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# Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment

S.Elizabeth Gibson

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# Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment

S. Elizabeth Gibson\*

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## INTRODUCTION

In 1978 Congress comprehensively revised federal bankruptcy laws for the first time in forty years.<sup>1</sup> In addition to significantly changing many substantive provisions of the Bankruptcy Code, the Bankruptcy Reform Act (1978 Act) also expanded the jurisdiction and enhanced the status of bankruptcy courts.<sup>2</sup> Disputes related to bankruptcy that previously could be adjudicated only in a state or federal district court,<sup>3</sup> and which frequently delayed completion of the underlying bankruptcy proceeding,<sup>4</sup> now could be decided by the bankruptcy court.<sup>5</sup> To ensure that litigants' rights to a jury trial would not be lost as a result of this jurisdictional expansion, Congress provided for the preservation of preexisting jury trial rights.<sup>6</sup>

In 1982, however, the Supreme Court upset Congress's restructured bankruptcy system. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>7</sup> the United States Supreme Court held that the provision of the 1978 Act expanding the bankruptcy courts' jurisdiction violated article III and thus was unconstitutional. The Court reasoned<sup>8</sup> that this broad jurisdic-

1. Pub. L. No. 95-598, 92 Stat. 2549 (1978).

2. *Id.* § 241(a), 92 Stat. 2549, 2668-69 (originally codified at 28 U.S.C. § 1471 (1982), codified as amended at 28 U.S.C. § 1334 (Supp. III 1985)).

3. Prior to the 1978 Act, most actions to collect the assets of the bankruptcy estate from third parties had to be pursued in nonbankruptcy courts. See *infra* note 212 and accompanying text.

4. See *infra* note 382 and accompanying text.

5. See 28 U.S.C. § 1471 (1982) (repealed 1984).

6. See *id.* § 1480.

7. 458 U.S. 50 (1982).

8. The Court disagreed as to the proper scope of the decision. The plurality opinion, after extensively reviewing the Court's precedents concerning the exercise of judicial power by judges lacking article III's protections, concluded that "the broad grant of jurisdiction to the bankruptcy courts contained in 28 U.S.C. § 1471 . . . is unconstitutional." *Id.* at 87. The concurring Justices preferred to limit the decision to the specific conclusion that "so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide

tional grant violated article III because it permitted bankruptcy judges, who lacked the tenure and salary protections mandated by article III,<sup>9</sup> to hear and decide state common law actions without the parties' consent.<sup>10</sup> When Congress eventually responded to the Court's decision, it retained the non-article III status of bankruptcy judges but reduced their authority over judicial proceedings to comply with article III's apparent requirement that the essential attributes of judicial power be vested only in article III courts.<sup>11</sup> Simultaneously, and without explanation, Congress replaced the 1978 Act's jury trial provision with a provision narrowly focused on specific categories of cases.<sup>12</sup>

In the wake of these developments, the constitutional status of jury trials in bankruptcy is confused. Lower courts<sup>13</sup> and legal scholars<sup>14</sup> are divided over the existence of a statutory or

Northern's lawsuit over Marathon's objection [is] violative of Art. III." *Id.* at 91 (Rehnquist, J., concurring).

9. See *infra* notes 348-51 and accompanying text.

10. 458 U.S. at 87 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring).

11. Congress responded to *Northern Pipeline* by enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. For a discussion of how this Act reduced the authority of bankruptcy judges, see *infra* notes 98-106 and accompanying text.

12. 28 U.S.C. § 1411 (Supp. III 1985).

13. Most of the judicial examination of the questions considered by this Article has been at the district and bankruptcy court levels. Two recent court of appeals decisions, however, have considered the issue of the right to jury trial in bankruptcy under the current law. See *Huffman v. Perkinson (In re Harbour)*, 840 F.2d 1165 (4th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3755 (U.S. Apr. 25, 1988); *Nordberg v. Granfinanciera, S.A. (In re Chase & Sanborn Corp.)*, 835 F.2d 1341 (11th Cir. 1988), *cert. granted*, 56 U.S.L.W. 3841 (U.S. June 13, 1988) (No. 87-1716). Both courts held that a defendant to a fraudulent conveyance action has neither a constitutional nor a statutory right to a jury trial. See *infra* note 227. As this Article went to press, the Supreme Court granted certiorari in *Nordberg*. Accordingly, one can hope for a resolution of some of the issues addressed in this Article during the Supreme Court's 1988 Term.

