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IN A CLASS BY ITSELF: THE CLASS PROOF OF CLAIM IN BANKRUPTCY PROCEEDINGS

Anthony Michael Sabino, Esq.*

INTRODUCTION

As the Bankruptcy Code enters its second decade, the still maturing bankruptcy court system continues to face numerous challenges in developing its jurisprudence. In the forefront of those controversies is the dispute now pending over the permissibility of class proofs of claims in bankruptcy proceedings. The first federal appellate court to address the issue in recent years ruled that class proofs of claims are impermissible.¹ The three federal courts that subsequently confronted the question proclaimed that the Bankruptcy Code and Rules do allow the filing of class proofs of claims in bankruptcy cases.² While the latter holding is increasingly embraced as the better view, the issue can be expected to remain controversial until either a greater number of appellate courts speak out, or the Supreme Court resolves the conflict. In addition, legislative enactments or judicial rulemaking remain viable possibilities for clarification of the matter.

The essence of the controversy is rather straightforward. The Bankruptcy Code of 1978,³ and its adjunct Bankruptcy Rules,⁴ permit a creditor to file a document with the bankruptcy court as a public record of a claim against the

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The author dedicates this article to the memory of the Honorable John J. Galgay, United States Bankruptcy Court for the Southern District of New York, in recognition of his many years of devoted service to that court and in acknowledgement of his contributions to its jurisprudence.

The views expressed in the Article are solely those of the author.


4. Presently being considered for revision, the current version of the Rules and the proposed amendments are reported at 126 F.R.D. 89 (1989); see also Sabino, New Bankruptcy Rules For The New Decade, 1 BANKR. L. REV. 22 (1990).
debtor. This document is known as a “proof of claim.” In the vast majority of cases, each creditor need only file a single proof of claim to establish his individual claims.

However, what of a claim that arises from a cause of action brought by a class of litigants? Our federal court system is well accustomed to class action litigation, having both crafted particularized rules of procedure and developed abundant case law designed to shepherd such cases through the process of adjudication. When members of a class of potential creditors of the debtor come before a federal bankruptcy court, how are they to present their claim?

In most of the earlier lower court decisions, opponents of the class proof contended this procedure was not contemplated by the statutes and rules, and, therefore, each claimant had to file an individual proof of claim. Yet the appellate courts have recently found that a putative class may indeed file a proof of claim as a class, a position the lower courts have now begun to follow.

The purpose of this article is to analyze the class proof controversy. First, the foundation of rules and bedrock principles governing class action litigation will be established, followed by a survey of the Bankruptcy Code and Rules pertinent to the claims process. Next, the earlier decisions on this issue will be presented. The modern circuit court decisions that espouse the current school of judicial thought will then be set forth, along with a discussion of the merits of the opposing positions. Finally, some suggestions shall be posited for those who contemplate filing a class proof of claim in a bankruptcy proceeding.

I. CLASS ACTIONS—THE RATIONALE FOR THE CLASS PROOF

In any discussion of the propriety of class proofs of claims in a bankruptcy proceeding, it must be remembered that such claims normally co-exist with a class action also brought in that same forum. In this context, 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.” The class proof is the necessary precursor to the class action, proclaiming its existence, its aggrieved members, and its chosen representatives. 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.

A. The Nature of the Class Action

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.”

5. BLACK’S LAW DICTIONARY 226 (5th ed. 1979).

6. 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
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." 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. 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. As so suc-


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; and (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).


8. The court, in Zenith Laboratories, Inc. v. Sinay (In re Zenith Laboratories), 104 Bankr. 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 (11th Cir. 1989), cert dismissed, 110 S. Ct. 3232 (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").

9. 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:

[1]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 persons may be without any effective redress unless they may employ the class-action device.
cinctly stated by Justice 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." 10

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." 11 For this reason, the class action occupies a unique niche in the scheme of alternatives available in multiple-party 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. 12

B. The Parameters of Rule 23

Turning to the specifics, 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 otherwise bring their claims separately, to effectively resolve their rights. 13 Consequently, the federal courts have held that Rule 23 is to be "construed most liberally in order to achieve its objectives." 14

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) 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 require-
ment); and (4) the interests of the class shall be fairly and adequately protected by the representatives (adequacy of representation requirement). 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. Accordingly, the Court has required that the class representative must "at all times adequately represent the interests of the absent class members." In addition to meeting the four conjunctive requirements of the first portion of Rule 23, a class action is maintainable only if it qualifies under one of the subdivisions of paragraph (b) of the class action rule. 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 controversy." In characterizing this as

16. General Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982); 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).
18. 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.
19. 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 adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class,
(B) 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 impede their ability to protect their interests; or
(2) the parties 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
pect of Rule 23, the Supreme Court emphasized that "the efficiency and economy of litigation . . . is a principal purpose of the procedure." 20

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. 21 The court 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. 22 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. 23 In this fashion, due process considerations are served. 24

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. 25 Such notice may inform class members of their opportunities

22. Such notice to all members of the class is mandatory only in class actions maintained under Rule 23(b)(3). Fed. R. Civ. P. 23(c)(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 of any stage in the proceedings. Fed. R. Civ. P. 23(d)(2).
24. 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 an 'opt out' or 'request for exclusion' form to the court." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).
to signify if the representation of their interests is fair and adequate, or to intervene to present their claims or defenses. Lastly, a class action cannot be dismissed or compromised without court approval and notice of the proposed action to all members of the class. In sum, "Rule 23 has built-in limitations against abuse."

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." Furthermore, courts have held that the party seeking to utilize the class action has the burden to establish his right to do so.

In Deposit Guaranty National Bank v. Roper, 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. These policy interests shape the courts' analysis as to whether the class action device is available to a group of plaintiffs in any given type of proceeding.

C. Califano and the Availability of the Class Action

An interpretation of the class action rule that is essential to this discussion was enunciated by the Supreme Court in Califano v. Yamasaki. In Califano,
the court rejected the argument that a statute authorizing suit by an “individual” precluded the class action. While substantively dealing with claims made pursuant to the Social Security Act, the Court’s applications of Rule 23 provides a foundation for many of the subsequent circuit court rulings on the validity of class proofs.

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. Pertinent here was plaintiff’s request for the district court below to certify a nationwide class. On this point, the Secretary argued that class relief was not available because the relevant statute merely authorized suit by any “individual.” Such language, asserted the Secretary, indicated that Congress contemplated a case-by-case adjudication of claims “incompatible with class relief.” The Secretary also referred to the otherwise sparse legislative history, which alluded to “a claimant” and “his claim.”

Analyzing the statutory provision at issue, Justice Blackmun wrote that it contained “no express limitation of class relief.” Instead, the statute prescribed only the usual type of civil action governed by the Federal Rules of Civil Procedure. The Federal Rules, which govern all civil suits, quite clearly allow a class action. Thus, the Court ruled that class relief is presumptively available unless Congress specifically intended that the Federal Rules should not apply. In the case before it, the Court held that Congress did not intend to exempt the action from the Federal Rules. The fact that the statute au-

34. Id. at 684.
35. Id. at 690.
36. Id.,
37. 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).
38. Id. at 698-99.
39. 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, 76th Cong., 1st Sess. 52 (1939) (containing the text of the pertinent legislative history).
41. Id. at 699-700; see also Fed. R. Civ. P. 1 (the Rules govern “in all suits of a civil nature”).
42. Califano, 442 U.S. at 700 (citing Fed. R. Civ. P. 23(b)(2)).
43. 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) (“If it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.”).
44. Califano, 442 U.S. at 700. The Court proclaimed:

We do not find in § 205(g) the necessary clear expression of congressional intent to exempt actions brought under that 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
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. 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.

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. Justice Blackmun wrote that class relief was wholly appropriate, notwithstanding the Secretary’s purported need for separate adjudications, as long as the class membership was limited to those with similar claims.

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. For these reasons, the Court agreed that Rule 23 was applicable.

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.

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.

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 the action in order to guard against improprieties. Likewise, safeguards exist to

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45. *Id.*
46. *Id.*
47. *Id.* at 700-01.
48. *Id.* at 701.
49. *Id.* (similar claims meaning claims arising from the same statutory cause of action).
50. *Id.; see also General Tel. Co. v. Falcon, 457 U.S. 147, 155 (1982)* (concluding, as the Court in Califano concluded, that the class action device is appropriate and economical where there are issues “common to the class as a whole”).
52. *Id.* at 702.
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. 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.

II. The Bankruptcy Code and Rules

The essence of a bankruptcy proceeding is the adjudication of the claims of creditors against the debtor. To facilitate this prime function, the Bankruptcy Code ("Code") and, to a greater extent, the Bankruptcy Rules provide the means by which creditors ensure their claims are made known to the debtor and other interested parties. The terms "claim" and "creditor" are expansively defined under the Code. A creditor is any "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."\(^{55}\)

A. The Definition of A Claim

Section 101 of the Code broadly defines a claim as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."\(^{56}\) The legislative history of section 101 emphasizes that the drafters contemplated the broadest possible definition of a "claim."\(^{57}\) Lest there be any doubt, the Supreme Court has pronounced, on more than one occasion, that "it is apparent that Congress desired a broad definition of a 'claim.' "\(^{58}\) As postulated by the Court of Appeals for the Second Circuit, Congress enacted this pervasive definition in the Code because it intended that

53. Id. at 700.
54. 11 U.S.C. § 101(9)(A) (1988). Provisions (B) and (C) of § 101(9) provide definitions of creditor in relation to an estate, and in relation to a community respectively.
56. The legislative history of the section states:
   The definition of paragraph (4) adopts an even broader definition of claim than is found in the present debtor rehabilitation chapters. . . . By this broadest possible definition, and by the use of the term throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.
57. Ohio v. Kovacs, 469 U.S. 274, 279 (1985) (citing legislative history); see also Kelly v. Robinson, 479 U.S. 36, 56 (1986) (Marshall, J., dissenting) ("The legislative history of the Code indicates that 'claim' was to be given the 'broadest possible definition.' ")
This expansive definition of "claim" significantly departs from the law pre-dating the enactment of the Code. Under the Bankruptcy Act of 1898, a claim had to be "provable" to be allowed. The legislative history explains that the current Code abolished the concept of "provability" because such a test would prevent certain creditors from participating in the distribution of the estate. Such a result would contravene the principal goal of the current law, which is to resolve all claims within the context of the bankruptcy proceeding. Judicial interpretations have also noted that the modern Code eliminated the concept of provability in favor of a "more expansive definition" of a claim. Thus, under the current Code, virtually all claims, regardless of type, are allowed in bankruptcy proceedings.

B. Filing the Claim

On the matter of filing a claim, section 501 of the Code is the principal statutory provision. That section simply states that a creditor or indenture


A provable debt was one which was defined in the statute as "a fixed liability, as evidenced by a judgment or instrument in writing, absolutely owing at the time of the filing of the petition whether then payable or not . . . ." Bankruptcy Act of 1898 § 63(a), 11 U.S.C. § 103 (1977) (repealed 1978).

The pre-1988 Act distinguished the concepts of provability and allowability since a provable debt was merely the basis for the owner's right to share in the estate; satisfying the provability requirement did not necessarily mean that the owner had a valid claim on the estate. Gilbert's Collier on Bankruptcy ¶ 1233-35 (J. Moore & E. Levi 4th ed. 1937).
63. See, e.g., In re Johns-Manville Corp., 57 Bankr. 680 (Bankr. S.D.N.Y. 1986). Prior to the 1978 reforms, a claim had to meet "threshold requirements of provability and allowability before qualifying for any distribution from the bankruptcy estate. . . . Thus even if certain kinds of contingent and unliquidated claims were provable, a strong possibility existed that they would not be allowed if they were incapable of reasonable estimation or liquidation." Id. at 686.
64. The modern concept of a claim in bankruptcy proceedings is neatly summarized by the leading treatise in this way:

The Code eliminates the concept of the provability of a claim. All claims within the definition of section 101 may be asserted against the debtor's estate. No distinction is drawn in the Code among claims of the kind previously described in . . . [the former Act]. Thus, regardless of its character, a claim or equity interest, proof of which is filed pursuant to section 501 is deemed to be allowed unless objection should be taken. 3 Collier on Bankruptcy ¶ 502.01[1] (15th ed. 1989).
trustee may file a proof of claim. If the creditor does not timely file a proof of claim, the debtor or the trustee may file the proof. In addition, in a reorganization proceeding, a proof of claim is deemed filed under section 501 if that claim appears in the schedules filed by the debtor, except when the claim is disputed, contingent, or unliquidated.

Section 501 is permissive only. It does not mandate that a creditor file a proof of claim. Instead, the section permits a filing where some purpose would be served, such as where a claim already listed by the debtor in its schedule of debts was incorrectly stated, or classified as disputed, contingent, or unliquidated. On other occasions, a filing may simply not be necessary. The legislative history of section 501 explains that the rules of procedure for the bankruptcy court will guide creditors as to when filing a proof of claim is necessary, as well as set time limits, format, and procedural matters.

A claim is automatically deemed allowed once it is filed, unless a party in interest objects. If an objection to a claim is made, the court, in most instances, upon notice and a hearing, will determine the amount of the claim to be allowed. Section 502(c) provides that any contingent or unliquidated claim which cannot be fixed or liquidated within a reasonable time must be

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Filing of proofs of claims or interests
(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.
(b) If a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim.
(c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.
(d) A claim of a kind specified in section 502(f), 502(g), 502(h) or 502(i) of this title may be filed under subsection (a), (b), or (c) of this section the same as if such claim were a claim against the debtor and had arisen before the date of the filing of the petition.
66. Id. at § 501(c); see also Bankr. R. 3004.

The filing of a proof of claim may not be necessary in no-asset litigation cases, where a secured creditor does not assert any claim against the estate and a determination of the claim is not made, and in situations where the asserted claim would be subordinated and the creditor would not recover from an estate. S. Rep. No. 989, 95th Cong., 2d Sess., 61 (1978); reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5847.
70. 11 U.S.C. § 502(a) (1988). A party in interest can be the debtor, trustee, or another creditor.
71. Id. § 502(b). Exceptions to § 501 are found in § 502(b)(1)-(9) and include, for example, unenforceable claims and unmatured claims.
estimated by the court for the purpose of allowing it.  

C. The Proof of Claim

Turning now to the pertinent Bankruptcy Rules, Rule 3001 governs the proof of claim. The Rule defines a proof of claim as a written statement setting forth a creditor's claim, which substantially conforms to the Official Forms promulgated with the Bankruptcy Rules. In describing who may execute the proof, the Rule provides that "[a] proof of claim shall be executed by the creditor or the creditor's authorized agent." Bankruptcy Rule 2019 determines who can be considered an "authorized agent" for a creditor. While the caption delimits the Rule to the representation of creditors in Chapter 9 and 11 cases, its usage seems to be more expansive, as evidenced by the frequent reliance placed upon it in the cases discussed below.

Bankruptcy Rule 2019 further demands that "every person or committee representing more than one creditor . . . file a verified statement" with the court describing the nature and amount of the claim and the facts that gave rise to it. Notably, this statement "shall include a copy of the instrument, if

74. Id. at 3001(a).
75. Id. at 3001(b). A proof of claim may also be filed by the debtor or the trustee. Bankr. R. 3004 (the debtor or trustee may file a proof of a claim in the name of a creditor).
76. Bankruptcy Rule 2019(a) which relates to representation of creditors and equity security holders in Chapter 9 and Chapter 11 reorganization cases requires the following data:
   In a chapter 9 municipality or chapter 11 reorganization case, except with respect to a committee appointed pursuant to § 1102 of the Code, every person or committee representing more than one creditor or equity security holder and, unless otherwise directed by the court, every indenture trustee, shall file a verified statement with the clerk setting forth (1) the name and address of the creditor or equity security holder; (2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition . . . . The statement shall include a copy of the instrument, if any, whereby the person, committee, or indenture trustee is empowered to act on behalf of creditors or equity security holders. A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision.
77. Contra In re Great W. Cities, Inc., 107 Bankr. 116, 120 n.16 (N.D. Tex. 1989) ("While many of the concerns relevant to application of Rule 2019 exist in the context of group representation in a chapter 7 proceeding, the statutory language mandates that the Rule does not apply in such a proceeding. This court declines to alter the express terms of the Rule.").
78. Specifically, the statement must set forth: (1) the name and address of the creditor; (2) the
any, whereby the person . . . is empowered to act on behalf of creditors.79 If the court determines that a party has failed to comply with the foregoing provisions of Bankruptcy Rule 2019, the court may refuse to permit that party to participate in the case.80 Furthermore, the court may hold invalid any authority held, or position taken, by such a person.81

Just as the procedures outlined above permit the filing of a claim, Bankruptcy Rule 3007 comes full circle in providing for objections to claims. Any party may file with the court a written objection to the allowance of a claim.82 Normally, an objection to a proof of claim is considered a "contested matter" rather than an "adversary proceeding."83 However, if "an objection to a claim is joined with a demand for relief of the kind specified in [Bankruptcy] Rule 7001, it becomes an adversary proceeding."84 At this juncture, the impact of

nature and amount of the claim; (3) a recital of the pertinent facts and circumstances in connection with the employment of the representative; and (4) with reference to the time of the employment of the putative representative, the amount of claims owed by that person, the times when acquired, the amounts paid therefor, and any disposition thereof. Bankr. R. 2019.

