

## BANKRUPTCY LAW'S TREATMENT OF CREDITORS' JURY-TRIAL AND ARBITRATION RIGHTS

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### INTRODUCTION

A creditor of a debtor in bankruptcy may have a variety of disputes with its debtor or the trustee in bankruptcy. Such disputes can be adjudicated by a judge, jury, or arbitrator.<sup>1</sup> This article discusses the creditor's rights to select among these three adjudicators.

While judges ordinarily adjudicate disputes in bankruptcy, creditors sometimes argue that they have a right to a jury trial or to arbitration. This article discusses these two creditor arguments in two common situations. Part I discusses creditors' arguments for a jury or an arbitrator to adjudicate *the creditor's claim* against the debtor. Part II discusses creditors' arguments for a jury or an arbitrator to adjudicate a claim *against the creditor* brought by the debtor or trustee in bankruptcy.

### I. A CREDITOR'S CLAIM AGAINST ITS DEBTOR IN BANKRUPTCY

In many types of civil litigation, plaintiffs get to choose among several courts with jurisdiction to hear the case.<sup>2</sup> But this opportunity—sometimes derided as "forum shopping"<sup>3</sup>—is generally not available to plaintiffs whose defendants file

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<sup>1</sup> "[L]itigation is the default process of dispute resolution. Parties can contract into alternative processes of dispute resolution, but if they do not do so then each party retains the right to have the dispute resolved in litigation." STEPHEN J. WARE, *PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION* § 1.5(b), at 6 (2d ed. 2007). So litigation, which may include a jury trial or bench trial, is the norm and adjudication by an arbitrator occurs only where both parties have agreed to it and thus contracted out of the litigation default. In the absence of an agreement to arbitrate, whether adjudication will be performed by a judge or jury is determined by law discussed *infra* at note 23 (discussing law/equity distinction within Seventh Amendment) and note 31 (discussing jury trial right in state court).

<sup>2</sup> See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1507 (1995) ("The American way is to provide plaintiffs with a wide choice of venues for suit."); John T. Cross, *Viewing Federal Jurisdiction Through the Looking Glass of Bankruptcy*, 23 SETON HALL L. REV. 530, 558 (1993) ("Outside of bankruptcy, it is the creditor—the one who seeks relief from the courts—who has the ability to select the court.").

<sup>3</sup> See Clermont & Eisenberg, *supra* note 2, at 1508 ("The name of the game is forum-shopping. In the American civil litigation system today, few cases reach trial. After perhaps some initial skirmishing, most cases settle. Yet all cases entail forum selection, which has a major impact on outcome. Consider the individual case. The plaintiff's opening moves include shopping for the most favorable forum. Then, the defendant's parries and thrusts might include some forum-shopping in return, possibly by a motion for change of venue."); see also Friederich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 553 (1989) (noting popularity of forum shopping despite "pejorative connotation" of term among legal profession); J. Skelly Wright, *The Federal Courts and The Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967) (describing forum shopping as "national legal pastime" arising out of interplay between lack of uniform state laws and long-arm jurisdiction statutes).

for bankruptcy.<sup>4</sup> With respect to forum selection, bankruptcy law is tough on plaintiffs (creditors) who seek to collect what they are owed from their defendants (debtors).

When a debtor files for bankruptcy,<sup>5</sup> the creditor's right to sue the debtor in an ordinary federal or state court disappears.<sup>6</sup> Instead, the creditor gets a right to file a "proof of claim"<sup>7</sup> against the debtor's bankruptcy estate<sup>8</sup> and this claim may be filed only in the debtor's bankruptcy court.<sup>9</sup> A creditor may choose not to file a claim in bankruptcy, but that typically waives the creditor's right to collect anything from the debtor<sup>10</sup> because debts not paid through the bankruptcy case are generally

<sup>4</sup> See *infra* notes 5–9 and accompanying text.

<sup>5</sup> Bankruptcy nearly always results from the debtor's choice to file. Creditors can push unwilling debtors into bankruptcy, 11 U.S.C. § 303(b) (2006), but only a small percentage of bankruptcy cases result from such involuntary petitions. See, e.g., ADMINISTRATIVE OFFICE OF THE U.S. COURTS, Judicial Facts and Figures, Statistical Table 7.2: U.S. Bankruptcy Courts Voluntary and Involuntary Cases Filed by Chapter of the Bankruptcy Code 2008, <http://www.uscourts.gov/judicialfactsfigures/2008/Table702.pdf> (reporting 1,042,223 voluntary bankruptcy petitions and 760 involuntary bankruptcy petitions were filed during fiscal year ending June 30, 2008); David S. Kennedy et al., *The Involuntary Bankruptcy Process: A Study of the Relevant Statutory and Procedural Provisions and Related Matters*, 31 U. MEM. L. REV. 1, 3 (2000) ("Of the 1,436,964 bankruptcy cases filed in the calendar year of 1998, only 847 were involuntary filings.").

<sup>6</sup> 11 U.S.C. § 362(a)(1) (2006) ("[A] petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of the commencement or continuation . . . of a judicial . . . action or proceeding against the debtor . . .").

<sup>7</sup> See 11 U.S.C. § 501 (2006) (allowing creditor to file proof of claim). In chapter 11 bankruptcy cases, debtors often effectively file the creditor's proof of claim and a creditor does not need to take action if the creditor agrees with the debtor's characterization of the creditor's claim on the debtor's bankruptcy schedules. See 11 U.S.C. § 1111(a) (2006) ("A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated."); see also FED R. BANKR. P. 3003(b)(1) ("The schedule of liabilities filed pursuant to § 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.").

<sup>8</sup> Upon a debtor's bankruptcy, nearly all the debtor's property becomes property of a newly-created entity, the bankruptcy estate. See 11 U.S.C. § 541(a) (2006) (stating that bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the estate").

<sup>9</sup> In some exceptional cases, the district court, rather than bankruptcy court, will hear the creditor's claim. See 28 U.S.C. §§ 157, 1334(a) (2006).