14. See, e.g., S. BERNSTEIN, *BANKRUPTCY PRACTICE AFTER THE AMENDMENTS ACT OF 1984*, at 39-47 (1984); 1 COLLIER ON BANKRUPTCY ¶ 3.01[7], at 3-92 to 3-101 (15th ed. 1987) [hereinafter COLLIER]; B. WEINTRAUB & A. RESNICK, *BANKRUPTCY LAW MANUAL* 6-30 (1985); Greenfield, *The National Bankruptcy Conference's Position on the Court System Under the Bankruptcy Amendments and Federal Judgeship Act of 1984, and Suggestions for Rules Promulgation*, 23 HARV. J. ON LEGIS. 357, 361-62, 368-70 (1986); Hendel & Reinhardt, *Evolution of Bankruptcy Court Jurisdiction After the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 90 COM. L.J. 272 (1985); King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 702-08 (1985); Norton & Lieb, *Jurisdiction and Procedure Under the 1984 Bankruptcy Amendments*, 1985 ANN. SURV. BANKR. L. 53, 162-64; Sabino, *Jury Trials in the Bankruptcy Court: A Continuing Controversy*, 90

constitutional right to a jury trial in bankruptcy and the circumstances under which a bankruptcy judge is authorized to conduct a jury trial. Indeed, the diversity of opinion could hardly be more extreme. One view is that there exists no right to a jury trial in almost any bankruptcy matter<sup>15</sup> and that it would be unconstitutional for a bankruptcy judge to conduct a jury trial under any circumstances.<sup>16</sup> Others contend that a bankruptcy judge is fully authorized to conduct jury trials and that jury trial rights in bankruptcy matters are identical to those that exist in nonbankruptcy federal courts.<sup>17</sup>

The complex statutory and constitutional questions underlying these disagreements about jury trials in bankruptcy are the subject of this Article. Part I of this Article reviews the legislative and judicial developments giving rise to the current controversy. Part II analyzes the narrowly worded bankruptcy jury trial statute enacted by Congress in 1984.<sup>18</sup> This statute, however, is silent as to most bankruptcy matters. Part III thus considers whether the seventh amendment provides litigants a constitutional right to a jury trial in bankruptcy. This Part analyzes whether Congress may eliminate seventh amendment rights merely by reassigning the adjudication of those matters from federal district courts to bankruptcy courts. Finally, Part IV addresses the constitutionality of permitting bankruptcy

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COM. L.J. 342 (1985); Note, *The Availability of Jury Trials in Bankruptcy Courts*, 4 BANKR. DEV. J. 257 (1987); Comment, *The Bankruptcy Amendments and Federal Judgeship Act of 1984: The Impact on the Right of Jury Trial in Bankruptcy Court*, 16 TEX. TECH. L. REV. 535 (1985).

15. This Article uses the term *bankruptcy matter* to refer to any case or proceeding falling within the scope of bankruptcy jurisdiction as conferred by 28 U.S.C. § 1334 (Supp. III 1985). Thus the term includes the bankruptcy "case," any civil proceeding "arising under" the Bankruptcy Code, and any civil proceeding "arising in" or "related to" a bankruptcy case.

16. See, e.g., *Terry v. Proehl* (*In re Proehl*), 36 Bankr. 86, 87 (W.D. Va. 1984); *Cameron v. Anderson* (*In re American Energy*), 50 Bankr. 175, 181 (Bankr. D.N.D. 1985); *Allard v. Benjamin* (*In re DeLorean Motor Co.*), 49 Bankr. 900, 912-13 (Bankr. E.D. Mich. 1985); *King*, *supra* note 14, at 702-08.

Authorities taking this restrictive view recognize a jury trial right only in the narrow category of cases expressly identified by 28 U.S.C. § 1411—personal injury and wrongful death tort claims. See *infra* note 97 and accompanying text.

17. See, e.g., *Price-Watson Co. v. Amex Steel Corp.* (*In re Price-Watson Co.*), 66 Bankr. 144, 145 (Bankr. S.D. Tex. 1986); *McCormick v. American Investors Management* (*In re McCormick*), 61 Bankr. 595, 596 (Bankr. D. Nev. 1986); *Leird Church Furniture Mfg. Co. v. Union Nat'l Bank* (*In re Leird Church Furniture Mfg. Co.*), 61 Bankr. 444, 444-45 (Bankr. E.D. Ark. 1986); S. BERNSTEIN, *supra* note 14, at 39-47; Comment, *supra* note 14, at 546, 554-55.

