



5TH CIRCUIT BANKRUPTCY BENCH-BAR CONFERENCE

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BANKRUPTCY CLASS ACTIONS

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1. BANKRUPTCY COURT JURISDICTION:

a. *Wilborn v. Wells Fargo Bank, N.A. (Matter of Wilborn)*, 609 F.3d 748, 754 (5th Cir. 2010) (“[I]f bankruptcy court jurisdiction is not permitted over a class action of debtors, Rule 7023 is virtually read out of the rules. This would ascribe to Congress the intent to categorically foreclose multi-debtor class actions arising under the Bankruptcy Code without a clear indication of such intent . . . We hold therefore that the bankruptcy court has authority to certify a class action of debtors whose petitions are filed within its judicial district provided that the prerequisites for a class under Rule 23 are satisfied.”)

b. Nationwide Class Permissible?

Fifth Circuit

i. Yes

Cano v. GMAC Mortgage Corp. (Matter of Cano), 410 B.R. 506 (Bankr. S.D. Tex. Aug. 10, 2009) (Yes, with a compilation of prior decisions holding both ways);

ii. Maybe

Wilborn v. Wells Fargo Bank, N.A. (Matter of Wilborn), 609 F.3d 748, 754 n.9 (5th Cir. 2010) (noting courts’ disagreement about whether a bankruptcy court may exercise jurisdiction over a nationwide class of debtors).

Other Circuits

iii. Yes

In re Haynes, 2014 WL 3608891, at *7 (Bankr. S.D.N.Y. July 22, 2014) (Yes);

Bank United v. Manley, 273 B.R. 229 (N.D. Ala. Nov. 29, 2001) (Yes);

In re Noletto, 244 B.R. 845 (Bankr. S.D. Ala. Feb. 15, 2000)(Yes);

Sims v. Capital One Fin. Corp. (In re Sims), 278 B.R. 457 (Bankr. E.D. Tenn. May 8, 2002) (Yes);

Conley v. Sears, Roebuck & Co., 222 B.R. 181 (D. Mass. May 1, 1998) (Yes).

iv. No

Barrett v. AVCO Financial Servs. Mgmt., Co., 292 B.R. 1 (D. Mass. Apr. 17, 2003) (No, discharge and automatic stay litigation is limited to courts “issuing” the order.);

Beck v. Gold Key Lease, Inc. (In re Beck), 283 B.R. 163 (Bankr. E.D. Pa. Aug. 6, 2002) (No, discharge and automatic stay litigation is limited to courts “issuing” the order.);

Cline v. First Nationwide Mortgage Corp. (In re Cline), 282 B.R. 686 (W.D. Wash. July 11, 2002) (No based upon policy issues);

Wells Fargo Bank v. Singleton (In re Singleton), 284 B.R. 322 (D.R.I. July 3, 2002) (No, discharge and automatic stay litigation is limited to courts “issuing” the order.);
Williams v. Sears, Roebuck & Co., 244 B.R. 858 (S.D. Ga. Jan. 19, 2000) (No based upon 28 U.S.C. § 1334(e) (exclusive jurisdiction of property of the estate));
Simmons v. Ford Motor Credit Co. (In re Simmons), 237 B.R. 672 (Bankr. N.D. Ill. Feb. 9, 1999) (No based upon policy issues).

