcy harms.

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General Statutory and Constitutional Theory, 41 WM. & MARY L. REV. 743, 941 (2000) (describing federal bankruptcy jurisdiction as “one of the most mysterious and perplexing facets of federal jurisdiction”); John B. Oakley, Prospectus for the American Law Institute's Federal Judicial Code Revision Project, 31 U.C. DAVIS L. REV. 855, 888 (1998) (describing bankruptcy jurisdiction as “a body of law practiced and analyzed almost exclusively by specialists, founded on statutes that are as confused as they are confusing, and beset by an identity crisis.”).

15 The concept of the debtor class is addressed in the following essays, but neither provides the comprehensive study that this Article undertakes. Elizabeth Warren & Jay Westbrook, Class Actions for Post–Petition Wrongs: National Relief Against National Creditors, 22 MAR AM. BANKR. INST. J. 14, 14 (2003) and Corinne Ball & Michele J. Meises, Current Trends in Consumer Class Actions in Bankruptcy, 56 BUS. LAW. 1245, 1256-57 (2001).

16 See infra Part IV.
II. THE GAP BETWEEN BANKRUPTCY LAW AND CREDITOR ACTION IN CONSUMER BANKRUPTCY CASES

A. CREDITOR ACTION AND INACTION IN BANKRUPTCY CASES

In the late 1990’s, Sears came under fire for its corporate policy of using invalid reaffirmation agreements to collect discharged debts. More than ten years earlier, Sears had launched an aggressive campaign to encourage as many of its customers in chapter 7 bankruptcy as possible to reaffirm their outstanding debts in exchange for retaining goods purchased on credit. At least one bankruptcy court objected to language contained in Sears’s form reaffirmation agreements and threatened sanctions should Sears file similar agreements in the future. Rather than omit the problematic language, Sears opted to sidestep court approval of the agreements in cases where it expected judicial pushback. Without court approval, reaffirmation agreements are void and unenforceable, and the debts owed to Sears are discharged at the conclusion of the debtor’s bankruptcy case. Although discharge operates as a permanent injunction against the collection of debt, Sears nevertheless encouraged its employees to continue their collection activities. Debtors, particularly those without counsel, did not know that the reaffirmation agreements had no effect. Sears encouraged this


18 See In re Melendez, 224 B.R. 252, 261 (Bankr. D. Mass. 1998) (reviewing Sears reaffirmation practices from the 1980s to the 1990s). Sears regularly sent representatives to debtor’s section 341 meetings of creditors to solicit reaffirmation agreements, regardless of the type of collateral at issue or the debtor’s ability to repay its obligations to Sears. Melendez, 224 B.R. at 262.

19 In re Iappini, 192 B.R. 8, 9-10 (Bankr. D. Mass. 1995) (finding that Sears failed to comply with § 524’s reaffirmation requirements and included language “designed to entice the Debtors to reaffirm an obligation” in bad faith).

20 Mark J. Balthazard, The Criminal Side of Sears, 1999 United States Attorney Bulletin: Bankruptcy Fraud 71, 71 (1999) (noting that an internal manual used by Sears employees advised that reaffirmation agreements should not be filed before bankruptcy judges that regularly rejected such agreements based on a belief that they were not in the debtor’s best interest). Sears reported to the District of Massachusetts that this practice had occurred in approximately 2,733 bankruptcy cases in that district alone. Conley v. Sears, Roebuck & Co., 222 B.R. 181, 182-83 (D. Mass. 1998). Subsequent investigation revealed that Sears encouraged this conduct on a nationwide basis. Balthazard, supra, at 72.


22 Id.

23 See Balthazard, supra note 20, at 72.

24 See National Bankruptcy Review Commission, Bankruptcy: The Next Twenty Years 163 (1997) (“While unfiled reaffirmations are not legally enforceable, many debtors presume the enforceability of agreements they have signed. An individual may continue to pay bills every
perception by continuing to send monthly bills after the discharge, engaging in
collection calls when debtors fell behind in their payments and, at times, suing the
debtors in state court to collect these discharged debts.25

Following a nationwide investigation involving state attorneys general, the
U.S. Trustee’s office,26 and ultimately the U.S. Attorney’s office, the Federal
Trade Commission, and the Federal Bureau of Investigation, Sears paid over $180
million in restitution and penalties to debtors and paid over $40 million in civil
fines to the state attorneys general.27 Its subsidiary, Sears Bankruptcy Recovery
Management Services, pleaded guilty to a criminal charge of bankruptcy fraud
and agreed to pay a $60 million fine.28 At that time, this penalty was the largest
fine ever assessed for bankruptcy fraud.29

Investigations of Sears’ business practices reveal that Sears knew that its
reaffirmation practices violated the Bankruptcy Code.30 Sears nevertheless
pursued its aggressive policies based on the small likelihood that its actions would
be discovered and their significant financial gains.31 Although this type of
reaffirmation abuse appears to have faded into bankruptcy lore, a similar decision-
making process may motivate the actions and inactions of large institutional
lenders in the wake of the sub-prime lending and foreclosure crisis of the mid-
2000s.

In recent years, bankruptcy courts have expressed frustration with lenders’
lack of preparation and “haphazard[ ] fail[ure] to comply with even the most basic
legal requirements of the bankruptcy system.”32 Mortgage lenders and servicers

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25 Id.
26 The U.S. Trustee Program was created by Congress in 1978 to oversee consumer bankruptcy
cases and guard against bankruptcy fraud.
27 Balthazard, supra note 3, at 73; see also Conley, 222 B.R. at 182 (outlining the terms of the
settlement).
28 Leslie Kaufman, Sears to Pay Fine of $60 Million in Bankruptcy Fraud Lawsuit, N.Y. Times,
29 Id.
30 The Last Act in Sears, National Association of Attorneys General: Bankruptcy Bulletin, 1999-
Jan/FEB NAAG Bankr. Bull. 2; see also Balthazard, supra note 20, at 72-73 (cataloging the legal
advice that Sears had received from inside and outside counsel that these practices were “at best,
highly risky and at worst illegal”).
31 See id. (recounting an internal Sears memorandum, which, after comparing the small likelihood
of getting caught against the advantages of obtaining payment through invalid reaffirmations,
concluded that “probably the biggest risk that [Sears] would have would be if some attorney
happens to run across this and thinks he might have grounds for a class action suit because of a
Bankruptcy Code violation.”).
have been sanctioned by bankruptcy judges for “robo-signing” affidavits\(^{33}\) and for seeking relief from the automatic stay without standing to do so.\(^{34}\) Other lenders have drawn criticism for failing to properly account for debts discharged in bankruptcy.\(^{35}\)

In numerous cases, lenders have presented the courts with unsubstantiated, inaccurate, or wrongfully inflated debt balances in proofs of claim.\(^{36}\) Lenders’ statements of account are frequently unintelligible and sometimes contradictory.\(^{37}\) At a minimum, the fees assessed in proofs of claim often diverge from the amounts the debtors believe that they owe\(^{38}\) and are written with such scant detail


\(^{35}\) See Robert Gerner and Brian Grow, Prisoners of Debt, BUSINESS WEEK, November 1, 2007 (describing the practices of Capital One Finance and other large consumer lenders); see also In re Torres, 367 B.R. 478, 486 (Bankr. S.D.N.Y. 2007) (collecting cases supporting the proposition that failing to report discharge of debts to credit reporting agencies “can constitute an act to extract payment of a debt in violation of section 524(a)(2).”).

\(^{36}\) See, e.g., In re Stewart, 391 B.R. 327 (Bankr. E.D. La. 2008) (sanctioning mortgage servicer for inflating proofs of claim with a variety of unwarranted fees, including excessive drive-by property inspections and two broker price opinions that were allegedly conducted when the property was inaccessible to civilians in the wake of Hurricane Katrina); In re Prevo, 394 B.R. 847, 851-52 (Bankr. S.D. Tex. 2008) (disallowing lender’s claim for foreclosure fees and costs, late fees, and broker-price-opinion fees, which were unsupported by documentation, and ordering the lender to show cause why it should not have to pay debtor’s attorneys fees incurred in prosecuting the claim objection).

\(^{37}\) See, e.g., In re Jones, 366 B.R. 584, 591-98 (Bankr. E.D. La. 2007) (requiring lender to reimburse debtor for $16,852 in charges paid by the debtor but “clearly not due . . . not authorized . . . not reasonably owed . . . [or] as of yet unexplained”); In re Garvida, 347 B.R. 697, 707 (9th Cir. BAP 2006) (adjusting mortgagee’s claim by roughly $35,000 after servicer failed to provide an intelligible accounting of how it arrived at the claimed loan balance); Maxwell v. Fairbanks Capital Corp (In re Maxwell), 281 B.R. 101 (Bankr. D. Mass 2002) (holding that lender violated both federal and state law by “repeatedly fabricat[ing] the amount of the Debtor’s obligation to it out of thin air.”).

\(^{38}\) See Porter, supra note 5, at 162-63. Porter’s empirical study of claims filed in 1,744 Chapter 13 cases reflects that creditors and debtors agreed on the amount the debtor owed in only 4.4% of cases. Id. Of the 95.6% of cases where the debtor and creditor disagreed on the amount of the debt, 70.4% of the time the mortgage lender asserted that more was owed. The median difference was $1,366 and the average difference was $3,533. Id.
that it is difficult determine whether they are valid under the loan agreement or applicable law.\footnote{Porter, supra note 5, at 141-152.} Other cases indicate that creditors have misapplied payments made by chapter 13 debtors over the life of their plans, resulting in improper declarations of default and assessment of late fees and charges.\footnote{In re Rathe, 114 B.R. 253 (Bankr. S.D. Idaho 1990) (“Payments made during the pendency of the Chapter 13 plan should have been applied by [the lender] to the current payments due and owing with the arrearage amounts to be applied to the back payments. [The lender] cannot utilize its accounting procedures to contravene the terms of a confirmed Chapter 13 plan and the Bankruptcy Code.”); \textit{see also} In re McCormack, 203 B.R. 521 (Bankr. D.N.H. 1996) (awarding plaintiff $10,000 in damages for lender’s practice of carrying disallowed attorneys fees on its records “for collection down the road” and for failing to properly apply mortgage and cure payments made by the debtor and the Trustee); In re Ronemus, 201 B.R. 458 (Bankr. N.D. Tex. 1996) (awarding damages to the debtor for lenders’ harassment, failure to maintain adequate records and misapplication of debtor’s payments); \textit{Stewart}, 391 B.R. at 348 (noting that Wells Fargo applied the debtor’s payments to late fees rather than principal and interest); \textit{Jones}, 366 B.R. at 595 (same).} In some cases, lenders’ accounting errors have led them to seek relief from the automatic stay in order to foreclose when the debtor was current on loan payments.\footnote{See, \textit{e.g.}, In re Schuessler, 386 B.R. 458, 492-93 (Bankr. S.D.N.Y. 2008) (imposing sanctions on creditor for filing an unsubstantiated motion for relief from the automatic stay, when record shows that there was substantial equity in the property and debtors had attempted to remit payment to Chase Bank, which payment was refused); In re Parsley, 384 B.R. 138, 180 (Bankr. S.D. Tex. 2008) (holding that attorney made misrepresentations in stay-relief motion in bad faith); In re Allen, No. 06-60121, 2007 WL 1747018, *4-8 (Bankr. S.D. Tex. June 18, 2007) (imposing sanctions against mortgage servicers’ counsel for filing repeated motions for relief from the automatic stay to permit foreclosure based upon inaccurate statements of past-due debt); Williams v. Fairbanks Cap. Corp., No. 00-00770-w, 2001 WL 1804312 (Bankr. D.S.C. Nov. 1, 2001) (sanctioning lender for filing relief from stay when payments were up to date); In re Asbill, No. Civ. A. 98-05819-w, 1999 WL 334386100 (Bankr. D.S.C. Feb. 1, 1999) (affirming bankruptcy-court order imposing sanctions against lender for filing motion for relief from stay despite the fact that the debtor was current on loan payments).} In \textit{In re Groshetein}, for example, the Bankruptcy Court for the Southern District of New York sanctioned three separate mortgage servicers for filing unsubstantiated stay-relief motions.\footnote{See 285 B.R. 118, 125 (Bankr. S.D.N.Y. 2002).} One of the servicers, Fairbanks Capital, had filed two separate motions for relief from the automatic stay, alleging that the debtor had failed to make post-petition mortgage payments, even though the debtor had timely tendered—and Fairbanks had cashed—all mortgage payments due.\footnote{\textit{Id.} at 122-23.} In its response to an order to show cause, a representative of Fairbanks explained that their accounting system was not set up to process partial payments.\footnote{\textit{Id.}} Because the debtor had remitted the amounts in a series of smaller
checks and money orders, these amounts were placed in a suspense account rather than applied to the mortgage debt.\footnote{Id.}


In a study of mortgage claims filed in 1,744 chapter 13 cases, Professor Katherine Porter found that “many creditors do not comply with applicable law governing claims.”\footnote{Porter, supra note 5, at 145.} A majority of proofs of claim in Porter’s sample were missing one or more pieces of required documentation.\footnote{Id.} Moreover, the fees asserted by many creditors appeared, for various reasons, to be “vulnerable to legal challenge.”\footnote{Id. at 155.}