18. 28 U.S.C. § 1411.

judges to conduct jury trials. Here the Article examines whether a jury trial before a non-article III bankruptcy judge constitutes a trial by jury within the meaning of the seventh amendment and, if so, whether article III of the Constitution permits a fixed-term bankruptcy judge to exercise this authority. Answering the latter question requires consideration of the current bifurcated system of bankruptcy procedures in light of the Supreme Court's uncertain article III precedents.

The Article concludes that the seventh amendment requires a jury trial for certain matters currently adjudicated in the bankruptcy courts. In many of the cases in which such rights exist, however, authorizing a non-article III bankruptcy judge to preside over the jury trial produces a serious constitutional conflict. Article III's requirement that the decisions of non-article III courts be subject to de novo review cannot be reconciled with the seventh amendment's prohibition against the reexamination of jury verdicts. To avoid this conflict and to assure compliance with both constitutional provisions, the Article proposes that jury trials of such matters be conducted only by article III district judges.

## I. DEVELOPMENTS UNDERLYING THE CURRENT CONTROVERSY

### A. JURY TRIALS UNDER THE 1898 ACT

Under the Bankruptcy Act of 1898 (1898 Act),<sup>19</sup> the predecessor of the 1978 Act, the forum where the case was brought determined whether a jury trial was available. Proceedings falling within the bankruptcy court's summary jurisdiction<sup>20</sup>

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19. Act of July 1, 1898, ch. 541, §§ 1-70, 30 Stat. 544 (as amended) (repealed 1979).

20. Under the 1898 Act, bankruptcy courts possessed exclusive jurisdiction over all administrative matters arising in the course of bankruptcy proceedings. *United States Fidelity & Guar. Co. v. Bray*, 225 U.S. 205, 217 (1912). They also had the exclusive right to determine title to and possession of assets within their custody. J. MACLACHLAN, *HANDBOOK OF THE LAW OF BANKRUPTCY* 205-06 (1956). Finally, bankruptcy courts could rule on matters submitted to them with the consent of the parties, even if the disputes involved property not within the courts' custody. *Harris v. Avery Brundage Co.*, 305 U.S. 160, 164 (1938). These three categories of proceedings comprised the bankruptcy courts' summary jurisdiction. Use of this term to describe the authority of the bankruptcy court may have developed because many of the matters traditionally brought before bankruptcy courts were nonadversarial and were resolved informally. See J. MACLACHLAN, *supra*, at 203-08; Gibson, *Removal of Claims Related to Bankruptcy Cases: What Is a "Claim or Cause of Action"?*, 34 UCLA L. REV. 1, 7-8 (1986); Treister, *Bankruptcy Jurisdiction: Is*

were generally conducted by bankruptcy referees<sup>21</sup> without the aid of a jury.<sup>22</sup> All other bankruptcy-related disputes were resolved by plenary suits<sup>23</sup> in a state or federal district court.<sup>24</sup> In these courts the right to a jury trial was determined either by the seventh amendment or by nonbankruptcy state or federal law.<sup>25</sup>

There were, however, two statutory exceptions to the rule barring jury trials in summary proceedings. First, a person against whom an involuntary bankruptcy petition was filed could demand a jury trial on the questions of insolvency and commission of acts of bankruptcy.<sup>26</sup> Second, a 1970 amendment

*It Too Summary?*, 39 S. CAL. L. REV. 78, 78-81 (1966); see also *infra* notes 206-10 and accompanying text (discussing bankruptcy courts as courts of equity when they exercised summary jurisdiction under the 1898 Act).

21. Under the 1898 Act, federal district courts were the statutorily designated "courts of bankruptcy." Ch. 541, § 1(8), 30 Stat. 544, 544. The duties of the bankruptcy courts, however, were generally carried out by bankruptcy referees appointed by the district courts. See *id.* §§ 33, 38-39, 30 Stat. 555-56. Referees were later designated bankruptcy judges. Fed. Bankr. R. 901(7), 11 U.S.C. app. at 1358 (1976).

22. See, e.g., 2 COLLIER, *supra* note 14, ¶ 19.07 (14th ed. 1976); D. COWANS, BANKRUPTCY LAW AND PRACTICE § 836 (1963); J. MACLACHLAN, *supra* note 20, at 204; Levy, *Trial by Jury Under the Bankruptcy Reform Act of 1978*, 12 CONN. L. REV. 1, 3-5 (1979); Comment, *Jury Trials in the Bankruptcy Court*, 1982 ANN. SURV. BANKR. L. 417, 418-21.