2. REQUIREMENTS FOR CERTIFICATION OF A CLASS:

- a. *Rule 23(a)* — applicable to all class actions
 - i. Numerosity (23(a)(1))- requires that the class be so numerous that joinder of all members is impracticable. There is no rule as to what specific number of class members is required for certification. The proper focus is whether joinder of all members is practicable in light of the size and other relevant factors.
 - A. Must generally provide some evidence or a reasonable estimate of the number of class members (70 - 100 is generally sufficient).
 - B. Is joinder of all members practicable.
 - C. Interest of judicial economy.
 - D. Does the class involve small individual claims.
 - E. Ease of identification of members.
 - ii. Commonality (23(a)(2))- requires that there be questions of law or fact common to the class. The threshold of ‘commonality’ is not high.
 - A. Requirement is easily met in most cases.
 - B. Need only show that there is at least one issue whose resolution will affect all or a significant number of putative class members.
 - C. *But see In re Patrick*, 2013 WL 951704, at *10 (Bankr. M.D. Pa. Mar. 11, 2013) (denying certification of a class based on alleged wrongful filing of secured claims because injury suffered would be potentially different for each individual class member).
 - iii. Typicality (23(a)(3)) - requires the representative parties to have claims or defenses that are typical of the claims or defenses of the class.
 - A. Test is not demanding.
 - B. Typicality is generally satisfied where the representative plaintiffs’ claims arise out of the same event or course of conduct as the other members’ claims and are based on the same legal theory.
 - C. Do the class representative’s claims have the same essential characteristics of those of the putative class.
 - D. Rational is that a plaintiff with typical claims will pursue his or her own self-interest in the litigation, and in so doing, advance the interests of the class members.
 - E. *See Alakozai v. Chase Inv. Servs. Corp.*, 2014 WL 5660697, at *13 (C.D. Cal. Oct. 6, 2014) (denying certification of a class because the named plaintiff’s bankruptcy filings created defenses unique to the individual).
 - iv. Adequate Representation (23(a)(4)) - requires a finding that the representative parties will fairly and adequately protect the interests of the class.

- A. Class representatives must possess a sufficient level of knowledge and understanding to be capable of controlling and prosecuting the litigation, but need not be legal scholars and may rely upon counsel as any other client would.
 - B. Class representative may not have interests antagonistic to the other class members.
 - C. Class counsel must be competent to prosecute the class action, sufficiently zealous and free of conflicts with the members of the class.
 - D. For the class representative:
 - 1) Problem of settling out;
 - 2) Must understand the class mechanism and the claims presented;
 - 3) No conflict of interest with the class members.
 - 4) Where the class is built on a fraud claim, the credibility of the named plaintiff is especially important. *Vincent v. Money Store*, 2015 WL 412895, at *7 (S.D.N.Y. Feb. 2, 2015) (rejecting certification where named plaintiffs had history of bad faith bankruptcy filings), *appeal docketed*, No. 15-1891 (2d Cir. June 11, 2015).
 - E. For class counsel:
 - 1) Obligation to notify the court of any proposed settlement.
 - 2) Must protect against overbroad releases.
 - 3) Fees v. recovery - must settle class claims first.
 - 4) Include incentive awards for class plaintiffs.
 - 5) Adequacy of representation flows to the class v. the class representatives.
- b. *Rule 23(b)* - Once all the elements of 23(a) have been met, Plaintiffs must satisfy one or more of the three prongs of 23(b) for certification.
- i. Rule 23(b)(1)(A)
 - A. A class may be maintained if the prosecution of separate actions by or against individual members of the class would create the risk of inconsistent or varying adjudications which would thereby create incompatible standards of conduct for the party opposing certification.
 - B. Generally applies to lawsuits seeking injunctive or declaratory relief.
 - C. Contrary rulings by different courts could create a situation where a party may be ordered to engage in irreconcilable conduct.
 - D. Mere fact that some plaintiffs prevail and some lose in separate lawsuits does not justify (b)(1)(A) certification.
 - E. A request for money damages is not evidence of a potential irreconcilable conduct.
 - F. *See In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1264 (10th Cir. 2004) (reviewing the bankruptcy court’s certification of a class under both Rule 23(b)(1)(A) and Rule 23(b)(1)(B), holding that (b)(1)(A) certification was not proper, because it “requires that there be more than the mere possibility that inconsistent judgments and resolutions of identical question of law would result if numerous actions are conducted instead of one class action.”)
 - ii. Rule 23(b)(1)(B)
 - A. Mandatory “limited fund” certification.
 - B. Designed to preserve a limited fund for the entire class against the individual claims of class members, which claims might otherwise exhaust the limited fund and thereby leave subsequent plaintiffs with no remedy.

