Bankruptcy's Arbitration Countercurrent and the Future of the Debtor Class

by

*Kara J. Bruce**

*Professor of Law, University of Oklahoma College of Law. I thank the National Conference of Bankruptcy Judges and American Bankruptcy Law Journal for inviting me to participate in the 2022 annual symposium and Judges Craig Gargotta and Terrence Michael for their work preparing this article for publication. This paper was enriched by my co-panelists' thoughtful contributions to the topic. Thanks are also due to Stephen Ware and Jon Lee for feedback on drafts of this article, the participants at the National Business Law Scholars' Conference for helpful comments, and Victoria Powell for research and editorial assistance.

INTRODUCTION

When clicking "accept" on a website's terms, purchasing a cell phone plan, opening a bank account, or accepting a job, consumers routinely agree to handle future legal disputes in arbitration. These agreements overwhelmingly require consumers to waive their rights to aggregate claims with similarly situated parties.[1] And the Supreme Court has rendered these types of "class action waiver" clauses virtually unassailable.[2] Relying on the policies underlying the Federal Arbitration Act (FAA), the Court has discredited every modern challenge to class action waivers that has been presented.[3] As a result, arbitration clauses have been held enforceable, even when they effectively eliminate civil liability for small-value injuries.

A much different pattern has played out in bankruptcy. Despite the steady stream of Supreme Court decisions favoring arbitration in other contexts, bankruptcy courts have consistently refused to enforce pre-dispute arbitration clauses. Their refusal relies on the equally strong policies underlying federal bankruptcy law, as well as a long line of case law that holds that arbitration of certain bankruptcy matters would "inherently conflict" with the Bankruptcy Code. Several circuit courts have affirmed these inherent-conflict findings, even as the Supreme Court's pro-arbitration opinions have become more absolute. A surprising outcome of bankruptcy's arbitration countercurrent is that pre-dispute arbitration clauses are far less effective at neutralizing class actions in bankruptcy than they are outside of bankruptcy.

This Article is part of a symposium, sponsored by the National Conference of Bankruptcy Judges and the American Bankruptcy Law Journal, that seeks clarity on the dueling federal policies underlying the Bankruptcy Code

[1] *See infra* Part I(B).
[2] *Id.*
[3] *Id.*

and the Federal Arbitration Act. Such a discussion would not be complete without considering the impact of this issue on the broader landscape of bankruptcy litigation. This Article situates the intersection of bankruptcy and arbitration within broader discussions of class actions in bankruptcy. It advances three main points:

> First, drawing from over a decade of research on debtor class actions in bankruptcy,[4] this Article explores how application of the "inherent-conflict" test has made bankruptcy class actions an outlier in the modern, anti-class action framework.[5] But a potent tension underlies arbitration decisions in debtor class action cases: In many cases, the very analysis that has led some courts to refuse arbitration of bankruptcy class action claims is at odds with the rationales that might support aggregation of these claims on a nationwide basis.[6] Nowhere is this tension more pronounced than in discharge injunction cases. There, courts often refuse to permit an arbitrator to exercise the contempt authority of the court that issued the order of discharge. With that decisional backdrop, it is difficult to see how a bankruptcy court could remedy aggregate violations of discharge orders entered in cases across the nation.

Next, this Article considers whether this tension can be reconciled, and in so doing identifies further remedial challenges. To be sure, there are alternative mechanisms for enforcing bankruptcy's discharge that are more amenable to nationwide class action treatment. But these alternatives may be more susceptible to class-killing arbitration clauses because they are less likely to present an inherent conflict with bankruptcy. This Article distills the dense thicket of judicial decisions involving class actions to enforce the discharge down to three guiding principles, and identifies, at the end of that analysis, a narrow pathway to justify the non-arbitrable, nationwide debtor class.[7]

Finally, considering that the audience for this symposium includes leading voices in the bankruptcy world, this Article provides some suggestions for future reforms. It observes that the difficult doctrinal issues discussed in this Article impose significant litigation costs on individual debtors who seek to

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[4]*See, e.g.*, Kara J. Bruce, *Recent Developments in Student Loan Non-Dischargeability: Aggregating Discharge Violation Claims*, 39 BANKR. L. LTR. 1 (2019) [hereinafter *Aggregating Discharge Claims*]; Kara J. Bruce, *Closing Consumer Bankruptcy's Enforcement Gap*, 69 BAYLOR L. REV. 479 (2017) [hereinafter *Enforcement Gap*]; Kara J. Bruce, *Vindicating Bankruptcy Rights*, 75 MD. L. REV. 443 (2016) [hereinafter *Vindicating*]; Kara J. Bruce, *The Debtor Class*, 82 TULANE L. REV. 21 (2013) [hereinafter *Debtor Class*].

[5]*See infra* Part II.

[6]*See infra* Part II(B)(2); Part III.

[7]*See id.*

enforce their discharges on an aggregate basis.[8] A more streamlined pathway to enforce the discharge ought to be available.[9] This section explores the benefits of class actions as a tool to combat systematic bankruptcy misconduct, and argues that any legislative reform of the discharge should include an express statement on the extent to which discharge claims can be arbitrated.[10] This Article concludes by suggesting legislative amendments and non-legislative reforms that might improve debtors' ability to aggregate claims for discharge violations.[11]

This Article proceeds in three parts. Part I, which follows, explores how pre-dispute arbitration clauses have come to dominate class actions. It highlights how the Supreme Court's increasingly vocal support of arbitration has limited nearly all efforts to balance arbitration's policies against competing interests. Part II moves into the bankruptcy arena. It introduces the debtor class action and evaluates how "inherent conflicts" between bankruptcy and arbitration have allowed these cases to survive motions to compel arbitration. This section concludes by observing how in discharge-violation cases in particular, the contempt-based rationales for refusing arbitration are in tension with efforts to aggregate the claims. Part III then focuses on class actions to enforce bankruptcy's discharge. This Part explores courts' attempts to harmonize the inherent-conflict analysis with efforts to aggregate discharge claims on a nationwide basis. Finally, Part III concludes by observing that a confluence of remedial barriers has undermined the integrity of the discharge. It proposes legislative and non-legislative reforms to enhance the effectiveness of discharge enforcement.

I. ARBITRATION'S EFFECT ON CLASS ACTIONS

Over the last thirty years, the Supreme Court has repeatedly underscored that the FAA creates a "liberal federal policy" in favor of arbitration.[12] In a variety of cases, across a variety of subject areas, the Court has steadfastly supported parties' freedom to choose arbitration. In so doing, the Court has invalidated a wide variety of lower-court rulings that seek to constrain its

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[8] *See infra* Part III(B). As discussed below, other remedial challenges limit debtors' ability to enforce the discharge individually.

[9] *See id.*

[10] *Id.*

[11] *Id.*

[12] *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) ("In enacting [the FAA], Congress declared a national policy favoring arbitration"); CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98 (2012) (The FAA establishes "a liberal federal policy favoring arbitration agreements."); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (same); E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 289 (2002) (same); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) (same); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (same).

scope.[13] A notable dimension of this pro-arbitration policy is that arbitration agreements have been held enforceable, even when they effectively foreclose civil lawsuits for small-value injuries. This section provides an overview of this historical background, describing how arbitration came to dominate consumer class actions and charting, in general terms, the current state of class action litigation.

A. The "Strong Federal Policy in Favor of Arbitration"

The FAA was enacted in 1925 in an effort to "reverse . . . judicial hostility to arbitration agreements."[14] Before the FAA was enacted, courts were reluctant to grant specific performance of pre-dispute arbitration agreements when one party or another sought resolution of the dispute in a judicial forum.[15] The FAA was viewed as a means to put arbitration clauses on similar footing to other provisions of a contract,[16] with the "unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the

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[13]*See, e.g.*, Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 479 (1989) ("[A]rbitration . . . is a matter of consent . . . and parties are generally free to structure their arbitration agreements as they see fit."); *see also* Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 574 (Alito, J., concurring) (2013) (quoting *Volt Info. Sciences, Inc.*); Stolt-Nielsen SA v. AnimalFeeds International Corp., 559 U.S. 662, 664 (2010) (same); *Waffle House*, 534 U.S. at 289 (same).

[14]Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 225-26 (1987) (internal citations and quotation marks omitted); *see also* Hall St. Assocs, L.L.C. v. Mattel, Inc., 562 U.S. 576, 581 (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.") (quotation omitted). For an extensive discussion of the development of the FAA, as well as Supreme Court construction of the FAA, *see* Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99 (2006).

[15]*See, e.g.*, Sherk v. Alberto-Culver Co., 417 U.S. 506, 510 n.4 (1974) ("English courts traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the Arbitration Act."); Troy A. McKenzie, *A Reprise of Bankruptcy & Arbitration in Concert:* In re Belton *and Enforcement of the Discharge Injunction*, 41 No. 5 Bankr. L. Ltr. NL 4 (May 2021) ("The longstanding common law view (dating to at least the early 17th Century) treated a contract purporting to assign future disputes to arbitration as revocable by either party (up until the dispute was actually put before the arbitral forum)."); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 270 (1926) ("While our American courts have usually declared a friendly attitude toward arbitration, they have felt themselves bound by the long standing decisions holding that arbitration agreements were revocable at will and would not be enforced by the courts. The result has been that any party who wished to avoid an agreement which he had made to arbitrate had only to declare his refusal to proceed and the courts would not order specific performance of the contract while the alternative of a damage suit was inadequate."); *Cf.* Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J. L. Econ & Org. 479, 481-82 (1995) (arguing that the perceived hostility to arbitration was overblown, and suggesting alternative drivers for modern arbitration statutes).

[16]*See* 65 Cong. Rec. 11080 (1924) (statement of Rep. Mills) ("This bill provides that where there are commercial contracts and there is disagreement under the contract, the court can [enforce] an arbitration agreement in the same way as other portions of the contract.").

courts."[17] Accordingly, the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract."[18]

At its inception, arbitration was used as a tool to resolve disputes between businesses with relatively equal bargaining power.[19] The legislative history of the FAA contains evidence that Congress intended to exclude more one-sided agreements, such as employment agreements and contracts of adhesion, from its scope.[20] Over time, however, the scope of contracts falling within the FAA has expanded. In a series of cases, the Supreme Court has applied the FAA to statutory rights, consumer contracts, and employment agreements, has found that it applies in state court, that it preempts conflicting state laws, and that it might affect traditional rules for interpreting contracts.[21]

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[17]Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967).

[18]9 U.S.C. § 2. The FAA further provides that courts must stay proceedings when issues before them are subject to an enforceable arbitration provision and permits a federal district court to compel arbitration if there has been a "failure, neglect or refusal" to comply with an enforceable arbitration agreement. 9 U.S.C. §§ 3-4.

[19]*See, e.g.*, Moses, *supra* note 14, at 111 ("The FAA was a bill of limited scope, intended to apply in disputes between merchants of approximately equal economic strength to questions arising out of their daily relations.").

[20]65 Cong. Rec. 1931 (1924) (statement of Rep. Graham) (noting that the FAA is designed to enforce agreements to arbitrate "when voluntarily placed in the document by the parties to it"); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 n.9 (1967) ("We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act."); *see also* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 124-29 (Stevens, J., dissenting) (discussing Congressional intent to carve out employment agreements from the FAA); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1633-49 (2018) (Ginsburg, J., dissenting) (discussing Congressional intent to carve out contracts of adhesion); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis L. Rev. 33, 38 (1997) (arguing the FAA's legislative history demonstrates Congressional intent to exclude contracts of adhesion).

[21]*See* Jean Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U.L.Q. 637, 644-74 (1996); Moses, *supra* note 14, at 114-16. For a brief overview of how this body of law developed, *see* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (holding the FAA governs in both state or federal court); Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (holding the FAA preempted state law); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637-38 (1985) (holding the FAA applies not only to contract matters, but also statutory claims involving antitrust law); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 686-87 (1996) (holding arbitration agreements may be revoked only by generally applicable contract defenses, not by state laws applicable only to arbitration provisions); *Circuit City Stores, Inc.*, 532 U.S. at 114-15 (expanding the FAA to apply to most employment agreements, despite language in the FAA that it should not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"); Stolt-Nielsen SA v. AnimalFeeds International Corp., 559 U.S. 662, 665 (2010) (holding that contracts silent on the issue of class arbitration cannot be read to permit class arbitration); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (invalidating California laws that prohibited class litigation and arbitration waivers); American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013) (holding that a contractual waiver of class arbitration is enforceable even if arbitration is economically infeasible as a result); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407,

These judicial decisions engendered a robust market response. Indeed, "[o]nce the Supreme Court began to issue decisions stating that commercial arbitration was 'favored' . . ., businesses jumped on the opportunity to compel arbitration in contexts where they previously thought arbitration agreements would not be enforced."[22] At present, arbitration clauses appear in a wide range of contracts, and it is well settled that parties can agree ex ante on not just the forum for resolving disputes, but also the procedures for doing so and the available remedies.[23]

B. Class Action Waivers in Consumer Contracts of Adhesion

Consumer contracts are an area in which arbitration agreements have proliferated in recent decades. Arbitration clauses now appear in the boilerplate of cellular phone contracts, checking account agreements, and other contracts for the provision of consumer goods and services.[24] These clauses almost always contain expansive waivers of the right to aggregate claims with similarly situated consumers.[25] Such class action waivers have a pronounced effect on consumer litigation: without the shared economics of class actions, consumers might not be in a position to pursue small-value claims.[26] Indeed, "[the] conventional wisdom holds—and empirical research tends to support—the notion that, for any given individual (and their attorney) who has a low-value but potentially meritorious claim, the costs of pursuing an

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1415 (2019) (holding that an ambiguous contract could not be interpreted against the drafter to allow class arbitration).

[22]Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 Stan. L. Rev. 1631, 1638 (2005).

[23]Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 Wake Forest L. Rev. 1001, 1005 (1996) ("[P]arties are largely free to specify by contract the procedures governing their arbitration. The Court has even suggested that they may be free to specify by contract the remedies the arbitrator may award, specifically, whether punitive damages are available in arbitration.").

[24]*See* Sternlight, *supra* note 22, at 1638 (collecting examples); Sarah Rudolph Cole, *On Babies and Bathwater: the Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 Hous. L. Rev. 457, 464 (2011) (same). The CFPB's watershed arbitration study, completed in 2015, found that arbitration agreements appeared in 53% of credit card agreements, 98.5% of payday lending agreements, 99.9% of cell phone contracts. Most of these agreements contained class action waivers). Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §§ § 3 at 24, § 2 at 8 (2015) [hereinafter CFPB Arbitration Study].

[25]*See* Sternlight, *supra* note 22, at 1656 (noting that these provisions gained popularity as a result of trade-journal articles that encouraged them). For a discussion of the development of collection action waivers, *see* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 396-99 (2005).

[26]Arbitration in America: Hearing on H.R. 1423 and S. 610 Before the S. Judiciary Comm., 116th Cong. 5 (Apr. 2, 2019) (statement of Myriam Gilles, Professor, Cardozo Law) ("Under these class-banning arbitration clauses, any claimant must bear 100% of the costs of proceeding in arbitration by herself; her claim cannot be joined with those of any other arbitral claimant as a way of distributing costs and risks.").

individual case are typically too high . . . to be an economically rational proposition."[27]

Some scholars suggest that stymieing aggregate litigation is a primary motivation for some companies to include arbitration provisions in consumer contracts.[28] For example, a recent empirical study found that large companies were far more likely to select arbitration in consumer contracts than they were in negotiated business contracts, and that the vast majority of consumer contracts contained class action waivers.[29] They concluded that this "selective use" of the arbitral forum "may be based more on strategic advantage [to avoid aggregate litigation] than on a belief that corporations are better serving their customers."[30]

And by all accounts, this tactic has been extremely effective. Consider the following empirical findings:

> Of the 826,537,000 consumer arbitration provisions in effect in 2018, only 6,000 resulted in arbitration . . . One 2018 study found that, had employees been filing arbitration claims at the same rate that they did in court, some 320,000 to 727,000 employment arbitrations claims would be filed annually—60 to 140 times the current rate. That means forced arbitration has eliminated more than 98% of employment claims. A recent study by the Economic Policy Institute reinforces these findings: Of workers with potentially meritorious claims subject to forced arbitration, virtually none are pursued. Indeed, only 1 in around 10,400 workers subject to forced arbitration files a claim each year.[31]

Over the years, consumer advocates have attempted to challenge the use of arbitration agreements to curb class action litigation.[32] But the Supreme

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[27]J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1292 (2022).

