

GOING TO THE HEAD OF  
THE “CLASS” IN BANKRUPTCY:  
THE CONTINUING EVOLUTION OF  
CLASS ACTIONS, THE CLASS PROOF, AND  
PLAINTIFF AND DEFENDANT CLASSES  
IN BANKRUPTCY CASES

By

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This Article is dedicated to the memory of our dear friend, Stephen Patrick Hoban, Esq., who left us before his time, with eternal gratitude for his teaching, support, collegiality, and most of all friendship. He will be missed, but he will be remembered always.

## Introduction

Class action litigation has very much preoccupied the American public, our lawmakers, the legal profession, and even the President in recent days. At the time of this writing, the Class Action Fairness Act (“CAFA”) has just been signed into law.<sup>1</sup>

Notwithstanding the current ballyhoo, class action litigation and its attendant devices have come to occupy a stable place in bankruptcy proceedings. No longer a novelty (much less an unwanted interloper) in insolvency cases, the class action and all it encompasses has settled down into its own rightful niche in the hierarchy of title 11.<sup>2</sup> However, that is not to say it is stagnant; rather, such a mode of litigation continues to evolve. And that is the purpose of this Article; to explore the history, the current status, and the emerging trends in class actions in bankruptcy, and all they entail.

To promote as full an understanding of the subject as possible, this Article shall first deal with the tradition of the class action as an efficacious tool of federal litigation, analyze its first acceptance into the realm of the bankruptcy court system, discuss the validation of the class proof of claim as part and parcel thereof, track the current developments in the utilization of the class action, first on behalf of plaintiffs (usually creditors in insolvency cases), and second on the burgeoning use of the class action against an ascertainable class of defendants in bankruptcy proceedings. This will bring us to a few conclusions and parting thoughts on the subject, and to reach that end, let us begin.

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<sup>1</sup> Pub. L. No. \_\_ (February 18, 2005), see S. Bill 5 (109<sup>th</sup> Cong., 1<sup>st</sup> Sess.). See e.g. France, “How to Fix the Tort System,” Business Week (March 14, 2005) 70, 72. While expected to have little or no impact subject of this Article, its preeminence in the media spotlight merely serves to underscore the timeliness and relevance of the class action as a contemporary issue.

<sup>2</sup> 11 U.S.C. § 101, et. seq. (the “Bankruptcy Code”).

## I.

### A. *The Class Action Defined*

A class action is defined as “a device by which, where a large group of persons are interested in a matter, one or more may sue or be sued as representatives of the class without needing to join every member of the class.”<sup>3</sup> The class action is no stranger to the bankruptcy court system. For instance, where mass tort liability cases have compelled defendant companies to seek protection under Chapter 11, the class action has simply migrated to the insolvency forum.<sup>4</sup> The federal civil rule governing class actions has thus made its weighty presence known in the bankruptcy courts, typically exercised on behalf of a class of plaintiffs/creditors.<sup>5</sup>

The class action device itself is not free from debate, but rather has been the source of extensive controversy. The class action suit has been described as “everything from ‘one of the most socially useful remedies in history’ to legalized blackmail.”<sup>6</sup>

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<sup>3</sup> Black’s Law Dictionary 226 (5<sup>th</sup> ed. 1979).

<sup>4</sup> See In re Combustion Engineering, Inc., 391 F.3d 190, 200-01 (3d Cir. 2004) (acknowledging the nationwide issue of asbestos liability, and attempts to achieve a global settlement of class actions within the context of a defendant’s plan of reorganization). Compare Findley v. Trustees of the Manville Personal Injury Settlement Trust (In re Johns-Manville Corp.), 237 F.Supp.2d 297 (E. & S.D.N.Y. 2002), for some of the extensive history of the tortuous multidistrict asbestos litigation, the gargantuan classes and attendant difficulties in case management, and the bankruptcy proceedings of the defendants rendered insolvent thereby, all in the context of the nation’s first “megabankruptcy” proceeding.

<sup>5</sup> Id. at 200. See also Amchem Prods. v. Windsor, 521 U.S. 591 (1997) (denying class certification to nationwide settlement class of asbestos claimants); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (same).

<sup>6</sup> As stated by the leading authority, “One of the most controversial recent developments in the law of federal procedure is the growth of the class action. The crucial event was the amendment in 1966 of Rule 23 of the Federal Rules of Civil Procedure. The controversy has indeed been a hot one.” C. Wright, The Law of Federal Courts § 78, at 740 (4<sup>th</sup> ed. 1983). Another authority cited four problems of the class action: (1) since most class members had only nominal claims, the real party in interest was the class attorney; (2) many defendants were coerced into settling non-meritorious claims because of the fear of the potentially large class suit; (3) the cost of discovery was very large; (4) class actions diluted the substantive law and possibly violated due process. Note, Class Actions in Bankruptcy, 64 Tex. L. Rev. 791, 802-03 (1985); see also Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326, 338-39 (1980) (discussing the potential negative effect of contingency fee arrangements on the volume of class action suits, concluding that the benefit of class action suits, allowing the individual with a small interest access to the courts, outweighed the negative effects of the contingency fee).

But more often, the class action has been applauded as a litigation device that “serves not only the convenience of the parties but also prompt, efficient judicial administration.”<sup>7</sup> The Supreme Court has expressed its approval of class actions, noting that “class actions serve an important function in our system of civil justice.”<sup>8</sup> The class action benefits small claimants whose individual claims are so small that they are not cost effective to bring separately. More important than the financial disincentive is the fact that claimants are often unable to procure the services of an attorney where the stakes are fairly meager.<sup>9</sup> By aggregating the many small claims into one large one, the class action allocates the costs of the litigation, particularly attorney’s fees, among the class members so as to make the lawsuit financially feasible.<sup>10</sup> As so succinctly stated by Justice

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<sup>7</sup> Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 185 (1974) (Douglas, J., dissenting in part) (footnote omitted).

<sup>8</sup> Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981).

<sup>9</sup> The court in Zenith Laboratories, Inc. v. Sinay (In re Zenith Laboratories), 104 B.R. 659 (D.N.J. 1989), succinctly and accurately painted the dilemma facing the small individual claimant:

To the individual litigant, the perceived costs of investigating a smaller potential claim may be thought to exceed the expected benefits. The individual litigant is unsure of his or her rights, wary of expending resources in an uncertain endeavor with an unknowable outcome, and, because of the modest size of the claim, frequently unable to secure legal representation. Thus the potential litigant may conclude that his or her resources are better spent on some other pursuit. The class action provides a champion to investigate similar claims, diminishes uncertainty regarding the legal status of the claim, and, by aggregating the claims, effectively distributes the costs of investigation that would otherwise be borne on an individual basis over the class membership. This procedural device thus readjusts the cost-benefit analysis and ensures that smaller claims whose combined value is significant cannot be avoided by a wrongdoer merely because of their individual size.

Id. at 663 n.3; see also Certified Class in the Charter Sec. Litig. V. Charter Co. (In re Charter Co.), 876 F.2d 487, 493 (11<sup>th</sup> Cir. 1989), cert. dismissed, 496 U.S. 944 (1990) (“when claims are small, they are unlikely to receive the attention of an attorney on an individual basis but might very well receive such attention when aggregated”).

<sup>10</sup> The economical attributes of Rule 23’s class action procedure were recognized by the Supreme Court in Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326 (1980). There, the court stated:

[t]he use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise. Plainly there has been a growth of litigation...vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost... Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved

Douglas, the class action serves small, individual claimants “whose claims may seem *de minimis* but who alone have no practical recourse for either remuneration or injunctive relief....The class action is one of the few legal remedies the small claimant has against those who command the status quo.”<sup>11</sup>

Consequently, the class action is particularly appropriate where the claimants are “in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive.”<sup>12</sup> For this reason, the class action occupies a unique niche in the scheme of alternatives available in multiparty litigation. Other procedural devices, such as joinder, intervention, and consolidation, presume that the users are economically powerful parties who can individually manage their own interests in seeking a legal remedy.<sup>13</sup> It is therefore appropriate at this juncture to analyze the controlling federal rule and focus on certain of the key policy attributes of the class action.

### *B. The Parameters of Rule 23*

Federal Rule of Civil Procedure 23 governs class actions. The principal goals are (1) efficiency – resolving many individual claims in a single action; (2) consistency – avoiding inconsistent decisions on common questions; and (3) protection of small claimants – establishing a procedure that allows small claimants, who could not

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persons may be without any effective redress unless they may employ the class-action device.  
*Id.* at 338-39.  
<sup>11</sup> *Eisen, supra*, 417 U.S. at 185-86 (Douglas, J., dissenting in part) (footnote omitted).  
<sup>12</sup> Kalven & Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 686 (1941).  
<sup>13</sup> Frankel, *Amended Rule 23 From a Judge’s Point of View*, 32 Antitrust L.J. 295, 298 (1966) (other devices assume the court is dealing with “economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention”).

otherwise bring their claims separately, to effectively resolve their rights.<sup>14</sup>

Consequently, the federal courts have held that Rule 23 is to be “construed most liberally in order to achieve its objectives.”<sup>15</sup>

In Deposit Guaranty National Bank v. Roper,<sup>16</sup> Chief Justice Burger postulated four interests that are implicated in determining the general availability of a class action. First is the interest of the class representatives—the personal stake they have in the controversy, and the accompanying right to utilize Rule 23 to pursue their individual claims. Second is the obligation of the class representative to represent the collective interests of the class. The third point to be considered is the right of class members to intervene in the action. Fourth, and last, is the responsibility of the district court to protect the class, and the integrity of the judicial process, by monitoring the proceeding.<sup>17</sup> These policy interests shape the court’s analysis as to whether the class action device is available to a group of plaintiffs in any given type of proceeding.

Returning to the procedural maxim, Rule 23 establishes that one or more members of a class may sue or be sued as representatives of all class members only if (1)

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<sup>14</sup> 7A C Wright, A. Miller & M. Kane, *Federal Practice and Procedure Civil 2d* § 1754 (1986). The authors state that the goals of the class action are:

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

Id. (footnote omitted).

<sup>15</sup> Id. (footnote omitted); see e.g., In re Sugar Indus. Antitrust Litig., 73 F.R.D. 322 (E.D. Pa. 1976) (allowing class action in an antitrust action brought by purchasers of refined sugar against sugar refiners).

<sup>16</sup> 445 U.S. 326 (1980). In this case, credit card holders brought a class action suit against National Bank on behalf of all Mississippi holders of credit cards issued by the bank. Id. at 326. The suit accused the bank of violating state usury law. The district court denied class certification and plaintiff appealed. The court of appeals reserved even in light of respondent’s argument that the issue had been mooted by the judgment in their favor. Id. While the court limited itself to the question of mootness to resolve conflicting holdings below, the context of the underlying class action provided an opportunity for the court to make some important observations regarding the class action. See id. at 331.

<sup>17</sup> Id.

the class is so numerous that joinder is impracticable (the numerosity requirement) (2) there are common questions of law or fact (the commonality requirement); (3) the claims or defenses of the representatives are typical of the class (the typicality requirement); and (4) the interests of the class shall be fairly and adequately protected by the representatives (adequacy of representation requirement).<sup>18</sup> The Supreme Court has noted that the commonality and typicality requirements tend to merge, and those two in turn tend to merge with the adequacy of representation requirement.<sup>19</sup> Accordingly, the Court has required that the class representative must “at all times adequately represent the interests of the absent class members.”<sup>20</sup>

The numerosity requirement is satisfied when joinder is “impracticable.”<sup>21</sup> Impracticable does not mean impossible, but simply difficult or inconvenient.<sup>22</sup> Plaintiffs need not devise an exact class size as a precondition to show numerosity.<sup>23</sup> For instance, the Second Circuit has found that numerosity is presumed when a class consists of forty or more plaintiffs, a relatively low number.<sup>24</sup>

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<sup>18</sup> Fed. R. Civ. P. 23(a).

<sup>19</sup> General Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1992); see also 7A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure Civil 2d § 1763 (1986) (stating that the commonality subdivision “may be a superfluous provision, or at least partially redundant,” since the common question of law requirement is an essential ingredient of a finding that the suit is maintainable as a class action).

<sup>20</sup> Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (citation omitted).

<sup>21</sup> Rule 23(a); Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993).