- C. Does not provide class members with an automatic right to opt-out of the class (discretionary with the court).
- D. Commonly utilized to avoid an unfair preference for the early claimants at the expense of later claimants.
- E. *Compare In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1264 (10th Cir. 2004) (upholding the bankruptcy court’s certification of a class under (b)(1)(B) where “fraudulent transfer and unlawful dividend claims against one defendant shareholder would present more than the mere possibility of a stare decisis effect on future dividends.”), with *Tilley v. TJX Companies, Inc.*, 345 F.3d 34, 42 (1st Cir. 2003) (vacating a district court’s certification of a class under (b)(1)(B), holding “class certification based solely on the prospect of stare decisis effect is improper” and requiring a “stare decisis plus” standard for certification).

iii. Rule 23(b)(2)

- A. A class may be maintained if 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.
- B. Subsection (b)(2) class actions are limited to those class actions seeking primarily injunctive or corresponding declaratory relief.
- C. Because a (b)(2) class must be homogeneous and cohesive, a class can be certified under subsection (b)(2) only where the defendant has acted in the same way toward all members of the class, or has acted on grounds applicable to all members of the class.
- D. Pattern and practice cases.
- E. Monetary damages must only be incidental - capable of calculation by objective standards.
- F. *See Tilley v. TJX Companies, Inc.*, 345 F.3d 34, 40 (1st Cir. 2003) (holding that defendant classes cannot be certified under Rule 23(b)(2) grounds).

iv. Rule 23(b)(3)

- A. A class may be maintained if the questions of law or fact common to the class members predominate over any questions affecting only individual members and the class action is superior to other available methods for fairly and efficiently adjudicating the controversy.
 - 1) “Predominance” is similar, but more demanding than the “commonality” requirement of 23(a).
 - 2) Predominance tests whether proposed classes are sufficiently cohesive to warrant determination by representation and requires the court to assess how the case will be tried by identifying the substantive issues that will control the outcome, assess the issues which will predominate and then determine whether the issues are common to the class.
 - 3) The most common factor destroying certification is the necessity for individualized damage determinations, thereby failing the predominance test.
 - 4) *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013) (noting Rule 23(b)(3) is an “adventurous innovation” that requires a predominance criterion more demanding than that found in 23(a)).

- 5) See generally *Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)*, 432 B.R. 671 (Bankr. S.D. Tex. 2010) *aff'd* 695 F.3d 360 (5th Cir. 2012).

3. CERTIFICATION STANDARDS VARY BY DISTRICT:

- a. Fifth Circuit
- i. *M.D. ex rel. Stuckenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012) (rigorous analysis required);
 - ii. *In re Entergy New Orleans, Inc.*, 353 B.R. 474, 478 (Bankr. E.D. La. 2006) (reviewing methods for class certification in the Fifth Circuit and comparing it to other Circuits).
- b. Supreme Court
- i. *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013);
 - ii. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013);
 - iii. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).
- c. Other Circuits
- i. *Garcia-Rubiera v. Calderon*, 570 F.3d 443 (1st Cir. 2009);
 - ii. *Monique Sykes, et al. v. Mel S. Harris and Assocs. LLC*, 780 F.3d 70 (2d Cir. Feb. 10, 2015);
 - iii. *Shahriar v. Smith & Wollensky Restaurant Group, Inc.*, 659 F.3d 234 (2d Cir. 2011);
 - iv. *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3d Cir. 2012);
 - v. *Brown v. Nucor Corp.*, 576 F.3d 149 (4th Cir. 2009);
 - vi. *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 844 (6th Cir. 2013) *cert. denied sub nom. Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014);
 - vii. *Spano v. The Boeing Co.*, 633 F.3d 574 (7th Cir. 2011);
 - viii. *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171 (8th Cir. 1995);
 - ix. *Evon v. Law Offices Of Sidney Mickell*, 688 F.3d 1015 (9th Cir. 2012);
 - x. *D.G. ex rel. Stricklen v. DeV Vaughn*, 594 F.3d 1188 (10th Cir. 2010);
 - xi. *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009).