[28]*See, e.g.*, Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 150 (2010) (concluding that "companies use arbitration clauses to limit their vulnerability to consumer claims, especially class actions"); J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1736-37 (2006) ("Corporations . . . have increasingly sought to channel [consumer] claims to arbitration, while at the same time denying claimants the right to proceed through class actions.").

[29]Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REF. 871, 881, 883 (2008).

[30]*Id.* at 895. *But see* Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 435 (2010) (arguing that the contracts examined in the Eisenberg study "are not representative of either business or consumer contracts as a whole" and "as a result, their findings should be construed narrowly").

[31]Glover, *supra* note 27, at 1305.

[32]*See* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 632-37 (2012).

Court has laid many of these arguments to rest in a series of cases. The following cases reflect several consistent themes, including an emphasis on neoliberal ideals of contract formation (even when considering contracts of adhesion), deep concerns about inefficiency and settlement threat underlying class actions, and a relative lack of concern for remedying small-value claims.

1. *Unconscionability Challenges and* AT&T Mobility LLC v. Concepcion

In *AT&T Mobility LLC v. Concepcion*, decided in 2011, the Court held that the FAA preempted a state law unconscionability defense to arbitration.[33] Vincent and Liza Concepcion sued AT&T for false advertising and fraud, alleging that they were charged $30.22 in sales tax for phones that AT&T advertised as "free."[34] AT&T sought to enforce the arbitration clause in the underlying agreements, which would have the effect of forcing each plaintiff to pursue a claim individually in arbitration.[35] The Conceptions opposed this motion, based on California law that provides that adhesive class action waivers are unconscionable when they are used to limit redress for these types of small individual injuries.[36] The District Court agreed and denied AT&T's motion.[37] The Ninth Circuit affirmed.[38]

The Supreme Court granted certiorari.[39] In a 5-4 decision, the Court held that California's rule "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" and is thus preempted by the FAA.[40]

The opinion relies heavily on the notion, which is found nowhere in the

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[33]AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[34]*Id.* at 337.

[35]*Id.* at 337-38 & n.2 (noting that the contract required that claims be brought in "in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding'" and that "the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding."). The agreement did, however, have a consumer-focused inducement to arbitrate individually: AT&T agreed to pay a minimum of $7,500, plus double attorney's fees, if the claimant received an arbitration award in excess of AT&T's final settlement offer. *Id.*

[36]*See* Discover Bank v. Superior Court, 36 Cal.4th 148, 153 (Cal. Ct. App. 2005).

[37]Laster v. T-Mobile USA, Inc., No. 05CV1167, 2008 WL 5216255, at *17 (S.D. Cal. Aug. 11, 2008), *aff'd sub nom.* Laster v. AT & T Mobility LLC, 584 F.3d 849, 852 (9th Cir. 2009), *rev'd sub nom.* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011), *and amended in part*, No. 05CV1167, 2012 WL 1681762 (S.D. Cal. May 9, 2012). Although the court found that AT&T's $7,500 inducement was sufficient encouragement for any individual consumer to pursue a small-value claim, it was nevertheless insufficient to support the deterrent goals of class action liability. *Id.* at ** 12, 14.

[38]Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009).

[39]AT&T Mobility LLC v. Concepcion, 560 U.S. 923 (2010).

[40]AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). The Supreme Court later returned to California's rule in DIRECTV, Inc. v. Imburgia, 577 U.S. 47 (2015). There, the Court held that contract language invalidating an arbitration agreement if the "law of your state" so provides did not allow the California rule to apply notwithstanding *Concepcion*). *Id.* at 53-54.

text or legislative history of the FAA, that the FAA serves the goals of *bilateral* arbitration—that is, arbitrations between one plaintiff and one defendant. Class arbitration, according to the Court, is slower, more procedurally complex, and inferior in virtually every way:

> Class-wide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties."[41]

With this view of arbitration in mind, the Court held that California's rule, which effectively permits consumers to demand class-wide arbitration, interferes with the goals of the FAA.[42]

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented.[43] The dissent characterized the California rule not as a "blanket policy" against class action waivers, but instead the proper application of state unconscionability doctrine, which the FAA expressly contemplates.[44] The dissent further challenged the notion that class arbitration procedures are at odds with arbitration policy, finding this notion unfounded in the history of

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[41]*Id.* at 342. This aversion to classwide arbitration did not make its first appearance in *Concepcion*. A few years earlier, in *Stolt-Nielsen SA v. AnimalFeeds International Corp*, the Court held that an arbitration agreement that was silent on the issue of class arbitration could not be construed to permit arbitration on a class-wide basis. 559 U.S. 662, 666 (2010). In so holding, the Court distinguished between the supposedly bargained-for benefits of bilateral arbitration and the "fundamental changes" wrought by class arbitration. *Id.* at 669. It held that "the differences between bilateral and class-action arbitration are too great for arbitrators to presume . . . that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 668-69. The Court has, on at least one occasion, interpreted *Stolt-Nielson* narrowly. *See* Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 570-72 (2013). But this rhetoric about class-wide arbitration being anathema to the FAA's purpose echoes several of the Court's subsequent cases. Most recently, in *Lamps Plus v. Variela*, the Court relied on *Stolt-Nielsen* to hold that a contract that is ambiguous cannot be interpreted to permit classwide arbitration. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019). In so holding, the court rejected application of the contract-interpretation doctrine *contra proferentem*, which provides that ambiguous contracts are construed against their drafters. *Id.* at 1417-19.

[42]*Concepcion*, 563 U.S. at 336, 346 ("California's *Discover Bank* rule similarly interferes with arbitration. Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*.").

[43]*Id.* at 357 (Breyer, J., dissenting).

[44]*Id.* at 367 (noting that "by using the words 'save upon such grounds as exist at law or in equity for the revocation of any contract,' Congress retained for the States an important role incident to agreements to arbitrate").

the FAA and factually incorrect.[45]

2. *Effective Vindication Challenges and* American Express v. Italian Colors Restaurant

Next, in *American Express v. Italian Colors Restaurant*, the Court rejected challenges to arbitration based on the concern that they prevented the effective vindication of statutory rights.[46] Earlier, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court had held arbitration of federal statutory claims was permissible, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."[47] In a later case, the Court noted in dicta that if the costs of arbitration were excessive, such costs might be sufficient to "preclude a litigant . . . from effectively vindicating her federal statutory rights."[48]

American Express v. Italian Colors Restaurant involved a class action filed by merchants against American Express Company ("American Express"), alleging the company violated the Sherman Act by forcing the merchants to accept credit cards at rates approximately thirty percent higher than competing card companies.[49] American Express sought to compel individual arbitration, as the underlying agreements between American Express and the merchants contained an arbitration clause that broadly precluded aggregation or other forms of cost sharing.[50] As with *Concepcion*, the costs of individual arbitration would easily eclipse any available damages.[51] Although the district court granted American Express's motion to compel arbitration,[52] the Court of Appeals for the Second Circuit reversed. Because the merchants "would incur prohibitive costs if compelled to arbitrate under the class action waiver," the Second Circuit found that the class action waiver was unenforceable.[53]

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[45]*Id.* at 359-66 (observing, among other things, that the American Arbitration Association has characterized class-wide arbitration as "a fair, balanced, and efficient means of resolving class disputes").

[46]Gilles & Friedman, *supra* note 32, at 633-35 (describing the development of this theory).

[47]Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).

[48]Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000).

[49]Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 231 (2013).

[50]*In re* American Express Merchants' Litigation, 667 F.3d 204, 209 (2d Cir. 2012) (quoting the underlying agreements).

[51]*Italian Colors Rest.*, 570 U.S. at 231 (noting that the merchants "submitted a declaration from an economist who estimated that the cost of an expert analysis necessary to prove the antitrust claims would be 'at least several hundred thousand dollars, and might exceed $1 million,' while the maximum recovery for an individual plaintiff would be $12,850, or $38,549 when trebled").

[52]*In re* Am. Express Merchs. Litig., No. 03 CV 9592, 2006 WL 662341, at *10 (S.D.N.Y. Mar. 16, 2006), *rev'd and remanded*, 554 F.3d 300 (2d Cir. 2009), *cert. granted, judgment vacated sub nom.* Am. Express Co. v. Italian Colors Rest., 559 U.S. 1103 (2010), *rev'd and remanded sub nom., In re* Am. Express Merchs. Litig., 634 F.3d 187 (2d Cir. 2011), *rev'd*, 667 F.3d 204 (2d Cir. 2012).

[53]*In re* Am. Express Merchs. Litig., 554 F.3d 300, 315-16 (2d Cir. 2009), *cert. granted, judgment vacated sub nom.* Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010), *rev'd and remanded sub nom. In re* Am. Express Merchs. Litig., 634 F.3d 187 (2d Cir. 2011), *rev'd*, 667 F.3d 204 (2d Cir. 2012).

After some complicated procedural history,[54] the Court ultimately granted certiorari to resolve the question "[w]hether the Federal Arbitration Act permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim." In a 5-3 decision, the Court held that it does not, and reversed.[55]

The Court emphasized that arbitration agreements must be "rigorously enforce[d]."[56] It found nothing in the antitrust laws to overcome the FAA's strong policies in favor of arbitration. While the Court acknowledged the existence of an effective-vindication exception, it held that the exception applied only to cases in which an arbitration clause amounts to a "prospective waiver of a party's *right to pursue* statutory remedies."[57] In contrast, "[t]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."[58] Accordingly, the Court held that arbitration of the matter would not prevent the effective vindication of statutory rights.[59]

Justice Kagan, joined by Justices Ginsburg and Breyer, issued a scathing dissent that characterized the majority ruling as a "betrayal of our precedents, and of federal statutes like the antitrust laws."[60] The dissenting justices described the effective-vindication rule as a boundary on arbitration that prevents arbitration "from choking off a plaintiff's ability to enforce congressionally created rights."[61] Important to the dissent's reasoning was the text of the arbitration agreement, which broadly prohibited not only class aggregation but also "other forms of cost-sharing . . . that could provide effective vindication."[62] The dissent expressed concern that the majority's holding allows a company like American Express to manufacture "de facto immunity" from liability.[63]

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[54]The Supreme Court first granted certiorari, and vacated and remanded the case for further consideration based on *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (in which the Court held that a party cannot be compelled to participate in class arbitration without an agreement to do so). The Court of Appeals for the Second Circuit did not change its ruling, stating that the ruling did not violate *Stolt-Nielson* because it did not *require* the parties to engage in class arbitration. The Second Circuit then reconsidered its ruling, *sua sponte*, in light of *Concepcion*, but held that *Concepcion* did not apply. *In re* American Exp. Merch. Litig., 667 F.3d 204, 213 (9th Cir. 2021). Finally, the Second Circuit denied rehearing *en banc*, with five judges dissenting. *In re* American Exp. Merch. Litig., 681 F.3d 139 (2d Cir. 2012).

[55]American Express Co. v. Italian Colors Rest., 570 U.S. 228, 239 (2013) (Justice Sotomayor took no part in the opinion).

[56]*Id.* at 233 (*quoting* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

[57]*Id.* at 235 (emphasis in original).

[58]*Id.* at 236 (emphasis in original).

[59]*Id.*

[60]*Id.* at 240 (Kagan, J., dissenting).

[61]*Id.*

[62]*Id.* at 252-53.

[63]*Id.* at 244.

3. *Conflict-Based Challenges and* Epic Systems Corporation v. Lewis

Most recently, in *Epic Systems Corp. v. Lewis*, the Court rejected a conflict-based challenge to arbitration.[64] *Epic* involved a collection of three Fair Labor Standards Act (FLSA) lawsuits filed in federal court by employees on behalf of putative classes.[65] The employers sought to compel arbitration, as the underlying employment agreements contained arbitration clauses with class action waivers.[66] The courts below held that enforcing arbitration clauses would violate the National Labor Relations Act ("NLRA").[67] Recall that the FAA provides that arbitration clauses are enforceable, "*save upon such grounds as exist at law or in equity for the revocation of any contract.*"[68] The lower courts held that, because the NLRA protects the rights of employees to engage in concerted activity,[69] arbitration clauses that required employees to litigate individually violated the NLRA and could not be enforced.[70]

In a 5-4 decision, the Supreme Court reversed, holding that the NLRA's collective action rules did not render the arbitration agreement unenforceable.[71] In reaching this decision, the Court interpreted the saving clause narrowly to apply only to "generally applicable contract defenses."[72] Because the employees' NLRA argument was not a generally applicable defense, but instead an "attack[ ] [on] only the individualized nature of the arbitration proceedings," it did not fall within the saving clause's scope.[73] This analysis again reflects the now-entrenched view among a majority of justices that the FAA serves the goals of bilateral arbitration alone.[74]

The Court then considered how to harmonize the dueling federal aims of the FAA and the NLRA, a matter of some relevance to this Article.[75] Here, the Court stated that the test for reconciling federal statutes is very exacting,

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[64]138 S. Ct. 1612, 1620 (2018).

[65]*Id.* at 1619-20.

[66]*Id.* at 1620.

[67]*Id.*

[68]9 U.S.C. § 2 (emphasis added).

[69]29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.").

[70]*See, e.g.*, Morris v. Ernst & Young, LLP, 834 F.3d 975, 980 (9th Cir. 2016), *rev'd sub nom.* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018), *and vacated*, 894 F.3d 1093 (9th Cir. 2018).

[71]*Epic Systems Corp.*, 138 S. Ct. at 1621-23.

[72]*Id.* at 1622.

[73]*Id.*

[74]*Id.* at 1622-23.

[75]*Id.* at 1624.

and if a party wishes to demonstrate an inherent conflict, the party "bears the heavy burden of showing a clearly expressed congressional intention" to do so.[76] The Court further underscored that "repeals by implication are disfavored" and "Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute."[77] Applying this standard to the NLRA, the Court found no indication in the statute's concerted action guarantees that Congress intended to displace arbitration, primarily because there is no "clear[ ] and manifest[ ]" statement to do so.[78]

Justices Ginsburg, Breyer, Sotomayor, and Kagan again dissented from the ruling, characterizing the majority's decision as "egregiously wrong."[79] The dissent recounted the history of labor relations leading up to the enactment of the NLRA to underscore how the right of employees to engage in collective action vis-à-vis their employers was fundamental in its design. It likewise noted that the Court has historically protected employees from employer interference in these rights.[80] The dissent characterized the challenge to arbitration at issue here not as a rule that singles out arbitration, but instead the generally applicable contract defense of illegality.[81] And even assuming the FAA and NLRA were inharmonious, the later-enacted NLRA should control.[82] The dissent concluded by explaining that "the inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."[83]

C. The Current State of Consumer Class Actions

As the cases described in this section make clear, federal arbitration policy has become a potent tool to limit the effectiveness of class actions in civil courts.[84] As a result of these cases, not to mention decisions ratcheting up the standards for class certification and placing other procedural hurdles in the path of consumer litigation,[85] consumer rights advocates have begun explor-

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[76]*Id.* at 1624 (internal citation and quotation marks omitted).

[77]*Id.* (internal citation and quotation marks omitted).

[78]*Id.* at 1624. As discussed further below, the majority's expansive approach to this topic has led some courts and commenters to question whether existing approaches to reconciling conflicts between bankruptcy and arbitration have been replaced by this textualist standard. *See infra* text accompanying notes 158-159.

[79]*Id.* at 1634 (Ginsburg, J., dissenting).

[80]*Id.* at 1637-38 (collecting cases).

[81]*Id.* at 1646.

[82]*Id.*

[83]*Id.*

[84]*Cf.* Georgene Vairo, *Is the Class Action Really Dead? Is that Good or Bad for Class Members?* 64 Emory L. J. 477 (2014) (arguing that although the class action device has been sharply curtailed, settlement classes are alive and well).

[85]*See, e.g.*, Comcast Corp. v. Behrend, 569 U.S. 27, 47 (2013) (holding that the plaintiffs did not satisfy Rule 23(b)(3)'s predominance requirement because they failed to show at the time of certification that damages could be established on a class-wide basis); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350

ing new frontiers for addressing negative-value claims.