23. See *infra* note 213.

24. Under § 23 of the 1898 Act, a district court generally could hear only those plenary suits over which it would have possessed jurisdiction in the absence of bankruptcy proceedings. Ch. 541, § 23, 30 Stat. 544, 552 (as amended) (repealed 1979). Notwithstanding the lack of federal jurisdiction in the absence of bankruptcy, district courts were granted jurisdiction concurrent with state courts to hear certain suits brought by a trustee. See *id.* § 60, 30 Stat. 544, 562 (recovery of preferences); *id.* § 67, 30 Stat. 544, 564 (avoidance of fraudulent conveyances); *id.* § 70, 30 Stat. 544, 565 (avoidance of transfers voidable by bankrupt's creditors). District courts also maintained jurisdiction of any other suit by the trustee or receiver against an adverse claimant if the defendant consented to the district court's jurisdiction. *Schumacher v. Beeler*, 293 U.S. 367, 377 (1934). Although the district court was sometimes referred to as a bankruptcy court when it heard plenary suits brought by the bankruptcy trustee, it actually sat as a district court rather than as a court of bankruptcy. Therefore a district judge rather than a bankruptcy referee presided over the cases. See, e.g., 2 COLLIER, *supra* note 14, ¶ 23.15[7] (14th ed. 1976); J. MACLACHLAN, *supra* note 20, at 213; see also *infra* notes 212-23 and accompanying text (discussing legal nature of plenary actions under 1898 Act).

25. See, e.g., *In re Baudouine*, 101 F. 574, 575 (C.C.N.Y. 1900); *Allen v. Gray*, 201 N.Y. 504, 508-09, 94 N.E. 652, 654-55 (1911); 2 COLLIER, *supra* note 14, ¶ 19.07 (14th ed. 1976); Levy, *supra* note 22, at 5; Comment, *supra* note 22, at 420.

26. Act of July 1, 1898, ch. 541, § 19, 30 Stat. 544, 551 (as amended) (repealed 1979). Section 19(a) provided:

A person against whom an involuntary petition has been filed shall be

to the 1898 Act provided for jury trials in proceedings before the bankruptcy court to determine the dischargeability of debts.<sup>27</sup> Although some disagreed about its intended scope,<sup>28</sup> this provision generally was not applied to the discharge issue itself. Rather, the provision was interpreted to apply to legal issues, such as liability or damages, that remained to be resolved if the claim was nondischargeable.<sup>29</sup> Beyond these narrow categories, however, the 1898 Act provided no jury trial rights. In addition, it was generally believed that there was no constitutional entitlement to a jury trial in summary proceedings.<sup>30</sup>

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entitled to have a trial by jury, in respect to the question of his insolvency, . . . and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed.

*Id.* An involuntary petition was required to allege the commission of one of the "acts of bankruptcy" specified in § 3 of the Act. Most of these acts required a showing of the alleged bankrupt's insolvency at the time of commission. *Id.* § 3, 30 Stat. 544, 546; see 1 COLLIER, ¶ 3.05 (14th ed. 1976); J. MACLACHLAN, *supra* note 20, at 35.

27. Act of Oct. 19, 1970, Pub. L. No. 91-467, § 7c(5), 84 Stat. 990, 993 (repealed 1979). In this Act Congress authorized bankruptcy courts to determine the dischargeability of debts and, if the debt should be found nondischargeable, to resolve the remaining issues between the bankrupt and the creditor. Permitting this litigation to take place in the bankruptcy court, rather than in state court as had previously been the practice, generated concern that the parties would be deprived of the right to a jury trial. Accordingly, the Act provided that "[n]othing in this subdivision c [authorizing bankruptcy court determination of dischargeability] shall be deemed to affect the right of any party, upon timely demand, to a trial by jury where such right exists." *Id.* § 17(c)(5), 84 Stat. 990, 993; see S. REP. NO. 1173, 91st Cong., 1st Sess. 4-5 (1970).