<sup>10</sup> See *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004) ("If a creditor chooses not to submit a proof of claim, once the debts are discharged, the creditor will be unable to collect on his unsecured loans. Rule 3002(a); see 11 U.S.C. § 726. The discharge order releases a debtor from personal liability with respect to any discharged debt by voiding any past or future judgments on the debt and by operating as an injunction to prohibit creditors from attempting to collect or to recover the debt. §§ 524(a)(1), (2); 3 W. NORTON BANKRUPTCY LAW & PRACTICE 2d § 48:1, p. 48–3 (1998) . . ."); see also Michael D. Fielding, *Elevating Business Above the Constitution: Arbitration and Bankruptcy Proofs of Claim*, 16 AM. BANKR. INST. L. REV. 563, 574 (2008) [hereinafter Fielding, *Elevating Business*] ("If a creditor decides not to submit a proof of claim, it cannot collect the debt owed once the debt is discharged."). Secured creditors may recover payment without filing a claim in bankruptcy but this recovery comes from the collateral rather than from the debtor. The recovery comes from the creditor's lien against property, rather than any person's liability to the creditor. See, e.g., ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 261–62 (6th ed. 2009) ("Debts are discharged, but liens are not. § 506(d). The discharged debtor has no personal liability on any debt, so unsecured debts are effectively vaporized. But . . . a secured debt remains attached to its collateral and can be enforced against the collateral after bankruptcy, even though the debtor cannot be sued for any deficiency.").

discharged.<sup>11</sup> So bankruptcy law routinely requires creditors to litigate in the bankruptcy-court forum if they want to collect any of the judgment that some body of substantive law (e.g., contract law) says they deserve.<sup>12</sup> In other words, bankruptcy law routinely tells creditors that their substantive rights are worthless unless they pursue those rights in a bankruptcy court, even though bankruptcy courts may provide creditors fewer procedural rights than are provided to creditors by ordinary federal or state courts.

Two of these procedural rights are the right to a jury trial and the right to arbitrate. One of these two, the right to a jury, is constitutional. The Seventh Amendment to the U.S. Constitution provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."<sup>13</sup> By contrast, the other of these procedural rights, the right to arbitrate, is merely statutory. The Federal Arbitration Act generally requires the enforcement of agreements to resolve disputes in arbitration, rather than litigation.<sup>14</sup> A creditor who argues that his debtor's bankruptcy should not deprive him of the right to arbitrate his claim against the debtor is seeking to vindicate his *statutory* right. In contrast, a creditor who argues that her debtor's bankruptcy should not deprive her of the right to a jury trial of her claim against the debtor is seeking to vindicate her *constitutional* right. Yet the jury-seeking creditor's argument is much less likely to succeed than the arbitration-seeking creditor's argument. Courts have long held that a debtor's bankruptcy ends a creditor's right to a jury trial on her claim against the debtor.<sup>15</sup> But courts are not nearly as dismissive of a creditor's

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<sup>11</sup> See 11 U.S.C. §§ 727(b), 1141(d), 1228(a), 1328(a) (2006). Some debts are excepted from the discharge, 11 U.S.C. § 523 (2006), but even creditors owed such debts often must litigate in the bankruptcy court to free themselves from the discharge. See, e.g., WARREN & WESTBROOK, *supra* note 10, at 229 ("[T]he discharge will be granted unless it is challenged by the trustee or a creditor.").

<sup>12</sup> See Cross, *supra* note 2, at 558–59 ("Filing a proof of claim in a bankruptcy case is not the calculated choice that is typically involved in a legal consent. In reality, the creditor has no other option. If he does not file the proof of claim, he will receive nothing from the bankruptcy distribution. Regardless of whether he receives anything, his debt is discharged. The creditor is precluded from pursuing an independent action against the debtor either before or after the discharge. Therefore, the creditor must either play the bankruptcy game or lose his claim. It is troubling to call the creditor's filing of the proof of claim a 'consent,' with all the consequences that may attach.").

<sup>13</sup> U.S. CONST. amend. VII.

<sup>14</sup> See 9 U.S.C. § 2 (2006) ("A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable . . ."); see also WARE, *supra* note 1, §§ 2.3–2.4, at 20–23. One might characterize the right to arbitrate as *contractual*, as well as *statutory*, because without a contract providing for arbitration, there is no right to arbitrate. See *id.* § 1.5(b), at 6. But courts generally did not enforce arbitration agreements prior to the FAA so it took a statute (the FAA), rather than the common law of contract, to recognize and vindicate the right to arbitrate. See *id.* § 2.4(b), at 23.

<sup>15</sup> The landmark case is *Barton v. Barbour* in which the claimant brought a negligence claim against the receiver of an insolvent company and the Supreme Court held that the claim could not be brought in a court of law without leave of the equity court overseeing the receivership. 104 U.S. 126, 130–31 (1881). In answering the claimant's arguments that her negligence claim should be allowed in a court of law (with a jury) as opposed to the court of equity handling the receivership, the Court said:

right to arbitrate his claim against the debtor in bankruptcy. In fact, courts sometimes enforce that right.<sup>16</sup>

This disparity is characterized as "an anomaly" in a recent law review article by Michael Fielding.<sup>17</sup> He objects to this situation in which "a statutory business right (i.e., the right to arbitrate) is given more weight than constitutional rights."<sup>18</sup> He

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[T]he right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity.

*Id.* at 133. As Professor Douglas Baird summarizes the "dictum" of *Barton*:

The administration of the assets of a debtor in bankruptcy and the determination of claims against those assets are matters that fall within the domain of the chancellor. Disputes about such matters are therefore not 'suits at common law' within the meaning of the seventh amendment, even though a similar dispute could arise outside of bankruptcy and even though outside of bankruptcy such disputes must be resolved through a trial by jury.

Douglas G. Baird, *Jury Trials After Granfinanciera*, 65 AM. BANKR. L.J. 1, 3 (1991) [hereinafter Baird, *Jury Trials*].