A recent trend is for consumer attorneys to launch "mass consumer arbitrations"—campaigns in which a plaintiff's firm files or threatens to file thousands of individual arbitration cases to address negative-value claims.[86] This tactic turns the traditional economics of consumer litigation against defendants. Particularly because many businesses agree to pay the filing fees for consumer arbitration claims filed against them (a technique that was thought to protect the arbitration clause from unenforceability based on unconscionability or similar doctrines),[87] the coordinated filing of individual arbitrations can saddle a *defendant* with exorbitant filing fees.[88] In response to this trend, some corporate behemoths, such as Amazon, have removed arbitration clauses from their consumer contracts.[89]

Public regulatory responses to limit arbitration's sway over small-value claims have also been pursued. For example, between 2012 and 2017, the Consumer Financial Protection Bureau completed an expansive empirical study of consumer arbitration, which resulted in a new rule that prohibited arbitration agreements with class action waivers in consumer financial services contracts.[90] But shortly thereafter, Congress passed a joint resolution invalidating the rule pursuant to the Congressional Review Act.[91] More recently, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which invalidates pre-dispute arbitration agreements (together with associated class action waivers) relating to sexual assault and harassment claims.[92] Comprehensive reform of con-

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(2011) (explaining that Rule 23(a)(2) commonality requires generating "common answers apt to drive the resolution of the litigation" (internal quotations omitted)); J. Maria Glover, The Supreme Court's "Non-Transsubstantive" Class Action, 165 U. PA L. REV. 1625, 1626 (noting that in *Dukes* and *Comcast*, the Supreme Court "increas[ed] the cost and difficulty of obtaining class certification").

[86]*See generally* Glover, *supra* note 27 (discussing this trend).

[87]*See id.* at 39.

[88]It is important to note that many such filing fees are structured as reimbursements. As such, in order to launch a mass consumer arbitration, the plaintiffs' firms must typically front the filing fees for each individual arbitration demand, which can often total between $200 and $400. *Id.* at 1328-29 (describing the massive capital outlays by plaintiffs' firms in pursuing mass arbitration, and noting that it exceeds the investment required to structure a class action).

[89]*See, e.g.*, Sarah Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, WALL ST. J., June 1, 2021 (describing how a flood of individual arbitration demand triggered a multi-million bill for filing fees, and how Amazon has since removed arbitration clauses from its user agreements).

[90]CFPB Arbitration Study, *supra* note 24, at §§ 1028(a) 2:6-27 (2015); *CFPB Issues Rule to Ban Companies From Using Arbitration Clauses to Deny Groups of People Their Day in Court Financial Companies Can No Longer Block Consumers From Joining Together to Sue Over Wrongdoing*, CFPB (July 10, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/.

[91]*See id.*; Notice of CRA Revocation, *available at* https://www.federalregister.gov/documents/2017/11/22/2017-25324/arbitration-agreements.

[92]*See* Heather M. Sager *et al.*, *New Law Ends Forced Arbitration of Sexual Assault and Sexual Harass-*

sumer arbitration, however, remains elusive.[93]

Meanwhile, the Court's strong support of arbitration continues. At the time of this writing, for example, the Court has just concluded a term in which it decided *four* cases involving the FAA.[94] The Court's decisions this term were uncharacteristically narrow, causing some legal commenters to question whether the Court's strong support of the FAA might be cooling.[95] But none of the Court's recent decisions fundamentally change the majority's emphasis on strict textual interpretation[96] or its approach to arbitration's sway over aggregate remedies.[97]

II. BANKRUPTCY'S ARBITRATION COUNTERCURRENT

The prior Part explored how arbitration clauses have been remarkably effective at neutralizing class actions in civil courts. This Part describes how a quite different pattern has played out in bankruptcy courts. Even following recent Supreme Court cases, bankruptcy courts and courts of appeals have refused to compel arbitration in class action adversary proceedings launched by consumer debtors against their creditors.[98] And at least so far, the Su-

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ment Disputes, Perkins Coie, March 9, 2022, available at https://www.perkinscoie.com/en/news-insights/new-law-ends-forced-arbitration-of-sexual-assault-and-sexual-harassment-disputes.html.

[93]A number of arbitration-fairness bills have been introduced following the passage of H.R. 445, The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. *See* Tamia Sutherland, *Update: An Influx of Arbitration Legislation*, CPR Speaks Blog (April 7, 2022), https://blog.cpradr.org/2022/04/07/update-an-influx-of-arbitration-legislation/ (collecting examples).

[94]Badgerow v. Walters, 142 S. Ct. 1310 (2022); Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1710 (2022); Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1787 (2022); Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1913 (2022).

[95]*See, e.g.*, Andrew J. Pincus, *Arbitration's Year at the Supreme Court*, REUTERS (July 8, 2022), https://www.reuters.com/legal/legalindustry/arbitrations-year-supreme-court-2022-07-08/.

[96]*See Badgerow*, 142 S. Ct. at 1322 (declining to allow policy considerations to trump "evident congressional choice"); *id.* (Breyer, J., dissenting) (indicating that it is appropriate in this case to consider "not simply the statute's literal words," but also the purposes and unintended consequences of a rigidly textualist interpretation).

[97]The *Viking River Cruises* case, in particular, reinforced the themes discussed in this Part. There, the Court considered whether the FAA preempts a California rule that invalidates waivers of the right to assert claims under California's Labor Code Private Attorneys General Act of 2004, Cal. Lab. Code. § 2698, *et seq. Badgerow*, 142 S. Ct. at 1913. In holding that the FAA preempted this rule, the court framed the Court's FAA jurisprudence as treating bilateral arbitration "as the prototype of the individualized and informal form of arbitration protected from undue state interference by the FAA." *Id.* at 1921. The court found that the claim-joinder mechanisms built into the PAGA, as interpreted by California courts, conflicted with this conception of bilateral arbitration and were therefore preempted. *Id.* at 1923-24.

[98]*See, e.g.*, Belton v. GE Cap. Retail Bank (*In re* Belton), 961 F.3d 612, 614 (2d Cir. 2020), *cert. denied sub nom.* GE Cap. Retail Bank v. Belton, 141 S. Ct. 1513 (2021) (refusing to compel arbitration); Anderson v. Credit One Bank (*In re* Anderson), 884 F.3d 382, 386 (2d Cir. 2018) (same); Midland Funding LLC v. Thomas, 606 B.R. 687, 695 (W.D. Va. 2019) (same); *see also In re* Bauer, No. AP 20-80012, 2020 WL 3637902, at *3 (Bankr. D.S.C. June 8, 2020) (same with respect to a matter that might become a class action); Knepp v. Educ. Fin. Servs. (*In re* Knepp), No. AP 18-01389, 2018 WL 11199014, at *7 (Bankr. D.N.J. Dec. 26, 2018) (same).

preme Court has declined to interrupt this trend.[99] As a result, bankruptcy is a small but well-defined corner of civil litigation in which consumer class actions might be an effective means to challenge widespread, but small-value, misconduct.[100]

This Part first provides a brief introduction to debtor class action cases. It then explains how judicial interpretations of the competing policies between bankruptcy and arbitration has led to this surprising state of affairs. It concludes by exploring some difficult class-certification implications that flow from these decisions.

A. Introducing the Debtor Class Action

Although class action adversary proceedings have become increasingly common in recent years, they have been around for well over two decades.[101] Some of the earliest published cases on debtor class actions related to a practice, widespread in the 1990s, where retail lenders pushed debtors to repay debts purportedly reaffirmed in bankruptcy.[102] In reality, the reaffirmation agreements were unenforceable because the creditors had not obtained court approval of the agreements.[103] Another pronounced wave of class actions involved suits against mortgage servicers for a variety of Bankruptcy Code violations relating to the servicing of debts in chapter 13 cases.[104]

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[99]*See* GE Cap. Retail Bank v. Belton, 141 S. Ct. 1513 (2021) (*cert. denied*); Credit One Bank, N.A. v. Anderson, 139 S. Ct. 144 (2018) (same).

[100]*See, e.g.*, McKenzie, *supra* note 15, at 2 (noting that consumer class actions in bankruptcy "stand[ ] out as an unusual remnant," considering the Court's well-established position on arbitration agreements with class action waivers); *see also Debtor Class*, *supra* note 4 and *Vindicating*, *supra* note 4 (discussing these issues in greater depth).

[101]For a more expansive analysis of these cases, *see Debtor Class*, *supra* note 4, and *Vindicating*, *supra* note 4.

[102]Reaffirmation is a process in bankruptcy where a debtor can agree to repay a debt otherwise subject to discharge in exchange for retaining the collateral. *See* Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 Am. Bankr. L.J. 709, 714-15 (1999). Sears, for example, regularly sent representatives to a debtor's § 341 meetings of creditors to solicit reaffirmation agreements, regardless of the type of collateral at issue or the debtor's ability to pay. *In re* Melendez, 224 B.R. 252, 261-62 (Bankr. D. Mass. 1998).

[103]*Debtor Class*, *supra* note 4, at 29 (describing this scandal); Conley v. Sears, Roebuck & Co., 222 B.R. 181, 182 (D. Mass. 1998) (describing Sears' reaffirmation practices); Singleton v. Wells Fargo, N.A., (*In re* Singleton), 284 B.R. 322, 323-24 (D.R.I. 2002) (plaintiffs alleged Wells Fargo collected debts under an invalid reaffirmation agreement); Bessette v. Avco Fin. Servs., Inc., 279 B.R. 442, 445 (D.R.I. 2002) (same with respect to Avco Financial Services); *see also* Aiello v. Providian Fin. Corp. (*In re* Aiello), 231 B.R. 693, 699 (Bankr. N.D. Ill. 1999) (debtor alleged that lender had a practice of sending intimidating communications to debtors to coerce them to sign reaffirmation agreements in violation of the automatic stay), *aff'd sub nom.* Aiello v. Providian Fin. Corp., 257 B.R. 245 (N.D. Ill. 2000), *aff'd*, 239 F.3d 876 (7th Cir. 2001).

[104]*See, e.g.*, Brannan v. Wells Fargo Home Mortg., Inc. (*In re* Brannan), 485 B.R. 443, 448 (Bankr. S.D. Ala. 2013) (alleging robo-signing violations); Rojas v. Citicorp Trust Bank FSB (*In re* Rojas), No. 09-07003, 2009 WL 2496807 at *1 (Bankr. S.D. Tex. Aug. 12, 2009) (alleging mortgage lenders filed false proofs of claim); Rodriguez v. Countrywide Home Loans, Inc. (*In re* Rodriguez), 396 B.R. 436, 439 (Bankr.

Several class action campaigns enforcing the discharge injunction have arisen in recent years. One line of cases alleges that lenders including JP Morgan Chase, Bank of America, Citigroup, and Synchrony Financial have refused to remove discharged debt from borrowers' credit reports.[105] These agencies have instead reported the debt as "charged off," rather than "discharged," a designation that plaintiffs believe is intended to pressure consumers to pay the debt to clear the notation from their credit reports.[106]

In another line of cases, Navient, the student loan servicer, has been accused of improperly seeking repayment of narrow class of private student loans that were discharged in bankruptcy.[107] This argument relies on the interpretation of § 523(a)(8)(A)(ii) of the Code, which excepts from discharge "an obligation to repay funds received as an educational benefit, scholarship, or stipend."[108] Plaintiffs in these cases assert that certain private student loans, unlike most other student loans, are dischargeable because they do not fit within the scope of § 523(a)(8)(A)(ii) or any other subsection of § 523(a)(8).[109] The plaintiffs further assert that Navient has "perpetuated and exploited the mistaken impression that all student loans are non-dischargeable in bankruptcy . . . for the purpose of continuing to collect on debt that has been discharged in bankruptcy."[110]

S.D. Tex. 2008) (alleging mortgage lenders failed to properly apply plan payment and assessed post-petition charges in violation of bankruptcy rules); Cano v. GMAC Mortg. Corp. (*In re* Cano), 410 B.R. 506, 518 (Bankr. S.D. Tex. 2009) (same); Alacantra v. Citimortgage, Inc. (*In re* Alcantara), 389 B.R. 270, 273 (Bankr. M.D. Fla. 2008) (alleging lender sent misleading mortgage statements in violation of the automatic stay).

[105]*See, e.g.*, Anderson v. Credit One Bank (*In re* Anderson), 884 F.3d 382, 385 (2d Cir. 2018) (describing Credit One Bank's credit-reporting practices); Belton v. GE Cap. Retail Bank (*In re* Belton), 961 F.3d 612, 614 (2d Cir. 2020), *cert. denied sub nom.*, GE Cap. Retail Bank v. Belton, 141 S. Ct. 1513 (2021) (same with respect to GE Capital); Haynes v. Chase Bank USA (*In re* Haynes), No. 11-23212, Adv. Pro. No. 13-08379, 2014 WL 3608891 (Bankr. S.D.N.Y. July 22, 2014) (same with respect to Chase Bank).

[106]*Anderson*, 884 F.3d at 389 ("Anderson has alleged that debt marked as 'charged off' rather than 'discharged' is more valuable to third-party debt buyers, who believe debtors will be compelled to pay the discharged debt in order to clear this negative item from their credit reports. This behavior is alleged to occur across a class of debtors."); *see also* 4 COLLIER ON BANKRUPTCY, ¶ 524.02 (Richard Levin & Henry J. Sommer eds., 16th ed.) ("The failure to update a credit report to show that a debt has been discharged is also a violation of the discharge injunction if shown to be an attempt to collect the debt. Because debtors often feel compelled to pay debts listed in credit reports when entering into large transactions, such a as home purchase, it should not be difficult to show that the creditor, by leaving discharged debts in the credit report, is attempting to collect the debt.").

[107]*See, e.g.*, Golden v. JP Morgan Chase (*In re* Golden), Adv. Pro. No. 17-01005 (Bankr. E.D.N.Y. 2017); Henry v. Educ. Fin. Servs. (*In re* Henry), Adv. Pro. No. 18-03154 (Bankr. S.D. Tex. 2018); Homaidan v. SLM Corporation (*In re* Homaidan), Adv. Pro. No. 17-01085 (Bankr. E.D.N.Y. 2017); Crocker v. Navient Solutions, LLC (*In re* Crocker), Adv. Pro. No. 18-20254 (Bankr. S.D. Tex. 2018).

[108]11 U.S.C. § 523(a)(8)(A)(ii).

[109]For a discussion of this argument, *see* Kara Bruce, *Recent Developments in Educational-Benefit Discharge Litigation*, 38 No. 10 BANKRUPTCY LAW LETTER NL 1 (October, 2018); Jason Iuliano, *Student Loan Bankruptcy and the Meaning of Educational Benefit*, 93 AM. BANKR. L.J. 277, 292 (2019).

[110]Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Compel Arbitration or, in

To those familiar with bankruptcy, but unfamiliar with debtor class actions, the concept of a class of debtor-plaintiffs might seem to be a jurisdictional non-starter. After all, bankruptcy relies on strong principles of centralization.[111] To that end, bankruptcy's jurisdictional framework is expansively crafted "in order that [federal courts] may handle everything that arises in a bankruptcy case."[112] As such, the idea that a group of debtors could step out of their individual case universes to bring a collective suit against a common creditor has struck some courts and commenters as "problematic and out of step with the basic concern of the bankruptcy court."[113]

Some courts have dismissed debtor class action cases on these grounds. Some conclude that the court lacks "related-to" jurisdiction over class members' claims because the claims lack a nexus to the lead debtor's estate.[114] Others conclude that § 1334(e)'s grant of exclusive jurisdiction over property of the estate prohibits any court other than a debtor's "home court" from resolving a dispute.[115]

I discuss the flaws in these approaches to debtor class actions in earlier writings.[116] To provide a brief overview, 28 U.S.C. § 1334(b) grants federal courts original but nonexclusive jurisdiction of proceedings that arise under

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the Alternative, to Dismiss, Homaidan v. Navient Solutions, LLC, Nos. 08-48275, 17-01085, 2018 WL 11211495 (Bankr. E.D.N.Y.) (January 8, 2018).

[111]*See, e.g.*, McCartney v. Integra Nat. Bank North, 106 F.3d 506, 512 (3d Cir. 1997) ("By centralizing all prebankruptcy civil claims against a debtor in the bankruptcy court, the debtor is granted a 'breathing spell' during which he is relieved of the financial pressures that drove him to bankruptcy. . . [This] permits the assets of the debtor's estate to be marshaled for distribution to creditors in an orderly and equitable fashion.").

