ELEVATING BUSINESS ABOVE THE CONSTITUTION: ARBITRATION AND BANKRUPTCY PROOFS OF CLAIM

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INTRODUCTION**

When a creditor files a proof of claim in a bankruptcy proceeding it is deemed to have waived its Seventh Amendment right to a jury trial. When a State files a proof of claim in a bankruptcy proceeding it is deemed to have waived its Eleventh Amendment immunity. Yet when a creditor files a proof of claim in a bankruptcy proceeding it is deemed *not* to have waived its right to later seek to compel arbitration.

Why has such an anomaly occurred? More importantly, is it a proper result from a policy perspective? It is undeniable that both the Federal Arbitration Act ("FAA") and the Bankruptcy Code influence commercial transactions. But surprisingly, there is no federal legislation which addresses the intersection of the FAA and the Bankruptcy Code. There has also been no Supreme Court decision which has squarely addressed the interplay of these two bodies of law. And in the academic world there has been extremely little analysis of the relationship between bankruptcy proofs of claim and their impact on the right to arbitrate versus other constitutional rights.[1]

This article addresses the fundamental question of whether it is proper for a bankruptcy court to conclude that the right to arbitrate has not been waived when a creditor has filed a proof of claim in a bankruptcy proceeding. Part I sets the stage by considering Supreme Court jurisprudence regarding the bankruptcy court's jurisdiction and federal legislation dealing with proofs of claim. It also addresses

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[1] The following is sampling of the relatively few commentaries on this topic: Michael D. Fielding, *Navigating the Intersection of Bankruptcy and Commercial Arbitration*, 27 No. 2 BANKING & FIN. SERVICES POL'Y REP. 13, 16 (2008) [hereinafter *Navigating the Intersection of Bankruptcy*] (noting "courts have effectively elevated the statutory right to compel arbitration above the constitutional right to a jury trial"); Michael D. Fielding, *Six Arguments to Avoid Arbitration in Bankruptcy*, *in* EFFECTIVE STRATEGIES IN MEDIATION, ADR Committee materials for the American Bankruptcy Institute 19th Annual Winter Leadership Conference (December 6–8, 2007) (*available on* Westlaw at 071206 ABI-CLE 217) [hereinafter *Six Arguments*] (contrasting waived right to jury trial and un-waived right to arbitrate after filing proof of claim); Fred Neufeld, *Enforcement of Contractual Arbitration Agreements Under The Bankruptcy Code*, 65 AM. BANKR. L.J. 525, 544–45 (1991) (discussing bankruptcy courts could hold party which has filed proof of claim has waived its right to arbitrate).

Supreme Court precedent dealing with the impact of a proof of claim on a State's Eleventh Amendment immunity and an individual's Seventh Amendment right to a jury trial. Part II of this article addresses the issue of bankruptcy and the right to arbitrate (including general jurisprudence regarding arbitration), general principles regarding waiver of the right to arbitrate in bankruptcy, the impact of the FAA in bankruptcy, and cases that have considered the issue of whether the filing of a proof of claim constitutes a waiver of the right to arbitrate. Finally, Part III considers why the current disparity has occurred and it proposes a solution to reconcile the competing differences associated with proofs of claim, constitutional rights, and the statutory right to arbitrate.

I. BANKRUPTCY COURT JURISDICTION AND PROOFS OF CLAIMS

A. General Rules Regarding Bankruptcy Court Jurisdiction

1. The bankruptcy court's in rem jurisdiction

Perhaps the most fundamental and most distinguishing characteristic of the bankruptcy court is its *in rem* jurisdiction. Succinctly stated, "[b]ankruptcy jurisdiction, at its core, is *in rem*."[2] Since the framing of the Constitution, bankruptcy jurisdiction has always been understood to principally be *in rem* jurisdiction.[3] Historically, courts that have adjudicated disputes involving a bankrupt's estate are deemed to have authority to issue ancillary orders that enforce the court's *in rem* adjudications.[4] Bankruptcy court jurisdiction includes the ability to issue "compulsory orders to facilitate the administration and distribution of the

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[2] Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 362 (2006). *See* James D. Jorgensen & Leila B. Helms, *Recent Developments in Public Education Law: Postsecondary Education, 2005–06*, 38 URB. LAW. 1201, 1218 (2006) (presenting need for bankruptcy jurisdiction to be *in rem* and extending to all of debtor's property in order to establish uniform bankruptcy procedure); Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Democracy*, 83 NOTRE DAME L. REV. 605, 636 (2008) (discussing bankruptcy jurisdiction is principally *in rem* jurisdiction and this has been rooted in original understanding of Bankruptcy Clause).

[3] *See Katz*, 546 U.S. at 369 ("Bankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction."); *see also* Texas v. Soileau (*In re* Soileau), 488 F.3d 302, 307 (5th Cir. 2007) (discussing holding of *Katz*, stating in ratifying Bankruptcy Clause of Constitution, *in rem* jurisdiction of bankruptcy courts was effectuated (quoting *Katz*, 546 U.S. at 378)); Susan M. Freeman & Marvin C. Ruth, *The Scope of Bankruptcy Ancillary Jurisdiction After* Katz *as Informed by Pre-*Katz *Ancillary Jurisdiction Cases*, 15 AM. BANKR. INST. L. REV. 155, 157 (2007) (acknowledging *Katz* court held by adopting Constitution, bankruptcy cases can effectuate *in rem* jurisdiction) (citation omitted).

[4] *See Katz*, 546 U.S. at 370 (discussing courts adjudicating disputes have historically had power to issue ancillary orders to enforce their *in rem* adjudications); *see also* James D. Walker, Jr. & Amber Nickell, *Eleventh Circuit Survey: Bankruptcy*, 57 MERCER L. REV. 1013, 1020 (2006) (noting *Katz* observed while bankruptcy jurisdiction is historically limited type of *in rem* jurisdiction, it still extends to issuing ancillary orders enforcing *in rem* adjudications (citing *Katz*, 546 U.S. at 369–71); Chris Micale, Case Note, Cent. Va. Cmty. College v. Katz, 38 URB. LAW. 1257 (2006) (discussing *Katz* decision, which found uniform bankruptcy law would include ancillary orders enforcing *in rem* jurisdiction of bankruptcy courts).

res."[5] Indeed, this power is expansive. For example, "the Bankruptcy Court's *in rem* jurisdiction allows it to adjudicate the debtor's discharge claim without *in personam* jurisdiction over the State."[6] Under this logic it is thus no surprise that the Supreme Court recently held in *Central Virginia Community College v. Katz* that by agreeing to the Constitution (including the bankruptcy clause) the States agreed not to assert their immunity.[7]

The Supreme Court's jurisprudence makes a distinction between *in rem* and *in personam* jurisdiction.[8] "[T]he bankruptcy court's jurisdiction is premised on the res, not on the persona."[9] The simple fact that an *in rem* determination in the bankruptcy court may be similar to a civil matter before a district court is irrelevant.[10] In other words, the *in rem* nature of the bankruptcy court means its "jurisdiction is premised on the debtor and his estate, and not on the creditors."[11] This, in turn, makes it possible for a debtor to obtain a "fresh start" even if all of its creditors choose not to participate in the bankruptcy proceedings.[12] "A bankruptcy

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[5] *Katz*, 546 U.S. at 362. *See* Fla. Dep't of Revenue v. Omine (*In re* Omine), 485 F.3d 1305, 1314 (11th Cir. 2007) (discussing *Katz* decision as stating "court's authority to issue compulsory orders to facilitate the administration and distribution of the res" comes from *in rem* jurisdiction of bankruptcy courts) (citation omitted); *see also* Richard Lieb, *State Sovereign Immunity: Bankruptcy Is Special*, 14 AM. BANKR. INST. L. REV. 201, 229 (2006) (recognizing jurisdiction of bankruptcy courts includes power to issue compulsory orders to facilitate administration and distribution of res (quoting *Katz*, 546 U.S. at 362)).

[6] Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 453 (2004). *See In re* Lake Worth Generation, L.L.C., 318 B.R. 894, 905–06 (Bankr. S.D. Fla. 2004) (discussing past holdings where court's *in rem* jurisdiction allows it to adjudicate request for relief without having *in personam* jurisdiction over State); Ralph Brubaker, *From Fictionalism to Functionism in State Sovereign Immunity: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief After* Hood, 13 AM. BANKR. INST. L. REV. 59, 77–78 (2005) (observing statement of *Hood* court which noted discharge of debt by bankruptcy court is exercise of *in rem* jurisdiction and this allows court to adjudicate claim without *in personam* jurisdiction over State) (citation omitted).

[7] *Katz*, 546 U.S. at 373 (stating in plan of Constitutional Convention, States agreed to give up their sovereign immunity from suit).

[8] *See, e.g.*, *Hood*, 541 U.S. at 453 (noting precedent distinguishes *in rem* and *in personam* proceedings); Shaffer v. Heitner, 433 U.S. 186, 207 (1977) (explaining when exercising in rem jurisdiction over property, same test applied for exercise of in personam jurisdiction); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (stating to subject defendant to in personam jurisdiction minimum contacts must exist).

[9] *Hood*, 541 U.S. at 450. *See* Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (explaining "related to" language of 28 U.S.C. section 1334(b) reads as giving district and bankruptcy courts jurisdiction over more than actions involving debtor's property or estate). *See generally* 28 U.S.C. § 1334(b) (2006) (stating "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11").

[10] *Hood*, 541 U.S. at 453. *Cf. In re* Federal-Mogul Global, Inc., 281 B.R. 301, 306 (Bankr. D. Del. 2002) (acknowledging narrow rule of common fact issues between civil and bankruptcy proceedings have no effect on bankruptcy court's jurisdiction as factual issue resolution would not be binding on debtor's estate).

[11] *Hood*, 541 U.S. at 447 (citation omitted). *See* Virginia v. Collins (*In re* Collins), 173 F.3d 924, 929 (4th Cir. 1999) (observing jurisdiction of federal court over debt satisfaction "'derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates'") (quoting Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777, 787 (4th Cir. 1997))); *see also* Spartan Mills v. Bank of Am. Ill., 112 F.3d 1251, 1255–56 (4th Cir. 1997) (acknowledging bankruptcy court's jurisdiction over action if outcome alters debtor's rights or affects administration of bankrupt estate (citing Pacor, Inc. v. Higgins (*In re* Pacor, Inc.), 743 F.2d 984, 994 (3d Cir. 1984))).

[12] *See* Grogan v. Garner, 498 U.S. 279, 286 (1991) (indicating purpose of Bankruptcy Code to provide procedure for debtors to create new opportunities without "pressure" of preexisting debt (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934))); Universal Oil Ltd. v. Allfirst Bank (*In re* Millennium Seacarriers,

court's *in rem* jurisdiction permits it to 'determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is 'one against the world.'"[13] Given this analysis, the Supreme Court has long held that a State is bound by a bankruptcy court's discharge order whether or not the State participates in the bankruptcy proceeding.[14]

Critically, the bankruptcy court's *in rem* jurisdiction encompasses all of the debtor's property. A bankruptcy court has "jurisdiction over *all* of the property of the debtor."[15] "Bankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate."[16] Indeed, "[c]ritical features of every bankruptcy proceeding are the exercise of *exclusive jurisdiction* over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts."[17]

2. The bankruptcy court's equitable jurisdiction

To be sure, the bankruptcy court's *in rem* jurisdiction is not its only distinguishing feature. Another very important element of a bankruptcy court's power is its equitable jurisdiction. "[T]he restructuring of the debtor-creditor

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Inc.), 419 F.3d 83, 92 (2d Cir. 2005) (stating bankruptcy proceeding was fresh start despite "lack of participation" by all creditors (quoting *Hood*, 541 U.S. at 446)); Brown v. Pa. State Employees Credit Union, 851 F.2d 81, 83 (3d Cir. 1988) (noting Congress intended for bankruptcy petitioners receive protections and benefit of "fresh start").

[13] Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 448 (2004) (citation omitted). *See* Gardner v. United States (*In re* Gardner), 913 F.2d 1515, 1518 (10th Cir. 1990) (explaining proceeding does not have to be against debtor or his property to relate to bankruptcy (citing *Pacor*, 743 F.2d at 9940)); *In re* Taylor, 281 B.R. 94, 98 (Bankr. S.D. Ala. 2001) (proceeding does not have to be against debtor or debtor's property (citing Miller v. Kemira, Inc. (*In re* Lemco Gypsum, Inc.), 910 F.2d 784, 788 (11th Cir. 1990))).

[14] *See Hood*, 541 U.S. at 448; Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96, 102 (1989) (observing "a State that files no proof of claim [is] bound, like other creditors, by discharge of debts in bankruptcy, including unpaid taxes"); Gardner v. New Jersey, 329 U.S. 565, 574 (1947) (stating those who offer proof of claim to invoke bankruptcy court's aid "must abide the consequences of that procedure" and State waives immunity in filing such claim) (citation omitted).

[15] *Gardner*, 329 U.S. at 578 (emphasis added). *See* 28 U.S.C. § 1334(e)(1) (2006) ("The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction-- (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate . . . ."); *see also In re* French, 303 B.R. 774, 779 (Bankr. D. Md. 2003) ("The district court in which the bankruptcy case is commenced obtains exclusive *in rem* jurisdiction over all of the property in the estate." (citing 28 U.S.C. § 1334(e) (2000))).

[16] *Hood*, 541 U.S. at 447. *See* 28 U.S.C. § 1334(e)(1); *see also In re* Rajapakse, 346 B.R. 233, 234 (Bankr. N.D. Ga. 2005) (positing bankruptcy courts, by reference to 28 U.S.C. section 157(a), have same jurisdiction as district courts over all property of debtor and estate).

[17] Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363–64 (emphasis added); *see In re* DelPiano, No. 03-82293-MGD, 2006 Bankr. LEXIS 3237, at *9 (Bankr. N.D. Ga. Sept. 22, 2006) (describing bankruptcy courts' purposes, including providing debtor fresh start with assistance such as "automatic stay, exemptions, and discharge" and ensuring creditors receive fair share of debtors' assets); *see also In re* Urban, 361 B.R. 910, 912–13 (Bankr. D. Mont. 2007) (explaining bankruptcy court has exclusive jurisdiction over all debtors' property to disperse to creditors unless debtor removes assets through exemption process, giving debtor fresh start) (citation omitted).

relations . . . is at the core of the federal bankruptcy power."[18] The Supreme Court has "long recognized that a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period'."[19] One of the key means by which Congress seeks to ensure prompt administration of the bankruptcy estate is through provisions regarding the bankruptcy court's summary disposition.[20] Using that rationale, it becomes clear that a bankruptcy court's authority to allow, disallow or reconsider claims is essential to the effective administration of the bankruptcy estate and should be done in a summary proceeding rather than through a more tedious plenary proceeding.[21] Moreover, "in the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate."[22]

In *Katchen v. Landy*, the Supreme Court noted that bankruptcy courts are "essentially courts of equity and they characteristically proceed in summary fashion to deal with the assets of the bankrupt they are administering."[23] The Supreme Court has "held that equity courts have power to decree complete relief and for that purpose may accord what would otherwise be legal remedies."[24] Moreover, the

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[18] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 56 n.12 (1989) (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982)). *See* 28 U.S.C. § 157(b)(2) (2006) (listing core proceedings of bankruptcy court which include adjusting relationship between debtor and creditor); *see also* Billing v. Ravin, Greenberg & Zackin, P.A., 22 F.3d 1242, 1245 n.1 (3d Cir. 1994) ("Core proceedings include 'matters concerning the administration of the estate' and 'other proceedings affecting the liquidation of the estate or the adjustment of the debtor-creditor . . . relationship.'" (quoting 28 U.S.C. § 157(b)(2)(A), (O) (1988))).

[19] Katchen v. Landy, 382 U.S. 323, 328 (1966) (quoting *Ex parte* Christy, 44 U.S. 292, 312 (1845)). *See* 11 U.S.C. § 362(d)(3)(A) (2006) (requiring debtor must file plan that has reasonable chance of confirmation within reasonable time when dealing with lifting of automatic stay); United Sav. Assoc. of Tex. v. Timbers of Involved Forest Assocs., Ltd., 484 U.S. 365, 376 (1988) (asserting courts have stated reorganization should be possible within reasonable time frame).

[20] *Katchen*, 382 U.S. at 329 (postulating summary disposition is means Congress chose to allow bankruptcy courts to promptly administer debtors' estate) (citation omitted); *see* Bailey v. Glover, 88 U.S. 342, 346 (1875) ("It is obviously one of the purposes of the Bankrupt Law, that there should be a speedy disposition of the bankrupt's assets . . . [through] quick and summary disposal of questions arising . . . without . . . delay."); *see also In re* Dietert, 271 B.R. 499, 502 (Bankr. S.D. Tex. 2002) (expounding on bankruptcy courts ability to determine whether objections to claims are valid in summary proceedings without presence of jury).

[21] *Katchen*, 382 U.S. at 329; *see* U.S. Fid. & Guar. Co. v. Bray, 225 U.S. 205, 218 (1912) (justifying creditors' complaints if administration of estate is sought to be administered through slow, less appropriate plenary suits as opposed to disposition in summary way); *see also In re* Commercial Fin. Servs., Inc., 252 B.R. 516, 521 (Bankr. N.D. Okla. 2000) (noting "the essence of a bankruptcy court's power is that of efficiently and inexpensively adjudicating claims against a bankruptcy estate . . . [through] the bankruptcy court's equitable jurisdiction").

[22] Pepper v. Litton, 308 U.S. 295, 307–08 (1939). *See* Heiser v. Woodruff, 327 U.S. 726, 732 (1946) ("It is true that a bankruptcy court is also a court of equity and may exercise equity powers in bankruptcy proceedings to set aside fraudulent claims . . . .") (citation omitted); *see also* Nat'l Cash Register Co. v. Dallen, 76 F.2d 867, 868 (3d Cir. 1935) ("Bankruptcy courts may apply rules regulating equitable actions.").

[23] 382 U.S. at 327 (citations omitted).

[24] *Id.* at 338. *See* Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 299 (1960) ("It is not to be doubted that an equity court, proceeding under unrestricted general equity powers, may decree all the relief, including incidental legal relief, necessary to do complete justice between the parties."); *see also* Porter v.

Supreme Court has noted that a general rule regarding courts of equity is that, once a court has jurisdiction over all the parties to the controversy, it "'will decide *all* matters in dispute and decree *complete* relief.'"[25] As such, a bankruptcy court's summary jurisdiction extends to disputes that relate to property of the bankruptcy estate.[26] These notions regarding summary jurisdiction are considered to be "elementary bankruptcy law."[27]

B. Core and Non-Core Jurisdiction

In a landmark decision in 1982, the United States Supreme Court held in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* that the broad jurisdiction given to bankruptcy judges under the 1978 Bankruptcy Reform Act violated Article III of the Constitution.[28] In response to that decision, Congress passed legislation in 1984 which created the notion of core and non-core matters in a bankruptcy proceeding.[29] In so doing, Congress intended the bankruptcy court's "core" jurisdiction to be construed as widely as constitutionally permitted.[30]

Warner Holding Co., 328 U.S. 395, 397–98 (1946) ("Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.").

[25] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 59 n.14 (1989) (emphasis added) (quoting *Katchen*, 382 U.S. at 335). *See* Alexander v. Hillman, 296 U.S. 222, 242 (1935) (noting courts of equity "will decide all matters in dispute and decree complete relief") (citation omitted); *see also* Longo v. McLaren (*In re* McLaren), 3 F.3d 958, 966 (6th Cir. 1993) (acknowledging courts of equity generally decide all aspects of "controversies brought before them") (citation omitted).

[26] Katchen v. Landy, 382 U.S. 323, 327 (1966) ("The bankruptcy courts 'have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession.'" (quoting Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 481 (1940))); Cline v. Kaplan, 323 U.S. 97, 98 (1944) ("A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court.") (citation omitted); *Thompson*, 309 U.S. at 481 ("Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession.").

[27] *Katchen*, 382 U.S. at 327. *See* G. Ray Warner, Katchen *Up In Bankruptcy: The New Jury Trial Right*, 63 AM. BANKR. L.J. 1, 16 (1989) ("By the time of the *Katchen* case, it was well settled that bankruptcy law converted what otherwise might have been a legal claim against the bankrupt debtor into an equitable claim for a pro rata share of the *res*."). *But see* Ralph Brubaker, *On The Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 746 (2000) (suggesting jurisdiction in bankruptcy remains "one of the most enduring puzzles of our federal court system").

[28] 458 U.S. 50, 70–71, 76 (1982) (discussing Article III restrictions on creation of legislative courts to exercise jurisdiction over matters related to those arising under bankruptcy laws).

[29] *See* S.G. Phillips Constructors, Inc. v. City of Burlington, Vt. (*In re* S.G. Phillips Constructors, Inc.), 45 F.3d 702, 705 (2d Cir. 1995) (stating Federal Judgeship Act of 1984 and Bankruptcy Amendments created distinction between core and non-core proceedings) (citation omitted); *In re* Iridium Operating, L.L.C., 285 B.R. 822, 829 (S.D.N.Y. 2002) (noting Congress enacted 28 U.S.C. section 157 which divided bankruptcy proceedings into two principal categories of core and non-core) (citation omitted); *see also In re* Winimo Realty Corp., 270 B.R. 108, 119 (S.D.N.Y. 2001) ("The Bankruptcy Code divides claims in bankruptcy proceedings into two principal categories, 'core' and 'non-core'.").

[30] *See In re S.G. Phillips Constructors, Inc.*, 45 F.3d at 705 (holding core jurisdiction would be construed as broadly as possible within constitutional limits) (citation omitted); *In re Iridium*, 285 B.R. at 829 (determining core jurisdiction for bankruptcy courts should be given broad interpretation "'that is close to or

Under the 1984 legislation, "[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."[31] Bankruptcy judges, in turn, "may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11."[32]

"In general, a 'core proceeding' in bankruptcy is one that 'invokes a substantive right provided by title 11 or . . . a proceeding that, by its nature, could arise only in the context of a bankruptcy case.'"[33] In contrast, a non-core proceeding is one that is

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congruent with constitutional limits'" (quoting *In re* Petrie Retail, Inc., No. 95B44528, 2001 WL 826122, at *5 (S.D.N.Y. July 19, 2001))); *see also In re* Enron Corp., 349 B.R. 108, 111 (Bankr. S.D.N.Y. 2006) (finding "'core proceedings' are to be given broad interpretation corresponding to constitutional limits") (citation omitted).

[31] 28 U.S.C. § 157(a) (2006). *See* Mt. McKinley Ins. Co. v. Corning Inc., 399 F.3d 436, 447 (2d Cir. 2005) (describing application of 28 U.S.C. § 157(a)); *see also* David S. Kennedy et al., *Professionalism: Dealing with Unprofessional Conduct in Bankruptcy*, 36 U. MEM. L. REV. 575, 592 (2006) (noting district court's ability to refer bankruptcy cases to bankruptcy court within its district). With respect to 28 U.S.C. section 157(c), Professor Charles Jordan Tabb has succinctly noted a constitutional problem with the statute. Specifically, he states:

> The constitutionality of the provision authorizing bankruptcy judges to hear and determine related proceedings with party consent is debatable. The de facto effect of the consent rule, when coupled with the comprehensive initial reference to the bankruptcy judge, is to confer subject matter jurisdiction over related proceedings to the non-Article III bankruptcy judge. Yet, subject matter jurisdiction cannot be conferred by consent. This objection should apply with full force to Article III jurisdictional concerns, which are rooted in the structural concept of separation of powers. However, a consent-based magistrate system has been upheld by the courts. For now, lower courts probably will "look the other way" and not press the niceties of the constitutional issue in bankruptcy. If the Supreme Court ever decides the issue, though, the outcome could be the same as in *Marathon*.

CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY § 4.3 (1997). *See* Jason C. Matson, Comment, *Running Circles Around* Marathon*? The Effect of Accounts Receivable as Core or Non Core Proceedings on the Article III Courts*, 20 EMORY BANKR. DEV. J. 451, 452–53 (2004) (noting this is "confusing" period in federal jurisprudence regarding what bankruptcy courts can decide and what should be decided by Article III courts) (citation omitted); Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1039, 1085–86 (1999) (discussing bankruptcy courts appear to be similar to magistrate courts, but when taking closer look have much more independent control over matters possibly arising in bankruptcy).

[32] 28 U.S.C. § 157(b)(1) (2006). *See Mt. McKinley*, 399 F.3d at 447–48 (indicating judges have jurisdiction in "'all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11'" (quoting 28 U.S.C. § 157(b)(1))); *In re* Perry, 388 B.R. 330, 337 (Bankr. E.D. Tenn. 2008) (discussing bankruptcy courts' ability to hear cases under title 11).

[33] Gruntz v. County of L.A. (*In re* Gruntz), 202 F.3d 1074, 1081 (9th Cir. 2000) (citing Wood v. Wood (*In re* Wood), 825 F.2d 90, 97 (5th Cir. 1987)). *See* Huse v. Huse-Sporsem, S.A. (*In re* Birting Fisheries), 300 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (determining core proceedings are those invoking substantive right under title 11) (citation omitted); *see also In re* 4 Front Petroleum, Inc., 345 B.R. 744, 750 (Bankr. N.D. Okla. 2006) (finding core proceedings are those having no existence outside of bankruptcy) (citation omitted).

"not integral to the restructuring of debtor-creditor relations and not involving a cause of action arising under title 11."[34]

Section 157 of title 28 of the United States Code sets forth a list of core-matters including:

> (A) matters concerning the administration of the estate;
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
> (C) counterclaims by the estate against persons filing claims against the estate;
> (D) orders in respect to obtaining credit;
> (E) orders to turn over property of the estate;
> (F) proceedings to determine, avoid, or recover preferences;
> (G) motions to terminate, annul, or modify the automatic stay;
> (H) proceedings to determine, avoid, or recover fraudulent conveyances;
> (I) determinations as to the dischargeability of particular debts;
> (J) objections to discharges;
> (K) determinations of the validity, extent, or priority of liens;
> (L) confirmations of plans;
> (M) orders approving the use or lease of property, including the use of cash collateral;
> (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
> (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims;
> (P) recognition of foreign proceedings and other matters under chapter 15 of title 11.[35]

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[34] *In re Gruntz*, 202 F.3d at 1081 (holding non-core proceedings are those not involving cause of action arising under title 11). *See In re 4 Front Petroleum, Inc.*, 345 B.R. at 750 (finding actions do not depend on bankruptcy laws for existence are non-core proceedings) (citation omitted); *cf. In re* Boulders on the River, Inc., 218 B.R. 528, 542 (D. Or. 1997) (noting non-core proceedings can be heard by bankruptcy courts and then "submit proposed findings of fact" to district court).