Anecdotal evidence from court cases likewise suggests that such behavior is common in consumer bankruptcy cases.\footnote{In re Wines, 239 B.R. 703, 706 (Bankr. D.N.J. 1999) (“The poor quality of papers filed by Fleet to support its claim is a sad commentary on the record keeping of a large financial institution. Unfortunately, it is typical of the products generated by lenders and loan servicers in court proceedings.”); In re Prevo, 394 B.R. 847 (Bankr. S.D. Tex. 2008) (“Due to their size and the frequency with which they file claims in bankruptcy, mortgage companies seem to believe that they are excused from complying with the fundamental requirements of the Bankruptcy Code and Rules.”).} Although mortgage lenders and servicers have received the most recent publicity for these actions and inactions, other consumer lenders have likewise strayed from bankruptcy’s formal requirements.\footnote{See, e.g., In re Herrera, 380 B.R. 447 (Bankr. W.D. Tex. 2007) (refusing to set aside the discharge injunction to allow debtor to reaffirm debt, when auto lender coerced debtor to reaffirm debt post-discharge with threat of repossession); see also supra note 32.} More distressing than the extent of this behavior is the fact that it occurs without opposition in most consumer bankruptcy cases. In Professor Porter’s study, 96% of mortgage claims passed through the bankruptcy process without objection.\footnote{Porter, supra note 5, at 145.} As Professor Porter notes, even if debtors or their attorneys

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discover wrongful conduct, often the costs of litigation are too high and the potential recovery too low to make litigation feasible.\textsuperscript{53}

\textbf{B. THE IMPACT OF CREDITOR OVERREACHING ON THE BANKRUPTCY PROCESS}

The consumer bankruptcy process is designed to further two central goals: to give “the honest but unfortunate debtor” a fresh start and to provide for the fair treatment and distribution of assets to creditors.\textsuperscript{54} The fresh-start policy is furthered primarily through the operation of the Bankruptcy Code’s exemption and discharge provisions, which limit the collection activities that creditors could employ outside of bankruptcy.\textsuperscript{55}

Exemptions permit a debtor to remove certain assets from the reach of unsecured creditors.\textsuperscript{56} In a chapter 7 case, the debtor retains this cache of exempt assets to effect a financial rehabilitation, while the remaining, non-exempt assets are liquidated for the creditors’ benefit. In a chapter 13 case, the debtor is entitled to keep her assets by completing a repayment plan that provides creditors at least what they would have received in a hypothetical chapter 7 liquidation.\textsuperscript{57} Exemptions limit the amount of property considered in the hypothetical liquidation analysis, thereby lowering debtor’s payments under a chapter 13 plan.\textsuperscript{58} Bankruptcy’s discharge rules prohibit creditors from collecting certain debts after a debtor emerges from bankruptcy.\textsuperscript{59} This permits a debtor to shed

\textsuperscript{53} See id.; see also In re Fagan, 376 B.R. 81, 87 (Bankr. S.D.N.Y. 2007) (“The danger . . . is that a debtor who does not have an attorney or the resources of intellect or spirit to defend against a baseless motion may lose his/her home despite being current on post-petition mortgage and plan payments.”).

\textsuperscript{54} Burlington v. Crouse, 228 U.S. 459, 473 (1913) (“It is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched.”); see also R. Stephen Painter Jr., Subprime Lending, Suboptimal Bankruptcy: A Proposal to Amend §§ 522(F)(1)(B) and 548(A)(1)(B) of the Bankruptcy Code to Protect Subprime Mortgage Borrowers and their Unsecured Creditors, 38 LOY. U. CHI. L. J. 81, 97-107 (2006) (discussing the policies furthered by consumer bankruptcy laws).


\textsuperscript{56} See id. § 522. The Bankruptcy Code permits states to opt out of this federal exemption scheme in favor of a state-created exemption program. If the state has not opted out, the debtor has the option of electing either the federal or state exemption scheme. See id. § 522(b)(2).


\textsuperscript{58} See id. §§ 1325(a)(4); 522.

\textsuperscript{59} 11 U.S.C. § 524 (The discharge “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover, or offset any [discharged debt] as a personal liability of the debtor, whether or not discharge of such debt is waived.”); see also Thomas H. Jackson, The Fresh-Start Policy in Bankruptcy Law, 98 HARV. L. REV. 1393 (1985) (evaluating the normative basis of discharge). The extent of a debtor’s discharge

Draft 12/15/15

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burdensome financial obligations, ensuring that she will exit bankruptcy in a better position to contribute to the open-credit economy. 60

This “fresh start” policy is commonly justified as a form of “social insurance.” 61 From an economic perspective, bankruptcy laws mimic traditional insurance by shifting the risk of default from the borrower to the lender. In exchange for lenders bearing the risk, borrowers pay a “premium” in the form of interest on the credit extended to them. 62 From a functional perspective, bankruptcy fills a social-insurance function by providing a “social safety net” to borrowers. 63 When front-line social programs—health insurance, unemployment,
and social security—fail, the bankruptcy process ensures that the borrower is not left to bear the full cost of his or her financial problems.\textsuperscript{64}

The second goal of consumer bankruptcy is to provide for the fair treatment of creditors. “[A]t its core, [bankruptcy] is debt-collection law.”\textsuperscript{65} As such, the ratable distribution of assets for the greatest collective benefit to creditors is a prime consideration.\textsuperscript{66} To further this goal, when a debtor files for bankruptcy protection, the debtor’s assets become part of the bankruptcy estate, subject to the control of the court and the trustee appointed to manage the case.\textsuperscript{67} The Bankruptcy Code then provides for an orderly resolution of claims against the estate and distribution of assets according to a priority scheme.\textsuperscript{68} During this period, all collection activities that might impact the debtor’s assets are halted by the automatic stay.\textsuperscript{69} The automatic stay not only protects the debtor; it preserves his or her assets for distribution to creditors.\textsuperscript{70} It also reduces lenders’ need to monitor debtors’ insolvency in order to win the race to the courthouse.\textsuperscript{71}

Bankruptcy’s distributive function is enhanced by the trustee’s avoidance powers, which enable the trustee overseeing the case to set aside pre-petition transactions that favor certain creditors at the expense of the broader creditor body.\textsuperscript{72} These avoidance powers restore value to the debtor’s estate and discourage creditors from engaging in aggressive pre-bankruptcy bargaining.\textsuperscript{73} In this way, bankruptcy’s avoidance powers foster collective activity among lenders to ensure the greatest overall recovery.

\textsuperscript{64} See Feibelman, \textit{supra} note 62, at 138-39. Social insurance is distinguished from social assistance, which provides benefits based on need and allocates no premium to the recipients. Social insurance generally responds to “temporary wealth or income shocks” and requires that its beneficiaries bear the cost of the protections, either directly or indirectly. \textit{Id.}

\textsuperscript{65} Jackson, \textit{supra} note 62, at 3.

\textsuperscript{66} \textit{Id.}

\textsuperscript{67} See, \textit{e.g.}, In re U.S. Lines, Inc., 197 F.3d 631, 640 (2d Cir. 1999) (“[O]ne of the core purposes of bankruptcy effectuated by Sections 362 and 105 of the Code is to allow the bankruptcy court to centralize all disputes concerning property of the debtor’s estate so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas.”) (internal quotations omitted).

\textsuperscript{68} \textit{See id.} §§ 502, 503, 726, 1322.

\textsuperscript{69} \textit{See} 11 U.S.C. § 362.

\textsuperscript{70} Feibelman, \textit{supra} note 62, at 139.

\textsuperscript{71} Painter, \textit{supra} note 54, at 104.

\textsuperscript{72} Thomas H. Jackson, \textit{Avoiding Powers in Bankruptcy}, 36 STAN. L. REV. 725, 726 (1984) (noting that “the ‘strongarm’ power of the trustee under section 544(a) of the Bankruptcy Code and the preference power embodied in section 547, are integral to bankruptcy because they allow it to preserve the benefits of a compulsory and collective proceeding that justify the process’ creditor-oriented rules in the first place.”). Jackson notes, however, that certain of the trustee’s avoidance powers (namely fraudulent conveyance powers) have a less collectivist origin. \textit{Id.}

\textsuperscript{73} Painter, \textit{supra} note 54, at 105.
Bankruptcy’s rules and procedures are calibrated to achieve a balance between these fresh-start and distributional policies, ensuring that the debtor’s limited assets are put to their greatest overall use. But when lenders deviate from the requirements of the Bankruptcy Code, they put these goals in jeopardy. First, creditors who receive more than they ought to during the debtor’s bankruptcy case generally do so at the expense of competing claimants to the debtor’s limited funds. Second, lender overreaching leaves debtors in a vulnerable position after bankruptcy, inhibiting their ability to contribute to the open-credit economy. Finally, overreaching tactics disadvantage the debtor’s other creditors who choose to follow the rules.

C. BRIDGING THE GAP BETWEEN BANKRUPTCY LAW AND CREDITOR ACTION

Recent consumer bankruptcy cases reveal a disconnect between the formalities of bankruptcy procedure and the realities of bankruptcy cases. This disconnect arises from a structural weakness in the bankruptcy system: Large institutional lenders do not have adequate incentives to comply with bankruptcy law. To address this problem, lawmakers must strengthen the mechanisms for detecting and remedying this noncompliant behavior or increase the severity of the penalty imposed.

74 Even perceptively minor departures from bankruptcy procedure may seriously undermine the goals of consumer bankruptcy. As Professor Porter has observed, a shocking number of lenders fail to file attachments to proofs of claim as required by Federal Rule of Bankruptcy Procedure 3001. Porter, supra note 5, at 149. Rule 3001 is designed to provide the bankruptcy trustee sufficient information to confirm the validity of the security interest, so that the trustee might avoid any interests that are not properly perfected. See Fed. R. Bankr. P. 3001. If a lender fails to include the required attachments, the trustee may not be able to discover an interest that should be avoided. This result favors the mortgagee, who failed to comply with the law in perfecting its security interest, to the detriment of other unsecured creditors with a proper claim to those funds. Porter, supra note 5, at 149.

75 See, e.g., id. at 172 (“Mortgagees’ frequent failure to comply with Rule 3001 results from weaknesses in the current rules, which do not deter creditors from disregarding the documentation requirements. While the rules themselves use mandatory language, phrased in terms of ‘shall,’ the reality is that some creditors treat them as aspirations—or ignore them entirely.”).

76 Economic theorists assert that a corporate actor’s compliance with applicable law depends on whether the “expected punishment cost” of the action exceeds the expected gain from violating the rules. See, e.g., John C. Coffee, Jr., No Soul to Damn: No Body to Kick: An Unascandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386, 389 (1981); Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968); Richard Posner, Economic Analysis of Law 165-67 (2d Ed. 1977). When determining the expected punishment cost of non-compliant behavior, a rational corporation would consider the likelihood that the improper conduct will be discovered and litigated and the severity of any expected penalty. Coffee, supra, at 389. Other elements affect this analysis, such as the stigmatization of a criminal conviction, the resources of the company to pay a fine, and behavioral aspects underlying
Congress, consumer protection agencies, federal banking regulators, and state attorneys general have taken aim at mortgage lenders and servicers, and the United States Trustee program has expanded its civil and criminal enforcement in consumer bankruptcy cases. Scholars and commentators have also proposed solutions to increase oversight over the bankruptcy process or enhance penalties for non-compliance. Amid these responses, little attention has been paid to an existing mechanism to deter wrongful conduct and achieve injunctive or monetary relief: the class action.

Class actions create economies of scale that make it feasible to litigate small claims. Class litigation promotes access to the law while creating a deterrent effect that more closely matches the extent of the harm inflicted. By the institution. See Nagin & Blumstein, The Deterrent Effect of Legal Sanctions on Draft Evasion, 29 STAN. L. REV. 241 (1977) (noting that concepts drawn from the study of in draft evasion may similarly explain aspects of white-collar crime).


78 Policing Lenders and Protecting Homeowners: is Misconduct in Bankruptcy Fueling the Foreclosure Crisis?, statement of Clifford J. White III, Executive Office for United States Trustees, United States Department of Justice (May 6, 2008) (noting that the United States Trustee Program initiated over 74,000 civil enforcement actions and made 1,163 criminal referrals in 2007).

79 Stephen W. Sather, Maintaining Professional Responsibility While Using Legal Technology, 72 TEX. BUS. J. 538, 541 (2009) (arguing that creditors’ attorneys should undertake independent reviews of computerized reports as part of their professional duties as an attorney on the case); Porter, supra note 5, at 174 (proposing that bankruptcy trustees should bear the burden of reviewing mortgage claims, and suggesting mechanisms to improve the clarity of claims). Henry E. Hildebrand III, The Sad State of Mortgage Service Providers, SEPT-AM. BANKR. INST. J. 10, 40 (2003) (noting favorably that debtors and trustees have begun to use various federal and state consumer protection statutes as “tools” to fight back against improper servicer misconduct).

80 Juliet M. Morigiello, Mortgage Modification, Equitable Subordination, and the Honest but Unfortunate Creditor, 79 FORDHAM L. REV. 1599, 1633-42 (2011) (proposing an expanded use of equitable subordination to curb abusive behavior by mortgage lenders and servicers); Porter, supra note 5, at 173 (suggesting that section 502(b) of the Bankruptcy Code be revised to include inadequate documentation as a basis for disallowing claims.