4. DEFENSES AVAILABLE FOR OPPOSING CLASS CERTIFICATION:

- a. Rule 23 Requirements.
- i. Plaintiffs' claims fail under predominance requirement of Rule 23(b)(3) where the Plaintiffs fail to link their damages model directly to the theory of liability and, therefore, cannot establish that damages are susceptible of measurement across entire class. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013).
 - ii. Plaintiffs' claims fail under the predominance and superiority inquiries of Rule 23 because individual issues for each class member, particularly with respect to damages, override class concerns. *Wilborn v. Wells Fargo Bank, N.A. (Matter of Wilborn)*, 609 F.3d 748 (5th Cir. 2010).
 - iii. Plaintiffs' claims fail the Rule 23(b)(2) predominance test "because individual issues for each class member, particularly with respect to damages, override class concerns when we consider how the case may be tried", and fails the Rule 23(b)(3) test because the monetary relief sought does not flow directly/automatically from a determination of liability. *Gilliland v. TSYs (In re Gilliland)*, 474 B.R. 482 (Bankr. N.D. Miss. July 6, 2012).
- b. Jurisdiction.
- i. Nationwide class action cannot be certified for civil contempt claims as only the court

where the contempt occurred has jurisdiction to issue a civil contempt award. *In re Death Row Records*, No. ADV. 10-02574, 2012 WL 952292 at *12 (B.A.P. 9th Cir. Mar. 21, 2012) (citing Bankruptcy Rule 9014);

- ii. *But see In re Haynes*, No. 11-23212 (RDD), 2014 WL 3608891, at *7 (Bankr. S.D.N.Y. July 22, 2014) (finding that enforcement of discharge injunctions and automatic stay is not limited to the issuing court and, therefore, can form the basis for a nationwide class).
- c. Standing/Conflict of Interest.
- i. Chapter 7 Trustee had a sufficient stake in the outcome of the proceeding to confer standing and fiduciary duties of Chapter 7 Trustee were not incompatible with being a class representative. *In re Death Row Records*, No. ADV. 10-02574, 2012 WL 952292 at *13 (B.A.P. 9th Cir. Mar. 21, 2012).
- d. Class Representative Has Individual Defenses.
- i. Plaintiff's claim is subject to unique defense (waiver, arbitration, consent, 12(b)(6) merit defenses) that destroys the ability to satisfy the typicality requirement. *Sandlin v. Ameriquest Mortgage Co., Inc. (In re Sandlin)*, 2010 WL 4260030 at *7 (N.D. Ala. S. Div. Oct. 21, 2010).
- e. Adequacy of Representation.
- i. Adequacy of counsel and class representative is not established. *Sandlin v. Ameriquest Mortgage Co., Inc. (In re Sandlin)*, 2010 WL 4260030 at *8-*9 (N.D. Ala. S. Div. Oct. 21, 2010);
 - ii. Alleged wrong action is different for each class claimant, as distinguished from alleged wrong based upon a general policy;
 - iii. "Serious concerns" about named plaintiff's credibility precluded class certification for fraud claim where plaintiff had a history of dismissed bad faith bankruptcy filings. *Vincent v. Money Store*, 2015 WL 412895, at *6 (S.D.N.Y. Feb. 2, 2015); *appeal docketed*, No. 15-1891 (2d Cir. June 11, 2015).
 - iv. *Alakozai v. Chase Inv. Servs. Corp.*, 2014 WL 5660697, at *13 (C.D. Cal. Oct. 6, 2014) (Named plaintiff was an inadequate class representative where he failed to disclose the class action in his bankruptcy filings and failed to disclose the revocation of his state insurance license.).
- f. Fail Safe Class.
- i. Definition: "A fail-safe class is a class whose membership can only be ascertained by a determination of the merits of the case because the class is defined in terms of the ultimate question of liability." *Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)*, 695 F.3d 360, 369-70 (5th Cir. 2012) (approving fail safe class).
 - ii. Such a class, by definition, shields the plaintiff from an adverse decision because the class members either win or are not in the class.
 - iii. There is a circuit split regarding the permissibility of fail safe classes. The Sixth and Seventh Circuits preclude certification of any fail safe class, while the Fifth and Ninth Circuits have declined to issue such a blanket prohibition. *Zarichny v. Complete Payment Recovery Servs., Inc.*, 2015 WL 249853, at *13 (E.D. Pa. Jan. 21, 2015) (disallowing Fail Safe Class and discussing circuit split).