<sup>22</sup> Id.; see also In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 508-09 (S.D.N.Y. 1996).

<sup>23</sup> Robidoux, *supra*, 987 F.2d at 935.

<sup>24</sup> Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir.), cert. denied, 515 U.S. 1122 (1995). See In re Kaiser Group International, Inc., 278 B.R. 58 (Bankr. D. Del. 2002). Certifying a class of 47 shareholders, the court held that:

While it would not be impossible to adjudicate each claim separately, class certification offers the benefit of adjudicating common issues once. It thus avoids the cost and time inherent in 47 separate hearings on the same issues of the procedural burden of requiring joinder of these separate claims and objections.

Kaiser, *supra*, 278 B.R. at 64.

Commonality is satisfied “if plaintiffs’ grievances share a common question of law or fact.”<sup>25</sup> Rule 23(a)(2)’s requirement of common factual or legal questions is not demanding and “does not require an identity of claims or facts among class members; instead, the commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.”<sup>26</sup>

Rule 23(a)(3) requires that the class representatives have claims typical of those shared by the class members. “Rule 23(a)(3) is satisfied when each class member’s claim arises from the same course of events, and each class member makes similar arguments to prove the defendant’s liability.”<sup>27</sup> Typicality does not require factual identity between the named class representatives and the class members, only that “the disputed issues of law or fact occupy essentially the same degree of centrality to the named plaintiff’s claim as to that of other members of the proposed class.”<sup>28</sup> Typicality ensures that class representatives “have the incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individualized actions.”<sup>29</sup>

Typicality exists when the “claims of the representative plaintiffs arise from the same course of conduct that gives rise to claims of the other class members, where the claims are based on the same legal theory, and where the class members have allegedly been injured by the same course of conduct as that which allegedly injured the proposed

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<sup>25</sup> Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 155 (2d Cir. 2001).

<sup>26</sup> Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178, 184 (3d Cir. 2001) (quotation marks omitted, alteration in original); accord, e.g., Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 625 (5<sup>th</sup> Cir. 1999); In re American Medical Sys., 75 F.3d 1069, 1080 (5<sup>th</sup> Cir. 1996).

<sup>27</sup> In re the Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 291 (2d Cir. 1992).

<sup>28</sup> Caridad v. Metro-North Comuter R.R., 191 F.3d 283, 293 (2d Cir. 1999) (quotation marks omitted).

<sup>29</sup> In re Oxford Health Plans, Inc., 191 F.R.D. at 375 (quotation marks omitted).

representatives.”<sup>30</sup> Indeed, when “the same [allegedly] unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor violations in the fact patterns underlying individual claims.”<sup>31</sup>

Rule 23(a)(4) dictates that the “adequacy of representation entails inquiry as to whether: 1) plaintiff’s interests are antagonistic to the interests of other members of the class and 2) plaintiff’s attorneys are qualified, experienced and able to conduct litigation.”<sup>32</sup>

Rule 23(a)(4) is satisfied if “the representative parties will fairly and adequately protect the interests of the class.”<sup>33</sup> A court must evaluate adequacy of representation by considering (i) whether the class representatives’ claims conflict with those of the class and (ii) whether class counsel is qualified, experienced, and generally able to conduct the litigation.<sup>34</sup>

Rule 23(a)(4) is met where there is no conflict between the class representatives and the other class members, and all share the common goal of maximizing recovery.<sup>35</sup>

The burden of proof is on the claimant to establish that each element of Rule 23 is met.<sup>36</sup> While the claimant need not prove the merits of his claim at this stage, he must

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<sup>30</sup> Id.

<sup>31</sup> Robidoux, *supra*, 987 F.2d at 936-37.

<sup>32</sup> Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 60 (2d Cir. 2000).

<sup>33</sup> Fed. R. Civ. P. 23(a)(4).

<sup>34</sup> In re Oxford Health Plans, Inc., 191 F.R.D. at 376; In re the Drexel Burnham Lambert Group, Inc., *supra*, 960 F.2d 285, 291 (2d Cir. 1992).

<sup>35</sup> See e.g. In re Drexel, *supra*, 960 F.2d at 291.

<sup>36</sup> In re First Interregional Equity Corp., 227 B.R. 358, 366 (Bankr. D.N.J. 1998); In re Grocerland Coop., 32 B.R. 427, 435 (Bankr. N.D. Ill. 1983).

provide more than bare allegations or conclusory statements to satisfy the requirements of Rule 23.<sup>37</sup>

Concomitantly, the court must rigorously analyze whether the proposed class satisfies the Rule 23(a) criteria,<sup>38</sup> but such analysis does not require or permit an evaluation of the relative strength of the merits of the case.<sup>39</sup> Yet be reminded that these four factors of Rule 23 “are to be construed liberally.”<sup>40</sup>

If Rule 23(a) is finally satisfied, the district court may then consider the appropriateness of class certification under Rule 23(b).<sup>41</sup> A class action is maintainable only if it qualifies under one of the subdivisions of paragraph (b) of the class action rule.<sup>42</sup> The prerequisites under Rule 23(b) are (1) that separate prosecutions by individual class members would risk conflicting or differing adjudications, or individual adjudications would be either dispositive of, or substantially impair, the interests of other class members; (2) the opponent has acted in a way that is applicable to the class making injunctive or declaratory relief appropriate; or (3) the common questions of law or fact predominate over the individual questions of class members, and “a class action is superior to other available methods for the fair and efficient adjudication of the

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<sup>37</sup> Morrison v. Booth, 763 F.2d 1366, 1371 (11<sup>th</sup> Cir. 1985).

<sup>38</sup> In re NASDAQ Market-Makers Antitrust Litigation, *supra*, 169 F.R.D. 493, 504 (S.D.N.Y. 1996).

<sup>39</sup> Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir. 1999), *cert. denied*, 329 U.S. 1107 (2000).

<sup>40</sup> Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 179 (2d Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991).

<sup>41</sup> In re Drexel Burnham Lambert Group, Inc., *supra*, 960 F.2d 283, 290 (2d Cir. 1992).

<sup>42</sup> Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 163-165 (1974). Eisen was a class action suit brought on behalf of odd lot traders at the New York Stock Exchange, accusing the Exchange of violating antitrust laws. Id. at 156. The circuit court found that the class action satisfied Rule 23(a) requirements, and further, that to maintain the class action, one of the three subdivisions of Rule 23(b) must be satisfied. Id. at 163.

controversy.<sup>43</sup> In characterizing this aspect of Rule 23, the Supreme Court emphasized that “the efficiency and economy of litigation... is a principal purpose of the procedure.”<sup>44</sup>

The predominance requirement “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.”<sup>45</sup> “Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member’s case as a genuine controversy can be achieved through generalized proof, and if these particular issues are most substantial than the issues subject only to individualized proof.”<sup>46</sup> The Supreme Court has held that Rule 23(b)(3)’s “common questions” analysis

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<sup>43</sup> Fed. R. Civ. P. 23(b). Rule 23(b) provides:

Any action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

- (1) the prosecution of separate actions by or against individual members of the class would create a risk of
  - (A) inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
  - (B) adjudication with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or impede their ability to protect their interests; or
- (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interests of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

<sup>44</sup> American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974). In American Pipe & Constr., the district court denied certification of a class, holding the statute of limitations had run against prospective class members. The Ninth Circuit Court of Appeals reversed, Utah v. American Pipe & Const., Co., 473 F.2d 580, 588 (9<sup>th</sup> Cir. 1973), and the Supreme Court affirmed, holding that an attempt to certify a class suspends the statute of limitations period and that the holding is in accordance with the efficiency and economy of litigation policy behind Rule 23. American Pipe & Const. Co. v. Utah, 414 U.S. at 552-54.

<sup>45</sup> Amchem, *supra*, 521 U.S. at 623.

<sup>46</sup> In re Livent, Inc. Noteholders Sec. Litig., 210 F.R.D. 512, 517 (S.D.N.Y. 2002) (internal quotation marks omitted).

“trains on the legal or factual questions that qualify each class member’s case as a genuine controversy.”<sup>47</sup>

Rule 23(b)(3) requires the Court to find that “questions of law or fact common to the members of the class predominate over any question affecting only individual members.”<sup>48</sup> A common question predominates when “resolution of some of the legal or factual questions that qualify each class member’s case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.”<sup>49</sup> The predominance requirement “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.”<sup>50</sup> Some variation in the damages accorded to potential subgroups does not preclude a finding of commonality.<sup>51</sup>

In addition to predominance, Rule 23(b)(3) requires the court to find that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Factors relevant to determining superiority include:

- (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and]
- (D) the difficulties likely to be encountered in the management of a class action.<sup>52</sup>

These factors are “nonexhaustive.”<sup>53</sup>

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<sup>47</sup> Amchem, supra, 521 U.S. 591, 623 (1997).

<sup>48</sup> Fed. R. Civ. P. 23(b)(3).

<sup>49</sup> Moore v. PaineWebber, Inc., 306 F.3d 1247, 1252 (2d Cir. 2002).

<sup>50</sup> Amchem, supra, 521 U.S. at 623, 625.

<sup>51</sup> See In re Visa Check/MasterMoney Antitrust Litigation, 280 F.3d 124, 139 (2d Cir. 2001), cert. denied, 536 U.S. 917 (2002) (“Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues.”).

<sup>52</sup> Fed. R. Civ. P. Rule 23(b)(3).

<sup>53</sup> Amchem, supra, 521 U.S. at 615. See also Amchem, 521 U.S. at 617 (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for

The (b)(3) test is satisfied when litigating each claim individually would likely result in wasteful and repetitive lawsuits, thus ineffectively utilizing the resources of the judiciary and the parties. The existence of multiple lawsuits would also threaten disparity and inconsistent outcomes.<sup>54</sup>

To prevent abuse, Rule 23 embodies a rigid set of procedures, all designed to permit a putative class action to proceed only if it is truly deserving of such treatment under the Rule. From the outset, the presiding judge must, as soon as practicable after the action is commenced, determine whether the action meets the requirements of Rule 23, and, therefore, may be maintained as a class action.<sup>55</sup>

The court further strives to protect the rights of individuals proposed to be included in the class by directing that members of the class receive “the best notice practicable” under the circumstances, including individual notice to identifiable members.<sup>56</sup> The notice must advise potential class participants that they may opt-out of the class if they so desire, that if they do not request exclusion from the class they shall be included in any judgment reached, and that any included class member may appear through counsel.<sup>57</sup> In this fashion, due process considerations are served.<sup>58</sup>

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any individual to bring a solo action prosecuting his or her rights.”) (internal quotation marks omitted); In re Livent Sec. Litig., *supra*, 210 F.R.D. at 518; In re Biech Sec. Litig., 187 F.R.D. 87, 107-08 (S.D.N.Y. 1999).

<sup>54</sup> In re Globalstar Securities Litigation, \_\_\_ F.Supp.2d \_\_\_, 2004 U.S. Dist. LEXIS 24164, at 15 (S.D.N.Y. 2004) (securities litigation lawsuit arising out of the bankruptcy of the underlying issuing company; the debtor/issuer was “carved out” of the class and excluded as a defendant for reason of the automatic stay, 11 U.S.C. § 362(a).

<sup>55</sup> Fed. R. Civ. P. 23c(1).

<sup>56</sup> Such notice to all members of the class is mandatory only in class actions maintained under Rule 23(b)(3), Fed. R. Civ. P. 23c(2). For class actions maintained under subdivisions(b)(1) or (b)(2), notice is not required. The court, in its discretion, however, may direct that class members receive notification at any stage of the proceedings. Fed. R. Civ. P. 23(d)(2). Most, but not all, bankruptcy class action proceedings are certified under subdivision(b)(3), thus implicating the mandatory notice provision. See, e.g., In re REA Express, Inc., 10 B.R. 812 (Bankr. S.D.N.Y. 1981).

<sup>57</sup> Fed. R. Civ. P. 23c(2).