81 See, e.g., Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (“A class action . . . aggregate[es] the relatively paltry potential recoveries into something for someone’s (usually an attorney’s) labor.”). Absent such aggregation, “defendant firms are in the position to spread the costs over the entire class of . . . claims, while plaintiffs . . . cannot.” David Rosenberg, Class Actions for Mass Torts: Doing Individual Justice by Collective Means, 62 IND. L. J. 561, 564 (1987).

82 See, e.g., Adam Zimmerman, Funding Irrationality, 59 DUKE L. J. 1105, 1115-17 (2010).

83 Id.; see also In re Am. Reserve Corp., 840 F.2d at 489 (“[T]he class action provides compensation that cannot be achieved in any other way; although the costs of litigation may
creating penalties for claims that would not otherwise be litigated, class actions force companies to internalize the costs of their wrongful conduct. In this manner, the class action provides a “cost-effective and less intrusive substitute for government regulation.”

In light of these qualities, the class action device should be a useful tool to adjust large creditors’ incentives to comply with bankruptcy law and procedure. But while some debtors have attempted to bring class action claims from within their bankruptcy cases, these cases have gained little traction. Aggregation of individual debtors’ claims seems, to many courts, to present significant jurisdictional challenges. The following Part examines the judicial response to debtor class-action cases, revealing a statutory and theoretical basis to assert jurisdiction over a nationwide debtor class.

III. A JURISDICTIONAL PERSPECTIVE ON DEBTOR CLASS ACTIONS

Class actions are not a foreign concept in bankruptcy. The Federal Rules of Bankruptcy Procedure incorporate Rule 23 of the Federal Rules of Civil Procedure, permitting bankruptcy courts to handle class actions in adversary proceedings. In some jurisdictions, this rule has justified the filing of class proofs of claim against a common debtor. In recent years, bankruptcy courts have become a popular forum for resolving mass tort claims, claims by unions

consume much of the benefit, the device still serves a deterrent function by ensuring that wrongdoers bear the costs of their activities.”

Elizabeth Cabraser, Enforcing the Social Compact Through Representative Litigation, 33 CONN. L. REV. 1239, 1241 & 1254 (2001) (“Of all available procedural mechanisms [to balance the interest of victims and society in punishment and deterrence with the rights of defendants], the class action is the most elegant, comprehensive, and fair.”).


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or employee groups against bankrupt employers or other parties,\textsuperscript{88} and certain non-debtor class claims.\textsuperscript{89} In at least one case, a trustee in bankruptcy has been permitted to certify a defendant class of creditors who had received preferential payments under the Bankruptcy Code.\textsuperscript{90}

Courts have hesitated, however, to allow classes of debtors to aggregate their claims against a common creditor. Courts handling debtor classes have struggled to reconcile the concept of a debtor class with the strong centralization policies underlying bankruptcy jurisdiction. As one prominent bankruptcy attorney explains, “bankruptcy jurisdiction has always hinged on the existence of a res—the debtor’s estate—and a bankruptcy court’s jurisdiction has always been limited to what was necessary to administer the estate of the debtor for which it had responsibility.”\textsuperscript{91} Because of the res-specific nature of bankruptcy cases, some courts have found that “assert[ing] jurisdiction over a class of persons that include not only the debtor before it but debtors in bankruptcy courts across the nation . . . is . . . problematic and out of step with the basic concern of the bankruptcy court.”\textsuperscript{92}

Some courts have interpreted the bankruptcy jurisdictional mandate to preclude debtor classes,\textsuperscript{93} while others have restricted debtor classes to the district in which the representative’s case is pending.\textsuperscript{94} Little circuit-level authority or academic literature exists to guide courts faced with the debtor class action cases. As a result, decisions on debtor class actions run the gamut from prohibitive\textsuperscript{95} to permissive.\textsuperscript{96}

This Part seeks to reconcile the divergent case law with bankruptcy’s jurisdictional framework to define the proper limits on the debtor class. Many courts, in myopic or misguided reliance on bankruptcy’s centralization policies, have reached jurisdictional determinations that run contrary to the statutory text and legislative scheme. Although centralization of bankruptcy matters is a dominant jurisdictional concern, it is not absolute, and litigation incident to


\textsuperscript{89} See, e.g., In re Sclater, 40 B.R. 594 (Bankr. E.D. Mich. 1984); In re Edmond, 934 F.2d 1304 (4th Cir. 1991); In re Livaditis, 132 B.R. 897 (Bankr. N.D. Ill. 1991).

\textsuperscript{90} See First Fed. of Michigan v. Barrow, 878 F.2d 912 (6th Cir. 1989) (“The class certification in the instant case not only conserved the judicial resource, but provided an efficient vehicle for achieving unitary adjudication as to all class members.”).


\textsuperscript{92} In re Cline, 282 B.R. 686, 693-94 (W.D. Wash. 2002) (holding that court lacked jurisdiction of a nationwide class).

\textsuperscript{93} See infra Part III(D)(1).

\textsuperscript{94} See infra Part III(D)(2) – (D)(3).

\textsuperscript{95} See infra Part III(D)(1).

\textsuperscript{96} See infra Part III(D)(4).
bankruptcy cases may indeed occur in outside courts. Federal bankruptcy jurisdiction provides few limitations on class litigation to vindicate systemic violations of bankruptcy law.

A. FEDERAL BANKRUPTCY JURISDICTION

The modern framework for federal jurisdiction over bankruptcy matters originated in the Bankruptcy Reform Act of 1978 (the “Reform Act”). The Reform Act broadened bankruptcy jurisdiction to permit federal courts to exercise both in personam and in rem jurisdiction so that all matters connected to the bankruptcy case could be handled in a central forum. Under the previous jurisdictional scheme, federal courts’ jurisdiction was in rem, centered on property of the bankruptcy estate. Federal courts had “summary” jurisdiction of disputes incident to the administration of property in actual or constructive possession of the court. They lacked jurisdiction of “plenary” suits, such as suits brought by the trustee against third parties relating to property not in courts’ actual or constructive possession. These in personam matters generally were to be resolved in the forum in which a debtor could have brought suit outside of bankruptcy.

This jurisdictional bifurcation between summary and plenary matters “engendered an excessive amount of preliminary litigation over jurisdictional...
issues,”\textsuperscript{105} which slowed the administration of cases and increased the costs of bankruptcy.\textsuperscript{106} Moreover, “[t]he federalism concerns that motivated the [1898 bankruptcy act’s] restrictive federal bankruptcy jurisdiction had subsided considerably”\textsuperscript{107} in the 80 years since its passage. Accordingly, the Reform Act sought to abolish the summary/plenary distinction “in order that [federal courts] may handle everything that arises in a bankruptcy case.”\textsuperscript{108} To address federalism principles, Congress permitted, and sometimes required, federal courts to abstain from hearing certain matters within their jurisdiction.\textsuperscript{109}

Despite the clear legislative drive to eliminate the summary-versus-plenary dichotomy and grant federal courts “pervasive”\textsuperscript{110} bankruptcy jurisdiction, modern bankruptcy jurisprudence continues to reflect a persistent \textit{in rem} slant.\textsuperscript{111} Professor Ralph Brubaker has observed this phenomenon at work in a number of contexts. For example, although the Reform Act granted federal courts expansive jurisdiction over all matters “related to” a bankruptcy case, the dominant judicial test for “related-to” jurisdiction turns on whether there is a relationship between an action and property of the debtor’s estate.\textsuperscript{112} Likewise, Supreme Court jurisprudence on the bankruptcy judge’s constitutional authority over bankruptcy matters has gradually crystalized the former summary-plenary

\textsuperscript{105} Brubaker, \textit{supra} note 14, at 792.
\textsuperscript{106} Flaxer, \textit{supra} note 101, at 373.
\textsuperscript{107} Brubaker, \textit{supra} note 100, at 269.
\textsuperscript{110} Pub. L. No. 95-598, § 241(a), 92 Stat. 2549, 2668 (enacting 28 U.S.C. § 1471(a)-(b) (1982) (repealed 1984)); see also Bankruptcy Court Revision: Hearings on H.R. 8200 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong. 217 (1977) (hereinafter H.R. 8200 Hearings] (statement of Attorney General Griffin Bell that the jurisdiction was to be “as broad [a] jurisdiction as possible” and “as broad as can be conceived.”); H.R. Rep. No. 95-595, at 14 n.84, 46, 48, reprinted in 1978 U.S.C.C.A.N. at 5976 n.84, 6010 (noting that jurisdiction was to be “complete” and “comprehensive”).
\textsuperscript{111} See Brubaker, \textit{supra} note 100, at 277.
\textsuperscript{112} See Pacor v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984) (“The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. . . . An action is related to bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.”); see also Brubaker, \textit{supra} note 100, at 277 (“Pacor essentially regards the bankruptcy estate as a jurisdictional \textit{res}. A particular claim is within federal bankruptcy jurisdiction, according to \textit{Pacor}, if the claim has a sufficient outcome-oriented, functional relationship to the jurisdictional \textit{res} . . . . \textit{Pacor} embraces the . . . \textit{in rem} model of bankruptcy jurisdiction and simply adopts a more expansive \textit{in rem} nexus.”).
dichotomy, which arises from an in rem model of bankruptcy jurisdiction.\textsuperscript{113} The cases discussed in this Article demonstrate a similar propensity to rely on the debtor’s property as a touchstone of all bankruptcy jurisdictional inquiries. But by relying on this outmoded jurisdictional framework, courts have created a difficult—and unwarranted—conceptual hurdle to the certification of debtor classes.

1. Jurisdiction of the District Court over Bankruptcy Matters

The federal district courts have original jurisdiction over bankruptcy cases and proceedings.\textsuperscript{114} 28 U.S.C. § 1334 provides three distinct grants of jurisdiction to the district courts. First, the district courts have “original and exclusive jurisdiction of all cases under [the Bankruptcy Code].”\textsuperscript{115} Second, the district courts have “original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code], or arising in or related to cases under [the Bankruptcy Code].”\textsuperscript{116} Finally, the particular district court in which the bankruptcy case is commenced or is pending has exclusive jurisdiction over property of the debtor and of the estate.\textsuperscript{117} District courts may vest much of this authority in the bankruptcy courts for their district, as discussed in more detail below.\textsuperscript{118}

A bankruptcy “case”\textsuperscript{119} is commenced by filing a petition for relief in bankruptcy.\textsuperscript{120} The case represents the umbrella under which a variety of bankruptcy “proceedings,”\textsuperscript{121} such as contested matters, adversary proceedings, plenary actions, and administrative disputes, may arise.\textsuperscript{122} Class action claims

\textsuperscript{113} Brubaker, supra note 104, at 151-58 (tracing the gradual constitutionalization of the summary-plenary dichotomy through Supreme Court jurisprudence); see also infra notes 129-143 (describing these matters in more detail); Judge Leif M. Clark, Why Jurisdiction Matters, AM. BANKR. INST. J. 35, 40 (1996) (observing that “slowly (and perhaps inexorably), court decisions are constricting the scope and reach of bankruptcy power, making the system more closely resemble the old summary/plenary scheme of the Bankruptcy Act.”).


\textsuperscript{115} 28 U.S.C. § 1334(a). The terms “original and exclusive” are designed to “make it clear that no jurisdiction over bankruptcy cases is left to state courts.” COLLIERS ON BANKRUPTCY 3.01[2].

\textsuperscript{116} 28 U.S.C. § 1334(b).

\textsuperscript{117} Id. § 1334(e).

\textsuperscript{118} See Part III(A)(2).

\textsuperscript{119} 11 U.S.C. § 1334(a) governs the District Court’s jurisdiction over “cases.”

\textsuperscript{120} See id. § 303.

\textsuperscript{121} 11 U.S.C. § 1334(b) governs the District Court’s jurisdiction over “proceedings.”