g. Offer of Judgment.

- i. *Vadai v. Dun & Bradstreet Credibility Corp.*, 302 F.R.D. 308 (S.D.N.Y. Sept. 2, 2014) (TCPA class action mooted by company's offer of judgment of \$7,500 with injunction preventing company from placing any automated calls to consumer's cell phone numbers).

5. CERTIFICATION GRANTED CASES:

Fifth Circuit

- a. *Rodriguez v. Countrywide Home Loans, Inc. (Matter of Rodriguez)*, 695 F.3d 360 (5th Cir. 2012) (affirming the certification of the injunctive class);
- b. *Mounce v. Wells Fargo Home Mortg., Inc. (In re Mounce)*, 390 B.R. 233, 241 (Bankr. W.D. Tex. 2008);
- c. *Harris v. Washington Mutual Home Loans (In re Harris)*, 297 B.R. 61 (Bankr. N.D. Miss. July 3, 2003), *aff'd Harris v. Washington Mut. Home Loans, Inc. (In re Harris)*, 312 B.R. 591 (N.D. Miss. 2004).

Other Circuits

- d. *In re Biery*, 2015 WL 8608804 (Bankr. E.D.Ky., Dec. 11, 2015) (class certified in a contested matter on ground that common questions bearing on mortgagee's liability for punitive contempt sanctions predominated and that class litigation was superior method for addressing the common questions).
- e. *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 570 (S.D.N.Y. 2014) *reconsideration denied*, 2014 WL 1301857 (S.D.N.Y. Mar. 19, 2014) (allowing certification of nationwide class based on fraud and misrepresentation despite the possibility that the laws of multiple states might apply) *reconsideration denied Ebin v. Kangadis Food Inc.*, No. 13 CIV. 2311 JSR, 2014 WL 1301857, at *1 (S.D.N.Y. Mar. 19, 2014);
- f. *In re Truland Grp., Inc.*, 520 B.R. 197, 208 (Bankr. E.D. Va. Nov. 26, 2014) (finding class action mechanism was the superior method for settling WARN Act claims);
- g. *Brannan v. Wells Fargo Home Mortg., Inc. (In re Brannan)*, 2013 WL 85158 (Bankr. S.D. Ala. Jan. 8, 2013) (determining class could be certified for injunctive relief);
- h. *Mazzei v. Money Store*, 288 F.R.D. 45 (S.D.N.Y. Dec. 20, 2012); *Mazzei v. Money Store*, 308 F.R.D. 92 (S.D.N.Y. May 29, 2015)(class decertified post-trial);
- i. *In re Death Row Records, Inc.*, No. ADV. 10-02574, 2012 WL 952292 (B.A.P. 9th Cir. Mar. 21, 2012) (remanding matter to bankruptcy court to issue a certification order solely under Civil Rules 23(a) and (b)(2) and narrowing scope of class action by excluding claims for interest damages and claims for willful violation of automatic stay);
- j. *In re Montano*, 398 B.R. 47 (Bankr. D.N.M. Oct. 15, 2008). Class later decertified for failure to properly identify class members. *In re Montano*, 493 B.R. 852, 860 (Bankr. D.N.M. May 21, 2013);
- k. *In re Powe*, 278 B.R. 539 and 280 B.R. 728 (Bankr. S.D. Ala. May 10, 2002);
- l. *In re Harris*, 280 B.R. 876 (Bankr. S.D. Ala. Aug. 3, 2001);
- m. *In re Noletto*, 280 B.R. 868 (Bankr. S.D. Ala. July 25, 2001);
- n. *In re Sheffield*, 281 B.R. 24 (Bankr. S.D. Ala. Dec. 29, 2000);
- o. *Tate v. Nationsbanc Mortgage Corp. (In re Tate)*, 253 B.R. 653, 663 (Bankr. W.D. N.C. Oct. 2, 2000);
- p. *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181 (D. Mass. May 1, 1998);
- q. *In re Coggin*, 155 B.R. 934 (Bankr. E.D. N.C. June 17, 1993).