[35] 28 U.S.C. § 157(b)(2) (2006) (setting forth non-exclusive list of core matters).

To be sure, the list of core matters is non-exclusive and courts have been left to devise tests for determining whether a matter is a core or non-core proceeding. For instance, the Third Circuit enunciated the following test to determine whether a matter is core or non-core:

> To determine whether a proceeding is a "core" proceeding, courts of this Circuit must consult two sources. First, a court must consult [section] 157(b). Although [section] 157(b) does not precisely define "core" proceedings, it nonetheless provides an illustrative list of proceedings that may be considered "core." Second, the court must apply this court's test for a "core" proceeding. Under that test, "a proceeding is core [1] if it invokes a substantive right provided by title 11 or [2] if it is a proceeding, that by its nature, could arise only in the context of a bankruptcy case."[36]

Stated more succinctly, "a core proceeding 'invokes a substantive right provided by title 11 or by its nature, could arise *only* in the context of a bankruptcy case.'"[37] "In contrast, 'a non-core proceeding belongs to the broader universe of all proceedings that are not core proceedings but are nevertheless related to a bankruptcy case.'"[38] "Undoubtedly, public policy does favor centralization of bankruptcy proceedings in bankruptcy court where a case is pending. However, this policy is not so strong as to abandon the forum selection clause if the proceeding is non-core."[39]

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[36] Halper v. Halper (*In re* Halper), 164 F.3d 830, 836 (3d Cir. 1999) (quoting Torkelsen v. Maggio (*In re* Guild & Gallery Plus, Inc.), 72 F.3d 1171, 1178 (3d Cir. 1996)). *See In re Wood*, 825 F.2d at 93 (applying Third Circuit core proceedings test in Fifth Circuit). *See generally* Jeffrey T. Ferriell, *Core Proceedings in Bankruptcy Court*, 56 UMKC L. REV. 47 (1987) (discussing what can constitute core issue in bankruptcy proceeding).

[37] *In re* Mid-Atl. Handling Sys., L.L.C., 304 B.R. 111, 122 (Bankr. D.N.J. 2003) (quoting Copelin v. Spirco, Inc., 182 F.3d 174, 180 (3d Cir. 1999)). *See In re Wood*, 825 F.2d at 97 (explaining proceedings created by federal bankruptcy law and proceedings arising only under federal bankruptcy law are core proceedings). *But see* Ben Cooper, Inc. v. Ins. Co. of the State of Pa. (*In re* Ben Cooper, Inc.), 896 F.2d 1394, 1398, 1404 (2d Cir. 1990) (positing bankruptcy jurisdiction should be construed as broadly as allowed by *Marathon* and holding adversarial post-petition contract disputes core proceedings); *In re* PSINet, Inc., 271 B.R. 1, 29 (Bankr. S.D.N.Y 2001) (rejecting holding of *In re Wood*, contemplating broad definition of core issues and holding adversarial proceedings for re-characterization of security agreements core issues).

[38] *In re Mid-Atl. Handling Sys.*, 304 B.R. at 122 (quoting *Copelin*, 182 F.3d at 180). *See* Nat'l Acceptance Co. of Am. v. Price (*In re* Colo. Energy Supply, Inc.), 728 F.2d 1283, 1286 (10th Cir. 1984) (defining non-core issues as "'those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district or state court'") (citation omitted); Ralls v. Docktor Pet Ctrs, Inc., 177 B.R. 420, 425 (D. Mass. 1995) ("Generally, if the claims could have been brought before the filing of the bankruptcy the claims are non-core.").

[39] *In re* McCrary & Dunlap Constr. Co., 256 B.R. 264, 266 (Bankr. M.D. Tenn. 2000) (citation omitted). *See* Envirolite Enters., Inc. v. Glastechnische Industrie Peter Lisec Gesellschaft, 53 B.R. 1007, 1013 (S.D.N.Y. 1985) (choosing to enforce forum selection clause rather than centralize bankruptcy proceedings); *In re* N. Parent, Inc., 221 B.R. 609, 620 (Bankr. D. Mass. 1998) (holding public policy for centralizing bankruptcy proceedings is outweighed by public policy for forum selection clauses for non-core proceedings) (citation omitted).

When confronted with both core and non-core claims, a bankruptcy court cannot apply a balancing test and adjudicate all claims in the same manner depending upon which type of claims predominate; rather, the bankruptcy court must apply the different core/non-core standards to the respective claims.[40] The mere fact that a party does not file a proof of claim does not automatically mean that any subsequent action by the trustee will be categorized as non-core.[41]

> Traditionally non-core claims against a creditor in an adversary proceeding will be considered core if: (1) the claim arises out of the same transaction as the creditor's proof of claim or setoff claim, or (2) the adjudication of the adversary proceeding claim would require consideration of issues raised by the proof of claim or setoff claim such that the two claims are logically connected.[42]

Where non-core claims are inextricably related to a trustee's claims against the creditor and where the creditor has filed a proof of claim, the non-core claims will be deemed to be core claims.[43] In contrast, where a creditor has filed a proof of claim and the trustee later brings an adversary action, the trustee's claims will be deemed to be non-core if those claims are unrelated to the creditor's claims.[44]

Some courts have recognized that where "the proof of claim contains a reservation of rights and is filed under the compulsion of the bar date, the proof of

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[40] *See Ralls*, 177 B.R. at 427–28 (holding non-core matters must be passed to Article III district court for final decision); *In re* Spookeyworld, Inc., 266 B.R. 1, 11 (Bankr. D. Mass. 2001) (holding bankruptcy court could not rule on plaintiff's summary judgment motion because along with core issues motion contained non-core issues bankruptcy court did not have final jurisdiction over); *In re* Best Reception Sys., Inc., 220 B.R. 932, 950 (Bankr. E.D. Tenn. 1998) (holding bankruptcy courts cannot make final judgments on non-core issues simply because core issues predominate proceedings).

[41] *In re* Celotex Corp., 152 B.R. 667, 674 (Bankr. M.D. Fla. 1993) ("Failure of a party to file proof of claim does not *ipso facto* make any action against that party a non-core matter.").

[42] *In re* Iridium Operating, L.L.C., 285 B.R. 822, 832 (S.D.N.Y. 2002) (citation omitted); *see In re* K&R Express Sys., Inc., 382 B.R. 443, 447 (N.D. Ill. 2007) (holding claims against creditor cannot be converted from non-core proceedings to core proceedings because claims are not related to creditor's proof of claim); *In re* Mercury Masonry Corp., 114 B.R. 35, 38 (Bankr. S.D.N.Y. 1990) (holding adversarial proceeding core instead of non-core because related to creditor's proof of claim and administration of estate).

[43] *See In re K&R Express Sys., Inc.*, 382 B.R. at 447 ("A non-core claim will be considered core if it 'arises out of the same transaction as the creditor's proofs of claim . . . or . . . [its] adjudication . . . would require consideration of issues raised by the proofs of claim . . . such that the two claims are logically related.'" (quoting CDX Liquidating Trust v. Venrock Assocs., No. 04C7236, 2005 WL 3953895, at *2 (N.D. Ill. Aug. 10, 2005))); *In re Iridium Operating, L.L.C.*, 285 B.R. at 830 (finding non-core claims became core because of "filing of proofs of claim, claims for administrative expenses, and . . . [the] assertion of the affirmative defense of set-off/recoupment"); *In re* Enron Corp., 349 B.R. 108, 112 (Bankr. S.D.N.Y. 2006) (stating courts have found non-core claims to be core "where a creditor files a proof of claim or asserts a counterclaim seeking set-off" (citing *In re Iridium Operating, L.L.C.*, 285 B.R. at 831)).

[44] *See In re K&R Express Sys., Inc.*, 382 B.R. at 447 (finding claims are non-core because unrelated to proof of claim); *see also In re* VWE Group, Inc., 359 B.R. 441, 450 (S.D.N.Y. 2007) ("[I]t is well settled that the filing of a proof of claim by a creditor does not automatically transform every non-core claim against the creditor into a core claim."); *In re Iridium Operating L.L.C.*, 285 B.R. at 830 (stating non-core claims will be core if arising out of same "operative facts as the core claims").

claim does not necessarily operate to transform a non-core claim into a core claim."[45] At least one court believes the language in the reservation of rights in the proof of claim must be particularly considered to determine whether the non-core claims have been transformed into core claims.[46] The problem with this approach, however, is it is wholly inconsistent with the notion that one automatically submits him or herself to the court's equitable jurisdiction by filing a proof of claim.

Some courts find that a creditor's filing of a proof of claim converts a non-core claim into a core claim.[47] The rationale for this conclusion is that (1) the proof of claims changes the matter to a core proceeding and (2) the creditor consented to the bankruptcy court's equitable jurisdiction by filing the proof of claim.[48] Indeed, even where creditors argue their claims are non-core, courts frequently find that the determinative factor is the simple fact that the creditor filed a proof of claim thereby subjecting itself to the bankruptcy court's equitable jurisdiction.[49]

C. General Rules Regarding Proofs of Claim

Before considering federal jurisprudence regarding the filing of a proof of claim and its relationship to jury trials and state sovereign immunity, it is necessary to understand the generally applicable statutes and jurisprudence regarding proofs of

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[45] *In re* Nw. Corp., 319 B.R. 68, 74 n.1 (D. Del. 2005). *See In re* Mid-Atl. Handling Sys., L.L.C., 304 B.R. 111, 124 (Bankr. D.N.J. 2003) (finding specific reservation in proof of claim prevented transformation into core claim). *But see In re Enron Corp.*, 349 B.R. at 112 ("[C]ourts reason that such creditors invoke the equitable jurisdiction of the bankruptcy court and avail themselves of the special procedures present only in the context of a bankruptcy proceeding . . . .") (citation omitted).

[46] *See In re Nw. Corp.*, 319 B.R. at 74 n.1 (stating "proofs of claim . . . filed [are] not dispositive here in light of the reservation of rights and other circumstances") (citation omitted); *In re Mid-Atl. Handling Sys., L.L.C.*, 304 B.R. at 124 (looking at language of reservation in proof of claim). *But see* Cent. Vt. Pub. Serv. Corp. v. Herbert, 341 F.3d 186, 191 (2d Cir. 2003) (noting theory of consenting to equitable jurisdiction by filing proof of claim).

[47] *See Herbert*, 341 F.3d at 191 ("[C]ases have upheld bankruptcy jurisdiction in what would otherwise be non-core proceedings where the party opposing the finding of jurisdiction has filed a proof of claim."); Benedor Corp. v. Conejo Enters., Inc. (*In re* Conejo Enters., Inc.), 96 F.3d 346, 353 (9th Cir. 1996) (stating filing proof of claim subjects claim to "core jurisdiction of the bankruptcy court"); *In re* Winimo Realty Corp., 270 B.R. 108, 120 n.7 (S.D.N.Y. 2001) (noting filing of proof of claim may be enough to make it core); Pan Am. World Airways, Inc. v. Evergreen Int'l Airlines, Inc., 132 B.R. 4, 7 (S.D.N.Y. 1991) ("When a creditor files a proof of claim it submits itself to the bankruptcy court's equitable power, and the claims, even though arising under state law, become core proceedings within the jurisdiction of the bankruptcy court.").

[48] *See Herbert*, 341 F.3d at 191 (relying on two theories when stating filing proof of claim changes non-core into core claims and gives bankruptcy court jurisdiction); *see also In re Iridium Operating, L.L.C.*, 285 B.R. at 830 (noting it has been held equitable jurisdiction arises from filing of proof of claim) (citation omitted); *In re* Enron Corp., 349 B.R. at 112 (reasoning courts have found non-core to become core because creditor consents to equitable jurisdiction).

[49] *See* Langenkamp v. Culp, 498 U.S. 42, 45 (1990) ("Respondents filed claims against the bankruptcy estate, thereby bringing themselves within the equitable jurisdiction of the Bankruptcy Court."); S.G. Phillips Constructors, Inc. v. City of Burlington, Vt. (*In re* S.G. Phillips Constructors, Inc.), 45 F.3d 702, 705 (2d Cir. 1995) (stating filing of proof of claim is "determinative factor" as to jurisdiction of bankruptcy court); Gulf States Exploration Co. v. Manville Forest Prods. Corp. (*In re* Manville Forest Prods. Corp.), 896 F.2d 1384, 1389 (2d Cir. 1990) (finding filing proof of claim brought about equitable jurisdiction).

claim.[50] The Supreme Court noted long ago that "one useful and fitting function of a [bankruptcy court is] the compromise or settlement of claims, so that interminable litigation might be ended and the interests of expedition in promulgating a plan of reorganization served."[51] The high court also opined that it is "traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure."[52] As such, a creditor who files a proof of claim seeking its allowance will be bound by what the court ultimately determines.[53]

In very plain terms this means that if a creditor wants to receive distribution from the bankrupt estate, it must submit a proof of claim.[54] If a creditor decides not to submit a proof of claim, it cannot collect the debt owed once the debt is discharged.[55] "'The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*.'"[56] Moreover, various courts have held that creditors have submitted themselves to a bankruptcy court's equitable jurisdiction by filing a proof of claim.[57] By filing a proof of claim creditors

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[50] "[I]f the debtor has a prepetition state law contract claim against a party, such as the one involved in *Marathon*, nothing in the filing of a proof of claim by that non-debtor party would obviate the unwaivable constitutional objection to having an untenured judge hear and determine the private state law claim." CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY, § 4.4 (1997). *See generally* N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 63–65 (indicating bankruptcy courts are not designed as legislative courts but may have ancillary jurisdiction over certain related claims); Lawrence D. Coppel & Bradley J. Swallow, *Defending Your Client from a Bankruptcy Claim*, 40 MD. B. J. 38, 40–41 (May/June 2007) (discussing difference between bankruptcy court's jurisdiction as created under Article I and legislative courts under Article III and bankruptcy court's ability to hear claims related to bankruptcy proceeding).

[51] Gardner v. New Jersey, 329 U.S. 565, 551 (1947).

[52] Katchen v. Landy, 382 U.S. 323, 333 n.9 (1966) (quoting Wiswall v. Campbell, 93 U.S. 347, 351 (1876)).

[53] *Katchen*, 382 U.S. at 334 (upholding idea creditor offering proof of claim will be bound by judicial determination regarding claims allowance); *see Gardner*, 329 U.S. at 573 (endorsing idea any party seeking allowance of bankruptcy claim will be bound by court determination); *Wiswall*, 93 U.S. at 351 (holding creditor seeking allowance of claim by court must accept court's decision).

[54] FED. R. BANKR. P. 3002(a) (requiring filing proof of claim); Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004) (acknowledging necessity of creditor filing claim to participate in bankruptcy proceeding); *see* U.S. Nat'l Bank v. Chase Nat'l Bank, 331 U.S. 28, 33 (1947) (stating secured creditor must file secured claim in jurisdiction to participate in proceeding).

[55] *Hood*, 541 U.S. at 447 (positing failure to submit proof of claim may preclude recovery of unsecured debts owed to creditor); *see Chase Nat'l Bank*, 331 U.S. at 33–34 (examining rights of creditor who declines or waives right to file claim); *see also* FED. R. BANKR. P. 3002(a) (noting necessity for filing proof of claim).

[56] *Katchen*, 382 U.S. at 329 (quoting *Gardner*, 329 U.S. at 574). *See* Fla. Dep't of Revenue v. Omine (*In re* Omine), 485 F.3d 1305, 1313 (11th Cir. 2007) ("The bankruptcy processes of proof, allowance, and distribution are all fundamentally about the adjudication of interests claimed in a res and are all inextricably intertwined."); *In re* Fairchild Aircraft Corp., Bankr. No. 90-50257C, 1990 WL 119650, at *8 (Bankr. W.D. Tex. June 18, 1990) (describing claim process as "adjudication of interest claimed in *res*" (quoting *Katchen*, 382 U.S. at 329)).

[57] *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 57–58 (1989) (affirming jurisdiction of bankruptcy court over petitioner who submitted to jurisdiction via filing his claim); *In re* Adelphia Commc'ns Corp., 307 B.R. 404, 418 (Bankr. S.D.N.Y. 2004) (explaining filing claim in bankruptcy court will signal submission to equitable jurisdiction of bankruptcy court); *In re* EXDS, Inc., 301 B.R. 436, 439 (Bankr. D. Del. 2003) (stating filing claim against bankruptcy estate subjects filer to bankruptcy courts equitable jurisdiction).

(including those in foreign countries) also submit themselves to the bankruptcy court's personal jurisdiction.[58]

As a general rule, an "unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed."[59] To begin, an entity considering filing a claim must determine whether it has a claim against the debtor. The Bankruptcy Code broadly defines "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."[60] As such the filing of a proof of claim has been termed "an action to collect [a] debt."[61]

"The Bankruptcy Code provision authorizing the filing of proofs of claim or interest is permissive only, and does not require filing of a proof of claim by any creditor."[62] "The rationale for requiring the filing of a formal proof of claim or

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[58] S.E.C. v. Infinity Group Co., 27 F. Supp. 2d 559, 562 (E.D. Pa. 1998) (examining cases where creditor consented to court's jurisdiction where he filed proof of claim with trustee); *see* Tucker Plastics, Inc. v. Pay 'N Pak Stores, Inc. (*In re* PNP Holdings Corp.), 99 F.3d 910, 911 (9th Cir. 1996) (holding by filing proof of claim, creditor submitted to personal jurisdiction of bankruptcy court in which claim is filed); *In re* Schwinn Bicycle Co., 182 B.R. 526, 531 (Bankr. N.D. Ill. 1995) (finding filing of claim in bankruptcy court gives the court jurisdiction over counterclaims filed by the estate). As a practical matter, bankruptcy courts have nationwide personal jurisdiction. *See, e.g.*, Norberg v. Granfinanciera, S.A. (*In re* Chase & Sandorn Corp.), 835 F.2d 1341, 1344 (11th Cir. 1988) (stating Federal Rule of Bankruptcy Procedure 7004(d) "provides for nationwide service of process and thus is the statutory basis for personal jurisdiction in this case"); *In re* Fries, 378 B.R. 304, 310 (Bankr. D. Kan. 2007) (finding personal jurisdiction is not limited for non-residents, stating "where national service of process is authorized . . . [t]he forum in bankruptcy cases is the United States."). *See generally* FED. R. BANKR. P. 7004(d) (codifying national service of process is permissible in bankruptcy cases).

[59] FED. R. BANKR. P. 3002(a). *See* Universal Am. Mortgage Co. v. Bateman (*In re* Bateman), 331 F.3d 821, 827 (11th Cir. 2003) (asserting inclusion of creditors in bankruptcy action is not "automatic process" thereby forcing creditors to fight for their own interest in estate by filing claim); *see also* Argricredit Corp. v. Harrison (*In re* Harrison), 987 F.2d 677, 680 (10th Cir. 1993) (positing unsecured creditor has to file proof of claim in order for court to consider claim).

[60] 11 U.S.C. § 101(5)(A) (2006). *See* Chateaugay Corp. v. Shalala (*In re* Chateaugay Corp.) 53 F.3d 478, 496–47 (2d Cir. 1995) (construing statute to have "wide scope" with validity of claim hinging on "(1) whether claimant possessed a right to payment, and (2) whether that right arose before the filing of the petition") (citation omitted); *In re* White, 363 B.R. 157, 163 (Bankr. D. Idaho 2007) (listing terms defining "claim"). Moreover, "claim" further means a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." 11 U.S.C. § 101(5)(B) (2006). *See In re* Lady H Coal Co., 199 B.R. 595, 601 (S.D. W. Va. 1996) (utilizing section 101(5)(B) in order to establish what claims are included in bankruptcy proceedings); *In re* Food & Fibre Prot., Ltd., 168 B.R. 408, 417 n.10 (Bankr. D. Ariz. 1994) (defining debt as liability on claim, allowing for equitable remedy where breach of performance provides for right of repayment).

[61] Coxson v. Commonwealth Mortgage Co. of Am. (*In re* Coxson), 43 F.3d 189, 194 (5th Cir. 1995) (finding creditor had initiated action against debtor by filing claim in bankruptcy court). *See In re* Jones, 122 B.R. 246, 250 (W.D. Pa. 1990) (holding "[t]he filing of a proof of claim, by its very nature, is an action to collect a debt") (citations omitted); *see also In re* Dangler, 75 B.R. 931, 936–37 (Bankr. E.D. Pa 1987) (stating filing proof of claim is "clearly" action in debt collection).

[62] 2 MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 52:13 (Edmonson ed., Thomson West 2008). *See* 11 U.S.C. § 501(a) (2006) (codifying "creditor . . . *may* file a proof of claim" (emphasis added)); 4 COLLIER ON BANKRUPTCY, ¶ 501[1], at 501-4 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) (noting "that the filing of a proof of claim or interest is always permissive . . . [and] should be filed only when 'some

interest in accordance with section 501 [of the Bankruptcy Code] is based upon ensuring that 'all those involved in the proceeding will be made aware of the claims against the debtor's estate.'"[63]

"A proof of claim is a written statement setting forth a creditor's claim."[64] It must substantially conform to the Official Bankruptcy Form No. 10.[65] A proof of claim can be executed by a creditor or its agent.[66] If a creditor claims it has a perfected security interest, then it must provide proof of the perfection when filing the proof of claim.[67]

> Under Federal Rule of Bankruptcy Procedure 3001, a creditor filing a proof of claim must attach a copy of the underlying contract to establish prima facie evidence of the validity of the contract.[68] This requirement would be meaningless unless the bankruptcy court's jurisdiction extended to consideration of the underlying contract supporting the claim. In other words, a bankruptcy court can only consider an objection to a claim and thus overcome the presumption of its validity by examining the contract itself and the circumstances surrounding its formation.[69]

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purpose would be served'" (quoting Simmons v. Savell (*In re* Simmons), 765 F.2d 547, 551 (5th Cir. 1985))).

[63] 4 COLLIER ON BANKRUPTCY, ¶ 501[1], at 501-4 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) (arguing purpose of filing formal claim is to provide notice to others who may have claims against debtor (citing Liona Corp. v. PCH Assocs. (*In re* PCH Assocs.), 949 F.2d 585, 605 (2d Cir. 1991))). *See* Chateaugay Corp. v. LTV Steel Co. (*In re* Chateaugay Corp.), 94 F.3d 772, 777 (2d Cir. 1996) (asserting "primary purpose of U.S.C. § 501" is to alert all parties involved in bankruptcy proceeding of claim being made against estate) (citation omitted); *see also In re* L.F. Rothschild Holdings, Inc., 143 B.R. 335, 337 (S.D.N.Y. 1992) (stating underlying rationale for filing proof of claim is to make all parties "aware of all the claims against the debtor").

[64] FED. R. BANKR. P. 3001(a) (delineating procedural rule that creditor must file claim, comporting with "appropriate Official Form"). *See In re* U.S. Office Prods. Co. Sec. Litig., 313 B.R. 73, 82 (D.D.C. 2004) (describing requirements for filing proper claim as containing "the creditor's name and address, a short description of the basis for the claim, the date the debt was incurred and the amount of the claim"); *see also In re* Montgomery, 305 B.R. 721, 725 (Bankr. W.D. Mo. 2004) (finding proper claim "must contain (1) the name and address of the creditor; (2) the basis for the claim; (3) the date the debt was incurred; (4) the classification of the claim; (5) the amount of the claim; and (6) documents to support the claim") (citation omitted).

[65] *See* FED. R. BANKR. P. 3001(a) (requiring proof of claim to "conform substantially to the appropriate Official Form").

[66] *See* 11 U.S.C. § 501(a) (2006) ("A creditor or an indenture trustee may file a proof of claim."); FED. R. BANKR. P. 3001(b) ("A proof of claim shall be executed by the creditor or the creditor's authorized agent except as provided in Rules 3004 and 3005."); 8B C.J.S. *Bankruptcy* § 1007 (2008) ("A proof of claim may be filed by a creditor or indenture trustee.").

[67] *See* FED. R. BANKR. P. 3001(d) ("If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected."); 8B C.J.S. *Bankruptcy* § 1025 (2008) ("A proof of claim properly executed and filed in a bankruptcy case constitutes prima facie evidence of the validity . . . of the claim."); *see also In re* Eagson Corp., 58 B.R. 395, 396 (Bankr. E.D. Pa. 1986) (holding claimants failed to carry burden of proving validity of claim, as "evidence supporting each of the claims was substantially deficient").

[68] FED. R. BANKR. P. 3001.

[69] *See* Durkin v. Benedor Corp. (*In re* G.I. Indus., Inc.), 204 F.3d 1276, 1280 (9th Cir. 2000).

"A proof of claim executed and filed in accordance with [the Federal Rules of Bankruptcy Procedure] . . . constitute[s] prima facie evidence of the validity and amount of the claim."[70] Moreover, a proof of claim is deemed allowed unless a party in interest objects.[71]

In chapter 7 or chapter 13 bankruptcies, a proof of claim will be deemed timely filed if it is filed no later than 90 days after the first date that is set for the mandatory section 341(a) meeting of creditors.[72] Section 341 meetings are set between 20 and 40 days from the date the debtor files for bankruptcy.[73] In a chapter 7 proceeding, a late filed claim is paid only after allowed unsecured claims are paid in full.[74]

In chapter 11 proceedings, the "schedule of liabilities filed pursuant to [section] 521(1) of the Code shall constitute prima facie evidence of the validity and amount of the claims of creditors, unless they are scheduled as disputed, contingent, or unliquidated."[75] Stated differently, a creditor does not need to file a proof of claim if the debtor's bankruptcy schedules properly identify the amount owed and the debt is not designated as disputed, contingent or unliquidated. But if a chapter 11 proceeding is converted to a chapter 7, a creditor cannot rely upon the debtor's

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[70] FED. R. BANKR. P. 3001(f). *See* 8B C.J.S. *Bankruptcy* § 1025 (2008); *see also* Smith v. Am. Founders Fin., Corp., 365 B.R. 647, 660–62 (S.D. Tex. 2007) (noting "the existence of the judgment does not prevent an analysis of the underlying transaction to determine whether the claim is valid").

[71] 11 U.S.C. § 502(a) (2006) ("A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects."); *see In re* Rago, 149 B.R. 882, 885 (Bankr. N.D. Ill. 1992) (establishing "untimeliness of the filing of proof of a claim does not in itself cause disallowance of the claim"); *see also In re* Breezewood Acres, 28 B.R. 32, 34 (Bankr. M.D. Pa. 1982) ("Allowability implies, not only provability, but also validity.").

[72] FED. R. BANKR. P. 3002(c) (providing proof of claim is timely filed within 90 days after "first date set for the meeting of creditors called under § 341(a) of Code", with exceptions); *see In re* Credit Service, 45 F. Supp. 890, 893 (D. Md. 1942) (denying allowance of "belatedly filed claims" where there was nothing to show fraud or any injustice to claimants); *see also In re* Bender Body Co., 47 F. Supp 867, 868 (N.D. Ohio 1942) (characterizing time limits on which bankruptcy claims must be filed as statutes of limitation).