80. Id. at 2019(a).
81. Id. at 2019(b).
82. Rule 3007:

Objections to Claims

An objection to the allowance of a claim shall be in writing and filed with the court. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.

Bankr. R. 3007.

83. Bankr. R. 9014 advisory committee's note. The advisory committee note provides that "the filing of an objection to a proof of claim . . . creates a dispute which is a contested matter." Id; see also Reid v. White Motor Corp., 886 F.2d 1462, 1469 n.8 (6th Cir. 1989) (holding, in accordance with Bankruptcy Rule 9014, the filed proof of claim was a "contested matter" and not an "adversary proceeding"), cert. denied, 110 S. Ct. 1809 (1990); Note, Class Actions in Bankruptcy, 64 Tex. L. Rev. 791, 795-96 (1985) (indicating that an objection to a proof of claim initiates a contested matter, not an adversary proceeding).

The Bankruptcy Rules distinguish between a contested matter and an adversary proceeding. An adversary proceeding is similar to ordinary litigation outside bankruptcy. Bankr. R. 7001 advisory committee's note (Rules pertaining to adversary proceedings "are based on the premise that to the extent possible practice before the bankruptcy courts and the district courts should be the same."). A contested matter is any dispute other than an adversary proceeding. See Bankr. R. 9014 advisory committee's note. An adversary proceeding is conducted by formal pleadings and procedure, whereas a contested matter is conducted primarily through simple motions. Note, supra, at 811. This flexibility allows contested matters to be resolved more quickly by the bankruptcy judge.

Thus, the formal rules applicable to adversary proceedings are inappropriate to decide the relatively simple issues of a contested matter. 13 Collier on Bankruptcy ¶ 914.03, at 9-61 (15th ed. 1989). Therefore, issues that must be resolved quickly, such as a request for relief from an automatic stay, are considered contested matters. "The formalities of the adversary proceeding process and the time for serving pleadings are not well suited to the expedited schedule. The motion practice [of a contested matter] is best suited to such requests because the court has flexibility to fix hearing dates and other deadlines . . . ." Bankr. R. 7001 advisory committee's note.

84. Bankr. R. 3007. Bankruptcy Rule 7001 provides the following demands for relief:
the adversary proceeding in bankruptcy cases comes to the fore.

D. Adversary Proceedings

Part VII of the Bankruptcy Rules governs adversary proceedings. An adversary proceeding is, in a sense, a "complete civil lawsuit within a bankruptcy case." 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. As logic would dictate, the rules governing litigation in the 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. 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.

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.

(1) to recover money or property, with some exceptions;
(2) to determine the validity, priority, or extent of a lien or other interest in property;
(3) to obtain approval for the sale of both the interest of the estate and of a co-owner in property;
(4) to object to or revoke a discharge;
(5) to revoke an order of confirmation of a chapter 11 or chapter 13 plan;
(6) to determine the dischargeability of a debt;
(7) to obtain an injunction;
(8) to subordinate any allowed claim, except subordination is provided for in a chapter 9, 11, or 13 plan.
(9) to obtain a declaratory judgment; or
(10) to determine a claim removed pursuant to 28 U.S.C. § 1452.

Bankr. R. 7001.

88. Bankr. 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.


90. Bankr. R. 9014 advisory committee's note. The advisory committee note states that "[w]herever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter."
The primary distinction is that adversary proceedings procedurally resemble litigation outside bankruptcy, whereas contested matters are conducted primarily through simple motions.\footnote{91}

Notably, Bankruptcy Rule 9014 makes over twenty of the Bankruptcy Rules found in Part VII applicable to such contested matters.\footnote{92} The Rule also gives the court discretion to use, at any stage, any of the rules found in Part VII.\footnote{93} 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.

It is clear then that a number of principles may be drawn from the foregoing matrix of statutes and rules of bankruptcy. First, the Bankruptcy Code calls upon creditors to file their claims in the bankruptcy court. Moreover, the terms "creditor" and "claim" encompass much in their definitions.

Second, the claim is filed via the device of a proof of claim, a straightforward document asserting the claim made. The proof may be submitted by the creditor or its authorized agent. If submitted by the latter method, the agent is obligated to make certain disclosures regarding the nature of his retention.

Third, specified types of litigation before the bankruptcy court are deemed "adversary proceedings," and are conducted pursuant to a subset of the Bankruptcy Rules which, for all intents and purposes, incorporate the Federal Rules of Civil Procedure \textit{in toto}. While all other disputes not within the definitional parameters of adversary proceedings are called "contested matters," the prosecution of such actions automatically includes a substantial number of the rules for adversary proceedings, and, at the court's discretion, may include any other bankruptcy adaptation of the Federal Rules of Civil Procedure.

Lastly, and of critical value to the instant discussion, is the fact that the class action rule, Federal Rule 23, is adopted without change for adversary proceedings by the Bankruptcy Rules, and is available for utilization in con-
Thus far, the rules for class actions and bankruptcy have been separately discussed. The bankruptcy courts had the first opportunity to analyze both of these areas together in attempting to decide whether class proofs of claims are permissible.

III. Early Decisions of the Bankruptcy Courts

The early decisions of the bankruptcy courts on the permissibility of class proofs of claims present a mixed lot. Indeed, a number of the cases more properly go to the question of whether the class action procedure is available to a group of individually filed proofs of claims, which is separate from the question of whether one party can file a class proof of claim on behalf of all putative class members in the first instance. Only the latter issue presents the conflict between the class action and the requirement of the Bankruptcy Rules that each creditor file a proof of claim. This conflict does not exist with the former issue because all the members of the class have filed individual proofs of claims. While these cases are not specifically on point, they are, nevertheless, instructive.

One such decision was rendered in *In re W.T. Grant Co.* Decided under the former Bankruptcy Act and Rules, *W.T. Grant* concerned the efforts of Frances Massey, a former employee of the debtor, to certify, as a class, former W.T. Grant employees who had been denied their full severance benefits. Massey further requested that she be named class representative. The trustee filed an objection to these requests.

The court posited one question before it as whether the proposed class of former employees should be certified with Massey as its representative. The court first held that Bankruptcy Rule 723, the predecessor to Bankruptcy Rule 7023, while applicable to adversary proceedings, was misplaced in contested matters such as the one at issue. However, following the reasoning of its earlier decision in *In re REA Express, Inc.*, the court exercised its discretion under the predecessor to Bankruptcy Rule 9014 to find that the class action

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94. See Note, *Class Actions in Bankruptcy*, 64 Tex. L. Rev. 791, 799 n.67 (1985); *see also* Sheftelman v. Standard Metals Corp. (In re Standard Metals Corp.), 817 F.2d 625, 631 n.10 (10th Cir.) (recognizing that these two issues were separate), vacated and rev'd on other grounds, 839 F.2d 1383 (1987), cert. dismissed, 109 S. Ct. 201 (1988).
96. 24 Bankr. 421 (Bankr. S.D.N.Y. 1982).
97. *Id.* at 422-23.
98. *Id.* at 423. A second issue, not relevant to this discussion, was whether former employees who signed waivers and cashed checks were members of the class. *Id.*
100. 10 Bankr. 812, 813-14 (Bankr. S.D.N.Y. 1981) (finding a class action appropriate to permit aggrieved employees to make a unified response and "meaningfully participate" in the bankruptcy proceedings).
rule merited application because the central issue concerned the wage claims of numerous former employees of the debtor.102 As in REA Express, this case called for a unified response by the claimants, who would otherwise lack the resources to pursue their claims as individuals. Such persons "should be afforded some procedural protections not ordinarily afforded other parties under the Bankruptcy Rules."103

Although the court recognized the existence of the class action in bankruptcy, it found that the class action was not appropriate in the case before it. The court warned that such claimants had to first satisfy the normal preconditions of Rule 23 before being certified as a class.104 It was on this ground that the plaintiff faltered. Reviewing the facts, the court ruled that the purported class, in actuality, was too small to meet the numerosity requirement of the predecessor to Rule 7023.105 Failing to meet the first requirement of that rule was by itself fatal to the plaintiff's cause.106 Thus, notwithstanding the court's favoring of the class action device where appropriate, the facts here did not merit the application of that procedure.

Conversely, the class action was found to be inappropriate as a matter of law in the bankruptcy proceeding of Moore v. Ross (In re Ross).107 In Ross, the plaintiffs had been the certified class representatives in a state court action against the debtor. The debtor filed for bankruptcy shortly after a judgment was entered against him in the class lawsuit. After the bankruptcy court declined to rule on plaintiffs' request on behalf of the class not to discharge the judgment in bankruptcy, the plaintiffs appealed.108 The appellate court ruled that the class that existed in the nonbankruptcy action did not remain a class in the bankruptcy action.109

The Ross court reasoned that the class action is merely a procedural device used to expedite otherwise burdensome and conflicting litigation.110 Therefore,
the creation of a class is unique to each specific type of litigation. Once that litigation is over, the class ceases to exist.\footnote{111}

Therefore, although there may be factual symmetry between a nondischargeability action in bankruptcy and the original lawsuit giving rise to the debt in issue, "[e]ach involves independent applications of law and assessments of the facts relating to that law."\footnote{112} For this reason, the putative class could not be certified.\footnote{113}

The court in \textit{In re Society of the Divine Savior}\footnote{114} provided the rationale for disallowing the class action in bankruptcy. While its impact on the class proof issue is achieved more by implication, the decision bears critical note here because its wholesale rejection of class procedures in bankruptcy proceedings presaged the hostility towards the class proof evinced in subsequent adjudications.\footnote{115}

The referee in bankruptcy disallowed the class action in the bankruptcy proceeding because permitting the class action would conflict with the explicit provisions of the Bankruptcy Act.\footnote{116} While the class in a class action includes members that have not actually participated in the proceeding, the Bankruptcy Act required each creditor to file an individual proof of claim in order to participate.\footnote{117} According to the bankruptcy referee, allowing one party to file a proof on behalf of a whole class of creditors would enable all the creditors to participate in the proceedings without complying with the requirements of the Bankruptcy Act.\footnote{118}

than substantive, origins. It owes its existence to the perceived need for party consolidation in order to expedite litigation that would otherwise involve burdensome and conflicting individual suits.

Given this procedural basis, the creation of a class relates solely to a single common litigational event. All actions taken on behalf of the class must relate to that litigation and, upon the conclusion thereof, the class ceases to exist.

\textit{Id.}

\footnote{111. \textit{Id.}}\footnote{112. \textit{Id.}}\footnote{113. \textit{Id.; accord Sweet v. Hanson (\textit{In re Hanson}), 104 Bankr. 261, 262-63 (Bankr. N.D. Cal. 1989) (prohibiting class dischargeability actions).}}\footnote{114. 15 Fed. R. Serv. 2d (Callaghan) 294 (E.D. Wis. 1971).} \footnote{115. According to Referee Ihlenfeldt, this case presented "the novel question of whether and to what extent 
Rule 23 . . . should be applied in bankruptcy cases." \textit{Id.} at 295. Adding to its uniqueness was the fact that the debtor was a nonprofit religious society that had established an annuity program for over one thousand of its religious and lay members. When the Society was forced into bankruptcy, a class action was commenced on behalf of the annuitant class. \textit{Id.} at 295-96. Agnes Madel proposed to be the representative plaintiff for the class. \textit{Id.} at 296. Agnes and her husband had deposited almost $69,000 in an annuity fund held by the defendant. \textit{Id.} The defendant stopped making annuity payments about five years after the deposit even though the value of the contract was still about $26,000. \textit{Id.} After the debtor lodged its opposition, the court took up "the procedural question" of whether to permit an action pursuant to Rule 23. \textit{Id.} \textit{Id.} at 298.} \footnote{116. \textit{Id.}}\footnote{117. \textit{Id.}}\footnote{118. \textit{Id.} at 298. The court stated: Having in mind all of the foregoing considerations, it is the opinion of this court that petitioner should not be permitted to proceed as in a class action. The reasons for}
Furthermore, the court believed that the usual justifications for the class action did not exist in bankruptcy proceedings. First, the court found no threat of multiple or repetitious suits since all creditors must present their claims in the same bankruptcy court. Also, the court found no danger that claimants with claims too small to warrant individual litigation would be left without a remedy. Once the first claimant was successful, the courts would treat all other similar claims in the same manner based on "collateral estoppel or some other related principle." This would protect the rights of all other later claimants in similar circumstances without the small claimants having to file their own separate actions.

As to the matter of the existence of common questions of law or fact making the case amenable to class litigation, the court reiterated that, regardless of the conclusion are first, that the usual problems which justify the maintenance of a class action are not present in this case, and second, that permitting petitioner to proceed by class action would result in a direct conflict with the provisions of the Bankruptcy Act.

It is the essence of class actions that the resulting judgment includes all those whom the court finds to be members of the class, regardless of whether they actually participated of record. On the other hand, § 57 for straight bankruptcy and § 355 for Chapter XI proceedings provide the stringent requirement that each and every creditor shall file his proof of claim in order to participate. As pointed out in debtor's brief, allowing one party representing the class to file a single claim on behalf of all members of the class would allow all such creditors to participate in the proceedings and to share in any distribution without fulfilling the statutory requirements of the Bankruptcy Act.


120. _Id._

121. _Id._ at 298-99. As one student article points out, applying preclusion principles raises problems of fairness. Note, Class Actions in Bankruptcy, 64 Tex. L. Rev. 791 (1985). First, if the first claimant is successful, then the subsequent claimants receive the benefit (having courts treat their claims as established) without bearing any of the cost of litigation. _Id._ at 807. Second, if the trustee in bankruptcy is successful, then he still theoretically would be required to defend against the other claims because the first decision is not binding on the subsequent claimants. _Id._

The court in Divine Savior downplayed the problem of repetitious litigation by emphasizing that, as a practical matter, the failure of the first claim would persuade courts to defeat all other subsequent claims. Divine Savior, 15 Fed. R. Serv. 2d (Callaghan) at 299.

There appears to be little or no danger here of the respondent debtor being harassed by repetitious litigation on the same issues. Failure of this annuitant to establish her claim of trust fund, while not res judicata as to others, would certainly have an impact on similar claims by other annuitants who must of necessity file their claims in this same court.

_id. However, it would be unfair to the subsequent claimants where the first claimant did not effectively defend his claim. Note, _supra_ at 807.
of the legal issues, the legal question "applicable to one claimant would be applied to all other claimants similarly situated." Moreover, there was no common question of fact in this case, "but rather an accounting problem" as to the funds possibly due each member of the putative class.

The early cases dealt with the separate question of whether class actions were available in bankruptcy. Of more recent vintage are the cases directly ruling upon the allowability of class proofs of claims in bankruptcy proceedings. These holdings, all rendered by bankruptcy courts, demonstrate a strong animus by those courts towards the class proof.