\textsuperscript{122} H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1997) (“[A]nything that occurs within a case is a proceeding.”); see also COLLIERS ON BANKRUPTCY 3.01[2] (noting that the “case” referred to in section 1334(a) is the umbrella under which all of the proceedings that follow the filing of a bankruptcy petition take place.”). A proceeding may also encompass matters that arise after the conclusion of a bankruptcy case, such as actions regarding the validity of a purported reaffirmation agreement. H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1997).
brought by debtors in bankruptcy qualify as bankruptcy “proceedings,” subject to
the district court’s nonexclusive jurisdiction, so long as they arise under
bankruptcy laws or arise in or relate to a bankruptcy case.\textsuperscript{123}

Debtors’ class action claims “arise under” the bankruptcy laws if they are
 premised on substantive bankruptcy rights, such as violations of the automatic
stay or the discharge injunction.\textsuperscript{124} “Arising in” jurisdiction is typically reserved
for administrative matters, claims “that by their nature, not their particular factual
circumstances, could only arise in the context of a bankruptcy case.”\textsuperscript{125} “Related-
to” jurisdiction is the broadest of section 1334’s jurisdictional grants. It is
frequently held to encompass any actions where “the outcome of the proceeding
could conceivably have any effect on the estate being administered in
bankruptcy.”\textsuperscript{126} Related-to jurisdiction would include class action claims
 premised on state-law causes of action, so long as they impacted property of the
estate.\textsuperscript{127} Bankruptcy courts lack jurisdiction over proceedings that do not fall
within one of these three categories, such as proceedings based on state law that
do not involve or affect property of the debtor’s estate.\textsuperscript{128}

2. \textit{Referral of Bankruptcy Matters to the Bankruptcy Courts}

“Each district court may provide that all cases under title 11 and any or all
proceedings arising under title 11 or arising in or related to a case under title 11

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\item \textsuperscript{123} 11 U.S.C. § 1334(b).
\item \textsuperscript{124} Continental Nat. Bank v. Sanchez (In re Toledo), 170 F.3d 1340, 1344 (11th Cir. 1999); \textit{see also} Wood v. Wood (In re Wood), 825 F.2d 90, 96 (5th Cir. 1987) (“Congress used the phrase ‘arising under title 11’ to describe those proceedings that involve a cause of action created or determined by a statutory provision of title 11.”). Examples of cases “arising under” the bankruptcy laws include fraudulent conveyance and avoidance actions, actions under section 549
to recover post-petition transfers, claims for exemptions under section 522, and discrimination claims under section 525. \textit{See} \textsc{collier on bankruptcy} 3.01[3][e][i].
\item \textsuperscript{125} Stoe v. Flaherty, 436 F.3d 209, 218 (3d Cir. 2006); \textit{see also} In re Toledo, 170 F.3d at 1345
(“The ‘arising in a case under’ category is generally thought to involve administrative-type
matters.”). For example, actions seeking turnover of property of the estate, to determine
the validity and amount of claims asserted against the estate, and to determine the validity, extent, and
priority of liens would qualify as matters “arising in” a bankruptcy case. \textit{See} \textsc{collier on
bankruptcy} 3.01[3][e][iv].
\item \textsuperscript{126} \textit{See} Pacor v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984).
\item \textsuperscript{127} Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.), 910 F.2d 784, 788 (11th Cir. 1990); \textit{Pacor},
743 F.2d at 994; \textit{see also} Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (expressing
approval of the \textit{Pacor} test).
\item \textsuperscript{128} Examples of cases in which the district courts lacked bankruptcy jurisdiction include Bass v.
Denney (In re Bass), 171 F.3d 1016 (5th Cir. 1999) (suit brought by a creditor against a third party
seeking to collect non-dischargeable debt); In re Dickenson Lines, Inc., 47 B.R. 653 (Bankr. D.
Minn. 1985) (suit to discharge a tax lien on a non-debtor’s property); and Torkelson v. Maggio (In
re Guild and Gallery Plus, Inc.), 72 F.2d 1171 (3d Cir. 1996) (litigation regarding priority of liens
on property not included in the debtor’s estate).
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shall be referred to the bankruptcy judges for the district.”

All jurisdictions have made such a grant, through local rule or standing order. This referral is subject to withdrawal for “cause” or if “resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.” Moreover, it is subject to constitutional limitations arising from bankruptcy judges’ status as Article I judges.

Because bankruptcy judges are not Article III judges, subject to the protections of life tenure and irreducible salary, they cannot exercise the full scope of bankruptcy jurisdiction accorded to the district courts. Yet the precise limits of bankruptcy-court authority remain unclear. The Reform Act originally conferred the district court’s bankruptcy jurisdiction fully upon the bankruptcy courts, but the Supreme Court soon ruled in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* that this delegation of power was unconstitutional.

In response, Congress passed the Bankruptcy Amendments

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130 See, e.g., In re Referrals to Bankr. Judges, General Order 2005-6 (S.D. Tex. March 10, 2005) (With some exception “[b]ankruptcy cases and proceedings arising under title 11 or arising in or related to a case under title 11 of the United States Code are automatically referred to the bankruptcy judges of this district.”); Western District of Washington Local Rule 1.01 (“This court hereby refers to the bankruptcy judges of this district all cases under title 11, and all proceedings arising under title 11 or arising in or related to cases under title 11.”) Western District of Michigan Local Rule 83.2(a) (“Pursuant to the powers granted by 28 U.S.C. § 157(a) any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 previously filed or hereafter filed shall be referred to the bankruptcy judges of this district.”); Northern District of California Bankruptcy Local Rule 5011-1(a) (same); Bankruptcy Court for the District of Maryland Local Rule 402 (same); Middle District of North Carolina Local Rule 83.11 (same).
132 Pub. L. No. 95-598, § 201(a), 92 Stat. at 2657 (repealed 1984) (enacting 28 U.S.C. § 151(a)); 28 U.S.C. § 1471(c) (repealed) (“The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.”); see also Eric G. Behrens, Stern v. Marshall: The Supreme Court’s Continuing Erosion of Bankruptcy Court Jurisdiction and Article I Courts, 85 AM. BANKR. L. J. 387, 396 (2011) (noting that this referral gave bankruptcy courts “broad powers necessary to efficiently and fairly handle all matters affecting the bankruptcy cases before them, but that power would emanate from the district court, to whom the bankruptcy judges’ orders also could be appealed”).
133 *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 89 (1982) [hereinafter “*Marathon*”]. This case involved a breach of contract action filed in the bankruptcy court by the debtor-in-possession, Northern Pipeline Construction Co., against Marathon Pipe Line Co. (“Marathon”). *Id.* at 56. Marathon filed a motion to dismiss, alleging that the Reform Act unconstitutionally delegated Article III judicial power on Article I judges. *Id.* at 56-57. The bankruptcy court denied the motion to dismiss, but on appeal the district court reversed, holding that the delegation of authority was unconstitutional. *Id.* at 57. A divided Supreme Court affirmed the district court, holding that the Reform Act violates the command of Article III that the judicial
and Federal Judgeship Act of 1984 (BAFJA), which restricts the types of actions that may be referred for final judgment to the bankruptcy courts. Specifically, BAFJA permits bankruptcy courts to hear and enter final orders on “core” bankruptcy matters arising under the bankruptcy laws or arising in a bankruptcy case. For non-core matters relating to a bankruptcy case, bankruptcy courts may issue reports and recommendations to the relevant district court.

The Supreme Court’s decision in *Stern v. Marshall* further reduced the bankruptcy judge’s authority to enter final judgment over bankruptcy matters. *Stern* involved a counterclaim for tortious interference with an expectancy, filed by the debtor in response to a defamation claim asserted against the bankruptcy estate. This counterclaim qualified as a “core” matter pursuant to 28 U.S.C. § 152(b)(2)(C) and therefore fell within the bankruptcy court’s statutory authority. In a 5-4 decision, the Court held that while the bankruptcy court had clear statutory authority over this “core” matter, the court lacked constitutional authority to enter a final order with respect to the counterclaim. Although the Court assured its readers that the decision “does not change all that much,” *Stern* “resurrects (and virtually confirms) the long-smoldering suspicion that other portions of the statutory grant of core jurisdiction to non-Article III bankruptcy judges are likewise unconstitutional.” As a result of *Stern*, courts must

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136 Id.
137 *Stern v. Marshall* arised out of the longstanding litigation between Vickie Lynn Marshall, known publicly as Anna Nicole Smith, and the son of her deceased husband. Before Marshall’s husband, J. Howard Marshall, died, his son, E. Pierce Marshall allegedly induced him to sign a living trust that did not include Vickie. Vickie filed suit in Texas state probate court, alleging that Pierce fraudulently induced J. Howard to sign the living trust. After J. Howard’s death, Vickie filed for bankruptcy relief. Pierce filed a complaint against the estate, alleging that Vickie had defamed him, and seeking a declaration that the defamation claim was non-dischargeable in bankruptcy. Pierce also filed a proof of claim against the estate. Vickie raised the defense of truth to the defamation action and filed a counterclaim for tortious interference with her expected gift from J. Howard. Pierce argued that the bankruptcy court lacked jurisdiction over the counterclaim. The bankruptcy court granted Vickie summary judgment on Pierce’s defamation claim, and issued a judgment on Vickie’s counterclaim, awarding her over $400 million in compensatory damages and $25 million in punitive damages. In so holding, the Bankruptcy Court concluded that it was a core proceeding under section 157(b)(2)(C), and that it therefore had the power to enter judgment on the claim. The district court reversed, holding that, irrespective of the broad scope of section 157(b)(2)(C), this claim was not a core matter. The Court of Appeals ultimately reversed the decision on a different ground, and the Supreme Court granted certiorari. See id. at 2601-03.
138 Id. at 2608.
139 Id. at 2620.

Draft 12/15/15

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undertake an independent inquiry, beyond a determination whether a matter is “core” or “non-core,” to determine whether they may issue final judgments on a matter at hand.141

Although Stern has caused much consternation,142 it has little impact on the issue of the debtor class. Stern and its predecessors involve separation-of-powers questions, namely, the extent to which Article I bankruptcy courts may issue final orders and the standards of review that will later be employed.143 But jurisdiction over debtor class actions raises distinct questions regarding the outer limits of federal bankruptcy jurisdiction, whether it is exercised by the district court or the bankruptcy court.144 This is a question of judicial federalism, as it probes the proper relationship between state and federal courts over matters associated with bankruptcy cases.145

B. COURTS’ RESPONSE TO DEBTOR CLASS ACTIONS

As noted above, courts have struggled to apply bankruptcy’s jurisdictional framework in the context of debtor class actions. Many courts have found the concept of class aggregation to directly or implicitly contravene bankruptcy’s process of centralizing a debtor’s assets in one bankruptcy court. Existing case law on the topic falls roughly into three categories: (1) the nexus cases, which prohibit debtor classes entirely; (2) the home court and contempt power cases, which limit classes to debtors within the representative’s district; and (3) nationwide jurisdiction cases, which exercise jurisdiction over nationwide debtor classes.

1. The Nexus Cases

Some of the earliest cases on debtor class actions were also the most restrictive. A series of decisions out of the Northern District of Illinois in the late

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141 See Crist, supra note 140, at 636 (explaining the “two-pronged test” that many lower courts have adopted after Stern.).
142 See generally id. (discussing lower-court response to the Stern decision).
144 Brubaker, supra note 14, at 789.
145 Id.
1990s leave little room for a debtor class to exist.\textsuperscript{146} These cases hold that the bankruptcy court may only hear matters that have an impact on the named debtor’s bankruptcy estate. These courts reason that, because claims of a debtor’s fellow class members would not affect the distribution of property in the debtor’s case, they cannot be aggregated.\textsuperscript{147} Because these cases are typified by the requirement of a nexus between the claims alleged and the debtor’s bankruptcy case, they are referred to herein as the “nexus cases.”

\textit{In re Knox} is a representative nexus case.\textsuperscript{148} In Knox, the plaintiff brought a complaint on behalf of a class of debtors alleging that the assignee of her auto loan routinely filed proofs of claim that inflated the amount owed by the debtor and misrepresented the value of the collateral.\textsuperscript{149} Because claims are allowed unless the debtor objects, the plaintiff argued that the assignee’s practice harms debtors by forcing them either to incur legal and appraisal fees to mount a claim objection or pay the inflated amounts.\textsuperscript{150} The Bankruptcy Court for the Northern District of Illinois acknowledged that it had “core” jurisdiction over the representative debtor’s claims, as they related to proofs of claim and objections thereto,\textsuperscript{151} but emphasized that “[n]o core jurisdiction lies \textit{in this bankruptcy case over [other class-members’] claims.”\textsuperscript{152} Because resolution of class claims had no

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\textsuperscript{147} See, e.g., \textit{Lenior}, 231 B.R. at 663 (“This Court is not a forum for recovery of money that would not be part of the bankruptcy estate of this Debtor.”); \textit{Simmons}, 237 B.R. at 676 (“The only case before this court is debtor’s chapter 13 proceeding. The class claims will not affect the amount of property available for distribution in the debtor’s case, nor will they affect the allocation of property among the debtor’s creditors. As a result, ‘related to’ jurisdiction does not support jurisdiction over the class claims alleged herein.”); \textit{Knox}, 237 B.R. at 692 (“[C]lass claims for monetary recovery could only benefit the class members, but could not affect the amount of property available for distribution in Knox’s case and thus could not affect allocation of property among Knox’s creditors.”); \textit{Wiley}, 224 B.R. at 64 (same).

\textsuperscript{148} 237 B.R. 687 (Bankr. N.D. Ill. 1999)

\textsuperscript{149} \textit{Knox}, 237 B.R. at 692. Knox alleged that the assignee routinely lists the entire value of its claim as secured, irrespective of the value of collateral, and that the claim included “unmatured interest in violation of § 502(b)(2) of the Bankruptcy Code.” \textit{Id.}

\textsuperscript{150} \textit{Id.}


\textsuperscript{152} \textit{Knox}, 237 B.R. at 693.
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impact on the lead debtor’s estate, the court held that it lacked subject-matter jurisdiction over the class.\(^{153}\)

The nexus cases rely a great deal more on policy rationales than on statutory text.\(^{154}\) These cases focus on the principle that bankruptcy centralizes the debtor’s assets for the benefit of the debtor’s various creditors, in order to provide for the fast, efficient, and fair resolution of claims. This reliance on centralization is superficially compelling, as it draws upon deeply held notions of the function and limitations of the bankruptcy process.\(^{155}\) A closer view reveals, however, that courts’ reliance on centralization in this context is misplaced. With respect to proceedings such as debtors’ class-action claims, there exist strong legislative directions and policy rationales to support the shared jurisdiction between state and federal courts.