[73] FED. R. BANKR. P. 2003(a) (applying Rule to either chapter 7 filing or chapter 11 filing); *see In re* Vaughn, 151 B.R. 87, 89 (Bankr. W.D. Tex. 1993) (noting creditors will be able to attend section 341 meetings if notice is filed in "timely fashion"); *see also In re* Analytical Sys., Inc., 71 B.R. 408, 412 (Bankr. N.D. Ga. 1987) (explaining purpose of federal rules is to provide "due process protections" to parties) (citation omitted).

[74] 11 U.S.C. § 726(a)(3) (2006) (describing distribution hierarchy of "tardily filed" unsecured claims); *see* Schilling v. Smith (*In re* Smith), No. 03-6248, 2005 WL 2089848, at *4 (6th Cir. Aug. 30, 2005) (discussing section 726 allows for repayment of "tardy claims", but only after timely filed claims); *see also In re* Barone, No. 04-21479, 2008 WL 783523, at *3 (Bankr. D. Conn. Mar. 25, 2008) (noting importance of timing for tardy and timely unsecured claims in section 726).

[75] FED. R. BANKR. P. 3003(b)(1). *See, e.g.*, 11 U.S.C. § 1111(a) (2006) (re-asserting under Rule 3003(b)(1), proof of claim is deemed filed under section 521 unless "disputed, contingent, or unliquidated"); Momentum Mfg. Corp. v. Employee Creditors Comm. (*In re* Momentum Mfg. Corp.), 25 F.3d 1132, 1135 (2d Cir. 1994) (noting under Rule 3003(b)(1), debtor must list liabilities as contested or else "must prove the invalidity of the claims").

schedules to have its claim deemed filed; rather it must affirmatively file a proof of claim if it hopes to participate in distributions from the chapter 7 proceeding.[76]

If a debtor designates a creditor's claim as contingent, unliquidated or disputed, then the creditor must file its proof of claim before the claims bar date which is set by the court.[77] Any proof of claim that is filed will supersede any scheduling of that claim by the debtor.[78] In a chapter 11 or 13 case, any creditor who fails to file a timely proof of claim will be prohibited from voting on the plan of reorganization and will not be allowed to share in the distributions from the bankruptcy estate.[79] Notably, however, if a creditor misses a claims bar date, the debtor or the trustee may file a proof of claim on the creditor's behalf within 30 days following the claims bar date.[80]

In the context of claims in a chapter 11 proceeding, Federal Rule of Bankruptcy Procedure 9006(b) allows the bankruptcy court to extend the bar date in situations where the original bar date was missed due to "'excusable neglect.'"[81] The standard

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[76] *See In re* Humblewit Farms, 23 B.R. 703, 704–05 (Bankr. S.D. Ill. 1982) (noting despite being properly scheduled in a chapter 11 proceeding, conversion to chapter 7 required filing of a proof of claim to be deemed filed); *see also In re* Rowe Furniture, Inc., No. 06-11143, 2008 WL 2009341, at * 4 (Bankr. E.D. Va. May 8, 2008) (finding "mere scheduling of a claim" in chapter 11 case is not sufficient once converted). *But see In re* Crouthamel Potato Chip Co., 786 F.2d 141, 146 (3d Cir. 1986) (finding inclusion on a debtor's schedule in chapter 11 to be sufficient and not requiring filing of proof of claim when converted to chapter 7).

[77] FED. R. BANKR. P. 3003(c)(2)–(3) (describing terms for filing proof of claim for creditors with contingent, unliquidated, or disputed claims); *see* First Fid. Bank, N.A., N.J. v. Hooker Invs., Inc. (*In re* Hooker Invs., Inc.), 937 F.2d 833, 840 (2d Cir. 1991) (noting failure "to file a proof of claim by the bar date" may prevent participation in distribution process); *see also In re* U.S. Office Prod. Co. Sec. Litig., 313 B.R. 73, 82 (D.D.C. 2004) (noting timely requirement to file proof of claim for creditors with disputed claims).

[78] FED. R. BANKR. P. 3003(c)(4) (explaining effects of filing proof of claim); *see In re* Desert Vill. Ltd. P'ship, 337 B.R. 317, 319 (Bankr. N.D. Ohio 2006) (noting filing proof of claim pursuant to Rule 3003(c)(4) is not new separate claim, but acts as amendment "to 'supersede any scheduling of that claim'" by debtor in chapter 11 petition (quoting FED. R. BANKR. P. 3003(c)(4))). *But see In re* Dynamic Brokers, Inc., 293 B.R. 489, 498 (B.A.P. 9th Cir. 2003) ("Although Rule 3003(c)(4) provides that a creditor's filing of a proof of claim supersedes any scheduling, it does not destroy the effect of scheduling in 'deemed allowed' status if the filed proof of claim is somehow procedurally incorrect." (citing FED. R. BANKR. P. 3003(c)(4))).

[79] FED. R. BANKR. P. 3003(c)(2) (establishing rule any creditor who fails to file timely proof of claim in chapter 11 case will "not be treated as a creditor with respect to such claim for the purpose[] of . . . distribution"); *cf.* Fed. Deposit Ins. Corp. v. Be-Mac Transp. Co. (*In re* Be-Mac Transp. Co.), 83 F.3d 1020, 1027 (8th Cir. 1996) (noting creditor's failure to file timely proof of claim will prevent participation in distribution process); *see also In re* 50-Off Stores, Inc., 220 B.R. 897, 902 (Bankr. W.D. Tex., 1998) (discussing previous Fifth Circuit case discussing unfairness in allowing creditors who did not file timely proof of claim to participate in distribution) (citation omitted).

[80] 11 U.S.C. § 501(c) (2006); FED. R. BANKR. P. 3004; *see In re* Rothman, 373 B.R. 785, 788 (Bankr. S.D. Ga. 2006) ("[T]he Chapter 7 Trustee had 30 days after the expiration of the time prescribed by Rule 3002(c)(5) to file proofs of claim on behalf of creditors under Rule 3004.").

[81] Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 389 (1993). *See* Hollewell Enters. Inc. v. First N. Bank (*In re* De Vries Grain & Fertilizer, Inc.), 12 F.3d 101, 105 (7th Cir. 1993) ("Justice White, the author of the majority opinion, was careful to point out that the 'excusable neglect' standard covers late filing of proofs of claim in Chapter 11 cases but not in Chapter 7 cases . . . ." (citing *Pioneer Inv. Servs. Co.*, 507 U.S. at 389)); *In re* Byrne, 162 B.R. 816, 818 (Bankr. W.D. Wis. 1993) (noting "it might be reasoned that the Supreme Court in *Pioneer* sought to limit the holding to Chapter 11 because a different standard for 'excusable neglect' would exist in Chapter 7 and 13"). Critically, the "'excusable neglect' standard of Rule 9006(b)(1) governs late filings of proofs of claim in Chapter 11 cases but not in

for determining excusable neglect was set forth by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*.[82] Excusable neglect includes "inadvertence, mistake, or carelessness, as well as . . . intervening circumstances beyond the party's control."[83] The decision whether neglect is excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission."[84]

Excusable neglect is determined from the totality of the circumstances surrounding the incident, including "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith."[85] While the late filed claims will increase the total amount of unsecured claims against the debtor's estate, any depletion in the assets available for timely filed claims is unfortunate, but standing alone, is an insufficient basis to find prejudice.[86] Finally, a creditor bears the burden of proving excusable neglect by a preponderance of the evidence.[87]

With respect to the withdrawal of a proof of claim, Federal Rule of Bankruptcy Procedure 3006 provides that a "creditor may withdraw a claim as of right by filing

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Chapter 7 cases." *Pioneer Inv. Servs. Co.*, 507 U.S. at 389. *See In re De Vries Grain & Fertilizer, Inc.*, 12 F.3d at 105; *In re Byrne*, 162 B.R. at 818.

[82] *Pioneer Inv. Servs. Co.*, 507 U.S. 380.

[83] *Id.* at 388 (expanding definition of "excusable neglect" to include "inadvertence, mistake, or carelessness" from traditional notion of "intervening circumstances beyond the party's control"). *See* Lynch v. United States (*In re* Lynch), 430 F.3d 600, 604 (2d Cir. 2005) ("'[W]e do not believe that the possibility that a court may properly find excusable neglect on such grounds [ambiguous or conflicting rules] alters the principle that failure to follow the clear dictates of a court rule will generally not constitute such excusable neglect.'" (quoting Canfield v. Van Atta Buick/GMC Truck, Inc., 127 F.3d 248, 250–51 (2d Cir. 1997))); *In re* Casey, 198 B.R. 918, 924–25 (Bankr. S.D. Ca. 1996) (explaining ignorance or misinterpretation of federal rules does not constitute "excusable neglect").

[84] *Pioneer*, 507 U.S. at 395. *See generally In re* Kmart Corp., 381 F.3d 709, 714 (7th Cir. 2004) (holding court had not abused its discretion by reviewing all relevant factors, including length of delay in filing); George Harms Constr. Co. v. Chao, 371 F.3d 156, 164 (3d Cir. 2004) (holding all relevant circumstances surrounding party's failure to file must be assessed and no one factor can "trump" others).

[85] *Pioneer*, 507 U.S. at 395. *See* Chemetron Corp. v. Jones 72 F.3d 341, 349 (3d. Cir 1995) (remanding to lower court to analyze all of *Pioneer* factors after previous failure to do so). *See generally In re* O.W. Hubbell & Sons, Inc., 180 B.R. 31, 36 (N.D.N.Y 1995) ("*Pioneer* merely requires an equitable examination of all relevant circumstances.") (citation omitted).

[86] *See e.g.*, Manus Corp. v. NRG Energy, Inc. (*In re* O'Brien Envtl. Energy, Inc.), 188 F.3d 116, 126 (3d Cir. 1999) ("*Pioneer* requires a more detailed analysis of prejudice which would account for more than whether the Plan set aside money to pay the claim at issue."); *In re* R.H. Macy & Co., 166 B.R. 799, 802 (S.D.N.Y. 1994) (noting decisions which posit prejudice do "not stop with dollar-for dollar depletion" of resources otherwise available for timely filed claims); *In re* Xpedior, Inc., 325 B.R. 392, 399 (Bankr. N.D. Ill. 2005) ("Prejudice is not simply whether a debtor has money in its plan to pay the claim at issue.") (citation omitted).

[87] *See In re* Bulic, 997 F.2d 299, 302 (7th Cir. 1993) (noting Rule 9006(b) requires showing "'failure to act was the result of excusable neglect'" (quoting FED. R. BANKR. P. 9006(b)(1))); Farley Inc. v. Ohio Bureau of Workers' Comp., 213 B.R. 138, 141 (N.D. Ill. 1997) (stating creditor has burden of proving "'excusable neglect'" by preponderance of evidence to have "proof of claim deemed timely filed") (citation omitted); *In re* Montaldo Corp., 209 B.R. 40, 47 (Bankr. M.D.N.C. 1997) (noting late-filing creditor "bears the burden of proving excusable neglect by a preponderance of the evidence").

a notice of withdrawal."[88] However, if an objection is filed after a creditor has filed its claim, then it may only be withdrawn upon order of the court.[89] Similarly, leave of court to withdraw a claim is required if the debtor has voted on the plan or otherwise significantly participated in the case.[90] However, a "creditor must obtain a court order to withdraw a proof of claim if: 1) an objection to the claim has been filed; 2) a complaint has been filed against the creditor in an adversary proceeding; 3) the creditor has accepted or rejected the debtor's plan; or 4) the creditor has otherwise participated significantly in the case."[91]

Various courts opine that once a claim is withdrawn it becomes a "legal nullity" and the parties are put into the positions they would have been in if the claim had never been filed.[92] Similarly, it has been held that a withdrawal of a claim has the effect of removing a creditor from the bankruptcy court's equitable jurisdiction.[93]

D. Proofs of Claim and State Sovereign Immunity

The Supreme Court jurisprudence regarding state sovereign immunity and its relationship to bankruptcy is well settled. The sovereign immunity of states "is a *constitutional* doctrine that is meant to be both immutable by Congress and resistant to trends."[94] "[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment."[95] Except as altered by the

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[88] FED. R. BANKR. P. 3006.

[89] FED. R. BANKR. P. 3006 (indicating there are four instances where court approval is required to withdraw a claim); *see In re* Varona, 388 B.R. 705, 726 (Bankr. E.D. Va. 2008) (noting creditor may not withdraw claim after objection is filed except upon court order (quoting FED. R. BANKR. P. 3006)); *In re* Frank, 322 B.R. 745, 753 (Bankr. M.D.N.C. 2005) (acknowledging Rule 3006 requires court order to withdraw proof of claim after debtor files objection).

[90] FED. R. BANKR. P. 3006.

[91] *In re* Mid-Atl. Handling Sys., L.L.C., 304 B.R. 111, 123–24 (Bankr. D.N.J. 2003) (citation omitted). *See In re* Cruisephone, Inc., 278 B.R. 325, 330 (Bankr. E.D.N.Y. 2002) (requiring creditor to get court approval to withdraw proof of claim in four circumstances: "i) an objection was filed, or ii) a complaint was filed against the creditor in an adversary proceeding, or iii) the creditor accepted or rejected the plan, or iv) otherwise participated significantly in the case"); *see also In re* Ogden N.Y. Servs., Inc., 312 B.R. 729, 732 (S.D.N.Y. 2004) (holding creditor did not properly withdraw claim because complaint was filed in adversary proceeding, which then requires court order to withdraw).

[92] Smith v. Dowden, 47 F.3d 940, 943 (8th Cir. 1995) (noting "successful withdrawal of a claim" under Rule 3006 before trustee initiates adversarial proceeding "renders the withdrawn claim a legal nullity and leaves the parties as if the claim had never been brought"). *See In re Mid-Atl. Handling Sys., L.L.C.*, 304 B.R. at 124; *In re* EXDS, Inc., 301 B.R. 436, 441 (Bankr. D. Del. 2003).

[93] *See In re* Worldcom, Inc., 378 B.R. 745, 755 (Bankr. S.D.N.Y. 2007) (determining creditor's claim is removed from "equitable jurisdiction of the bankruptcy court" after withdrawal of proof of claim); *In re* Jones, 292 B.R. 555, 560 n.3 (Bankr. E.D. Tex. 2003) (positing voluntary dismissal of a claim eliminates power of court to adjudicate claim); *In re* 20/20 Sport, Inc., 200 B.R. 972, 976 (Bankr. S.D.N.Y. 1996) (discussing effect of removing claim as same as if claim had not been filed).

[94] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 n.4 (1999). *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 752 (2002) (acknowledging Constitution's supporters "'assured'" people Constitution would not encroach upon state sovereign immunity) (citation omitted). *But see* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 375 (2006) (interpreting Constitution to support Congress' authority to intrude upon state sovereign immunity in context of bankruptcy legislation).

[95] Alden v. Maine, 527 U.S. 706, 713 (1999) (holding Eleventh Amendment bars suit against states

Constitution itself or Amendments thereto, "the States' immunity from suit is a fundamental aspect of sovereignty which the States enjoyed before the ratification of the Constitution and which they retain today."[96] As such, Congress generally lacks authority to abrogate the states' Eleventh Amendment immunity.[97]

The Supreme Court has "long recognized that a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'"[98] The Supreme Court accordingly applies a stringent test to determine whether it has waived its immunity.[99] A state can generally waive its immunity in one of two manners: voluntarily invoking federal court jurisdiction or making a "clear declaration" of its intent to submit itself to federal jurisdiction.[100] The reason the Supreme Court requires a "clear declaration" of waiver is so that it is certain that a state has consented to federal court jurisdiction.[101] To be effective, a government's waiver of

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without their consent to liability). *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (upholding notion that federal court instruction to state officials and institutions on how to carrying out their official duties would be "intrusion on state sovereignty"). *But see* Deposit Ins. Agency v. Superintendent of Banks of N.Y. (*In re* Deposit Ins. Agency), 482 F.3d 612, 618 (2d Cir. 2007) (noting *Ex parte Young*, 209 U.S. 123, 159–60 (1908), provides exception to state immunity rule applying to suits regarding state's action possibly violating federal law).

[96] *Alden*, 527 U.S. at 713. *But see* N. Ins. Co. of N.Y. v. Chatham County, Ga., 547 U.S. 189, 193–94 (2006) (rejecting state immunity in suits against counties and municipalities acting in some state capacities); *In re Deposit Ins. Agency*, 482 F.3d at 618–19 (exempting immunity where state illegally took and retained assets and other property from creditors in violation of federal law).

[97] *See* Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 72–73 (1996) (holding, as per Eleventh Amendment, "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction"). *But see Katz*, 546 U.S. at 377–78 (rejecting state immunity in *in rem* proceedings turning on bankruptcy laws); Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 449–51 (2004) (finding bankruptcy court has jurisdiction in *in rem* proceeding against state which does not intrude upon state sovereignty where debtor was seeking to simply discharge her loan obligation without seeking additional monetary or injunctive relief). *See generally* Richard Lieb, *State Sovereign Immunity: Bankruptcy Is Special*, 14 AM. BANKR. INST. L. REV. 201, 219–20 (2006) (highlighting *Seminole*'s negative impact on debtors, since immunity gives states "virtually free pass from compliance with the bankruptcy laws").

[98] *Coll. Sav. Bank*, 527 U.S. at 675 (quoting Clark v. Barnard, 108 U.S. 436, 447 (1883)). *See* Gardner v. New Jersey, 329 U.S. 565, 574 (1947) (stating voluntary filing of proof of claim against debtor's estate assets constitutes waiver); *see also* DeKalb County Div. of Family & Children Servs. v. Platter (*In re* Platter), 148 F.3d 676, 678–79 (7th Cir. 1998) (indicating voluntary filing of adversary proceeding declaring debt non-dischargeable constitutes waiver).

[99] *Coll. Sav. Bank*, 527 U.S. at 675; *see* Edelman v. Jordan, 415 U.S. 651, 673 (1974) (acknowledging waiver "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction'" (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909))). *See generally* Lieb, *supra* note 97, at 219 (examining how test is "virtually impossible to pass," even under Fourteenth Amendment).

[100] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 676 (1999) (quoting Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944)) (requiring "'clear declaration" of intention to submit to jurisdiction absent the State invoking jurisdiction voluntarily). *See* State Bd. of Equalization, of Cal. v. Harleston (*In re* Harleston), 331 F.3d 699, 701 (9th Cir. 2003) (holding voluntary filing proof of claim, even when claim is not priority, constitutes waiver); *see also In re* Metromedia Fiber Network, Inc., 281 B.R. 524, 532–33 (Bankr. S.D.N.Y. 2002) (authorizing language in contract consenting "to sue and be sued" on contractual issues to be waiver of immunity).

[101] *Coll. Sav. Bank,* 527 U.S. at 680, 683 (rejecting constructive waivers on ground they are essentially same as forced waiver); *see* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 360, 364 (2001) (holding state's failure to comply with federal disabilities statute, which provided for liability, did not rise to waiver);

sovereign immunity must be unequivocal.[102] "The classic description of an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a known right or privilege.'"[103] Indeed, "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights."[104]

"It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure."[105] "When a State files a proof of claim in the reorganization court, it is using a traditional method of collecting a debt. A proof of claim is, of course, prima facie evidence of its validity."[106] If an objection is filed to a state's proof of claim, the bankruptcy court does not accept the claim at face value; rather, it must make a determination regarding the validity thereof.[107]

The allowance and disallowance of a claim is not a suit against the state.[108] Rather, the state is simply seeking payment from the debtor.[109] In short, the "whole

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AER-Aerotron, Inc. v. Tex. Dep't of Transp., 104 F.3d 677, 680 (4th Cir. 1997) (arguing mere letters demanding payment of claim without intention to file them with court do not constitute waiver).

[102] *See* United States v. Nordic Vill., Inc., 503 U.S. 30, 33 (1992) (requiring "unequivocal" expression of government's waiver of sovereign immunity); United States v. Mitchell, 445 U.S. 535, 538 (1980) ("A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" (quoting United States v. King, 395 U.S. 1, 4 (1969))); Univ. Med. Ctr. v. Sullivan (*In re* Univ. Med. Ctr.), 973 F.2d 1065, 1085 (3d Cir. 1992) (stating United States agencies' sovereign immunity can only be waived by unequivocal expression).

[103] *Coll. Sav. Bank*, 527 U.S. at 682 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). *See* Brookhart v. Janis, 384 U.S. 1, 4 (1966) (describing effective waiver) (citation omitted); *In re* Mootosammy, 387 B.R. 291, 298 (Bankr. M.D. Fla. 2008) (defining "waiver" (citing Blanton v. State, 978 So. 2d 149, 155 (Fla. 2008))).

[104] *Coll. Sav. Bank*, 527 U.S. at 682 (quoting Aetna Ins. Co. v. Kennedy *ex rel.* Bogash, 301 U.S. 389, 393 (1937)). *See Brookhart*, 384 U.S. at 4 (acknowledging presumption against waiving constitutional rights); *see also* Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio, 301 U.S. 292, 307 (1937) (providing "acquiescence in the loss of fundamental rights" is not presumed).

[105] Gardner v. New Jersey, 329 U.S. 565, 573 (1947) (citing Wiswall v. Campbell, 93 U.S. 347, 351 (1876)). *See* Langenkamp v. Culp, 498 U.S. 42, 44 (1990) (recognizing according to *Granfinanciera*, claim against bankruptcy estate subjects creditor to equitable power of court (citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 58–59, & n.14 (1990))); *In re* Applied Thermal Sys., Inc., 294 B.R. 784, 788 (Bankr. N.D. Okla. 2003) (positing Court has held creditor filing proof of claim in bankruptcy court bound by judicial decision).

[106] *Gardner*, 329 U.S. at 573 (citation omitted). *See* Wright v. Holm (*In re* Holm), 931 F.2d 620, 623 (9th Cir. 1991) (noting proof of claim allegations provide some evidence claim is valid and *prima facie* establish it) (citation omitted); *In re* Dow Corning Corp., 250 B.R. 298, 321 (Bankr. E.D. Mich. 2000) (indicating proper proof of claim as *prima facie* evidence of validity of claim) (citations omitted).

[107] *Gardner*, 329 U.S. at 573 (stating proof of claim is not conclusive where objections are raised); *see In re Holm*, 931 F.2d at 623 (highlighting after objection, objector can put forth evidence defeating claim) (citation omitted); *see also* B-Line, L.L.C. v. Kirkland (*In re* Kirkland), 379 B.R. 341, 358 (B.A.P. 10th Cir. 2007) (indicating proof of claim objection triggers shift in burden of proof to objector prior to determination of validity of claim).

[108] *Gardner*, 329 U.S. at 573–74 (noting where claimant is state, procedure of allowance and disallowance does not make for suit against the state "because the court entertains objections to the claim"); *see In re* NVR L.P., 206 B.R. 831, 851 (Bankr. E.D. Va. 1997) (holding state's proof of claim filing only gives consent to adjudication of that claim), *vacated in part, aff'd in part, rev'd in part by* 189 F.3d 442 (4th Cir. 1999); *In re* Rose, 215 B.R. 755, 760 (Bankr. W.D. Mo. 1997) (explaining proof of claim filed by State in bankruptcy proceeding is waiver of State's sovereign immunity regarding that particular claim, upholding principle that

process of proof, allowance, and distribution is . . . an adjudication of interests claimed in a res."[110] The subsequent treatment of that claim (i.e., rejection, reduction, allowance, or subordination to an inferior ranking) does not alter the simple fact that the process is simply an adjudication of the creditor's interest in the res.[111] Thus, in *Gardner v. New Jersey*, the Supreme Court unambiguously declared that "[w]hen the State becomes the actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim."[112] Fifty-two years later in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the Supreme Court reaffirmed that *Gardner v. New Jersey* "stands for the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts."[113]

Notably, a State's "waiver is not limited to adjudication of the proof of claim."[114] "[W]hen a state or an arm of the state files a proof of claim in a

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judgment is not wanted against State (citing *In re* C.J. Rogers, Inc., 212 B.R. 265, 274 (Bankr. W.D. Mo. 1997))).

[109] *See Gardner*, 329 U.S. at 573–74 (concluding court's exercise of jurisdiction over proof and allowance does not amount to suit against state, but rather "[t]he State is seeking something from the debtor"); Cal. State Bd. of Equalization v. Goggin, 191 F.2d 726, 728 (9th Cir. 1951) (stating conducting state tax assessments is paramount to administration of bankruptcy estates and is therefore not suit against state) (citation omitted); Illinois v. Sullivan (*In re* Chi. Rys. Co.), 175 F.2d 282, 291 (7th Cir. 1949) (finding where claimant in bankruptcy court is state, objections to claim does not translate into suit against state).

[110] *Gardner*, 329 U.S. at 574 (holding in procedure of proof and allowance state seeks something from debtor and nothing is "sought against" state). *See* Katchen v. Landy, 382 U.S. 323, 329–30 (1966) (acknowledging "bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession"); *In re* Metromedia Fiber Network, Inc., 299 B.R. 251, 273 (Bankr. S.D.N.Y. 2003) (agreeing "all aspects of administration of the debtor's estate are properly deemed proceedings *in rem*").

[111] Gardner v. New Jersey, 329 U.S. 565, 574 (1947) (noting "process of proof, allowance and distribution" is still only adjudication of creditor's interest in res, regardless of what results thereafter); *see* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 378 (2006) (finding states relinquish sovereign immunity in any action "necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts"); State of Cal., State Bd. of Equalization v. Harleston (*In re* Harleston), 275 B.R. 546, 552 (B.A.P. 9th Cir. 2002) (indicating when state submits proof of claim it not only waives its immunity regarding adjudication of its interest in res alone, but also with regard to any "determination of its rights against the debtors").

[112] *Gardner*, 329 U.S. at 574 (holding state waives immunity with respect to "adjudication of the claim" upon filing claim in bankruptcy proceeding). *See* Fla. Dep't of Revenue v. Omine (*In re* Omine), 485 F.3d 1305, 1314–15 (11th Cir. 2007) (agreeing state waives its sovereign immunity as to claims litigated when it files proof of claim in bankruptcy proceeding); Montana v. Goldin (*In re* Pegasus Gold Corp.), 394 F.3d 1189, 1195 (9th Cir. 2005) (highlighting by filing proof of claim in bankruptcy proceeding state waives sovereign immunity and voluntarily submits to jurisdiction of federal court); Ga. Dep't of Revenue v. Burke (*In re* Burke), 146 F.3d 1313, 1319 (11th Cir. 1998) (holding once state waives sovereign immunity by filing proof of claim, that immunity applies to adjudication of entire claim and state must comply with court's automatic stay order and discharge injunction).