The stark opposition to the use of the class proof is exemplified in the decision of *In re Baldwin-United Corp.* In that celebrated proceeding, class proofs of claims were filed by two groups: the allegedly defrauded buyers of Baldwin-United securities and a group of purchasers of annuities issued by the debtor’s insurance subsidiaries. The debtor objected to the claims as filed.

The bankruptcy court found for the debtor and rejected the class proofs on three principal grounds. First, the court pondered who could be considered a “creditor” empowered to file a proof of claim. Upon its examination of section 501 of the Bankruptcy Code, the court found that nowhere in the Code is the term “creditor” defined as a “class” or “representative” of a class.

Furthermore, Bankruptcy Rule 3001 provides that a proof of claim is to be filed by a creditor or its “authorized agent.” The bankruptcy court ruled that the claimants in this case were not authorized agents under the auspices of that rule because they failed to file the statement demanded by Bankruptcy Rule 2019 containing, among other things, the names and addresses of the creditors represented and the pertinent facts in connection with the employment of the representative. According to the court, being a class representative is not the equivalent of being an agent for purposes of filing a proof of claim. "The cornerstone of any agency relationship is its consensual nature. . . There has been no consent here."

Second, the bankruptcy court reviewed the applicability of Federal Rule 23 in bankruptcy proceedings. While agreeing “that class action procedures may be appropriate for dealing with multiple claims that have been properly filed,”

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122. *In re Society of the Divine Savior*, 15 Fed. R. Serv. 2d (Callaghan) at 299.
123. *Id.*
125. *Id.* at 147. It had been noted earlier in this proceeding that there were possibly “between 20 and 50 different classes of equity security holders” with an interest in the debtor. See *In re Baldwin-United Corp.*, 45 Bankr. 375, 376 (Bankr. S.D. Ohio 1983).
126. *In re Baldwin-United Corp.*, 52 Bankr. at 147-50.
127. *Id.* at 147-148.
128. *Id.* at 147-48.
129. *Id.* at 148.
130. *Id.*
131. *Id.* Judge Newsome found support for this basis for protecting the class in the Restatement (Second) of Agency § 1 (1958), which defines agency as “the fiduciary relation which results from the manifestation of consent by one person to another so the other shall act on his behalf or control, and consent by the other to act.”
the court found a lack of persuasive authority that a class claim could be an effective substitute on behalf of individuals who failed to file their own individual claims.\textsuperscript{132} As the putative class representatives were not seeking to certify a class of persons who had already filed individual claims, the court refused to decide if the requirements of the class action rule were met.\textsuperscript{133} In addition, the court held that the case at bar was a contested matter, not an adversary proceeding, and therefore Rule 7023 (the bankruptcy version of Federal Rule 23) had no application.\textsuperscript{134} Emphasizing that its power to apply the class action rule in a contested matter is purely one of discretion, the court found that the mere triggering of such a proceeding could not justify utilizing the class action rule to "legitimize an otherwise unauthorized proof of claim."\textsuperscript{135}

Third and last, the court refused to find that equitable considerations compelled the use of class proofs of claims. Looking to the public notice given of the bar date\textsuperscript{136} for the filing of claims, which included mailings to all creditors, notices to holders of the debtor's securities, and publication in several national newspapers, the court held that the notice given was adequate to appraise all potentially interested persons.\textsuperscript{137} Undoubtedly, the court was persuaded by the fact that several hundred purchasers of Baldwin-United securities had filed individual proofs. "This clearly indicates," said the court, "that the process of filing a proof of claim is not as burdensome or complicated as the claimants asserted."\textsuperscript{138}

For all of the above reasons, the Baldwin-United court purged the class

\textsuperscript{132} Id. at 149; see also \textit{In re} Grocerland Coop., Inc., 32 Bankr. 427 (Bankr. N.D. Ill. 1983) (holding, under the former act, that "it is within the bankruptcy court's discretion to allow only those claimants who filed a timely proof of claim to participate in a class action").

\textsuperscript{133} \textit{In re} Baldwin-United Corp., 52 Bankr. 146, 149 (Bankr. S.D. Ohio 1985).

\textsuperscript{134} Id.

\textsuperscript{135} Id. at 149-50. Of interest on this point is the bankruptcy judge's wholesale rejection of the argument made by the Securities and Exchange Commission in favor of class proofs of claims. The court stated:

The SEC urges that we apply Rule 7023 to the resolution of the class claims filed in the case because "securities fraud actions are the epitome of the serious and complicated contested matter referred to by the Advisory Committee." (SEC Memorandum in Response, Doc. 3-12 at 13.) This argument fails to recognize that the instant contested matter is not a complex securities fraud action, nor is it an action based on the marketing and sale of [annuities], it is instead an objection to proofs of claims on the basis that those claims are not authorized by either the Bankruptcy Code or Rules.

\textit{Id.} at 150. It might be said that this assertion by the court is, at best, questionable, as it fails to consider that the claims objected to indeed represented underlying causes of action of a complex nature in the securities fraud area.

\textsuperscript{136} The bar date is similar to a statute of limitations. Bankruptcy Rule 3003(c)(3) directs the court to fix the date before which the proofs of claims must be filed. \textit{Bankr. R. 3003(c)(3).} This date is called the bar date. \textit{In re} Charter Co., 876 F.2d 866, 867 (11th Cir. 1989), \textit{cert. dismissed}, 110 S. Ct. 3232 (1990). After this deadline passes, a claimant cannot participate in the bankruptcy proceeding unless he shows just cause. \textit{Id.} The bar date provides finality to the bankruptcy proceedings. \textit{Id.}

\textsuperscript{137} \textit{In re} Baldwin-United Corp., 52 Bankr. at 150.

\textsuperscript{138} Id.
proof of claim.\textsuperscript{139} Notably, the court concluded that even if the class claims were allowed, any victory by the class "would likely be a hollow one" given the court's earlier ruling subordinating any securities fraud claims.\textsuperscript{140}

Another Ohio bankruptcy court similarly rejected class proofs of claims in \textit{In re Electronic Theatre Restaurants Corp.}.\textsuperscript{141} In that case, Glassman, a creditor, had filed a proof of claim in a representative capacity, based upon an ongoing district court class action against the debtor. The underlying class action grew out of alleged violations of the federal securities laws, in connection with purchases by the certified class of the debtor's securities.\textsuperscript{142} Glassman moved for application of Rule 7023 and for class certification. The debtor moved to dismiss the claim.\textsuperscript{143}

As in \textit{Baldwin-United}, the bankruptcy court examined the Code and Rules and held that the statutory definition of a "creditor" does not include a "class" or a "representative" thereof.\textsuperscript{144} Moreover, Glassman was not an authorized agent for the class because he failed to aver in a Rule 2019 statement\textsuperscript{145} that he was both an agent for each and every member of the putative class and "specifically authorized by each claimant to file a proof of claim on their behalf."\textsuperscript{146} Since Glassman failed to meet the requirements imposed by the Bankruptcy Rules to attain "authorized agent" status, the debtor's objection to the class proof of claim was granted.\textsuperscript{147} The court also held that Bankruptcy Rule 7023 did not apply because the filing of a proof of claim "does not constitute an adversary proceeding."\textsuperscript{148}

A strident voice against the class proof of claim is found in \textit{Dade County School District v. Johns-Manville Corp. (In re Johns-Manville Corp.)},\textsuperscript{149} yet another decision emanating from the Johns-Manville massive reorganization proceeding. The undeniably unique facts of \textit{Johns-Manville} set this adjudication apart from its brethren.

The legal analysis underlying the denial of the class proof is relatively straightforward. Examining the letter of the law, the court found that, with one exception, "the Code and Rules contain no express provision for the filing of a class proof of claim."\textsuperscript{150} Citing the subsection of section 501 that explic-
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itly permits a representative filing by an indenture trustee as the exception to the rule, the court asserted that this illustrated "Congress' awareness of the class proof of claim concept."\textsuperscript{151} The omission of further provisions allowing class proofs to be filed for different types of claimants "may be deemed to be a deliberate prohibition of them in other contexts."\textsuperscript{152}

Moreover, the bankruptcy court opined that its construction of section 501 as exclusive was "amply supported by caselaw," in view of the fact that (at least at that time) "[n]o court in this Circuit or any other Circuit has held that a class proof is cognizable in bankruptcy."\textsuperscript{153} The bankruptcy court found the holding of Society of the Divine Savior persuasive.\textsuperscript{154} "Against this vigorous precedential backdrop," the court strenuously disallowed the class proof of claim.\textsuperscript{155}

However, as previously mentioned, the instant decision is one that is particularly reliant upon its own individual facts. The claim in question was filed by the so-called "Schools Committee," representing all schools in the United States having asbestos related damage claims against Johns-Manville.\textsuperscript{156} The Schools Committee was, at a minimum, not the typical class representative. It was formed approximately a month after the Johns-Manville bankruptcy commenced, at which time it set about notifying each potential school claimant about the existence of the bankruptcy, the potential for a claim against the debtor, and the formation of the Committee.\textsuperscript{157}

The Committee even negotiated with Johns-Manville to develop procedures to resolve the school claims and assisted in preparing a special proof of claim form and notice procedure for its constituents. Johns-Manville mailed the special proof to the approximately 42,500 schools listed by the Committee, and further, mailed another set of forms to nearly a thousand other schools.\textsuperscript{158} The Committee went on record as stating that these procedures were reasonably calculated to give adequate notice to all potential school claimants.\textsuperscript{159}

Notwithstanding these gargantuan efforts, only about 5,000 schools filed individual claims. On the last day to file proofs of claims, the Schools Committee filed the class proof at issue, along with a class adversary proceeding, purportedly on behalf of the 42,500 schools it had previously catalogued.\textsuperscript{160} Given all the elaborate steps taken and the intimate involvement of the Committee in the entire process from the very beginning, it is little wonder that the court

\textsuperscript{151}. In re Johns-Manville Corp., 53 Bankr. at 350.
\textsuperscript{152}. Id. at 351.
\textsuperscript{153}. Id. (citation omitted).
\textsuperscript{154}. Id.
\textsuperscript{155}. Id. at 352 (reasoning that all potential plaintiffs had ample notice and opportunity to file individual proofs of claims).
\textsuperscript{156}. Id. at 347.
\textsuperscript{157}. Id. at 348.
\textsuperscript{158}. Id.
\textsuperscript{159}. Id. at 348-49.
\textsuperscript{160}. Id. at 347.
dismissed the class proof, harshly decrying it as "an act of prestidigitation." In brief, while the more rational approach of the court in *W.T. Grant* recognized the positive attributes of class litigation in bankruptcy, other courts of bankruptcy refused to acknowledge the obvious corollary and permit the filing of a class proof of claim as the natural first step in instituting a Rule 23 action. Unfortunately, as discussed below, this hostility to the class proof device was adopted by at least one appellate court.

IV. STANDARD METALS—THE CLASS PROOF REJECTED

Spearheading the instant controversy over the permissibility of filing class proofs of claims in bankruptcy proceedings is *Sheftelman v. Standard Metals Corp. (In re Standard Metals Corp.)*, where the Tenth Circuit became the first circuit court of appeals to address the question under the modern Bankruptcy Code and Rules. The procedural history of the case merits close scrutiny. The debtor, Standard Metals, raised over six million dollars through the sale of tax-exempt industrial revenue bonds to finance the acquisition of a lead smelting plant. Notwithstanding this capital infusion, insurmountable financial problems led to the debtor's default on the bonds. Standard Metals and its subsidiaries all filed for bankruptcy shortly thereafter.

When Standard Metals filed its schedules and statement of affairs with the bankruptcy court, it failed to list a single purchaser of the revenue bonds as a potential creditor. A bar date was set by the court and notice thereof was given only to the creditors listed on the debtor's schedules.

Sheftelman, a holder of the defaulted bonds, commenced an action in federal district court approximately three months after the bar date passed. The lawsuit was a class action filed on behalf of all the purchasers of the bonds, and it alleged violations of both federal and state securities laws by various parties. Standard Metals was not named as a defendant since it was then under the protection of the automatic stay provisions of the Bankruptcy

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161. *Id.*; accord *In re Continental Airlines Corp.*, 64 Bankr. 874, 880-81 (Bankr. S.D. Tex. 1986) (dismissing class-like claims filed by various labor unions, where over 15,000 claims filed by approximately 11,000 individual employees demonstrated that the individual proof of claim requirement "can and does work").


163. 817 F.2d at 630. Many years before, the Court of Appeals for the Third Circuit approached the issue, but under wholly different circumstances. The tribunal's decision to deny a class action in *Securities and Exch. Comm'n v. Aberdeen Sec. Co.*, 480 F.2d 1121 (3d Cir. 1973) was based upon "the intricacies of the Securities Investor Protection Act" and Chapter X of the Bankruptcy Act of 1898. *Id.* at 1123, 1128. That holding was based in part on the court's earlier ruling that intervention by a class of creditors was not appropriate in the context of a railroad reorganization. *In re Penn Central Transp. Co.*, 455 F.2d 976, 976 (3d Cir. 1972). As such, these opinions are simply not mappable with the more recent decisions.

164. *In re Standard Metals Corp.*, 817 F.2d at 627.

165. *Id.*
Approximately three weeks after filing the class action, Sheftelman filed proofs of claims in the bankruptcy proceeding on behalf of himself and the class of bond holders. In the proofs, Sheftelman raised the same allegations that were contained in the district court class action. The debtor objected to the proofs of claims, contending they were untimely and that a class proof of claim was impermissible in a bankruptcy proceeding.

When Sheftelman failed to produce himself for his deposition or to attend a court hearing, the bankruptcy judge dismissed his claim. The bankruptcy court further ruled that class proofs of claims were not allowed in a bankruptcy proceeding, and dismissed the class claim as well. The district court affirmed but, significantly, found it unnecessary to consider whether the bankruptcy judge's decision on the availability of class proofs of claims was correct.

The court of appeals affirmed the decision of the bankruptcy judge to dismiss the class proof of claim, holding that such claims violate the statutory scheme of the Bankruptcy Code and Rules. Examining Bankruptcy Code section 501 and Bankruptcy Rule 3003, the court found the filing of a proof of

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166. *Id.* at 627 n.1. Under § 362 of the Bankruptcy Code, all judicial proceedings against the debtor are stayed once he files a petition in bankruptcy. 11 U.S.C. § 362 (1988). The stay “is intended to protect the debtor from its creditors and to permit time to formulate a workable plan or reorganization and payment.” *In re Zenith Laboratories, Inc.*, 104 Bankr. 659, 661 (D.N.J. 1989).


168. *Id.* Following the debtor’s objection to the class proof, a series of motions were filed, which mainly focused on the taking of Sheftelman’s deposition. After much contentiousness over where and when Sheftelman was to be deposed, the bankruptcy court finally ordered him to either appear in court at the hearing on the debtor’s objection to the proofs of claims, or be deposed before that time. The court informed Sheftelman that the sanction for a failure to comply would be dismissal of the claim. *Id.*

169. *Id.* at 627-28; *see also In re Standard Metals Corp.*, 48 Bankr. 778, 784 (Bankr. Colo. 1985) (contending that there must be an agency relationship between the named plaintiff and other potential class members which would allow the named plaintiff to file claims on behalf of the class members).

170. *In re Standard Metals Corp.*, 817 F.2d at 629; *id.* at 635 (Seth, J., dissenting) (concluding that the circuit court panel should not have considered the class action issue since the district court expressly refused to rule on the issue).