It is well remembered that federal courts stringently supervise class actions. The close watch maintained by the court is exemplified in subdivision (d) of Rule 23. Among other provisions, Rule 23(d) empowers the court: (1) to enter any orders necessary to prevent undue repetition or complication in the course of a proceeding; or (2) to require, for the protection of the class members, notice of significant events in the proceeding.<sup>59</sup> Such notice may inform class members of their opportunities to signify if the representation of their interests is fair and adequate, or to intervene to present their claims or defenses.<sup>60</sup> Lastly, a class action cannot be dismissed or compromised without court approval and notice of the proposed action to all members of the class.<sup>61</sup> In sum, Rule 23 has built-in limitations against abuse.<sup>62</sup>

The Supreme Court has carefully maintained the safeguards that protect the fairness of class action proceedings. For instance, the Court has repeatedly held that “a class representative must be part of the class and ‘possess the same interest and suffer the same injury’ as the class members.”<sup>63</sup> Furthermore, courts have held that the party seeking to utilize the class action has the burden to establish his right to do so.<sup>64</sup>

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<sup>58</sup> Indeed, the Supreme Court has made it a strict requirement that the notice of a class action “describe the action and the plaintiffs’ rights in it. Additionally... an absent plaintiff [must] be provided with an opportunity to remove himself from the class by executing and returning as ‘opt out’ or ‘request for exclusion’ form to the court.” Phillips Petroleum Co. v. Shutts, *supra*, 472 U.S. 797, 812 (1985).

<sup>59</sup> Fed. R. Civ. P. 23c(2).

<sup>60</sup> Fed. R. Civ. P. 23(d).

<sup>61</sup> Fed. R. Civ. P. 23(e). *See also* Fed. R. Civ. P. 23(f)(appeals); *see also* In re Delta Air Lines, 310 F.3d 953, 957 (6<sup>th</sup> Cir. 2002) (denying interlocutory appeal of district court’s order certifying a class).

<sup>62</sup> Dolgow v. Anderson, 43 F.R.D. 472, 287 (E.D.N.Y. 1968). The entire Dolgow opinion bears reading, as Judge Weinstein masterfully blends legal principles and social commentary in his exhaustive analysis of the nature of class litigation.

<sup>63</sup> East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977) (quoting Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208, 216 (1974)) (ultimately holding that the named plaintiffs were not the appropriate class representatives).

<sup>64</sup> *See e.g.*, Senter v. General Motors Corp., 532 F.2d 511, 522 (6<sup>th</sup> Cir.) (indicating that the plaintiff satisfies the burden when the provisions of Rules 23(a) and 23(b) are met), cert. denied, 429 U.S. 870 (1976).

Classes can also be created for the singular purpose of settling a controversy. Called “settlement only” classes, they are widely accepted, assuming some preconditions are met. For example, the Second Circuit has acknowledged the propriety of certifying a class solely for settlement purposes<sup>65</sup> and the Supreme Court has confirmed the viability of such certifications.<sup>66</sup>

To be sure, whether certified for settlement or litigation purposes, a class must meet each of the four requirements in Rule 23(a) and at least one of the three requirements in Rule 23(b).<sup>67</sup> At the same time, however, a district court “confronted with a request for settlement-only class certification... need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.”<sup>68</sup>

That is the Rule, and it prevails to this day, largely unchanged. To better appreciate its effect upon modern insolvency jurisprudence, let us pause to analyze a non-bankruptcy case which nonetheless helped set the pattern for Rule 23’s employment in bankruptcy cases.

### C. Califano Sets the Stage

An interpretation of the class action that is essential to this discussion was enunciated by the Supreme Court in Califano v. Yamasaki.<sup>69</sup> In Califano, the court rejected the argument that a statute authorizing suit by an “individual” precluded the class

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<sup>65</sup> E.g., Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982).

<sup>66</sup> Amchem, *supra*, 521 U.S. at 619-22 (1997); see also, e.g., Thompson v. Metropolitan Life Ins. Co., 216 F.R.D. 55, 60-61 (S.D.N.Y. 2003) (certifying class for settlement purposes).

<sup>67</sup> See Fed. R. Civ. P. 23.

<sup>68</sup> Amchem, *supra*, 521 U.S. at 620 (internal citations omitted). See also In re American Family Enterprises, 256 B.R. 377, 413-14 (D.N.J. 2000) (Politan, J.) (settlement class, comprised of millions of persons allegedly defrauded in a “publisher’s sweepstakes” by the debtor/direct marketing firm, was ascertainable on the basis of objective criteria, but so numerous as to be impracticable (following Amchem)).

<sup>69</sup> 442 U.S. 682 (1979).

action. While substantively dealing with claims made pursuant to the Social Security Act, the Court’s application of Rule 23 in Califano provides many of the norms now applied to class actions in bankruptcy cases.<sup>70</sup>

Briefly, the respondents in Califano sought to prevent the Secretary of the Department of Health, Education, and Welfare from recouping alleged overpayments of Social Security benefits.<sup>71</sup> Pertinent here was plaintiff’s request for the district court below to certify a nationwide class.<sup>72</sup> On this point, the Secretary argued that class relief was not available because the relevant statute merely authorized suit by any “individual.”<sup>73</sup> Such language, asserted the Secretary, indicated that Congress contemplated a case-by-case adjudication of claims “incompatible with class relief.”<sup>74</sup> The Secretary also referred to the otherwise sparse legislative history, which alluded to “a claimant” and “his claim.”<sup>75</sup>

Analyzing the statutory provision at issue, Justice Blackmun wrote that it contained “no express limitation of class relief.”<sup>76</sup> Instead, the statute prescribed only the usual type of civil action governed by the Federal Rules of Civil Procedure.<sup>77</sup> The Federal Rules, which govern all civil suits, quite clearly allow a class action.<sup>78</sup> Thus, the Court ruled that class relief is presumptively available unless Congress specifically

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<sup>70</sup> Id. at 684.

<sup>71</sup> Id. at 690.

<sup>72</sup> Id.

<sup>73</sup> Id. at 698 (quoting 42 U.S.C. § 405(g) (1988), which gives an individual the right to have a final decision of the Secretary reviewed by filing a civil action within 60 days).

<sup>74</sup> Id. at 698-99.

<sup>75</sup> Id. at 699 n.13. The Secretary was alluding to the fact that both “claimant” and “claim” are used in the singular and not plural form in the legislative history. See S. Rep. No. 734, 76<sup>th</sup> Cong., 1<sup>st</sup> Sess. 52 (1939) (containing the text of the pertinent legislative history).

<sup>76</sup> Califano v. Yamasaki, 442 U.S. 682, 699 (1979).

<sup>77</sup> Id. at 699-700; see also Fed. R. Civ. P. 1 (the Rules govern “in all suits of a civil nature”).

<sup>78</sup> Id. at 700 (citing Fed. R. Civ. P. 23(b)(2)).

intended that the Federal Rules should not apply.<sup>79</sup> In the case before it, the Court held that Congress did not intend to exempt the action from the Federal Rules.<sup>80</sup> The fact that the statute authorized suit by any “individual” did not indicate that the usual Federal Rules permitting the class action should not apply.<sup>81</sup>

The Court provided examples of other statutes which spoke in terms of an individual plaintiff yet allowed class relief. The Court cited civil rights and mandamus statutes under the Judicial Code, and ERISA provisions pursuant to Title 29 of the United States Code.<sup>82</sup> According to the Court, it was “not unusual” for the Social Security law, like other statutes, to speak in terms of an individual plaintiff since the class action device is a designated exception to the usual rule of litigation conducted by, and on behalf of, individuals.<sup>83</sup>

Thus, the Court held that where the district court has jurisdiction over all the members of the class, it has the jurisdiction to certify a class action under Rule 23.<sup>84</sup> Justice Blackmun wrote that class relief was wholly appropriate, notwithstanding the

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<sup>79</sup> Id. at 700. “In the absence of a direct expression by Congress of its intent to depart from the usual course of trying ‘all suits of a civil nature’ under the Rules established for that purpose, class relief is appropriate in civil actions brought in federal court... “ Id.; see also J.I. Case v. Borak, 377 U.S. 426, 433 (1964) (“[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.”).

<sup>80</sup> Id. at 700. The Court proclaimed:

We do not find in § 205(g) the necessary clear expression of congressional intent to exempt actions brought under the statute from the operation of the Federal Rules of Civil Procedure. The fact that the statute speaks in terms of an action brought by “any individual” or that it contemplates case-by-case adjudication does not indicate that the usual Rule providing for class actions is not controlling, where under that Rule certification of a class action otherwise is permissible. Indeed, a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs, but class relief has never been thought to be unavailable under them.

Id.

<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> Id. at 700-01.

<sup>84</sup> Id. at 701.

Secretary's purported need for separate adjudication, as long as the class membership was limited to those with similar claims.<sup>85</sup>

The Supreme Court noted that class relief was particularly well suited for the type of claims before it. The various individual claims had common issues and questions of law with minimal factual differences from case to case. In addition, each individual claim had relatively small monetary value. Finally, the class action would be more efficient for both the courts and the parties by permitting more economical litigation.<sup>86</sup> For these reasons, the Court agreed that Rule 23 was applicable.<sup>87</sup> Notably, the Court also found no impediment to the certification of a nationwide class, finding that “[n]othing in Rule 23...limits the geographical scope of a class action” otherwise proper where jurisdiction lies over the claims of the members of the class.<sup>88</sup>

In sum, the ultimate goal of the class action is to provide parties with small claims and limited resources an avenue for obtaining a remedy that would otherwise be too costly to pursue. The economies and efficiencies of judicial administration that a class action can provide are also important. These policy considerations are the raison d'être behind the class action.

Today, it is axiomatic that Rule 23 recognizes and establishes the rules of engagement for class actions. To prevent misuse, strict qualifications must be met in order for putative class litigants to proceed. Moreover, the courts have exercised their powers under the Rule to scrutinize the class, its representative, and the prosecution of

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<sup>85</sup> Id. (similar claims meaning claims arising from the same statutory cause of action).

<sup>86</sup> Id.; see also General Tel. Co. v. Falcon, *supra*, 457 U.S. 147, 155 (1982) (concluding, as the Court in Califano did, that the class action device is appropriate and economical where there are issues “common to the class as a whole”).

<sup>87</sup> Califano v. Yamasaki, *supra*, 442 U.S. 682, 701 (1979).

<sup>88</sup> Id. at 702.

the action in order to guard against improprieties. Likewise, safeguards exist to protect individuals who choose to opt-out and remove themselves from the class suit.

Lastly, the Supreme Court has made it abundantly clear that, absent a specific legislative exclusion, the class action is readily accessible to any putative class that otherwise meets the strictures of Rule 23.<sup>89</sup> The vitality and the pervasive availability of the class action cannot therefore be minimized. These principles are important to bear in mind when considering the rules concerning bankruptcy proceedings, our next subject.

#### *D. Rule 23 and Adversary Proceedings*

A unique characteristic of the American bankruptcy process is that it encompasses two separate and distinct avenues for litigation. The first pathway takes us before the bankruptcy court within the context of the “main case.” This is where and how we conduct routine motion practice and undertake most of the business of sorting out the debtor/creditor relationship and the distribution of the former’s remaining assets to the latter.<sup>90</sup>

The second well traveled road to obtain relief from the bankruptcy judge is called the “adversary proceeding.”<sup>91</sup> An adversary proceeding is, in a sense, a “complete civil lawsuit within a bankruptcy case.”<sup>92</sup> These proceedings include, *inter alia*, actions to recover money, to determine liens, to determine the dischargeability of a debt, or to obtain an injunction or other equitable relief.<sup>93</sup> Part VII of the Bankruptcy Rules governs adversary proceedings.<sup>94</sup> As logic would dictate, the rules governing litigation in the

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<sup>89</sup> *Id.* at 700.

<sup>90</sup> *See generally* Sabino, PRACTICAL GUIDE TO BANKRUPTCY ¶ 7.1[3] at 7-5 and 7-6 (1995).

<sup>91</sup> *See generally* Sabino, PRACTICAL GUIDE TO BANKRUPTCY ¶ 6.7 (1995).

<sup>92</sup> WEINTRAUB & RESNICK, BANKRUPTCY LAW MANUAL ¶ 6.02[2] (rev. perm. Ed. 1986).

<sup>93</sup> Bank. R. 7001.