[113] 527 U.S. 666, 681 n.3 (1999).

[114] State Bd. of Equalization of Cal. v. Harleston (*In re* Harleston), 331 F.3d 699, 702 (9th Cir. 2003). *See* AER-Aerotron, Inc. v. Tex. Dep't Transp. 104 F.3d 677, 681 (4th Cir. 1997) (noting filing of proof of claim functions as waiver of sovereign immunity "with regard to claims of the debtor arising out of the same transaction"); Texaco, Inc. v. La. Land & Exploration Co., 113 B.R. 924, 934 (M.D. La. 1990) (concluding by "asserting its claim for relief in this federal bankruptcy proceeding," state also waives sovereign immunity with regard to assertion of counterclaims seeking to diminish state's recovery on proof of claim).

bankruptcy proceeding, the state waives its Eleventh Amendment immunity with regard to the bankruptcy estate's claims that arise from the same transaction or occurrence as the state's claim."[115] Courts have applied a "logical relationship" test to determine whether the estate's claims arise from the same transactions or occurrence that gave rise to the state's claims against the estate.[116]

Prior to the *Katz* decision, the Supreme Court's jurisprudence created a difficult choice for states. In 1933 the high court declared that "[i]f a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated."[117] Indeed, the Supreme Court held in *New York v. Irving Trust Co.* that a State may be barred from receiving a distribution from a bankruptcy estate if it fails to timely file a proof of claim.[118] "The rationale underlying proof of claim waiver of immunity also presuppose[d] that the state [would] be able to determine *ex ante* whether it will be opening itself up to a counterclaim by electing to participate in the bankruptcy estate."[119]

E. Proofs of Claim and the Seventh Amendment Right to a Jury Trial

1. *Granfinanciera* and *Langenkamp*

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[115] *In re Harleston*, 331 F.3d at 702 (noting in addition to waiving its sovereign immunity regarding proof of claim, state also waives immunity with regard to bankruptcy estate's claims arising from "same transaction or occurrence as the state's claim" with key determination being whether "adversary proceeding arises from the same transaction or occurrence" as state's claim) (citation omitted). *See* Lazar v. California (*In re* Lazar), 237 F.3d 967, 978 (9th Cir. 2001) (discussing approaches of different circuit courts with regard to waiver of state's sovereign immunity in claims arising from same transaction or occurrence as state's claim); Price v. United States (*In re* Price), 42 F.3d 1068, 1072 (7th Cir. 1994) (holding claim for attorneys' fees and costs is property of estate and therefore arises from same transaction or occurrence as IRS' claim in bankruptcy proceeding).

[116] *In re Harleston*, 331 F.3d at 702 (detailing when "logical relationship" exists) (citation omitted); *see* Pinkstaff v. United States (*In re* Pinkstaff), 974 F.2d 113, 115 (9th Cir. 1992) (stating "'logical relationship'" is found where counterclaim stems from "same aggregate set of operative facts" as "initial claim" and those facts provide "basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights otherwise dormant in the defendant") (citation omitted); *see also* Pochiro v. Prudential Ins. Co. of Am., 827 F.2d 1246, 1249 (9th Cir. 1987) (highlighting Arizona's use of "'logical relationship'" test, in step with federal courts).

[117] New York v. Irving Trust Co., 288 U.S. 329, 333 (1933). *See* Wyo. Dep't of Transp. v. Straight (*In re* Straight), 143 F.3d 1387, 1389 (10th Cir. 1998) ("[A]ny governmental entity which elects to join the ranks of creditors seeking benefits the bankruptcy court can allocate must recognize that resort is subject to the mantle of equity."); *see also* Dekalb County Div. of Family And Child. Serv. v. Platter (*In re* Platter), 140 F.3d 676, 680 (7th Cir. 1998) (noting state's dilemma in considering whether to join proceedings).

[118] 288 U.S. at 332–33 (citation omitted).

[119] Montana v. Goldin (*In re* Pegasus Gold Corp.), 394 F.3d 1189, 1196 (9th Cir. 2005). *See* Arecibo Cmty. Health Care Inc. v. Puerto Rico, 270 F.3d 17, 29 (1st Cir. 2001) (highlighting state's chance for weighing benefits against liabilities before choosing participation in proceedings); Schlossberg v. Maryland (*In re* Creative Goldsmiths of D.C. Inc.), 119 F.3d 1140, 1148 (4th Cir. 1997) (indicating state's lack of immunity against defenses upon choosing participation).

Similar to the jurisprudence regarding state immunity and bankruptcy, the jurisprudence regarding an entity's Seventh Amendment right to a jury trial and its relationship to bankruptcy is well delineated. This jurisprudence principally stems from the Supreme Court's decisions in *Granfinanciera, S.A. v. Nordberg*[120] and *Langenkamp v. Culp*.[121] At issue in *Granfinanciera* was whether an entity who had not filed a proof of claim was entitled to a jury trial when later sued by the bankruptcy trustee for the recovery of an allegedly fraudulent conveyance.[122] The court held that such a party was entitled to a jury trial on a trustee's fraudulent transfer claim notwithstanding the fact that Congress had designated the fraudulent conveyance proceeding as a "core" matter.[123]

In rendering its decision, the Supreme Court relied upon its decision in *Katchen v. Landy* which "turned . . . on the bankruptcy court's having 'actual or constructive possession' of the bankruptcy estate, . . . and its power and obligation to consider objections by the trustee in deciding whether to allow claims against the estate."[124] The Supreme Court interpreted its prior decisions in *Schoenthal* and *Katchen* as holding that a creditor's Seventh Amendment jury trial right depended on whether the creditor had filed a proof of claim.[125] "'By presenting their claims [the creditors] subjected themselves to all the consequences that attach to an appearance . . . .'"[126] "As *Katchen* makes clear . . . by submitting a claim against the bankruptcy estate, creditors subject themselves to the court's equitable power to disallow those claims, even though the debtor's opposing counterclaims are legal in nature and the Seventh Amendment would have entitled creditors to a jury trial had they not tendered claims against the estate."[127]

The Supreme Court in *Granfinanciera* also enunciated a two-part test for determining whether a controversy is legal in nature and, therefore, entitles the defendant to the right to a jury trial pursuant to the Seventh Amendment. First, the court is to compare the action to similar 18th century actions brought in England; second, the court then examines the remedy to determine whether it is legal or equitable in nature.[128] Notably, the Supreme Court did not decide whether a bankruptcy court could conduct a jury trial of a fraudulent conveyance action where

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[120] 492 U.S. 33 (1989).

[121] 498 U.S. 42 (1990).

[122] *Granfinanciera, S.A.*, 492 U.S. at 36 ("The question presented is whether a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer.").

[123] *Id.* at 36.

[124] *Id.* at 57 (citations omitted).

[125] *Id.* at 58.

[126] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 59 n.14 (1989) (citation omitted).

[127] *Id.* (expanding on bankruptcy courts' general adjudicative power over all matters in its possession). *See* Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 481 (1947) ("Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession."); *see also* First Fid. Bank, N.A. N.J. v. Hooker Invs., Inc. (*In re* Hooker Invs., Inc.), 937 F.2d 833, 839–40 (2d Cir. 1991) (discussing bankruptcy courts' essential position as administrator of creditor-debtor relationships).

[128] *Granfinanciera, S.A.*, 492 U.S. at 42 (citation omitted).

the defendant has *not* filed a proof of claim.[129] However, it did make clear that Congress cannot take away a party's right to a jury trial in contests involving private rights.[130] It also noted that Congress cannot divest a party of its Seventh Amendment right to a jury trial merely by labeling the action as core and delegating its resolution to a non-Article III adjudicative body.[131]

Twenty-two months after the *Granfinanciera* decision, the Supreme Court issued its decision in *Langenkamp v. Culp*, which considered whether a defendant, who had previously filed a proof of claim in the bankruptcy proceedings, was entitled to a Seventh Amendment right to jury trial when later sued by a trustee to recover preferential transfers under section 547 of the Bankruptcy Code.[132] The Supreme Court confirmed that a party, who does not file a proof of claim, *is* entitled to a jury trial when later sued for a preferential transfer.[133] Then, in reliance upon the *Granfinanciera* decision, the Supreme Court reiterated the principle that the filing by a creditor of a proof of claim triggers the claims allowance process, which, thus, subjects the creditor to the court's equitable jurisdiction.[134] This result is so

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[129] *Id.* at 50.

[130] *Id.* at 51–52 (explaining Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury"); *see* Grant R. Mainland, Note, *A Civil Jury in Criminal Sentencing:* Blakely*, Financial Penalties, and the Public Rights Exception to the Seventh Amendment*, 106 COLUM. L. REV. 1330, 1355–56 (2006) (indicating Supreme Court in *Granfinanciera* reasoned fraudulent conveyance action "was a common law 'private right' . . . which could not be removed from Article III or state courts solely on Congress's say so" (citing *Granfinanciera, S.A.*, 492 U.S. at 60–61))); Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 422–23, 426 (1995) (noting deciding factor in *Granfinanciera* was adjudication of "public right").

[131] *See Granfinanciera, S.A.*, 492 U.S. at 61.

[132] 498 U.S. 42, 42–43 (1990) (stating issue of case as "whether creditors who submit a claim against a bankruptcy estate and are then sued by the trustee in bankruptcy to recover allegedly preferential monetary transfers are entitled to jury trial under the Seventh Amendment"); *see* Paul P. Daley & George W. Shuster, Jr., *Bankruptcy Court Jurisdiction*, 3 DEPAUL BUS. & COM. L.J. 383, 417–18 (2005) (stating "the Supreme Court addressed the question of whether a creditor that has filed a proof of claim against the debtor is entitled to a jury trial"); *see also In re* Bank of New Eng. Corp., 360 B.R. 1, 6 (D. Mass. 2007) (stating Supreme Court in *Langenkamp* "decided . . . that whether a party was entitled to a jury trial in a preference action brought by the trustee of the estate turned on whether that party had triggered the claims allowance process of the bankruptcy court by filing a proof of claim against the estate") (citation omitted).

[133] *See Langenkamp*, 498 U.S. at 44 (asserting "the Tenth Circuit correctly held that 'those appellants that did not have or file acclaims against the debtors' estates undoubtedly [were] entitled to a jury trial on the issue whether the payments they received from the debtors within ninety days of the latter's bankruptcy constitute[d] avoidable preferences'" (quoting Langencamp v. Hackler (*In re* Republic Trust & Sav. Co.), 897 F.2d 1041, 1046 (10th Cir. 1990), *rev'd sub nom.* Langenkamp v. Culp, 498 U.S. 42 (1990))); Gregory J. Anderson, *Jury Trials: Post*-Granfinanciera *and* Langenkamp *Confusion*, 20 COLO. LAW. 31, 33 (1991) (acknowledging circuit court decision, where "[t]he Tenth Circuit followed *Granfinanciera* by holding that parties who had not filed claims against the estate were entitled to a jury trial on the issue of whether the payments were avoidable preferences"); E. Scott Fruehwald, *Jury Trials in Bankruptcy Court After* Granfinanciera, 24 CUMB. L. REV. 79, 87–88 (1993) (indicating Supreme Court agreed with appellate court by holding "creditors who had not filed proofs of claim had a right to a jury trial").

[134] *Langenkamp*, 498 U.S. at 44 (stating Supreme Court "recognized [in *Granfinanciera*] that by filing a claim against a bankruptcy estate the creditor triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power" (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 58 (1989))); *see* N.I.S. Corp. v. Hallahan (*In re* Hallahan), 936 F.2d 1496, 1503 (7th

because the claim and any subsequent preference action are "integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity jurisdiction*."[135] Because such a matter is only triable in equity, there is no jury trial right.[136] In sharp contrast, if no proof of claim is filed, then a bankruptcy trustee's preference action qualifies as a legal claim to which the creditor is entitled to a jury trial.[137] In short, the Supreme Court made it clear that "'a creditor's right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate.'"[138]

2. The aftermath of *Granfinanciera* and *Langenkamp*

Following the Supreme Court's *Langenkamp* decision in 1991, one commentator suggested that, despite earlier precedent, courts would follow the rationale involving the right to a jury trial and conclude that the right to arbitrate had been waived by the filing of a proof of claim.[139] Yet today, courts do not apply

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Cir. 1991) (referring to Supreme Court stating "that 'when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity'" (quoting Katchen v. Landy, 382 U.S. 323, 336 (1966))); Anderson, *supra* note 133, at 33 (noting Supreme Court "stated that when a creditor files a claim against the bankruptcy estate, the process of 'allowance and disallowance of claims' is triggered" and "[a] subsequent preference action brought by the trustee becomes part of the claims-allowance process, which is triable only in equity").

[135] *Langenkamp*, 498 U.S. at 44 (citing *Granfinanciera, S.A.*, 492 U.S. at 57–58). *See* Bankr. Servs., Inc. v. Ernst & Young (*In re* CBI Holding Co.), 529 F.3d 432, 466 (2d Cir. 2008) ("If the bankruptcy trustee responds by filing its own claim against the creditor that would eliminate the basis for the creditor's claim, those two claims 'become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction'" (quoting *Langenkamp*, 498 U.S. at 44)); Ned W. Waxman & David C. Christian II, *Federal Powers After* Seminole Tribe*: Constitutionally Bankrupt*, 47 DRAKE L. REV. 467, 477 (1999) (noting *Langenkamp* decision states "'the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity jurisdiction*'" (quoting *Langenkamp*, 498 U.S. at 44)).

[136] *Langenkamp*, 498 U.S. at 44–45 (stating "[i]f the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is only triable in equity" and is not entitled to right to jury trial under Seventh Amendment) (citation omitted); Anderson, *supra* note 133, at 33 (referring to Supreme Court in *Langenkamp* explaining "'there is no Seventh Amendment right to a jury trial'" when "[a] subsequent preference action brought by the trustee becomes part of the claims-allowance process, which is triable only in equity") (citation omitted); Waxman & Christian, *supra* note 135, at 477 (stating "there is no Seventh Amendment right to a jury trial" when "a preference action from the trustee . . . becomes part of the claims-allowance process which is triable only in equity" (quoting *Langenkamp*, 498 U.S. 44–45)).

[137] *Langenkamp*, 498 U.S. at 45 (holding when no claim filed jury trial must be allowed) (citation omitted); *see* Travellers Int'l AG. v. Robinson, 982 F.2d 96, 98 (3d Cir. 1992) (reasoning party lost right to jury trial by submitting proof of claim); *In re* Asousa P'ship, 276 B.R. 55, 63 (Bankr. E.D. Pa. 2002) (discussing *Grandfinanciera* which observed right to jury trial depends on whether claim has been submitted) (citation omitted).

[138] *Langenkamp*, 498 U.S. at 45 (quoting *Granfinanciera, S.A.*, 492 U.S. at 58). *See Travellers Int'l AG.*, 982 F.2d at 98 (applying Supreme Court rule from *Langenkamp* where once proof of claim is filed party waives right to jury trial); *see also* Roberds, Inc. v. Palliser Furniture, 291 B.R. 102, 105 (S.D. Ohio 2003) (discussing *Langenkamp* rule where party losses right to jury trial once claim submitted).

[139] *Compare* Langenkamp v. Culp, 498 U.S. 42, 45 (1990) (finding claims filed against the estate precluded jury trial) (citation omitted), *and* Neufeld, *supra* note 1, at 544–45 ("Applying the reasoning of the

the *Langenkamp* rationale to proofs of claim and the right to arbitrate. Moreover, very few commentators have even raised a concern regarding the issue.[140] Indeed, some commentators now routinely conclude—with little or no substantive analysis—that the filing of a proof of claim does not waive one's right to arbitrate.[141]

The Supreme Court's jurisprudence regarding proofs of claim and jury trials presents a real dilemma for creditors. They must choose between filing a proof of claim to be eligible to participate in the bankruptcy estate distributions or they can forego the claim to preserve their Seventh Amendment right to a jury trial.[142] With respect to a non-core action initiated by a debtor, a creditor who files counterclaims after being sued and who has not filed a proof of claim is entitled to a jury trial.[143] Moreover, where a trustee receives an assignment of a creditor's claims and then pursues another creditor on the assigned claims, the creditor/defendant will be

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Supreme Court in the jury trial cases, bankruptcy courts could hold that an entity that has filed a proof of claim . . . and waived its right to arbitration."), *with* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 58–59 (1989) (discussing right to jury trial depends on whether or not claim has been submitted).

[140] *See* Fielding, *Navigating the Intersection of Bankruptcy*, *supra* note 1, at 16:

> Notably, courts have also held the filing of a proof of claim does not waive the right to arbitrate. Yet this makes one wonder whether courts have gone too far in protecting the right to arbitrate. Specifically, a party will be deemed to have waived its right to a jury trial—a constitutional right—by filing a proof of claim. By holding that the filing of a proof of claim does not result in a waiver of the right to arbitrate, courts have effectively elevated the statutory right to compel arbitration above the constitutional right to a jury trial. Viewed in this light, it would be prudent for a creditor to consider the potential need to compel arbitration before filing a proof of claim in a bankruptcy proceeding.

Fielding, *Six Arguments*, *supra* note 1 ("Have we taken the right to arbitrate too far? A party will be deemed to have waived its right to a jury trial—a constitutional right—by filing a proof of claim. Yet courts have held that [it] does not waive the right to arbitrate. This seems to be inherently wrong."); *see also* Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 183, 183 (2007) (noting enforceability of arbitration provisions is "confusing and unclear" area of law).

[141] *See, e.g.*, 2 MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 52:13 (Gabriel Wilner & Larry E. Edmonson eds., 3d ed. 2008) (discussing filing proof of claim "does not waive a right to compel arbitration"); 1 THOMAS H. OEHMKE, COMMERCIAL ARBITRATION §§ 23:11, 23:56 (3d ed. 2008) (stating submitting claim does not waive right to arbitration) (citations omitted); 1 HOWARD J. STEINBERG, BANKRUPTCY LITIGATION § 5:348 (2d ed. 2008) (listing factors which effect right to arbitration, but not including filing proof of claim).

[142] *See, e.g.*, First Fid. Bank, N.A., N.J. v. Hooker Invs., Inc. (*In re* Hooker Investments, Inc.), 937 F.2d 833, 837 (2d Cir. 1991) (noting bank's concern it would lose right to jury trial if claim filed); *In re* Coated Sales, Inc., 119 B.R. 452, 455 (Bankr. S.D.N.Y. 1990) (discussing party's potential loss of right to jury trial if claim filed against estate) (citation omitted); Michael L. Cook, et al., *Fraudulent Transfers*, 898 PRACTISING L. INST. 743, 779 (2007) ("[A] creditor may be forced to choose between filing a timely proof of claim and preserving its right to a jury trial in a preference and fraudulent transfer action.") (citation omitted).

[143] *See In re* McClelland, 332 B.R. 90, 95 (Bankr. S.D.N.Y. 2005) ("Unlike the act of filing a proof of claim, the assertion of a counterclaim by the debtor does not automatically result in waiver of the right to trial by jury on those counterclaims."); *see also In re* Enron Corp., 318 B.R. 273, 275 (S.D.N.Y. 2004) (stating party would be entitled to jury trial on claim if claim deemed non-core); *In re* J.T. Moran Fin. Corp., 124 B.R. 931, 941 (S.D.N.Y. 1991) (holding non-core issues should be tried by jury).

entitled to a jury trial even though it has previously filed a proof of claim.[144] Similarly, for a matter related to a bankruptcy proceeding where a third party brings a non-core claim against a creditor who filed a proof of claim against the estate, the creditor will still be entitled to a jury trial on the merits of the matter.[145]

Notably, the Eighth Circuit has held that, where a creditor files a proof of claim and later withdraws it before the trustee commences an fraudulent conveyance proceeding, the creditor was entitled to a Seventh Amendment jury trial.[146] However, other courts have wholly rejected this notion by holding that once a creditor files a proof of claim, it "has irrevocably waived a right to a jury trial as to any issue which might arise in that case."[147]

In certain instances, creditors have filed proofs of claim with protective language which, they assert, preserves their Seventh Amendment right to a jury trial.[148] However, these arguments are ineffective and the creditor's jury trial right has been deemed to be waived.[149]

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[144] *In re* CBI Holding Co., 311 B.R. 350, 366–67 (Bankr. S.D.N.Y. 2004) (declaring creditor may seek jury trial on claims of third party creditor even after filing proof of claim against estate); *see Granfinanciera, S.A.*, 492 U.S. at 63 (dismissing concerns of slower resolution in bankruptcy proceedings and greater expense as reasons to disregard Seventh Amendment) (citation omitted); *In re* WorldCom, Inc. 378 B.R. 745, 751 (Bankr. S.D.N.Y. 2007) (agreeing Seventh Amendment protects right to trial by jury in common law actions) (citation omitted).

[145] *In re* Formica Corp., 305 B.R. 147, 150 (Bankr. S.D.N.Y. 2004) (noting agreement among parties and lower court that plaintiff is entitled to jury trial in non-core proceeding); *see In re* CIS Corp., 172 B.R. 748, 763–64 (Bankr. S.D.N.Y. 1994) (holding defendant is entitled to jury trial in non-core proceeding); *cf.* Orion Pictures Corp. v. Showtime Networks, Inc. (*In re* Orion Pictures Corp.), 4 F.3d 1095, 1101 (2d Cir. 1993) (reaching conclusion Constitution does not permit jury trials in non-core matters to be held by bankruptcy courts).

[146] Smith v. Dowden, 47 F.3d 940, 943 (8th Cir. 1995) (concluding withdrawal of claim before commencement of proceedings is equal to claim never being brought) (citation omitted); *see* Langenkamp v. Culp, 498 U.S. 42, 45 (1990) (reaffirming right to jury trial is dependent on submission of claim against estate by creditor) (citation omitted); *see also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 57–58 (1989) (acknowledging previous holding where petitioner would have been entitled to jury trial in plenary action commenced by trustee if petitioner had not brought claim in bankruptcy court).

[147] *In re* Glen Eagle Square, Inc., 132 B.R. 106, 112 (Bankr. E.D. Pa. 1991). *See* Travellers Int'l AG. v. Robinson, 982 F.2d 96, 100 (3d Cir. 1992) (noting bankruptcy court has exclusive jurisdiction following filing of claim); *In re* EXDS, Inc., 301 B.R. 436, 440 (Bankr. D. Del. 2003) (stating creditor's withdrawal of proof of claim will not reinstate jury trial rights that previously existed).

[148] *See Travellers Int'l AG.*, 982 F.2d at 99 (describing petitioner's argument right to jury trial was not waived because claim filed in bankruptcy court contained contingency); *In re* Asousa P'ship, 276 B.R. 55, 67–68 (Bankr. E.D. Pa. 2002) (noting how creditor in *Travellers Int'l AG.* tried to prevent waiver of right to jury trial by stated intention not to waive right and filing of motion in district court); *see also In re EXDS, Inc.*, 301 B.R. at 440 (positing creditor cannot reverse effect of filing proof of claim for "strategic reasons").

[149] *See Travellers Int'l AG.*, 982 F.2d at 100 (rejecting argument claim filed with contingency does not invoke "equitable jurisdiction" of bankruptcy court); *see also In re Asousa P'ship*, 276 B.R. at 67–68 ("The submission to bankruptcy court jurisdiction arising from the filing of a proof of claim cannot be avoided by couching the proof of claim in protective language . . . ."); *cf. In re* NDEP Corp., 203 B.R. 905, 913–14 (Bankr. D. Del. 1996) (allowing party to retain right to jury trial in part because there was no filing of proof of claim, but rather filed counterclaims).

Another interesting issue is whether "the filing of [a] counterclaim act[s] as the waiver of a jury trial right."[150] The Third Circuit has opined that a "'defendant does not waive objections to jurisdiction and venue by asserting a compulsory counterclaim.'"[151] Although some opine this to be the correct conclusion,[152] this approach is clearly in the minority.[153] Rather, "an overwhelming majority of courts have determined that parties who file counterclaims, whether permissive or compulsory, trigger the bankruptcy court's process of allowance and disallowance of claims, thereby subjecting themselves to the equitable power of a bankruptcy court, waiving their Seventh Amendment right to a jury trial."[154]

Notably, a year following the *Langenkamp* decision the Fifth Circuit held that by filing a voluntary bankruptcy petition, debtors did not submit themselves to the bankruptcy court's equitable jurisdiction and thereby waive their right to a jury trial on pre-petition state law claims.[155] However, the Seventh Circuit subsequently held

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[150] 1 COLLIER ON BANKRUPTCY, ¶ 3.08[2][a][ii], at 3-88 (Alan N. Resnick et al. eds., 15th ed. rev. 2006). *Compare* Billing v. Ravin, Greenberg & Zackin, 22 F.3d 1242, 1249 (3d Cir. 1994) (noting previous holding of "asserting" of compulsory counterclaim does not "waive objections to jurisdiction") (citation omitted), *with In re* EZ Pay Servs., Inc., 389 B.R. 278, 288 (Bankr. M.D. Fla. 2008) (rendering defendant subject to bankruptcy court's "equitable power" as result of counterclaim asserted against trustee).

[151] Beard v. Braunstein, 914 F.2d 434, 442 (3d Cir. 1990) (quoting 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1416, at 125 (2d ed. 1990)). *See In re Asousa P'ship*, 276 B.R. at 68 (noting Third Circuit in *Beard* held jurisdiction objection is not waived upon filing of compulsory counterclaim); *see also In re* Americana Expressways, 161 B.R. 707, 713 n.12 (D. Utah 1993) (citing *Beard* as example of court which held filing of compulsory counterclaim does not qualify as "'consent'" to "bankruptcy court's equity jurisdiction").

[152] *See, e.g.*, Neifeld v. Steinberg, 438 F.2d 423, 430 n.13 (3d Cir. 1971) (listing such cases); Dragor Shipping Corp. v. Union Tank Car Co., 378 F.2d 241, 244 (9th Cir. 1967) (holding compulsory counterclaims do "not constitute a waiver of any jurisdictional defense [the party] previously or concurrently assert[ed]"); 1 COLLIER ON BANKRUPTCY, ¶ 3.08[2][a][ii], at 3-89 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) (arguing while *Beard* represents "'minority of courts" it reaches correct conclusion regarding waiver upon filing of compulsory counterclaims) (citation omitted).

[153] *See* Control Ctr., L.L.C. v. Lauer, 288 B.R. 269, 280–82 (M.D. Fla. 2002) (discussing minority and majority approaches); *In re Americana Expressways*, 161 B.R. at 713–14 (noting majority of courts have held filing of counterclaim "constitutes" claim, thus constituting waiver of jury trial); *cf.* Bayless v. Crabtree, 108 B.R. 299, 304–05 (W.D. Okla. 1989) (finding filing of permissive counterclaim constituted proof of claim and "settled precedent" dictates this constitutes consent to power of court).