171. *Id.* at 630. The Tenth Circuit first addressed the question of the propriety of dismissing Sheftelman’s proof of claim as a sanction of disobeying the discovery order. *Id.* at 629. The court had little difficulty in holding that Sheftelman “willfully violated” the bankruptcy court’s order and the resulting dismissal was appropriate. *Id.*

The court of appeals then considered the effect of the dismissal of Sheftelman’s individual proof of claim on the class proof of claim. Despite the fact that the district court did not rule on that point, the Tenth Circuit nevertheless concluded it must reach the issue. *Id.* The court reasoned that it was necessary to consider whether the bankruptcy court was correct in holding that class claims are not provable under the Bankruptcy Act. The court cited the case of *Reed v. Heckler*, 750 F.2d 779, 785 (10th Cir. 1985), to support their de novo review, explaining that in *Reed* a district court’s failure to certify a class was reviewable by the court because the decision was based upon an “erroneous view of the law.” *In re Standard Metals Corp.*, 817 F.2d at 630.
claim to be "a stringent requirement" for unscheduled creditors seeking allowance of their claims.\textsuperscript{172} "The [Code] and the Rules do not expressly permit or expressly prohibit class proofs of claims."\textsuperscript{173} However, the court found that the import of the language of the Code provisions was "that each individual claimant must file a proof of claim or expressly authorize an agent to act on his or her behalf."\textsuperscript{174}

Furthermore, the court ruled that a putative class representative "cannot be considered an authorized agent of all of the creditors in a putative class . . . . An agent may file a proof of claim only for those individuals who have expressly authorized the agent to do so."\textsuperscript{175} Thus, a purported agent cannot file a valid class claim unless he can demonstrate that each member of the class authorized the filing. The court opined that Bankruptcy Rule 3001(b) simply does not permit an agent to file a proof of claim first and then inform the creditor after the fact.\textsuperscript{176}

The court then discussed the extent that class actions are available in bankruptcy proceedings.\textsuperscript{177} The court recognized the propriety of class actions "in some instances where a large number of creditors have filed similar claims."\textsuperscript{178} However, according to the court, the appropriateness of the class action device cannot negate the individual filing requirements for a group of claimants, notwithstanding the fact that the claims are similar and large in number. "Class action procedures," pronounced the Tenth Circuit, "can be employed in a bankruptcy proceeding only to consolidate claims that have already been properly filed."\textsuperscript{179}

\textsuperscript{172} Id. at 630-31; accord \textit{In re} Woodmoor Corp., 4 Bankr. 186, 192 (Bankr. D. Colo. 1980) (holding "[e]ach claimant must prove and file his own claim").

\textsuperscript{173} Id. \textit{at} 631; \textit{In re} Standard Metals Corp., 817 F.2d 625, 631 (10th Cir.) (footnote omitted) \textit{vacated and rev'd on other grounds sub nom.} Sheftelman \textit{v. Standard Metals Corp.}, 839 F.2d 1383 (1987), \textit{cert. dismissed}, 488 U.S. 881 (1988). The court found that the Federal Rules of Civil Procedure, including the class action rule, did not generally apply to contested matters. Instead, their use was left to the discretion of the court through Bankruptcy Rule 9014. \textit{Id.} \textit{at} 631 n.8. The court found that Congress's expressed intent, to give bankruptcy courts discretion in allowing class action suits, distinguished this action from \textit{Califano} \textit{v. Yamasaki}, 442 U.S. 682 (1979). In \textit{Califano}, the Supreme Court held that the class action was presumptively available in the absence of a clear expression by Congress to exempt the action in question from the Federal Rules of Civil Procedure. 442 U.S. at 700; \textit{see supra} notes 33-53 and accompanying text for a summary of \textit{Califano}.

\textsuperscript{174} \textit{Id.} \textit{at} 631.

\textsuperscript{175} \textit{Id.}

\textsuperscript{176} \textit{Id.}

\textsuperscript{177} \textit{Id.} The court recognized the distinction "between the permissibility of class proofs of claims and the availability of class action procedures to a group of individually filed proofs of claims." \textit{Id.} The court explicitly stated that these were distinct issues and it decided only the former. \textit{Id.} \textit{at} 631 n.10.

\textsuperscript{178} \textit{Id.} \textit{at} 632.

\textsuperscript{179} \textit{Id.} \textit{See Note,} \textit{Class Actions in Bankruptcy,} 64 Tex. L. Rev. 791, 792, 799 n.67 (1985) (arguing to allow class actions in bankruptcy cases where warranted by efficiency and fairness, but only under the assumption that "individual proofs of claim must be filed by all class members . . . in any class action").
As almost an aside, the panel lastly noted that class proofs of claims are unnecessary in bankruptcy proceedings. Given the bankruptcy court's complete control over the debtor's estate and that court's ability to resolve multiple claims, "[t]here is no need for the class to file as a class."180

The Tenth Circuit's initial holding was, however, short-lived. In late December of the same year, the court issued an Opinion on Rehearing, essentially abandoning its earlier findings on the class proof of claim issue.181 Heard by the identical panel, the per curiam decision confined itself to issues of standing, notice to creditors, and the propriety of sanctions.182 "In view of the disposition of this appeal," the court declared, "it is not necessary to consider the class action claims issue."183 As a result, the Eleventh Circuit in Certified Class in the Charter Security Litigation v. Charter Co. (In re Charter Co.)184 contended that the "precedential value of the holding in Standard Metals is uncertain."185 The court added that the original opinion "may be dicta" in light of the subsequent rehearing.186

In conclusion, Standard Metals now acts as the vanguard of the cases rejecting the class proof. Essentially renewing the old arguments against the device, the Tenth Circuit perpetuated the view of the bankruptcy courts below that the Bankruptcy Code and Rules do not accommodate the class proof. Nonetheless, many questions persist as to the correctness of the Tenth Circuit's review in Standard Metals and the continued vitality of its holding.

V. THE TRILOGY—THE CLASS PROOF ACCEPTED

Notwithstanding Standard Metals, three federal circuits in quick succession, have moved recently to embrace the class proof. These courts have not found class action principles antithetical to the goals of bankruptcy. Instead, they have found the procedural advantages of the class proof to further the purpose of the bankruptcy laws.

180. In re Standard Metals Corp., 817 F.2d 625, 632 (10th Cir.), vacated and rev'd on other grounds sub nom. Sheftelman v. Standard Metals Corp., 839 F.2d 1383 (1987), cert. dismissed, 488 U.S. 881 (1988); see also In re Great W. Cities, Inc., 88 Bankr. 109, 113-14 (Bankr. N.D. Tex. 1988), vacated in part, rev'd in part, and remanded, 107 Bankr. 116, 121-22 (N.D. Tex. 1989). In Great Western, the district court found the bankruptcy court "erred when it viewed the proofs of claim as class claims." Id. at 118 (footnote omitted). The court held the claim was a "group" claim, made on behalf of a known set of claimants who were "in no sense a 'class' within the meaning of [Federal Rule of Civil Procedure] 23." Id. Thus, the district judge did not decide whether the bankruptcy court correctly rejected the purported class proof, but, significantly, he observed the more recent opinions favored the class proof device. Id. at 118 n.9.


182. Id. at 1385-87.

183. Id. at 1387.


185. 876 F.2d at 869.

186. Id. at 869 n.4.
A. American Reserve

Among the three cases allowing class proofs of claims in bankruptcy proceedings, the seminal decision is the Seventh Circuit’s opinion in In re American Reserve Corp.\(^{187}\) On an interlocutory 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.”\(^{188}\) Concluding that “class actions may exist within as well as outside bankruptcy,” the court found in favor of allowing class proofs of claims.\(^{189}\)

The facts in American Reserve are typical of cases dealing with class proofs. American Reserve was the holding company for Reserve Insurance Co., an insolvent domestic insurer accused of fraud by its 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.\(^{190}\) These persons “undoubtedly have ‘claims,'” noted the court, given the greatly enlarged definition of a claim under the modern Bankruptcy Code.\(^{191}\)

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.\(^{192}\) 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.\(^{193}\) 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 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.\(^{194}\)

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.”\(^{195}\) 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.”\(^{196}\) According to the court, the defrauded policyholders

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187. 840 F.2d 487 (7th Cir. 1988), rev’g 71 Bankr. 32 (N.D. Ill. 1987).
188. 840 F.2d at 488.
189. Id.
190. Id. (the class was composed of people who purchased policies between 1977 and 1979).
191. Id. (citing 11 U.S.C. § 101(4)).
192. Id.
193. Id. Judge Easterbrook made the simple but pointed observation that “[f]iling a proof of claim is a ‘stage.'” Id.
194. Id.
195. Id. at 489 (citations omitted).
196. Id.
of American Reserve were just as deserving of recovery as any other creditors.\textsuperscript{197}

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.\textsuperscript{198} "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.\textsuperscript{199} Moreover, class action litigation serves a deterrent function by ensuring that wrongdoers pay for their misdeeds.\textsuperscript{200}

Refusing to make an artificial distinction, the Seventh Circuit held that this compensatory function was "as important inside bankruptcy as outside."\textsuperscript{201} In a non-bankruptcy context, the class action aggregates claims, provides compensation, and deters wrongdoing.\textsuperscript{202} Noting the opportunity costs of investigation and the constraints of Rule 11,\textsuperscript{203} 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."\textsuperscript{204} 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.\textsuperscript{205}

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.\textsuperscript{206} 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."\textsuperscript{207} 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.\textsuperscript{208}

Espousing the presumption that representational litigation is available in

\textsuperscript{197} Id.
\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} See Bankr. R. 9011 (adopting Fed. R. Civ. P. 11, which governs the imposition of sanctions).
\textsuperscript{204} In re American Reserve Corp., 840 F.2d 487 (7th Cir. 1988), rev'g 71 Bankr. 32 (N.D. Ill. 1987).
\textsuperscript{205} Id.
\textsuperscript{206} Id. at 489 n.3 (quoting Huddleston v. Holland (In re American Reserve Corp.), 71 Bankr. 32, 35 (N.D. Ill. 1987)).
\textsuperscript{207} Id.
\textsuperscript{208} Id. at 489-90.
federal cases, the Seventh Circuit saw "nothing unusual" about class actions in bankruptcy cases. To the contrary, the court viewed the historical suits on creditors' bills as precursors to our modern class litigation.

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. 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.

Nevertheless, the court in American Reserve found these to be serious but not fatal problems. 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.

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. 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. In fact, the court found the class action superior in that it eliminates some of the cost barriers for small claimants who might not otherwise file.

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." 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. In such cases, the court found that "[o]ur benchmark—that bankruptcy courts exist to marshall assets and make awards

209. Id. at 490.
210. Id.
211. 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).
212. In re American Reserve Corp., 840 F.2d 487, 490-91 (7th Cir. 1988).
213. Id. at 491.
214. Id.
215. Id. (discussing FED. R. CIV. P. 23(c)(1)).
216. Id.
217. Id. at 491-92.
218. Id. at 492.
219. Id. (referring to BANKR. R. 9014 and FED. R. CIV. P. 23).
220. Id.
justified by non-bankruptcy entitlements—calls for employing the class device.”

Lastly, the American Reserve court examined section 501 of the Bankruptcy Code, the provision that requires the creditor or his agent to file a proof of claim. Other courts had previously relied upon this provision to conclude that class proofs of claims are not allowed in bankruptcy. The court noted that while the statute allows some representative filings, “[i]t is silent on the question whether there may be other representative filings.” Refusing to interpret this silence as demanding exclusivity, Judge Easterbrook opined:

Why should we infer from the list of ways to do something that there are no others? The legislature does not tie up every knot in every statutory subsection. A list of four ways may imply only that Congress has yet to consider whether there should be others. . . .

Neither the legislative history nor the structure of the 1978 Code suggests that the list in [section] 501 is exclusive. The history is silent—on class actions, on representative claims in general.

The structure of section 501, concluded the court, “is not fundamentally different” from the civil rights statute in Califano, where the Supreme Court found that the specification of adjudication by an “individual” was not inconsistent with class suits. Moreover, the filing of representative claims, other than those enumerated in section 501, “would not interfere with the operation of the bankruptcy system.”

As evidence that the methods of filing in section 501 are not exclusive, the court made the pointed observation that section 501 “omits the most common representative filing of all: by an agent on behalf of a principal,” an act specifically authorized by Bankruptcy Rule 3001. If section 501 was to be deemed exhaustive, the filings of claim by agents would be ineffectual and Rule 3001 would be rendered a nullity.

In addition, if section 501 were deemed exhaustive, then Bankruptcy Rule

221. Id.
222. Id.
223. Id. The expressly permitted representative filings are an indenture trustee on behalf of a bondholder, a bankrupt’s co-debtor or guarantor on behalf of creditor, and a bankrupt on behalf of creditor. 11 U.S.C. § 501 (1988).
225. Id. at 492-93 (relying on Califano v. Yamasaki, 442 U.S. 682 (1979)).
226. Id. at 493.
227. Id.
228. Id. Accord In re Retirement Builders, Inc., 96 Bankr. 390, 392 (Bankr. S.D. Fla. 1988), wherein Bankruptcy Judge Cristol found § 501 not exclusive because its legislative history did not suggest it was so. The court reasoned that to find otherwise “would exclude the authority given by Bankruptcy Rule 3001(b)” for filings by agents. Id. In finding in favor of class proofs of claims, the Florida bankruptcy court also reconsidered its decision to the contrary in In re Arrow Air, 75 Bankr. 372 (Bankr. S.D. Fla. 1988). In re Retirement Builders, Inc., 96 Bankr. at 391.
7023 would also be a nullity. According to the court, to interpret section 501 as preventing the prosecution of a claim on behalf of anyone who failed to file an individual proof of claim would absolutely bar a class action. Yet, Rule 7023 expressly states there are to be class actions in bankruptcy.

Furthermore, the court found that the availability of class actions was not irreconcilable with the filing of individual claims. The Seventh Circuit acknowledged that while class actions are certainly allowed in bankruptcy proceedings, not every cause is certifiable for class treatment. If a bankruptcy judge declines to certify a class, then each individual must file a separate proof of claim. The ostensible class representative never becomes an authorized agent, thereby avoiding any conflict with the statutory provisions in the Code pertaining to agent filings. If, however, the court certifies the class, its putative representative then ascends to authorized agent status, comporting with the Code's requirements allowing an authorized agent to file a proof of claim. "It follows," concluded the American Reserve court, "that there may be class proofs of claims in bankruptcy." However, as the bankruptcy court had not decided the certification question, the panel remanded the instant matter for further consideration in light of its holdings.

B. The Charter Company

The grounds of decision of American Reserve were followed by the Court of Appeals for the Eleventh Circuit in Certified Class in the Charter Security Litigation v. Charter Co. (In re Charter Co.). Prior to the commencement of that bankruptcy proceeding, an action was brought in district court on behalf of purchasers of Charter stock, alleging that Charter misrepresented its financial condition in violation of the federal securities laws. The class representatives filed a proof of claim for the class in the bankruptcy case. The shareholder group was subsequently certified as a class in the securities litigation. After lengthy negotiations, Charter lodged an objection to the class proof of claim. The claimants responded by asking the bankruptcy court to apply Rule 7023 and grant class certification of the claim in the bankruptcy proceeding. Finding a class proof of claim impermissible in bankruptcy proceedings and the claimants' request for class certification to be untimely, the bankruptcy court disallowed the proof of claim and the district court affirmed.

229. In re American Reserve Corp., 840 F.2d 487, 493 (7th Cir. 1988).
230. Id.
231. Id.
232. Id. at 493-94. The court suggested that the district court judge direct the trustee to send all policy purchasers a notice of the bankruptcy proceeding and proof of claim form.
234. Id. at 867.
235. Id. at 867-68.
236. Id. at 868.
237. Id.
On appeal, the Eleventh Circuit held that class proofs of claims are allowable. The issue of whether such proofs were allowable under the Bankruptcy Code was a question of first impression in the Eleventh Circuit. Notably, the court stated that "the precedential value of the holding in Standard Metals is uncertain." The Charter court contended that the original opinion in Standard Metals "may be dicta" in light of the subsequent resolution by the Tenth Circuit, which apparently obviated the need to consider the class claims issue. In any case, the Eleventh Circuit found the reasoning of American Reserve "more persuasive."

The court began by noting that the "Bankruptcy Code contains no explicit provision authorizing the filing of a class proof of claim. . . . The question we face is how to interpret that silence." Turning to the legislative history of the Bankruptcy Code, the court found support for the conclusion that class proofs of claims are valid. Acknowledging the lack of a specific discussion of the issue, the court found the legislative history "evinces a congressional intent to open bankruptcy proceedings to the widest possible range" of claimants. The Code's broadest possible definition of a "claim" contemplates the bringing of all conceivable claims into the bankruptcy court for adjudication. Prohibiting class proofs of claims would "read out" this expansive definition. Thus, the court concluded that interpreting section 501 of the Code as allowing class proofs would be consistent with the statutory scheme at work on this point.