<sup>94</sup> Bank. R. 7001.

bankruptcy forum generally adopt the Federal Rules of Civil Procedure. The advisory committee notes indicate that the proceeding in the bankruptcy courts should be conducted in the same manner as in a district court.<sup>95</sup> As a prime example of this concept, and essential to the instant discussion, Bankruptcy Rule 7023 applies Federal Rule 23 in adversary proceedings with nary a modification.<sup>96</sup>

Equally important, the purview of the rules contained in Part VII is not necessarily limited to adversary proceedings. The Bankruptcy Rules in Part VII could also be applicable to contested matters. A contested matter is any actual dispute in a bankruptcy court other than an adversary proceeding.<sup>97</sup> The primary distinction is that adversary proceedings procedurally resemble litigation outside bankruptcy, whereas contested matters are conducted primarily through simple motions.<sup>98</sup>

Notably, Bankruptcy Rule 9014 makes over twenty of the Bankruptcy Rules found in Part VII applicable to such contested matters.<sup>99</sup> The Rule also gives the court

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<sup>95</sup> Bank. R. 7001 advisory committee's note. The advisory committee note states:

These Part VII rules are based on the premise that to the extent possible practice before the bankruptcy courts and the district courts should be the same. These rules either incorporate or are adaptations of most of the Federal Rules of Civil Procedure. The content and numbering of these Part VII rules correlate to the content and numbering of the F.R.Civ.P. Most, but not all, of the F.R.Civ.P. have a comparable Part VII rule.

Id.

<sup>96</sup> According to Bankruptcy Rule 7023, "Rule 23 [Federal Rule of Civil Procedure] applies in adversary proceedings." Bank. R. 7023.

<sup>97</sup> Bank. R. 9014 advisory committee's note. The advisory committee note states that "[w]henver there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter."

<sup>98</sup> See id.

<sup>99</sup> Bank. R. 9014 (Contested Matters) provides:

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. A person who desires to perpetuate testimony may proceed in the same manner as provided

discretion to use, at any stage, any of the rules found in Part VII.<sup>100</sup> This gives courts discretion to use the class action procedure found in Bankruptcy Rule 7023, the counterpart to Rule 23 of the Federal Rules of Civil Procedure, in a contested matter. The class action rule, Federal Rule 23, is adopted without change for adversary proceedings by the Bankruptcy Rules, and is available for utilization in contested matters as well. Today, be it in adversary proceedings or via motion practice in the main case, there is no longer any doubt whatsoever that class action procedures are available in bankruptcy cases without let or hindrance.<sup>101</sup>

There we have it, or least some of it. The foregoing exemplifies Rule 23 as the governing procedural axiom for the commencement and maintenance of class actions, and the adoption of said rule in toto into the fabric of bankruptcy cases and proceedings. Undeniably, class actions have a rightful place in the bankruptcy process. Yet that integretation has not always been a smooth one. Indeed, it has taken at least one watershed decision by one of the nation's preeminent tribunals to secure the role of class actions in bankruptcy, and to that landmark we now turn.

## II.

### *American Reserve-The Watershed*

The seminal decision allowing class actions in bankruptcy proceedings is the Seventh Circuit's opinion in In re American Reserve Corp.<sup>102</sup> On an interlocutory

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in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VI are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

<sup>100</sup> Id.

<sup>101</sup> AARP v. First Alliance Mortgage Co. (In re First Alliance Mortgage Co.), 269 B.R. 428, 446-447 (C.D. Cal. 2001) (following American Reserve, Charter and Birting).

<sup>102</sup> 840 F.2d 487 (7<sup>th</sup> Cir. 1988), rev'g, 71 B.R. 32 (N.D. Ill. 1987).

appeal, the court was asked to decide whether a person may file a proof of claim “as representative of others similarly situated in a bankruptcy case.”<sup>103</sup> Concluding that “class actions may exist within as well as outside bankruptcy,” the court found in favor of permitting class actions in bankruptcy, as well as allowing class proofs of claims.<sup>104</sup>

The facts in American Reserve are typical of cases dealing with class actions in bankruptcy cases. American Reserve was the holding company for Reserve Insurance Co., an insolvent domestic insurer accused of fraud by policyholders in a state court class action filed prior to the bankruptcy filing of American Reserve. Subsequently, the plaintiffs in the state action filed a proof of claim in the bankruptcy case on behalf of themselves and a class of policyholders.<sup>105</sup> These persons “undoubtedly have ‘claims,’” noted the court, given the greatly enlarged definition of a claim under the modern Bankruptcy Code.<sup>106</sup>

The court commenced its analysis by examining the applicable Bankruptcy Rules, specifically Bankruptcy Rule 7023, the class action rule, and Bankruptcy Rule 9014, the rule incorporating most of the Federal Rules of Civil Procedure in contested matters.<sup>107</sup> The court had no difficulty in finding that, pursuant to the discretionary authority expressed in Rule 9014, Rule 7023 could be applied by the bankruptcy judge at any stage of a contested proceeding.<sup>108</sup> Of crucial import was the further conclusion of the court that:

Rule 23 provides for filing by a representative, not just prosecution by a representative of claims already pending. So the right to file a proof of claim on

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<sup>103</sup> 840 F.2d at 488.

<sup>104</sup> Id.

<sup>105</sup> Id. (the class was composed of people who purchased policies between 1977 and 1979).

<sup>106</sup> Id., citing 11 U.S.C. § 101(4).

<sup>107</sup> Id.

<sup>108</sup> Id. Jude Easterbrook made the simple but pointed observation that “[f]iling a proof of claim is a ‘stage.’”

behalf of a class seems secure, at least if the bankruptcy judge elects to incorporate Rule 23 via Rule 9014, as the judge did in this case.<sup>109</sup>

The court reconciled the overall goals of bankruptcy law with the advantages of class actions. “The principal function” of a bankruptcy proceeding, said the court, “is to determine and implement in a single collective proceeding the entitlements of all concerned.”<sup>110</sup> While the bankruptcy court has the task of establishing priorities and apportioning assets among creditors with the same level of priority, “the starting point is legal entitlements that exist outside of bankruptcy.”<sup>111</sup> According to the court, the defrauded policyholders of American Reserve were just as deserving of recovery as any other creditors.<sup>112</sup>

Reflecting on the advantages of the class action, the court noted the procedural benefit of concentrating litigation in a single forum, thereby permitting a speedier resolution than multiple suits would allow.<sup>113</sup> “Substantively, the class action permits the aggregation and litigation of many small claims that otherwise would lie dormant. At least in principle, the class action provides compensation” that would be otherwise unachievable.<sup>114</sup> Moreover, class action litigation serves a deterrent function by ensuring that wrongdoers pay for their misdeeds.<sup>115</sup>

Refusing to make an artificial distinction, the Seventh Circuit held that this compensatory function was “as important inside bankruptcy as outside.”<sup>116</sup> In a non-bankruptcy context, the class action aggregates claims, provides compensation, and

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<sup>109</sup> Id.

<sup>110</sup> Id. at 489 (citations omitted).

<sup>111</sup> Id.

<sup>112</sup> Id.

<sup>113</sup> Id.

<sup>114</sup> Id.

<sup>115</sup> Id.

<sup>116</sup> Id.

deters wrongdoing.<sup>117</sup> Noting the opportunity costs of investigation and the constraints of Rule 11,<sup>118</sup> the “combination of contingent claims...and the effort needed to decide whether to pursue an identified claim means that for many small claims, it is class actions or nothing.”<sup>119</sup> These claims should be resolved inside bankruptcy to prevent other creditors, who have filed individual proofs of claims, from enjoying a disproportionately high share of the distribution that would result if they could exclude a proof of claim filed by a rival creditor class.<sup>120</sup>

Indeed, the court chided the district court for stating that a class proof of claim permits creditors who have not made the minimal effort to file a proof of claim to share in the distribution of the estate, perhaps at the expense of other creditors who properly filed.<sup>121</sup> The circuit court found the foregoing to be an argument in favor of class proofs of claims, asserting that “[t]he members of the class may be entitled to compensation, and if this can be achieved without surplus paperwork so much the better.”<sup>122</sup> Furthermore, the class claim may be essential to discover the full range of the debtor’s liabilities, and identify creditors and the amount of their claims.<sup>123</sup>

Espousing the presumption that representational litigation is available in federal cases,<sup>124</sup> the Seventh Circuit saw “nothing unusual” about class actions in bankruptcy

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<sup>117</sup> Id.

<sup>118</sup> See Bankr. R. 9001 (adopting Fed. R. Civ. P. 11, which governs the imposition of sanctions).

<sup>119</sup> American Reserve, supra, 840 F.2d at 489.

<sup>120</sup> Id.

<sup>121</sup> Id. at 489 n.3 (quoting Huddleston v. Holland (In re American Reserve Corp.), 71 B.R. 32, 35 (N.D. Ill. 1987)).

<sup>122</sup> Id.

<sup>123</sup> Id. at 489-90.

<sup>124</sup> Id. at 490.

cases.<sup>125</sup> To the contrary, the court viewed the historical suits on creditors' bills as precursors to our modern class litigation.<sup>126</sup>

To be sure, the court did not gloss over the difficulties inherent in bankruptcy class litigation. Judge Easterbrook fairly noted the complexity of class actions and its concomitant drain on the resources of both the court and all interested parties, the modest (and usually ever-decreasing) recovery available to plaintiffs, and the decreased likelihood of deterrence as to the already bankrupt debtor/defendant.<sup>127</sup> For these reasons, the court acknowledged that the complications of a class action in a bankruptcy case might not be justified by its limited ability to compensate and deter.<sup>128</sup>

Nevertheless, the court in American Reserve found these to be serious but not fatal problems.<sup>129</sup> Federal Rule 23 requires the court to expeditiously decide if an action is maintainable as a class suit and to promptly order notice of the action to be given to class members. If adhered to, the court opined that these directives would permit the class to be certified quickly and its members identified.<sup>130</sup>

Notably, the court found the response to a class action notice under Rule 23 “not fundamentally different” from the filing of a proof of claim.<sup>131</sup> Given this symmetry, the outcome of creditors should be the same, whether it be by filing a proof of claim or by responding to a notice of a class action.<sup>132</sup> In fact, the court found the class action

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<sup>125</sup> Id.

<sup>126</sup> Id. The court discussed cases preceding the former Bankruptcy Act of 1898 such as Handley v. Stutz, 137 U.S. 27 (1890), (judgment creditors as a class allowed to sue stockholders of an insolvent corporation in equity), and Richmond v. Irons, 121 U.S. 29 (1887), (creditors as class allowed to sue insolvent bank pursuant to creditors bill).

<sup>127</sup> Id. at 490-91.

<sup>128</sup> Id. at 491.

<sup>129</sup> Id.

<sup>130</sup> Id. (discussing Fed. R. Civ. P. 23c(1)).

<sup>131</sup> Id.

<sup>132</sup> Id. at 491-92.

superior in that it eliminates some of the cost barriers for small claimants who might not otherwise file.<sup>133</sup>

Notwithstanding the problems of the class proof, the Seventh Circuit made it unmistakably clear that the Bankruptcy Rules do authorize class actions, and the pertinent rules give the bankruptcy judge “substantial discretion to consider the benefits and costs of class litigation.”<sup>134</sup> Small suits with little opportunity for worthwhile recovery and deterrence may be rejected in the court’s discretion. But actions for significant stakes, based on sound legal theories, may represent “substantial prospects” for compensation or deterrence, without overriding negative costs.<sup>135</sup> In such cases, the court found that “[o]ur benchmark--that bankruptcy courts exist to marshal assets and make awards justified by non-bankruptcy entitlements--calls for employing the class device.”<sup>136</sup>

The Seventh Circuit in American Reserve irrevocably opened the door wide to class action litigation in the bankruptcy court. As we will see, what followed was equally inevitable.

### III.

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<sup>133</sup> Id. at 492.

<sup>134</sup> Id. (referring to Bankr. R. 9014 and Fed. R. Civ. P. 23).

<sup>135</sup> Id.

<sup>136</sup> Id. The Seventh Circuit further held that Bankruptcy Rule 3001(b) does not prohibit the filing of a class proof of claim by a putative class representative. The Seventh Circuit in American Reserve described how a class representative becomes an “authorized representative” under 3001(b):

The representative in a class action is an agent for the missing. Not every effort to represent a class will succeed; the representative is an agent only if the class is certified. Putative agents keep the case alive pending the decision on certification. If the bankruptcy judge denies the request to certify a class, then each creditor must file an individual proof of claim; the putative agent never obtains “authorized agent” status. If the court certifies the class, however, the self-appointed agent has become “authorized”, and the original filing is effective for the whole class (the principals). It follows that there may be class proofs of claims in bankruptcy.