[154] *Lauer*, 288 B.R. at 281–82 (citing numerous opinions supporting proposition filing of counterclaim subjects individual to court's control). *See In re EZ Pay Servs., Inc.*, 389 B.R. at 288 (recognizing "prevailing view" acknowledges "defendant loses its right to a jury trial" when he files counterclaim)*; cf. In re* Price, 347 B.R. 857, 861 (Bankr. M.D. Ala. 2006) (noting "numerous courts" extend reasoning in *Granfinanciera* and *Langenkamp* to counterclaims)

[155] *In re* Jensen, 946 F.2d 369, 373 (5th Cir. 1991) (holding bankruptcy petition "has nothing to do with" court's ability to exercise control over "debtor's pre-petition claims"); *see Billing*, 22 F.3d at 1250–51 (noting *In re Jenson* court held right to jury trial is not lost upon voluntary filing of bankruptcy petition) (citations omitted); *In re* Enron Corp., 319 B.R. 122, 126 (Bankr. S.D. Tex. 2004) (noting Fifth Circuit in *In re Jensen* held voluntary filing does not constitute waiver of right to jury trial) (citations omitted); *see also* Germain v. Conn. Nat'l Bank, 988 F.2d 1323, 1330 (2d Cir. 1993) (noting disagreement between Fifth and Seventh Circuits). It is conceivable that a debtor would be entitled to a jury trial right if it was placed into an involuntary bankruptcy proceeding. *See* Beery v. Turner (*In re* Beery), 680 F.2d 705, 710 (10th Cir. 1982) (ruling bankruptcy rules afford individuals, in certain circumstances, right to jury trial on certain issues when involuntary petition is filed against that individual) (citation omitted); *In re* Maley Tire Co. 273 F. Supp. 369, 370 n.3 (N.D.N.Y. 1967) ("A person against whom an involuntary petition has been filed shall be

that a debtor is not entitled to a jury trial because it has submitted itself to the bankruptcy court's jurisdiction by filing for bankruptcy protection.[156]

II. BANKRUPTCY PROOFS OF CLAIM AND THE RIGHT TO ARBITRATE

Before analyzing cases that have dealt with the intersection of bankruptcy and arbitration, it is necessary to first review general jurisprudence regarding the Federal Arbitration Act[157] and agreements to arbitrate. This is essential to understanding why bankruptcy jurisprudence regarding arbitration agreements and proofs of claim is so different from Supreme Court jurisprudence regarding the intersection of constitutional rights and bankruptcy proofs of claim.

A. General Jurisprudence Regarding the FAA and the Right to Arbitrate

The Supreme Court has noted that there is a "'liberal federal policy favoring arbitration agreements.'"[158] The main purpose of the FAA was to overcome courts' refusals to enforce arbitration agreements.[159] Indeed, there is a strong federal policy which guarantees enforcement of private agreements to arbitrate.[160] "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all

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entitled to have a trial by jury in respect to the question of his insolvency . . . and of any act of bankruptcy alleged in such petition to have been committed . . . ." (citing 11 U.S.C. § 42(a) (1982))); *see also In re* Glannon, 245 B.R. 882, 888–92 (D. Kan. 2000) (ruling debtor who was subjected to court's power based on "involuntary bankruptcy petition" was entitled to jury trial).

[156] N.I.S. Corp. v. Hallahan (*In re* Hallahan), 936 F.2d 1496, 1505 (7th Cir. 1991) (noting creditors lose their right to jury trial when they file claims, thus debtors who seek protection of court also lose right to jury trial) (citations omitted); *see* Billing v. Ravin, Greenberg & Zackin, 22 F.3d 1242, 1250 (3d Cir. 1994) (noting *In re Hallahan* held when debtor files voluntary bankruptcy proceeding, that debtor losses "right to a jury trial in dischargeability proceedings brought by a creditor who has filed a proof of claim"); *In re* Quarles, 294 B.R. 729, 730 (Bankr. E.D. Ark. 2003) (citing to *In re Hallahan* as example of court which held "voluntary debtor" is not entitled to jury trial).

[157] 9 U.S.C. §§ 1–16 (2006) (outlining general provisions of FAA).

[158] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). *See* Equal Employment Opportunity Comm'n v. Waffle House Inc., 534 U.S. 279, 289 (2002) (noting Court's construction of provisions of FAA as exhibiting liberal policy in support of these agreements) (citation omitted); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 81 (2000) ("To invalidate the agreement would undermine the liberal federal policy favoring arbitration agreements . . . .") (citation omitted).

[159] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995) (stating "basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate"); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989) (discussing FAA was created to deal with judiciary's hostility towards arbitration agreements) (citation omitted); Ford v. NYLCare Health Plans of the Gulf Coast, Inc., 141 F.3d 243, 247 (5th Cir. 1998) (noting "federal policy underlying the FAA 'is simply to ensure the enforceability'" of private arbitration agreements (quoting *Volt Info Scis.*, 489 U.S. at 476)).

[160] *Mitsubishi Motors Corp.*, 473 U.S. at 625–26 (observing federal policy "'to enforce private agreements'") (citation omitted); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985) (noting "passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered"); Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 410 (3d Cir. 2004) (reaffirming "central purpose of the FAA is to give effect to private agreements").

other contracts.'"[161] "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[162]

It has been said that arbitration has twin goals: resolving disputes efficiently and avoiding lengthy and time consuming litigation.[163] Yet when a party files a motion seeking to arbitrate a matter, the FAA requires courts to compel the arbitration "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums."[164] Notably, efficiency in resolving all claims does not seem to be a high priority with the courts. "The legislative history of the [FAA] establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate."[165] Congress' main purpose in passing the FAA was to enforce private agreements to arbitrate.[166] This purpose cannot be ignored when courts interpret the FAA or consider its impact on the efficient resolution of a dispute.[167] Indeed, the Supreme Court has affirmed an order

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[161] Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1402 (2008) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)). *See* Cooper v. QC Fin. Servs. Inc., 503 F. Supp. 2d 1266, 1275 (D. Ariz. 2007) (reiterating arbitration agreements are treated equally by law in relation to all other contracts); Ornelas v. Sonic-Denver T, Inc., No. 06-cv-00253-PSF-MJW, 2007 WL 274738, at *3 (D. Colo. Jan. 29, 2007) (reinforcing FAA "embodies a national policy favoring arbitration") (citation omitted).

[162] *Mitsubishi Motors Corp.*, 473 U.S. at 626–27. *See Waffle House Inc.*, 534 U.S. at 289 (stressing FAA's "'purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts . . . .'") (citation omitted); *Allied-Bruce Terminix Co.*, 513 U.S. at 270–271 (discussing origins of courts' suspicion of arbitration agreements and how Congress' motivation was to change this) (citations omitted).

[163] *See* Preston v. Ferrer, 128 S. Ct. 978, 986 (2008) ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 633)); Rich v. Spartis, 516 F.3d 75, 81 (2d Cir. 2008) (indicating plaintiffs are helped by general rule and "'twin goals of arbitration'" which include "'settling disputes efficiently and avoiding long and expensive litigation'") (citation omitted); *see also* Houdstermaatschappij v. Standard Mircrosystems Corp., 103 F.3d 9, 12 (2d Cir. 1997) (qualifying review of arbitration awards in order to avoid "'undermining'" aims of arbitration) (citation omitted).

[164] *Byrd*, 470 U.S. at 217 (rejecting contrary authority and holding FAA to require "district courts to compel arbitration" when one party files motion to compel, even where result would be "inefficient"). *See* Fisher v. A.G. Becker Paribas Incorporation, 791 F.2d 691, 698 (9th Cir. 1986) (remarking FAA "requires district courts to compel arbitration even where the result would be the possibly inefficient maintenance of separate proceedings in different forums") (citation omitted); *In re* Mor-Ben Ins. Markets Corp., 73 B.R. 644, 648 (B.A.P. 9th Cir. 1987) (confirming Ninth Circuit decision in *Fisher* stated district courts must compel arbitration regardless of resulting inefficiency) (citation omitted).

[165] *Byrd*, 470 U.S. at 219. *See Hay Group, Inc.*, 360 F.3d at 410 ("[E]fficiency is not the principal goal of the FAA. Rather, the central purpose of the FAA is to give effect to private agreements."); *see also* Rush v. Oppenheimer & Co., 779 F.2d 885, 887 (2d Cir. 1985) (noting "defendants' delay in seeking arbitration during approximately eight months of pretrial proceedings is insufficient by itself to constitute a waiver of the right to arbitrate").

[166] *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270–71 (1995) (noting in passing FAA, Congress was "'motivated, first and foremost, by a . . . desire' to change [the past] antiarbitration rule") (citation omitted); *see also Byrd*, 470 U.S. at 220 (explaining "passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered"); Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) (declaring Arbitration Act was created "to place arbitration agreements 'upon the same footing as other contracts'" (quoting H.R. REP. NO. 96, at 1, 2 (1924))).

[167] *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985) (stating impact of Act on "efficient dispute resolution" should not "overshadow [Congress'] underlying motivation"); *cf.* Moses H. Cone Mem'l

which compelled arbitration despite the fact that arbitration resulted in bifurcated proceedings.[168] Moreover, the Supreme Court has expressly rejected the notion that an overriding purpose of the FAA is "to promote the expeditious resolution of claims."[169] Rather, the high court has bluntly stated: "[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute."[170]

What is the impact of the FAA on a court's jurisdiction? An agreement to arbitrate is simply a submission of the dispute to arbitration forum rather than a judicial forum.[171] "'The [FAA] was passed not to oust the jurisdiction of the courts but to provide for maintaining their jurisdiction while at the same time recognizing arbitration agreements as affirmative defenses and providing a forum for their specific enforcement.'"[172] The modern judicial view of arbitration agreements is that they do not divest courts of jurisdiction but they do prevent courts from adjudicating the merits of the parties' disputes that are subject to arbitration.[173]

Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983) (requiring arbitration agreement to be enforced even though it resulted in state and federal proceedings); Summer Rain v. Donning Co./Publishers, Inc., 964 F.2d 1455, 1460 (4th Cir. 1992) (rejecting intertwining doctrine and stating arbitration must be compelled even if possibly inefficiency).

[168] *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22 (holding arbitration should proceed despite pending state court litigation).

[169] *Byrd*, 470 U.S. at 219. *See* Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 410 (3d Cir. 2004) (noting "efficiency is not the principal goal of the FAA"); *see also* Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1158 (3d Cir. 1989) (acknowledging "inefficient delay" resulting from "grant of the motion to compel and stay arbitration" required showing "that it would be substantial enough to override the policy favoring arbitration").

[170] *Byrd*, 470 U.S. at 221. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22 (noting arbitration should proceed despite pending litigation in state courts); *cf.* Volkswagen of Am., Inc. v. Sud's of Peoria, Inc., 474 F.3d 966, 972 (7th Cir. 2007) (noting "district courts actually may prefer to stay the balance of the case in the hope that the arbitration might help resolve, or at least shed some light on, the issues remaining in federal court").

[171] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."); *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (stating "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA"); Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1293 (11th Cir. 1998) (explaining in *Mitsubishi Motors Corp.*, court held "Sherman Act did not render" forum selection clause unenforceable in international agreement, as "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the *substantive* rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum'" (quoting *Mitsubishi Motors Corp*., 473 U.S. at 628)).

[172] DiMercurio v. Sphere Drake Ins., 202 F.3d 71, 76 (1st Cir. 2000) (citation omitted). *See* Skirchak v. Dynamics Research Corp., 508 F.3d 49, 56 (1st Cir. 2007) (explaining court may decide whether parties' agreement "may be enforced under the FAA" because presence of arbitration agreement "does not divest a court of its jurisdiction").

[173] *See Skirchak*, 508 F.3d at 56 ("An agreement to arbitrate does not divest a court of its jurisdiction."); *see also DiMercurio*, 202 F.3d at 77 (clarifying court is prevented from deciding "merits of arbitrable disputes" but "arbitration agreements do not divest court of jurisdiction"); Prudential-Bache Sec., Inc. v. Fitch, 966 F.2d 981, 988 (5th Cir. 1992) (remarking court normally having jurisdiction over suit is not "'divested [of jurisdiction] by the arbitration agreement'") (citation omitted).

Stated differently, "[a] private agreement between parties cannot divest the district court of jurisdiction granted by Congress; it can only limit the parties' rights to invoke the court's jurisdiction."[174] "It is neither illogical nor meaningless for a court's jurisdiction to remain intact and crucial to the overall arbitration scheme even while it honors the parties' voluntary agreement to deal with the merits outside the courtroom."[175] "Agreements to arbitrate are now typically viewed as contractual arrangements for resolving disputes rather than as an appropriation of a court's jurisdiction."[176]

The Supreme Court has devised a two-part test to determine the arbitrability of an issue.[177] First, the court must decide if the parties agreed to arbitrate the particular issues in dispute.[178] Second, the court must then determine "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims."[179] Unless grounds exist for revoking a contract, an agreement to arbitrate

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[174] Commc'n Workers of Am. v. Am. Tel. & Tel. Co., 932 F.2d 199, 210 (3d Cir. 1991). *See* Phone Directories Co. v. Clark, 209 F. App'x 808, 812 (10th Cir. 2006) (acknowledging court's jurisdiction is not determined by agreement by parties, and court has jurisdiction "independent of any provisions in a private agreement"); *see also* New Moon Shipping Co. v. MAN B & W Diesel AG, 121 F.3d 24, 28 (2d Cir. 1997) (highlighting parties do not have power to remove federal court's jurisdiction through private contract) (citation omitted).

[175] *DiMercurio*, 202 F.3d at 77. *See* Mastrobuono v. Shearson Lehman Hotton, Inc., 514 U.S. 52, 57 (1995) (acknowledging "FAA's proarbitration policy" is designed to make sure an agreement is enforced according to all its terms) (citation omitted); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478–79 (1989) (observing "Congress' principle purpose of ensuring that private arbitration agreements are enforced according to their terms" and by allowing courts to enforce these agreements "according to their terms . . . we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA") (citations omitted).

[176] *DiMercurio*, 202 F.3d at 76. *See Volt Info Scis.*, 489 U.S. at 476 ("[T]he federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."); *see also* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219–220 (1985) (remarking purpose of FAA "was to ensure judicial enforcement of privately made agreements to arbitrate").

[177] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (approving of two step inquiry of arbitrability used by lower court, which first must determine "whether the parties' agreement to arbitrate reached the statutory issues," and second "considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims"); *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (stressing not all "statutory claims" are arbitrable, and even if parties agreed to arbitrate particular issue, "'the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue'" (quoting *Mitsubishi*, 473 U.S. at 628)); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226–27 (1987) (discussing "agreements to arbitrate statutory claims" are enforced by FAA, but if the "party opposing arbitration" can show "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue," agreement will not be enforced).

[178] *See Mitsubishi Motors Corp.*, 473 U.S. at 628 (presenting first step as "determining whether the parties' agreement to arbitrate reached the statutory issues"); George Fischer Foundry Sys., Inc. v. Adolph H. Hottinger Maschinenbau GmbH, 55 F.3d 1206, 1207–08, 1210 (6th Cir. 1995) (affirming district court's holding parties in licensing agreement agreed license was subject to arbitration clause, and parties "'should be held to that agreement where the Tribunal has yet to determine what law it will apply'") (citation omitted); Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 845 (2d Cir. 1987) (finding during number of exchanges in sales transaction, parties made signed and unsigned agreements which evinced agreement to arbitrate disputes under these agreements).

[179] *Mitsubishi Motors Corp.*, 473 U.S. at 628 (affirming lower court decision subjecting antitrust claim to arbitration in international context). *See* Jill A. Pietrowski, Comment, *Enforcing International Commercial*

must be enforced.[180] Moreover, the FAA "pre-empts state law . . . [and] state courts cannot apply state statutes that invalidate arbitration agreements."[181]

B. Waiver of the Right to Arbitrate

Another key threshold component to understanding arbitration and bankruptcy proofs of claims is having a basic understanding of general principles regarding waiver of the right to arbitrate. "A contractual right to arbitrate may be waived expressly or implicitly."[182]

> Courts must examine the totality of the circumstances and "determine whether based on all the circumstances, the party against whom the waiver is to be enforced has acted inconsistently with the right to arbitrate." . . . Although several factors may be considered in determining waiver, diligence or the lack thereof should weigh heavily in the decision—"*did that party do all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration?*"[183]

Agreements-Post-Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 36 AM. U. L. REV. 57, 85–89 (1986) (criticizing *Mitsubishi* court for its failure to "supply workable guidelines for international arbitrators who might face unfamiliar issues of statutory law"). *But cf.* Am. Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821, 827–28 (2d Cir. 1968) (holding strong public policy "and the nature of the claims that arise in such cases" prevented antitrust claims from being handled in arbitration proceedings).

[180] *See Byrd*, 470 U.S. at 218 (finding district court lacks discretion in deciding whether to uphold arbitration agreement but rather court is mandated to enforce such proceedings "absent a ground for revocation of the contractual agreement"); *see also* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (finding validity of "contract as a whole" must be decided by arbitrator rather than court); Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1293–94 (9th Cir. 2006) (affirming complaint which alleges invalidity of arbitration clause itself is to be decided by court rather than arbitrator).

[181] Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 272 (1995) (citing Southland Corp. v. Keating, 465 U.S. 1, 15–16 (1984)). *See Southland*, 465 U.S. at 10 (noting in enacting FAA, Congress "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration"); Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983) (finding section 2 of FAA "create[d] a body of federal substantive law of arbitrability" which would override any contrary state laws).

[182] Ernst & Young LLP v. Baker O'Neal Holdings, Inc., 304 F.3d 753, 756 (7th Cir. 2002) (affirming lower court decision denying motion to compel arbitration finding appellant had impliedly waived its right to arbitrate). *See* Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 694 (9th Cir. 1986) (setting out three requirements party seeking arbitration must demonstrate in order to successfully compel arbitration); *cf.* Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968) (reaffirming strong "federal policy favoring arbitration" and thus finding waiver "is not to be lightly inferred").

[183] Sharif v. Wellness Int'l Network, Ltd., 376 F.3d 720, 726 (7th Cir. 2004) (emphasis added) (quoting Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 391 (7th Cir. 1995)) (citations omitted). *See Cabinetree of Wis., Inc.*, 50 F.3d at 390 (supporting finding party has implicitly waived its right to arbitrate when it has chosen judicial, rather than arbitrary forum, to adjudicate matter). *But cf.* Sw. Indus. Imp. & Exp., Inc. v. Wilmod Co., Inc., 524 F.2d 468, 470 (5th Cir. 1975) (finding "[p]articipation in settlement negotiations" does not "preclude the right to arbitrate").

"To safeguard its right to arbitration, a party must 'do all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration.'"[184]

There is a common, three-part test for determining whether a right to arbitrate has been waived. "A party may be found to have waived its right to arbitration if it: '(1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts.'"[185]

> Prejudice can be substantive, such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration, or it can be found when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur unnecessary delay or expense.[186]

> In order to determine whether prejudice exists for a finding of waiver a court should consider the following factors: the timeliness of the motion to arbitrate; the degree to which the moving party has contested the merits of the opponent's claims; whether the moving party has informed its adversary of the intention to seek arbitration; the extent of the moving party's prior non-merits motion practice; the moving party's assent to pretrial orders; and the extent to which both parties have engaged in pre trial discovery.[187]

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[184] Lewallen v. Green Tree Servicing, L.L.C., 487 F.3d 1085, 1091 (8th Cir. 2007) (quoting *Cabinetree of Wis., Inc.*, 50 F.3d at 391). *See In re* Wireless Tel. 911 Calls Litig., No. MDL-1521, 2005 WL 2709286, *3–4 (N.D. Ill. Oct. 20, 2005) (finding defendant failed to do all could have been reasonably expected of it in order to choose forum in which to litigate matter when he waited six months to file motion to compel arbitration and participated in judicial forum in four instances in connection with this matter).

[185] *Lewallen*, 487 F.3d at 1090 (quoting Ritzel Commc'ns v. Mid-Am. Cellular Tel. Co., 989 F.2d 966, 969 (8th Cir. 1993)). *See Ritzel Commc'ns, Inc*, 989 F.2d at 970 (finding "[w]hen a party appealing the denial of its arbitration rights ignores the available means to avoid wasteful litigation pending appeal, it is acting inconsistently with those rights"); 1 THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 23:30 (3d ed. 2008) (illustrating constraints and limitations of waiving one's right to arbitration).

[186] *In re* Fleming Cos., Inc. 325 B.R. 687, 691–92 (Bankr. D. Del. 2005) (quoting Kramer v. Hammond, 943 F.2d 176, 179 (2d Cir. 1991)). *See* Com-Tech Assocs. v. Computer Assocs. Int'l, Inc., 938 F.2d 1574, 1576 (2d Cir. 1991) (denying defendant's motion to compel arbitration after "protracted litigation"); *In re* Kaiser Group Int'l, Inc. 307 B.R. 449, 455–56 (Bankr. D. Del. 2004) (noting Second Circuit case in which court observed "use of litigation by one side to 'unfairly profit from the benefits of discovery that it would not otherwise have been entitled to in arbitration' is 'precisely the type of prejudice our cases have sought to avoid'") (citation omitted).

[187] *In re* Charter Behavioral Health Sys., LLC, 277 B.R. 54, 58 (Bankr. D. Del. 2002) (citation omitted). *See* Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 926–27 (3d Cir. 1992) (listing relevant factors court will consider when determining if prejudice has occurred); Gavlik Constr. Co. v. H.F. Campbell Co., 526 F.2d 777, 783 (3d Cir. 1975) (observing courts have "only found waiver where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery").

Notably, the Seventh Circuit does not require a showing of prejudice in order to find that the right to arbitrate has been waived.[188] Rather, a critical issue in determining whether a right to arbitrate has been waived is "whether the party filing the lawsuit intended to elect a judicial forum rather than the arbitral tribunal."[189] However, the Seventh Circuit would allow, in appropriate circumstances, a court to permit the rescission of a previous waiver.[190]

C. Jurisprudence Which Generally Considers the Intersection of the FAA and the Bankruptcy Code

The current view of the intersection of bankruptcy and arbitration is dominated by the Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon*[191] wherein the high court articulated the standards by which a court may refuse to compel arbitration when a competing statutory claim is at issue. The court noted that the FAA's arbitration mandate can be overridden by another opposing congressional command.[192] The party that opposes the arbitration bears the burden of showing "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue."[193] If Congress did in fact "intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history,' . . . or from an inherent conflict between arbitration and the statute's underlying purposes."[194]

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[188] *See, e.g.*, Grumhaus v. Comerica Sec., Inc. 223 F.3d 648, 653 (7th Cir. 2000) (finding waiver in absence of prejudice); *Cabinetree of Wis., Inc.*, 50 F.3d at 390 ("To establish a waiver of the contractual right to arbitrate, a party need not show that it would be prejudiced if the stay were granted and arbitration ensued."); St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co., 969 F.2d 585, 590 (7th Cir. 1992) (holding court may find waiver even if "non-defaulting party" remains unprejudiced).

[189] Iowa Grain Co. v. Brown, 171 F.3d 504, 509–10 (7th Cir. 1999). *See* Ernst & Young LLP v. Baker O'Neal Holdings, Inc., 304 F.3d 753, 757–58 (7th Cir. 2002) (finding appellant's right to compel arbitration waived because their actions indicated intention to proceed with litigation, not arbitration); Joseph Huber Brewing Co., Inc. v. Pamado, Inc., No. 05 C 2783, 2006 WL 2583719, at *18–19 (N.D. Ill. Sept. 5, 2006) (construing plaintiff's failure to immediately disclose agreement regarding arbitration of dispute as contrary to possibly finding plaintiff took "all reasonable steps" to make determination of how to proceed).

[190] *See Iowa Grain Co.*, 171 F.3d at 509–10 ("[I]f a district court finds an initial waiver of the right to arbitrate, it is also entitled to permit that waiver to be rescinded, depending on the coarse the litigation takes."); Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 391 (7th Cir. 1995) ("[A] variety of circumstances may make the case abnormal, and then the district court should find no waiver or should permit a previous waiver to be rescinded.") (citation omitted).

[191] 482 U.S. 220 (1987).

[192] *Id.* at 226.

[193] *Id.* at 227. *See* Whiting-Turner Contracting Co. v. Elec. Mach. Enters, Inc. (*In re* Elec. Mach. Enters., Inc.), 479 F.3d 791, 795 (11th Cir. 2007) (stating burden of proof to establish congressional intent to prevent waiver of forum is on party opposing arbitration (citing Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987))); MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108 (2d Cir. 2006) (embracing *McMahon* court's view that burden of proving congressional intent to "preclude arbitration of the statutory rights at issue" rests upon party opposing arbitration).

[194] *McMahon*, 482 U.S. at 227 (citations omitted). *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (positing where congressional intent to protect "against waiver of the right to a judicial forum" is present, it "will be deducible from text or legislative history"); Phillips v. Congelton, L.L.C. (*In re* White Mountain Mining Co.), 403 F.3d 164, 168 (4th Cir. 2005) (espousing

Following the *McMahon* rationale, bankruptcy courts have generally adopted a *per se* rule that non-core matters must be arbitrated.[195] The reason for this *per se* rule is that compelling arbitration of a non-core claim "will not inherently conflict with the Bankruptcy Code."[196] Core claims, however, create a greater judicial challenge because there is a tension between the FAA's arbitration mandate and the overall purposes of the Bankruptcy Code. Unsurprisingly, there is variance among courts regarding the standards applied by a bankruptcy court in determining whether a core matter should be arbitrated.[197]

McMahon court's proposition congressional intent to protect against waiver of right will be apparent from statutory text, legislative history, or from "inherent conflict between arbitration and the statute's underlying purposes") (citation omitted).