In addition, the court found it persuasive that Congress had "incorporated [Federal] Rule 23 into the Bankruptcy Code" by adopting it in Bankruptcy Rule 7023. The Charter court concluded:

Given that Congress indisputably intended to make procedures related to prosecuting a class action available to bankruptcy claimants, there is a strong indication that procedures related to initiating a class action should

238. Id. at 873.
239. Id. at 869. The Eleventh Circuit had declined to address the matter some years before in In re GAC Corp., 681 F.2d 1295 (11th Cir. 1982), decided under the former Bankruptcy Act. There the court stated, "We need not and do not decide the issue whether a class proof of claim is ever allowable [in a bankruptcy proceeding.]" Id. at 1299. Writing for the panel, Circuit Judge Clark held that the putative representative for the class of plaintiffs in a securities fraud litigation "failed to follow any of the procedures required to prosecute a class action." Id. at 1299.
241. Id. at 869 n.4. The Tenth Circuit's original opinion Standard Metals, which invalidated class proofs of claims, was vacated and reversed on other grounds by the Tenth Circuit in an unpublished order. See In re Standard Metals Corp., 817 F.2d 625 (10th Cir. 1987); see also supra notes 181-83 and accompanying text.
243. Id. at 869-70 (citing In re GAC Corp., 681 F.2d 1295, 1299 (11th Cir. 1982)).
245. Id.
246. Id.
be available. Other Code sections incorporating the Federal Rules of Civil Procedure have been construed to further the policies and procedures of the incorporated rule.\footnote{247}

Finding it "illogical and contrary to important class action policy considerations," the Eleventh Circuit decried the view adopted by other courts that class actions in bankruptcy cases can proceed only after each potential class member files an individual proof of claim.\footnote{248} Such a construction, wrote the court, merely effectuates one policy of Rule 23, that of consolidating numerous claims into one proceeding, while ignoring the companion goal of permitting the collective prosecution of small claims, which would be economically unsuitable to pursue individually.\footnote{249}

Furthermore, the court went on to state that the goals of Rule 23 are consistent with the bankruptcy statute's policy of effectively compensating deserving creditors. Creditors with small claims "are no less creditors under the Code than someone with a large, easily filed claim."\footnote{250} Permitting the class proof of claim allows all these creditors to recover their just compensation.\footnote{251}

The court also rejected the debtor's contention that section 501 provides an exclusive list of the permissible means to file claims. Like the court in American Reserve, the court pointed to the fact that the section 501 does not expressly provide for the filing of a claim by a creditor's authorized agent, a procedure authorized by Bankruptcy Rule 3001.\footnote{252} "Thus, the maxim of statutory construction of \textit{expressio unius est exclusio alterius}--that specification of certain things implies an intention to exclude all others—obviously does not apply."\footnote{253}

The court stated that even if none of these indications in the Code existed, it would still be influenced by the Supreme Court's pronouncement in Califano, declaring Rule 23 to be fully applicable in all litigation, absent a direct expression by Congress to the contrary. According to the court, the Califano pre-

\footnote{247. Id. at 870-71 (emphasis in original) (citation omitted).}
\footnote{248. Id. at 871.}
\footnote{249. Id.}
\footnote{250. Id.}
\footnote{251. Id. The court stated: This policy, which is not fulfilled absent class filing, is also consistent with the goals of the bankruptcy statute. As noted in the discussion of the breadth of the statute's definition of a claim, the bankruptcy statute has the goal of facilitating creditor compensation. It would be incongruous for this bedrock policy to be thwarted by reading a procedural limitation into the Code. Bankruptcy also seeks to achieve equitable distribution of the estate. Persons holding small claims, who absent class procedures might not prosecute them, are no less creditors under the Code than someone with a large, easily filed claim. Applying Rule 23 to filing procedures will bring all claims forward, as contemplated by the Bankruptcy Code.}
\footnote{252. Id.}
\footnote{253. Id. See also 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47.23 (Sands 4th ed. 1984) ("there is an inference that all omissions should be understood as exclusions").}
sumption applied in full force because, among other things, "there is no express limitation in filing class proofs of claims in the Bankruptcy Code. Therefore, the statute must be presumed to incorporate class action procedures."254

In addition, the court refuted Charter's argument that a class proof conflicts with the "authorized agent" strictures of Bankruptcy Rules 3001 and 2019.255 Bankruptcy Rule 3001, which requires the creditor or his authorized agent to file the proof of claim, is satisfied because a claimant filing a class proof as a putative representative has at least minimally sufficient authority for his agency, cannot prejudice other claimants (given Rule 23's procedures for notice and opting-out) and will, in any extent, be supervised by the court under long-standing class action safeguards.256 Bankruptcy Rule 2019 requires a representative of more than one creditor to file a disclosure statement.257 Compliance with class certification procedures would nunc pro tunc satisfy Rule 2019's requirement that an agent file a disclosure statement.258

Given "Congress's inclusion of Rule 23 in bankruptcy proceedings, the clear congressional intent that the Bankruptcy Code encompasses every type of claim, and the presumption established in [Califano v.] Yamasaki," the Eleventh Circuit concluded that class proofs of claims are allowable in bankruptcy.259 The court also concluded that the class proof of claim was timely filed in the case before it.260 However, since the bankruptcy judge never reached the question of whether or not to apply Bankruptcy Rule 7023, the orders below were reversed and the case remanded.261

C. Reid v. White Motor Corp.

As the last leg of the triad, the Court of Appeals for the Sixth Circuit recently joined its brethren in finding class proofs of claims allowable in bankruptcy. In Reid v. White Motor Corp.,262 an attorney filed a state court class action in which discharged employees of the debtor sought severance pay.263 Three years later, the debtor filed its bankruptcy petition and the lawsuit was

254. In re Charter Co., 876 F.2d 886, 876 (11th Cir 1989), cert. dismissed, 110 S. Ct. 3232 (1990); see also Bankr. R. 7001 advisory committee's note ("to the extent possible practice before the bankruptcy courts and the district courts should be the same").

Refuting Charter's other arguments against filing a class proof of claim, Judge Anderson found the bankruptcy courts were capable of estimating class claims, negating concerns of unduly protracted proceedings. In re Charter Co., 876 F.2d at 872-73; see also 11 U.S.C. § 502(c) (1988) (empowering the bankruptcy court to estimate contingent or unliquidated claims).

255. In re Charter Co., 876 F.2d at 873.
256. Id.
258. In re Charter Co., 876 F.2d at 873.
259. Id.
260. Id. at 876.
261. Id. at 876-77.
263. Id. at 1463.
stayed. After three more years, the state court dismissed the action for failure to prosecute. Sometime thereafter, Reid filed a claim "as the purported agent of the [former employee] class."

After the bar date for the filing of proofs of claims passed, the trustee moved for summary judgment against Reid, alleging, inter alia, that class proofs of claims were impermissible under the Bankruptcy Rules. The bankruptcy court held for the trustee and was affirmed by the district court.

The Sixth Circuit acknowledged the "conflict between the reported decisions considering the permissibility of a class proof of claim in bankruptcy proceedings." Nevertheless, this court found that "the more equitable resolution was recently enunciated by the Seventh Circuit in In re American Reserve which endorsed the filing of a class proof of claim."

The Sixth Circuit expressed its agreement with its neighboring circuit court that Bankruptcy Rule 9014 authorizes bankruptcy judges, in their discretion, to invoke Federal Rule 23 at any stage in contested matters, including the adjudication of class proofs of claims. The court adopted much of the reasoning of the Seventh and Eleventh Circuits.

Rejecting the trustee's argument to the contrary, the court opined that neither the Code nor its legislative history precludes the class proof. First, the court found that section 501 failed to provide the clear expression of congressional intent necessary to terminate the ability to file class actions under Califano. Second, the court noted that section 501 cannot be an exclusive list of situations where a person can file a proof of claim on behalf of a creditor because such an interpretation would nullify the meaning of Bankruptcy Rules 7023 and 3001(b). Thus, the Sixth Circuit ruled that class proofs of claims are permissible. "Rule 9014 delegates wide discretion to the bankruptcy judge in considering certification of class proofs of claims pursuant to

264. For an explanation of the automatic stay provisions of § 362 of the Bankruptcy Code, see supra note 166.
265. Reid, 886 F.2d at 1463.
266. Id.
267. Id. at 1463-64.
268. Id. at 1464; see In re White Motor Co., 65 Bankr. 383, 391 (N.D. Ohio 1986).
270. Id. (citations omitted).
271. Id. at 1469-70.
272. Id. at 1470. For a discussion of Califano, see supra notes 33-53 and accompanying text.
273. Reid, 886 F.2d at 1470. The court stated, "Bankruptcy Rule 7023 which explicitly permits the utilization of a class action in an adversary proceeding in the bankruptcy court would be superfluous." Id. In addition, Bankruptcy Rule 3001(b), "which permits the filing of proof of claim by an 'authorized' agent, would also be meaningless if section 501 was strictly construed." Id. See also American Reserve Corp. v. Huddleston (In re American Reserve Corp.), 840 F.2d 487, 493 (7th Cir. 1988) ("[i]f § 501 prevents the class representative from prosecuting the claim on behalf of anyone who failed to file a proof-of-claim form . . . then there never will be a Rule 23 class action . . . yet Bankruptcy Rule 7023 says there are to be Rule 23 class actions in bankruptcy").
Rule 7023 in a contested matter. 274

The victory was, however, a Pyrrhic one for Mr. Reid. Notwithstanding its holding that class proofs of claims were permissible in bankruptcy, the panel confirmed the bankruptcy judge had not abused his discretion in denying the instant proof of claim. "Reid," said the court, "totally disregarded compliance with the bankruptcy procedures regulating the filing of class proofs of claims in a bankruptcy proceeding" by failing to 1) confirm his capacity to represent the class, 2) identify the class, and 3) timely petition the bankruptcy court to apply Bankruptcy Rules 9014 and 7023. 275

These three federal circuit cases form the trilogy that has swiftly and surely permitted the class proof of claim in bankruptcy proceedings. Of primary importance here are the recurring themes the Seventh, Eleventh, and Sixth Circuits have propounded. One after another, they have opined on the broad policy favoring the availability of the class action, unless it is specifically excluded by legislative action, and the concomitant permissibility of the class proof.

Rejecting the contrary view which prevailed in the courts below, these courts have expounded a more principled interpretation of the Bankruptcy Code and Rules. Rather than forcing an awkwardly restrictive application upon the statutes, their view proposes that the bankruptcy law, its procedural rules, and the Federal Rules all be read in conjunction with regard to the class proof issue, with the result being the allowance of the class proof. As might be expected, the view of the trilogy allowing the class proof has been adopted by many district courts.

VI. THE TRILOGY'S PROGENY

Recent district court opinions are certain signs of the rising preeminence of the circuit trilogy, as the lower federal courts rally around the banner raised by the Seventh, Eleventh, and Sixth Circuits in favor of the class proof of claim. These district court cases have generally followed the reasoning of the circuit court cases.

The bankruptcy of giant LTV provided the backdrop for District Judge Lasker's opinion advocating the class proof in Iles v. LTV Aerospace and Defense Co. (In re Chateaugay Corp.). 276 Looking to the facts, the plaintiffs in Chateaugay were a class of female LTV employees who had filed a gender discrimination suit against the company in the Northern District of Texas over a year before LTV filed its Chapter 11 bankruptcy petition. The plaintiffs' motion for class certification was pending at the time LTV came under the protection of the Bankruptcy Code. After the bankruptcy judge rebuffed their


275. Id. at 1470-71.

276. 104 Bankr. 626 (S.D.N.Y. 1989). The decision bears greater than normal weight because of the confluence of Judge Lasker's stature as a jurist, the fact that the opinion emanates from the traditionally precedent-setting Southern District of New York, and because the LTV case was one of the most significant bankruptcy proceedings of the last decade.
application to proceed with the discrimination suit, the plaintiffs filed a proof of claim on behalf of the putative class. The bankruptcy court disallowed the class claim, finding class proofs barred under the Code. On appeal, Judge Lasker reversed the decision below and approved the plaintiffs' class proof of claim. 277

The court first found that section 501 did not exclude the class proof. 278 According to the court, American Reserve "persuasively points out" that merely because the Code states certain representatives may file proofs of claims does not mean that other representative filings are unavailable. 279 "Neither the legislative history nor the structure of the 1978 Code suggests that the list in [section] 501 is exclusive." 280 Thus the lack of a specific reference in the Code to a class proof "does not compel the conclusion" that such a device is forbidden. 281

Refuting the further argument that a class proof is impermissible because pre-Bankruptcy Code case law purportedly rejected it, the district judge held that "any disallowance of class proofs of claims prior to Congress' enactment of the Bankruptcy Code of 1978 was not a 'well-recognized' or 'established' judicial concept." 282 Finding a dearth of useful jurisprudence, the court declared that the failure of the legislature to address the issue presented by these

277. Id. at 627-28. Significantly, the court noted that the propriety of the class proof was a question of first impression in the Second Circuit, while acknowledging the holdings in American Reserve, Charter, and Standard Metals. Id. at 629. The opinion first found the Bankruptcy Code "does not directly address" the permissibility of the class proof. Id. Judge Lasker noted that Chief Bankruptcy Judge Lifland had relied upon his own ruling in Dade County School Dist. v. Johns-Manville Corp. (In re Johns-Manville Corp.), 53 Bankr. 346, 350-52 (Bankr. S.D.N.Y. 1985), that the omission of a provision in § 501 for class proofs indicated that Congress sought to bar them from bankruptcy proceedings. Id. It was this rationale that the Chateaugay court now rejected. In re Chateaugay Corp., 104 Bankr. at 629. In fact, the parenthetical discussion in Chateaugay makes the precedential value of Johns-Manville now highly suspect, if not indeed overridden. Judge Lasker found the analysis therein regarding the lack of explicit statutory authorization "does not support barring the filings of proofs of claims on behalf of a class." Id. at 629 n.5.

278. In re Chateaugay Corp., 104 Bankr. at 630. The court stated that "[w]hile such an analysis is logically tenable, there is no evidence in the legislative history or elsewhere that [§ 501] . . . was intended to exclude the filing of class proofs of claims by other representatives." Id.

279. Id. at 630.
280. Id.
281. Id.

282. Id. at 631 (citing In re Charter Co., 876 F.2d 866, 870 n.6 (11th Cir. 1989), cert. dismissed, 110 S. Ct. 3232 (1990)). In so doing, the court deflected any allegation that it was bypassing the edict of the Supreme Court in Midlantic Nat'l Bank v. New Jersey Dept of Envtl. Protection, 474 U.S. 494 (1986), where the Supreme Court held:

The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-267 (1979).

The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.

Id. at 501. By undermining any support on the earlier decisions as embodying an accepted judicial concept, Judge Lasker obviated any reliance on this proposition.
few decisions “cannot fairly be interpreted as approving them or evincing an intention to bar the filing of class proofs of claims. An equally likely, perhaps more likely, conclusion is that Congress simply failed to consider the issue.”

Moreover, the court found that the allowance of class proofs was consistent with the legislative history and policies underlying the Bankruptcy Code. For instance, the definition of “claim” under the 1978 enactment “represented a significant expansion” of the term. Judge Lasker opined that the filing of an unliquidated class action claim is “certainly consistent” with this all-encompassing definition, and furthermore serves the legislative intent to deal with any and all obligations of the debtor within the context of the bankruptcy case. The class proof, the court concluded, is “at the least consistent with the broad goals of the Bankruptcy Code of 1978.”

The Chateaugay court also applied the principles espoused by the Supreme Court in Califano. First, the court found that the usage of certain terms in section 501 did not bar class proofs any more than the use of the term “individual” barred the class action brought in Califano. Moreover, federal courts have permitted class actions even where an express rule was lacking or the Federal Rules were inapplicable. Above all else, Judge Lasker opined that the clear expression of Congressional intent, needed to overcome the presumption that a class proof was permissible, “is lacking in the Code.”