While *Barton* involved an analog to a debtor in bankruptcy, the receivership of an insolvent company, it was not technically a bankruptcy case. Nevertheless, Professor Baird notes that "[l]ower courts adopted the dictum in *Barton* without discussion under the 1898 Bankruptcy Act." Douglas G. Baird, *The Seventh Amendment and Jury Trials in Bankruptcy*, 1989 SUP CT. REV. 261, 264 n.6 (1989) [hereinafter Baird, *Seventh Amendment*] (citing *Carter v. Lechty*, 72 F.2d 320 (8th Cir. 1934); *In re Rude*, 101 F. 805 (D. Ky. 1900); *In re Christensen*, 101 F. 243 (N.D. Iowa 1900)). More recent cases holding that a debtor's bankruptcy ends a creditor's right to a jury trial on her claim against the debtor include *In re Commercial Fin. Servs., Inc.*, 252 B.R. 516, 524–25 (Bankr. N.D. Okla. 2000) (stating that plaintiffs waived their jury trial right on claims against debtor even if the claims were not labeled as proofs of claim but rather as requests for payment of administrative expenses), and *In re Beugen*, 81 B.R. 994, 997 (Bankr. N.D. Cal. 1988) ("There is clearly no constitutional right to a jury trial in Taubman's action against Beugen. Taubman's action is a 'claim' against the bankruptcy estate, in that it asserts a right to receive payment from Debtor Beugen.").

<sup>16</sup> See *In re Shores of Panama, Inc.*, 387 B.R. 864, 867–68 (Bankr. N.D. Fla. 2008) (lifting stay to allow creditor to continue arbitration of its claim against debtor); *In re Snake River Dairyman's Ass'n*, No. 03-41124, 2004 WL 4960361, at \*6–7 (Bankr. D. Idaho Mar. 31, 2004) (allowing creditor to continue arbitration of its claim against debtor); *In re Farmland Indus., Inc.*, 309 B.R. 14, 21 (Bankr. W.D. Mo. 2004) (allowing creditor to pursue its claim against debtor in arbitration); *In re Phico Group, Inc.*, 304 B.R. 170, 173–75 (Bankr. M.D. Pa. 2003) (allowing creditor to pursue arbitration of his employment claim against debtor); *In re Statewide Realty Co.*, 159 B.R. 719, 722–25 (Bankr. D.N.J. 1993) (permitting creditor to pursue arbitration of its claim against debtor); see also *In re Transp. Assocs., Inc.*, 263 B.R. 531, 536 (Bankr. W.D. Ky. 2001) (requiring arbitration of trustee's objection of creditor's claim).

<sup>17</sup> Fielding, *Elevating Business*, *supra* note 10, at 563 ("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 . . . 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?"); see also Michael D. Fielding, *Navigating the Intersection of Bankruptcy and Commercial Arbitration*, BANKING & FIN. SERVS. POL'Y REP., Feb. 2008, at 13, 16 [hereinafter Fielding, *Navigating the Intersection*] ("[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.").

<sup>18</sup> Fielding, *Elevating Business*, *supra* note 10, at 609.

says "it seems inherently wrong to view arbitration in such a way that arbitration related rights are given greater weight than Constitutional rights."<sup>19</sup> Fielding describes the topic as one centering on the doctrine of "waiver":

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 . . . . 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.<sup>20</sup>

As a fix for this apparent anomaly, Fielding suggests that "a party should be deemed to have waived its right to arbitrate when it files a proof of claim in a bankruptcy proceeding."<sup>21</sup>

In contrast, I do not believe there is an anomaly to fix. While one might say that a creditor filing a proof of claim in bankruptcy "waives" her right to a jury trial on her claim against the debtor,<sup>22</sup> this would be loose language. A more precise description is that the debtor's bankruptcy ended the creditor's right to a jury trial on her claim against the debtor before the creditor decided whether or not to file a proof of claim. This is because the Seventh Amendment jury right applies only to claims arising at law, as opposed to claims in equity,<sup>23</sup> and the Supreme Court has

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 563.

<sup>21</sup> *Id.* at 609; see also Fred Neufeld, *Enforcement of Contractual Arbitration Agreements Under The Bankruptcy Code*, 65 AM. BANKR. L.J. 525, 545 (1991) ("Applying the reasoning of the Supreme Court in the jury trial cases, bankruptcy courts could hold that an entity that has filed a proof of claim is deemed to have subjected itself to the claims allowance procedures of the Bankruptcy Code and waived its right to arbitration.").

<sup>22</sup> Fielding, *Elevating Business*, *supra* note 10, at 563 (filing proof of claim in bankruptcy proceeding "waives" right to jury trial); see *In re Commercial Fin. Servs., Inc.*, 252 B.R. 516, 521–22 (Bankr. N.D. Okla. 2000) ("[O]nce a claimant asserts a claim in the bankruptcy court, it has subjected itself to the bankruptcy court's equitable jurisdiction and has waived trial by jury. It is undisputed that Plaintiffs have asserted claims against CFS in the bankruptcy court. Plaintiffs' arguments that the procedures by which they asserted claims preserves their jury trial rights elevate form over substance."); *In re Glen Eagle Square, Inc.*, 132 B.R. 106, 112 (Bankr. E.D. Pa. 1991) (stating that once creditor files proof of claim with bankruptcy court it "has irrevocably waived a right to a jury trial as to any issue which might arise in that case").

<sup>23</sup> The text of the Seventh Amendment expressly limits the right to "suits at common law." U.S. CONST. amend. VII. The Supreme Court has "consistently interpreted the phrase 'Suits at common law' to refer to 'suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.'" *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989) (quoting *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 447 (1830)); see also *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998) ("The Seventh Amendment thus applies not only to common-law causes of action, but also to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." (internal quotation marks omitted)); ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 157–58 (2001) ("Because the Seventh Amendment 'preserves' the right to a jury trial as it existed in England in 1791, the Court has long held that there is a right to a jury trial for legal, but not equitable, matters.").

long held that a claim against a debtor in bankruptcy is a claim in equity.<sup>24</sup> Therefore, the Court holds, the constitutional right to a jury trial simply does not apply to such a claim.<sup>25</sup>

By contrast, the statutory right to arbitrate applies equally to claims at law and claims in equity. There is no parallel in the Federal Arbitration Act to the law/equity distinction in the Seventh Amendment.<sup>26</sup> A creditor seeking to arbitrate its claim against a debtor in bankruptcy is not defeated by the longstanding holding that its claim is a claim in equity. As noted above, however, a creditor seeking a jury trial on such a claim is defeated by that holding.<sup>27</sup>

In short, the different treatment of a creditor's jury and arbitration rights on its claim against the debtor is caused by the law/equity distinction, not by different

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<sup>24</sup> In 1966, the Supreme Court stated that the Bankruptcy Act of 1898 (the predecessor to the current Bankruptcy Code) "converts the creditor's legal claim into an equitable claim to a pro rata share of the res." *Katchen v. Landy*, 382 U.S. 323, 336 (1966). "As bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession, and as the proceedings of bankruptcy courts are inherently proceedings in equity, there is no Seventh Amendment right to a jury trial for determination of objections to claims . . . ." *Id.* at 336–37 (citations omitted). In *Katchen*, the Court quoted and endorsed its 19th Century reply to the argument that disputed claims must be tried before a jury:

"[T]hose who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction . . . .

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"So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods."

*Id.* at 337 (quoting *Barton v. Barbour*, 104 U.S. 126, 133–34 (1881)); *see also* *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) ("[B]y 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 . . . . [T]he claims-allowance process . . . is triable only in equity." (quoting *Granfinanciera*, 492 U.S. at 58)); *Baird*, *Jury Trials*, *supra* note 15, at 3 (summarizing the "dictum" of *Barton v. Barbour*: "The administration of the assets of a debtor in bankruptcy and the determination of claims against those assets are matters that fall within the domain of the chancellor. Disputes about such matters are therefore not 'suits at common law' within the meaning of the seventh amendment, even though a similar dispute could arise outside of bankruptcy and even though outside of bankruptcy such disputes must be resolved through a trial by jury."); Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten Callaway v. Benton Case*, 72 AM. BANKR. L.J. 1, 43 n.188 (1998) (citing *Katchen*, *Granfinanciera* and *Langenkamp* for proposition that "allowance of claims against a bankruptcy estate has traditionally been regarded as an integral part of the *in rem* process of distributing the assets of the bankruptcy estate, distinct from a nonbankruptcy adjudication of the claim"); 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*. Thus, a creditor had no right to a jury trial of its claim against the estate." (footnotes omitted)).

<sup>25</sup> *See supra* note 24.

<sup>26</sup> *See* Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

<sup>27</sup> *See supra* note 24.

standards of waiver for these two rights. It would be incorrect to say that when a creditor files a proof of claim in bankruptcy, the creditor waives her right to a jury trial on that claim.<sup>28</sup> In fact, by the time the creditor filed that proof of claim, the creditor had no jury right to waive. The creditor lost that right when her debtor's bankruptcy case commenced. For a creditor who values her jury right, the harm comes when the debtor's bankruptcy, as the Supreme Court put it in *Katchen v. Landy*, "converts the creditor's legal claim into an equitable claim."<sup>29</sup>

This harm is usually inflicted on the creditor by the debtor's decision to file for bankruptcy, as involuntary bankruptcy is much less common than bankruptcy commenced by a debtor's filing.<sup>30</sup> Prior to the debtor's bankruptcy filing, the creditor may have already begun litigation against the debtor in an ordinary federal or state court, which would have given the creditor a jury trial of her claim against the debtor.<sup>31</sup> But the debtor's decision to file for bankruptcy prevents that litigation from continuing to a jury trial.<sup>32</sup> And the looming bankruptcy discharge gives the creditor only one route to the winning judgment that substantive law (e.g., contract law) says she deserves: filing a proof of claim in a court, the bankruptcy court, that will not give her a jury trial.<sup>33</sup> So it was the debtor's bankruptcy—not any waiver by the creditor—that deprived the creditor of her jury trial right on her claim against the debtor. By contrast, a debtor's bankruptcy filing does not deprive a creditor of his right to arbitrate his claim against the debtor. So it is entirely appropriate that courts sometimes allow arbitration of claims against debtors in bankruptcy,<sup>34</sup> while following Supreme Court precedent that denies a right to jury trial of such claims. With respect to creditors' jury and arbitration rights on their claims against debtors in bankruptcy, therefore, there is no anomaly to fix.<sup>35</sup>

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<sup>28</sup> See *supra* notes 23–25 and accompanying text; see also Baird, *Jury Trials*, *supra* note 15, at 4 ("Katchen rested not upon the idea that the creditor constructively consented to the jurisdiction of the bankruptcy court, but rather upon the idea that the bankruptcy court had the power to divide the bankruptcy estate and, as a corollary, all the issues necessary to effect such a division.").

<sup>29</sup> *Katchen*, 382 U.S. at 336.

<sup>30</sup> See *supra* note 5.

<sup>31</sup> While the Seventh Amendment applies only in federal court, see *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) (noting that Fourteenth Amendment does not incorporate Seventh Amendment right to jury trial), nearly all state constitutions contain a provision that similarly protects the right to trial by jury. See Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1417, 1466 & n.252 (noting that all states' constitutions, except for Louisiana and Colorado, guarantee right to jury trial).

<sup>32</sup> See *supra* note 6.

<sup>33</sup> See *supra* notes 5–12 and accompanying text.

<sup>34</sup> See *supra* note 16.

<sup>35</sup> While current law follows logically from the Supreme Court's holding that the debtor's bankruptcy "converts the creditor's legal claim into an equitable claim," *Katchen v. Landy*, 382 U.S. 323, 336 (1966), one can question that holding. See, e.g., Baird, *Jury Trials*, *supra* note 15.

One can argue that the seventh amendment jury trial guarantee is not limited to those cases in which a party [in the eighteenth century] could insist on the jury trial as a matter of right, but rather secures the right in any case that was ordinarily resolved by jury in the eighteenth century. The seventh amendment, under this view, ensures that

## II. CLAIMS AGAINST CREDITORS WHO HAVE FILED A PROOF OF CLAIM IN BANKRUPTCY

Part I of this article discussed creditors' arguments for a jury or an arbitrator to adjudicate *the creditor's claim* against the debtor. It explained that bankruptcy law's different treatment of a creditor's jury and arbitration rights is caused by the law/equity distinction, not by different standards of waiver for these two rights. This article's second part now turns to the question whether different standards of waiver explain the different treatment of a creditor's jury and arbitration rights on claims *against the creditor* brought by the debtor or trustee in bankruptcy.