Id. at 493 (citations omitted); followed by In re Kaiser Group International, Inc., 278 B.R. 58, 63 (Bankr. D. Del. 2002). See also Charter, supra, 876 F.2d at 873 (“there is no apparent reason” to prohibit a putative class representative from filing a class proof of claim; that representative status is sufficient to classify that person as an “agent” for purposes of filing a claim under Bankruptcy Rule 3001(b)).

*Class Actions in Bankruptcy-The Plaintiff Class*

And what had the Seventh Circuit wrought in American Reserve?

Nothing less than the full fledged acceptance of class actions in bankruptcy, to the point that today they are almost commonplace, employed to address a wide variety of claims, injured parties, and, as we will see later, even defendants. To better understand our subject, let us now canvass the modern landmarks that set forth the fresh boundaries of bankruptcy class action litigation today.

For starters, it goes without saying, or at least it should go without saying, that a bankruptcy court must still possess fundamental jurisdiction over a matter before it can contemplate granting class action status. In Porter v. Nations Credit Consumer Discount Co. (In re Porter),<sup>137</sup> Bankruptcy Judge Fox was compelled to deny class action status to a debtor's non-bankruptcy law claim, which did not arise in or under the debtor's Chapter 13 case.<sup>138</sup> Porter reminds that federal courts possess limited jurisdiction in our greater scheme of federalism, and this is even more attenuated in the bankruptcy forum, where the jurisdiction of the Article I bankruptcy judges is even more severely circumscribed.<sup>139</sup>

Yet aggressive litigants will test the jurisdictional waters. This was demonstrated in Beck v. Gold Key Lease, Inc. (In re Beck),<sup>140</sup> where the putative class representative sought Rule 23 status to prosecute a claim not well founded upon federal grounds. The Beck court roundly declared that “[a] procedural rule such as Rule 23...cannot be read as enlarging the limited jurisdictional grant”

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<sup>137</sup> 295 B.R. 529 (Bankr. E.D. Pa. 2003).

<sup>138</sup> Id. at 539-40.

<sup>139</sup> See, i.e., Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

<sup>140</sup> 283 B.R. 163 (Bankr. E.D. Pa. 2002).

given the non-Article III bankruptcy judges.<sup>141</sup> Clearly, the teaching of these cases is that the basic jurisdictional predicate must exist, as always, before one even begins to think of class action litigation in the bankruptcy court.

Next, the bankruptcy court in Dean v. First Union Mortgage Corp. (In re Harris)<sup>142</sup> exemplified the proper application of Rule 23(b)(2). There the court found that class certification was proper pursuant to that proviso where the defendant's conduct was generally applied to the putative class in a "distinct pattern," as compared to dealing with the plaintiff/claimants individually.<sup>143</sup>

In Noletto v. NationsBanc Mortgage Corp. (In re Fair),<sup>144</sup> a challenge was made as to the qualification of the putative class representative on the "adequacy" grounds of Rule 23. Apparently, the gentleman proposed was somewhat lacking in a formal education. Chief Bankruptcy Judge Margaret Mahoney did not find his personal shortcomings to be fatal. The court noted that the literacy and sophistication of the putative class representative is not necessarily an obstacle. The proposed class representative need not be perfect, just merely adequate, ruled the bankruptcy judge.<sup>145</sup>

It has been held that debtors can be class representatives in a class action, if they otherwise meet all the requirements of Rule 23, and the cause of action is

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<sup>141</sup> Id. at 175 n. 18. Accord Barrett v. Avco Financial Services Management Co., 292 B.R. 1, 8 (D. Mass. 2003).

<sup>142</sup> 280 B.R. 876 (Bankr. S.D. Alabama 2001).

<sup>143</sup> Id. at 882-83.

<sup>144</sup> 280 B.R. 868 (Bankr. S.D. Alabama 2001).

<sup>145</sup> Id. at 875, following Sheffield v. HomeSide Lending, Inc. (In re Sheffield), 281 B.R. 24 30 (Bankr. S.D. Alabama 2000).

exempt property retained by the debtor, not belonging to the estate nor the trustee for prosecution.<sup>146</sup>

Since the acceptance of class action litigation in bankruptcy in American Reserve, the bankruptcy courts have done a workman's like job in separating the wheat from the chaff, that is to say, authorizing class actions pursuant to Rule 23 when and if appropriate, but disallowing such maneuvers when they are not proper. For example, in Peterson v. Wells Fargo Bank, N.A. (In re Peterson),<sup>147</sup> the bankruptcy judge refused to permit a Rule 23 action where there was a distinct lack of a predominance of common questions of law and fact among the putative class members.<sup>148</sup>

The foregoing is a fair sampling of current class action practice in the bankruptcy court. Not surprisingly, it appears the federal courts have had little difficulty in melding concepts of class action litigation to bankruptcy law practice. But the prosecution of class actions in bankruptcy cases has also given rise to new

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<sup>146</sup> Wilson v. Collecto, Inc., \_\_\_ F.Supp. 2d \_\_\_, 2004 U.S. Dist. LEXIS 3074 (N.D. Ill. 2004). Compare Dechert v. Cadle Co., 333 F.3d 801 (7<sup>th</sup> Cir. 2003) (where the debtor did not assert the claim was exempt property, it belonged to the trustee, and the trustee could not properly represent a class because of his conflicting duties to the creditor body of the estate). Heath v. General Motors Acceptance Corp. (In re Heath), 305 B.R. 249, 254-55 (Bankr. N.D. Miss. 2004) (class certification not granted to Chapter 13 debtor/putative class representative alleging violation of Bankruptcy Code Section 524 (the discharge injunction proviso), for reason of the failure to meet Rule 23's typicality and commonality requirements and for the failure to state a viable cause of action). See Federal Trade Commission v. First Alliance Mortgage Co., 269 B.R. 428, 451 (C.D. Cal. 2001) (class action plaintiffs claiming against debtor mortgage lender brought adversary proceedings). Williams v. Sears, Roebuck and Co. (In re Williams), 244 B.R. 858, 861-62 (S.D. Ga. 2000) (debtor/plaintiff sought relief for a nationwide class of similarly situated debtors, all of whom allegedly suffered from the defendant/creditor's unlawful rescission of otherwise valid reaffirmation agreements entered into pursuant to Bankruptcy Code Section 524(c)).

<sup>147</sup> 281 B.R. 685 (Bankr. E.D. Cal. 2002).

<sup>148</sup> Id. at 689. See also Walls v. Wells Fargo Bank, N.A. (In re Walls), 262 B.R. 519, 525 (Bankr. E.D. Cal. 2001) (circuit split on legal question destroyed claim of commonality); Dawson v. Dovenmuehle Mortgage, Inc., 214 F.R.D. 196, 200 (E.D. Pa. 2003) (predominance of individual issues destroyed commonality of questions of law and fact; class action not allowed); Powe v. Chrysler Financial Corp., L.L.C. (In re Powe), 278 B.R. 539, 557 (Bankr. S.D. Alabama 2002) (Mahoney, C.J.) (class decertified when commonality found lacking), overruling 281 B.R. 336, 353 (Bankr. S.D. Alabama 2001) (commonality initially established, giving rise to identifiable class and even subclasses).

ramifications, directly resulting from the joining of these two disparate forces.

Principal among them is the “class proof,” to which we now turn.

#### IV.

##### *The Class Proof of Claim*

The class proof of claim in bankruptcy cases, “once so maligned by the bankruptcy courts, has now been advocated by the circuit courts and is fully allowed in bankruptcy cases.”<sup>149</sup> Nearly fifteen years ago, the author was able to boldly proclaim that truism after the creation of a landmark trilogy of circuit court decisions on the subject, commencing with the aforesaid American Reserve, supra, indeed the seminal decision in this regard, followed by Certified Class in the Charter Security Litigation v. Charter Co. (In re Charter Co.),<sup>150</sup> an Eleventh Circuit holding, and the Sixth Circuit’s ruling in Reid v. White Motor Corp.<sup>151</sup> This triumvirate of circuits correctly declared the class action litigation was available within the larger context of a bankruptcy case, and by logical extension, properly embraced the role of the class proof of claim to facilitate the workings of Rule 23 in such contests.<sup>152</sup>

The “triple threat” of American Reserve, Charter, and Reid made it beyond peradventure that the filing of a class proof of claim is allowed in bankruptcy proceedings. The unassailability of that trilogy was finally written in stone by the Ninth Circuit but a few years later. In Birting Fisheries, Inc. v. Lane (In re Birting Fisheries,

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<sup>149</sup> Sabino, “In A Class By Itself: The Class Proof of Claim in Bankruptcy Proceedings,” 40 DePaul Law Review, 115, 174 (1990) (hereinafter “Sabino, Class Proof”), cited by Office and Professional Employees International Union, Local 2 v. Federal Deposit Insurance Corp., 962 F.2d 63 n. 9 (D.C. Cir. 1992) (Ruth Bader Ginsburg, J.); Jones v. Amdura Corp. (In re Amdura Corp.), 170 B.R. 445 (D. Colorado 1994); In re Mortgage & Realty Trust, 125 B.R. 575 (Bankr. C.D. Cal. 1991).

<sup>150</sup> 876 F.2d 866, 873 (11<sup>th</sup> Cir. 1989), cert. dismissed, 496 U.S. 944 (1990).

<sup>151</sup> 886 F.2d 1462, 1469 (6<sup>th</sup> Cir. 1989), cert. denied, 494 U.S. 1080 (1990). See Sabino, Class Proof, supra, at 142-52 (analyzing the trilogy).

<sup>152</sup> Sabino, Class Proof, supra, at 60-63.

Inc.,<sup>153</sup> that august tribunal, no doubt following the platitude of “less is more,” took but a few lines to declare, most plainly and emphatically, that class proofs of claim are without question recognized in bankruptcy cases.<sup>154</sup> The legitimacy of the class proof of claim in bankruptcy thus established, its usage, while not necessarily commonplace, no longer engenders unnecessary controversy.<sup>155</sup>

For our coda on the modern class proof of claim, there is nothing more eloquent than the conclusion of the erudite Bankruptcy Judge Dennis Michael Lynn, who declared in In re Craft<sup>156</sup> that “class proofs of claim are consistent with the [Bankruptcy] Code and the [Bankruptcy] Rules and...are a necessary device to ensure that the relief afforded by the Code is as complete as possible.”<sup>157</sup>

With the class proof of claim firmly ensconced in bankruptcy practice, the next stage of evolution is taking us in a new and different direction. A class of plaintiff/creditors prosecuting an action and filing a class proof of claim is now commonplace. But what about a class of defendants instead? This is the question that now preoccupies us, and rightly so. Thus, we give it our attention hereinbelow.

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<sup>153</sup> 92 F.3d 939 (9<sup>th</sup> Cir. 1996).

<sup>154</sup> Birting, *supra*, at 940.

<sup>155</sup> See Gillman v. Continental Airlines (In re Continental Airlines), 203 F.3d 203, 205 n.1 (3d Cir. 2000) (class proof of claim filed on behalf of class of claimants alleging securities fraud against debtor, its officers, and directors); In re U.S. Airways Group, Inc., 296 B.R. 673-674-75 (E.D. Va. 2003) (Ellis, J.) (class proof of claim filed by a nationwide class of travel agents, seeking recognition as administrative creditors in the sum of \$40 billion against the debtor airline, as part of a pending antitrust suit against the debtor and several other major airlines; the astronomical ad damnum included the trebling of damages pursuant to the Sherman Act); AARP v. First Alliance Mortgage Co. (In re First Alliance Mortgage Co.), 269 B.R. 428, 444 (C.D. Cal. 2001) (explicitly recognizing validity of class proofs of claim in bankruptcy cases); Krim v. Keck, Mahin & Cate (In re Keck, Mahin & Cate), 253 B.R. 530, 532-33 (N.D. Ill. 2000) (class proof of claim for \$1 billion, alleging securities fraud, dismissed, not as defective in and of itself, but for failure of putative class representative to state fraud with particularity, as required by Federal Rule of Civil Procedure 9, in the underlying Rule 23 complaint); In re First Interregional Equity Corp., 227 B.R. 358, 366 (Bankr. D.N.J. 1998); In re Woodward & Lothrop Holdings, Inc., 205 B.R. 365, 370 (Bankr. S.D.N.Y. 1997); In re Sacred Heart Hospital of Norristown, 177 B.R. 16, 22 (Bankr. E.D. Pa. 1995).