Furthermore, as a matter of policy, the court rejected the notion that the class proof would cause “excessive delay or unmanageable problems of valua-

283. In re Chateaugay Corp., 104 Bankr. 626, 631 (S.D.N.Y. 1989). The Court’s review of the pre-Code decisions is particularly informative:

When [ ] § 501 was enacted in 1978 no circuit courts had considered the issue, and only one reported and two unreported bankruptcy decisions barred class proofs of claims. See In re Society of the Divine Savior, 15 Fed. R. Serv. 2d (Callaghan) 294, 298 (E.D. Wis. 1971) (holding class proofs of claims impermissible under the Bankruptcy Act’s “stringent requirement that each and every creditor shall file his proof or claim in order to participate”); In re Cartridge Television, Inc., 535 F.2d 1388, 1389-90 (2d Cir. 1976) (appeal of bankruptcy court’s unreported holding that filing of class proofs of claims was impermissible under the Code and Rules mooted because the underlying class action allegations were dismissed); In re Stirling Homex Corp., 579 F.2d 206, 209 n.5 (2d Cir. 1978) (ruling in unreported bankruptcy decision that filing of proofs of claims on behalf of a class is not permissible was not contested on appeal and not considered by court); In re GAC Corp., 681 F.2d 1295, 1299-1300 (11th Cir. 1982) (disallowing class proof of claim for failure to comply with procedural requirements but not deciding issue whether class claims may ever be filed).

Id. (footnote omitted).


285. Id. at 631-32.

286. Id. at 632.

287. Id. at 633.

288. Id. at 633; see also Quinault Allottee Ass’n v. United States, 453 F.2d 1272, 1274-75 (Ct. Cl. 1972) (class action permitted in Court of Claims although Rule 23 had not been adopted therein).

As the court explained, permitting the class proof would not cause any extra delay or uncertainty because "[section] 502(c)(1) specifically provides for the expeditious estimation of unliquidated contingent claims" and because bankruptcy judges generally are experienced at estimating the value of claims. If any delay existed at all, it would be outweighed by the benefit of protecting small claimants who otherwise could not bring their claims.

Lastly, the court applied Bankruptcy Rules 7023 and 9014 to this controversy. While finding the rationale of the Seventh Circuit in American Reserve "impressive" on this point, the district court deemed the reasoning nevertheless unnecessary to the instant holding. The Chateaugay court held that a class proof of claim "must be presumed valid and may be filed as of right." Once objected to, the claim establishes a contested matter that authorizes the bankruptcy court to determine whether the application of Rule 7023 is warranted. Pursuant to Rule 9014, it is within the sound discretion of the bankruptcy judge to apply Rule 7023 or not.

Moreover, the exercise of that discretionary power must be "in accordance with the criteria set forth in [Federal Rule of Civil Procedure] 23." Since the bankruptcy court did not exercise its discretion to apply the class action rule in this case, the decision below was reversed and remanded, in accordance with Judge Lasker's conclusion that a class proof of claim is permissible in a bankruptcy proceeding.

In the neighboring District of New Jersey, a similar conclusion as to the validity of the class proof was reached in Zenith Laboratories, Inc. v. Sinay (In re Zenith Laboratories). The class representatives had filed a class proof subsequent to Zenith's petition for reorganization.

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290. Id.
291. Id.
292. Id. The court stated that:

[any potential marginal increase in delay or in difficulty of valuation of claims would be justified in order to protect the right of small claimants (who might not otherwise be aware of the existence of or be able to process their claims) to be represented by the filing of a class proof of claim.

Id.
293. Id. at 634.
294. Id.
295. Id.
296. Id.
297. Id.
298. 104 Bankr. 659 (D.N.J. 1989). In Zenith, the bankruptcy court had denied a motion made by the shareholder class to modify the automatic stay so as to continue the class litigation, while concurrently granting the debtor's motion to broaden the stay to enjoin further proceedings against the three co-defendants, all Zenith executives. Id. at 661. Interestingly, less than three months prior to the bankruptcy, it was the same district judge who had certified the plaintiff/shareholder class in the underlying action, which alleged violations of the federal securities laws and common law misrepresentations. Id. at 660-61.
The district court disagreed with the holding of the bankruptcy court below and concurred with the view espoused by the Seventh and Eleventh Circuits in favor of the class proof.\textsuperscript{300} The court acknowledged that the Third Circuit had not considered the class proof issue,\textsuperscript{301} but noted that "classes are now regularly certified under the Bankruptcy Code."\textsuperscript{302}

The court noted that a primary goal of the class action is to aggregate common claims in a single forum.\textsuperscript{303} The bankruptcy court below had asserted that this policy was served through the mechanism of the bankruptcy itself.\textsuperscript{304} Apparently unsatisfied with that logic, the district court went on to find that the class action serves another important purpose by permitting small claimants who otherwise would not be represented to participate in the bankruptcy proceeding.\textsuperscript{305} "To deny the use of a class claim would frustrate this policy and, as a practical matter, leave the majority of small claimants in bankruptcy proceedings without a remedy."\textsuperscript{306}

Furthermore, the court concurred with the trilogy that Congress had indeed provided that the Federal Rules governing class actions apply in bankruptcy proceedings. As justification, the court looked no further than the adoption of the class action rule via Bankruptcy Rule 7023, and the availability thereof by means of Rule 9014.\textsuperscript{307}

Rejecting as well the notion that section 501 of the Code embodied an exclusive list of permissible filings by representatives, the district court opined that "[t]he fact that Congress failed to create an explicit provision for the filing of class claims does not definitively settle the question . . . . To disallow a class proof of claim would effectively prohibit the use of class actions in bank-

\textsuperscript{300} Id. at 662.
\textsuperscript{301} In re Zenith Laboratories, Inc., 104 Bankr. 662 n.2 (citing Whittaker v. Philadelphia Elec. Co. (In re Whittaker), 882 F.2d 791, 793 n.1 (3d Cir. 1989) (bankruptcy court decision to permit suit as a class action unchallenged on appeal)).
\textsuperscript{302} In re Zenith Laboratories, Inc., 104 Bankr. 659, 662 (D.N.J. 1989).
\textsuperscript{303} Id. at 662.
\textsuperscript{304} Id. at 663.
\textsuperscript{305} Id. As the court emphasized, "Since there are significant opportunity costs associated with identifying and investigating claims and since many potential litigants with small claims are unaware of the full scope of their rights in bankruptcy, the class action may be the only practical means of permitting small claims to be brought." Id. at 662-63.
\textsuperscript{306} Id. at 663. A corollary to this function is the deterrent function served by the class action. The class action discourages potential wrongdoing by those who could victimize small claimants. As the court stated, the class action "serves a deterrent function by ensuring that wrongdoers bear the costs of their activities." Id. at 662; see In re American Reserve Corp., 840 F.2d 487, 489 (7th Cir. 1988) (class action litigation serves a "deterrent function" by ensuring that wrongdoers pay for their misdeeds), rev'g 71 Bankr. 32 (N.D. Ill. 1987).
\textsuperscript{307} In re Zenith Laboratories, Inc., 104 Bankr. at 663.
The court agreed with Charter that although the legislative history is silent on the allowability of class proofs, that body of authority nevertheless demonstrates a congressional intent to open bankruptcy proceedings to the broadest possible spectrum of claimants. A narrow reading of section 501 "would frustrate this goal." The class action is "consistent with the broader goals of bankruptcy in facilitating creditor compensation and ensuring equitable distribution of the debtor's assets," concluded the court.

Finally, the court brought to the fore a vital aspect of the class action that the cases rejecting the class proof had neglected, that is, the notion that small claims are no less deserving in bankruptcy adjudications than large ones.

The unarticulated premise of the opinions in the cases where class proofs of claims were disallowed seems to be that the policies underlying class actions are hostile to the policies the Bankruptcy Code advances. According to this view, rather than being provided the opportunity to opt-out of a class, small claimants should, in the words of appellee's counsel, be required to demonstrate that their claims are "worth the candle" by filing individuals proofs of claims. This procedure effectively requires the small claimant to opt-in. Perhaps this perspective reflects the view that the debtor's assets are to be conserved for larger creditors. This policy, however, is utterly without support in the Code or its legislative history. By the extension of [Federal Rule of Civil Procedure 23] to bankruptcy proceedings and the broad definition of what constitutes a claim, it is clear that Congress did not believe that the policies underlying bankruptcy and class actions were in conflict. For these reasons, class proofs of claims should be permitted in adversary proceedings or when the bankruptcy judge has exercised his or her discretion under Bankruptcy Rule 9014 to apply [Federal Rule of Civil Procedure 23] to a contested matter.

Notwithstanding his unabashed support for the class proof, the district judge was compelled to let the decision below stand on the separate ground that the class had never sought application of the class action rule. However, leave was granted for the class representatives to seek application of Rule 23 in accord with this decision.

At the time of this writing, Chateaugay and Zenith are the most prominent among the adherents to the trilogy. Yet it is a virtual certainty that the circuit court opinions will propagate more lower court decisions in favor of the class proof. Indeed, it is quite reasonable to expect that the trilogy of today will gain even wider acceptance by their sister circuits, particularly in view of the

308. Id.
309. Id.
310. Id. at 664 (quoting In re Charter Co., 876 F.2d 866, 870 (11th Cir. 1989), cert. dismissed, 110 S. Ct. 3232 (1990)).
311. Id.
312. Id.
313. Id.
fact that the Supreme Court has denied certiorari in *Reid*\(^{314}\) and *Charter*.\(^{315}\) These developments may lead to the clear domination of a view allowing class proofs of claims in bankruptcy proceedings.

### VII. DISCUSSION

The cases that addressed the permissibility of class proofs of claims have been divided. The early bankruptcy court cases disallowed the class proof on the grounds that the Bankruptcy Code required each creditor to file a separate proof of claim. The later circuit court decisions have accepted the class proof because the goals of bankruptcy law coincide with the purpose of the class action. An analysis of the cases addressing the issue reveals that the better view is to allow the class proof.

#### A. The Emergence of the Better View

The prevailing view on the permissibility of the class proof has experienced a stunning metamorphosis, going from virtually total rejection to an ever-widening acceptance. Consider the striking contrast in the relative timing of the pertinent cases and the level from which the holdings were issued. The majority of the cases decided prior to or in the early days of the Bankruptcy Code rejected the concept of the class proof of claim.\(^{316}\) Moreover, almost all of those cases were adjudicated at the trial level.\(^{317}\)

The courts in these early cases reasoned that the lack of any inclusion of a class proof device within the letter of the bankruptcy law was necessarily fatal to its proposed use. Taking an inflexible view, they believed the statutory provisions and procedural rules precluded any accommodation for a class proof. As in *In re Society of the Divine Savior*, these courts further claimed that the purposes of the class suit were not served in bankruptcy proceedings, relying on the fact that the bankruptcy court already had the power to gather together all claimants, no matter how numerous, deal with the totality of their claims in one forum, and then disburse the assets of the debtor as necessary. Finding security in the thought that the bankruptcy case, in and of itself, avoided multiple litigation, decided common questions of law and fact, and in general protected all creditors, both great and small, these courts rejected the pleas of putative representatives for permission to file a proof on behalf of an aggrieved class.

As the jurisprudence of the Bankruptcy Code matured, many courts simply

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316. *See supra* notes 94-186 and accompanying text.

317. *See supra* notes 94-186 and accompanying text. *Aberdeen Securities*, one of the few of that era which rose to be heard by a circuit court, had its basis in law on a completely different footing than the particular issue with which today's courts now grapple. *See Securities and Exch. Comm'n v. Aberdeen Sec. Co., Inc.*, 480 F.2d 1121 (3d Cir. 1973).
continued this unfortunate school of judicial thought in opposition to permitting class proofs of claims in bankruptcy proceedings. The court in *Standard Metals* was the first circuit court to confront the question, but rather than take a more dynamic approach and examine the issue in a fresh light, the court chose to merely perpetuate the status quo.

The other circuit courts of appeals addressing the question took a markedly different tack than did the Tenth Circuit in *Standard Metals*. In rapid succession, each of the appellate courts to subsequently rule on class proofs of claims declared the class proof device to be completely allowable in bankruptcy proceedings. Rejecting the earlier lower court precedents and *Standard Metals'* support thereof, the Seventh, Eleventh and Sixth Circuits adopted a more innovative approach. Looking at the issue anew, under the penumbra of the Bankruptcy Code and Rules of today, these courts ruled that a putative representative could file a proof of claim on behalf of a class in a bankruptcy case. While not necessarily unique, the magnitude of the ruling courts, the rapidity in which they successively embraced the class proof device, and the ease with which other courts have followed, must be heavily factored into any analysis.

Moreover, the precedential value of *Standard Metals* has been substantially undermined, as it now stands apart from its brethren. The further criticism leveled at *Standard Metals*, calling the decision "merely dicta," must also be considered. Indeed, one might question the propriety of the Tenth Circuit's ruling as to the class proof matter. The district court below expressly refrained from deciding the issue; therefore, arguably, the class proof question was not properly before the panel for appellate review. Moreover, the *per curiam* opinion, issued on the rehearing by the identical panel only a few months after the original decision, explicitly avoided the question of the allowability of a class proof of claim, instead grounding its holding on distinctly different points of law. Clearly, the Tenth Circuit's very own words on the rehearing make its first decision highly suspect, if not a nullity. Indeed, those seeking sure footing from *Standard Metals* in opposing the class proof would be well advised to look elsewhere for enduring support for that proposition.

Thus, the current trend is unmistakably toward allowing the class proof. After the class proof was disallowed by several bankruptcy court decisions and one appellate court decision with limited precedential value, recent circuit court and district court opinions have accepted the class proof with open arms. Turning now to the substantive points raised by these recent opinions, the arguments focus on the suitability of the class action to the goals of bankruptcy.


319. The status of Sheftelman v. Standard Metals Corp. (*In re* Standard Metals Corp.), 817 F.2d 625 (10th Cir. 1987) remains unclear. In the background material of a decision on a tangential issue, Bankruptcy Judge Clark tells us that "in early March, 1988, the Tenth Circuit stated . . . its April 20, 1987 decision [817 F.2d 625] was not vacated by its December 29, 1989 decision [839 F.2d 1383]" except for the notice issue. Subsequent petitions for a rehearing of the December 29, 1987 opinion were denied. *In re* Standard Metals Corp., 105 Bankr. 625, 628 (Bankr. D. Colo. 1989).
This rationale cuts sharply against the theories proffered by the courts opposing the class proof of claim.

**B. The Justification for the Class Proof in Bankruptcy**

As a preliminary matter, the cases allowing the class proof all proceed from a common ground: the vitality and utility of the class action, as propounded by the Supreme Court. Given the importance of the class action, *a fortiori* the class proof must follow.

The mechanism of the class action, as gleaned from the learned commentary and the wealth of case law, was explicitly created to provide individuals of modest means, and having relatively small claims, access to the judicial process equal to that of the more fortunate, larger claimants who have a greater ability to protect their individual interests. As the Eleventh Circuit pointed out in *Charter*, the very goal of the class action is to facilitate the pursuit of small claims that otherwise would fall to the wayside. Small claimants must confront a marked lack of resources to prosecute a claim, a problem exacerbated by the possibility, indeed likelihood, that the costs involved would outweigh the benefits.

Moreover, small creditors have almost always been subject to the hostilities of larger creditors seeking to “squeeze” them out. As the court pointedly observed in *American Reserve*, the debtor’s “principal creditors do not want to thrust additional hands into the till.” Small claims, therefore, need the procedural benefits and economies of Rule 23. In addition to directly benefiting the small claimant, the class action’s deterrent effect helps forestall future wrongdoing by those who would seek to victimize seemingly minor claimants.

Notwithstanding the beneficial attributes of the class action, the earlier cases claimed that a bankruptcy proceeding already fulfilled the purported goals of Rule 23 in that it was, *inter alia*, a collective proceeding that gathers all claimants in a single forum. Some of these courts went so far as to declare the class devices, including the class proof, to be antithetical to bankruptcy proceedings.

This extreme view simply does not withstand scrutiny. Undeniably, bankruptcy proceedings and the class action share a number of common features. Like the bankruptcy, the class suit gathers claimants, concentrates litigation, and grants far-ranging relief. But this similarity between the two proceedings is not sufficient reason to exclude one from the other, let alone condemn the class devices, including the class proof, to be antithetical to bankruptcy proceedings.