[112]S. Rep. No. 95-989, at 153 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5939; *see also* Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In Rem Model of Bankruptcy Jurisdiction*, 15 BANKR. DEV. J. 261, 269-70 (1999).

[113]Cline v. First Nationwide Mortg. Corp. (*In re* Cline), 282 B.R. 686, 693-94 (W.D. Wash. 2002).

[114]*See, e.g.*, Knox v. Sunstar Acceptance Corp. (*In re* Knox), 237 B.R. 687, 693 (Bankr. N.D. Ill. 1999) ("[C]lass claims for monetary recovery could only benefit the class members, but could not affect the amount of property available for distribution in Knox's case and thus could not affect allocation of property among Knox's creditors."); Lenior v. GE Capital Corp. (*In re* Lenior), 231 B.R. 662, 668 (Bankr. N.D. Ill. 1999) ("This Court is not a forum for recovery of money that would not be part of the bankruptcy estate or of this Debtor."); Simmons v. Ford Motor Credit Co. (*In re* Simmons), 237 B.R. 672, 676 (Bankr. N.D. Ill. 1999) ("The only case before this court is debtor's chapter 13 proceeding. The class claims will not affect the amount of property available for distribution in debtor's case, nor will they affect the allocation of property among debtor's creditors. As a result, 'related to' jurisdiction does not support jurisdiction over the class claims alleged herein.").

[115]*See, e.g.*, Williams v. Sears, Roebuck & Co. (*In re* Williams), 244 B.R. 858, 866 (S.D. Ga. 2000) ("If the claims raised by Plaintiff on behalf of the putative members of the debtor class are 'property' of each individual debtor's bankruptcy estate, § 1334(e) prohibits this Court—or any court other than '[t]he district court in which [the] case under title 11 is commenced or pending' for that matter—from exercising jurisdiction over that property." (alterations in original)), *aff'd*, 34 F. App'x 967 (11th Cir. 2002); Guetling v. Household Fin. Servs., Inc., 312 B.R. 699, 704 (M.D. Fla. 2004) (same); *In re Cline*, 282 B.R. at 695-96 (same).

[116]*Debtor Class*, *supra* note 4.

the Bankruptcy Code, or arise in or relate to a bankruptcy case.[117] Section 1334(b) jurisdiction is tied neither to the debtor's "home" bankruptcy court nor to the underlying bankruptcy case.[118] Put another way, there is no requirement that an "arising under" or "arising in" proceeding, such as one of the debtor class action cases described above, also "relate to" a bankruptcy case currently before the court.[119] Further, "related-to" bankruptcy jurisdiction "applies generally to district courts, rather than to a particular court."[120]

"The jurisdictional statutes . . . first grant[ ] the district courts jurisdiction over bankruptcy cases and proceedings, and then authoriz[e] the district courts to refer that jurisdiction to the bankruptcy courts."[121] Accordingly, if a court has federal bankruptcy jurisdiction over debtor class claims, the matter can be referred to a federal bankruptcy judge to hear the proceeding.[122] "Which particular district or bankruptcy court should hear a matter is not a matter of jurisdiction, but rather one of venue."[123] Considering that "venue in class litigation is ordinarily determined with reference to the named parties and their claims only," venue should not pose a challenge to most debtor class actions.[124]

Courts that have dismissed debtor class actions because the class members' claims do not "relate to" the lead debtor's bankruptcy case misread § 1334(b) and are wrongly decided.[125] Moreover, while § 1334(e) provides that the court where the bankruptcy case is pending has exclusive jurisdiction of property of the estate, that rule ought not be read in a matter that trumps § 1334(b)'s text and purpose.[126] For these and other reasons discussed in my earlier article, "the jurisdictional concerns underlying debtor class actions are largely unfounded."[127]

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[117]28 U.S.C.A. § 1334(b).

[118]Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 780 & n.122 (2000).

[119]*See, e.g.*, *In re* Cano, 410 B.R. 506, 551 (Bankr. S.D. Tex. 2009) ("The jurisdictional test for bankruptcy court jurisdiction is not whether each cause of action relates to or arises in or under an individual bankruptcy case. The test is whether each cause of action relates to or arises in or under *any* bankruptcy case.").

[120]*Debtor Class*, *supra* note 4, at 55 (collecting authority).

[121]Elizabeth Warren and Jay L. Westbrook, *Class Actions for Post-Petition Wrongs: National Relief Against National Creditors*, 22 AM. BANKR. INST. J. 14 (March 2003).

[122]*See Debtor Class*, *supra* note 4, at 71-72.

[123]*Id.* at 71.

[124]*Id.* at 71-72.

[125]*Id.* at 51-56.

[126]*Id.* at 56-62.

[127]*Id.* at 73. It also bears observing that Rule 23 of the Federal Rules of Civil Procedure, which governs class actions, is incorporated into the Federal Rules of Bankruptcy Procedure. *See* FED. R. BANKR. P. 7023.

B. Arbitrating the Debtor Class

The types of agreements at issue in these debtor class action cases—credit cards, retail credit transactions, and student loans—are run-of-the-mill consumer contracts that frequently contain arbitration clauses.[128] Such clauses, as discussed above, frequently include waivers of a consumer's right to aggregate claims with other similarly situated consumers.[129] But notwithstanding the very strong messaging emanating from the Supreme Court in recent years, courts have relatively consistently refused to enforce arbitration clauses in bankruptcy class actions.[130]

Bankruptcy's forgiving approach to consumer class actions arises from the dueling federal policies underlying bankruptcy law and arbitration. Although the Supreme Court has steadfastly supported parties' rights to choose arbitration, it has acknowledged that "[l]ike any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command."[131]

Although the Bankruptcy Code does not contain an explicit command relating to arbitration, courts have long observed that the centralization principles underlying bankruptcy law are, to some extent, in tension with arbitration's pull.[132] While the principles underlying bankruptcy law "may not always conflict [with arbitration], they frequently do diverge," and courts must carefully balance them when determining which forum should handle a given matter.[133]

1. *The Prevailing Standard:* McMahon's *Inherent-Conflict Test*

For years, the prevailing test for resolving conflicts between the FAA and other federal statutes has been supplied by *Shearson/American Express, Inc. v. McMahon*.[134] There, the Court held that "[i]f Congress did 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."[135] When applying this test to cases involving the intersection of bankruptcy and arbitration, courts have generally not found any indication in the Bankruptcy Code's text or legislative history that would foreclose operation of arbitration clauses.[136] Courts have thus focused on whether arbitrating a

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[128]*See supra* Part II(A).

[129]*See supra* Part I(B).

[130]*See, e.g.*, cases cited *supra* note 98.

[131]Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987).

[132]*See infra* Part II(B)(1).

[133]*In re* McPherson, 630 B.R. 160, 167 (Bankr. D. Md. 2021).

[134]*Shearson/American Express*, 482 U.S. 220 (1987).

[135]*Id.* at 227.

[136]Continental v. Thorpe Insulation Co. (*In re* Thorpe Insulation Co.), 671 F.3d 1011, 1020 (9th Cir. 2012) (collecting cases).

matter would create an "inherent conflict" with the purpose or policies of the Bankruptcy Code.[137]

As the focus of this symposium issue makes clear, *McMahon*'s "inherent conflict" standard has proved to be difficult to apply. Although a variety of approaches have developed,[138] many courts use the distinction between "core" claims and "non-core" claims as something of a proxy for determining when bankruptcy policy should dominate.[139] If a matter is non-core, courts typically enforce the parties' agreement to arbitrate.[140] If a matter is core, most courts will take some additional steps to determine whether arbitrating the dispute would interfere with the goals of bankruptcy.[141]

Not all courts have accepted the distinction between core and non-core matters as helpful to the question of arbitrability.[142] And, of course, the dis-

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[137]Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 183, 202 (2007).

[138]A number of academic articles catalogue these approaches more extensively than this article does. *See, e.g., id.*; Julian Ellis, *A Comparative Law Approach: Enforceability of Arbitration Agreements in American Insolvency Proceedings*, 92 AM. BANKR. L. J. 141 (2018); André Albertini, *Arbitration in Bankruptcy: Which Way Forward?*, 90 AM. BANKR. L. J. 599 (2016); Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503, 541 (2009); Robert M. Lawless, *Core and Not-So-Core Rhetoric About the Intersection of Arbitration and Bankruptcy*, 28 No. 7 BANKR. L. LTR 1 (2008); Fred Neufeld, *Enforcement of Contractual Arbitration Agreements Under The Bankruptcy Code*, 65 AM. BANKR. L. J. 141 (1991).

[139]*See* Resnick, *supra* note 137, at 205-06. "Core" and "non-core" are jurisdictional terms used to describe Article I bankruptcy judges' authority to enter final judgments. *See* Stern v. Marshall, 564 U.S. 462, 473-74 (2011). "Core" bankruptcy proceedings are considered to be matters of substantive bankruptcy law, matters which would only come to light in a bankruptcy case. "Non-core" proceedings are proceedings that could have been brought in a state or federal court if the bankruptcy petition had not been filed. Cont'l Nat'l Bank v. Sanchez (*In re* Toledo), 170 F.3d 1340, 1348-49 (11th Cir. 1999); Wood v. Wood (*In re* Wood), 825 F.2d 90, 97 (5th Cir. 1987).

[140]*See, e.g.*, Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1161 (3d Cir. 1989) (finding arbitration of non-core adversary claims would not "seriously jeopardize the objectives of the code," and that the court did not have the discretion to refuse to compel arbitration); *see also* Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc. (*In re* Elec. Mach. Enters., Inc.), 479 F.3d 791, 796 (11th Cir. 2007) (citing Hays & Co. v. Merrill Lynch, Pierce, Fenner, & Smith, 885 F.2d 1149, 1556-57 (3d Cir. 1989)); *In re* Crysen/Montenay Energy Co., 226 F.3d 160, 165-66 (2d Cir. 2000) (same); Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (*In re* Nat'l Gypsum Co.), 118 F.3d 1056, 1066 (1997) (holding that the *Hays* court's approach to non-core matters makes "eminent sense" and has been "universally accepted"); *but see* Henderson v. Legal Helpers Debt Resolution, L.L.C. (*In re* Huffman), 486 B.R. 343, 358 (Bankr. S.D. Miss. 2013) ("The Fifth Circuit . . . has not foreclosed the possibility . . . that a bankruptcy court could deny arbitration of a noncore proceeding if the opposing party could show it would cause an inherent conflict of interest with the Bankruptcy Code."); AmeriCorp, Inc. v. Hamm, No. 2:11-CV-677, 2012 WL 1392927, at *5 (M.D. Ala. Apr. 23, 2012) ("Although classified as a non-core proceeding, the unique set of facts presented in this case, when considered in the aggregate, compel the Court to the conclusion that arbitration of this dispute would seriously disturb the objectives of the Chapter 7 bankruptcy."); Ellis, *supra* note 138 at 171 ("[P]arties should at least be cautious of assuming non-core claims are arbitrable on their face").

[141]*See infra* notes 146-156 and accompanying text.

[142]*See, e.g.*, Mintze v. Am. Gen. Fin. Servs. (*In re* Mintze), 434 F.3d 222, 229 (3d Cir. 2006) ("The core/non-core distinction does not . . . affect whether a bankruptcy court has the discretion to deny

tinction between core and non-core matters has blurred following the Supreme Court's 2011 ruling in *Stern v. Marshall*.[143] After *Stern*, some courts have begun the *McMahon* analysis by distinguishing between "constitutionally" core and non-core claims, thereby treating *Stern*-style claims as non-core.[144] Other courts have relied less heavily on the core/non-core distinction when applying the inherent conflict test after *Stern*.[145]

If courts identify the matter as "core" (or abandon the core/non-core opening gambit entirely), they then question whether arbitrating a matter would conflict with the purposes underlying the Bankruptcy Code. A variety of tests have developed to answer this question. In the Third and Fifth Circuits, for example, courts will typically refuse to enforce pre-dispute agreements to arbitrate over rights that derive from the Bankruptcy Code.[146] If the claim is based on a Bankruptcy Code provision, "the importance of the federal bankruptcy forum provided by the Code is at its zenith," and the bankruptcy court has "significant discretion to assess whether arbitration would be consistent with the purpose of the [Bankruptcy] Code."[147] The Fifth Circuit frames this inquiry as a two-part test: whether "the underlying nature of a proceeding derives exclusively from the provisions of the Bankruptcy Code" and whether "arbitration of the proceeding conflicts with the purpose of the Code."[148]

The Second, Fourth, and Ninth Circuits have looked more broadly and generally to whether the substance of the dispute mandates resolution in the bankruptcy arena.[149] For example, the Second Circuit requires a balancing of

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enforcement of an arbitration agreement."); *Nat'l Gypsum*, 118 F.3d at 1067 ("[W]e refuse to find such an inherent conflict based solely on the jurisdictional nature of a bankruptcy proceeding. . . We believe that nonenforcement of an otherwise applicable arbitration provision turns on the underlying nature of the proceeding . . . .").

[143]564 U.S. 462, 473-74 (2011) (holding that some matters falling within the bankruptcy court's core jurisdiction were not within the court's constitutional authority to resolve to final judgment).

[144]*See, e.g.*, Edwards v. Vanderbilt Mortg. & Fin., Inc. (*In re* Edwards), No. 13-02217, 2013 WL 5718565, at *2 (Bankr. E.D.N.C. Oct. 21, 2013) (finding that when a matter is unconstitutionally core, "the arbitration agreement should control").

[145]*See, e.g.*, Trinity Commc'ns LLC v. Momentum Commc'ns. (*In re* Trinity Commc'ns, LLC), No. 09-13154, 2012 WL 1067673, at *14 (Bankr. E.D. Tenn. Mar. 14, 2012) ("Although the parties spend considerable effort debating whether the issues raised by the parties are core or non-core . . . the court finds it more productive to follow the lead of other courts . . . and conclude that the core/non-core distinction is not dispositive.").

[146]*See, e.g.*, *Nat'l Gypsum*, 118 F.3d at 1067-69; *In re* Gandy, 299 F.3d 489, 495 (5th Cir. 2002); Mintze v. Am. Gen. Fin. Servs., Inc. (*In re* Mintze), 434 F.3d 222, 226 (3d Cir. 2006).

[147]*Nat'l Gypsum*, 118 F.3d at 1068-69; *see also Gandy*, 299 F.3d at 498 (applying the *National Gypsum* standard to uphold the bankruptcy court's decision to deny arbitration in case where bankruptcy issues predominated and their resolution "implicates matters central to the purposes and policies of the Bankruptcy Code"); *Mintze*, 434 F.3d at 231-32 ("With no bankruptcy issue to be decided by the Bankruptcy Court, we cannot find an inherent conflict.").

[148]*Gandy*, 299 F.3d at 495.

[149]*See In re* Thorpe Insulation Co., 671 F.3d 1011 (9th Cir. 2012); MBNA Am. Bank v. Hill, 436 F.3d

policies to determine whether a matter is "'substantially' core or truly a function of the bankruptcy process."[150] Factors that have been relevant to this question include bankruptcy's centralization policies,[151] avoiding piecemeal litigation,[152] the impact of the arbitration on other claimants[153] or the reorganization process,[154] whether the matter is central to bankruptcy's goals,[155] and whether arbitrators are suited to resolve the matters.[156]

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104 (2d Cir. 2006); Phillips v. Congleton, L.L.C. (*In re* White Mountain Mining Co.), 403 F.3d 164, 169 (4th Cir. 2005); *In re* U.S. Lines, Inc., 197 F.3d 631, 640-41 (2d Cir. 1999); *see also* Anderson v. Credit One Bank, N.A. (*In re* Anderson), 884 F.3d 382 (2d Cir. 2018), (applying *U.S. Lines* and *Hill*).

[150]*In re* Hostess Brands, Inc., No. 12-22052, 2013 WL 82914, at *3 (Bankr. S.D.N.Y. Jan. 7, 2013).

[151]*See, e.g.*, Phillips v. Congleton, L.L.C. (*In re* White Mountain Mining Co.), 403 F.3d at 170 (emphasizing bankruptcy's jurisdictional pull when deciding that the bankruptcy court should determine whether pre-petition cash advances were debt or equity).