6. CERTIFICATION DENIED CASES:

Fifth Circuit

- a. *Wilborn v. Wells Fargo Bank (Matter of Wilborn)*, 609 F.3d 748 (5th Cir. 2010) (questions of law or fact common to the class members did not predominate and injunctive or declaratory relief was not appropriate for the class as a whole);
- b. *Gilliand v. Capital One Bank (In re Gilliland)*, 474 B.R. 482 (Bankr. N.D. Miss. 2012) (denying class certification based on variance of class representative's circumstances from those of other potential class members);
- c. *In re Entergy New Orleans, Inc.*, 353 B.R. 474 (Bankr. E.D. La. 2006) (denying class certification based on Rule 7023);
- d. *Thompson v. HomEq Servicing Corp.(In re Thompson)*, 351 B.R. 402 (Bankr. N.D. Miss. 2006) (denying class certification because the proposed class definition did not state a cognizable cause of action).

Other Circuits

- e. *Vincent v. Money Store*, 2015 WL 412895 (S.D.N.Y. Feb. 2, 2015) (denying class certification based on alleged fraud where court would have to consider the content of individual mailings delivered to each class member and where named plaintiff had credibility issues due to past bad faith bankruptcy filings), *appeal docketed*, No. 15-1891 (2d Cir. June 11, 2015);
- f. *Zarichny v. Complete Payment Recovery Servs., Inc.*, 2015 WL 249853, at *10 (E.D. Pa. Jan. 21, 2015) (finding that "fail safe class" would require extensive and individualized "mini-trials" in order to identify class members and therefore failed the ascertainability requirement);
- g. *Alakozai v. Chase Inv. Servs. Corp.*, 2014 WL 5660697, at *13 (C.D. Cal. Oct. 6, 2014) (declining to certify class and discussing class's failure to properly demonstrate typicality, adequacy of representation, predominance and superiority);
- h. *In re Patrick*, 2013 WL 951704, at *10 (Bankr. M.D. Pa. Mar. 11, 2013) (denying class certification for debtors alleging false filing of secured claims by creditor because of uncertainty of common injury and fail to show predominance and superiority);
- i. *In re Movie Gallery, Inc.*, 2012 WL 909501, at *5 (Bankr. E.D. Va. Mar. 15, 2012) (finding class certification was neither practical nor efficient when the Rule 7023 motion is not filed until after consideration of the case was "well underway.");
- j. *In re Motors Liquidation Co.*, 447 B.R. 150 (Bankr. S.D.N.Y. Jan. 28, 2011) (disallowing class certification of proofs of claim since individual issues would predominate);
- k. *In re Blockbuster Inc.*, 441 B.R. 239 (Bankr. S.D.N.Y. Jan. 20, 2011) (finding that proposed classes did not satisfy either commonality prerequisite to class certification or provision of certification rule allowing for class certification when common issues predominated);
- l. *In re Circuit City Stores, Inc.*, 439 B.R. 652 (E.D. Va. Oct. 29, 2010) *aff'd in part on other grounds sub nom. Gentry v. Siegel*, 668 F.3d 83 (4th Cir. 2012) (holding that bankruptcy court's findings that proposed class litigation of claims against debtors for alleged violations of state labor laws would be inferior to individual bankruptcy claims resolution process and would unduly complicate administration of other claims before court against debtors were not clearly erroneous, and therefore denial of motion to apply class certification rule to class proofs of claim was not abuse of discretion);
- m. *Sandlin v. AmeriquestMortg. Co. (In re Sandlin)*, 2010 WL 4260030 (Bankr. N.D. Ala. Oct. 21, 2010) (deciding to deny motion for class certification because debtors failed to establish typicality or adequacy of representation).