Although the Supreme Court does not use the word "waiver," the Court holds that, by filing a proof of claim, a creditor ends her right to a jury trial on many claims that might be brought against her by the debtor or trustee.<sup>36</sup> In contrast, a

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what was done as a matter of common practice [in the eighteenth century] remains [thereafter] as a matter of right.

*Id.* at 8. Under this view, the constitutional question is whether disputes over creditors' claims against debtors in bankruptcy were ordinarily resolved by jury in the eighteenth century? This question admits no clear answer because bankruptcy law as we know it did not exist then. "Although there was no bankruptcy law proper in this country at the time the seventh amendment was adopted, there were many laws that governed the rights of creditors and insolvent debtors. Bankruptcy law as we know it today is an amalgam of these insolvency laws and English bankruptcy law." *Id.* at 6–7. While bankruptcy cases in eighteenth century England were heard by the chancellor in equity, Professor Baird explains, the chancellor could "call upon the common law jury to decide the factual disputes." *Id.* at 7. "One contemporary treatise on bankruptcy law noted that: 'Wherever facts are in dispute, the usual way is to direct an issue at law, to bring the question of fact before a jury. Of this, the instances in the books are too numerous to be cited.'" *Id.* (quoting THOMAS COOPER, *THE BANKRUPT LAW OF AMERICA COMPARED WITH THE BANKRUPT LAW OF ENGLAND* 118 (1801)). Baird explains that in the eighteenth century "[j]uries frequently heard bankruptcy disputes of every variety . . . [including disputes over] the amount and the validity of a particular debt." Baird, *Jury Trials*, *supra* note 15, at 7. So the view that the Seventh Amendment applies "in any case that was ordinarily resolved by jury in the eighteenth century" might well result in a constitutional right to a jury trial for a dispute over "the amount and the validity of a particular debt," that is, the typical dispute over a creditor's claim against a debtor in bankruptcy. *Id.* at 8 & 7.

This view, while plausible, is (as Professor Baird notes) "at odds with the idea that we have accepted since *Barton v. Barbour* that [with respect to the Seventh Amendment] one should distinguish between those matters that are central to the bankruptcy process and those that are not." *Id.* at 8. For a perspective on eighteenth century practice that may differ from Baird's, see John C. McCoid, II, *Right to Jury Trial in Bankruptcy*: *Granfinanciera, S.A. v. Nordberg*, 65 AM. BANKR. L.J. 15, 29 (1991), stating that "legal issues arising in the course of administering the bankrupt's estate, such as the validity of a claim, were generally tried in bankruptcy without a jury." For a third view, see Marcia S. Krieger, "The Bankruptcy Court is a Court of Equity": *What Does That Mean?*, 50 S.C. L. REV. 275, 300 (1999), criticizing *Katchen* and other cases on ground that they rest on "the historical mistake made in *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934),] that, in matters pertaining to bankruptcy administration, bankruptcy courts sit in equity" (emphasis omitted)).

<sup>36</sup> See *Langenkamp v. Culp*, 498 U.S. 42, 44–45 (1990) (quoted *infra* p. 13); *Granfinanciera*, 492 U.S. at 59 & n.14 (quoted *infra* at p. 13).

Lower courts reach the same holding and sometimes do use the word "waiver." *E.g.* *Schubert v. Lucent Techs., Inc.* (*In re Winstar Commc'ns., Inc.*), 554 F.3d 382, 406–07 (3d Cir. 2009) (concluding that by filing proof of claim creditor lost jury right on estate's breach of contract action against creditor); *Bankr. Servs., Inc. v. Ernst & Young* (*In re CBI Holding Co.*), 529 F.3d 432, 438 (2d Cir. 2008) (holding that by filing proofs of claim creditor waived its right to jury trial on fraud claims brought against it: "E & Y waived its



creditor who does not file a proof of claim retains her right to a jury trial on such claims.<sup>37</sup> While filing a proof of claim ends the creditor's right to a jury trial on many claims that might be brought against her by the debtor or trustee, it does not necessarily end the creditor's right to arbitrate such claims against her.<sup>38</sup> This

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right to a jury trial on the CBI claims when it submitted its Proof of Claim against the estate and subjected itself to the equitable powers of the bankruptcy court."); *SNA Nut Co. v. Haagen-Dazs Co.*, 302 F.3d 725, 730–31 (7th Cir. 2002) (finding that by filing proof of claim creditor lost jury right on estate's breach of contract action against creditor); *Travellers Int'l AG v. Robinson*, 982 F.2d 96, 98 (3d Cir. 1992) ("[B]y submitting a proof of claim to the debtor's estate, Travellers effectively waived its right to a jury trial [on preference claim against it] and submitted itself to the equitable jurisdiction of the bankruptcy court." (emphasis added)); *In re Lloyd Sec., Inc.*, 156 B.R. 750, 751, 754 (Bankr. E.D. Pa. 1993) (concluding that creditor "waived" jury right on estate's breach of contract action against creditor since the creditor's counterclaim, filed in response to debtor's breach of contract claim against creditor, "was not a 'compulsory counterclaim[]' [thus] this filing [becomes] the equivalent of his filing a proof of claim against the estate of" the debtor"); *In re Glen Eagle Square, Inc.*, 132 B.R. 106, 112 (Bankr. E.D. Pa. 1991) (holding that by filing proof of claim creditor "has irrevocably waived a right to a jury trial as to any issue which might arise in that case" (emphasis added)).

One court summarized the relevant legal doctrine as follows:

The creditor does not have a right to a jury trial with respect to determination of the creditor's claim against the estate or with respect to any objections to the claim. The objections to the claim, even to the extent that they constitute a counterclaim for affirmative relief that exceeds the creditor's claim, can be adjudicated by the bankruptcy judge without a jury and the bankruptcy judge can award a judgment for affirmative relief against the creditor if, and only if, all elements necessary to adjudication of the counterclaim are part of the adjudication of the objection to claim. The creditor retains a right to a jury trial with respect to any issue that need not be adjudicated as part of the allowance of the claim or an objection to the claim.

*In re Sentry Operating Co. of Tex.*, 273 B.R. 515, 523 (Bankr. S.D. Tex. 2002) (stating that by filing claim creditor "waived" jury right on declaratory judgment action against it).