<sup>156</sup> 321 B.R. 189 (Bankr. N.D. Tex. 2005).

<sup>157</sup> Id. at 192.

## V.

### *A. The Defendant Class in Bankruptcy Cases-A New Beginning*

Momentarily pausing to reflect, we have thus far analyzed and established the generic nature of the class action mode of federal litigation, the procedural norms that safeguard its use, and its incorporation into bankruptcy proceedings, particularly when the class action device is employed by discrete groups of plaintiffs that are recognizable enough to avail themselves of Rule 23, and thus empowered to prosecute common claims against the debtor and others in the context of the insolvency case. Similarly, we have seen how the routine individual proof of claim, typically the manifestation of the demand of a single entity to be paid in a bankruptcy case, has grown to encompass a “class proof” filed on behalf of a subset of claimants meeting the requirements for validation as a distinct cadre pursuant to Rule 23. Not so many years ago, experienced bankruptcy practitioners would have supposed (and rightly so at the time) that the recognition of the class proof of claim was the foreseeable end of the evolution of class action litigation in the bankruptcy forum.

But that was not to be, and that is partly the raison d’etre for this Article. For just as the federal courts have recognized the ability of claimants to band together into a class for purposes of litigating, filing class claims, and so forth, the natural evolution of all the above has brought us to a corollary that we should have expected.

Today, standing in precise counterpoise, is the ability of a single debtor in possession or an individual trustee to sue multiple defendants, and, most importantly for this discussion, impose upon them the label of a defendant class. Indeed, commonality, typicality, and the rest of Rule 23 cannot logically or equitably be restricted to plaintiffs

alone. Rather, those same legal precepts are equally applicable to defendants in bankruptcy court litigation, and, as the saying goes, if the shoe fits, it must be worn.

We now come to the point in our discussion where we must examine the ability to collect similarly situated defendants, and assuming they meet the same parameters of the Federal Rules, review and analyze how today's courts are increasingly permitting class action litigation in insolvency cases against a defendant class. And while the notion of the defendant class in bankruptcy may be in sharp contradistinction to the more traditional plaintiff/creditor class in the same forum, we shall see how the same rules apply, and how the courts are dealing with this new and growing trend.

### *B. Dehon*

A thoughtful reckoning of the defendant class action in bankruptcy was given by Bankruptcy Judge Henry J. Boroff in the case known as Gray v. Shapiro (In re Dehon, Inc.).<sup>158</sup> The name "Dehon" might not be easily recognized, but this debtor was better known in the business world under the name of its predecessor firm, Arthur D. Little, Inc., "[a]t one time... a premier international consulting firm" as described by the court.<sup>159</sup> After Little succumbed to bankruptcy and sold substantially all its assets in an orderly liquidation pursuant to Chapter 11, the remaining entity was christened Dehon.<sup>160</sup> Mr. Gray was appointed plan administrator.<sup>161</sup>

In the course of his duties, Mr. Gray analyzed over one thousand claims filed by various prepetition stock ownership plans for the debtor's shares. Several thousand Dehon employees of various rank held the company's stock within these plans, and had

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<sup>158</sup> 298 B.R. 206 (Bank. D. Mass. 2003).

<sup>159</sup> Id. at 210 n.3.

<sup>160</sup> Id. at 209-210, 209 n.1., and 210 n.3.

<sup>161</sup> Id. at 210.

made claims relating to the debtor's obligations to redeem or repurchase its stock or stock options. The plan administrator concluded that the claims of this body were all subject to subordination pursuant to Section 510.<sup>162</sup> As required by proper procedure,<sup>163</sup> Gray commenced an adversary proceeding on behalf of the plan and against the shareholder/claimants.<sup>164</sup>

The plan administrator then moved the bankruptcy court to certify a defendant class,<sup>165</sup> which he described as all current and former beneficiaries and fiduciaries of these stock plans holding Dehon shares.<sup>166</sup> Interestingly, Gray proposed to advance \$50,000 of the debtor's money to the putative class representative "to help pay the legal fees of the putative defendant class."<sup>167</sup> To be sure, Gray sought mandatory certification of a single defendant class.<sup>168</sup>

Shapiro, the putative class representative, made only a limited opposition. Mr. Shapiro's prime issue was his belief that, while a class action was certainly advantageous here, any class certified herein should be of the "opt-out" variety, and not of the mandatory kind. Thus, Shapiro argued for the creation of a number of subclasses of defendants. And Shapiro wanted more than the \$50,000 Gray offered to cover the defendant class' legal costs.<sup>169</sup>

To begin his discussion, Bankruptcy Judge Boroff first identified a trio of issues before him: 1) should there be a single defendant class or several subclasses of defendants; 2) should the class (or subclasses) be mandatory or opt-out; and 3) was the

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<sup>162</sup> Id. at 211. See 11 U.S.C. § 510(b).

<sup>163</sup> See Fed. R. Bank. P. 7001, et seq.

<sup>164</sup> Id. at 209. See also Fed. R. Bank. P. 7001.

<sup>165</sup> Id. at 209.

<sup>166</sup> Id. at 209 n.2.

<sup>167</sup> Id. at 209.

<sup>168</sup> Id.

<sup>169</sup> Id. at 209 and 212.

\$50,000 advance for legal fees sufficient?<sup>170</sup> Of course, the paramount question was the application of the rules of class actions to this particular controversy, and so the court turned to address the threshold prerequisite of Rule 23.<sup>171</sup>

The Dehon court noted that certification of defendant and plaintiff classes under Rule 23 is governed by the same two-part analysis.<sup>172</sup> Certification is permitted if: the putative class satisfies the Rule 23(a)(1) and (2) prerequisites of numerosity and commonality; the class representative satisfies the Rule 23(a)(3) and (4) prerequisites of typicality and adequacy of representation; and the class fits into one of the three categories of Rule 23(b).<sup>173</sup>

Certainly, Bankruptcy Judge Boroff was respectful of the Supreme Court's admonition in Eisen v. Carlisle & Jacquelin<sup>174</sup> that it has no "authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."<sup>175</sup> In a subsequent ruling, however, the Supreme Court held that the rigorous analysis required under Rule 23 sometimes involves "considerations that are enmeshed in the factual and legal issues comprising the [underlying] cause of action."<sup>176</sup> "Ultimately, a line of cases interpreting Eisen through the lens of General Telephone has concluded that a court must formulate some prediction about the probable course of litigation in a case if it is to correctly determine class

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<sup>170</sup> Id. at 214.

<sup>171</sup> Id.

<sup>172</sup> Id., citing Tilley v. the TJX Companies, Inc., 212 F.R.D. 43, 45-46 (D. Mass. 2003); In re Integra Realty Resources, Inc., 179 B.R. 264, 269 (Bankr. D. Col. 1995); 7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE, § 1770, 395 (2002) (describing the "sue or be sued" language of Rule 23 as authorizing the certification of defendant classes).

<sup>173</sup> Id. at 214. See TJX Companies, *supra*, 212 F.R.D. at 46.

<sup>174</sup> 417 U.S. 156, 177 (1974).

<sup>175</sup> Dehon, *supra*, 298 B.R. at 214.

<sup>176</sup> General Telephone Co. v. Falcon, *supra*, 457 U.S. 147, 160 (1982).

certification.”<sup>177</sup> Having struck that precautionary note, the Dehon court proceeded with its Rule 23 analysis, turning to numerosity, the first requirement.

Judge Boroff dispatched that prerequisite with alacrity, declaring “[i]t seems clear that a class with over one thousand members, as is the case here, easily satisfies the numerosity requirements of Rule 23(a)(1).”<sup>178</sup> While the actual number of putative class members is a consideration, the impracticality of joinder of those members, owing to geographic dispersal, is of greater import.<sup>179</sup>

Here in Dehon, the case for numerosity was made even more compelling because the members of the putative class were scattered throughout not only the United States, but the world (remember, the predecessor Arthur Little firm was an international consultancy).<sup>180</sup> Thus, the court found that class certification here was appropriate because alternative procedures of joinder to a federal court action were not just impracticable, they were well nigh impossible.<sup>181</sup>

On this point of “geographic dispersal,” Dehon reminds us of a noteworthy feature of bankruptcy court jurisdiction. “[I]t should be remembered that the United States Bankruptcy Court operates with the benefit of nationwide service of process: ‘all that is needed is sufficient contacts with the United States, not the state where the bankruptcy case is pending.’”<sup>182</sup> This court’s jurisdiction, said Judge Boroff, extends to

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<sup>177</sup> Dehon, *supra*, 298 B.R. at 214. See Waste Management Holdings, Inc. v. Mowbray, 208 F.3d 288, 297-98 (1<sup>st</sup> Cir. 2000); Retired Chicago Police Ass’n v. City of Chicago, 7 F.3d 584, 598-99 (7<sup>th</sup> Cir. 1993).

<sup>178</sup> Id. at 214. Compare Dale Electronics (court certified a defendant class consisting of only thirteen members), 53 F.R.D. at 534; see also Citizens Banking Co. v. Monticello State Bank, 143 F.2d 261 (8<sup>th</sup> Cir. 1944) (certifying, under the predecessor to Rule 23, a twelve person class); In re Braniff Airways, 22 B.R. 1005, 1008 (Bankr. N.D. Tex. 1982) (certifying a defendant class of over 1000 members).

<sup>179</sup> Id. at 214. See DeMarco v. Edens, 390 F.2d 836, 845 (2<sup>nd</sup> Cir. 1968); Dale Electronics, *supra*, 53 F.R.D. at 534.

<sup>180</sup> Id. at 214.

<sup>181</sup> Id. at 214, quoting Dale Electronics, *supra*, 53 F.R.D. at 534.

<sup>182</sup> Id. at 214, quoting Integra Realty, *supra*, 179 B.R. at 268.

foreign defendants as well under the same contacts analysis.<sup>183</sup> Furthermore, a bankruptcy court can order notice to all class members as a condition of certification to ensure that due process requirements are met.<sup>184</sup>

Commonality was next on the court's agenda. As is well established, said Judge Boroff, commonality is satisfied if there are issues of law or fact common to the members of the class.<sup>185</sup> But this does not mean that all class members must have in common all questions of fact and law.<sup>186</sup> Despite factual differences between the members of the class, commonality can still exist.<sup>187</sup>

Here in Dehon the parties agreed that all of the putative class members had interests in the debtor's stock held for them or by them in a variety of plans. The plan administrator moved to subordinate all of those claims to the claims of the general unsecured creditors under Section 510 of the Code. "Given the nature of those claims, this Court can reasonably infer that certain defenses of the individual members of the putative class to Dehon's subordination strategy will be available to every other member," and commonality is thus established for the purposes of Rule 23.<sup>188</sup>

And what of the "typicality" of the claims or, in this case, the defenses of the putative class members? The Dehon court turned to this, and first clarified that, "[u]nlike the first two requirements under [Rule] 23(a), typicality is a condition of the

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<sup>183</sup> Id.; but cf. Stonington Partners, Inc. v. Lernout Hauspie Speech Products N.V., 310 F.3d 118 (3d Cir. 2002) (directing the bankruptcy court on remand to conduct choice of law analysis to accommodate parallel bankruptcy proceeding in Belgium).

<sup>184</sup> Id. See Fed. R. Civ. P. 23(d); In re Gap Stores, 789 F.R.D. 283, 292 (N.D. Cal. 1978).

<sup>185</sup> Id. at 214. Blake v. Arnett, 663 F.2d 906, 912 (9<sup>th</sup> Cir. 1981); Dale Electronics, supra, 53 F.R.D. at 536.

<sup>186</sup> Id. In re Broadhollow Funding Corp., 66 B.R. 1005, 1009 (Bankr. E.D.N.Y. 1986).

<sup>187</sup> Id. at 214. See also Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5<sup>th</sup> Cir. 1993) (holding that commonality existed for a class action ERISA claim despite the fact that at least four different pension plans were involved).