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320. See *supra* notes 248-49 and accompanying text.
322. See, e.g., Society of the Divine Savior, 15 Fed. R. Serv. 2d (Callaghan) 294, 298 (E.D. Wisc. 1971) (reasoning that the submission of a single proof of claim on behalf of a class is contrary to the Bankruptcy Act requirement that each and every creditor file a proof of claim).
Beyond the procedural efficiency of the class proof, which is also accomplished under bankruptcy law, the class action also offers substantive advantages. Only the class action device can protect small claimants, as recognized by the Seventh Circuit in *American Reserve*. Rule 23 reaches out to numerous small individuals, who otherwise would be relinquished to obscurity, and gives them the means to collectively seek appropriate relief in an economically viable way, with adequate safeguards for the class plaintiffs and the defendants alike. The class proof is the first step in realizing these ideals in bankruptcy proceedings.

In sum, the class proof of claim accomplishes two primary goals: first, it achieves the bankruptcy law mandate of facilitating creditor compensation and an equitable distribution of assets; second, it fulfills the object of Rule 23 by initiating relief to a class of similarly situated claimants. The courts that disallow the class proof because it engenders participation by unknown creditors simply misapprehend the role of the class claim and the Rule 23 action. The purpose of the class action rule is to establish the parameters of the typical class member, and, once having defined these attributes, to identify the actual class members entitled to recovery in the action. Therefore, these claimants are not truly unknown, but temporarily hidden from view. The filing of the class proof initiates the steps whereby these creditors may be accurately identified, and it is, therefore, a vital phase in such litigation.

On a related point, it was sheer folly for certain courts to suggest that the class claim permits "lazy" creditors to be compensated at the expense of more diligent creditors. Creditors benefitted by the class proof do not fail to file because they are lazy, but because their claims are too small to make an individual filing economically feasible. One could easily substitute the word "small" for "lazy" and "larger" for "diligent." The laws of bankruptcy do not, and more importantly should not, penalize small stakeholders for the aggrandizement of larger, well-heeled creditors. A rejection of a legitimate class proof is unmistakably a rejection of small creditors in favor of large claimants, a distinction the Bankruptcy Code does not make. The *Charter* court found such a concept abhorrent, declaring small creditors no less important or deserving because of their relative size.323

Strife between small and large creditors seeking recovery in a bankruptcy case will always exist. "Conflicts among creditors are inherent in all bankruptcy cases. [In complex ones] they are inevitable."324 Yet this is not an acceptable rationale to deny any creditor, regardless of its relative size and resources, the opportunity to participate in the bankruptcy process to the fullest extent possible. Indeed, as stated by one commentator, the "protection of creditors from each other" is an essential function of the bankruptcy process.325

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The additional burden of permitting a class proof, if any exists at all, is worthwhile because it permits additional, small creditors to obtain redress for their injuries, which in the aggregate are usually quite substantial.

The class action is designed to overcome many of the difficulties small, individual claimants encounter in seeking redress in a large, complex proceeding. Many of these hindrances begin with becoming aware of remedies, obtaining counsel, and then filing a claim. Class action procedures are, therefore, designed to overcome those obstacles by facilitating notice to putative class members, obtaining recognition of the class via the certification process, and establishing its causes of action in the proper court.

Admittedly, precluding the class proof does not ban the class action from the bankruptcy forum. The Standard Metals court reasoned along these lines. According to that court, Rule 23 is available provided that the members of the putative class each file an individual proof of claim. This argument is not facetious by any means. However, such rationalizations tend to beg the question and, moreover, ignore the logical realities of the class action. These artificial distinctions between individual proofs filed to substantiate a class action, and a class proof filed with the same purpose, do not serve the equitable aims of the Bankruptcy Code. If individual proofs filed separately can be unified for purposes of a class action, it is a non sequitur to prohibit the filing of a class proof which seeks the same end. Furthermore, the class proof of claim has the additional benefit of helping relieve the bankruptcy court’s extraordinary burden of paperwork, by substituting a single document for the oppressive mass of repetitious individual proofs that would otherwise have to be filed in order to initiate a class action.

Permitting a class proof of claim will not make the individual proof superfluous. This argument misses the mark, as it utterly fails to recognize the functional differences between the two instruments. To laud the supposed sanctity of the individual proof over the class claim is the same as commanding individual claimants to opt-in. The court in Zenith found this concept repugnant to the objectives of the Bankruptcy Code because it would conserve the debtor’s estate for larger creditors, to the detriment of small, individual claims.

One might even suggest there is a denial of due process to potential claimants, particularly small ones, where a class proof is deemed impermissible. As the filing of the class proof may be the sole avenue to commencing a class action, its prohibition may effectively estop the utilization of Rule 23. Notwithstanding the argument that individual claimants may file separately and then later join forces in a class litigation, the practicalities of the situation are

327. See In re American Reserve Corp., 840 F.2d 487, 489 n.3 (7th Cir. 1988), rev’g 71 Bankr. 32 (N.D. Ill. 1987).
such that a rejection of the class proof at the threshold could very likely be fatal to the bringing of any class suit. Once it is recognized that the class suit is the only viable litigation alternative, the due process question must be squarely faced.

The class proof of claim is a natural, indeed necessary, companion to the class action. The filing of the class proof is itself the first step in accomplishing many of the goals of bankruptcy, and in fact achieves some of them outright. The class proof brings the litigation into the forum, commences the certification process, and begins to provide notice to putative class members. It maximizes the extent of participation in the action by potential claimants who might otherwise go uncompensated. This facet is quite important because many small claimants, particularly in the context of bankruptcy proceedings, may find the individual costs of pressing claims to be prohibitive or may be simply unaware of the availability of a recovery.

C. The Califano Mandate

The trilogy of cases favoring the class proof have been faithful to the basic edict of the Supreme Court, as announced in Califano, that the class action rule is a device available to litigants in all civil actions, unless Congress specifies to the contrary. Indeed, one might make the simplistic, but nevertheless accurate, statement that Rule 23 was promulgated to be used, not to remain collecting dust on a bookshelf. As so forcefully stated by the Circuit Court of Appeals for the District of Columbia in ruling on a class action suit, "The Federal Rules of Civil Procedure are to be applied in all civil actions absent a direct expression of congressional intent to the contrary."

The circuit courts did not merely pronounce that the mere existence of the class action rule, with nothing more, was sufficient to authorize the use of a class proof in bankruptcy proceedings. The respective circuit courts each embarked upon the proper inquiry, mandated by Califano, to determine if there was a legislative obstacle to the employment of the class proof. After careful analysis, the courts correctly concluded there was no such impediment.

Given the particular context of bankruptcy adjudications, the circuit courts comprising the trilogy carefully scrutinized the Bankruptcy Code. The courts found that Congress failed to hint of any intent to hinder the availability of class action procedures in bankruptcy cases. More to the point, the trilogy courts' examination of section 501 of the Code did not supply a basis for the exclusion of a proof of claim filed by a class.

It is interesting to note the shift in the court's perspective. Standard Metals and its lower court predecessors held that a class proof was impermissible because section 501 did not explicitly authorize it. In contrast, the trilogy cases held that because the Code did not prohibit the class proof, it should be al-

329. 442 U.S. 682 (1979); see supra notes 33-53 and accompanying text.
allowed. The directive of *Califano*, that the exclusion of class litigation is appropriate only if a prohibition can be clearly discerned, suggests that the latter view, as exemplified by the Seventh, Eleventh and Sixth Circuits, is the better one. It is, therefore, beyond cavil that the correct application of the principle of *Califano* necessitates a finding that a class action, and, therefore, a class proof, is not to be excluded from bankruptcy proceedings.

**D. Section 501 Is Not Exclusive**

Just as section 501 could not be read as evincing a congressional intent to exclude class relief from bankruptcy proceedings, it cannot be read as forbidding the filing of a class proof of claim. As cases such as *Reid*\(^3\) point out, neither the Bankruptcy Code nor its legislative history suggests that section 501 prescribes the sole means of bringing a claim into the bankruptcy court.

The notion of the exclusivity of Rule 501 is further debunked by looking to the Bankruptcy Rules. Bankruptcy Rule 3001(b) specifically authorizes a method of filing omitted from section 501: a filing by a creditor’s agent. Section 501 simply cannot contain an exclusive list of permissible methods of filing a claim. Filing a class proof of claim is a method of filing, like the method prescribed in Bankruptcy Rule 3001(b), that is not enumerated in section 501.

Interpreting section 501 to be exclusive would have the further effect of negating Bankruptcy Rule 7023, the rule allowing class actions. If the class proof were not allowed under section 501, the meaning of Rule 7023 would be eviscerated and the class action would be superfluous. As the court in *American Reserve Corp.* explained, if section 501 is exclusive and prohibits the filing of a class proof, "then there will never be a Rule 23 class action; there will only be a 'spurious class action'; yet Bankruptcy Rule 7023 says that there are to be Rule 23 class actions in bankruptcy."\(^3\)

The Sixth Circuit in *Reid* made the salient point on behalf of the trilogy when it found that the Bankruptcy Code and its adjunct Rules must be read *in pari materia*.\(^3\) Not only does this represent the more reasoned view of statutory construction,\(^3\) it clearly demonstrates that no single bankruptcy statute, such as section 501, or any one of the Bankruptcy Rules can be fairly read in isolation from the rest of the Code and Rules.

Further support for the view that section 501 is not exclusive can be found in the definitions provided in the Code and the legislative history of essential terms such as "claim" and "creditor." It is beyond dispute that Congress crafted these definitions so as to facilitate a wide application to all kinds of

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\(^3\) 331. Reid v. White Motor Corp., 886 F.2d 1462, 1470 (6th Cir. 1989), cert. denied, 110 S. Ct. 1809 (1990); see supra note 273 and accompanying text.

\(^3\) 332. In re American Reserve Corp., 840 F.2d 487, 493 (7th Cir. 1988) (emphasis in original), rev’d 71 Bankr. 32 (N.D. Ill. 1987).

\(^3\) 333. 886 F.2d at 1470; see supra notes 262-75 and accompanying text.

\(^3\) 334. See 73 Am. Jur. 2d, Statutes, § 187 (2d ed. 1974) (“Sections and acts *in pari materia*, and all parts thereof, should be construed together and compared with each other.”) (footnote omitted).
claims and all kinds of creditors. In light of this expansive treatment, the
terms of art perpetuated by the Bankruptcy Code itself lend strength to the
arguments that a class may present itself to the court as a creditor (or group
of creditors), and then avail itself of the procedural devices to be found in the
bankruptcy forum, including the proof of claim.

A restrictive reading of a statute, such as section 501, frustrates this expan-
sive definition of "claim" and "creditor." Those who would place technical
barriers around a bankruptcy statute, such as section 501, should remember
the declaration of Justice Douglas over fifty years ago that, in construing the
scope of bankruptcy provisions, "substance will not give way to form," and
"technical considerations will not prevent substantial justice from being
done." 335

It would, therefore, seem clear from an analysis of the controlling statutes
in the Bankruptcy Code, and the legislative intent underlying them, that the
class proof of claim is allowable in bankruptcy proceedings. The delimiting
view of the earlier decisions runs afoul of the admonition by the Supreme
Court that, in interpreting the laws of bankruptcy, the courts "do not read
these statutory words with the ease of a computer. There is an overriding con-
sideration that equitable principles govern." 336 Clearly, the narrow adherence
to the black letter of the law in the decisions disallowing the class proof flies in
the face of the more reasoned approach to statutory interpretation demanded
by the Supreme Court. Moreover, the former approach virtually ignores the
many equitable considerations attendant to class litigants and their particular
needs.

E. Federal Rule 23 and the Bankruptcy Rules—A Partnership

As the previous discussion has shown, the Bankruptcy Rules far from pro-
hibit the class proof of claim, and in fact, wholeheartedly support the availa-
bility of Federal Rule 23 in filing a class proof. An analysis of the interplay
between the Federal Rules and the Bankruptcy Rules adds further support to
the class proof.

First, the Federal Rules of Civil Procedure and Bankruptcy Rules are in-
tended to be coordinated bodies. Both sets of rules emanate from the same
parent. Although not directly addressed, either pro or con, in any of the deci-
sions discussed, the Supreme Court has the ultimate authority to prescribe
rules for the federal courts, both district and bankruptcy. The statutes bestow-
ing the rulemaking power are virtually symmetrical. 337 Therefore, one may

337. The Rules Enabling Act, which applies to the Federal Rules of Civil Procedure, reads in
pertinent part as follows:

Rules of procedure and evidence; power to prescribe
(a) The Supreme Court shall have the power to prescribe general rules of practice
and procedure and rules of evidence for cases in the United States district courts
(including proceedings before magistrates thereof) and courts of appeals.
logically expect a high degree of congruence between the Federal Rules and the Bankruptcy Rules. Of course, the two sets of procedural guidelines do not always seamlessly mesh. But in the instant controversy, a minute examination is wholly unnecessary to reach the conclusion that the class action rule is fully applicable in both forums.

The plain fact remains that Federal Rule 23 provides for class actions in the federal trial courts. Bankruptcy Rule 7023, adopting Rule 23 in toto, makes the class action rule fully operative in bankruptcy cases. Clearly, proscribing the class proof would mean placing artificial limitations on Rule 7023 that neither set of rules contemplates.

Analysis of Bankruptcy Rule 3001, the "authorized agent" provision, also endorses the availability of the class proof. Once again, the opinions which have read the Rule as prohibiting a class proof are, at the least, guilty of exalting form over substance. The Rule neither expressly permits nor prohibits such a filing. The proper emphasis should be placed on the lack of a prohibition, rather than on the lack of express approval. This position is fortified by the fact that the Rules permit a proof to be lodged in a number of ways, including a filing by an agent of the creditor, the debtor, or the trustee, among others. The prescribed form for a proof is not so inflexible as to delimit itself to usage by individuals only.

Moreover, the narrow reading given the term "authorized agent" by some courts is a draconian interpretation. As held by the Eleventh Circuit in *Charter*, the putative class representative possesses at least the minimum authority to enable him to file a class proof. The class proof does not controvert the strictures of either Rule 3001 or Rule 2019, which regulates an agent's authority to act for a creditor. Instead, the congruence between the requirements of those Bankruptcy Rules validating the agent's status and the Rule 23 safeguards for the conduct of class actions insures that a class representative in a bankruptcy litigation stands in at least as good a position as any "authorized agent."

A basic tenet of the class action has been that the trial judge hearing the case is duty bound to maintain a close watch over the proceedings. Surely this mandatory vigilance by the bench not only measures up to the demands of the Bankruptcy Rules that an agent be authorized, it indeed amplifies that protection by ensuring a constant monitoring by the court of the class representative and his conduct of the litigation. Should the class representative falter in the performance of his or her duties to the class, remedial action by the court is a virtual certainty. In sum, the ongoing supervision provided for by Rule 23 not
only meets the Rule 2019 and Rule 3001 mandates at the time the class proof is filed, it goes further by maintaining that authority on a constant basis.

If the class action is certified, as it must be before it can proceed, the court gives its imprimatur of approval, thus meeting the needs of the Bankruptcy Rules. In this manner, as Charter indicates, Rule 3001(b) is satisfied because the putative class representative becomes the “authorized agent.” The requirements of Rule 2019 are likewise met, as the class representative obtains his authority nunc pro tunc from the court. The opt-out alternative under Rule 23 protects claimants who do not wish to be included in the class, thereby preventing prejudice to their interests.

A comparison of the strictures of Rule 23 and the demands of the Bankruptcy Rules reveal quite plainly that they act in parallel to achieve the same results; namely, court approval of the authority of the class representative/authorized agent, no prejudice to the class members, and court supervision of the conduct of the litigation. And if the class is not certified, then individual proofs will be required. At that point, the bankruptcy court is well within its discretionary power to set or extend an appropriate “bar date,” the date by which claims must be filed with the court to be considered valid for any distribution of the debtor’s assets.339

In sum, it is illogical that a court would oppose a class proof, given the unfettered adoption of Rule 23 in the Bankruptcy Rules. The trilogy is correct in finding that the Bankruptcy Rules permit class actions. It is undisputed that the class action can be used to prosecute claims already filed. Common sense dictates that the promulgation of the class action rule in Bankruptcy Rule 7023 means that the originating class proof is acceptable in bankruptcy proceedings as well. As the Charter court ruled, the prosecution of a class action necessitates its initiation, hence the allowability of the class proof should be unquestioned. Likewise, American Reserve came to the foregone conclusion that Rule 7023 provides for the threshold filing of the class proof, not only the prosecution of a Rule 23 action.