[195] *See, e.g.*, *In re Elec. Mach. Enters., Inc.*, 479 F.3d at 796 ("In general, bankruptcy courts do not have the discretion to decline to enforce an arbitration agreement relating to a non-core proceeding."); *Hill*, 436 F.3d at 108 ("Bankruptcy courts generally do not have discretion to refuse to compel arbitration of 'non-core' bankruptcy matters . . . .") (citation omitted); Gandy v. Gandy (*In re* Gandy), 299 F.3d 489, 495 (5th Cir. 2002) ("[I]t is generally accepted that a bankruptcy court has no discretion to refuse to compel arbitration of matters not involving 'core' bankruptcy proceedings . . . .") (citation omitted); *In re* Anthony, 334 B.R. 780, 787 (Bankr. N.D. Miss. 2005) (noting Fifth Circuit held bankruptcy courts generally do not have "'discretion to refuse to compel arbitration'" in non-core matters (quoting *In re Gandy*, 229 F.3d at 495)); *see also* Jason H. Watson & David A. Wender, *Contractual Arbitration Provisions May Preempt Bankruptcy Court Administration*, 4 No. 19 ANDREWS BANKR. LITIG. REP. 2 (January 28, 2008) (*available on* Westlaw at 4 No. 19 Andrews Bankr. Litig. Rep. 2). It is important to note, however, that the core/non-core distinction is *not* the test for determining whether a matter must be arbitrated during a bankruptcy proceeding. *See* Mintze v. Am. Gen. Fin. Servs., Inc. (*In re* Mintze), 434 F.3d 222, 229 (3d Cir. 2006) ("The core/non-core distinction does not, however, affect whether a bankruptcy court has the discretion to deny enforcement of an arbitration agreement."); Nat'l Gypsum Co. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (*In re* Nat'l Gypsum Co.), 118 F.3d 1056, 1067 (5th Cir. 1997) (categorizing this distinction as overbroad); *In re* Cooley, 362 B.R. 514, 519–20 (Bankr. N.D. Ala. 2007) (observing Second, Third, Fourth, and Fifth Circuit Courts of Appeal, and Ninth Circuit Bankruptcy Appellate Panel "have all refused to apply a simple core versus non-core test in their search for a *McMahon* exception").

[196] Watson & Wender, *supra* note 195, at 2; *see* Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1161 (3d Cir. 1989) (noting determination must be reached as to whether arbitration enforcement would conflict with Bankruptcy Code); Resnick, *supra* note 140, at 203–04 (noting because *Hays* court "found no irreconcilable conflict" with Bankruptcy Code when arbitrating non-core matters, such arbitration was held mandatory).

[197] *See, e.g.*, *In re Elec. Mach. Enters.*, *Inc.*, 479 F.3d at 799 (proffering "discretion to deny enforcement of the arbitration agreement" exists only where enforcement "inherently conflict[s] with the Bankruptcy Code"); *Hill*, 436 F.3d at 108 ("[B]ankruptcy court will not have discretion to override an arbitration agreement unless it finds that the proceedings are based on provisions of the Bankruptcy Code that 'inherently conflict' with the Arbitration Act or that arbitration of the claim would 'necessarily jeopardize' the objectives of the Bankruptcy Code.") (citation omitted); *In re Mintze*, 434 F.3d at 231 (signaling "discretion to deny" enforcement of arbitration agreement exists only where "party opposing arbitration can establish congressional intent . . . to preclude waiver of judicial remedies for the statutory rights at issue"); *In re Gandy*, 299 F.3d at 495 (predicating discretion not to compel arbitration upon: (1) "underlying nature of a proceeding derives exclusively from . . . the Bankruptcy Code"; and (2) arbitration causes conflict with purpose of Bankruptcy Code) (citation omitted); *In re Nat'l Gypsum Co.*, 118 F.3d at 1067 (indicating non-enforcement of arbitration provision depends on: (1) whether underlying proceeding "derives exclusively from the provisions of the Bankruptcy Code"; and (2) "if so, whether arbitration . . . would conflict with the purposes of the Code"). *See generally In re White Mountain Mining Co.*, 403 F.3d at 169 (treating congressional intent as required to legitimize discretion to enjoin arbitration in bankruptcy). For a helpful discussion regarding differing standards among certain Circuit Courts, see Jacob Aaron Esher, *Arbitration and Judicial Discretion: Circuits Are Split*, 5 NORTON BANKR. LAW ADVISER, at 6 (May 2006). *See also* Resnick, *supra* note 140, at 200–12.

Pursuant to 11 U.S.C. section 157(b)(2)(B), the allowance or disallowance of a claim against the estate is a core proceeding. Yet, in some cases where creditors have filed proofs of claim, there is no discussion of whether the right to arbitrate has been waived; rather, the court has simply exercised its discretion and compelled arbitration.[198] In other cases, debtors have argued that the filing of the proof of claim converted the underlying action into a core matter which must be determined by the bankruptcy court.[199] However, courts consistently reject the argument that arbitration cannot be compelled simply because the dispute is a core proceeding due to the mere fact that the creditor filed a proof of claim.[200]

One notable case is *In re Phico Group* wherein the bankruptcy court recognized that a creditor's underlying claims would normally be categorized as a non-core proceeding.[201] However, the court noted that the creditor's voluntary proof of claim triggered the claims allowance process which subjected it to the bankruptcy court's equitable jurisdiction.[202] But despite this fact, the court did not believe that allowing the arbitration to continue would result in any adverse impact on the core proceedings.[203] Thus, it allowed the arbitration to proceed.[204]

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[198] *See In re Mintze*, 434 F.3d at 225–26 (foregoing discussion of waiver yet remanding with instructions to require parties to arbitrate as required by arbitration provision); *In re* Farmland Indus., Inc., 309 B.R. 14, 15 (Bankr. W.D. Mo. 2004) (granting motion for relief from automatic stay to allow arbitration without discussing waiver); *In re* Phico Group, Inc., 304 B.R. 170, 171–72 (Bankr. M.D. Pa. 2003) (lifting automatic stay and allowing arbitration without considering issue of waiver).

[199] *See* S.G. Phillips Constructors, Inc. v. City of Burlington, Vt. (*In re* S.G. Phillips Constructors, Inc.), 45 F.3d 702, 705 (2d Cir. 1995) (reaffirming premise "when a creditor files a proof of claim, the bankruptcy court has core jurisdiction to determine that claim") (citation omitted); *In re* Erie Power Techs., Inc., 315 B.R. 41, 44 (Bankr. W.D. Pa. 2004) ("Debtor posits that its bankruptcy filing and the filing of a proof of claim by [respondent] renders the underlying action a claims resolution issue that is a core matter which must be adjudicated in the Bankruptcy Court."); *In re* Best Reception Sys., Inc., 220 B.R. 932, 944 (Bankr. E.D. Tenn. 1998) ("[W]here a party has filed a proof of claim in a debtor's case, any action asserted by that party against the debtor that raises the same issues as those encompassed by the proof of claim is a core proceeding under the authority of 28 U.S.C.A. § 157(b)(2)(B).").

[200] *See, e.g.*, *In re Gandy*, 299 F.3d at 495 (stating it is within Bankruptcy Court's discretion to refuse to enforce arbitration agreements involving core matters, but "it is generally accepted that a bankruptcy court has no discretion to refuse to compel that arbitration of matters not involving 'core' bankruptcy proceedings") (citation omitted); *In re Erie Power Techs., Inc.*, 315 B.R. at 44 ("Where a proceeding is a core proceeding, the Bankruptcy Court has discretion to either enforce or deny enforcement of an arbitration clause.") (citation omitted); *In re* U.S. Lines, Inc., 197 F.3d 631, 640–41 (Bankr. D. Md. 2003) (discussing ability of court to use its discretion in determining whether to deny arbitration in "core proceedings").

[201] 304 B.R. at 173 (stating if cause of action only concerned "contractual rights and obligations between the parties" it would be determined by state law and beyond jurisdiction of bankruptcy court).

[202] *Id.* at 173 (finding "voluntary act of filing a proof of claim against Debtor's estate" brought claim within bankruptcy court's equitable power) (citation omitted). *See* Langenkamp v. Culp, 498 U.S. 42, 44–45 (1990) (stating "filing a claim against a bankruptcy estate" subjects individual to "bankruptcy court's equitable power") (citation omitted); *In re* Seminole Walls & Ceilings Corp., 336 B.R. 539, 546 (Bankr. M.D. Fla. 2006) (discussing how in bankruptcy proceeding parties choosing to file voluntary proof of claim "subject" themselves to "bankruptcy court's equitable power") (citation omitted).

[203] *In re Phico Group*, 304 B.R. at 175 ("The record fails to indicate that any adverse issues amounting to either inefficient delay or duplicate proceedings would be substantial enough to override the strong federal policy of enforcing arbitration clauses."). *Accord In re* New Knight, Inc., 291 B.R. 367, 377 (Bankr. E.D. Pa. 2003) (holding plaintiff failed to demonstrate purpose of the Bankruptcy Code would have been "adversely affected . . . by enforcing the arbitration clause" and ordered case to remain in arbitration); *In re* Slipped

Some debtors have argued that allowing a creditor to proceed to arbitration conflicts with one of the central purposes of the Bankruptcy Code—centralized resolution of claims.[205] Debtors have also argued that being forced to arbitrate will deplete precious assets and delay the on-going bankruptcy proceedings.[206] But based upon the factual circumstances, courts have generally not been persuaded that arbitration would have an adverse impact on the on-going core bankruptcy proceedings.[207] Indeed, as one bankruptcy court so bluntly stated: "The policies of centralized resolution of claims and a generalized prohibition against piecemeal litigation are present in any core bankruptcy proceeding, and . . . these weaker policies underlying the Bankruptcy Code must yield to the stronger federal policy favoring the enforcement of valid arbitration agreements."[208]
Notably, courts and commentators agree that a debtor's bankruptcy filing does not waive the debtor's right to arbitrate.[209] For example, one court held that, although

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Disc Inc., 245 B.R. 342, 346 (Bankr. N.D. Iowa 2000) (holding "present adversary proceeding does not implicate any substantive bankruptcy rights" and should remain in arbitration).

[204] *In re* Phico Group, Inc., 304 B.R. 170, 175 (Bankr. M.D. Pa. 2003) (lifting automatic stay so arbitration could proceed). *Accord In re New Knight, Inc.*, 291 B.R. at 377 (granting motion to compel arbitration); *In re Slipped Disc Inc.*, 245 B.R. at 346 (granting defendant's "[m]otion to Stay Proceedings and Compel Arbitration").

[205] *See In re Phico Group, Inc.*, 304 B.R. at 174 (discussing defendant's argument that proceeding to arbitration would conflict with one purpose of Bankruptcy Code, "'centralized resolution of pure bankruptcy issues'"); *see also* MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108 (2d Cir. 2006) (stating one objective of Bankruptcy Code was to create centralized resolutions for "'purely bankruptcy issues'"); *In re* Farmland Indus., Inc., 309 B.R. 14, 21 (Bankr. W.D. Mo. 2004) (holding policy consideration of promoting centralized resolution of bankruptcy claims was "insufficient" in this case "to create an inherent conflict between the Bankruptcy Code and the Arbitration Act").

[206] *See In re Phico Group, Inc.*, 304 B.R. at 174–75 (rejecting debtor's argument that enforcement of arbitration clause "would deplete [his] assets and delay the resolution of the core bankruptcy proceedings"); *In re* Flechtner Packing Co., 63 B.R. 585, 588 *(*Bankr. N.D. Ohio 1986) (rejecting plaintiff's "complaint to compel arbitration" on grounds "cost of arbitration, as well as the delay in administration of the estate, would unnecessarily burden the bankruptcy estate"). *See generally* Matthew Dameron, Note, *Stop the Stay: Interrupting Bankruptcy to Conduct Arbitration*, 2001 J. DISP. RESOL. 337, 348 (2001) (discussing policies court considered in *In re Slipped Disc* when determining whether to direct parties to arbitrate and making note of policy of "maintaining the assets of the estate for creditors") (citation omitted).

[207] *See, e.g.*, *In re Phico Group, Inc.*, 304 B.R. at 175 (rejecting Debtor's argument "that allowing the parties to continue through the arbitration process would result in an adverse impact on the core proceedings in the underlying bankruptcy case"); *In re* Erie Power Techs., Inc., 315 B.R. 41, 45 (Bankr. W.D. Pa. 2004) (finding "no conflict between allowing [arbitration] to proceed and the basic bankruptcy purpose[] of centralized resolution of bankruptcy claims"); *In re Farmland Indus., Inc.*, 309 B.R. at 21 (construing impact of arbitration on Code's policies of centralized resolution of claims and generalized prohibition on piecemeal litigation present in any core bankruptcy proceeding as "*de minimus*").

[208] *In re Farmland Indus., Inc.*, 309 B.R. at 21. *See In re Erie Power Techs., Inc.*, 315 B.R. at 45 (determining "[t]he Arbitration will cause no material impact in the bankruptcy case that is sufficient to override the federal policy favoring arbitration"); *cf. In re* Shores of Pan., Inc., 387 B.R. 864, 866–67 (Bankr. N.D. Fla. 2008) (noting enforcement of arbitration agreement, despite policy of centralization, would not seriously harm debtor's reorganization attempts).

[209] *See* Crysen/Montenay Energy Co. v. Shell Oil Co. (*In re* Crysen/Montenay Energy Co.), 226 F.3d 160, 162–63 (2d Cir. 2000) (finding no implied waiver of right to enforce arbitration clause in contract); *In re* Kaiser Group Int'l, Inc., 307 B.R. 449, 455–56 (D. Del. 2004) (determining party's litigatory actions without actual proof of prejudice to other party did not establish waiver of right to arbitration); 1 THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 23:30, at 23-121 (3d ed. 2008) ("The debtor's filing of a

the trustee could not be compelled to arbitrate, the trustee could nevertheless voluntarily proceed to arbitrate without the approval of the bankruptcy court.[210] The rationale for this holding is the unambiguous language of Federal Rule of Bankruptcy Procedure 6009 which provides: "With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal."[211]

D. The Filing of a Proof of Claim and its Impact on the Right to Arbitrate

1. Decisions where a proof of claim was filed but the right to arbitrate was deemed *not* to be waived.

Some debtors have argued that by filing a proof of claim a creditor has submitted itself to the bankruptcy court's jurisdiction and is not entitled to arbitrate.[212] However, this argument has not been well received. Indeed, the author

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bankruptcy petition does not waive arbitration rights to which the debtor might be entitled."). It is generally accepted that the trustee or a liquidating trust "stands in the shoes of the debtor for the purposes of [an] arbitration clause and that the trustee-plaintiff is bound by the clause to the same extent as would the debtor." Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1153 (3d Cir. 1989). *See* Furness v. Wright Med. Tech., Inc. (*In re* Mercurio), 402 F.3d 62, 66 (1st Cir. 2005) (refusing to allow trustee to avoid forum selection clause); *see also* Trefny v. Bear Stearns Sec. Corp., 243 B.R. 300, 318 (S.D. Tex. 1999) (citing *Hays & Co.*, 885 F.2d at 1153) (noting words of *Hays* court, stating trustee "'stands in the shoes of the debtor for the purposes of the arbitration clause'"); *In re* Olympus Healthcare Group, Inc., 352 B.R. 603, 611 (Bankr. D. Del. 2006) (positing "[l]iquidating [s]upervisor stands in the place of [d]ebtors with regard to its obligations under the [agreement]"); *In re* Anthony, 334 B.R. 780, 786–87 (Bankr. N.D. Miss. 2005) (rejecting assertion by trustee that it is not "bound" by enforceable arbitration agreements executed by debtors). In contrast, however, in determining whether a debtor had a right to arbitrate, at least one court has wholly ignored the fact that the debtor had filed bankruptcy and rather focused on a traditional waiver analysis. *See, e.g.*, *In re* Fleming Cos., Inc., 325 B.R. 687, 691–92 (Bankr. D. Del. 2005) (holding debtor did not waive right to compel arbitration because "party trying to avoid arbitration" failed to meet "burden of establishing prejudice"); *In re* Charter Behavioral Health Sys., LLC, 277 B.R. 54, 58 (Bankr. D. Del. 2002) (applying prejudice test to determine debtor did not waive right to arbitrate); *In re* Watts, 244 B.R. 823, 832–33 (Bankr. N.D. Cal. 2000) (highlighting prejudice as "necessary" factor in determining waiver).

[210] *In re* Al-Cam Dev. Corp., 99 B.R. 573, 578 (Bankr. S.D.N.Y. 1989). *See* FED. R. BANKR. P. 6009 ("With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal."). *See generally* Mette H. Kurth, Comment, *An Unstoppable Mandate and an Immovable Policy: The Arbitration Act and the Bankruptcy Code Collide*, 43 UCLA L. REV. 999, 1014–15 (1996) (noting allowing arbitration without court approval "violates neither the letter nor the policy behind the automatic stay" when "debtor is the party seeking arbitration") (citations omitted).

[211] FED. R. BANKR. P. 6009.

[212] *See, e.g.*, *In re* Mor-Ben Ins. Mkts. Corp., 73 B.R. 644, 647 (B.A.P. 9th Cir. 1987) ("Mor-Ben contends that the filing of the proofs of claim by the insurers subjected them to the jurisdiction of the bankruptcy court for resolution of those claims."); *In re* Bohack Corp., 431 F. Supp. 646, 653 n.3 (E.D.N.Y. 1977) (observing debtor's waiver argument "lacks merit"), *aff'd* 567 F.2d 237 (2d Cir. 1977); *In re* Martin, 387 B.R. 307, 314 (Bankr. S.D. Ga. 2007) ("Debtor also claims that CitiFinancial has waived its right to arbitration by filing a proof of claim in the underlying bankruptcy case."); *In re* Transp. Assocs., Inc., 263 B.R. 531, 536 (Bankr.

is only aware of one reported decision which concluded that the right to arbitrate was lost by the filing of a proof of claim.[213]

Courts that hold the filing of a proof of claim does *not* constitute a waiver of the right to arbitrate can be divided into four general categories: (1) those that simply cite prior precedent without any substantive analysis of the issue;[214] (2) those that engage in a traditional waiver analysis and determine whether prejudice occurred;[215] (3) those that conclude that a waiver of the right to arbitrate cannot occur because a proof of claim is the only means for obtaining a distribution from the estate and it would be unfair to allow this "coerced participation" to constitute a waiver of the right to arbitrate;[216] and (4) at least one court has analyzed the issue from the perspective of the arbitration provision which expressly provided that a party's judicial or non-judicial efforts would not constitute a waiver of the right to arbitrate.[217] Notably, in many instances where creditors have filed proofs of claim, there is no discussion of whether the right to arbitrate has been waived; rather, the

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W.D. Ky. 2001) ("[T]he Trustee argued that by filing a proof of claim, NU waived its right to enforce the arbitration clause and submitted itself to the jurisdiction of the bankruptcy court.").

[213] *See In re* J.T. Moran Fin. Corp., 118 B.R. 233, 235–36 (Bankr. S.D.N.Y. 1990) (refusing to enforce arbitration clause because filing proof of claim is deemed consent to jurisdiction of bankruptcy court to adjudicate claim); *see also In re* Interco Inc., 137 B.R. 993, 997 (Bankr. E.D. Mo. 1992) (acknowledging other courts "permitted debtors to utilize bankruptcy procedures rather than submit to arbitration"); *In re* Chorus Data Sys., Inc., 122 B.R. 845 (Bankr. D.N.H. 1990) (upholding jurisdiction of bankruptcy court).

[214] *See, e.g.*, *In re* Herrington, 374 B.R. 133, 147 (Bankr. E.D. Pa. 2007) ("[N]umerous courts have concluded that a creditor who files a proof of claim does not, by that act alone, waive its contractual right to arbitrate a dispute."); *In re Transp. Assocs., Inc.*, 263 B.R. at 536 ("Bankruptcy courts uniformly hold that filing a proof of claim does not waive a party's right to invoke an arbitration provision.") (citation omitted); Rinker Portland Cement Corp. v. Seidel, 414 So. 2d 629, 630 (Fla. Dist. Ct. App. 1982) (positing proof of claim filing does not constitute "waiver of the arbital forum").

[215] *See e.g.*, *In re Bohack Corp*, 431 F.Supp. at 653–54 n.3 (noting "debtor has failed to make any showing of prejudice resulting from the filing of the administrative claim"); *In re Martin*, 387 B.R. at 314 (finding right to arbitration was not waived because party was not prejudiced by other party's actions); *In re* Kaiser Group Int'l, Inc., 307 B.R. 449, 454–55 (Bankr. D. Del. 2004) (recognizing prejudice is "'the touchstone for determining whether the right to arbitrate has been waived'" and describing various ways of establishing prejudice, noting prejudice was not shown in this case) (citation omitted).

[216] *See In re* Hart Ski Mfg. Co., 18 B.R. 154, 159 (Bankr. D. Minn. 1982) (reasoning "[f]iling the proof of claim did not invoke the judicial function of the Court" but instead invoked Court's "administrative function"), *amended on other grounds*, 22 B.R. 762 (Bankr. D. Minn. 1982), *aff'd*, 22 B.R. 763 (D. Minn. 1982), *aff'd*, 711 F.2d 845 (8th Cir. 1983); *see also In re* Wirecomm Wireless, Inc., No. 2:07-CV-02451-MCE, 2008 WL 3056491, at *4 (E.D. Cal. August 1, 2008) (deciding securing "right to partake in distribution of the debtor's estate" may be done "without waiving the right to arbitration") (citation omitted); *In re* Statewide Realty Co., 159 B.R. 719, 724 (Bankr. D.N.J. 1993) (noting there was "no recourse" for creditor to protect its position without filing proof of claim, and therefore its actions did not "constitute waiver") (citation omitted).

[217] *See e.g.*, Lewallen v. Green Tree Servicing, L.L.C., 487 F.3d 1085, 1091 (8th Cir. 2007) (quoting specific arbitration provision between parties, "'Lender retains an option to use judicial or non-judicial relief . . . . [A lawsuit of this sort] shall not, constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this Agreement . . . .'" and finding arbitration would therefore occur); *see also* John J. Cruciani, *Eighth Circuit Review: Participating in Bankruptcy Waives Arbitration Rights*, NORTON BANKR. L. ADVISER, Mar. 2008, at 17 (summarizing facts and holding in *Lewallen*).

court simply analyzes the underlying claim and determines whether to compel arbitration.[218]

One of the earliest decisions to consider the intersection between a proof of claim and the right to arbitrate was *Bohack Corp. v. Truck Drivers Local Union No. 807* wherein the District Court for the Eastern District of New York rejected the argument that the filing of a proof of claim constituted a waiver of the creditor's right to arbitrate.[219] In doing so, the court noted that "in the context of a bankruptcy proceeding, waiver should not be a controlling consideration in ordering arbitration. Rather, the bankruptcy court must decide on the desirability of arbitration, taking into account the intent of one or both parties to avoid arbitration."[220] Moreover, the court opined that "[t]he powers of a bankruptcy court to order arbitration are sufficiently broad to overcome a waiver by one of the parties."[221] The court also denied the waiver argument because there had been no showing of prejudice.[222]

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[218] *See, e.g.*, Mintze v. Am. Gen. Fin. Srvs., Inc. (*In re* Mintze), 434 F.3d 222, 225–26 (3d Cir. 2006) (remanding case "with instructions to order the parties to engage in arbitration in accordance with the terms of the arbitration provision" without engaging in discussion of whether there was waiver of right to arbitrate); Gandy v. Gandy (*In re* Gandy), 299 F.3d 489, 499 (5th Cir. 2002); *In re* Rozell, 357 B.R. 638, 643 (Bankr. N.D. Ala. 2006) (analyzing action as "'otherwise related' or non-core proceeding" rather than discussing whether there was waiver of right to arbitrate); *In re* Mirant Corp., 316 B.R. 234, 237–46 (Bankr. N.D. Tex. 2004) (using *National Gypsum* test to evaluate and resolve parties' claims (citing Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (*In re* Nat'l Gympsum Co.), 118 F.3d 1056 (5th Cir. 1997))); *In re* Farmland Indus., Inc., 309 B.R. 14, 18–21 (Bankr. W.D. Mo. 2004); *In re* Phico Group, Inc., 304 B.R. 170, 175 (Bankr. M.D. Pa. 2003) (permitting "parties to continue through the arbitration process" despite creditor's filing of proof of claim, without using "waiver" terminology); *In re* Cavanaugh, 271 B.R. 414, 425–426 (Bankr. D. Mass. 2001) (calling "[e]nforcement of the arbitration clause under [the] circumstances . . . an abrogation of this Court's obligation to construe and enforce the injunction issuing under its authority and to determine the parties' rights and obligations under bankruptcy law").

[219] 431 F. Supp. 646, 653 n.3 (E.D.N.Y. 1977), *aff'd* 567 F.2d 237 (2d Cir. 1977).

[220] 431 F. Supp. at 653 n.3. *See* William E. Deitrick, *The Conflicting Policies Between Arbitration and Bankruptcy*, 40 BUS. LAW. 33, 44 (1984) ("[I]t is logical for bankruptcy courts to compel arbitration of factual issues where contractually agreed between a debtor and another party and where the bankruptcy issues do not permeate these factual issues."); *see also In re* Brookhaven Textiles, Inc., 21 B.R. 204, 207 (Bankr. S.D.N.Y. 1982) ("Equally important considerations in deciding whether to retain jurisdiction or surrender it to an arbitration tribunal concern the bankruptcy court's obligation to determine claims arising under a petition so as to effectively provide for the protection of the debtor and the preservation of the rights of the creditors.").

[221] *In re* Bohack Corp., 431 F. Supp. 646, 653 n.3 (E.D.N.Y. 1977). *See* Crysen/Montenay Energy Co. v. Shell Oil Co. (*In re* Crysen/Montenay Energy Co.), 226 F.3d 160, 165–66 (2d Cir. 2000) (reviewing bankruptcy court's "power to stay non-core proceedings in favor of arbitration"); *In re* Hagerstown Fiber Ltd. P'ship, 277 B.R. 181, 201 (Bankr. S.D.N.Y. 2002) (reiterating *In re Crysen/Montenay Energy Co.* court's holding bankruptcy courts have power "'to stay *non-core* proceedings in favor of arbitration'") (citation omitted).

[222] *In re Bohack Corp.*, 431 F. Supp. at 654 n.3 (noting "debtor has failed to make any showing of prejudice resulting from the filing of the administrative claim"). *See In re* Fleming Cos., Inc., 325 B.R. 687, 692 (Bankr. D. Del. 2005) (noting debtor had not waived right to compel arbitration because of failure of opposing party to show prejudice). *See generally* ITT World Commc'ns, Inc. v. Commc'ns Workers of Am., 422 F.2d. 77, 82–83 (2d Cir. 1970) (saying filing answer in damages claim does not constitute waiver of right to arbitration without prejudice to opposing party) (citation omitted).