<sup>188</sup> Id. at 215.

representative, not the class.”<sup>189</sup> Typicality does not require a replication of all class members’ claims in the putative representative’s claim, but instead it may be achieved if all the claims belonging to the class arise from the same event or course of conduct, and are based on the same legal theory. “Typicality can be satisfied if the putative representative’s claims and legal theories do not actually conflict with other class members, thereby prejudicing their claims.”<sup>190</sup>

Given the state of the law, the court had no difficulty in concluding the claims held by Mr. Shapiro were typical of those held by his fellow ex-employees. Shapiro, of course a former Little employee himself, held filed a claim for nearly \$77,000 arising out of his stockholdings. The Dehon court anticipated that his defenses to Gray’s subordination lawsuit would be typical of his former coworkers.<sup>191</sup>

And what of other counterclaims or defenses that might or might not be available to Shapiro in this action? Such has not yet been asserted, noted the court, and it would not denigrate the typicality of Mr. Shapiro’s claims on things not yet asserted. Besides, if due process or class maintenance concerns later arise, the court could always cure factual or legal variations between class members by decertification, in whole or in part, or by the creation of sub-classes, as the situation warrants.<sup>192</sup> The typicality of the putative class representative’s claims thus assured, the bankruptcy judge now inquired as his individual capabilities to protect and serve the proposed class.

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<sup>189</sup> Id. at 215. See Edmondson v. Simon, 86 F.R.D. 375, 381 (N.D. Ill. 1980).

<sup>190</sup> Id. at 215. See also Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 57 (3<sup>rd</sup> Cir. 1994); Kline v. Security Guards, Inc., 196 F.R.D. 261, 265 (E.D. Pa. 2000).

<sup>191</sup> Id.

<sup>192</sup> Id. at 215. See also Boucher v. Syracuse University, 164 F.3d 113, 118 (2<sup>nd</sup> Cir. 1999); Barnes v. American Tobacco Co., 161 F.3d 1227, 140 (3<sup>d</sup> Cir. 1998); In re “Agent Orange” Prod. Liab. Litig., 818 F.2d 145, 163 (2<sup>nd</sup> Cir. 1987). It is routine for courts to exclude defendants from a class. See, e.g., Gerber v. Computer Assocs. Int’l, Inc., 303 F.3d 126, 130-31 (2<sup>d</sup> Cir. 2002) (noting in dictum district court’s exclusion of defendants and their affiliates from the plaintiff class); In re Worldcom Securities Litig., 219 F.R.D. 267, 275 n.3 (S.D.N.Y. 2003) (excluding from class defendants and affiliated persons and entities).

Here Dehon noted that adequate representation under Rule 23 has two prongs: 1) an assurance of the ability of both the class representative and its counsel to conduct the litigation; and 2) an absence of conflict between the class representative and the putative class members.<sup>193</sup> Significant in this inquiry was: whether the putative class representative has a substantial claim to defend; whether there existed any collusion between the putative class representative and the plaintiff; and whether the putative class representative had the resources to conduct the litigation fully.<sup>194</sup> Notably, some courts have held adequacy of resources to be of lesser import in light of their authority to remove the putative representative for cause.<sup>195</sup>

Here, Mr. Shapiro held a claim of \$76,398.53, “not an insignificant sum of money and certainly worth defending; he would, it seems, be highly motivated.”<sup>196</sup> There was no evidence of any collusion, and counsel for the putative representative was a highly skilled and well regarded firm in the litigation of bankruptcy matters. And remember, said the court, Mr. Shapiro has at least \$50,000 at his disposal, courtesy of Mr. Gray, with which to conduct the defense of the class action.<sup>197</sup>

The resources are clearly there, declared Judge Boroff, and should a conflict or other problem develop later in the litigation, “the Court has... the tools with which to properly protect... the affected class members.”<sup>198</sup>

In sum, the Dehon bankruptcy court concluded that every test found under Rule 23 for the class and its representative was well met. Now it was time to address the more

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<sup>193</sup> Id. at 215. See also Integra Realty, *supra*, 179 B.R. at 270-71.

<sup>194</sup> Id. See also In re Cardinal Indus., Inc., 105 B.R. 834, 644 (Bankr. S.D. Ohio 1989).

<sup>195</sup> Id. See also TJX Companies, *supra*, 212 F.R.D. at 47.

<sup>196</sup> Id. at 216.

<sup>197</sup> Id. at 216.

<sup>198</sup> Id. at 216.

vigorously contested issue of the shape of the class, as either of the mandatory or of the opt-out variety.<sup>199</sup>

The bankruptcy court observed that under Rule 23(b)(1)(A), certification of a mandatory class is authorized if separate actions run the risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.<sup>200</sup> Alternatively, under Rule 23(b)(1)(B), a mandatory class action may be maintained if separate actions would create the risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.<sup>201</sup>

Here, Mr. Gray met both tests. He was duty bound to review the validity of each claim filed in these cases. Those to which the plaintiff did not object would be allowed as a matter of law.<sup>202</sup>

Presently, the 1,176 unsecured claims are based exclusively on alleged stock repurchase rights. Yet they are interrelated. Were some claims allowed and others disallowed based on the same theory of subordination, Mr. Gray would be compelled to bring every one of the stock repurchase claims before the court to obtain a ruling. Stare decisis would be of no value whatsoever. Further, the cost of bringing each and every

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<sup>199</sup> Id.

<sup>200</sup> Id. at 216, citing Fed. R. Civ. P. 23(b)(1)(A).

<sup>201</sup> Id., citing Fed. R. Civ. P. 23(b)(1)(B). See Pension Transfer Corp. v. Beneficiaries Under the Third Amendment to Fruehauf Trailer Corp. Retirement Plan, 319 B.R. 76 (entering judgment for fraudulent conveyance liability under Section 548 against multiple defendants, previously certified pursuant to Rule 23, as a mandatory defendant class, who benefited by an amendment made to the debtor's pension plan shortly before the bankruptcy).

<sup>202</sup> Id.

such claim before the court would impact and impair the distribution to each and every unsecured creditor in the case.<sup>203</sup>

For these reasons, Judge Boroff concluded that the “only practical approach to the disposition of the stock repurchase claims is to adjudicate whether they may be subordinated-once.” It is also the best way to protect the estate against unreasonable costs, and the best way to protect creditors of the estate from one another. Therefore, the class will be a mandatory one, ruled the court.<sup>204</sup>

The final issue for the Dehon court was one of money, i.e., was the \$50,000 “war chest” offered by Gray sufficient to defray the litigation costs of the newly constituted class of defendants? Judge Boroff characterized this as a “rather novel issue” of how much estate property to allocate to the class representative for defending the class. Although the administrator claimed that \$50,000 would be enough, the putative representative was alarmed by that limitation.<sup>205</sup>

The court viewed the administrator’s offer as generous, given the singular issue before the putative class was whether or not the stock repurchase claims should be subordinated. “Clarity is often better achieved after events have unfolded rather than before,” said the court, and Mr. Gray cannot reasonably prognosticate the cost to either party of dealing with unasserted counterclaims. Notably, the administrator had not proposed a cap on his costs of prosecuting the class.<sup>206</sup>

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<sup>203</sup> Id. at 216-17. Parenthetically, the court opined that many courts have held that stare decisis alone will not suffice to create a mandatory class. Id. See La Mar v. H&B Novelty & Loan Co., 489 F.2d 461, 467 (9<sup>th</sup> Cir. 1973); but see In re Alexander Grant & Co. Litig., 110 F.R.D. 528, 538 (S.D. Fla. 1986). The Alexander Grant court disagreed with the restrictive view of Rule 23(b)(1)(B) taken by the La Mar court, noting if mere stare decisis alone was not enough to certify a mandatory class then the subsection would be reduced to “mere surplusage.” Id. at 216 n.11. See Alexander Grant & Co., supra, 110 F.R.D. at 538.

<sup>204</sup> Id. at 216.

<sup>205</sup> Id.

<sup>206</sup> Id. at 216.

Therefore, the bankruptcy court found “no reason” to artificially delimit the compensation to the defendant class at this preliminary stage. After all, observed Judge Boroff, “[b]ankruptcy courts are quite expert in evaluating requests for reimbursement and compensation” in bankruptcy cases.<sup>207</sup> The court forecast that the class representative would be making a “substantial contribution” to the debtor’s estate, as that term is understood in bankruptcy, for reason that his services shall reduce the costs of litigation, and likely shorten the time frame of the case. Indeed, Shapiro’s duties will be undertaken at the request of Gray, as the debtor’s representative.<sup>208</sup>

Given these apparent benefits, the former’s costs should be allowed in whatever reasonable amounts, as part of the normal process of professional fee applications made at a later stage.<sup>209</sup> To be sure, the Dehon court cautioned, this was not a “blank check;” any fee request by the class representative would be “closely review[ed]” in conformity with Bankruptcy Code’s strictures on professional compensation.<sup>210</sup> For all these good reasons, the Dehon court granted the request, and certified the defendant class.<sup>211</sup>

Dehon was a neat illustration of the defendant class at work before the bankruptcy court. It certainly will be a well respected precedent for some time. However, we have further authority from the circuit court level, and to that we now turn.

### *C. Weinman-The Tenth Circuit Speaks*

The most recent and relevant case allowing the certification of a defendant class in a bankruptcy-related matter is Weinman v. Fidelity Capital Appreciation Fund (In re

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<sup>207</sup> Id. at 217.

<sup>208</sup> Id.

<sup>209</sup> Id. at 217.

<sup>210</sup> Id. at 217. See 11 U.S.C. § 330 (fee applications).

<sup>211</sup> Id. at 217-18.

Integra Realty Resources, Inc.).<sup>212</sup> There the Tenth Circuit not only approved the use of Rule 23 to bring a class action, it permitted the still rare event of certifying a class of defendants, not plaintiffs, as is far more common.

The factual background of Integra is long and complex. But rather engage in a convoluted retelling of the tale, we can distill the facts down to only those essential for our discussion.

Integra, originally in the hotel business, expanded into chains of multistate restaurants in the 1980s. In a series of complicated investment banking maneuvers, it spun off the restaurant operation in 1988 by distributing a subsidiary's stock to over 5,000 Integra shareholders. In a masterstroke of precognition, the prospectus for the spinoff warned that if Integra encountered funding difficulties, the recipients of the subsidiary's stock might be forced to return those shares or their equivalent value to a bankruptcy trustee.

How true those words turned out to be, for in 1992, with its own stock devalued to pennies per share, Integra filed for Chapter 11. On that same day, the subsidiary's distributed stock was trading at nearly \$52 per share, after adjusting for stock splits.<sup>213</sup> Subsequently, Jeffrey A. Weinman was appointed trustee of a special trust, benefiting Integra's unsecured creditors, and tasked with recovering monies from all those who received shares in the 1988 spinoff.<sup>214</sup>

Trustee Weinman commenced an adversary proceeding to recover the value of the shares spun off, alleging, inter alia, that the transaction was an avoidable transfer under

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<sup>212</sup> 354 F.3d 1246 (10<sup>th</sup> Cir. 2004).

<sup>213</sup> Indeed, over the years of litigation, the per share price for the subsidiary's stock rose as high as over \$100 per share, split-adjusted. Id. at 1253.

<sup>214</sup> Id. at 1251-1254.

both federal and state law.<sup>215</sup> To facilitate that litigation, the trustee sought to certify a defendant class of over 6,000 potential shareholders. What followed was a long and winding road toward class certification, the reaching of an accord, and an ostensible settlement with the class. However, the path taken was full of twists, turns, and obstacles.

Again summarizing for sake of brevity, most class members never appeared nor objected to the relief sought against them. Yet a few of the more vociferous litigants either appeared, filed objections, or “opted-out” of the class, but with no discernable pattern. These diverse parties became the present appellants, and they and their multitude of issues finally arrived before the circuit court, subsequent to the bankruptcy court approving the class and a proposed settlement, the latter accord calling for holders of the subsidiary’s stock to repay approximately \$7 per share to the trustee.<sup>216</sup>

On the appeal, the Tenth Circuit had many issues to address. Paramount to this Article’s discussion was the court’s disposition of the matters pertaining to the legitimacy of the class action itself. On this point, the first major aspect was the propriety of the class certification herein. Writing for the panel, Circuit Judge Stephen H. Anderson agreed the question “lies at the heart of this case.”<sup>217</sup>

As a threshold matter, the court rejected the trustee’s allegation that the bankruptcy court’s certification order was unreviewable because it was interlocutory and thus mooted by the settlement. It is axiomatic, noted the circuit, that the court overseeing a class action retains the power to monitor the appropriateness of the certified class throughout the proceeding, and may even modify or decertify a putative class at any time

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<sup>215</sup> See 11 U.S.C. § 544, § 550.