[152]*See, e.g.*, *In re Thorpe Insulation Co.*, 671 F.3d at 1023 ("Arbitration of a creditor's claim against a debtor, even if conducted expeditiously, prevents the coordinated resolution of debtor-creditor rights and can delay confirmation of a plan of reorganization."); *In re U.S. Lines*, 197 F.3d at 641 ("[T]he bankruptcy court is the preferable venue in which to handle mass tort actions involving claims against an insolvent debtor.").

[153]*See, e.g.*, *Hill*, 436 F.3d at 110 (holding that claims for violation of the automatic stay could be arbitrated because the estate had been fully administered and the debtor had received a discharge from chapter 7); *see also* Sternklar v. Heritage Auction Galleries, Inc. (*In re* Rarities Grp., Inc.), 434 B.R. 1, 11 (D. Mass. 2010) (permitting arbitration of fraudulent transfer claim and noting that "[t]here do not appear to be any other creditors or third parties in these proceedings whose interests might be affected if the claims are resolved by arbitration"); Martin v. Citifinancial (*In re* Martin), 387 B.R. 307, 322 (Bankr. S.D. Ga. 2007) (finding an inherent conflict because the debtor's chapter 13 plan was "entirely contingent" on whether the claim at issue was secured or unsecured and the case was "dead in the water" until that issue was resolved).

[154]*In re White Mountain Mining Co.*, 403 F.3d at 170 (lower court finding that international arbitration would make it difficult for the debtor to obtain funding, undermine creditor confidence in the reorganization, affect the debtor's business relationships, and add unnecessary costs and distractions was not clearly erroneous); Ford Motor Cred. Co. v. Roberson, No. 10-1041, 2010 WL 4286077, at *3 (D. Md. Oct. 29, 2010) (concluding that because the outcome of the proceeding will affect the debtor's resources available to pay her debts, "[a]rbitration of the claims against Ford would 'substantially interfere with [her] efforts to reorganize' efficiently" (quoting *In re White Mountain Mining Co.*, 403 F.3d at 170)).

[155]*In re Thorpe Insulation Co.*, 671 F.3d at 1022 (finding congressional intent that the bankruptcy court manage all aspects of a § 524(g) reorganization); Ackerman v. Eber (*In re* Eber), 687 F.3d 1123, 1130-31 (9th Cir. 2012) ("[A]llowing an arbitrator to decide issues that are so closely intertwined with dischargeability would 'conflict with the underlying purposes of the Bankruptcy Code.'"); Henderson v. Legal Helpers Debt Resol., L.L.C. (*In re* Huffman), 486 B.R. 343, 363 (Bankr. S.D. Miss. 2013) (highlighting that "Congress clearly contemplated the regulation of debt relief agencies . . . through the [Bankruptcy Abuse Prevention and Consumer Protection Act]" and refusing to compel arbitration of related matters); *In re* Hostess Brands, Inc., No. 12-22052, 2013 WL 82914, at *3-4 (Bankr. S.D.N.Y. Jan. 7, 2013) (finding cash collateral issues to be unique to bankruptcy and invoking substantial bankruptcy rights that are central to the bankruptcy process); Arentson v. A.G. Edwards & Sons, Inc. (*In re* Arentson), 126 B.R. 236, 238 (Bankr. N.D. Miss. 1991) ("[T]his cause of action is exclusively related to a bankruptcy statute, 11 U.S.C. § 525(b), which provides an avenue of redress for discrimination solely because an individual has filed for bankruptcy relief. It is a cause of action that literally begs for resolution in a bankruptcy forum.").

[156]*See, e.g.*, *In re* Hermoyian, 435 B.R. 456, 465 (Bankr. E.D. Mich. 2010) ("[D]ischargeability and other issues relating to the 'fresh start' [should be] determined in one forum with particularized expertise to do so." (quoting Holland v. Zimmerman (*In re* Zimmerman), 341 B.R. 77, 79-80 (Bankr. N.D. Ga. 2006)); *In re* Oakwood Homes Corp., No. 02-13396, 2005 WL 670310, at *5 (Bankr. D. Del. Mar. 18, 2005)

As the foregoing description might illustrate, there are few clear guideposts restricting application of the *McMahon* analysis to a given dispute. This reality can lead to extensive litigation surrounding arbitrability.[157] What is more, a variety of additional factors can further complicate the question of arbitrability. First, the sweeping declarations supporting the FAA in recent Supreme Court cases like *Epic Systems* have caused some litigants to argue that the *McMahon* test has been displaced by a more exacting standard.[158] Most courts, however, observe that the Court does not typically replace precedent sub silentio, and do not construe these cases so broadly.[159]

Second, a bankruptcy dispute might comprise multiple claims, only some of which present an inherent conflict. In these cases, courts must decide

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("[C]ertain fact situations may be expected to bring about fairly consistent results, wherever they are tried. To subject these matters to arbitration, before individuals or tribunals with little or no experience in bankruptcy law or practice, and with little or no concern for the rights and interests of the body of creditors, of which the particular defendant is only one, would introduce variables into the equation which could potentially bring about totally inconsistent results."); *In re Eber*, 687 F.3d at 1131 (noting that the bankruptcy court has "special expertise" to determine dischargeability and familiarity with the case at hand); *In re Huffman*, 486 B.R. at 364 ("Of most concern to the Court is that arbitrators on the roster of the American Arbitration Association ("AAA") need not be attorneys, much less attorneys experienced in bankruptcy law. . . . Here, the Court finds that arbitration is not an adequate and accessible substitute to litigation in this forum, given the nature of the bankruptcy issues involved."); AmeriCorp, Inc. v. Hamm, No. 2:11-cv-677, 2012 WL 1392927, at *5 (M.D. Ala. Apr. 23, 2012) (refusing to compel arbitration of non-core proceedings based on a fear that the defendant would have an unfair advantage in arbitration); *In re Arentson*, 126 B.R. at 238 (expressing concern that the New York Stock Exchange and the National Association of Securities Dealers, who presided over the arbitration, would not view the matter to be high priority and that the plaintiff may not have the means to fairly compete with the defendant).

[157]Kirgis, *supra* note 138, at 520 ("[t]he various tests are so vague and malleable that they give courts license to do almost anything they want.").

[158]For example, the Court's decision in *Compucredit Corp. v. Greenwood* took a textualist approach to the intersection of the FAA and the Credit Repair Organization Act. 565 U.S. 95, 104 (2012) ("Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms."). More recently, in *Epic Systems v. Lewis*, the Court noted that it has rejected every attempt to find an inherent conflict between the FAA and a competing federal statute, and stated that "the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act." 138 S. Ct. 1612, 1627 (2018). Following both of these cases, litigants argued, and some courts accepted, that *McMahon*'s inherent conflict test had been supplanted by a strict textual reading. *See, e.g.*, Blackburn v. Capital Transaction Grp., Inc., No. 2:13-CV-98, 2014 WL 923316, at *4 (E.D. Tenn. Mar. 10, 2014) (citing *Compucredit Corp.*); Jackson Kennedy, *The Fall of* McMahon*?: Assessing the Survival of the* McMahon *Test For Arbitrability in Core Bankruptcy Proceedings After* Epic Systems Corp. v. Lewis, 40 REV. LIT. 89 (2020) (collecting examples of litigants arguing that *Epic* displaces *McMahon* in the bankruptcy context).

[159]The Fifth Circuit, for example, has noted a difference in "tone" between the opinions, but determined that the test articulated by *Epic* is "substantially the same" as *McMahon*. *Matter of* Henry, 944 F.3d 587, 592 (5th Cir. 2019) (per curiam). Agreeing with the Fifth Circuit, the Second Circuit has interpreted *Epic Systems* as creating a sort of tiebreaker when applying the *McMahon* factors: "where two of *McMahon*'s factors clash, a court should resolve the dispute in favor of the statutory text and any contextual clues derived therefrom." Belton v. GE Cap. Retail Bank (*In re* Belton), 961 F.3d 612, 616 (2d Cir. 2020), *cert. denied sub nom.*, GE Cap. Retail Bank v. Belton, 141 S. Ct. 1513 (2021).

whether to bifurcate the cause of action and send some of the claims to arbitration.[160] Lurking below these difficult interpretive questions is the existential concern: when (if ever) will the Supreme Court grant certiorari on the arbitrability of bankruptcy matters?[161] And, if certiorari is granted, to what extent will bankruptcy's arbitration exceptionalism remain in place? In the last five years, the Court has twice denied certiorari over the intersection of bankruptcy and arbitration, a pattern that seems distinct from the Court's enthusiastic interest in deciding FAA cases in other contexts.[162] It remains to be seen whether this signals some degree of bankruptcy exceptionalism in arbitration, or simply that the proper vehicle has not arrived at the Court.[163]

2. *Applying* McMahon *to Debtor Class Actions*

It is difficult to draw generalizations about how *McMahon* applies to debtor class action cases because, as discussed above, *McMahon*'s analysis depends on the individual claims asserted by the plaintiffs. Not only that, but the "malleability" of the inherent-conflict inquiry makes outcomes in any case difficult to predict. Nevertheless, it is worth noting that many of the debtor class action cases introduced above are premised on "core" or "bankruptcy-derived" claims, which under most standards make them strong candidates for avoiding arbitration.[164] Finding an inherent conflict in these contexts means that the class action waiver in an underlying arbitration agreement will not be given effect. In many cases, a settlement soon follows.[165]

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[160]For a discussion of this issue, *see In re* McPherson, 630 B.R. 160, 176 (Bankr. D. Md. 2021); *see also* Robert M. Lawless, *Forget the Core: Reframing Arbitration & Bankruptcy*, 96 AM. BANKR. L. J. 701 (2022) (discussing the Supreme Court's response to the "intertwining" doctrine).

[161]*See, e.g.*, McKenzie, supra note 15 (discussing the Court's decision not to grant certiorari on the intersection of bankruptcy and arbitration to date and questioning whether bankruptcy's procedural foundation makes it distinct from other contexts in which an inherent conflict has not been found). Other papers in this symposium series suggest that the bankruptcy system is distinct and that many bankruptcy matters are not amenable to resolution in arbitration. *See* Lawless, *supra* note 160 (arguing that parties cannot, through pre-dispute arbitration clauses, contract out of bankruptcy's collective resolution process, and setting forth a framework for assessing which matters are arbitrable and which are not); Anthony Casey & Joshua C. Macey, *The Bankruptcy Tribunal*, 96 AM. BANKR. L. J. 749, 758 (2022) ("Because bankruptcy's minimum purpose is about coordination, the consolidation of decisions before one tribunal is of central importance. That includes the resolution of disputes as they arise as well as that subsequent proceedings with regard to that resolution. Using pre-filing arbitration agreements to allow a new tribunal to determine the validity and scope of the bankruptcy tribunal's judgments undermines that centralized coordination significantly. A creditor should not be allowed to arbitrate its post-petition attempts to collect pre-petition debt.") (footnote omitted).

[162]*See* GE Cap. Retail Bank v. Belton, 141 S. Ct. 1513 (2021) (*cert. denied*); Credit One Bank, N.A. v. Anderson, 139 S. Ct. 144 (2018) (same).

[163]*See* McKenzie, *supra* note 15 (discussing these cases and considering possible reasons for the Court's decision not to grant *certiorari*).

[164]*Vindicating*, *supra* note 4, at 471-79 (discussing application of *McMahon* to debtor class actions in more depth).

[165]*See, e.g.*, Golden v. Discover Bank (*In re* Golden), 630 B.R. 896, 922 (Bankr. E.D.N.Y. 2021) (collecting a list of nationwide settlements issued in debtor class action cases within the Second Circuit in recent

Consider, for example, the numbers of class action cases filed that challenge mortgage servicers' policies and practices surrounding proofs of claim.[166] Disputes based on allegations that proofs of claim are inaccurate, contain unlawful fees, or fail to include necessary documentation, and allegations that lenders misapplied plan payments or assessed hidden fees for post-discharge collection,[167] all fall firmly within the confines of "core" jurisdiction and derive from the Bankruptcy Code. These types of claims also invoke some of the most foundational aspects of the bankruptcy case: balancing the relative rights of competing claimants to a debtor's estate, administering a chapter 13 plan, and ensuring the integrity of a debtor's fresh start. Even considering the unpredictability of the inherent-conflict test, it is difficult to imagine courts finding such matters appropriate for arbitration, no matter what brand of *McMahon* they apply.[168] All of this presumes, of course, that *McMahon* remains the operative standard. If a court (or *the* Court) concludes that a clear and manifest intent to displace the FAA is the operative standard in bankruptcy, then any and all types of proceedings are potentially subject to arbitration.[169]

Class actions that allege discharge violations present a particularly strong inherent conflict under *McMahon*, due to the nature of relief sought. Section 524(a) of the Code provides that a discharge in bankruptcy "operates as an injunction" against the continued enforcement of those debts.[170] The Code does not contain an express private right of action for enforcing the discharge; instead, violations of the discharge injunction typically give rise to an order of civil contempt.[171] Because "contempt is an affront to the court issuing the order,"[172] many courts (including the Courts of Appeals for both the Second and Fifth Circuits) have been unwilling to enforce pre-dispute arbitration agreements with respect to discharge-violation cases.[173]

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years). Many of the settlements cited were in cases that generated published decisions on the arbitrability of debtor class claims.

[166]*See supra* note 100 (discussing these cases).

[167]*Vindicating*, *supra* note 4, at 471-72 (collecting cases).

[168]*See, e.g.*, Midland Funding LLC v. Thomas, 606 B.R. 687, 694 (W.D. Va. 2019) (affirming the refusal to arbitrate violations of Bankruptcy Rule 3001).

[169]*See, e.g.*, Trevino v. Select Portfolio Servicing (*In re* Trevino), 599 B.R. 526, 549 (Bankr. S.D. Tex. 2019) (holding that arbitrating a discharge violation would not conflict with the Code and noting that "in light of the Supreme Court's Epic decision, a party must do more than simply show that referring a matter to arbitration would conflict with the purposes of the Bankruptcy Code").

[170]11 U.S.C. § 524(a)(2)-(3).

[171]Cox v. Zale Del., Inc., 239 F.3d 910, 916 (7th Cir. 2001) (suit for violation of § 524 may be brought as a contempt action).

[172]Waffenschmidt v. MacKay, 763 F.2d 711, 716 (5th Cir. 1985).

[173]Belton v. GE Cap. Retail Bank, 961 F.3d 612, 616-17 (2d Cir. 2020), *cert. denied sub nom.* GE Cap. Retail Bank v. Belton, 141 S. Ct. 1513 (2021) ("[T]he only court that may offer a contempt remedy is the court that issued the discharge order – the bankruptcy court."); Anderson v. Credit One Bank (*In re* Anderson), 884 F.3d 382, 391 (2d Cir. 2018) ("[T]he discharge injunction is an order issued by the

But observe the potential tension embedded in this analysis: when applying the *McMahon* test, courts often refuse to enforce arbitration clauses when they determine that these matters should be resolved in the context of a debtor's bankruptcy case or by the judge presiding over the case. But debtor class actions, by definition, are aggregated separate and apart from debtors' bankruptcy cases. Some courts have found it difficult to reconcile the rationale for avoiding arbitration with plaintiffs' attempts to maintain a class action.[174]

Nowhere is this tension more pronounced than in the discharge injunction cases. As noted above, courts tend to refuse to compel arbitration of discharge violations based on the principle that the court that issued the order triggering § 524's injunction has the singular authority to enforce its violation.[175] With that decisional backdrop, it is difficult to see how a bankruptcy judge could then adjudicate discharge violations for a nationwide class of debtors, or even on behalf of the judge across the hall.

This point was made overtly, albeit in dicta, by the Second Circuit in *In*

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bankruptcy court and that the bankruptcy court alone possesses the power and unique expertise to enforce it."); Matter of Henry, 944 F.3d 587, 591 (5th Cir. 2019) (per curiam) ("An action to enforce such a right implicates an important bankruptcy policy, the ability of a bankruptcy court to enforce its own orders, such that requiring arbitration "would be inconsistent with the Bankruptcy Code.") (quotation omitted); *but see In re Trevino*, 599 B.R. at 549 (holding that after *Epic*, discharge violations can be sent to arbitration).