The modern day proof of claim/arbitration waiver analysis has its genesis in the *In re Hart Ski Manufacturing Co.* matter.[223] At issue in that case was whether a creditor's proof of claim constituted a default or waiver under section 3 of the FAA.[224] The debtor argued that the creditor's initial choice of forum was the bankruptcy court where it filed its proof of claim.[225] From this the debtor concluded that the proof of claim constituted an action before the bankruptcy court.[226] The bankruptcy court, however, flatly rejected this view.[227] It concluded that:

> The filing of a proof of claim under the Bankruptcy Code was purely a ministerial or administrative act . . . . Filing the proof of claim did not invoke the judicial function of the Court. It invoked the administrative function of the Court which was necessary to preserve [the creditor's] right to participate in the plan as an unsecured creditor.[228]

In essence, the court viewed the creditor's filing of a proof of claim as "coerced participation" in the bankruptcy proceedings and it was unwilling to find a waiver under those circumstances.[229] On appeal, the District Court affirmed the bankruptcy court's decision concluding that the creditor's behavior was not tantamount to a waiver of the right to arbitrate and that the "filing [of] a proof of claim is not equal to the commencement of a lawsuit."[230] In a very short opinion, the Eighth Circuit

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[223] 18 B.R. 154, 160 (Bankr. D. Minn. 1982) (upholding creditor's right to arbitration under FAA after filing proof of claim in Bankruptcy Court), *amended on other grounds*, 22 B.R. 762 (Bankr. D. Minn. 1982), *aff'd*, 22 B.R. 763 (D. Minn. 1982), *aff'd*, 711 F.2d 845 (8th Cir. 1983).

[224] *Id.* at 159 ("In this case, therefore, we must look to the conduct of the defendant evidencing default to determine whether or not this conduct has been adverse or inconsistent with defendant's present claim to a right to arbitrate to the extent that it constitutes a waiver of that right.").

[225] *Id.* ("Hart claims that the most important fact bearing upon the determinative issue is [the creditor's] initial choice of this forum. This choice, Hart claims, was made by [the creditor] filing a proof of claim in the reorganization proceedings.").

[226] *Id.* ("Hart views this as tantamount to the commencement of an action in this Court.").

[227] *Id.* ("The Court cannot agree.").

[228] *Id.*

[229] *In re* Hart Ski Mfg. Co., 18 B.R. 154, 159 (Bankr. D. Minn. 1982), *amended on other grounds*, 22 B.R. 762 (Bankr. D. Minn. 1982), *aff'd*, 22 B.R. 763 (D. Minn. 1982), *aff'd*, 711 F.2d 845 (8th Cir. 1983). *See* Hoos & Co. v. Dynamics Corp. of Am., 570 F.2d 433, 437–38 n.15 (2d Cir. 1978) (discussing 1963 amendment to Bankruptcy Act requiring creditors to file proof of claims "'in order to participate in'" chapter 11 distributions) (citation omitted); Glenn A. Guarino, Annotation, *Disposition by Bankruptcy Court of Request for Arbitration Pursuant to Arbitration Agreement to Which Debtor in Bankruptcy is a Party*, 72 A.L.R. FED. 890, § 4[b] (1985) (summarizing *In re Hart Ski Manufacturing Co.* and providing context for holding by noting related cases).

[230] *In re* Hart Ski Mfg. Co., 22 B.R. 763 (D. Minn. 1982), *aff'd*, 711 F.2d 845 (8th Cir. 1983). *But see* Nortex Trading Corp. v. Newfield, 311 F.2d 163, 164 (2d Cir. 1962) (stating within bankruptcy proceedings filing proof of claim was "analogous to the commencement of an action"); *In re* Am. Anthracite & Bituminous Coal Corp., 22 F.R.D. 504, 506 (S.D.N.Y. 1958) ("While a proof of claim may not technically be equated with a complaint it is, in effect, not less than that.").

subsequently affirmed the District Court's decision.[231] Critically, none of the *Hart Ski* opinions considered the proof of claim/arbitration issue in the context of the Supreme Court's *Katchen v. Landy* decision.

A few years later in *In re Mor-Ben Insurance Markets Corp*., the Ninth Circuit Bankruptcy Appellate Panel flatly rejected the argument that the filing of a proof of claim subjected a creditor to the bankruptcy court's jurisdiction.[232] In doing so it opined that a "claim may be filed to secure a creditor's right to partake in distribution of the debtor's estate without waiving his right to arbitration."[233] Many decisions subsequent to *Hart Ski* and *Mor-Ben* have simply relied upon those decisions without much, if any, substantive analysis.[234]

In 2007, the Eighth Circuit added a new perspective to the proof of claim/arbitration issue when it issued its opinion in *Lewallen v. Green Tree Servicing, L.L.C*.[235] In that case, the debtor contended that the creditor's filing of a proof of claim constituted a civil action to collect the debt which, in turn, invoked litigation.[236] But the Eighth Circuit summarily dismissed the notion by simply citing the *Statewide Realty* decision for the proposition that the filing of a proof of claim does not waive a creditor's right to arbitrate.[237] But to further buttress its conclusion, the court cited the parties' arbitration clause which provided that the creditor's use of judicial or non-judicial efforts to enforce its security agreement would not constitute a waiver of any party's right to compel arbitration.[238] The court's reliance upon the parties' contract to find that a waiver had not occurred upon the filing of the proof of claim appears to be a new approach to the proof of claim/arbitration issue.[239] But notwithstanding its unique analysis, however, the court ultimately concluded that the right to arbitrate had been waived due to the creditor's inconsistent conduct with that right.[240]

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[231] Hart Ski Mfg. Co. v. Maschinenfabrik Hennecke, GmbH (*In re* Hart Ski Mfg. Co.), 711 F.2d 845, 846 (8th Cir. 1983) (finding, as factual question, parties agreed to arbitrate dispute).

[232] 73 B.R. 644, 647 (B.A.P. 9th Cir. 1987) (stating filing does not necessarily subject creditor to court's jurisdiction but even when there is jurisdiction, court can compel parties to arbitrate "when the arbitration forum is required by" FAA).

[233] *Id.* at 647 (citing *In re Hart Ski Mfg. Co.*, 18 B.R. at 154). *See In re* Greene, 33 B.R. 1007, 1010 (D.R.I. 1983) (stating Congress "clearly set forth" proof of claim filing time requirements). *But see* State of Cal., State Bd. Of Equalization v. Harleston (*In re* Harleston), 275 B.R. 546, 552 (B.A.P. 9th Cir. 2002) (stating "'[a] creditor who offers proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences'" (quoting Wiswall v. Campbell, 93 U.S. 347, 351 (1876))).

[234] *See*, *e.g.*, *In re* Herrington, 374 B.R. 133, 147 (Bankr. E.D. Pa. 2007) (following "numerous courts" which concluded filing proof of claim alone does not waive right to arbitrate); *In re* Transp. Assocs., Inc., 263 B.R. 531, 536 (Bankr. W.D. Ky. 2001) (stating bankruptcy courts "uniformly hold" filing proof of claim is not waiver); *In re* Statewide Realty Co., 159 B.R. 719, 724 (Bankr. D.N.J. 1993) (noting, without any analysis, filing proof of claim does not constitute waiver) (citation omitted).

[235] 487 F.3d 1085 (8th Cir. 2007).

[236] *Id.* at 1091.

[237] *Id.*

[238] *Id.*

[239] Subsequently, at least one court has opined that "the determination of the amount of a claim may be removed from the bankruptcy court if the contract calls for binding arbitration." *In re* Rhodes, Inc., 382 B.R. 550, 559 (Bankr. N.D. Ga. 2008).

[240] Lewallen v. Green Tree Servicing, L.L.C., 487 F.3d 1085, 1090–94 (8th Cir. 2007).

2. A lone contrarian: a proof of claim *is* a waiver of the right to arbitrate

There is at least one decision where a court has found that the filing of a proof of claim resulted in the waiver of the right to arbitrate. In *In re J.T. Moran Financial Corp.*, the plaintiff filed an adversary proceeding in the bankruptcy court against the debtor and a third-party defendant.[241] Thereafter, the third-party defendant withdrew its consent to the bankruptcy court's jurisdiction.[242] In an attempt to avoid jurisdictional bifurcation of the claims against the debtor and the third-party defendant, the plaintiff filed a motion for relief from the automatic stay seeking to compel arbitration pursuant to the rules of the New York Stock Exchange.[243]

In considering the request for arbitration, the bankruptcy court (in reliance upon *Shearson/American Express, Inc. v. McMahon*) noted the federal policy provisions favoring arbitration.[244] The court further noted that debtors and trustees are bound to pre-petition arbitration agreements.[245] Critically, however, the court opined that the plaintiffs did not solely rely upon their arbitration clause to determine their damages against the debtor.[246] Rather, the plaintiffs had also filed proofs of claims.[247] From this the court concluded (in reliance upon the Supreme Court's *Granfinanciera* and *Katchen* decisions) that "by filing proofs of claims against the debtors and by commencing an adversary proceeding against the debtors, the plaintiffs have consented to the jurisdiction of this court with respect to their claims against the debtor."[248] Indeed, the court noted that the "filing of a proof of claim against a debtor is part of the process of allowance and disallowance of claims which is integral to the restructuring of debtor-creditor relations."[249] Moreover, the

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[241] 118 B.R. 233, 234 (Bankr. S.D.N.Y. 1990).

[242] *Id.*

[243] *Id.* at 235.

[244] *Id*. (describing "federal policy favoring arbitration where the parties previously entered into agreements" requiring all disputes to use arbitration) (citation omitted). *See* Ritzel Commc'ns, Inc. v. Mid-Am. Cellular Tel. Co., 989 F.2d 966, 968–69 (8th Cir. 1993) (acknowledging in light of federal policy favoring arbitration, "any doubts concerning waiver of arbitrability should be resolved in favor of arbitration") (citation omitted); Nesslage v. York Sec., Inc., 823 F.2d 231, 234 (8th Cir. 1987) (noting there is "strong federal policy in favor of arbitration") (citation omitted).

[245] *In re* J.T. Moran Fin. Corp., 118 B.R. 233, 235 (Bankr. S.D.N.Y. 1990) (noting "trustee in bankruptcy or a debtor in possession is bound by a prepetition agreement to arbitrate") (citation omitted). *See* Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1150, 1154 (3d Cir. 1989) (holding trustee was "bound by the arbitration agreement"); Fallick v. Kehr, 369 F.2d 899, 899 (2d Cir. 1966) (noting "an advance agreement to waive the benefits of the [Bankruptcy Act] would be void").

[246] *In re J.T. Moran Fin. Corp.*, 118 B.R. at 235.

[247] *Id*.

[248] *Id*. *See* Cent. Vt. Pub. Serv. Corp. v. Herbert, 341 F.3d 186, 191 (2d Cir. 2003) (finding jurisdiction where proof of claim filed); S.G. Phillips Constructors, Inc. v. City of Burlington, Vt. (In re S.G. Phillips Constructors, Inc.), 45 F.3d 702, 707 (2d Cir. 1995) (noting filing proof of claim results in submission to jurisdiction).

[249] *In re J.T. Moran Fin. Corp.*, 118 B.R. at 235 (citation omitted). *See In re* Peachtree Lane Assocs., Ltd., 150 F.3d 788, 798 (7th Cir. 1998) (holding "creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity*

bankruptcy court concluded that "[w]hen the plaintiffs filed their proofs of claims with respect to the sale of their pledged collateral, they accordingly submitted the issues with respect to their claims to the exclusive jurisdiction of the district court in a case under title 11, as governed by 28 U.S.C. § 1334(d)."[250] *In re J.T. Moran* is a singular decision in the realm of arbitration agreements and proofs of claim because it links the jurisdictional rationale of *Katchen* and *Granfinanciera* with the strong federal policy favoring arbitration. Surprisingly, no other court has linked these two concepts.

III. ANALYSIS AND RECONCILIATION

A. Why is there a Disparity between Arbitration and Constitutional Rights in the Context of Bankruptcy Proofs of Claim?

In the context of bankruptcy proofs of claims, why has such a dramatic disparity arisen between the treatment of the right to arbitrate versus the Seventh Amendment right to a jury trial or a state's Eleventh Amendment immunity? In short, the answer is that the current state of the law is really the result of separate judicial lines of authority, which have largely ignored one another.[251]

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jurisdiction" (citing Lagenkamp v. Culp, 498 U.S. 42, 44–45 (1990))); Billing v. Ravin, Greenberg & Zackin, P.A., 22 F.3d 1242, 1249 (3d Cir. 1994) (noting *Granfinanciera* court "as recognizing that by filing a proof of claim a creditor triggers the process of allowance and disallowance of claims" which becomes "integral to the restructuring of the debtor-creditor relationship") (citation omitted).

[250] *In re J.T. Moran Fin. Corp.*, 118 B.R. at 236. *See In re* Neese, 12 B.R. 968, 971 (Bankr. W.D. Va. 1981) (defendants in adversary proceeding brought by trustee "voluntarily availed themselves of the jurisdiction of" bankruptcy court "when they filed . . . proofs of claim in . . . bankruptcy case"); *see also* 28 U.S.C. § 1334(d) (2006) (stating decision to abstain "not reviewable by appeal").

[251] *See In re* Taylor, 260 B.R. 548, 556–57 (Bankr. M.D. Fla. 2000) (establishing party can waive Seventh Amendment jury trial right after signing arbitration agreement unless party shows arbitration clause is unconscionable); Janet A. Flaccus, *The Eleventh Amendment and Bankruptcy Jurisdiction Over States*, 10 J. BANKR. L. & PRAC. 207, 222 (2001) ("Five circuit courts of appeal have held that the filing in bankruptcy of a proof of claim can waive the states' Eleventh Amendment immunity. . . . Each of these cases is ruling only on the facts in front of the court."); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 715 (2001) [hereinafter *Mandatory Binding*] (noting "one court and one commentator have suggested resolving the tension between the tough standard protecting waiver of the jury trial and the more lax standard for interpreting arbitration agreements by applying the more lax arbitration standard to contractual jury trial waivers"). This dichotomy illustrates one of the inherent weaknesses of *stare decisis*. *See* Sternlight, *Mandatory Binding*, *supra*, at 670 (noting challenges to waiver of jury trial in mandatory arbitration were "shrugged off by the courts without sufficient analysis"); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 49 (1997) [hereinafter *Rethinking*] (observing "Supreme Court has long held . . . many constitutional rights, including . . . civil jury trial" to be waivable); *see also In re Taylor*, 260 B.R. at 557 (concluding it is "common sense" for court to "inquire into the enforceability of the arbitration clause" instead of enforceability of waiver of constitutional right to jury trial). The problem with *stare decisis* is that once a Constitutional right is treated lightly, it is difficult to re-elevate that right. *See* Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613, 619 (2002) (acknowledging past holding "that a State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity") (citation omitted); Sternlight, *Mandatory Binding*, *supra*, at 674 (finding issues of waiver of jury trial in arbitration

On the one hand, the early judicial animosity toward arbitration agreements led to the enactment of the FAA and subsequent Supreme Court pronouncements regarding the right to arbitrate.[252] These Supreme Court decisions have consistently and strongly favored the right to arbitrate. Lower courts, in turn, have created a body of law under which it is now very difficult to find a waiver of one's right to arbitrate. Indeed, the judicial apprehension toward waiver of the right to arbitrate has been buttressed by the *McMahon* standards for determining whether a federal claim is exempted from the FAA's requirements.[253] But the problem with the heavy reliance on *McMahon* is that it arose in a non-bankruptcy context. Critically, there has never been a Supreme Court decision analyzing the intersection of the FAA and the Bankruptcy Code. Indeed, bankruptcy creates a fundamentally different dynamic than a standard commercial arbitration setting. Yet reliance on arbitration

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cases are treated in favor of arbitration while same issues not treated "lightly" in cases of contractual waiver of jury trial); Sternlight, *Rethinking*, *supra*, at 7 (noting United States Supreme Court's decisions favoring "binding arbitration over litigation" puts due process of consumers and employees in danger). Simultaneously, statutory rights can be given a more rigid interpretation and application. *See In re* United Mo. Bank of Kan. City, N.A., 901 F.2d 1449, 1450 (8th Cir. 1990) (holding bankruptcy judge does not have "statutory authority to conduct jury trials" in that particular instance under Bankruptcy Amendments and Federal Judgeship Act of 1984); Amy Field Herzog, Note, *Jury Trials in Bankruptcy Court? The Seventh Circuit Adds its Voice to the Debate in* In Re Grabill Corp., 25 LOY. U. CHI. L.J. 137, 138 (1993) (noting several cases held bankruptcy court can conduct jury trials based on "statutory and constitutional authority" while other cases have held "bankruptcy courts do not have the statutory authority to conduct jury trials"). The net result is a Constitutional right can be lowered while a statutory right may be given greater substantive weight. *See* Herzog, *supra*, at 138 (noting several courts held bankruptcy court cannot conduct jury trials on "purely statutory grounds" without addressing whether Constitution allows this); Sternlight, *Mandatory Binding*, *supra*, at 725 (noting "'Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case once it is determined that the litigation should proceed before a court'" and this right disappears "'[i]f the claims are properly before an arbitral forum pursuant to an arbitration agreement'" (quoting Marsh v. First USA Bank, N.A., 103 F. Supp. 2d 909, 922 (N.D. Tex. 2000))); *cf.* Ben Cooper, Inc. v. Ins. Co. of the State of Pa. (*In re* Ben Cooper, Inc.), 896 F.2d 1394, 1402 (2d Cir. 1990) (holding "bankruptcy courts may conduct jury trials in core proceedings").

[252] *See* Southland Corp. v. Keating, 465 U.S. 1, 10–13 (1984) (finding Congress in enacting FAA intended recognition of arbitration agreements not only by federal courts but also "withdrew the power of the states to require a judicial forum for the resolution of claims" which parties contractually agreed to address through arbitration, after history of aversion towards arbitration agreements by common law); Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 180–82 (2002) (highlighting business-driven reform "to overcome . . . judicial hostility" led to enactment of FAA and recognition of arbitration agreements as contracts by Supreme Court). *See generally* Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 389–92 (1992) (discussing enactment of FAA by Congress after pressure from businesses resulted in legislation passed which "required courts to enforce some or all agreements to arbitrate").

[253] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 35 (1991) (holding ADEA claim was subject to compulsory arbitration pursuant to arbitration agreement in securities registration application as applicant did not meet burden to show "Congress intended to preclude a waiver of a judicial forum for ADEA claims"); Gay v. CreditInform, 511 F.3d 369, 379 (3d Cir. 2007) ("A party seeking to avoid arbitration for a statutory claim has the burden of establishing that Congress intended to preclude arbitration of the claim."); Mintze v. Am. Gen. Fin. Servs., Inc. (*In re* Mintze), 434 F.3d 222, 229 (3d Cir. 2006) (finding arbitration enforcement can be overcome when "party opposing arbitration" establishes congressional intent to create exception to FAA mandate regarding statutory claims).

decisions from non-bankruptcy related cases has distorted the impact of resolving arbitration issues in bankruptcy.

In contrast, when the Supreme Court has analyzed the intersection of bankruptcy and constitutional issues in the context of proofs of claim filed against the estate, the result has consistently been a finding in favor of the bankruptcy proceeding at the expense of individual or state's rights (i.e., waiver of the right to a jury trial and waiver of Eleventh Amendment immunity).[254] By exclusively looking to the *McMahon* standards and ignoring the implications of *Gardner*, *Katchen*, and *Langenkamp*, courts have essentially ignored the impact of the bankruptcy court's *in rem* and equitable jurisdiction as it relates to a party's right to compel arbitration during a bankruptcy proceeding.

The rule of law is at its best when the Constitution truly is the highest law of the land. But when the Constitution is not, practically speaking, the highest law of the land, then the legal system is out of balance. This imbalance, in turn, can create problems and lead to serious unintended consequences. One of these practical, unintended results is that a statutory business right (i.e., the right to arbitrate) is given more weight than constitutional rights. Indeed, it seems inherently wrong to view arbitration in such a way that arbitration related rights are given greater weight than Constitutional rights.

B. Reconciliation: A Proposed Solution

Reconciliation of this problem is not difficult. In very simple terms, a party should be deemed to have waived its right to arbitrate when it files a proof of claim in a bankruptcy proceeding. Indeed, there is an ample basis in both the FAA and existing jurisprudence to support this conclusion.

Section 3 of the FAA provides that a court shall stay the legal proceedings pending arbitration provided that "the applicant for the stay is not in default in proceeding with such arbitration."[255] "A default occurs when a party 'actively participates in a lawsuit or *takes other action inconsistent with*' the right to arbitration."[256] The Ninth Circuit has noted that by filing a proof of claim relating to

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[254] *See* Langenkamp v. Culp, 498 U.S. 42, 44–45 (1990) (holding creditors who submitted claims against debtor's bankruptcy estate had no Seventh Amendment right to jury trial when bankruptcy trustee brought suit against them, as they submitted themselves to jurisdiction of bankruptcy court by filing claims) (citations omitted); Katchen v. Landy, 382 U.S. 323, 329 (1966) (establishing bankruptcy courts have power to evaluate claims through summary proceedings instead of plenary suit); Gardner v. New Jersey, 329 U.S. 565, 573–74 (1947) (finding when state files proof of claims in bankruptcy court against fund "it waives any immunity" in adjudicating claim).

[255] 9 U.S.C. § 3 (2006).

[256] N&D Fashions, Inc. v. DHJ Indus., Inc., 548 F.2d 722, 728 (8th Cir. 1976) (emphasis added) (citation omitted) (finding no default occurred when party "demanded arbitration and moved for a stay immediately upon the filing of the complaint" and "took no action inconsistent with the right to arbitration"). *See* Ritzel Commc'n, Inc. v. Mid-Am. Cellular Tel. Co., 989 F.2d 966, 971 (8th Cir. 1993) (determining any right to arbitrate party had was waived because, in part, party litigated "before asserting its arbitration rights" which was considered acting "inconsistently with its arbitration rights"); Parler v. KFC Corp., 529 F. Supp. 2d 1009, 1012 (D. Minn. 2008) (acknowledging court's power to decide whether party waived its right to

an underlying contract between the debtor and the creditor, the creditor "voluntarily subject[s] the agreement to the bankruptcy court's jurisdiction . . . because the agreement is an integral component of the bankruptcy court's consideration of [the creditor's] claim."[257] Under this rationale, an agreement to arbitrate would be subjected to bankruptcy court jurisdiction by filing a proof of claim.

Similarly, the Seventh Circuit has held that "an election to proceed before a nonarbitral tribunal for the resolution of a contractual dispute is a *presumptive* waiver of the right to arbitrate."[258] However, the Seventh Circuit further clarified that "while normally the decision to proceed in a judicial forum is a waiver of arbitration, a variety of circumstances may make the case abnormal, and then the district court should find no waiver or should permit a previous waiver to be rescinded."[259] From this, one can conclude that the Seventh Circuit would presumably hold that the filing of a proof of claim is a presumptive waiver of the right to arbitrate. However, that presumption would be rebuttable.

"The classic description of an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a known right or privilege.'"[260] Indeed, "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights."[261] Yet in the context of bankruptcy, the

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arbitrate "by 'actively participat[ing] in a lawsuit or tak[ing] other action inconsistent with the right to arbitration'" (quoting *N&D Fashions, Inc.*, 548 F.2d at 728)).

[257] Durkin v. Benedor Corp. (*In re* G.I. Indus., Inc.), 204 F.3d 1276, 1279–80 (9th Cir. 2000) (noting although "bankruptcy court does not have jurisdiction over the breach of contract claim" in state court, "bankruptcy court does have core jurisdiction over the proof of claim filed by [creditor] in the bankruptcy proceeding"). *See* Simmons v. Savell (*In re* Simmons), 765 F.2d 547, 551 (5th Cir. 1985) (acknowledging section 501(a) of Bankruptcy Code allows creditors to file voluntary proof of claim); *see also In re* Transport Associates, 263 B.R. 531, 534 (Bankr. W.D. Ky. 2001) (asserting "[s]ome courts conclude that where actions are derived exclusively from the [Bankruptcy] Code, such as preference, fraudulent conveyance, or violation of the discharge injunction proceedings, the bankruptcy court may exercise its discretion to deny arbitration after careful consideration").

[258] Cabinetree of Wis. Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (7th Cir. 1995) (emphasis added). *See* Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, 821 F.2d 772, 774 (D.C Cir. 1987) (positing right to arbitrate "can be waived" and if there is "any ambiguity as to the scope of the waiver, [courts] would . . . resolve the issue in favor of arbitration"); *see also* Kramer v. Hammond, 943 F.2d 176, 178 (2d Cir. 1991) (noting there is "strong presumption in favor of arbitration").

[259] *Cabinetree*, 50 F.3d at 391 (citation omitted). *See* Iowa Grain Co. v. Brown, 171 F.3d 504, 509–10 (7th Cir. 1999) (explaining "even if a district court finds an initial waiver of the right to arbitrate, it is also entitled to permit that waiver to be rescinded, depending on the course the litigation takes"); *see also* St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prod. Co., Inc., 969 F.2d 585, 587–88 (7th Cir. 1992) (establishing whether party waived its right to arbitrate depends on particular circumstances and if "alleged defaulting party has acted inconsistently with the right to arbitrate") (citation omitted).

[260] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). *See* Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 277–78 (5th Cir. 2005) (elaborating "[t]he first part, 'intentional relinquishment,' captures the principal of *voluntariness*; and the second part, 'known right or privilege,' captures the element of *knowingness*") (citation omitted); *see also* Bueno v. City of Donna, 714 F.2d 484, 492–93 (5th Cir. 1983) (noting in order to constitute waiver, there must be evidence of "actual knowledge of the existence of the right or privilege, full understanding of its meaning, and clear comprehension of the consequence of the waiver").

[261] *Coll. Sav. Bank*, 527 at 682 (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)). *See* Mirant Corp. v. The Southern Co., 337 B.R. 107, 121 (N.D. Tex. 2006) (noting "the court will not presume that a litigant has knowingly and willfully surrendered its constitutional right to a jury trial for the resolution of

constitutional right to a jury trial and a state's sovereign immunity are deemed waived by the simple act of filing of a proof of claim. In contrast, in a bankruptcy setting courts often only find a waiver of the right to arbitrate if the party knew of the right, acted inconsistently with that right, and the other party was prejudiced thereby.[262] Why should a higher standard be applied in the context of an arbitration clause in the context of a bankruptcy? "[I]n ordinary contract law, a waiver normally is effective without proof of consideration or detrimental reliance."[263] Indeed, Supreme Court jurisprudence makes clear that the purpose of the FAA is to place agreements to arbitrate on an *equal* footing with other contracts.[264] In their zeal to protect the right to arbitrate, courts must be cautious not to elevate or give greater weight to the right to arbitrate than they do to other contractual provisions.

A party seeking to arbitrate may argue that the arbitration provision is a forum selection clause which must be honored. To be sure, "[a]ssuming jurisdiction otherwise lies, forum selection clauses are as enforceable in bankruptcy courts as they are in other federal courts."[265] Critically, however, "a mandatory forum-selection clause does not . . . divest a court of jurisdiction that it otherwise retains."[266] Rather, the forum selection provision simply constitutes a stipulation between the parties which they ask the court to honor.[267] The Supreme Court noted

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disputes that are only incidentally related to the bankruptcy process"); *see also In re* Data Compass Corp., 92 B.R. 575, 578 (Bankr. E.D.N.Y 1988) (noting "Supreme Court has consistently held that courts must indulge in every reasonable presumption against waiver" of right to jury trial under Seventh Amendment).