7. CLASS PROOFS OF CLAIM:

- a. A majority of courts allow class proof claims. *Matter of TWL Corporation*, 712 F.3d 886, 893 (5th Cir. 2013) (bankruptcy court had discretion whether to authorize application of Rule 23 to a proof of claim); *In re Entergy New Orleans, Inc.*, 353 B.R. 474 (Bankr. E.D. La. 2006); *but see Unioil v. Elledge (In re Unioil, Inc.)*, 962 F.2d 988 (10th Cir. 1992);
- b. Must comply with Rule 23/7023 either pre- or post-petition. The issue is timing (after an objection is filed?) and who carries the burden of requesting application from the court;
- c. May also need to comply with Rule 2019 if the proof of claim is in a chapter 11 case.

Fifth Circuit

- a. *In re Craft*, 321 B.R. 189 (Bankr. N.D. Tex. Jan. 26, 2005) (discussing burden on claimant to seek application of Rule 7023 in a timely manner and questions applicability of 2019 to class claims).

Other Circuits

- a. *In re Quick Cash, Inc.*, No. 15-11800-j11 (Bankr. D.N.M. 2015) (permitting class proofs of claim, discussing unresolved question of whether filing class proofs of claim is universally prohibited in the Tenth Circuit and discussing need to establish special procedures or special forms of notice of the deadline for filing class proofs of claim);
- b. *In re Dynege, Inc.*, 770 F.3d 1064, 1070 (2d Cir. 2014) (to assert a claim on behalf of a class in a contested matter, the class representative must first properly file a Rule 9014 motion in the bankruptcy court. Otherwise, the class representative does not have standing to act on behalf of a class as part of the bankruptcy proceeding);
- c. *In re Associated Cmty. Servs., Inc.*, 520 B.R. 650, 658 (Bankr. E.D. Mich. Oct. 30, 2014) (where late-filed class claim would unreasonably delay consideration of debtor's reorganization plan, court dismissed class claim as untimely filed);
- d. *In re MF Global Inc.*, 512 B.R. 757, 768 (Bankr. S.D.N.Y. July 17, 2014) (class proof of claim may be filed any time after the Chapter 11 case is filed, no need to wait for objection);
- e. *Gentry v. Siegel*, 668 F.3d 83 (4th Cir. 2012) (the bankruptcy court retains significant discretion to determine whether and when to apply the requirements of 7023 to the claim process);
- f. *In re Musicland Holding Corp.*, 362 B.R. 644 (Bankr. S.D.N.Y. Mar. 13, 2007) (detailed explanation of the legal basis and procedural requirements for filing a class proof of claim);
- g. *In re Birting Fisheries, Inc.*, 92 F.3d 939 (9th Cir. 1996) (per curiam) (filing of class proof of claim allowed by the Bankruptcy Code);
- h. *The Certified Class In The Charter Securities Litigation v. The Charter Company (In re The Charter Company)*, 876 F.2d 866, 873 (11th Cir. 1989) (class proof of claims allowed in bankruptcy);
- i. *Reid v. White Motor Corporation*, 886 F.2d 1462, 1472 (6th Cir. 1989) (while the rules permit the filing of a class proof of claim, compliance with Rule 7023 to commence a class action is required);
- j. *In re American Reserve Corporation*, 840 F.2d 487, 488 (7th Cir. 1988) (“Bankruptcy Rule 9014, which applies to ‘a contested matter in a case ... not otherwise governed by these rules’ states that ‘[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply.’ Rule 9014 thus allows bankruptcy judges to apply Rule 7023 — and thereby Fed. R. Civ. P. 23, the class action rule — to ‘any stage’ in contested matters.” Filing a proof of claim is a ‘stage.’”).