[174]Indeed, at least two courts have determined that the class-action nature of a case weighs *in favor of* arbitration. *See, e.g.*, MBNA America Bank, N.A. v. Hill, 436 F.3d 104, 109 (2d Cir. 2006); Williams v. Navient Sol. LLC, (*In re* Williams), 564 B.R. 770, 783 (Bankr. S.D. Fla. 2017) (noting "[t]he fact that the Plaintiff brought her section 523(a)(8) and section 524(a)(2) claims on behalf of a putative class weighs in favor of compelling arbitration"). Most notably, in *MBNA Bank v. Hill*, the Second Circuit held that a claim that a creditor violated the automatic stay could be sent to arbitration because the debtor's estate had been fully administered, resolution of her claim would not affect other creditors of the estate, and the debtor was no longer under the protection of the automatic stay. 436 F.3d at 109. The court then added, "as a purported class action, Hill's claims lack the direct connection to her own bankruptcy case that would weigh in favor of refusing to compel arbitration." *Id. Hill*'s evaluation of the class-action nature of the proceedings ought not gain traction, for a few reasons. First, the *McMahon* test resolves conflicts between bankruptcy *law* and arbitration, not conflicts between a bankruptcy *debtor* and her individual case. *Hill*'s effort to find a connection between the class action claims and the debtor's bankruptcy *case* tracks with some of the jurisdictional objections to debtor class actions, which I discredit in Part II(A), above. Second, although *Hill* has not been overruled, the Second Circuit has confined this dimension of *Hill*'s reasoning to the unique facts of that case. *See* Anderson v. Credit One Bank (*In re* Anderson), 884 F.3d 382, 391 (2d Cir. 2018) (distinguishing *Hill*). In two recently decided cases, the Second Circuit refused to compel arbitration of debtor class action cases under the inherent-conflict standard. *Id.*; Belton v. GE Cap. Retail Bank (*In re* Belton), 961 F.3d 612, 614 (2d Cir. 2020), *cert. denied sub nom.* GE Cap. Retail Bank v. Belton, 141 S. Ct. 1513 (2021). Thus, even within the Second Circuit, the fact that an action is advanced on behalf of a class should not weigh in favor of a decision to compel arbitration. And finally, the inherent-conflict test captures considerations far broader than principles of centralization. As such, it is not necessarily inconsistent to find a matter non-arbitrable, but also susceptible to aggregation within the bankruptcy system. *See Vindicating*, *supra* note 4.

[175]*See, e.g.*, cases cited *supra* in note 173.

re Belton.[176] There, the court denied arbitration of a debtor class action proceeding involving discharge violations. After determining that a complaint for violation of the discharge was not subject to arbitration "because contempt proceedings involve considerations that the issuing court is uniquely positioned to assess," the court noted that this finding was "anathema" to the concept that one bankruptcy court could adjudicate compliance with another court's discharge order in a nationwide class action case.[177] As Troy McKenzie aptly describes, arguments to avoid arbitration based on contempt may place litigants "out of the frying pan of the FAA but into the fire of a potentially uncertifiable class."[178] The final Part of this Article confronts this tension underlying class actions and discusses remedial implications.

III. THE DOUBLE-EDGED SWORD OF THE DISCHARGE CLASS ACTION

The previous Part explored how application of *McMahon*'s inherent conflict test in bankruptcy has limited the effectiveness of class action waivers in consumer arbitration agreements. It also observed how this outcome may stand in some tension with efforts to advance a discharge-enforcement case as a nationwide class action. This Part considers whether, and how, this tension can be reconciled.

Answering this question requires courts to engage deeply with the nature and scope of their contempt authority, a matter that is both complex and expensive to litigate. Considering the centrality of the discharge to bankruptcy's fresh start policy, a clearer path to remedy widespread discharge violations ought to be available. This Part concludes by making the case for legislative reform of the discharge injunction in a manner that facilitates class action treatment. This Part also suggests non-legislative alternatives to support nationwide aggregation for discharge enforcement.

A. Can Discharge Enforcement Claims Be Aggregated?

Considering whether discharge-violation claims can be heard in a class action setting is a difficult question, and court decisions on the topic fall all over the map. Some courts reject nationwide class actions for discharge violations out of hand as beyond the court's contempt authority.[179] Others, ob-

[176]*Belton*, 961 F.3d at 617.

[177]*Id.*

[178]McKenzie, *supra* note 15, at 8.

[179]*See, e.g.*, *In re* Death Row Records, Inc., No. 10-02574, 2012 WL 952292, at *12 (B.A.P. 9th Cir. Mar. 21, 2012) (bankruptcy court had jurisdiction over a nationwide class for claims except for claims punishable by contempt); Guetling v. Household Financial Servs., Inc., 312 B.R. 699, 704 (M.D. Fla. 2004) ("To the extent those alleged out-of-district class members have claims arising from their bankruptcy proceedings in other districts, those districts are the proper locations to bring those claims or to potentially pursue actions for contempt of any court orders."); Barrett v. Avco Fin. Servs. Mgmt. Co., 292 B.R.

serving that the discharge is a matter of statute, with identical rubber-stamped orders issuing from every bankruptcy court across the nation, are not so limited.[180] Courts and commenters have found a variety of alternative decisional pathways—implied private rights of action, overlapping state or federal claims, and the like—to reconcile this tension.[181] Rather than profile all the various approaches to this difficult issue, as I have done in earlier works,[182] this section instead draws from the cases to distill the underlying analysis to a few guiding principles.

1. *Principle 1: There are No Jurisdictional or Statutory Impediments to Aggregate, Out-of-District Enforcement of the Discharge*

The first principle is that nothing within bankruptcy's jurisdictional scheme, or the Bankruptcy Code or procedural rules more broadly, should be read to prohibit a nationwide class action to enforce the discharge.

Federal courts have "arising under" jurisdiction of adversary proceedings to enforce the discharge pursuant to § 1334(b) of the Code. The jurisdictional framework does not limit enforcement of the discharge to a particular court.[183] Rather, "[a]ll district courts are empowered by the statute to hear cases" within the scope of federal bankruptcy jurisdiction.[184]

Litigants look to *Alderwoods Group, Inc. v. Garcia*, a case decided by the Court of Appeals for the Eleventh Circuit, for the principle that the issuing-

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1, 8 (D. Mass. 2003) ("The court believes that it lacks jurisdiction over the claims of putative class members whose bankruptcies were discharged outside the District of Massachusetts."); Singleton v. Wells Fargo Bank (*In re* Singleton), 284 B.R. 322, 325 (D.R.I. 2002) ("Subject matter jurisdiction in this case is determined by the . . . legal principle that only persons subject to a court's authority may be found in contempt by that court.") (citation omitted); Williams v. Sears, Roebuck & Co., 244 B.R. 858, 867 (S.D. Ga. 2000), *aff'd*, 34 F. App'x 967 (11th Cir. 2002) ("The Court . . . has no jurisdiction to grant declaratory relief for members of the putative class unless the specific discharge injunction . . . was entered by the Southern District of Georgia."); Montano v. First Light Fed. Credit Union (*In re* Montano), Nos. 7-04-17866, 7-1026 , 2007 WL 2688606, at *2 (Bankr. D.N.M. Sept. 10, 2007) ("As a general rule, only the court that issues the disobeyed order or injunction has jurisdiction to hold a violator in contempt.") (citation omitted); Nelson v. Providian Nat'l Bank (*In re* Nelson), 234 B.R. 528, 534 (Bankr. M.D. Fla. 1999) ("[T]he bankruptcy court has no jurisdiction to entertain a private cause of action for damages by debtors who obtained their discharge in a court other than this one.").

[180]Bessette v. Avco Fin. Servs., Inc., 230 F.3d 439, 446 (1st Cir. 2000), *amended on denial of reh'g* (Dec. 15, 2000) ("Appellant seeks enforcement of the statutory injunction . . . not one individually crafted by the bankruptcy judge, in which that judge's insights and thought processes may be of particular significance. Thus, few of the practical reasons for confining contempt proceedings to the issuing tribunal apply here."); Walls v. Wells Fargo Bank, N.A. (*In re* Walls), 262 B.R. 519, 528 (Bankr. E.D. Cal. 2001) ("The [automatic stay and discharge] injunctions . . . are Code created, statutory injunctions. . .. Their extent does not depend on individual orders for injunctive relief fashioned by individual bankruptcy judges.").

[181]*See, e.g.*, *Aggregating Discharge Claims*, *supra* note 4; Ralph Brubaker, *Implied Private Right of Action, Contempt, Preemption, Rescission, Restitution? Determining the Appropriate Remedy for Improper Reaffirmation Conduct*, 21 No. 9 BANKRUPTCY LAW LETTER NL 8 (February 2001).

[182]*See Debtor Class*, *supra* note 4; *Aggregating Discharge Claims*, *supra* note 4.

[183]*See supra* Part II(A).

[184]*Debtor Class*, *supra* note 4, at 71.

court limitation is a jurisdictional bar to out-of-district enforcement.[185] But that case analyzed enforcement of the discharge exclusively under § 1334(e) of the Code, which grants courts exclusive jurisdiction of property of the estate.[186] *Alderwoods* did not engage with courts' jurisdictional grant over proceedings under § 1334(b). As I explore elsewhere, such a capacious reading of § 1334(e) can swallow other dimensions of the jurisdictional framework, including § 1334(b) and bankruptcy's abstention, venue, and removal provisions.[187] As such, most courts have held that § 1334(e) should apply only to matters that directly involve property of the debtor or the estate, and not as a restriction on courts' jurisdiction to address other Code violations.[188] Here, because the discharge-violation claims do not implicate estate property, reliance on § 1334(e) is misplaced.

Instead of presenting a jurisdictional bar, the issuing-court limitation on discharge enforcement emanates from a respect for judicial process. Courts have characterized the limitation as both a prudential doctrine and a matter of comity.[189] The second principle, discussed below, considers what weight such considerations should carry in this analysis.

Beyond the jurisdictional question, nothing within the Bankruptcy Code or Federal Rules of Bankruptcy Procedure limits enforcement of the discharge solely to the court that issued the order of discharge. Rather, Federal Rule of Bankruptcy Procedure 4004(f) provides a mechanism by which debtors can register their discharge in a foreign court and, when registered, the discharge can be enforced by the non-issuing court.[190]

The most pointed statutory or procedural challenge to all of this appears in *In re Crocker*, a recent decision from the Court of Appeals for the Fifth

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[185]682 F.3d 958, 971 (11th Cir. 2012) ("As the court that controlled the rest of Debtors' estate, the Delaware Bankruptcy Court retained jurisdiction to effectuate and enforce the discharge injunction . . . . [T]he Florida Bankruptcy Court lacked jurisdiction to entertain the complaint because the discharge injunction was never its to enforce.").

[186]11 U.S.C. § 1334(e).

[187]*Debtor Class*, *supra* note 4, at 62.

[188]Noletto v. Nationsbanc Mortg. Corp. (*In re* Noletto), 244 B.R. 845, 852-54 (Bankr. S.D. Ala. 2000). *See also* W.F. Blachy v. Butcher, 221 F.3d 896, 909 (6th Cir. 2000) (agreeing with *In re* Noletto that §1334(e) should be read narrowly to avoid conflict with other bankruptcy provisions and concluding that a bankruptcy court may share jurisdiction with another court); Lee v. Miller, 263 B.R. 757, 761 (S.D. Miss. 2001) ("[T]his court is not persuaded that the strictures of §1334(e) preclude abstention and remand; rather, this court is convinced that §1334(e) must be appropriately construed in consonance with the other bankruptcy venue provisions.").

[189]*See, e.g.*, Gray v. Petoseed Co., 985 F. Supp. 625, 631 (D.S.C. 1996), *aff'd*, 129 F.3d 1259 (4th Cir. 1997) ("[T]he Court now concludes that principles of comity and the orderly administration of justice, rather than lack of subject-matter jurisdiction, require the Court to decline to hear the compensatory contempt claims."); *see also In re* Crocker, 941 F.3d 206, 216 (5th Cir. 2019), *as revised* (Oct. 22, 2019) (declining to follow *Alderwoods*).

[190]*See* FED. R. CIV. P. 4004(f).

Circuit.[191] There, the Fifth Circuit held—incorrectly, in this author's view—that the revision history of § 524 and related procedural rules evidenced congressional intent to preclude enforcement of a discharge by a foreign court.[192]

Crocker's historical analysis proceeded as follows: First, when the statutory discharge injunction was initially crafted as part of the Dischargeability Amendments in 1970, both the statute and the Federal Rules of Bankruptcy Procedure provided that an order of discharge could be registered in another district.[193] "[W]hen so registered," such order would have "the same effect as an order of the bankruptcy court of the district where registered *and may be enforced in like manner.*"[194] When the 1978 Code was enacted less than a decade later, the quoted language was not included in the text of § 524.[195]

The court acknowledged that a procedure for registering an order of discharge has consistently remained in the Federal Rules of Bankruptcy Procedure through these reforms and until today. The modern version of 4004(f) provides, for example, that:

> An order of discharge that has become final may be registered in any other district by filing a certified copy of the order in the office of the clerk of that district. When so registered the order of discharge shall have the same effect as an order of the court of the district where registered.[196]

But the *Crocker* court made much of the fact that the Bankruptcy Rules after 1978 omitted the phrase "enforced in like manner."[197] The court surmised that Congress's choice to exclude the out-of-district enforcement language from the text of § 524, together with the omission of the "enforced in like manner" clause from the registration procedure in the Bankruptcy Rules, indicates legislative intent that enforcement by a foreign court is prohibited.[198]

The process for registering a discharge was never a substantive element of the law, but rather a procedural device designed "'merely to supplement and effectuate . . . the enjoining feature' of the discharge order."[199] As such, its removal from the body of the statute (particularly when it consistently

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[191]941 F.3d 206, 212 (5th Cir. 2019), *as revised* (Oct. 22, 2019).

[192]*Id.* at 213.

[193]*Id.* at 212.

[194]*Id.* at 213 (emphasis added).

[195]*Id.*

[196]FED. R. BANKR. P. 4004(f).

[197]*Crocker*, 941 F.3d at 213.

[198]*Id.*

[199]Vern Countryman, *The New Dischargeability Law*, 45 AM. BANKR. L. J. 1, 47 (1971) (quoting letters of Murray Drabkin and Lawrence P. King to the House and Senate Judiciary Committees).

remained part of the Federal Rules of Bankruptcy Procedure) ought not carry the weight *Crocker* ascribes to it. Further, it is difficult to see how Rule 4004(f) of the Bankruptcy Rules retains any meaning whatsoever under the Fifth Circuit's analysis in *Crocker*. The discharge already enjoins debt collection on a nationwide basis.[200] There is no need for a debtor to register the discharge after moving to a new location to give it effect. Instead, registering the discharge provides a debtor who changes their residence with a more convenient forum to advance discharge-enforcement proceedings.[201] The court's analysis of the power of the issuing court is also difficult to harmonize with the reality that other courts have concurrent jurisdiction to enforce the discharge.[202]

A sounder reading of these statutory and rules developments is that the modern process of registering a discharge is "virtually identical" to the process put in place in 1970.[203] Notably, this procedure has remained part of the Bankruptcy Rules since that time. Further, as suggested by the influential Collier on Bankruptcy treatise, "[t]he language that the judgment may, in that other district, 'be enforced in like manner' was eliminated [from the rules], presumably because it was unnecessary and redundant."[204]

While there may not be any overt statutory or procedural limitations to nationwide enforcement of the discharge, the nature of the contempt remedy deserves greater focus. The next principle considers whether and to what extent the discharge's contempt remedy should operate as a limit on aggregate, out-of-district enforcement.

2. *Principle 2: The Discharge Injunction Carries Some "Old Soil" Limitations of Contempt*

Class action plaintiffs tend to emphasize that the discharge is a matter of statute, and because it operates identically across the country, there is no logical reason why it should not be enforced outside of the district. While this argument may have some intuitive appeal, the long history underlying the discharge suggests that we cannot dispense with the contempt remedy so easily. Principle 2 states that the statutory discharge, by design, has actual injunctive force and is remediable principally through the inherent contempt powers of the federal court.