The centralization principles employed in the nexus cases are codified in 28 U.S.C. § 1334(a) and (e), which grant district courts exclusive jurisdiction over cases and property of the estate, respectively.\(^{156}\) Civil proceedings in bankruptcy are governed by a distinct provision—section 1334(b)—which provides that the district court’s jurisdiction over bankruptcy proceedings is nonexclusive.\(^{157}\) Section 1334(b) provides for nonexclusive jurisdiction over proceedings because proceedings may, at times, have only an attenuated relationship to the underlying case. In such circumstances, the interest of justice and the convenience of the parties, as well as broader federalism concerns, may be served by transfer to another state or federal court.\(^{158}\)

Many courts and commentators have observed that bankruptcy’s centralization policy, “though pervasive within the jurisdictional scheme, is not

\(^{153}\) Id. at 694.

\(^{154}\) This phenomenon was likewise observed by the District Court for the Southern District of Georgia in In re Williams, 244 B.R. 858 (S.D. Ga. 2000), aff’d 34 Fed. Appx. 967 (11th Cir. 2002).

\(^{155}\) A central function of bankruptcy is to administer the debtor’s assets to maximize the distribution to creditors. See supra text accompanying notes 65-73. To that end, waste and duplication are to be avoided.

\(^{156}\) See 28 U.S.C. § 1334(a), (e); supra Part II(B).


\(^{158}\) See Richard H. Gibson, Home Court, Outpost Court: Reconciling Bankruptcy Case Control with Venue Flexibility in Proceedings, 62 Am. Bankr. L. J. 37, 38 (1988) (“Bankruptcy proceedings . . . are discrete pieces of litigation which can involve parties, issues and fact patterns having little to do with the other aspects of the case and little connection with the home court. Recognizing this, Congress provided that venue over proceedings always is transferable to “outpost courts.”); see also Wood v. Wood (In re Wood), 825 F.2d 90, 93 (5th Cir. 1987) (echoing the district court’s “concern that an overbroad interpretation of section 1334 would bring into federal court matters that should be left to state courts to decide.”); Brubaker, supra note 14, at 840 n.360 (2000) (collecting cases for the proposition that “the Supreme Court’s discussions of exclusive federal bankruptcy jurisdiction over estate administration consistently recognize the corollary discretionary power to abstain from hearing particular proceedings.”).
absolute.” 159 The Third Circuit, for example, observed the limitations on this policy when ruling on the enforceability of an arbitration clause in a bankruptcy proceeding. In Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., the Chapter 11 trustee argued that the bankruptcy court should exercise jurisdiction over the proceeding despite the existence of an arbitration clause, based on the “policy favoring unified and consistent exercise of jurisdiction and supervision of a debtor and the debtor’s estate.” 160 The court disagreed, noting:

While one can argue with some force that the Bankruptcy Reform Act of 1978 was intended to focus all bankruptcy related matters in a single bankruptcy court . . . the 1984 amendments confer on the district court original but not exclusive jurisdiction over suits of this character. Thus, it is clear that . . . Congress did not envision all bankruptcy related matters being adjudicated in a single bankruptcy court.” 161

Title 28 provides a variety of circumstances in which courts other than the court in which the case is pending may hear and resolve proceedings. 162 These provisions balance the federal interest in centralizing bankruptcy matters with the countervailing interests that an outpost court may have in resolving the litigation. 163 To the extent that the nexus cases rely on theories of centralization to prohibit debtor class actions, their reliance is misplaced.

The nexus cases require a relationship between the class action proceeding and the underlying case that closely traces the concept of “relation to” jurisdiction under 1334(b) and the Pacor test. In In re Lenoir, for example, the court acknowledged that the lead debtor’s claims were “core” matters either arising under the bankruptcy laws or arising in a bankruptcy case, but nevertheless determined that it had no jurisdiction over the identical claims of class members because the claims brought on behalf of the class will not “affect the amount of

161 Id. (holding that the court lacked the discretion to deny enforcement of the arbitration clause applicable to the non-core dispute).
162 See, e.g., infra notes 179-181 (discussing bankruptcy’s abstention and venue rules, which define circumstances in which matters may, or must, be heard in other courts).
163 See Gardina, supra note 109, at 64 (“[T]here is support in the Bankruptcy Code itself for the proposition that not all aspects of the bankruptcy need be litigated within a single bankruptcy court forum. . . . Notably, the federal courts do not have exclusive jurisdiction over all bankruptcy matters. And Congress has recognized that, at times, the bankruptcy court’s jurisdiction must yield to federalism concerns.”).
property available for distribution in this Plaintiff’s case’ or ‘affect allocation of property among this Plaintiff’s creditors.’

This requirement stands at odds with statutory grant of ‘related-to’ jurisdiction. First, a matter’s relation to a bankruptcy case is not a prerequisite for bankruptcy jurisdiction, but rather an independent basis for jurisdiction that may be invoked if ‘arising under’ or ‘arising in’ jurisdiction is not present. This conclusion is supported by the disjunctive phrasing of section 1334(b). Accordingly, if claims ‘arise under’ title 11 or ‘arise in’ a bankruptcy case, courts should not reject jurisdiction if the cases do not simultaneously ‘relate to’ the bankruptcy case before them.

Second, section 1334(b)’s grant of ‘related to’ bankruptcy jurisdiction applies generally to district courts. As the Third Circuit explained in In re Maritime Electric Co., section 1334(b) “does not confer ‘related to’ jurisdiction only upon the specific district court presently exercising jurisdiction over a particular bankruptcy case under title 11.” Rather, “[a]ll district courts are empowered by the statute to hear cases ‘related to’ specific bankruptcies pending in other district courts.” While venue, as a practical matter, will frequently be placed in the court handling the underlying case, such a conclusion is not as foregone as the nexus-case analysis would suggest.

The nexus-case approach finds no support in the text of section 1334. It disregards competing policies that dictate that bankruptcy proceedings may be placed in a variety of state and federal courts to satisfy interests of comity and justice and the convenience of the parties. In sum, the nexus cases fail to present a defensible jurisdictional limitation to the certification of debtor classes.

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164 In re Lenior, 231 B.R. 662, 667-68 (Bankr. N.D. Ill. 1999). This language aligns closely with Pacor’s test for ‘related-to’ jurisdiction, which focuses on a relation to the assets of the debtor’s estate. See supra note 112.


166 Maritime Elect. Co., Inc. v. United Jersey Bank (In re Maritime Elec. Co., Inc). 959 F.2d 1194, 1211-12 (3d Cir. 1991); see also In re Rodriguez, 396 B.R. 454-55. (“The jurisdictional test is not whether each cause of action relates to or arises in or under the Rodriguez bankruptcy case. The test is whether each cause of action relates to or arises in or under any bankruptcy case.”). While Maritime Electric involved a proceeding that arose before the debtor’s bankruptcy filing, its analysis has been applied to cases where the cause of action related to the bankruptcy case arose post-petition, to find that there is jurisdiction. See, e.g., In re Patrick, 344 B.R. 56, 60 (2005) (holding that the bankruptcy court had national jurisdiction over a class of debtors suing a common creditor for filing false proofs of claim).

167 Id.

168 Id.

169 See infra notes 180-181; 233-234 (discussing bankruptcy’s venue provisions and applying them to debtor class actions).
2. **The Home Court Cases**

The nexus cases have had limited appeal beyond the Northern District of Illinois. Most courts have held that some form of class relief is available to debtors under the Bankruptcy Code. A number of courts have, however, restricted the class to debtors within the district in which the class action is commenced. A significant line of cases (the “home court” cases) construes the bankruptcy courts’ jurisdictional grant over property of debtors’ estates to prohibit the exercise of jurisdiction over nationwide debtor classes. 28 U.S.C. § 1334(e) grants the bankruptcy court in which the debtor’s case is pending, often called the “home court,” exclusive jurisdiction of all property of the debtor’s estate. The home court cases identify debtors’ claims as property of the estate, and therefore hold that the claims are subject to the home court’s exclusive jurisdiction. Based on this broad interpretation of section 1334(e), the home court cases refuse to certify classes extending beyond the district in which the class action proceedings were commenced.

Like the nexus cases, the home court cases rely on the centrality of bankruptcy jurisdiction around a debtor and her property. These cases, however, present a more defensible textual argument to restrict jurisdiction of a debtor class. In *In re Williams*, a prominent home court case, the court held that “the function of § 1334(e) is clear—to insure that only one court administers the bankruptcy estate of a debtor.” If this were not the case, the court noted, “the orderly distribution of assets of the debtor to holders of claims against the estate—one of the main functions of bankruptcy—could not be accomplished.” This is a plausible interpretation of section 1334(e). Causes of action certainly may be considered property of a bankruptcy estate and theoretically may fall

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171 See, e.g., *Williams v. Sears, Roebuck and Co.* (In re Williams), 244 B.R. 858 (S.D. Ga. 2000) (“If the claims raised by Plaintiff on behalf of the putative members of the debtor class are ‘property’ of each individual debtor’s bankruptcy estate, § 1334(e) prohibits this Court—or any court other than ‘[t]he district court in which [the] case under title 11 is commenced or pending’ for that matter—from exercising jurisdiction over that property.”), aff’d 34 Fed. Appx. 967 (11th Cir. 2002); see also *In re Cline*, 282 B.R. 686 (W.D. Wash. 2002) (following the *Williams* court’s interpretation of section 1334(e)); *Guetling v. Household Fin. Servs., Inc.*, 312 B.R. 699, 704 (M.D. Fla. 2004) (relying on *Williams* to support its holding that out-of-district class members must advance their claims in their home district).
173 See *Williams*, 244 B.R. at 866; *Cline*, 282 B.R. at 690; *Guetling*, 312 B.R. at 704.
174 *Id.*
175 *Williams*, 244 B.R. at 866.
176 *Id.*
within section 1334(e)’s exclusive jurisdiction. Applying section 1334(e) broadly to include all such causes of action becomes problematic, however, when considered together with the broader jurisdictional framework.

First, the home court cases’ interpretation of section 1334(e) blocks the operation of the Bankruptcy Code’s abstention rules in the likely case that an action qualifies as property of the estate. Section 1334(c) permits bankruptcy courts to abstain from hearing bankruptcy proceedings based on considerations of comity and justice. This section further mandates abstention in circumstances where “related-to” jurisdiction is virtually the only connection between the action and the bankruptcy case. If a debtor brought a claim against her lender for pre-petition violations of Ohio’s consumer protection laws, alleging damages well below the amount-in-controversy requirement for diversity jurisdiction, the debtor’s claim would likely be subject to mandatory abstention under section 1334(c)(2). But the claim would also qualify as property of the estate under section 541 of the Bankruptcy Code. Thus, under a broad reading of section 1334(e), this matter would be within the exclusive jurisdiction of the home bankruptcy court, but the home court would simultaneously be compelled to abstain from hearing the matter if a party in interest so moved.

Second, a broad interpretation of section 1334(e) undermines bankruptcy’s venue provisions. Although venue may typically be had in the home court’s district, 28 U.S.C. § 1409 provides for a number of permissive and mandatory venue alternatives for proceedings arising under the bankruptcy laws or arising in

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177 Any causes of action that arise before the petition date would qualify as property of the estate. 11 U.S.C. § 541(a)(1) (2012) (including in the definition of property of the estate “all legal or equitable interests of the debtor in property as of the commencement of the case”). Property of the estate would likewise include property that the estate acquires post-petition. See id. § 541(a)(7).

178 See 11 U.S.C. § 1334(c)(1) (permitting abstention “in the interest of justice, or in the interest of comity with State courts or respect for State law.”).

179 Id. § 1334(c)(2) (“Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.”). This rule is subject to an exception for personal injury and wrongful death claims contained in 28 U.S.C. § 157(b)(5).
or relating to a bankruptcy case. These provisions become a nullity if the only court permitted to hear such proceedings were the debtor’s home court.

Finally, a broad interpretation of section 1334(e) may sharply narrow the scope of the removal right for proceedings relating to bankruptcy cases. 28 U.S.C. § 1452 provides that “[a] party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of [title 28].” An expansive reading of the home-court rule would prohibit removal to any district court other than the debtor’s home court. In Cook v. Cook, for example, the debtors had a pending chapter 11 case in the Northern District of California and sought to remove a Michigan state-court action to the Eastern District of Michigan in order to transfer venue to the Northern District of California. Construing section 1334(e) broadly, the bankruptcy court for the Eastern District of Michigan held that it lacked jurisdiction over the proceeding because the action was property of the estate within the Northern District of California’s exclusive jurisdiction. Accordingly, the court declined to permit the action’s removal for venue-transfer purposes.

To be sure, sections 1334(b) and (e) are difficult provisions to reconcile. There is no indication that 1334(e) should supersede the district courts’ “original

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180 Section 1409(a)’s permissive venue in the home court is subject to change “in the interest of justice or for the convenience of the parties.” Moreover, section 1409(b) provides that venue for actions to recover relatively small amounts (such as a money judgment less than $1,000 or a consumer debt of less than $15,000) from a non-debtor party must be brought in the district in which the defendant resides. Section 1409(d) provides that venue for post-petition claims arising from the operation of the debtor’s business must be brought in the forum that would have been appropriate absent the bankruptcy case.