[262] *See* Lewallen v. Green Tree Servicing, L.L.C., 487 F.3d 1085, 1090 (8th Cir. 2007) (citation omitted); Ritzel Commc'ns, Inc. v. Mid-American Cellular Tel. Co., 989 F.2d 966, 969 (8th Cir. 1993) (citation omitted); *see also* 1 THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 23:30 (3d ed. 2007) (discussing filing bankruptcy petition does not waive right to arbitrate).

[263] *Cabinetree*, 50 F.3d at 390 (citation omitted). *See* BMC Indus., Inc. v. Barth Indus., Inc., 160 F.3d 1322, 1333 (11th Cir. 1998) (concluding Uniform Commercial Code "does not require consideration or detrimental reliance for waiver of a contract term"); *see also* Wis. Knife Works v. Nat'l Metal Crafters, 781 F.2d 1280, 1285–86 (7th Cir. 1986) (noting modifications are "enforceable even if not supported by consideration").

[264] Hall St. Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1402 (2008) (stating FAA reflects general policy to give arbitration agreements same standing as other contracts (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006))); Equal Employment Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279, 289 (2002) (explaining FAA generally enforces arbitration provisions except on such grounds required for revocation of a contract) (citations omitted); *In re* Herrington, 374 B.R. 133, 139 (Bankr. E.D. Pa. 2007) ("[I]n general, '[t]he FAA makes agreements to arbitrate enforceable to the same extent as other contracts.'" (quoting Harris v. Green Tree Fin. Corp., 183 F.3d 173, 178 (3d Cir. 1999))).

[265] Street v. The End of the Rd. Trust, 386 B.R. 539, 547 (D. Del. 2008). *See* Mercurio v. Wright Med. Tech., Inc. (*In re* Mercurio), 402 F.3d 62, 66–67 (1st Cir. 2005) (finding in bankruptcy proceeding forum selection clause could not be set aside on theory of "'mere inconvenience'" for trustee) (citation omitted); *In re* Sargent Elec. Co., 341 B.R. 514, 518–19 (Bankr. W.D. Pa. 2006) (indicating public policy favoring enforcement of forum selection clauses trumps policy of centralizing bankruptcy core proceedings when circumstances "necessarily" prohibit centralization) (citations omitted).

[266] Silva v. Encyclopedia Britannica Inc., 239 F.3d 385, 388 n.6 (1st Cir. 2001). *See* Marrero v. Aragunde, 537 F. Supp. 2d 305, 308 n.3 (D.P.R. 2008) (positing mandatory forum selection clause is joint request by parties to court to decline jurisdiction rather than divestment of jurisdiction); Steen Seijo v. Ben R. Miller, Inc., 526 F. Supp. 2d 191, 194 n.1 (D.P.R. 2007) (suggesting power of court is not affected by forum selection clause rather clause indicates common objective of parties to limit proper forum).

[267] *See* Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) (stating courts encountering forum selection clauses must decide whether it should exert its jurisdiction beyond "giv[ing] effect to the legitimate

long ago that a general rule regarding courts of equity is that, once a court has jurisdiction over all the parties to the controversy, it "'will decide *all* matters in dispute and decree *complete* relief.'"[268] Thus, by filing a proof of claim, a creditor unconditionally submits its claims to the bankruptcy court and waives its right to arbitrate those issues.[269]

Indeed, an additional basis to find that the filing of a proof of claim is a waiver of the right to arbitrate is found in section 2 of the FAA which provides that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*."[270]

It is black letter law that contractual provisions can be waived.[271] While waiver of a contractual clause and revocation of a contract are legally distinct, a waiver, for all practical purposes, constitutes a revocation of the particular contractual clause that is waived. By filing a proof of claim relating to a controversy covered by an applicable arbitration agreement, it would be wholly consistent with constitutional jurisprudence to deem the arbitration agreement waived. In such a case, the creditor will be deemed to have submitted itself to the bankruptcy court's equitable jurisdiction. Such a conclusion is consistent with the FAA because section 2 contemplates revocation of contractual clauses.

Ironically, the current jurisprudence regarding proofs of claim and the right to arbitrate is fundamentally at odds with the law generally applicable to a proof of claim. Specifically, when a creditor files a proof of claim it is deemed allowed

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expectations of the parties"); *Silva*, 239 F.3d at 388 n.6 (reiterating forum selection provision does not encumber court's jurisdiction but rather demonstrates shared intention of parties to request court to decline jurisdiction); Gipson v. Wells Fargo & Co., No. 07-1970 (JBD), 2008 WL 2501149, at *3 (D.D.C. June 24, 2008) (discussing legitimacy of forum selection clauses and presumptive expectation courts are to show deference to such clauses).

[268] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 59 n.14 (1989) (emphasis added) (quoting Katchen v. Landy, 382 U.S. 323, 335 (1966)). *See* Commodity Futures Trading Comm'n v. Levy, No. 06-14592, 2008 WL 3992664, at *10 (11th Cir. Aug. 29, 2008) (restating courts in equity are not limited to particular type of relief in disputed matters properly set before them, noting they may "award 'complete relief'" (citing Porter v. Warner Holding Co., 328 U.S. 395, 399 (1946))); N.I.S. Corp. v. Hallahan (*In re* Hallahan), 936 F.2d 1496, 1508 (7th Cir. 1991) (affirming bankruptcy court's decision to retain matter of determining Hallahan's liability having ruled on dischargeability of debt (citing Alexander v. Hillman, 296 U.S. 222, 242 (1935))).

[269] *But see In re* Kaiser Group Int'l, Inc., 307 B.R. 449, 454–56 (D. Del. 2004) (noting "party seeking to avoid arbitration must demonstrate prejudice" for court to deny motion to compel arbitration) (citations omitted); *In re* Martin, 387 B.R. 307, 314–15 (Bankr. S.D. Ga. 2007) (discussing circumstances under which party *might* "'waive its right to arbitration'") (citation omitted); *In re* Rozell, 357 B.R. 638, 641–45 (Bankr. N.D. Ala. 2006) (concluding even in core proceeding court "'will not have discretion to override an arbitration agreement unless it finds'" either "'inherent[] conflict'" with FAA or arbitration "'necessarily jeopardize[s]'" the Code's objectives) (citation omitted).

[270] 9 U.S.C. § 2 (2006) (emphasis added).

[271] *See* Thomas v. Guardsmark, Inc., 381 F.3d 701, 705 (7th Cir. 2004) (providing parties to contract have ability to waive provisions of their contract); *see also* Bobrow Palumbo Sales Inc. v. Broan-Nutone, L.L.C., 549 F.Supp. 2d 249, 266 (E.D.N.Y. 2008) (stating written contract may be orally modified even when in presence of clause prohibiting oral modification so long as waiver of clause can be demonstrated); Van Dusen Aircraft Supplies, Inc. v. Terminal Constr. Corp., 70 A.2d 65, 67 (N.J. 1949) ("The law is generally that if the benefit of a provision in a contract is waived compliance therewith is excused and the party waiving it cannot thereafter insist on its performance.") (citation omitted).

unless there is an objection. If an objection is filed, the issue of the claim's allowance or disallowance is properly considered by the bankruptcy court because the proceeding is a core matter. Yet when an arbitration clause exists, creditors often seek to remove the matter from the bankruptcy court and place it before an arbitrator. In other words, the creditor originally invoked bankruptcy court jurisdiction by filing its proof of claim. But once its claim is challenged, it immediately seeks to withdraw the resolution of that claim from the judicial authority to whom the creditor originally submitted itself. But this "have my cake and eat it too" philosophy contradicts a central tenet of the bankruptcy process—summary resolution of claims against the debtor.

Long ago, the Supreme Court declared that the "whole process of proof, allowance, and distribution is . . . an adjudication of interests claimed in a res."[272] This principle is particularly true in arbitration because arbitration simply determines the rights and amounts owed vis-à-vis the participating parties. At the end of the day, a creditor who prevails in arbitration is simply left with a claim against the debtor. Indeed, often relief from the automatic stay may only be granted such that the claim may be liquidated.

The Supreme Court's decision in *Katchen v. Landy* provides another analogous basis as to why a party must be deemed to have waived its right to arbitrate if it files a proof of claim.[273] *Katchen* involved a dispute between a creditor who had filed two proofs of claim in the bankruptcy proceedings and a trustee who asserted that the creditor was liable for a preferential transfer.[274] The creditor argued, in part, that because the dispute involved legal and equitable issues, it was entitled to its Seventh Amendment right to a jury trial.[275] The Supreme Court rejected this argument because it was not consistent with the equitable purposes of the bankruptcy estate nor prior Supreme Court precedent.[276] Rather, the Court opined that Congress had intended that claim objections be resolved in summary fashion (and not through a plenary proceeding), and noted "to say that because the trustee could bring an independent suit against the creditor to recover his voidable preference, he is not entitled to have his statutory objection to the claim tried in the bankruptcy court in the normal manner is to dismember a scheme which Congress has prescribed."[277]

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[272] Gardner v. New Jersey, 329 U.S. 565, 574 (1947).

[273] 382 U.S. 323 (1966).

[274] *Id.* at 325.

[275] *Id.* at 337–39.

[276] *Id.* at 336–39 (citation omitted) (stating bankruptcy claims are "inherently proceedings in equity" and Seventh Amendment right to jury trial therefore does not apply) (citations omitted). *See* Barton v. Barbour, 104 U.S. 126, 133–34 (1881) (explaining bankruptcy cases are equitable and right to trial by jury does not apply to cases in equity, even for issues which would be considered issues of law outside of bankruptcy proceeding but "belong[] to the bankruptcy proceedings"); *see also In re* Hendon Pools of Mich., Inc., 57 B.R. 801, 802–03 (Bankr. E.D. Mich. 1986) ("[W]here the statutorily created equitable jurisdiction of the bankruptcy courts is invoked, there is no right to a jury trial.") (citation omitted).

[277] *Katchen*, 382 U.S. at 328–30, 339 (noting Congress provided that decisions regarding allowance or disallowance of claims are "to be exercised in summary proceedings and not by the slower and more expensive processes of a plenary suit") (citation omitted). *See In re Hendon Pools*, 57 B.R. at 803 (holding where equitable jurisdiction granted to bankruptcy courts by Congress is invoked, there is "neither a

By allowing creditors to invoke the bankruptcy court's equitable jurisdiction by filing a proof of claim and later to assert that the creditor is still entitled to compel arbitration of its claims is a holding which effectively dismembers Congress' scheme to resolve claims in a summary proceeding.

One may argue that creating a *de facto* arbitration/proof of claim/waiver rule is fundamentally unfair because it forces a creditor to choose between the arbitration process and its right to be paid. But such a result is not an anomaly in bankruptcy jurisprudence. The Supreme Court has stated that it is "'traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure.'"[278] Similarly, a party who chooses not to submit a proof of claim against the bankruptcy estate is entitled to the benefits and consequences of such a decision.[279] In 1933 the Supreme Court held in *New York v. Irving Trust Co.* that a State may be barred from receiving a distribution from a bankruptcy estate if it fails to file a proof of claim.[280] Similarly, creditors today must decide whether to file a proof of claim or forego a bankruptcy court distribution so as to protect their Seventh Amendment right to a jury trial.[281] Moreover, this proposed arbitration/proof of claim/waiver rule will not come as a surprise to the creditor. "Selection of a forum in which to resolve a legal dispute should be made at the earliest possible opportunity in order to economize on the resources, both public and private, consumed in dispute resolution."[282] "Parties know how important it is to settle on a

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statutory nor a constitutional right" of trial by jury); *In re* McLouth Steel Corp., 55 B.R. 357, 359 (Bankr. E.D. Mich. 1985) ("[W]here a trustee responds to a creditor's claims by counterclaiming for the avoidance of a preferential transfer, the summary jurisdiction of the bankruptcy court was invoked." (citing *Katchen*, 382 U.S. at 389)).

[278] *Katchen*, 382 U.S. at 333 n.9 (quoting Gardner v. New Jersey, 329 U.S. 565, 573 (1947)). *See In re* Applied Thermal Sys., Inc., 294 B.R. 784, 788–89 n.12 (Bankr. N.D. Okla. 2003) (showing Supreme Court has consistently held submitting proof of claim results in jurisdiction of bankruptcy court); *see also* Wiswall v. Campbell, 93 U.S. 347, 351 (1876) ("A creditor who offers proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences.").

[279] *See In re* Asousa P'ship, 276 B.R. 55, 72 (Bankr. E.D. Pa. 2002) (acknowledging choice not to file proof of claim precludes recovery in bankruptcy); Wilson v. Allegheny Int'l, Inc., 134 B.R. 282, (N.D. Ill. 1991) (suggesting failure to file proof of claim bars recovery from "bankrupt's estate") (citation omitted). *See generally* 11 U.S.C. §§ 501, 502 (2006) (explaining filing and allowance of claims in bankruptcy proceeding).

[280] 288 U.S. 329, 330, 333 (1933) (holding New York ineligible to receive distributions from estate when failed to file proof of claim form within proper time period).

[281] *See* Katchen v. Landy, 382 U.S. 323, 328–30 (1966) (suggesting plaintiff may have had Seventh Amendment right to trial by jury if claim was not brought as part of "bankruptcy proceeding and awaited a federal plenary action by the trustee"); First Fid. Bank v. Hooker Invs., Inc. (*In re* Hooker Invs., Inc.), 937 F.2d 833, 838 (2d Cir. 1991) (explaining filing proof of claim brings allowance or disallowance of claims into court's equity jurisdiction disallowing Seventh Amendment right to jury trial); Cook, et al., *supra* note 142 ("[A] creditor may be forced to choose between filing a timely proof of claim and preserving its right to a jury trial . . . .") (citation omitted).

[282] Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 391 (7th Cir. 1995). *See* Balt. & Ohio Chi. Terminal R.R. Co. v. Wis. Cent. Ltd., 154 F.3d 404, 408 (7th Cir. 1998) (holding "demand for arbitration . . . must be made as early as possible so that the other party can know in what forum he has to proceed") (citation omitted); Frietsch v. Refco, Inc., 56 F.3d 825, 830 (7th Cir. 1995) (recognizing "judicial economy requires selection of the proper forum at the earliest possible opportunity") (citation omitted).

forum at the earliest possible opportunity, and the failure of either of them to move promptly for arbitration is powerful evidence that they made their election—against arbitration."[283] Indeed, one commentator has cautioned that "before filing a proof of claim, creditors may need to determine whether there is—and whether they would tend to enforce—a contractual arbitration provision and whether they can preserve their right to compel arbitration."[284] Thus, adoption of a *per se* arbitration/proof of claim/waiver rule is better from a business perspective because it creates a bright line of certainty which is consistent with other Supreme Court pronouncements regarding proofs of claim.[285]

Finally, it must be noted that a finding that a creditor has waived its right to arbitrate does not necessarily preclude arbitration of the dispute. If both parties consent, it would be perfectly appropriate for a court to allow arbitration. Indeed, such a process may lend itself to the creditor giving the debtor certain concessions in order to obtain its consent to arbitrate.[286]

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[283] *Cabinetree*, 50 F.3d at 391. *But cf.* KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp., 184 F.3d 42, 50 (1st Cir. 1999) (noting where "'there is an agreement to arbitrate, the FAA reflects a strong, well-established, and widely recognized federal policy in favor of arbitration'" (quoting Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 29 F.3d 727, 730 (1st Cir. 1994), *aff'd*, 515 U.S. 528 (1995)); Commercial Metals Co. v. Balfour, Guthrie, & Co., 577 F.2d 264, 266 (5th Cir. 1978) (emphasizing whether disputes will be subject to arbitration is "left solely to the agreement of the parties").

[284] Watson & Wender, *supra* note 195. *See In re* Herrington, 374 B.R. 133, 147 (Banrk. E.D. Pa. 2007) (explaining "a creditor who files a proof of claim does not, by that act alone, waive its contractual right to arbitrate a dispute"). *But see* S & H Contractors, Inc. v. A. J. Taft Coal Co., Inc., 906 F.2d 1507, 1514 (11th Cir. 1990) (holding "a party that '[s]ubstantially invok[es] the litigation machinery' prior to demanding arbitration may waive its right to arbitrate" (quoting E.C. Ernst, Inc. v. Manhattan Constr. Co., 559 F.2d 268, 269 (5th Cir. 1977))).

[285] Critically, however, adoption of the *per se* rule would not result in a waiver of a creditor's right to arbitrate if the creditor simply filed an entry of appearance in the bankruptcy proceeding to generally defend its interests. *See e.g.*, Gordon v. Dadante, No. 07-3560, 2008 WL 4372951, at *4–5 (6th Cir. Sept. 23, 2008) (holding party's right to arbitrate was not waived where no substantive claims had been filed by or against the party and where the party simply appeared to defend its rights under an agreement). Such a situation could occur in a chapter 7 proceeding before a proof of claim is filed or in a chapter 11 proceeding where the creditor's claim is deemed allowed and no proof of claim is filed. If however, the creditor appears and contests points in the bankruptcy proceeding that directly relate to the creditor's claim for which a right of arbitration exists, then a court could determine that the creditor has acted inconsistent with its right to compel arbitration and thereby waived it. *See* Ernst & Young L.L.P. v. Baker O'Neal Holdings, Inc., 304 F.3d 753, 757 (7th Cir. 2002) (holding creditor's participation in plan confirmation process was "sufficient to waive its right to arbitrate"); Crysen/Montenay Energy Co. v. Shell Oil Co. (*In re* Crysen/Montenay Energy Co.), 226 F.3d 160, 162 (2d Cir. 2000) ("[A] party waives its right to arbitration when it engages in protracted litigation that prejudices the opposing party."); *see also* Lewallen v. Green Tree Servicing, L.L.C., 487 F.3d 1085, 1090, 1092 (8th Cir. 2007) (noting creditor "acted inconsistently with its right to arbitrate by urging the bankruptcy court to dispose of" chapter 13 debtor's claims "on the merits").

[286] It has been recently suggested that proposed legislation that would modify the FAA to make unenforceable arbitration clauses relating to consumer and employee oriented matters is not needed. *See* Alan S. Kaplinsky & Mark J. Levin, *Consumer Arbitration: If the FAA "Ain't Broke," Don't Fix It*, 63 BUS. LAW. 907, 908 (2008) (arguing current statutory scheme "works well and does not need to be fixed by Congress"); *cf.* William B. L. Little, *Fairness is in the Eye of the Beholder*, 60 BAYLOR L. REV. 73, 145–51 (2008) (discussing strong opposition to Arbitration Fairness Act of 2007 by securities industry). *See generally* Recent Proposed Legislation, *Arbitration — Congress Considers Bill to Invalidate Pre-Dispute Arbitration Clauses for Consumers, Employees, and Franchisees — Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007)*, 121 HARV. L. REV. 2262 (2008) (discussing generally Arbitration Fairness Act of

CONCLUSION

The absence of clear legislation delineating the interplay between the FAA and the Bankruptcy Code has created challenging questions for courts, which have attempted to resolve the interplay between these two critically important statutes. The confusion has been compounded by the absence of any Supreme Court pronouncements on the topic. In contrast, the Supreme Court has left an indelible and heavy mark with respect to the right to arbitrate. Similarly, it has left a plain mark regarding bankruptcy and the impact of a filed proof of claim.

If a State wants to participate in the distribution of a bankruptcy estate, it must submit itself to the claims allowance process.[287] If that were not the case then it would be impossible to meet a fundamental purpose of bankruptcy: an orderly but summary proceeding.[288] Similarly, "[t]he precedent is clear that once a party invokes the core jurisdiction of the bankruptcy court by filing a proof of claim, that party has no Seventh Amendment right to a jury trial."[289] Likewise, because a bankruptcy proceeding is inherently equitable, there is no Seventh Amendment jury trial right to an objection to a proof of claim.[290] Fundamentally bankruptcy is just a commercial issue. But under the current state of law, the right to arbitrate in a bankruptcy setting is applied more rigidly than Constitutional issues.

2007). Adoption of a *per se* rule that the filing of a proof of claim waives one's right to compel arbitration would add further protection to consumer bankruptcy filers without the need of modifying the FAA. Indeed, it would be "the best of both worlds" for consumer debtors because they would have the option of resolving their dispute in the bankruptcy court or they could agree to voluntarily proceed with arbitration.

[287] Gardner v. New Jersey, 329 U.S. 565, 574 (1947) (citing New York v. Irving Trust Co., 288 U.S. 329, 333 (1933)); State of Conn., Comm'r of Fin. & Control v. Crisp (*In re* Crisp), 521 F.2d 172, 178 (2d Cir. 1975) (stating state submits itself to bankruptcy court's jurisdiction upon filing proof of claim against bankruptcy estate); Conn. Performing Arts Found., Inc. v. Brown, 47 B.R. 911, 916 (D. Conn. 1985) (holding "state subjects itself to the bankruptcy power of the United States" by making claim against bankruptcy estate).

[288] *See Gardner*, 329 U.S. at 574; *Irving Trust Co.*, 288 U.S. at 333 (holding purpose of Bankruptcy Act authorizes constitutional power of bankruptcy courts over states involved in distribution of bankruptcy estate, "otherwise, orderly and expeditious proceedings would be impossible"); Virginia v. Collins (*In re* Collins), 173 F.3d 924, 930 (4th Cir. 1999) ("If a state could assert Eleventh Amendment immunity to avoid the effect of a discharge order, the bankruptcy system would be seriously undermined.").

[289] Institut Pasteur & Genetics Sys. Corp. v. Cambridge Biotech Corp. (*In re* Cambridge Biotech Corp.), 186 F.3d 1356, 1372 (Fed. Cir. 1999). *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 58 (1989) (holding Seventh Amendment right to jury trial not waived where no claim has been filed); *see also In re* Applied Thermal Systems, Inc., 294 B.R. 784, 790 (Bankr. N.D. Okla. 2003) (upholding well-established principle "that once a creditor has filed a proof of claim, any right to a jury trial under the Seventh Amendment to the United States Constitution is waived").

[290] Katchen v. Landry, 382 U.S. 323, 336–37 (1966); *see* Barton v. Barbour, 104 U.S. 126, 133 (1881) (describing "fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction"); *see also In re* Armstrong, 238 B.R. 438, 440 (Bankr. E.D. Ark. 1999) ("It is well-settled that a party filing a claim has no right to a jury trial.").

The Supreme Court has *not* stated that a purpose of the FAA was to put arbitration agreements on a higher footing than all other contracts.[291] Rather, the purpose is to place agreements to arbitrate on an "'*equal* footing'" with other contracts.[292] Yet in bankruptcy, courts have effectively elevated arbitration agreements above other run-of-the-mill contracts. Indeed, courts have elevated the right to arbitrate above Constitutional rights.

The resolution of the interplay between a proof of claim and the right to arbitrate is relatively simple. "The restructuring of the debtor-creditor relations . . . is at the core of the federal bankruptcy power."[293] Moreover, it is "'traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure.'"[294] Therefore, "the filing of a proof of claim constitutes a creditor's complete submission to bankruptcy court jurisdiction."[295] As such, the filing of a proof of claim should be deemed a waiver of one's right to arbitrate.

To be sure, a *per se* rule finding that the filing of a proof of claim results in a waiver of the right to arbitrate is not fundamentally unfair. "In bankruptcy cases the right to arbitration, like the right to a jury trial, is for all practical purposes a strategic matter, involving questions of procedural hurdles, delay and costs of

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[291] *See* Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1402 (2008) ("Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'" (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006))); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995) ("[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate"); Dluhos v. Strasberg, 321 F.3d 365, 369 (3d Cir. 2003) (noting "'hostility'" of courts to arbitration agreements) (citation omitted).

[292] *Hall St. Assocs.*, *L.L.C.*, 128 S. Ct. at 1402 (citation omitted) (emphasis added); *see* Zurich Am. Ins. Co. v. Watts Indus., Inc., 466 F.3d 577, 580 (7th Cir. 2006) (noting "national policy favoring arbitration") (citation omitted); Keymer v. Mgmt. Recruiters Int'l, Inc., 169 F.3d 501, 504 (8th Cir. 1999) (stating arbitration agreements are viewed "in the same light as any other contractual agreements").

[293] *Granfinanciera*, 492 U.S. at 56 n.12 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (opinion of Brennan, J.)). *See* Sheridan v. Michels (*In re* Sheridan), 362 F.3d 96, 125 (1st Cir. 2004) (empowering courts with ability to sanction parties in order to administer debtor-creditor relations effectively); *cf.* Gruntz v. County of L.A. (*In re* Gruntz), 202 F.3d 1074, 1081 (9th Cir. 2000) (highlighting that non-core proceedings are not "integral" to restructuring of debtor-creditor relations and do not involve cause of action arising under title 11).

[294] *Katchen*, 382 U.S. at 333 n.9 (quoting Gardner v. New Jersey, 329 U.S. 565, 573 (1947)). *See* Wiswall v. Campbell, 93 U.S. 347, 351 (1876) ("A creditor who offers proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences."); *In re* Glen Eagle Square, Inc. 132 B.R. 106, 112 (Bankr. E.D. Pa. 1991), *aff'd* 132 B.R. 115 (E.D. Pa. 1991) (indicating by filing proof of claim party submits to court's jurisdiction).

[295] *In re Glen Eagle Square, Inc.*, 132 B.R. at 112. *See* Gulf States Exploration Co. v. Manville Forest Prod. Co. (*In re* Manville Forest Prod. Corp.), 896 F.2d 1384, 1389 (2d Cir. 1990) ("By filing a proof of claim, Gulf submitted itself to the equitable power of the bankruptcy court to disallow its claim.") (citation omitted); *see also* Peters v. Lines, 275 F.2d 919, 925 (9th Cir. 1960) ("We can see no valid reason why the filing of a proof of claim should not constitute a consent to the bankruptcy court's jurisdiction so as to enable the bankruptcy court to render an affirmative judgment against the creditor on the trustee's counterclaim arising out of the same contract.").

litigation, all for the purpose of enhancing bargaining positions."[296] In short, a proof of claim/arbitration waiver rule creates a bright line that is consistent with other Supreme Court jurisprudence regarding proofs of claim in bankruptcy proceedings.

[296] Fred Neufeld, *Enforcement of Contractual Arbitration Agreements Under the Bankruptcy Code*, 65 AM. BANKR. L.J. 525, 545 (1991). *Cf.* Gregory W. MacKenzie, Note, *ICSID Arbitration as a Strategy for Levelling the Playing Field Between International Non-Governmental Organizations and Host States*, 19 SYRACUSE J. INT'L L. & COM. 197, 218 (1993) (positing international agencies are "limited to arbitration to settle [their] claim[s] against a host state") (citation omitted).