The modern discharge has its origin in the court-issued injunctions that began to arise following the Supreme Court's 1934 decision in *Local Loan v. Hunt*.[205] Before that time, the bankruptcy court lacked continuing jurisdic-

[200] 9 Collier on Bankruptcy ¶ 4004.07 (2022) (Richard Levin & Henry J. Sommer eds., 16th ed.).
[201] *Id.*
[202] For example, the bankruptcy discharge can be raised in civil court as an affirmative defense.
[203] 9 Collier on Bankruptcy ¶ 4004.RH (2022) (Richard Levin & Henry J. Sommer eds., 16th ed.).
[204] *Id.*
[205] 292 U.S. 234 (1934).

tion to enforce the discharge.[206] If a creditor violated the discharge, for example by suing to collect a discharged debt, the debtor was responsible for raising the discharge as an affirmative defense.[207] This state of affairs was problematic for reasons similar to those affecting consumer debtors today: creditors could rely on the likelihood that debtor would not have the knowledge, wherewithal, or funds to challenge the post-discharge collection, and could successfully obtain default judgments in state court on debts that had been discharged.[208]

Local Loan involved the debtor Hunt's prepetition agreement to assign his future wages to Local Loan.[209] Under Illinois law, which applied to the transaction, the assignment operated as a lien on Hunt's future wages.[210] After Hunt had received a discharge in bankruptcy, Local Loan sued Hunt's employer to enforce the wage assignment.[211] Hunt turned to the bankruptcy court that entered the discharge to enjoin the practice as contrary to federal bankruptcy law.[212] The case ultimately went before the Supreme Court, which held that the Illinois treatment of wage assignments was inconsistent with federal bankruptcy law.[213] But in so holding, the court blessed Hunt's return to the bankruptcy court to address the discharge violation. The Court adopted an expansive view of bankruptcy courts' jurisdiction to enforce the discharge, concluding that bankruptcy courts had the continuing power to "to secure or preserve the fruits and advantages of a judgment or decree rendered therein."[214]

After *Local Loan*, some federal courts began issuing injunctions to enforce discharges in bankruptcy, but other courts construed the Court's holding so narrowly that it was effectively dead letter.[215] Without these injunctions, unwitting debtors would find that their failure to raise the discharge as an affirmative defense amounted to a waiver.[216]

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[206]Garrard Glenn, *Effect of Discharge in Bankruptcy: Ancillary Jurisdiction of Federal Court*, 30 VA. L. REV. 531, 532 (1944).

[207]Ralph Brubaker, *From Fictionalism to Functionalism in State Sovereign Immunity: The Bankruptcy Discharge As Statutory* Ex Parte Young *Relief After Hood*, 13 AM. BANKR. INST. L. REV. 59, 97 (2005); *In re* Scheffler, 68 F.2d 902, 904 (2d Cir. 1934) ("The correct procedure is to interpose the discharge as a defense in the state proceeding.").

[208]Glenn, *supra* note 206, at 537; Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief*, 76 AM. BANKR. L. J. 461, 523 (2002).

[209]292 U.S. at 238.

[210]*Id.*

[211]*Id.*

[212]*Id.*

[213]*Id.* at 244-45.

[214]*Id.* at 239 ("The jurisdiction of the court follows that of the original cause.").

[215]Brubaker, *supra* note 207, at 522-23.

[216]Countryman, *supra* note 199, at 5 ("If [a debtor] litigated, or could have litigated, the issue of dischargeability in the creditor's post-bankruptcy action . . . he was not allowed to relitigate that issue in

> Consequently, creditors could wantonly ignore the debtor's discharge and sue in state court, in the hopes that the debtor would simply default, and many debtors did default on the mistaken assumption that the bankruptcy discharge made it unnecessary to appear and defend suits on discharged debts. Unsophisticated debtors, therefore, could easily find themselves subject to binding judgments requiring payment of discharged debts.[217]

Congress stepped in to address this and related issues by passing the "dischargeability amendments" to the Code in 1970.[218] These amendments provided that judgments obtained on a discharged debt were of no effect, and that "an order of discharge shall enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt."[219] This treatment of the discharge injunction carried over into § 524 of the Code.[220]

This history reveals that "Congressional use of the word 'injunction' was not meant as a metaphor but was intended to give a bankrupt debtor the enforcement powers of the federal court that had granted the discharge."[221] And "[t]he consequences for violating the discharge injunction are identical to the consequences attendant to violating a court order, namely, civil contempt."[222] These realities take on additional weight in light of the Supreme Court's recent ruling in *Taggart v. Lorenzen.* There, the Court declared that the discharge injunction carries the "old soil" of common law understandings of how injunctions should be enforced.[223]

The implications of this background for a motion to compel arbitration seem clear: arbitration agreements cannot divest a court of its power to issue civil contempt sanctions. But it is not clear how far this principle should extend *within* the federal bankruptcy system. For example, is only the individual judge who issued the injunction permitted to enforce it? Several courts have interpreted the identity of the "issuing court" more loosely, permitting judges within the same district to enforce injunctions issued by other judges

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bankruptcy court. And it did not avail the debtor who failed to appear and defend a post-discharge action to plead that 'he thought the discharge in bankruptcy operated as an automatic defense.'").

[217]Brubaker, *supra* note 208, at 523

[218]Act of Oct. 17, 1970, Pub. L. No. 91-467, 84 Stat. 990 (superseded 1978).

[219]Act of Oct. 17, 1970, Pub. L. No. 91-467, 84 Stat. 991 (superseded 1978).

[220]11 U.S.C.A. § 524.

[221]*Brief of Amici Curiae Professors Ralph Brubaker, Robert M. Lawless, and Bruce A. Markell in Support of Appellee*, Anderson v. Credit One Bank, N.A. (*In re* Anderson), 2017 WL 896046, *11 (2d Cir. Feb. 27, 2017).

[222]*Id.*

[223]Taggart v. Lorenzen, 139 S. Ct. 1795, 1801 (2019) (*citing* Hall v. Hall, 138 S. Ct. 1118, 1128 (2018)).

in that district.[224] Along these same lines, few would argue that the issuing-court limitation might preclude an appellate court's review of a contempt order.[225] But extending courts' inherent contempt powers to permit nationwide enforcement of the discharge seems to many courts to be a bridge too far.[226]

The third principle considers alternative remedies for enforcing the discharge. Here, it finds methods to aggregate discharge violation claims on a nationwide basis without over-taxing courts' inherent contempt authority. But not all methods would survive a motion to compel arbitration of debtor class claims, thereby undercutting their utility in class action litigation.

3. *Principle 3: Section 524's Contempt Remedy is Not the Exclusive Vehicle for Discharge Enforcement*

The final principle is that contempt is not the exclusive method to remedy discharge violations. Alternative pathways to enforcing the discharge are available, and these alternatives can provide a stronger basis for aggregating claims.

To provide one example,[227] violations of the discharge also can give rise to violations of applicable consumer protection law, such as the Fair Debt Collection Practices Act (FDCPA) or Fair Credit Reporting Act (FCRA).[228] As I discuss elsewhere, § 524 of the Code does not evidence Congress's intent to preempt or preclude overlapping state or federal claims.[229] But while grounding an action in consumer protection liability might obviate the concern about a non-issuing court's enforcement, it also makes the action more vulnerable to being arbitrated under the *McMahon* standard discussed above. After all, FDCPA and FCRA claims are not uniquely tied to the bankruptcy case and do not create the same distribu-

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[224]*See, e.g.*, *In re* McLean, 794 F.3d 1313, 1319 (11th Cir. 2015) (holding that the entire district had the authority to enforce the discharge, "irrespective of the case number of, or the judge who might have presided over, the prior proceeding").

[225]Martin v. Trinity Indus., Inc., 959 F.2d 45, 46 (5th Cir. 1992) (citations omitted) ("We review the District Court's contempt order for an abuse of discretion."); *but see* Jones v. CitiMortgage Inc., 15-14853 (11th Cir. Nov. 9, 2016) (in an unpublished *per curiam* opinion, relying on Alderwoods Group v. Garcia, 682 F.3d 958, 971 (11th Cir. 2012), to hold that the district court lacked jurisdiction to enforce a discharge entered by the bankruptcy court below).

[226]*See, e.g.*, Beck v. Gold Key Lease, Inc. (*In re* Beck), 283 B.R. 163, 171 (Bankr. E.D. Pa. 2002) (stating the position that the court may not enforce violations of the discharge injunction on a nationwide basis is "supported by the overwhelming number of lower courts to consider the issue").

[227]This Article does not discuss other potential alternatives, such as finding an implied private right of action in § 524. For a more thorough discussion of such alternatives, *see Aggregating Discharge Claims*, *supra* note 4.

[228]These issues were also discussed extensively in *Caldwell v. Redstone Fed. Credit Union*, No. 2:15-CV-01923, 2016 WL 4702821, at *4 (N.D. Ala. Sept. 8, 2016).

[229]For a more extensive discussion of this issue, *see* Brubaker, *supra* note 181 (arguing that § 524 does not displace state-law causes of action); Kara Bruce & Alexandra P.E. Sickler, *Private Remedies and Access to Justice in a Post-Midland World*, 34 EMORY BANKR. DEV. J. 365 (2018).

tional impact as arbitrating more foundational bankruptcy matters might. As such, this pathway might trade one set of remedial challenges for another.

Other courts have observed that § 105(a) of the Bankruptcy Code, which permits courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," provides a source of contempt powers that is not restricted to the issuing court.[230] This argument, which was advanced by the First Circuit in a debtor class action cases over twenty years ago,[231] has recently been revived in a series of discharge class actions within the Eastern and Southern Districts of New York.[232]

For example, in *In re Haynes*, the Bankruptcy Court for the Southern District of New York considered whether a class action alleging violations of the discharge injunction and FCRA could be aggregated on a nationwide basis.[233] The defendant argued that the court lacked the power to enforce the discharges of debtors outside of the district.[234] Although the court acknowledged that it was a "close question," it concluded that bankruptcy courts have the power to adjudicate a nationwide class action alleging systemic discharge violations.[235]

The *Haynes* court began by grounding the principle that issuing courts should enforce injunctions in cases construing the All Writs Act.[236] The All Writs Act is drafted in a manner that leads logically to the issuing-court limitation. It provides that "[t]he Supreme Court, and all courts established by act of Congress, may issue all writs necessary or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law."[237] Bankruptcy courts have a separate source of statutory enforcement authority, which emanates from § 105 of the Code.[238] Unlike the All Writs Act, § 105 does not facilitate the exercise of the court's *jurisdiction*.[239] Rather, § 105 permits the court to issue orders "necessary or appropriate to carry out the

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[230]11 U.S.C. § 105(a).

[231]Bessette v. Avco Fin. Servs., Inc., 230 F.3d 439 (1st Cir. 2000), *amended on denial of reh'g* (Dec. 15, 2000). *Bessette* involved a class action case asserting that the defendant violated the discharge injunction by attempting to enforce unfiled reaffirmation agreements. The Court of Appeals held that § 105 provided statutory contempt authority to order monetary relief (including actual damages, punitive damages, and attorney's fees) for violation of the discharge. *Id.* at 450.

[232]*See, e.g.*, Golden v. Discover Bank (*In re* Golden), 630 B.R. 896, 914 (Bankr. E.D.N.Y. 2021); Ajasa v. Wells Fargo Bank, N.A. (*In re* Ajasa), 627 B.R. 6, 24 (Bankr. E.D.N.Y. 2021); Lopez v. Wells Fargo Bank, N.A. (*In re* Lopez), 627 B.R. 6 (Bankr. E.D.N.Y. 2021); Haynes v. Chase Bank USA (*In re* Haynes), No. 11-23212, 2014 WL 3608891 (Bankr. S.D.N.Y. July 22, 2014).

[233]*Haynes*, 2014 WL 3608891.

[234]*Id.* at *6.

[235]*Id.* at *9.

[236]*Id.* at *8.

[237]*Id.* (citing 28 U.S.C. § 1651 and *In re* Debs, 158 U.S. 564, 594–95 (1895)) (emphasis added).

[238]*Id.*

[239]*Id.*

provisions *of this title.*"[240]

The *Haynes* court also highlighted legislative history that explains that § 105 was intended to "cover any powers . . . that are *not* encompassed by the All Writs statute."[241] As such, the *Haynes* court determined it was a "mistake to rely upon All Writs Act cases to hold that a bankruptcy court has power under the applicable statute only to enforce its own orders."[242]

Following *Haynes*, a growing number of courts have relied on § 105's contempt authority to provide an avenue for nationwide enforcement of the discharge.[243] This approach seems to provide a reasoned justification for nationwide aggregation that would also likely survive a motion to compel arbitration under the *McMahon* test. As such, it seems to be the strongest pathway currently available to find the non-arbitrable nationwide class action to enforce the discharge. But not all courts interpret § 105 in a manner that supports this result.[244]

B. Widening the Remedial Pathway for Discharge Violations

The previous sections have worked through a complex procedural thicket. The challenge has been to identify whether there is pathway to discharge enforcement that is at once not subject to class-killing arbitration clauses, and also capable of moving forward as a nationwide class action. As we have seen, some of the strongest reasons to avoid arbitration, emanating from the unique powers of courts to enforce their own orders, stand in some tension with efforts to aggregate claims in a nationwide class action. Meanwhile, arguments that better justify a nationwide class, such as asserting claims under consumer protection laws, are more susceptible to arbitration under *McMahon*'s inherent-conflict test.[245]

Relying on § 105(a) as an independent source of contempt authority provides one pathway to the non-arbitrable nationwide class. But this pathway rests on two increasingly fragile foundations: the ever-narrowing concept of the court's equitable authority,[246] on the one hand, and the continued applicability of the *McMahon* standard, on the other.[247] More practically, arbi-

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[240]*Id.* (emphasis added).

[241]*Id.* (emphasis in original).

[242]*Id.*

[243]*See* cases cited *supra* note 232.

[244]For example, in *Pertuso v. Ford Motor Credit Co.*, the Court of Appeals for the Sixth Circuit held that § 105 cannot be read to augment the remedial powers established in the Code. 233 F.3d 417, 423 (6th Cir. 2000); *see also In re* Forson, 549 B.R. 866, 871 (Bankr. S.D. Ohio 2016) (finding that the *Haynes* approach could not be adopted in light of *Pertuso*).

[245]*See supra* text accompanying notes 228-229.

[246]For a discussion of the scope of bankruptcy equity and § 105 and changes over time, *see* Laura Coordes, *Narrowing Equity in Bankruptcy*, 94 Am. Bankr. L. J. 303 (2020).

[247]*See supra* notes 158-159.

trability and contempt-power questions in these cases have been litigated for *years*, which undermines the strong emphasis on speed and efficiency that undergird both bankruptcy and arbitration policy.[248]

These are only a portion of the remedial challenges underlying the discharge. To provide one additional potent example, the bankruptcy system is still adjusting to the Supreme Court's 2019 decision in *Taggart v. Lorenzen*, in which the Court held that a remedy of civil contempt in inappropriate "where there is [a] fair ground of doubt as to the wrongfulness of the defendant's conduct."[249] This holding raises the evidentiary burden for establishing contempt liability and further constrains the effectiveness of lawsuits to challenge discharge violations.[250]

Enforcement of the discharge is, and has been, ripe for legislative reform. Scholars and commenters have long suggested that Congress should amend § 524 to create a private right of action.[251] Doing so was a major conclusion of the American Bankruptcy Institute's Commission to Study Consumer Bankruptcy Reform and is part of a bankruptcy reform bill currently pending in Congress.[252] This Article joins those calls, with one suggested addition: any amendments aimed at improving consumers' ability to sue to enforce the discharge should include an express statement on the extent to which those actions are arbitrable.

This section develops this argument in two steps. First, it explores how an affordable remedial pathway to enforce the discharge has historically been a critical component of the statute and its fresh start function. Next, it argues that aggregating claims in a class action framework can provide that affordable pathway by rebalancing the asymmetries involved in litigating discharge violations.

1. *The Discharge Depends on an Effective Enforcement Mechanism*

The prior sections have engaged to some extent with the history surrounding bankruptcy's discharge injunction. This section revisits those discussions to expose how a meaningful private-law enforcement mechanism has always been a critical component of the modern discharge and the "fresh start" policy it advances.

The discharge as we know it today has been part of the U.S. Bankruptcy

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[248]*See* Resnick, *supra* note 137.

[249]139 S. Ct. 1795, 1801 (2019).