<sup>37</sup> See, e.g., *Langenkamp*, 498 U.S. at 44 ("[T]he Tenth Circuit correctly held that 'those appellants that did not have or file claims 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.'" (alterations in original) (quoting *Langenkamp v. Hackler (In re Republic Trust & Sav. Co.)*, 897 F.2d 1041, 1046 (10th Cir. 1990), *rev'd*, *Langenkamp*, 498 U.S. 42)); *Granfinanciera*, 492 U.S. at 58–59 ("Because [creditors] . . . have not filed claims against the estate, [trustee's] fraudulent conveyance action [against creditors] does not arise 'as part of the process of allowance and disallowance of claims.' Nor is that action integral to the restructuring of debtor-creditor relations. Congress therefore cannot divest [creditors] of their Seventh Amendment right to a trial by jury." (quoting *Katchen*, 382 U.S. at 336)); *Bennett v. Genoa Ag Center (In re Bennett)*, 154 B.R. 126, 133 (Bankr. N.D.N.Y. 1992) (finding that defendants against whom debtor brought adversary proceeding alleging breach of contract, tortious interference with contract, and other causes of action retained right to jury trial where they did not file proofs of claim against debtor).

<sup>38</sup> Several courts have granted creditors' requests to order arbitration of claims against creditors who have filed proofs of claim. See *Mintze v. Am. Gen. Fin. Servs. (In re Mintze)*, 434 F.3d 222, 233 (3d Cir. 2006) (ordering arbitration of debtor's adversary proceeding, seeking rescission of loan, against creditor that had filed proof of claim); *In re Mor-Ben Ins. Mkts. Corp.*, 73 B.R. 644, 649 (B.A.P. 9th Cir. 1987) (ordering arbitration of debtor's adversary proceeding to collect alleged account receivable from creditor-insurers who had filed proofs of claim); *New Cingular Wireless Servs., Inc. v. Burkhart (In re Wire Comm Wireless, Inc.)*, No. 2:07-cv-02451-MCE, 2008 WL 4279407, at \*4 (E.D. Cal. Sept. 16, 2008) (ordering arbitration of trustee's adversary proceeding against creditor that had filed proof of claim because such filing "does not waive its right to arbitration"); *Nova Hut v. Kaiser Group Int'l Inc. (In re Kaiser Group Int'l Inc.)*, 307 B.R. 449, 454–55 (D. Del. 2004) (ordering arbitration of debtor's claims against creditor that had filed proof of

difference initially seems to support Michael Fielding's description of an "anomaly" in which bankruptcy law inexplicably treats the constitutional jury right with less deference than the (merely statutory) right to arbitrate.<sup>39</sup>

As discussed in Part I, however, the law/equity distinction explains bankruptcy law's different treatment of a creditor's jury and arbitration rights on the creditor's claim against the debtor. Perhaps the law/equity distinction also helps explain bankruptcy law's different treatment of a creditor's jury and arbitration rights on claims against the creditor. Part I quoted the Supreme Court saying that its rationale for denying a creditor's right to a jury trial on the creditor's claim against

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claim); *O. Mustad & Sons, A/S v. Seawest Indus., Inc.* (*In re Seawest Indus., Inc.*), 73 B.R. 946, 949 (W.D. Wash. 1987) (ordering arbitration of debtor's breach of warranty claim against creditor that had filed proof of claim); *In re Martin*, 387 B.R. 307, 324 (Bankr. S.D. Ga. 2007) (ordering arbitration of debtor's tort claims against creditor that had filed proof of claim); *In re Herrington*, 374 B.R. 133, 147 (Bankr. E.D. Pa. 2007) (ordering arbitration of debtor's claims against creditor that had filed proof of claim); *In re Transp. Assocs., Inc.*, 263 B.R. 531, 535–36 (Bankr. W.D. Ky. 2001) (ordering arbitration of trustee's claims dealing with "contract interpretation and accounting principles," but not trustee's equitable subordination claim, against creditor that had filed proof of claim); *In re Hart Ski Mfg. Co.*, 18 B.R. 154, 160 (Bankr. D. Minn. 1982) (ordering arbitration of debtor's contract, warranty and tort claims against creditor that had filed proof of claim), *aff'd*, 711 F.2d 845 (8th Cir. 1983); *Rinker Portland Cement Corp. v. Seidel*, 414 So. 2d 629, 630 (Fla. Dist. Ct. App. 1982) (ordering arbitration of claim against creditor that had filed proof of claim).

On the other hand, several courts have denied creditors' requests to order arbitration of claims against creditors who have filed proofs of claim. *See, e.g., Gandy v. Gandy* (*In re Gandy*), 299 F.3d 489, 498–500 (5th Cir. 2002) (declining to enforce arbitration agreement with respect to debtor in possession's fraudulent transfer actions against the creditor because resolution of these claims "implicates matters central to the purposes and policies of the Bankruptcy Code"); *In re Mirant Corp.*, 316 B.R. 234, 246 (Bankr. N.D. Tex. 2004); *In re Cavanaugh*, 271 B.R. 414, 426 (Bankr. D. Mass. 2001); *In re J.T. Moran Fin. Corp.*, 118 B.R. 233, 236 (Bankr. S.D.N.Y. 1990).

While the effect of a filed proof of claim on a creditor's right to enforce its arbitration agreement is a difficult issue, several other difficult issues also relate to the enforceability of arbitration clauses in bankruptcy. *See* 8 NORTON BANKRUPTCY LAW AND PRACTICE 3d, § 169:4, at 169–15 (2009) (stating that courts generally grant creditors' requests to order "arbitration in debtor-derivative, noncore matters, such as adversary proceedings to enforce state or federal law claims that the debtor could have asserted prepetition"); Marianne B. Culhane & Michaela M. White, *Enforcing (or not) Arbitration Clauses in Bankruptcy*, 1362 PRAC. L. INST. CORP. L. & PRAC. HANDBOOK SERIES 39, 48 (2003) ("[W]here the debtor or trustee asserts a claim based on the Bankruptcy Code, the court may have discretion to refuse arbitration."); Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503, 503–04 (2009); Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 183, 220–21 (2007) (arguing that "disputes over the enforceability of arbitration clauses in bankruptcy have resulted in extensive, time-consuming, and expensive court litigation" with varying results from jurisdiction to jurisdiction).