181 Numerous courts have found this to be true in contexts not involving class action claims. See, e.g., Appel v. Grable (In re B&L Oil Co.), 834 F.2d 156, 160 (10th Cir. 1987) (turnover complaint reversed and remanded for a determination of 1409(d)’s applicability); In re Cont’l Air Lines, Inc., 61 B.R. 758, 766 (S.D. Tex. 1986) (holding that interpreting 1334(e) as an exclusive jurisdictional provision “is unpersuasive because it would render the venue provisions of title 28 virtually meaningless”); Transicoil, Inc. v. Blue Dove Devl. Assoc. (In re Eagle-Picher Indus., Inc.), 162 B.R. 140 (Bankr. S.D. Ohio 1993) (“The purpose of § 1409(d) is to limit the trustee’s ability to proceed in the ‘home court’, if the proceeding is based on a claim arising out of the operation of the debtor’s business after the case is commenced.”); Jim Walter Resources Inc. v. S.D. Belcher, Jr. (In re Hillsborough Holdings Corp.), 146 B.R. 1008 (Bankr. M.D. Fla. 1992) (holding venue in “home court” was improper under 1409(d) and transferring proceeding to outpost court).


185 Id.

186 Many courts and academics have attempted to do so. See generally Gibson, supra note 158 (outlining five separate lines of cases attempting to reconcile 1334(b) and (e)).
but not exclusive” jurisdiction over proceedings under section 1334(b), or preclude the operation of bankruptcy’s abstention, venue, and removal provisions.\textsuperscript{187} Such a reading would undermine the policies that support shared jurisdiction over proceedings among state and federal courts.\textsuperscript{188} Conversely, section 1334(b) should not render 1334(e) inapplicable in bankruptcy proceedings.\textsuperscript{189}

Some courts have harmonized these provisions by limiting 1334(e)’s exclusive jurisdiction over property of the estate only to proceedings that seek to administer and distribute estate property.\textsuperscript{190} Claims that are not in substance \textit{in rem}, but which nevertheless qualify as estate property,\textsuperscript{191} would then be amenable to nationwide jurisdiction. As one court stated:

> 1334(e) must be read narrowly to limit the ‘home court’ exclusive jurisdiction of bankruptcy courts strictly to \textit{in rem} matters involving property of the debtor or property of the estate and not as a restriction on nationwide jurisdiction over claims for violation of provisions of the code, other federal statutory provisions, or other remedies that might be available to debtors and trustees.\textsuperscript{192}


\textsuperscript{188}Many courts have noted that jurisdiction in bankruptcy proceedings may be exercised by courts other than the home bankruptcy court. See, e.g., Blachy v. Butcher, 221 F.3d 896, 909 (6th Cir. 2000) (“[A] bankruptcy court can share its jurisdiction with other courts.”); Lee v. Miller, 263 B.R. 757 (2001) (same).

\textsuperscript{189}See Cook, 220 B.R. at 923 (expressing concern that courts overreact to the conflicts between 1334(e) and other jurisdiction and venue provisions “by inferring, in essence, that \S 1334(e) means nothing at all”).

\textsuperscript{190}In re Death Row Records, No. 06–11205, 2012 WL 952292, *12 (9th Cir. BAP March 21, 2012) (noting that class members’ turnover claims were not solely \textit{in rem} claims, and thus were amenable to nationwide class jurisdiction); Cano v. GMAC Mortgage Corp. (In re Cano), 410 B.R. 506, 553 (Bankr. S.D. Tex. 2009) (finding 1334(e)’s exercise of control over property of the estate is “distinct from determining whether rights in the lawsuit are meritorious”); Krause v. Wells Fargo Bank, N.A. (In re Krause), 414 B.R. 242, 252 (Bankr. S.D. Ohio 2009) (noting that the court has nationwide jurisdiction over various \textit{in personam} claims but only district-wide jurisdiction over \textit{in rem} claims attempting to avoid mortgage liens); In re Collette, 297 B.R. 321, 325 (S.D. Ga. 2003) (harmonizing the statutory structure by limiting 1334(e)’s application only to proceedings that allow another court to exercise \textit{in rem} jurisdiction over property of the estate); Bank United v. Manley, 273 B.R. 229, 247 (N.D. Ala. 2001) (same); Noletto, 280 B.R. at 868 (same); Kerney v. Capital One Fin. Corp. (In re Klimeczak), 279 B.R. 457, 487-88 (Bankr. E.D. Tenn. 2002) (same).

\textsuperscript{191}Property of the estate is defined in 11 U.S.C. \S 541.

\textsuperscript{192}Krause, 414 B.R. at 255-56 (citing Noletto, 244 B.R. at 852-54); see also Blachy v. Butcher, 221 F.3d 896 (6th Cir. 2000) (agreeing with Noletto that section 1334(e) should be read narrowly to avoid conflict with other bankruptcy provisions and concluding that a bankruptcy court may share jurisdiction with another court); Lee v. Miller, 263 B.R. 757, 761 (S.D. Miss. 2001) (“[T]his
Absent Congressional action to resolve the conflict between sections 1334(b) and (e), this narrow interpretation of section 1334(e) provides a workable harmonization. It permits the operation of bankruptcy’s venue, abstention, and removal provisions, but does not upset the home court’s central authority over property of the estate. For example, if an outpost court handles litigation involving the debtor and awards the debtor a money judgment on a claim that qualifies as estate property, the damages would properly be paid to the trustee of the debtor’s case. The trustee would then distribute the award according to the home court’s procedures. This procedure preserves the home court’s authority to control the estate’s assets and distribute them in accordance with the Bankruptcy Code’s priority scheme, while shifting the burden of collection of estate property to an appropriate forum.193

3. THE CONTEMPT POWER CASES

Some courts have limited the scope of debtor class actions not on the basis of subject-matter jurisdiction, but on the limits of judicial authority. These cases (the “contempt power” cases) frequently involve violations of section 524’s discharge injunction.194 Section 524 does not expressly provide a private right of action to enforce general discharge violations.195 Although some courts have found a right of action implied under section 524196 or held that section 524 is

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193 See, e.g., Lee v. Miller, 263 B.R. 757 (2001) (“Abstention and remand will allow the state court to liquidate the plaintiffs’ claims. Then, the Bankruptcy Court will be able to administer claims that have been fully liquidated, and this court will not have the unnecessary burden of conducting a trial on the merits of state law claims.”).

194 11 U.S.C. § 524. (A discharge from bankruptcy “operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover, or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.”).

195 See id.; see also Molloy v. Primus Automotive Financial Services, Inc., 247 B.R. 804, 815 (C.D. Cal. 2000) (“The express language of § 524 does not reveal an intent on the part of Congress to create a private right of action for its enforcement.”). As a result of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), section 524(i) arguably provides a private right of action for misapplications of payments over the course of a plan. See 11 U.S.C. § 524(i); Hilary B. Bonial, CREDITOR'S PAYMENT APPLICATION DURING BANKRUPTCY, AM. BANKR. INST. J., November 2008, at 14, 61 (“Section 524(i) most assuredly provides postdischarge debtors with a remedy for any 'willful' misapplication.”).

196 See, e.g., Ins. Co. of North America v. NGC Settlement Trust (In re National Gypsum Co.), 118 F.3d 1056, 1063 (5th Cir. 1997) (rejecting the argument that “any affirmative right conferred by [section 524] does not confer an independent cause of action”); Molloy, 247 B.R. at 815-20
enforceable through the courts’ general powers of equity.\textsuperscript{197} a majority of courts have held that violations of the discharge injunction are enforceable only through contempt proceedings.\textsuperscript{198}

Many such courts have held that matters enforceable by contempt must be handled by the court that issued the injunction.\textsuperscript{199} Based on this principle, courts have refused to certify classes to enforce the discharge orders beyond the district, because it would “require an unwarranted intervention” into the issuing court’s affairs.\textsuperscript{200} Courts have applied a similar analysis to class actions alleging

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\item \textsuperscript{199} See, e.g., Cox, 239 F.3d at 917 (“But once [Debtor] has paid his debt in full and is not in jeopardy of being sued, affirmative relief can be sought only in the bankruptcy court that issued the discharge”); Williams, 244 B.R. at 867 (“The Court, therefore, lacks jurisdiction to enforce violations of § 524’s discharge injunction through civil contempt proceedings unless the debtor received his discharge from the Southern District of Georgia”); see also Baker v. Gen. Motors Corp., 522 U.S. 222, 236 (1998) (“Sanctions for violations of an injunction . . . are generally administered by the court that issued the injunction.”); Waffenschmidt v. McKay, 763 F.2d 711, 716 (5th Cir. 1985) (“Enforcement of an injunction through a contempt proceeding must occur in the issuing jurisdiction because contempt is an affront to the court issuing the order.”).
\item \textsuperscript{200} Cline, 282 B.R. at 690; see also In re Death Row Records, No. 06–11205, 2012 WL 952292, *12 (9th Cir. B.A.P. March 21, 2012) (finding that the bankruptcy court had jurisdiction over nationwide class for claims other than claims punishable by contempt); Guetling v. Household Fin. Servs., Inc. (In re Guetling), 312 B.R. 699, 704 (M.D. Fla. 2004 (“To the extent that those alleged out-of-district class members have claims arising from their bankruptcy proceedings in other districts, those jurisdictions are the proper locations to bring those claims or to potentially pursue actions for contempt of any court orders.”); Porter v. NationsCredit Consumer Discount Co. (In re Porter), 295 B.R. 529, 539 (Bankr. E.D. Pa. 2003) (“[B]efore a class action may be maintained under federal bankruptcy court jurisdiction, the class representative must demonstrate that the court has subject matter jurisdiction over each class member’s claim, including the claims of the unnamed members.”); Barrett, 292 B.R. at 8 (“[T]he court believes that it lacks jurisdiction over the claims of putative class members whose bankruptcies were discharged outside the District of Massachusetts.”); Singleton, 284 B.R. at 325 (“Subject matter jurisdiction in this case is determined by the . . . legal principle that only persons subject to the court’s authority may be found in contempt by that court.”); Bessette v. Avco Fin. Servs., Inc., 271 B.R. 442, 449 (D.R.I.
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violations of the automatic stay, despite the fact that the automatic stay provides a private right of action for its violation.\footnote{See \textit{In re Death Row Records, No. 06–11205}, 2012 WL 952292 (9th Cir. BAP March 21, 2012) (noting that section 362(k) provides relief only to individuals, and bankruptcy trustees must bring claims for violation of the automatic stay using civil contempt under section 105(a)); \textit{Cline}, 282 B.R. at 696 (“The integrity and finality of bankruptcy cases throughout the country could be threatened . . . if bankruptcy courts in other jurisdictions could address alleged violation of the automatic stay in cases pending in other courts.”); \textit{see also Guetling v. Household Fin. Servs., Inc.}, 312 B.R. 699, 704 (M.D. Fla. 2004) (noting that there is “no indication that Congress intended private civil actions in district courts to result from alleged violations of the automatic stay in bankruptcy,” and while another remedy such as contempt or other equitable relief might be available, it must be brought in the district that entered the relevant order).}

A number of courts and commentators argue that courts’ contempt powers should not be so limited when redressing violations of the discharge injunction or automatic stay. These injunctions are statutory, applying through operation of law rather than a specific court’s order.\footnote{See, e.g., \textit{Bessette}, 279 B.R. 442, 447 (D.R.I. 2002) (acknowledging that the discharge order is “a statutory order under § 524(c), and not an order issued by a judge”).} They apply in an identical manner for thousands of debtors, in every court in the nation. As two leading bankruptcy scholars noted:

> The [discharge] ‘injunction’ is a statutory provision, not a court order. Its character as an ‘injunction’ is a legal fiction, a point buttressed by the fact that the usual findings for an injunction do not have to be made and the usual notice and a hearing are not needed to bind the entire world.\footnote{Elizabeth Warren & Jay Westbrook, \textit{Class Actions for Post–Petition Wrongs: National Relief Against National Creditors}, 22 MAR. AM. BANKR. INST. J. 14, 14 (2003). Other bankruptcy professionals have interpreted Congress’s use of the words “operates as an injunction against” to indicate its intent that the discharge no longer “(a) be created by a specific court order; (b) be bound to the imperfect instrument of an injunction; [and] (c) be restricted to the frail remedy of contempt.” Gary Klein & John Roddy, \textit{Class Actions in Bankruptcy Court: Jurisdictional and Remedial Issues}, 1301 PLI/Corp 653, 673 (2002) (comparing the 1898 Act’s use of “enjoin” with the Bankruptcy Code’s expanded language).}

The First Circuit Court of Appeals and a handful of bankruptcy courts have adopted this broad view of their contempt authority to permit jurisdiction over nationwide classes alleging violations of the discharge injunction,\footnote{\textit{See Bessette v. Avco Fin. Servs., Inc.}, 230 F.3d 439 (1st Cir. 2000) (“Appellant seeks enforcement of a statutory injunction . . . not one individually crafted by the bankruptcy judge, in which that judge’s insights and thought processes may be of particular significance. Thus, few of} but this approach remains the minority view.\footnote{See \textit{Bessette}, 279 B.R. 442, 447 (D.R.I. 2002) (acknowledging that the discharge order is “a statutory order under § 524(c), and not an order issued by a judge”).}
Other courts have distinguished between their inherent and statutory contempt powers to justify the nationwide enforcement of violations of the discharge injunction. Inherent contempt authority is common to all courts, whereas statutory contempt authority emanates from section 105 of the Bankruptcy Code. Section 105 enables courts to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [title 11].” Some courts have found this authority broad enough to enable nationwide class relief for violations of the discharge injunction.