[250]For a thoughtful discussion of this issue, *see* Hon. Terrence L. Michael, *Restoring the Fresh Start: Four Areas of Consumer Bankruptcy Law That Need To Be Fixed Now*, 30 AM. BANKR. L. J. 61, 86-90 (2022).

[251]*See, e.g.*, *id.* (suggesting legislative reforms "to relieve debtors from the arduous standards of civil contempt").

[252]Final Report of the ABI Commission on Consumer Bankruptcy 15-17, *available at* https://consumercommission.abi.org/; Consumer Bankruptcy Reform Act of 2022, S. 4980, 117th Cong (2021-22).

system since 1898.[253] The 1898 Act made bankruptcy available, on a voluntary basis, to "[a]ny person who owes debts, except a corporation."[254] The bankruptcy discharge for the first time was a matter of statutory right, not subject to the approval of the court or the debtor's creditors.[255] It was widely understood at the time that the 1898 Act was designed "to make discharges easy, inexpensive, and certain."[256]

Since that time, when the enforcement mechanisms supporting the discharge have fallen short of these ideals, either Congress or the Court has stepped in to preserve the "easy, inexpensive, and certain" pathway to relief. The Court makes this goal explicit in its *Local Loan* opinion. As discussed above, the *Local Loan* Court established that bankruptcy courts had continuing jurisdiction to enforce the discharge. In so holding, the Court observed that Hunt already had a procedural pathway to challenge enforcement of his wage assignment as against bankruptcy policy. The traditional pathway to relief would be to intervene in the state court proceeding between *Local Loan* and Hunt's employer to challenge the treatment of his wage assignment. But the Court found that alternative "inadequate to meet the requirements of justice."[257] Because the treatment of wage assignments was well established at the municipal court level, vindicating the underlying bankruptcy policy would require the debtor to "pursue an obviously long and expensive course of litigation [involving] successive appeals through the state intermediate and ultimate Courts of Appeal."[258] Because this litigation could cause "trouble, embarrassment, expense" disproportionate to the amounts at stake, the Court permitted the more streamlined and effective enforcement through the bankruptcy court.[259]

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[253]For a comprehensive discussion of the history of bankruptcy's discharge, dating back to the Statute of Anne, *see* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L. J. 325 (1991).

[254]*Id.* at 363. Before 1898, the United States did not have consistent federal bankruptcy laws. Early iterations of federal bankruptcy law served primarily as tools for creditor recovery. *Id.* at 344-62. This is not to say that the 1898 act was the first pro-debtor bankruptcy statute. For example, the Bankruptcy Act of 1841, repealed in 1843, introduced a number of debtor protections, including voluntary bankruptcy filings and eligibility to non-merchant debtors. *Id.* at 349-53. The 1867 Act also contained many features designed to "relieve the plight of debtors." *Id.* at 355. But before 1898, obtaining a discharge in bankruptcy remained elusive. *Id.* at 357 (noting that "[f]ewer than one-third of the bankrupts ultimately received a discharge" under the 1867 Act, owing to the extensive list of reasons for denying a discharge).

[255]*Id.* at 363-64.

[256]Henry G. Newton, *The United States Bankruptcy Law of 1898*, 9 YALE L.J. 287, 290 (1900). This free availability of the discharge represents a significant shift in bankruptcy policy. As Professor Tabb has exhaustively recounted, "the 1898 law recognized formally for the first time the overriding *public* interest in granting a discharge to 'honest but unfortunate' debtors." Tabb, *supra* note 253, at 364 (emphasis in original).

[257]292 U.S. 234, 241 (1934).

[258]*Id.*

[259]*Id.*

Not only that, but when lower courts construed *Local Loan* narrowly, Congress stepped in to codify the discharge injunction. The Dischargeability Amendments of 1970 were uniquely focused on "sav[ing] the bankrupt the time and expense of defending postbankruptcy actions on discharged claims," and limiting related procedural overreaching by creditors.[260]

Turning to modern financial times, large institutional creditors typically have thousands of customers whose debts have been discharged in bankruptcy. By implementing polices or practices—practices which could amount to a single line of code in a servicer's software—a single creditor has the capacity to simultaneously violate the discharge of tens of thousands of customers nationwide.[261] This modern ability to aggregate harms is particularly amenable to an aggregate response. And, it is in keeping with the history of the discharge's fresh-start policy to develop meaningful and affordable mechanisms for enforcing the discharge. The following section explains why class actions are an effective mechanism to punish and deter discharge violations.

2. *Class Actions Can be an Effective Counterbalance to Systematic Violations of the Discharge*

I have explored in other writings how the economics of class action adversary proceedings are well suited to address small-value suits in bankruptcy. The benefits of class action treatment are particularly pronounced in cases alleging that a large institutional creditor has systematically violated debtors' discharges.[262]

First, consider the nature of the discharge-violation cases profiled above. These claims involve relatively sophisticated legal and factual matters, such as the functional differences between the notations of "charged off" and "discharged" on a credit report or the interstices within § 523(a)(8)(A)(ii) of the Code.[263] It is fair to assume that ordinary consumers are not intimately familiar with either of these technicalities, and thus might not always recognize a discharge violation if it occurs.

Second, even if a consumer is aware of a violation, the economic challenges to bringing an action are significant. Litigation to enforce the discharge frequently does not fall within the scope of their bankruptcy attorney's representation,[264] and few consumer debtors emerge from bankruptcy with "war chests" set aside to finance such actions. Bankruptcy's structural supports of the judge, case trustee and U.S. Trustee Program are generally not in a position to address this behavior, as the debtor no longer has an ongoing connec-

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[260]*See generally* Countryman, *supra* note 199, at 45-46.

[261]*See Debtor Class*, *supra* note 4, at 155.

[262]*See generally* sources cited *supra* note 4.

[263]*See supra* notes 105-110 (discussing these cases).

[264]Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASH L. REV. 1115, 1126-27 (2016).

tion with the bankruptcy process.[265]

Meanwhile, if a large institutional creditor is purposefully overreaching, it has every incentive to avoid the development of negative precedent.[266] For example, empirical work in the student loan dischargeability context suggests that creditors have invested large amounts to settle cases involving the interpretation of § 523(a)(8).[267]

Class actions are designed to rebalance these types of asymmetries. "Class actions create economies of scale that make it feasible [for plaintiffs] to litigate small claims."[268] They can also serve as a "means for private citizens to enforce public values."[269] Empowering class litigants as "private attorneys general" supports the efforts of governmental agencies, who cannot, due to resource limitations, litigate all cases.[270] Federal consumer protection legislation in particular employs private litigation as a "central mechanism of statutory enforcement."[271]

Although successfully advancing a class action in the modern legal framework is no small feat, "many debtor class actions may be able to run the

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[265]I have explored elsewhere how structural limitations on bankruptcy judges, the U.S. Trustee Program, and private trustees prevent an optimal level of regulation of the bankruptcy system. *See, e.g.*, Alexandra P.E. Sickler & Kara Bruce, *Bankruptcy's Adjunct Regulator*, 72 FLA. L. REV. 159 (2020).

[266]To put this asymmetry in sharper relief, consider recent developments in *In re Anderson*. In this case, the plaintiffs alleged Credit One reported discharged debts as "charged off" rather than discharged, as described above. Anderson filed his case on behalf of a putative class in 2014. Since that time, the case has involved extensive litigation, predominantly on arbitrability, which has led to appeals to the Court of Appeals for the Second Circuit and a writ of certiorari to the Supreme Court on the arbitration matters discussed earlier. Anderson v. Credit One Bank (*In re* Anderson), 641 B.R. 1, 13 (Bankr. S.D.N.Y. 2022) (discussing the case history). The plaintiffs ultimately prevailed, and the case has moved forward as a class action. Most recently, however, the court sanctioned Credit One for "extraordinary discovery abuse" that included "prolonged, extraordinary, wrongful efforts to prevent the exploration of its defenses." *Id.* at 21, 50. The court's opinion details at length how Credit One repeatedly avoided producing evidence of its practices regarding the reporting of discharges to credit reporting agencies. *Id.* As a sanction for these discovery abuses, the court found it appropriate to issue a default judgment against the defendant. *Id.* at 38. This case provides a particularly noteworthy example of the massive expenditures required to litigate these claims under the current statutory framework.

[267]Jason Iuliano, *The Student Loan Bankruptcy Gap*, 70 DUKE L. J. 497, 525 (concluding that "student loan creditors are both aggressively litigating cases that they believe they will win and quickly settling cases that may yield adverse precedent"); *Enforcement Gap*, *supra* note 4, at 503 (2017).

[268]*Debtor Class*, *supra* note 4, at 40; *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("A class action . . . aggregat[es] the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

[269]Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 309 (2010).

[270]Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2520-21 (2008).

[271]Elizabeth J. Cabraser, *Enforcing the Social Compact Through Representative Litigation*, 33 CONN. L. REV. 1239, 1242 (2001) ("Regulation by litigation is designed into our system of government."); *see also* Gilles, *supra* note 269, at 305-06 (collecting examples of federal consumer legislation that "expressly contemplates class action litigation as a means of redress").

gantlet of modern class certification."[272] This is particularly true in the case of discharge violations, where the harm is often perpetuated as a matter of policy or internal practice, and where class members might be willing to forgo individualized compensatory damages in favor of collective relief.[273]

Class actions are, to be sure, a controversial procedural device. Scholars and commenters have long weighed their benefits against their inefficiencies, and I have explored that literature as it applies to debtor class actions in prior writings.[274] While class actions have their detractors, primarily those who view the matter with an eye toward plaintiff compensation, rather than deterrence, the regulatory advantages of class actions in consumer bankruptcy—their potential to curb widespread and abusive conduct—provide a significant complement to bankruptcy's enforcement regime. Particularly in the case of discharge violations, where debtors have few other safeguards, class action cases can be an effective safety net to preserve the integrity of the fresh start.

3. *Legislative Reforms and Second-Best Suggestions*

The prior sub-Parts explored how a confluence of remedial barriers threatens the integrity of discharge enforcement. It argued that class action cases are an effective tool to combat systemic bankruptcy misconduct. This section briefly charts the contours of meaningful legislative reform.

A necessary first step is to amend § 524 of the Bankruptcy Code to create an express private right of action. If enacted, this amendment improves enforcement of the discharge in several key respects. First, it removes the difficulties inherent in allowing a judge other than the issuing judge enforce an order of discharge. This makes for a much clearer procedural path toward a nationwide class action to enforce the discharge.

This amendment would address other concerns that have arisen regarding the contempt remedy for discharge violations, including the heightened evidentiary burdens for demonstrating a discharge violation after the Court's recent ruling in *Taggart*.[275] It would also bring consistency to the processes for enforcing the automatic stay and discharge injunction.

These discharge class actions would likely not be stymied through motions to compel arbitration under the *McMahon* standard, considering the centrality of the discharge to bankruptcy's core aims.[276] But given the overriding concern that *McMahon* has been or will someday be replaced by a

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[272]*Vindicating*, *supra* note 4, at 480.

[273]*Id.*

[274]*Debtor Class*, *supra* note 4, at 41-42 (discussing these issues).

[275]Taggart v. Lorenzen, 139 S. Ct. 1795, 1801 (2019).

[276]Under the framework Professor Lawless proposes in a companion article, a private right of action to enforce the discharge would be amenable to arbitration. *See* Lawless, *supra* note 160, at 723 (noting that this type of action remedies harm to a debtor, and does not "implicat[e] issues about the estate, the court's

textual standard, as well as the effectiveness of arbitration clauses in stymieing class actions, a statement on arbitrability should be included. A stronger legislative reform would couple an express private right of action in § 524 with an expression of Congress's intent regarding the arbitrability of discharge disputes.[277]

Such an amendment does not necessarily need to bar arbitration of all discharge actions. A more balanced approach would be to create a reverse presumption. Under such a statute, discharge violations would presumably be non-arbitrable, unless the party seeking to compel arbitration demonstrates that to do so would not impair bankruptcy policy or the debtors' ability to vindicate their fresh starts. Applying such a standard, a single debtor's lawsuit seeking compensation for discharge violations might be amenable to arbitration, but a class action case that serves to uphold the integrity of the discharge more broadly would not.

In the absence of legislative reform, the bankruptcy system also can respond in a way that enhances the availability of aggregate remedies for discharge violations. First, the Bankruptcy Rules Advisory Committee could help streamline the out-of-district enforcement concern by amending Bankruptcy Rule 4004 to signal the availability of out-of-district enforcement. As noted above, Bankruptcy Rule 4004(f) currently provides a mechanism under which a debtor can register an order of discharge in another jurisdiction.[278] If an order is registered as such, "the order of discharge shall have the same effect as an order of the court of the district where registered."[279] The Rule could instead be amended to provide that an order of discharge that becomes final can be enforced in any district. This could remove a lot of the litigation surrounding which courts are competent to enforce the discharge.

Second, so long as *McMahon* remains the operable standard in bankruptcy, bankruptcy courts retain significant power to consider the effects of ordering arbitration on the pursuit of bankruptcy policy. In an earlier writing, I argued that the effective-vindication defense rejected by the Court in *Italian Colors Restaurant* retains some vitality as a component of *McMahon*'s inherent-conflict standard.[280] The Court's discussion in *Epic Systems* suggests

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in rem jurisdiction, third-party rights, or contractual capacity," factors which lead to the decision to arbitrate).

[277]The Supreme Court's analysis of the intersection of arbitration with other federal statutes is increasingly focused on such express statements of Congressional intent, particularly to permit aggregate claims notwithstanding a class action waiver. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

[278]Bankruptcy Rule 4004(f) provides that "[a]n order of discharge that has become final may be registered in any other district by filing a certified copy of the order in the office of the clerk of that district." FED. R. BANKR. P. 4004(f).

[279]*Id.*

[280]*Vindicating*, *supra* note 4, at 476-78. In particular, I argued that where the practical effect of arbitrating a debtor class action case is to render the action financially impracticable, and where such a

that that style of argument would not be well received by the Court. Nevertheless, the bulk of existing authority following *Epic Systems* holds that the *McMahon* standard exists apart from that restrictive decision. And a long line of cases applying *McMahon* provide authority for the non-arbitrability of debtor class action cases for discharge violations.[281] By construing existing authority with an eye toward preserving meaningful remedial pathways to discharge enforcement, courts can support the integrity of bankruptcy's fresh start policies.

IV. CONCLUSION

This symposium edition has focused on the intersection of bankruptcy and arbitration, two strong federal policies with procedural dimensions that can work at cross purposes. Courts seeking to balance these statutes labor under a standard that has long been difficult to apply, and which rests on an increasingly unsteady foundation.

The implications of this intersection on consumer class actions in bankruptcy are pronounced. While at present, bankruptcy's arbitration exceptionalism has limited the effectiveness of class-killing arbitration clauses, any widening of the use of arbitration in bankruptcy will have follow-on effects on these cases. Considering the limited structural supports available to debtors after they have emerged from bankruptcy, as well as the significant economic and procedural challenges to litigating discharge violations individually, the discharge faces a threat of underenforcement. When faced with these types of concerns in the past, both Congress and the Court have stepped in to respond. It may finally be time for them to do so again.

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result will undermine the enforcement of bankruptcy laws that further bankruptcy's central aims, these factors can support courts' refusal to compel arbitration. Put another way, the same principles that motivated the "effective vindication" defense to class action waivers, described in Part I(A), retain some vitality within the confines of *McMahon*'s inherent-conflict inquiry. *Id.*

[281] *See, e.g.*, *In re* Bauer, No. AP 20-80012, 2020 WL 3637902, at *3 (Bankr. D.S.C. June 8, 2020) (distinguishing the trend identified in *Epic Systems* based on principles of bankruptcy exceptionalism, relating to the "singular nature" of bankruptcy jurisdiction) (internal quotation omitted); *In re* Roth, 594 B.R. 672, 675 (Bankr. S.D. Ind. 2018) (observing that bankruptcy policy is grounded in the Constitution and involves the modification of contractual rights); Knepp v. Educ. Fin. Servs., No. AP 18-01389, 2018 WL 11199014, at *4 (Bankr. D.N.J. Dec. 26, 2018) (distinguishing the cases cited in *Epic Systems* because none involved Bankruptcy law and none "dealt with an order of the court and one as integral and important as the discharge order and related injunction").