Without question, Rule 7023 applies primarily to adversary proceedings. But as the trilogy cases have found, Rule 9014 allows the court, in its discretion, to apply the class action rule “at any stage” in a contested matter. An objection to a claim is a contested matter. Thus, if a class proof is filed and objected to, Rule 9014 allows courts to use the class action rule. Moreover, since the decision to apply any adversary rule lies within the sound discretion of the court, that added safeguard should comfort those wary of the class proof, given the bankruptcy judge’s power to curtail abuses.

339. Vancouver Women’s Health Collective Soc’y v. A.H. Robins Co., 820 F.2d 1359, 1363 (4th Cir. 1987) (the decision to extend or not to extend the bar date for the filing of claims is committed to the sound discretion of the bankruptcy judge, and it is subject to reversal only upon a showing of a clear abuse of that discretion); see also Bankr. R. 3003(c)(3) (in Chapter 9 and Chapter 11 proceedings, the court shall fix and may extend the bar date).
F. Estimating the Class Claim

While the above discussion demonstrated that the Bankruptcy Code and Rules support the class proof, the class proof has not escaped criticism. One potential problem raised by opponents of the class proof is that the class action would complicate the bankruptcy proceeding to such a degree as to cause unreasonable delay. At the center of this argument is the premise that class claims are difficult to valuate.

However, the class proof brings no greater problems in valuation than any other claim. Bankruptcy courts will have no more difficulty adjudicating a class claim than those presented in asbestos or toxic tort litigation. Moreover, the Code is specifically designed to circumvent the problem in valuation through section 502. This section empowers the bankruptcy court to estimate any contingent, unliquidated claims, thus eradicating any impediment to the expeditious administration of the estate.

G. The Class Proof—The Clear and Present Need

Any criticism mounted against the class proof fails to recognize the growing need of the class action device to manage the complexities of the modern bankruptcy proceeding. The early decisions denouncing the class proof criticized it as “antithetical” to the general aims of adjudications in bankruptcy. In addition to the fact that modern rationale has displaced this outmoded thinking, the older cases fail to account for the dynamic growth in the relative enormity and complexity of recent bankruptcy filings, especially in reorganization cases. These proceedings are light years away from some of the situations confronting the earlier courts of bankruptcy. Indeed, today “the mega reorganization resembles the modern complex civil lawsuit.” Furthermore, these massive proceedings now swelling the bankruptcy courts are much like class action lawsuits, given the grouping of large numbers of creditors seeking similar relief. In light of these modern complexities, the line between the


341. 840 F.2d at 491 n.5. Judge Easterbrook opined that the valuation of claims in a fraud class action “may be a good deal easier” than in asbestos litigation, such as that which was the catalyst for the *Johns-Manville* bankruptcy. *Id.*

342. One need look no further than the definitive proclamation by Judge Lasker in *Chateaugay* that: first, pursuant to § 502, the bankruptcy judge has the undisputed power to estimate any uncertain claims, including class claims; second, the bankruptcy court is well able to undertake that task, as it has proven it could do so in the past; third, the estimation process bears no inherent delay to the administration of the case; and, finally, the greater policy objective of a more equitable distribution to all claimants, especially small ones, is served. *In re* Chateaugay Corp., 104 Bankr. 626, 633 (S.D.N.Y. 1989).

343. See Largest U.S. Bankruptcies, Wall St. J., Jan. 16, 1990, at A10, col. 1 (in charting the 15 largest bankruptcy filings in terms of assets, only four were filed before 1988).


345. *Id.* at 343.
"pure" bankruptcy case and complex civil litigation (such as the class action) has been blurred to say the least. Bright line distinctions that seemed possible before are thus more difficult, if not impossible, to justify.

VIII. Validating the Class Proof of Claim

As the discussion above indicates, the better view increasingly espoused by the higher federal courts supports the propriety of the class proof of claim. Notably, however, each of the three circuit courts to rule on the issue did not accept the claim before it. The class claim was denied not because of its very nature, but rather because each individual scenario possessed fatal flaws that prevented recognition of the instant class proof as a properly filed claim.

This indicates that while the trilogy cases authorize the device, the decisions lack a definitive example of a class proof of claim that passes muster on a procedural basis. The picture is far from bleak, however, as a putative class litigant can easily discern from these and other cases the defects that would condemn a class proof to rejection, and thereby avoid those pitfalls. As in many cases, the knowledge of what not to do permits a party to formulate a valid class proof of claim, shepherd it through the court's procedural maze, and obtain ultimate acceptance of the class proof's rightful place in the bankruptcy proceeding.

A simplistic, but nevertheless essential, point is that the road travelled by a class proof is much smoother if it springs from a class action litigation already under way. Obviously, the more advanced a Rule 23 action is before the intervention of a bankruptcy filing, the easier it will be to fortify the class proof from attack. In the best of all worlds, the class action would have been already initiated, the class certified, and the class representative deemed fit by the time the class proof is filed. As the Charter court noted, it would be backwards to disallow a class proof and demand individual filings where a certified class already existed.346

While this situation represents the ideal scenario, there is nothing necessarily fatal to the class proof where the class action was filed just prior to the bankruptcy. The essential terms of the complaint, namely, the causes of action, the identification of the putative class and its proposed representatives, and the ad damnum clauses, provide a sufficient basis from which the class proof may be drafted. Also, subsequent pleadings filed for the requisite class certification and so forth further supplement the justification for the class proof.

Finally, the bankruptcy proceeding may itself precipitate a stirring among potential class plaintiffs. While the automatic stay347 forestalls any commencement of litigation against the debtor after he enters bankruptcy, it of course

does not bar the filing of a proof of claim, including a class proof. Indeed, as discussed above, the claim of a class, no doubt either unscheduled or disputed by the debtor and, therefore, presumptively contingent and unliquidated, should be timely filed in order to comply with the Bankruptcy Code and Rules demanding that claimants be on record and make themselves known. Without question, the putative class which only begins to assert itself after the debtor enters bankruptcy has the most difficult course to navigate. Nonetheless, its problems are not insurmountable and the proof of claim of such a class can be successfully validated.

The first step in validating a class proof is the actual physical act of filing the class proof of claim with the bankruptcy court. The mechanics of the filing are themselves uncomplicated and no elaboration is needed here. All that is called for is the filing of a completed form of proof of claim with the bankruptcy court clerk. This document merely needs to be filled in with the appropriate data as to the claimants, the basis of the claim, and the amount in issue. However, with reference to the immediately preceding discussion, putative class claimants would be well advised to buttress the common proof of claim form with the attachment of the class action complaint, related pleadings, or similar documents exemplifying compliance with the parameters of Rule 23.

An even greater priority at this stage is to meet the substantive requirements of the class action rule. This is particularly true for the party who shall be the standard bearer for the class. For the erstwhile class representative, the Reid case is particularly instructive. In that case, the Sixth Circuit unabashedly criticized Reid for his utter disregard of proper procedure. The court found that Reid lacked representative capacity for the putative class because he was not a class member possessing the same interest and suffering the same injury. He was merely an attorney who offered to prosecute a claim. In sum, Reid lacked standing to represent the class. Furthermore, Reid failed to identify the class he was representing and failed to file a timely petition requesting the court to apply Bankruptcy Rule 7023.

The Sixth Circuit also looked harshly at Reid’s lack of authority to be designated as the authorized agent for the class. Reid never filed a verified statement with the bankruptcy court memorializing his status as an authorized agent, as required by Bankruptcy Rule 2019, and per force never filed along with that document the underlying instrument empowering him to act for the class. Since Reid failed to comply with Bankruptcy Rule 2019 he could not be considered an authorized agent and, thus, the court denied the class proof.

350. Id. at 1471 (citations omitted).
351. Id.
352. Id. at 1471 (citing In re Baldwin-United Corp., 52 Bankr. 146, 148 (Bankr. S.D. Ohio
Moreover, Reid's role as attorney for the putative class in the earlier state court action did not bestow authority upon him for the purposes of this subsequent class action, as consent to being a member or representative of a class in one proceeding is not necessarily transportable to another litigation. 53

Reid is thus highly instructive as to the several requirements that must be met to file a class proof. First, pursuant to Rule 23, the putative class representative has standing only if he is a member of the class he claims to represent. In addition, as with any class action, the class must be identified. Also, verification of the authority of an agent purporting to act on behalf of the class is also clearly necessary, pursuant to Rule 2019. 5

The next hurdle facing the class claimant is the procedure he must follow in petitioning the court to apply the bankruptcy class action rule, Rule 7023. The Charter court emphasized the timing of the procedural compliance made by the putative class in filing its proof of claim. As the court explained, the class representative must file its class proof before the bar date. Once the claim is properly filed, it is deemed allowed unless an interested party makes an objection. 5 That objection creates a contested matter. 5 Once the permissibility of the class becomes a contested matter, the class representative can then request the court to apply Bankruptcy Rule 7023. The bankruptcy judge then has the discretion to determine whether the class action device is appropriate to the particular claimants. Thus, "[t]he Bankruptcy Rules impose no time requirement [before an objection is made] with respect to filing a motion for application of Bankruptcy Rule 7023; indeed, the Code contains no other instance where a claimant must perfect a claim prior to objection." 5

1985)).

353. Id. at 1471-72.

354. Some might view this as a paradox. That is, the putative class representative must file a Rule 2019 statement to be in compliance with bankruptcy court procedures, and thus, be recognized as the rightful class representative. Yet he technically cannot file a legitimate Rule 2019 document stating he is the "authorized agent" until his putative authority is indeed recognized by the bench. This difficulty particularly holds where the class emerges after the bankruptcy filing. The problem, however, does not exist in reality.

First, American Reserve and Charter postulated that Rule 2019 can be satisfied when the class is certified, even if this means the authority of the class representative is granted nunc pro tunc. The putative representative becomes the "authorized agent" within the meaning of the Rules when the class is certified. American Reserve Corp. v. Huddleston (In re American Reserve Corp.), 840 F.2d 487, 496 n.6 (6th Cir. 1989); In re Charter Co., 876 F.2d 866, 873 (11th Cir. 1989), cert. dismissed, 110 S. Ct. 3232 (1990). Second, American Reserve found the putative authority of the class representative sufficient to maintain the action pending certification. In re American Reserve Corp., 840 F.2d at 493 (referring to American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553-54 (1974), finding that the filing of a class suit suspends the statute of limitations pending certification of the class).


356. For a discussion of the differences between an adversary proceeding and contested matter, see supra note 83 and accompanying text.


Setting the relevant guideposts, the Charter court wrote:
The teaching of Charter is that once an objection to the class proof is lodged, the class claimants should then timely move the court to apply Rules 9014 and 7023, and seek a finding by the court that all the prerequisites to Rule 23 have been met, primarily those for class certification. Certainly, a class that was certified in a pre-petition action shall have the easier task on this point, as it had previously surpassed this threshold requirement.

Nonetheless, a fair reading of the American Reserve holding indicates that a prior class certification in another court does not necessarily bind the bankruptcy judge and compel an identical certification, let alone any certification at all. Since American Reserve instructs the bankruptcy courts to consider Rule 23 and also weigh the desirability and efficiency of any suit as a bankruptcy class action, an automatic recertification is by no means guaranteed. While the putative class can conceivably make the same case for certification with respect to Rule 23 grounds, it must also convince the bankruptcy court of the efficacy of a class action.

The decision of whether to certify the class has direct bearing on the allowability of the class proof. As the court in American Reserve held, denial of the...
request to certify the class compels rejection of the class proof.\textsuperscript{360} Putative class members would then be obligated to file their proofs individually. However, as with other aspects of filing the class proof, judicial approval of the class action connotes the acceptance of the class proof originally filed.\textsuperscript{361}

In sum, although the trilogy cases themselves lack a concrete example of a permissible class proof, they nevertheless provide a number of guideposts on the way to validating a class proof. First and foremost, any putative class must be mindful of the basic requisites for class litigation under Rule 23. Generally, this requires the identification of a class and the existence of a class representative that possesses the essential qualifications, principally that of standing.

Next, the class proof of claim must actually be filed, with its supplemental documents. Exactly what should be filed in order to comply with Rule 2019 remains an open question. It appears that the Rule's demand that the class representative is an "authorized agent" can be met nunc pro tunc when the class is certified. The question remains as to what document, if any, the putative agent must initially file to adhere to Rule 2019. The best approach is for the putative class representative to make the Rule 2019 filing on the basis of his pending status as the class representative, and further allege that class certification and court approval of his role will be sought at the first available opportunity.

The class must also meet certain procedural requirements necessary to secure court approval of the class proof. The better view indicates that a class proof, just like any other claim, is deemed allowed until an objection is made. Once an objection is interposed, the class has its first opportunity to seek the application of Rule 7023. Pursuant to Rule 9014, the class claimants should then timely petition the bankruptcy court to apply the class action rule in this contested matter.

At this point, the bankruptcy court exercises discretion as to whether class litigation is appropriate in the context of the particular proceeding before it. If it finds in the affirmative, the action may proceed with the class certified, the class representative authorized, and the class proof allowed.

While future refinements in the trilogy line of reasoning will hone this process to a sharp point, it would seem that the trail to validating a class proof of claim has at least been blazed, if not altogether clearly marked.

\section*{IX. Conclusion}

The class proof of claim has experienced a sudden shift from virtual total rejection to fast-growing popularity. The better view accepts the class proof of claim as a legitimate device available in a bankruptcy proceeding to a group of similarly situated claimants. As the groundswell initiated by the recent trilogy of circuit court decisions spreads through the courts below, the class proof will establish itself as an accepted procedural device, thus displacing the confined

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rationales of the earlier cases decrying its validity.

The Supreme Court time and again has interpreted Rule 23 to make class litigation freely available, demonstrating a marked reluctance to circumscribe its boundaries. A proper analysis must start with the presumption that the class action is appropriate in bankruptcy; therefore, the class proof of claim must likewise be found permissible.

The early decisions rejecting the class proof did not take full cognizance of this precept. Moreover, they further erred by reading the pertinent law and rules in a highly restrictive fashion that, per force, outlawed the class action device altogether in the context of bankruptcy.

But formalism gave way to reason as the circuit courts moved to overcome this anachronistic view. In rapid succession, the Seventh, Eleventh, and Sixth Circuits permitted the class proof of claim in bankruptcy proceedings. Looking at the Code and the Bankruptcy Rules in a fresh light, the courts ultimately concluded that no conflict existed between the strictures of the law and the allowance of the class proof.

The appellate courts have blended this more reasoned view of the Code and Rules with the pronouncements of the Supreme Court on the availability of class actions, and the essential equities favoring small claimants to support the class proof as a beneficial tool in bankruptcy procedure. Moreover, as this better view garners strength, its adherents in the trial courts have begun to apply it with regularity, thus insuring its own place in the jurisprudence of the bankruptcy courts.

In vindicating the class proof as a permissible device, the circuit trilogy has laid the procedural foundation for its future use. The putative class must file its proof of claim and, at the appropriate time, seek application of the class action rule. Allowing the class action to proceed in bankruptcy will not sacrifice the existing precedents, as the class proof is validated only if its purported class meets all the basic requisites for class litigation as set down by the established caselaw and rules. And lest there be any undue concern, authorization of the class action, and thus, allowance of the class proof, is still left to the sound discretion of the bankruptcy judge.

In conclusion, the class proof of claim, once so maligned by the bankruptcy courts, has now been advocated by the circuit courts and is fully allowed in bankruptcy cases. Given its turbulent history, and the evolutionary forces that will continue to shape it in the future, the class proof of claim in bankruptcy proceedings is truly a unique creation, one that is undeniably in a class by itself.