<sup>216</sup> Weinman, *supra*, 354 F.3d at 1254-56.

<sup>217</sup> Id. at 1261.

before final judgment.<sup>218</sup> Moreover, the fact that various of these appellants had objected to class certification at the settlement fairness hearing preserved their rights to appeal.<sup>219</sup>

That done, Circuit Judge Anderson noted that appellate review of class certification is conducted pursuant to an abuse of discretion standard.<sup>220</sup> Furthermore, in the instant case, the heightened scrutiny required for “settlement-only” class certification, as found in Amchem Prods. Inc. v. Windsor,<sup>221</sup> was inopposite here, because class certification occurred before settlement negotiations even began.<sup>222</sup>

As established elsewhere in this Article, proper class certification under Rule 23 turns upon the four prerequisites of an appropriately defined class; numerosity, commonality, typicality, and fair and adequate representation.<sup>223</sup> Here, the appellants had challenged only the “fair and adequate representation” prong of the test, alleging that a mutual fund holding many of the subsidiary’s shares was hopelessly conflicted by its own manifold interests, divergent from that of its supposed class brethren. Not so, said the panel, finding that shareholder to be a fair and adequate class representation.<sup>224</sup>

The contours of the instant class thereby confirmed as just, the Tenth Circuit progressed to Rule 23’s next requirement. The federal rule demands the underlying cause of action be maintainable as a class, and the allowable categories are: 1) the prosecution of separate actions against individual class members would carry a risk of inconsistent

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<sup>218</sup> Id. at 1261. See Fed. R. Civ. P. 23c(1).

<sup>219</sup> Id. at 1261-62. See Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1145 (8<sup>th</sup> Cir. 1999); see also Namoff v. Merrill Lynch, et al. (In re Dennis Greenman Sec. Litig.), 829 F.2d 1539, 1542-43 (11<sup>th</sup> Cir. 1987) (an objection made during the course of litigation to either the nature of the class certification or settlement terms preserves the right to appeal the settlement).

<sup>220</sup> Id. at 1262, citing Fed. R. Civ. P. 23(b)(1). See also J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1287 (10<sup>th</sup> Cir. 1999).

<sup>221</sup> 501 U.S. 591, 620-21 (1997).

<sup>222</sup> Weinman, supra, 354 F.3d at 1262.

<sup>223</sup> Id. at 1262.

<sup>224</sup> Id. at 1262 and 1259-60.

judgments or an adjudication of some would pragmatically be dispositive of the rest of the class; 2) the party opposing the class has refused to act appropriately for the class; or 3) common questions of law or fact predominate over individual issues, and a class action is the superior means to a fair and efficient adjudication.<sup>225</sup> Here in Integra, the bankruptcy judge found a Rule 23 action could be maintained on either the first (separate actions risk inconsistent results) or the third (common questions predominate), and finally certified the class on the former ground.<sup>226</sup>

Now the appellants challenged that selection as erroneous, alleging that a certification on the basis of the domination of common fact and law issues would have permitted opting out.<sup>227</sup> The Tenth Circuit decreed the lower court's certification was correct, albeit on a basis that the bankruptcy judge might not have originally intended. Judge Anderson pointed out that certification on the "separate actions might lead to inconsistent results" rubric demands more than a facial chance that disparate judgments may result.<sup>228</sup> In the case at bar, that threat was not so clear cut, opined Judge Anderson.

Thus, the Tenth Circuit decided to move to surer ground. The panel decreed it more certain that "in the absence of class certification, the Trustee's first suit against a defendant or group of defendants could be dispositive of all remaining suits." The result would be that "[t]his first suit would thus decide the rights of absent shareholders without the class action's assurance that they be adequately represented."<sup>229</sup>

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<sup>225</sup> Id. at 1262. See Fed. R. Civ. P. 23(b)(1), (2), and (3), respectively.

<sup>226</sup> Id.

<sup>227</sup> Id. at 1263. To be sure, opting out is not available when a class is certified because separate actions would lead to inconsistent results. See Fed. R. Civ. P. 23(b)(1) and 23c(2). Simply put, you can opt out of a "(b)(3) class," but not a "(b)(1) class."

<sup>228</sup> Id. at 1263-64. See Nat'l Union Fire Ins. Co. v. Midland Bancor, Inc., 158 F.R.D. 681, 687 (D. Kan. 1994).

<sup>229</sup> Id. at 1264.

Expanding upon the rationale for its decision, the Tenth Circuit was careful to note that the vast majority of courts have basically agreed that the mere threat of stare decisis consequences cannot compel class certification.<sup>230</sup>

But the instant case is different, wrote Judge Anderson. Here, there is much more than a mere chance of a preclusive effect. For instance, the first determination that the spinoff was a fraudulent conveyance would be conclusive, regardless of the specific identity of the recipient. These were passive stockholders, reminds the tribunal, and therefore their active defenses are few. Under these limited conditions, the initial legal rulings on the key issues would be unavoidably dispositive upon the cases of subsequent defendants. Such inevitability makes this case distinguishable, reasoned the Tenth Circuit.<sup>231</sup>

But appellants still argued that the bankruptcy court's creation of a mandatory class without opt-out rights under Rule 23 was improper as a violation of due process.<sup>232</sup> The panel disagreed. In its due process analysis, the circuit court differentiated this litigation on the grounds that the defendant stockholders were virtually indistinguishable. The trustee's claims here rise and fall upon Integra's general business transactions; "[t]he culpability of individual defendants is of no consequence in this analysis."<sup>233</sup> If this case had not been settled, and the court had declared the spinoff to be an avoidable transfer under the Bankruptcy Code or other applicable law, then judgments against individual defendants would have been set according to a universally applied formula or parameter,

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<sup>230</sup> Id. at 1264, quoting TJX Companies, supra, 212 F.R.D. at 42 (possibility of stare decisis repercussions, by itself, is not a sufficient basis to certify a class; otherwise, the remainder of Rule 23 would be rendered "superfluous.")

<sup>231</sup> Id. at 1264. Almost parenthetically, the circuit court observed that the trustee would obviously bring all cases, even individually, in the same venue, thereby increasing exponentially the likelihood of preclusive effect. Id. at 1264.

<sup>232</sup> Id. at 1264-65. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

<sup>233</sup> Id. at 1265.

calculated upon the basis of how many shares the party received in the spinoff.

Certifying a class in these circumstances does not violate due process, declared the Tenth Circuit.<sup>234</sup>

For all these good and varied reasons, the Tenth Circuit found the bankruptcy court's certification of a class was not an abuse of discretion, including the lower court's designation of a mandatory, rather than an opt-out, class. The panel affirmed on the basis that this class certification ran true to the requirements of Rule 23, particularly because it afforded judicial economy by limited opt-outs which would have degraded the efficacy of the contemplated class litigation.<sup>235</sup>

Weinman not only brings us to the present day, it exemplifies that we have now come full circle. After an arduous journey, the bankruptcy forum recognizes the legitimacy and efficacy of the class action by plaintiff/creditors. Our travels are complete (at least for now) with this modern recognition of the defendant class in Rule 23 litigation in bankruptcy cases. Indeed, the Tenth Circuit's decision might be the vanguard of an entirely new trend in bankruptcy litigation.

### Conclusion

In the complexity of everyday bankruptcy practice, as parties and their counsel labor so hard to resolve the manifold ramifications of the debtor/creditor relationship, we sometimes forget that our battles are, after all, fought in a court of law, and in fact a federal forum. Because the bankruptcy courts are such an integral part of our federal

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<sup>234</sup> Id. at 1265.

<sup>235</sup> Id. at 1266. While not precisely on point with the crux of this Article, we commend to the reader for further edification of these related and important points the Tenth Circuit's analysis of the underlying class settlement as fair and adequate, id. at 1266-69, the rights of class members to appeal, id. at 1256-1258, the panel's discussion of the "law of the case" doctrine, id. at 1258-59, and finally, the analysis of Rule 23's requirements for the adequacy of class representation and notice to class members. Id. at 1259-61.

judiciary, we must remember that the tools of federal litigation are integrated into the insolvency court, and deeply so at that.

A significant example of that is the integration of the class action, Rule 23, and the class proof of claim into bankruptcy practice. For all its pros and cons, the class action is a fixture in the federal court system, and if recent developments are any sign, class litigation may become even more deeply imbedded in federal litigation. If anything, the growth of class actions within the context of bankruptcy proceedings is expected, natural, unavoidable, and, quite possibly, beneficial. After all, is not an essential touchstone of bankruptcy the concept of bringing together an outsized group of (potentially) underrepresented creditors to sort out their numerous claims against the insolvent entity? Is it not so that routine bankruptcy proceedings reflect issues of numerosity, commonality, common facts, and common questions of law? Therefore, since the fundamentals of the bankruptcy process possess a powerful identity with the characteristics of class claimants and their actions, the bankruptcy system should embrace the class action, which neatly fits into its established framework.

Consider also that taking refuge in the bankruptcy court is not immunization from liability nor litigation. When a debtor is properly called to account for an alleged wrong, the Bankruptcy Code works only to change the forum for, not the reality of, litigation. Those alleging injury and seeking recompense have every right to take full advantage of Rule 23 in all its aspects in bankruptcy cases, just as they would outside the insolvency court. Indeed, “the more things change, the more they stay the same,” and that is simply just and fair.

If one permits litigation pursuant to Rule 23 to be undertaken, then likewise the natural precursor to that litigation, the class proof of claim, must be allowed. Creditors file ten of thousands of proofs of claim every day; thankfully, class actions are not initiated at the same breathtaking pace, but they exist nonetheless. The unerring logic is that if you permit both constituent elements, then the device born of a combination of the two is similarly lawful. Without a doubt, the higher courts have recognized this, and the validity and, in fact, the utility, of the class proof of claim is now beyond question.

The foregoing neatly disposes of the class action vis-à-vis the complaining creditor parties and the class proof. And what of the burgeoning practice of naming a defendant class and having a debtor-in-possession or a trustee conduct litigation against such a group? While arrayed neatly in counterpoise, nothing really changes, nor should it. Simply put, if the debtor can be sued by a class, why shouldn't the debtor or trustee be allowed to sue a class? Rule 23 and all its devices are available to everyone in federal court who qualifies, so the validity of the defendant class in any bankruptcy-related action is without question. The rules are the same; we have equally applied Rule 23, all of its prerequisites, all of its conditions, and all of its benefits to defendant classes in bankruptcy litigation. Our early success in this relatively new endeavor have demonstrated it is eminently reasonable and workable, and so we shall continue.

The class action is an immutable part of our federal court system. Even as he signed the Class Action Fairness Act of 2005 (“CAFA”)<sup>236</sup> into law, the President, often at odds with the legal profession, proclaimed that “[c]lass-actions can serve a valuable purpose in our legal system...[w]hen used properly, class-actions make the legal system

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<sup>236</sup> Pub. L. No. \_\_ (February 18, 2005), *see* S. Bill 5 (109<sup>th</sup> Cong., 1<sup>st</sup> Sess.) (aimed at bringing *interstate* class actions into federal courts, it makes significant changes to Title 28, the Judicial Code, in the main by expanding federal court jurisdiction to encompass such litigation).

more efficient and help guarantee that injured people receive proper compensation.<sup>237</sup> To be sure, bold words from the President, and ones that validate nearly everything we have said herein.

In closing, class actions and Rule 23, for both plaintiff and defendant classes, have proven their efficacy and their value, time and again. We will continue to employ them to maximum effect to obtain just results in bankruptcy cases. In bankruptcy, the class action is here to stay.

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<sup>237</sup> “President Signs Class-Action Fairness Act of 2005,” White House Home Page (February 18, 2005), available at [www.whitehouse.gov/news/releases/2005/02/](http://www.whitehouse.gov/news/releases/2005/02/).