Courts generally hold that creditors do not have the right to arbitrate fraudulent transfer and preference and similar claims asserted against them because such claims by the trustee or debtor-in-possession derive, not from the debtor (who agreed to arbitrate), but from the debtor's other creditors (who did not agree to arbitrate). *See, e.g., In re Gandy*, 299 F.3d at 495 (holding that Bankruptcy Court has discretion to refuse enforcement of arbitration agreement when claim derives exclusively from Bankruptcy Code); *Allegaert v. Perot*, 548 F.2d 432, 436 (2d Cir. 1977); *In re Bethlehem Steel Corp.*, 390 B.R. 784, 791–92 (Bankr. S.D.N.Y. 2008) ("Avoidance claims are not derivative of the debtor's rights; rather, they are statutory claims created in favor of creditors that can only be prosecuted by a trustee or debtor in possession, or as in this case, by the Liquidating Trust as assignee under Debtor's confirmed chapter 11 plan. Claims that are derivative of a debtor's rights may be subject to arbitration."); *In re Friedman's, Inc.*, 372 B.R. 530, 542 (Bankr. S.D. Ga. 2007); *In re Hagerstown Fiber Ltd. P'ship*, 277 B.R. 181, 211 (Bankr. S.D.N.Y. 2002).

<sup>39</sup> *See* Fielding, *Elevating Business*, *supra* note 10, at 563.

the debtor is that the debtor's bankruptcy "converts the creditor's legal claim into an equitable claim."<sup>40</sup> Does the Court similarly say that the debtor's bankruptcy converts a trustee's or debtor's claim against the creditor from a legal claim to an equitable one? No, but the Court comes close to saying that the debtor's bankruptcy *plus the creditor filing a proof of claim* converts some common claims brought against creditors from legal to equitable.

In the 1989 case of *Granfinanciera, S.A. v. Nordberg*,<sup>41</sup> the Court said that:

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.<sup>42</sup>

The following year, in *Langenkamp v. Culp*,<sup>43</sup> the Court said:

In *Granfinanciera* we recognized 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. If the creditor is met, in turn, with a preference action<sup>[44]</sup> from the trustee, that action becomes part of the claims-allowance process which is triable only in equity. In other words, 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. As such, there is no Seventh Amendment right to a jury trial. If a party does not submit a claim against the bankruptcy estate, however, the trustee can recover allegedly preferential transfers only by filing what amounts to a legal action to recover a monetary transfer. In those circumstances the preference defendant is entitled to a jury trial.

Accordingly, "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."<sup>45</sup>

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<sup>40</sup> *Katchen*, 382 U.S. at 336.

<sup>41</sup> 492 U.S. 33 (1989).

<sup>42</sup> *Id.* at 59 n.14 (emphasis added); *see also Katchen*, 382 U.S. at 336 ("[A]lthough petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity." (citation omitted)).

<sup>43</sup> 498 U.S. 42 (1990).

<sup>44</sup> Bankruptcy Code section 547 entitles the trustee (or debtor) to recover certain transfers made to or for the benefit of a creditor shortly before bankruptcy. *See* 11 U.S.C. § 547 (2006).

<sup>45</sup> 498 U.S. at 44–45 (citations and emphasis omitted) (quoting *Granfinanciera*, 492 U.S. at 58–59).

These statements from *Granfinanciera* and *Langenkamp* suggest that if a creditor files a proof of claim and is met with a preference action,<sup>46</sup> the preference action is part of "the [bankruptcy] court's equitable power to disallow [creditor's] claims."<sup>47</sup> In contrast, a preference action against a creditor who has not filed a proof of claim can only be asserted as an independent lawsuit (called an "adversary proceeding") that is a "legal action," rather than "part of the claims-allowance process which is triable only in equity."<sup>48</sup>

In *Granfinanciera* and *Langenkamp* then, the Court uses a law/equity distinction that may explain bankruptcy law's different treatment of a creditor's jury and arbitration rights on preference claims *against the creditor*. The Court's statements, although partially dicta<sup>49</sup> and perhaps not entirely consistent,<sup>50</sup> can perhaps best be read to say that the debtor's bankruptcy plus the creditor filing a proof of claim converts a preference claim against the creditor from legal to equitable.<sup>51</sup> And the Court's "conversion" reasoning seems to extend beyond preference actions. The fact that *Granfinanciera* involved a fraudulent transfer (rather than a preference) claim suggests that the conversion reasoning generally applies to at least some other claims that can be asserted against both creditors who have not filed proofs of claim and against creditors who have.<sup>52</sup>

In sum, the Supreme Court seems to be saying that the debtor's bankruptcy plus the creditor filing a proof of claim converts at least some claims against the creditor from legal to equitable.<sup>53</sup> This view would explain why creditors filing proofs of

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<sup>46</sup> A preference action may be brought as either a defense (a section 502(d) objection to claim) or a counterclaim (an adversary proceeding). See, e.g., *Parker N. Am. Corp. v. Resolution Trust Corp.* (*In re Parker N. Am. Corp.*), 24 F.3d 1145, 1155 (9th Cir. 1994) (stating that preference actions may be defenses under section 502(d) or counterclaims); *In re Am. Spring Bed Mfg. Co.*, 153 B.R. 365, 368 (Bankr. D. Mass. 1993) (raising preference as affirmative defense); *In re SRJ Enters., Inc.*, 151 B.R. 189, 192 (Bankr. N.D. Ill. 1993) (raising preference action through counterclaim).

<sup>47</sup> See *Granfinanciera*, 492 U.S. at 59 n.14.

<sup>48</sup> See *Langenkamp*, 498 U.S. at 45.

<sup>49</sup> The Court's statement in *Langenkamp* that a preference defendant who has not filed a proof of claim "is entitled to a jury trial" is dicta because the *Langenkamp* case involved a preference action against a creditor that had filed a proof of claim. When the Supreme Court gets a case that focuses its attention on whether preference actions are actions at law or equity, the Court may conclude that such actions are equitable because they are created by the Bankruptcy Code for the estate rather than derived from the debtor's pre-bankruptcy actions at law. See *supra* note 38.