In In re Cano, for example, the bankruptcy court for the Southern District of Texas underscored section 105’s function to “afford bankruptcy courts the authority to avoid protracted and multifaceted litigation.” On that basis, the court found its use “particularly appropriate in the context of a nationwide class action.” Although this approach has likewise faced criticism, it provides an additional theoretical basis for permitting nationwide class actions to enforce all bankruptcy-code violations.

4. The Outer Limits of the Courts’ Constitutional Authority

A small number of courts and commentators have questioned the constitutionality of a bankruptcy court’s jurisdiction over nationwide debtor classes. They suggest that a bankruptcy court runs afoul of its derivative authority over bankruptcy matters if it receives a referral of a claim from a court outside of the practical reasons for confining contempt proceedings to the issuing tribunal apply here.”); Walls v. Wells Fargo Bank, N.A. (In re Walls), 262 B.R. 519, 528 (Bankr. E.D. Cal. 2001) (“The [automatic stay and discharge injunctions] are Code created, statutory injunctions . . . . Their extent does not depend on individual orders for injunctive relief fashioned by individual bankruptcy judges.”).

See, e.g., In re Beck, 283 B.R. 163, 171 (Bankr. E.D. Pa. 2002) (the position that the court may not enforce violations of the discharge injunction on a nationwide basis is “supported by the overwhelming number of lower courts to consider the issue”).

See, e.g., In re Yorkshire, LLC, 540 F.3d 328, 332 (5th Cir. 2008) (“It is well-settled that a federal court, acting under its inherent authority, may impose sanctions against litigants or lawyers appearing before the court so long as the court makes a specific finding that they engaged in bad faith conduct.”).


See, e.g., supra note 197.


Id.

211 Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th Cir. 2002) (holding that violations of the discharge injunction could not be remediated through section 105); Petruso v. Ford Motor Credit Co., 233 F.3d 417 (6th Cir. 2000) (same).
its district. This argument fundamentally misapprehends the process by which matters are referred from the district to the bankruptcy court.

As noted above, a bankruptcy court’s jurisdiction is derivative, arising by referral from the relevant district court. This process works by first vesting the district court with authority over proceedings, and then permitting the district court to exercise its power of referral to the bankruptcy judge for that district. Notably, at no point does a bankruptcy court receive referral from a foreign district court. If one accepts, as argued herein, that the district court may exercise jurisdiction over the aggregate claims of a debtor class, then that district court is permitted to refer the action to the bankruptcy court for the district. To the extent that the class claims involve either non-core matters or matters prohibited from Article I adjudication by Stern and its progeny, the bankruptcy courts will simply be limited to issuing reports and recommendations on the matters adjudicated. This limitation, however, does not arise from the collective nature of the class proceeding. On the contrary, it applies with equal force whether the debtors’ claims are brought individually or in the aggregate.

5. The Nationwide Jurisdiction Cases

Over the years, a number of courts have exercised jurisdiction over nationwide classes of debtors. The foundation case in this line of authority is

212 See, e.g., Cline v. First Nationwide Mortgage Corp. (In re Cline), 282 B.R. 686, 695 (W.D. Wash. 2002) (“There may also be a constitutional issue with the concept of a bankruptcy court exercising jurisdiction over out-of-district class members.”). Ball, supra note 91, at 1259 (“[A]ny attempt to assume jurisdiction over the claims of debtors whose bankruptcies were administered in other districts violates the constitutional proscriptions of Marathon.”).

213 See supra part III(B)(2).

214 In re Manley, 273 B.R. 229 (N.D. Ala. 2001) (“The jurisdictional statutes . . . derivatively empower the bankruptcy courts, by first granting the district courts jurisdiction over bankruptcy cases and proceedings, and then authorizing the district courts to refer that jurisdiction to the bankruptcy courts.”); see also Warren & Westbrook, supra note 203, at 45 (“We teach our students to enter the jurisdictional wonderland of bankruptcy always through one gate: What is the bankruptcy jurisdiction of the federal district court? Once that question is answered, then the allocation of function within the federal courthouse can be addressed.”).

215 See infra Part III(A).

216 See In re Death Row Records, No. 06–11205, 2012 WL 952292 (9th Cir. BAP March 21, 2012) (holding that court had jurisdiction on nationwide class of debtors for claims that do not directly implicate property of the estate); Rojas v. Citicorp (In re Rojas), Nos. 04–42708, 05–30917, 2009 WL 2496807 (Bankr. S.D. Tex. Aug. 12, 2009) (rejecting arguments that the court’s subject matter jurisdiction is restricted to matters that may affect the named plaintiff’s case); In re Cano, 410 B.R. 506, 550-51 (Bankr. S.D. Tex. 2009) (finding that the exercise of jurisdiction over a nationwide debtor class is consistent with Fifth Circuit authority and the foundations of bankruptcy jurisdiction); In re Krause, 414 B.R. 243 (Bankr. S.D. OH. 2009) (holding that the bankruptcy court had jurisdiction over in personam claims of a nationwide debtor class); Patrick v. Dells, 344 B.R. 56 (Bankr. M.D. Pa. 2005) (holding that a plain reading of 1334(b) and Third
In re Noletto. In Noletto, the plaintiffs brought suit on behalf of a class of consumer debtors, alleging that NationsBank, their loan servicer, improperly included in its proof of claim a $125 attorney’s fee. The defendant argued that the court lacked jurisdiction over all claims except for those of the named plaintiff. The Bankruptcy Court for the Southern District of Alabama held that it had subject matter jurisdiction over the claims of the class under the plain language of section 1334 and its legislative history. The court first rejected the argument that the debtors’ claims—matters fitting either “arising under” or “arising in” jurisdiction—must “relate to” the bankruptcy case before the court. It then considered the scope of section 1334(e)’s home-court rule, adopting an interpretation that gave meaning to the venue, abstention, and removal aspects of the bankruptcy jurisdictional system. Although the court acknowledged that it had no evidence that Congress had envisioned debtor class actions when drafting section 1334, it found no prohibition in their use under the bankruptcy laws. Without class relief, the court noted, “there might be no affordable universal redress for creditor bankruptcy abuses which could arise.”

The nationwide jurisdiction approach has gained prominence in class action cases decided since the global financial crisis of the mid-2000s. In particular, a number of cases arising in the Bankruptcy Court for the Southern District of Texas provide strong and comprehensive support for nationwide circuit authority support the holding that federal courts have jurisdiction over bankruptcies pending in other districts; see also In re Sims, 278 B.R. 457 (Bankr. E.D. Tenn. 2002) (noting that arguments to the contrary were “facially compelling” but concluding that there is bankruptcy subject matter jurisdiction over class action claims invoking substantive bankruptcy rights); In re Slick, 2002 Bankr. LEXIS 772 (Bankr. S.D. Ala. May 10, 2002); In re Noletto, 244 B.R. 845 (Bankr. S.D. Ala. 2000). In re Noletto, 244 B.R. at 850.

Id. at 848.

Id. at 849 (highlighting the disjunctive phrasing of section 1334(b)’s jurisdictional grant). The court distinguished several nexus cases as they involved primarily state-law causes of action, but noted that to the extent these cases hold there is no subject-matter jurisdiction over class action claims for violations of substantive bankruptcy rights, the court disagreed with their holding. See id. at 857

Id. at 847 (“Section 1334(b) must be read in this way . . . in order to give meaning to . . . the venue provisions covering the most appropriate place for bankruptcy proceedings to be filed.”); id. at 852 (“A broad reading of § 1334(e)’s scope is . . . inconsistent with § 1334(c).”).

Id. at 850.

Id.

jurisdiction over debtor class claims. These cases consider authority from the home-court, nexus, and contempt-power categories and reject each limitation presented. In addition, both the Fifth Circuit and the Ninth Circuit Bankruptcy Appellate Panel have recently found bankruptcy jurisdiction over debtor class claims. This trend may indicate that courts have begun to recognize not only the jurisdictional legitimacy of debtor class actions, but also their benefits to debtors harmed by recent patterns of lender misconduct.

IV. A Framework for Approaching Debtor Class Actions

Of the existing authority on debtor class actions, the cases permitting jurisdiction over a nationwide debtor class are more soundly reasoned than the alternatives. The nationwide-jurisdiction approach reflects a nuanced attention to the jurisdictional framework. It applies the plain language of section 1334 and gives effect to concerns of justice, comity, and convenience of the litigants. Such an interpretation does no damage to the strong policies favoring the centralized resolution of disputes or the home court’s authority over property of the estate. What is more, it permits the application of Bankruptcy Rule 7023 and may encourage the social benefits of class litigation that are recounted below.

For all these reasons, federal courts should not hesitate to follow Noletto and its progeny. Federal courts may accept jurisdiction over the aggregate claims of debtors in bankruptcy, so long as the claims arise under the bankruptcy laws, arise in an existing bankruptcy case, or relate to an existing bankruptcy case. The district court may refer class claims to the bankruptcy court, and if the claims are within Congress’s power to delegate to Article I judges, then the bankruptcy court may enter final judgment on those matters. If, in contrast, the matters are non-core or fall within Stern’s proscription, the bankruptcy court may hear the matters and issue reports and recommendations for implementation by the relevant district court.


226 Id.

227 See In re Death Row Records, No. 06–11205, 2012 WL 952292 (9th Cir. BAP March 21, 2012); In re Wilborn, 609 F.3d 748, 750 (5th Cir. 2010).

228 See infra Part IV(B).

229 Assuming a complaint alleges violation of substantive bankruptcy rights, or matters of bankruptcy procedure, such as the automatic stay or the discharge injunction, it would fall within bankruptcy’s arising under or arising in jurisdiction. Claims based on state consumer protection laws may “relate to” the debtor’s bankruptcy case, so long as the claims have a “conceivable effect” on the bankruptcy case. See supra Part III(A)(1).

In observation of the home court’s command over property of the estate, courts may limit their jurisdiction in cases in which claims directly implicate estate property. In such cases, a class may form on a district-wide basis. Courts may likewise limit their jurisdiction to the district in cases in which their contempt power is invoked. But, in consideration of the strong social benefits of permitting debtor class litigation to occur, courts may instead (a) interpret section 524 to provide an implied right of action to enforce its violation; (b) interpret section 105 to permit nationwide class relief for discharge-injunction violations; or (c) find that the limitations on their contempt powers do not apply with equal force for statutory injunctions.

Which particular district or bankruptcy court should hear a matter is not a matter of jurisdiction, but rather one of venue. The proper venue for bankruptcy proceedings is generally the district court in which the case is pending, but that rule is subject to numerous exceptions. Section 1409, for example, provides permissive and mandatory venue alternatives, and section 1412 provides that the court may transfer venue to another district court “in the interest of justice or convenience of the parties.” Furthermore, venue in class litigation is ordinarily determined with reference to the named parties and their claims only. Even absent this rule, bankruptcy courts may apply section 1412 to transfer venue to facilitate class litigation.

A. CLASS CERTIFICATION CONCERNS

The prior Parts of this article reveal that prevailing jurisdictional concerns in the debtor class action context are largely overstated. Class actions are a viable alternative to prevent and remediate abuse in bankruptcy cases. But while debtor classes can overcome most jurisdictional hurdles, they will face challenges that emanate from the class action device. Federal Rule of Bankruptcy Procedure 7023, which incorporates Federal Rule of Civil Procedure 23, requires that a class satisfy requirements of numerosity, commonality, typicality, and adequacy typically requires a two-part inquiry: whether the named plaintiff is an adequate class representative, and whether class counsel is adequate. See National Association for Mental Health, Inc. v Califano, 717 F.2d 1451, 1458 (D.C. Cir. 1983).

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231 See, e.g., Krause v. Wells Fargo Bank, N.A. (In re Krause) 414 B.R. 242, 252 (Bankr. S.D. Ohio 2009) (finding that trustee’s exercise of strong-arm powers to avoid mortgage liens were in rem claims not capable of nationwide class jurisdiction).


235 Fed. R. BANKR. P. § 7023(a)(1) (requiring that the class be “so numerous that joinder of all members is impracticable”).

236 Id. § 7023(a)(2) (requiring that “there are questions of law or fact common to the class”).

237 Id. § 7023(a)(3) (requiring that “the claims or defenses of the representative parties are typical of the claims or defenses of the class”). Adequacy typically requires a two-part inquiry: whether the named plaintiff is an adequate class representative, and whether class counsel is adequate. See National Association for Mental Health, Inc. v Califano, 717 F.2d 1451, 1458 (D.C. Cir. 1983).
The class must additionally meet one of three alternative bases for certification contained in Rule 7023(b). Rule 7023(b)(1) is appropriate if prosecuting the actions separately would create a risk of inconsistent results that would establish incompatible standards of conduct for the party opposing the class or absent class members. Rule 7023(b)(2) is appropriate when the claimants seek primarily declaratory or injunctive relief in cases “where the party opposing the class has acted or refused to act on grounds generally applicable to the class.” Finally, Rule 7023(b)(3) applies when common questions of law or fact predominate and the class action is a superior method of adjudication.