8. ARBITRATION:

- a. Mandatory arbitration clauses may preclude class action
 - i. Bankruptcy Court may have the authority to deny enforceability of arbitration provisions.
 - A. Core Proceedings – Discretion To Refuse To Compel Arbitration;
 - B. Non-Core Proceedings – No Discretion.
 - ii. Fifth Circuit
 - A. *In re Gandy*, 299 F.3d 489 (5th Cir. 2002) (bankruptcy court did not abuse its discretion in denying motion to compel arbitration);
 - B. *Matter of Nat'l Gypsum Co. (In re National Gypsum Co.)*, 118 F.3d 1056 (5th Cir. 1997) (discussing limits of court discretion).
 - iii. Other Circuits
 - A. *In re Belton*, No. 15 CV 1934 VB, 2015 WL 6163083, at *1 (S.D.N.Y. Oct. 14, 2015)(reversing *In re Belton*, 2014 WL 5819586 (Bankr. S.D.N.Y. Nov. 10, 2014) (denying motion to compel arbitration despite an otherwise valid arbitration agreement between the debtor and creditor)).

9. DEBTOR AS A MEMBER OF A NON-BANKRUPTCY CLASS:

- a. Many class actions allow or require an election by potential class plaintiffs;
- b. Bankruptcy may be filed prior to election deadline;
- c. Is the right to opt-in/opt-out property of the estate?;
- d. What if the proposed settlement includes a release of all counterclaims?;
- e. Is the automatic stay implicated?;
- f. Does 11 U.S.C. § 108 automatically extend the deadline to opt-in/opt-out?;
- g. What is the effect of confirmation and vesting/non-vesting of property of the estate?;
- h. *Santangelo v. Fairbanks Capital Corp. (In re Santangelo)*, 325 B.R. 874 (Bankr. M.D. Fla. Mar. 22, 2005) (The chapter 13 debtor's failure to opt-out found to be similar to a failure to file a claim within statute of limitations, and confirmation of the plan vested the claims/right in the debtor and property of the estate therefore was not implicated.).

10. ARTICLES/TREATISES:

- a. Kara Bruce, *Vindicating Bankruptcy Rights*, 75 Md. L. REV 102 (2015);
- b. Kara Bruce, *The Debtor Class*, 88 TUL. L. REV. 21 (2013);
- c. Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 1 (2008);
- d. COLLIER PAMPHLET ED. OVERVIEW 1334, Mathew Bender & Co., Inc., 2006, p. 6-7;
- e. Robert P. Wasson, Article: *Remedying Violations of the Discharge Injunction Under Bankruptcy Code 524, Federal and Non-Bankruptcy Law and State-Law Comports with Congressional Intent, Federalism and Supreme Court Jurisprudence for Identifying the Existence of an Implied Right of Action*, 20 BANKR. DEV. J. 77 (2003);
- f. Elizabeth Warren and Jay Westbrook, *Class Actions for Post-Petition Wrongs: National Relief Against National Creditors*, 22-2 ABIJ (March 2003);
- g. Corrine Ball & Michelle J. Meises, *Current Trends in Consumer Class Actions in the Bankruptcy Arena*, 56 BUS. LAW 1245 (May 2001).