<sup>50</sup> While *Granfinanciera* and *Langenkamp* are consistent at the broad level discussed in the text, they may conflict with respect to more specific questions. See G. Ray Warner, *Rotten to the "Core": An Essay on Juries, Jurisdiction and Granfinanciera*, 59 UMKC L. REV. 991, 1025-28 (1991).

<sup>51</sup> See *supra* text accompanying notes 41-48.

<sup>52</sup> See *Granfinanciera*, 492 U.S. at 58.

<sup>53</sup> Similar reasoning has been used by lower courts on the question whether a party retains its jury right when, although it did not file a proof of claim, it did file a counterclaim when sued by a debtor in bankruptcy. "[A]n 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." *Control Center, L.L.C. v. Lauer*, 288 B.R. 269, 281 (M.D. Fla. 2002).

These courts, for the most part, have adopted what has come to be referred to as the "conversion theory." Under the conversion theory, the concept of waiver is

claim lack the right to a jury trial for claims asserted against them,<sup>54</sup> while sometimes retaining the right to arbitrate claims asserted against them.<sup>55</sup> As noted above, the statutory right to arbitrate applies equally to claims at law and claims in equity because there is no parallel in the Federal Arbitration Act to the law/equity distinction in the Seventh Amendment.<sup>56</sup> So a creditor who files a proof of claim and seeks to arbitrate a claim against it is not defeated by a holding that the claim against it is "part of the claims-allowance process which is triable only in equity."<sup>57</sup> By contrast, a creditor seeking a jury trial on a claim against it is defeated by that holding.<sup>58</sup>

So *Granfinanciera* and *Langenkamp* use a law/equity distinction that plausibly explains bankruptcy law's different treatment of a creditor's jury and arbitration rights on some common claims by trustees and debtors in bankruptcy against creditors. The Supreme Court might well say that the different treatment of a creditor's jury and arbitration rights is caused by the law/equity distinction, not by different standards of waiver for these two rights. Indeed, the Court said in *Granfinanciera* that its "rationale differs from the notion of waiver."<sup>59</sup> The Court said that waiver "reasoning is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which to pursue their claims."<sup>60</sup> So although the Supreme Court has not addressed the different treatment of a creditor's jury and arbitration rights, the Court has given a reason to believe that this difference is caused by the law/equity distinction, not by different standards of waiver for these two rights.<sup>61</sup> If so then, as with claims *by*

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inapplicable, and instead the focus is on the disputed res to which the defendant lays claim. When a counterclaim seeking monetary relief is entered in an adversary proceeding the claim is automatically converted from "a legal dispute over money into an equitable dispute over a share of the estate." Thus, the defendant does not "lose its right to a jury trial by filing a counterclaim and thereby waiving the right." Instead, the defendant loses "its right to a jury trial by filing a counterclaim and thereby seeking a piece of the disputed res, the debtors' estate, which [is] subject to the bankruptcy court's equitable power to allow and disallow claims." This is the result obtained regardless of whether the counterclaim is permissive or compulsory, because the defendant's filing represents an "attempt to obtain a portion of the debtor's estate," triggering the non-jury, public rights "process of allowing and disallowing claims in bankruptcy court."

*Control Center*, 288 B.R. at 282 (citations omitted).

<sup>54</sup> See *supra* note 36.

<sup>55</sup> See *supra* note 38.

<sup>56</sup> See 9 U.S.C. §§ 1–16 (2000).

<sup>57</sup> *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990).

<sup>58</sup> See *supra* note 36.

<sup>59</sup> *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 59 n.14 (1989).

<sup>60</sup> *Id.*; see *supra* notes 5–12 and accompanying text.

<sup>61</sup> See *Germain v. Conn. Nat'l Bank*, 988 F.2d 1323, 1329 (2d Cir. 1993) ("[T]he *Katchen*, *Granfinanciera*, and *Langenkamp* line of Supreme Court cases stands for the proposition that by filing a proof of claim a creditor forsakes its right to adjudicate before a jury any issue that bears directly on the allowance of that claim—and does so not so much on a theory of waiver as on the theory that the legal issue has been converted to an issue of equity." (emphasis omitted)). That said, it is true that the "trigger" converting a claim against a creditor from law to equity is the creditor filing a proof of claim. So creditors are right to think "if I file a

creditors, when it comes to claims *against* creditors, there is no anomaly to fix in bankruptcy law's different treatment of a creditor's rights to a jury trial and to arbitration.

#### CONCLUSION

Michael Fielding is correct that, until his publications, commentators had made little effort to address the differences in bankruptcy law's treatment of creditors' jury and arbitration rights.<sup>62</sup> And Fielding is right to emphasize that bankruptcy law treats the constitutional jury right with less deference than the, merely statutory, right to arbitrate. But this apparent anomaly is actually the plausible result of a limitation within the Seventh Amendment jury right, its applicability only to claims at law but not claims in equity. The right to arbitrate is not similarly limited. So creditors seeking to arbitrate claims by and against debtors in bankruptcy are not defeated by longstanding holdings placing such claims on the equity side of the law/equity line. In contrast, creditors seeking jury trials of claims by and against debtors in bankruptcy are defeated by such holdings.

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proof of claim then I'll lose my jury right but if I don't file a proof of claim then I'll never collect a penny of the judgment that some body of substantive law (e.g., contract, tort) says I deserve." As Michael Fielding says, "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." Fielding, *Elevating Business*, *supra* note 10, at 588; *see also* E. Scott Fruehwald, *Jury Trials in Bankruptcy Court After Granfinanciera*, 24 CUMB. L. REV. 79, 89 (1994) ("Faced with the choice of losing a right to a jury trial or a right to submit a claim against the estate, a creditor will normally file a claim. Arguably, a creditor should not be faced with this choice. However, if every creditor retained a right to a jury trial, the claims adjudication process provided by the Bankruptcy Code would be significantly affected by the large number of jury trials. Therefore, a creditor's filing of a proof of claim justifies the denial of a jury trial and protects essential aspects of bankruptcy.").

<sup>62</sup> Apparently, the only pre-Fielding example is Neufeld, *supra* note 21. *See* Fielding, *Navigating the Intersection*, *supra* note 17, at 16.