Fact-intensive claims are unlikely to meet the “commonality” and “typicality” requirements of Rule 7023(a) and the “predominance” requirement if asserted under Rule 7023(b)(3). For example, a claim that lenders routinely send threatening letters in violation of the automatic stay might allege common conduct, but the damages claimed might be unique to each debtor’s circumstances. Likewise, a claim that fees charged by a lender are unreasonable depends highly on the facts of the individual case, as well as the standards in the area in which the debtor has borrowed.

Additionally, to the extent that jurisdictions have adopted varying interpretations of the Bankruptcy Code, a court might find certification improper on “commonality,” “typicality” or “predominance” grounds. In Peterson v. Wells Fargo Bank, N.A. (In re Peterson), for example, the plaintiff filed suit on behalf of a nationwide class of chapter 7 debtors, alleging that Wells Fargo had a practice of collecting discharged debts by automatic withdrawals from debtors’ accounts. The court decertified the class, finding that the “commonality” and “typicality” requirements of Rule 7023(a) were not met, and that the “predominance” requirement was not satisfied because the damages claimed would be unique to each debtor.

See, e.g., In re Powe, 278 B.R. 539 (2002) (decertifying class for remaining issue of the reasonableness of fees, because the class lacked commonality).
bank accounts, which violated the automatic stay and the discharge injunction.\footnote{244} Whether Wells Fargo indeed violated these provisions depended on whether the debtor’s jurisdiction recognized the right to allow debts to “ride through” the bankruptcy case.\footnote{245} Due to differences in interpreting the “ride through” right, the bankruptcy court for the Eastern District of California declined to permit certification.\footnote{246}

Nevertheless, it is certainly conceivable that some of the debtor’s claims may present adequate grounds for class certification. For example, claims where a lender charges a flat bankruptcy fee to every proof of claim filed in a consumer bankruptcy case present no obvious challenge to the commonality or typicality requirements of Rule 7023(a).\footnote{247} These claims may be appropriate for certification under either 7023(b)(2) or (b)(3).\footnote{248}

\footnote{244} 281 B.R. 685, 686 (Bankr. E.D. Cal. 2002).
\footnote{245} Chapter 7 debtors who wish to keep property during the bankruptcy case must either redeem the property or reaffirm their debt. Some courts, however, have recognized the option of a “ride–through,” which allows the debtor to continue to pay the debt gradually through the course of the bankruptcy case. BAPCPA has arguably removed this “fourth option” from the Bankruptcy Code. See Antoinette Dumont v. Ford Motor Credit Co. (In re Dumont), 2008 WL 2990218, at *4 (9th Cir. BAP Feb. 16, 20088) (collecting cases); but see In re Chin, 381 B.R. 191 (Bankr. D. Md. 2008) (allowing the ride-through to continue after BAPCPA); In re Moustafi, 371 B.R. 434 (Bankr. D. Ariz. 2007) (same); In re Stevens, 365 B.R. 610 (Bankr E.D. Va. 2007) (same).
\footnote{246} Peterson, 281 B.R. at 689; see also Henry & Associates, 272 B.R. 266, 274-77 (C.D. Cal. 2002), aff’d 69 Fed. Appx. 394 (9th Cir. 2007) (holding that circuit split on “ride through” upset commonality and predominance elements for class certification).
\footnote{247} See, e.g., In re Cano, 410 B.R. 506 (Bankr. S.D. Tex. 2009) (certifying class alleging the wrongful assessment of a flat bankruptcy fee under Rule 7023(b)(2)); In re Sheffield, 281 B.R. 24, 28-30 (Bankr. S.D. Ala. 2000) (same); In re Harris, 280 B.R. 876 (Bankr. S.D. Al. 2001) (same); In re Nollett, 281 B.R. 36 (Bankr. S.D. Ala. 2000) (same); see also In re Death Row Records, No. 06–11205, 2012 WL 952292 (9th Cir. BAP March 21, 2012) (certifying class for turnover claims under Rule 7023(b)(2)); In re Coggin, 155 B.R. 934 (ED.N.C. 1993) (certifying case under 7023(b)(2) and (b)(3) for violations of the discharge injunction); Watts v. Pennsylvania Housing Finance (In re Watts), 76 B.R. 390, 401 (1987) (certifying class under Rule 23(b)(2) for violations of the anti-discrimination and automatic stay provisions of 11 U.S.C § 525 and 362(a)(3) as well as 42 U.S.C 1983);
\footnote{248} See id. In the past, these claims have most commonly been certified under Rule 7023(b)(2). See supra note 247. Recent Supreme Court authority may limit the utility of Rule 7023(b)(2) in consumer bankruptcy cases. The Supreme Court held In Wal-Mart Stores, Inc. v. Dukes that Rule 23(b)(2) may only be used when a single injunction or declaration would provide relief to the entire class. See 131 S. Ct. 2541, 2557 (2011). “[Rule 23(b)(2)] does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.” Id.

After the Wal-Mart case, Rule 7023(b)(3) may prove a more effective basis for certification.
B. CLASS ANTI-PATHY

A broader challenge to the use of class actions in bankruptcy is the prevailing anti-class-action mentality. Recent cases reflect a gradual narrowing of the class-action rules and are often punctuated with statements of judicial hostility to the class device. As Professor John Coffee has observed, “the tide has turned against class certification, and new barriers have arisen across a variety of contexts where formerly class certification had seemed automatic.”251 Against this backdrop, anything resembling innovation or expansion of the class action device will likely face resistance.252

Despite the current state of class action theory, there exist strong justifications for bankruptcy courts to use this device to the fullest extent permissible in consumer bankruptcy cases. The behavior described in this Article presents a classic case for class action relief.253 The harms suffered in many consumer bankruptcy cases are too small to litigate on an individual basis, and aggregate litigation provides a meaningful private-law vindication of debtor’s rights.254

250 See, e.g., Erwin Chemerinsky, New Limits on Class Actions, Nov-Trial 54, 56 (2011) (“The Wal-Mart decision reflects a conservative majority that is quite hostile to class action suits.”); see also American Reserve Corp., 840 F.2d 487, 489-91 (7th Cir. 1988) (noting that class actions are an administrative “headache” because they encourage litigation that never would otherwise be pursued, and because they require greater demands on judicial resources since the small recoveries mean that no one has a sufficient incentive to monitor them, and highlighting the plaintiffs’ bar being out for themselves and questioning the deterrent value of class actions).
252 See John C. Coffee, Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation, 100 COLUM. L. REV. 370, 372 (2000) (“Indeed, the clearest message in Ortiz is that any innovation in class action procedures that departs from ‘the traditional norm’ is hereafter likely to be disfavored.”).
253 See, e.g., In re Williams, 244 B.R. 858, 862 (S.D. Ga. 2000) (“At first blush, it would appear that the class action is the perfect procedural device to remedy systematic, widespread violations of law by a single defendant, especially where the damages resulting from such illegal conduct is presumably dispersed over a large number of individuals, thereby reducing the incentives that any individual plaintiff might have to bring suit against the wrongdoer.”).
254 The use of class actions to remedy widespread and systemic harms was suggested in the 1940s and became part of the class action rules in 1966. See Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 U. CHI. L. REV. 684, 684 (1941) (“Modern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is
Additionally, class actions may provide valuable *ex post* regulation that would have broad effects on lenders’ behavior in the bankruptcy process. Class actions have long been lauded as a “means for private citizens to enforce public values.”\(^{255}\) Empowering class litigants as “private attorneys general” acknowledges the resource limitations of government agencies and provides those agencies with enhanced support.\(^{256}\) Outside of bankruptcy, federal consumer-protection legislation employs aggregate litigation as a “central mechanism of statutory enforcement.”\(^{257}\) Considering the heavy caseloads of many bankruptcy judges and trustees, bankruptcy courts would do well to provide those in the best position to discover lender misconduct—debtors and their attorneys—a realistic means to correct it.

In his study of small-claims class actions, Professor William Rubenstein identifies four categories of positive externalities arising from class litigation. First, class litigation creates “decrease effects” through the impact of *stare decisis* and injunctions on generally applicable policies or behavior.\(^{258}\) Second, class litigation creates “settlement effects” in cases in which a defendant agrees to cease a particular type of conduct that affects a range of non-plaintiff individuals.\(^{259}\) Third, class litigation creates “threat effects” by forcing parties to consider the risk of litigation in corporate decision-making.\(^{260}\) Finally, class litigation creates positive “institutional effects” by diversifying regulation of defendants among public and private actors.\(^{261}\) In these ways, class litigation disproportionately expensive . . . . This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one.”). Over time, the deterrence justification has ceded ground to the “compensationalist” rationales of class actions. Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 109-121 (2006) (discussing the rise of a “compensationalist hegemony” in class-action theory).


\(^{259}\) Id. at 724.

\(^{260}\) Id.

\(^{261}\) Id. at 724-25. *C.f. Richard A. Posner, Economic Analysis of Law* 530-31 (6th ed. 2003) (litigation “establishes rules of conduct designed to shape future conduct, not only the present disputants' but also other people’s.”)
“establishes rules of conduct that both delineate boundaries for acceptable social behavior and decrease the need for future lawsuits.”

The predominant critiques of class actions focus primarily on their limitations in compensating plaintiffs for harm suffered. The scholarship on class actions is replete with suggestions that class counsel face strong incentives to seek “sweetheart” settlements at the expense of their clients. Some have argued that attorneys’ incentives “transform [the attorney-client] relationship into the converse connection in which the attorney becomes the principal and the unsophisticated client becomes the agent.” Others have highlighted that class actions reduce the control a litigant would expect in non-aggregate proceedings, replacing it with “bureaucratic justice” that averages each plaintiff’s unique circumstances to form a collective prayer for relief.

While these critiques are well taken when considering class actions’ compensatory aims, they do little to impeach the public-law benefits of class litigation. The advantage of forcing companies to internalize the cost of wrongful behavior is significant and should not be sacrificed because of imperfections in class actions’ compensatory function, especially when the harms suffered are small. This is particularly true in bankruptcy, where the harm of creditor

262 Burch, supra note 256, at 2520. While these justifications for class litigation largely arise from small-claim classes, some have argued that their impact is not so limited. See Note: Locating Investment Asymmetries and Optimal Deterrence in the Mass Tort Class Action, 117 HARV. L. REV. 2665, 2668 (2004) (“[C]onsideration of optimal deterrence need not and should not be restricted to small-claims class actions.”).

263 See, e.g., Coffee, supra note 251, at 371-72 (“[W]here the plaintiffs’ attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interest of class members to the attorney’s own economic self-interest.”); see also JAY TIDMARSH AND ROGER H. TRANSGRUD, COMPLEX LITIGATION: PROBLEMS IN ADVANCED CIVIL PROCEDURE 121 (Foundation 2002) (“[T]he notion that class actions exist primarily to profit lawyers while doing little for clients has reached the status of urban legend.”); but see Rosenberg, infra note 265, at 583 (critiquing the view that class action plaintiffs’ attorneys have greater incentives toward disloyalty).


265 See David Rosenberg, Class Actions for Mass Torts: Doing Individual Justice by Collective Means, 62 IND. L. J. 561, 561 (1987). This aggregation of claims may create adverse selection problems, as the strongest claims become commingled with weaker claims, and may create a result inconsistent with the merits of an individual litigant’s dispute. See, e.g., Edward J. Brunet, A study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria, 12 GA. L. REV. 701, 713-18 (1978) (arguing that when too many parties are joined to an action, the court may become overloaded and resultantly make poor-quality decisions).

266 See Gilles, supra note 255, at 309 (A public-law view of class actions “prioritizes the deterrence function . . . , and as a consequence, is highly tolerant of remedies that may not provide full direct compensation to plaintiffs [but] force defendants to disgorge ill-gotten gains.”) (quotation omitted); see also Gilles & Friedman, supra note 254, at 105 (“In reality, there is
overreaching is often borne by competing creditors, and damage awards will inure to their benefit, rather than the debtor’s. These entities are generally able to price the risk of debtor non-payment and may be in a better position to absorb inadequacies of class-action compensation.

If used more aggressively, debtor class actions could provide a meaningful check on lender misconduct in consumer bankruptcy cases. Because of the substantial positive effects of class litigation on the bankruptcy process, courts should encourage class relief to the fullest extent permissible under Rule 7023. In recognition of the strictures of class certification, debtor class actions should not be promoted to the exclusion of other law-reform proposals. Rather, Congress might, as some scholars recommend, enhance the penalties for lender non-compliance with the bankruptcy laws. Additionally, Congress or the courts might explore options to facilitate non-class aggregate litigation, either through administrative consolidation of similar matters, or through a more structured multi-district litigation process for factually similar nationwide claims. Any of these tactics might encourage the positive externalities of the class device while avoiding the certification challenges that debtor class actions present.

V. CONCLUSION

Class actions are a valuable—and viable—mechanism to combat systemic violations of bankruptcy law at the hands of large institutional lenders. Used more expansively, the class device may not only remedy wrongful conduct, but also vindicate the legal norms of the bankruptcy process. Although jurisdictional challenges have historically overshadowed the use of class actions in consumer bankruptcy cases, this article reveals that many jurisdictional limitations on debtor class actions are unsupported by the text and policy of the Bankruptcy Code. The true limitations on debtor class actions in bankruptcy arise not from bankruptcy’s unique jurisdictional structure, but from the class device itself. In light of that reality, additional law reform efforts may augment the debtor class to foster greater levels of compliance with bankruptcy law and procedure.

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