28. Professor Countryman maintained that § 17(c)(5) did not grant a right to a jury trial on the threshold question concerning whether a particular debt was or was not dischargeable. He argued that the provision merely preserved previously existing jury trial rights. Since there had never been a right to a jury trial on the discharge issue itself, he concluded that none was created by this statute. Countryman, *Jury Trials on Dischargeability—A Reply to Referee Herzog*, 46 AM. BANKR. L.J. 305, 305-07 (1972); Countryman, *The New Dischargeability Law*, 45 AM. BANKR. L.J. 1, 34-43 (1971). Bankruptcy Referee Herzog disagreed. He read the statutory language and the legislative history of § 17(c)(5) as indicating a congressional intent to provide for jury trials on the dischargeability issue. Herzog, *The Case for Jury Trials on the Issue of Dischargeability*, 46 AM. BANKR. L.J. 235, 241-43 (1972).

29. See, e.g., *In re Swope*, 466 F.2d 936, 938 (7th Cir. 1972) (per curiam), cert. denied, 409 U.S. 1114 (1973); *Walter E. Heller & Co. v. Merrill (In re Merrill)*, 433 F. Supp. 455, 457-58 (N.D. Ala. 1977), modified, 594 F.2d 1064 (5th Cir. 1979); *In re Copeland*, 412 F. Supp. 949, 953-54 (D. Del. 1976); *In re Hinchey*, 349 F. Supp. 116, 118 (D. Or. 1972); *In re Palfy*, 336 F. Supp. 1268, 1270-71 (N.D. Ohio 1972).

30. See, e.g., *Beery v. Turner (In re Beery)*, 680 F.2d 705, 710 (10th Cir.), cert. denied, 459 U.S. 1037 (1982). In a proceeding under the 1898 Act, the court stated that "the right to a jury trial in bankruptcy proceedings is purely

The 1898 Act was silent as to who should conduct the jury trial in the two exceptional situations in which the statute established such a right. In 1960 the Judicial Conference passed a resolution expressing its sense that bankruptcy referees should not conduct jury trials.<sup>31</sup> The bankruptcy rules promulgated by the Conference in 1973, however, expressed a contrary view. The rule governing involuntary petitions provided that if an alleged bankrupt demanded a jury trial, the referee was to preside unless the bankrupt's demand specified that a district judge conduct the trial or a local rule required a district judge to conduct it.<sup>32</sup> Although the Rule governing dischargeability seemed to favor the conduct of jury trials by a district judge, it too permitted referees to conduct jury trials.<sup>33</sup> It provided that the trial of an issue for which a jury trial had been demanded would take place before the district judge unless a local rule provided otherwise.<sup>34</sup> The Advisory Committee notes explained that the local rule could provide for a referee to conduct the jury trial in the bankruptcy court.<sup>35</sup>

## B. JURY TRIALS UNDER THE 1978 ACT

When Congress revised the bankruptcy laws in 1978,<sup>36</sup> it in-

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statutory. There is no constitutional right to such trial as bankruptcy proceedings are equitable in nature." *Id.*; see 2 COLLIER, *supra* note 14, ¶¶ 19.02, .07; D. COWANS, *supra* note 22, § 836; Kennedy, *The Bankruptcy Rules Under the Bankruptcy Reform Act*, 1981 ANN. SURV. BANKR. L. 13, 28; Comment, *supra* note 22, at 419.

31. *Report of the Proceedings of a Special Session of the Judicial Conference of the United States*, 22 ANN. REP. PROC. JUD. CONF. U.S. 375, app. at 396 (1960).

32. The Rule provided in part: "If the [jury trial] demand specifies that a district judge conduct the trial or if a local rule of court so provides, the trial shall be placed on the calendar of the district court as a jury action; otherwise the referee shall conduct the jury trial." Fed. Bankr. R. 115(b)(1), 11 U.S.C. app. at 1298 (1976).

33. Fed. Bankr. R. 409, 11 U.S.C. app. at 1329 (1976).

34. The Rule stated in part: "The trial of an issue for which a jury trial has been demanded shall be placed on the jury calendar of the district court when it is ready for trial unless (1) the bankruptcy judge determines after hearing on notice that the issue is not triable of right by a jury or (2) a local rule of court provides otherwise." Fed. Bankr. R. 409(c), 11 U.S.C. app. at 1329 (1976).

35. See 12 COLLIER ¶ 409.1 (14th ed. 1976). The precise number of jury trials that were conducted by referees pursuant to these provisions is unclear.

36. Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978). For discussions of the legislative history of the 1978 Act, see generally Butler, *A Congressman's Reflections on the Drafting of the Bankruptcy Code of 1978*, 21 WM. & MARY L. REV. 557 (1980); Klee, *Legislative History of the New Bankruptcy Law*, 28 DE PAUL L. REV. 941 (1979). The legislative history of the 1978

cluded among its reforms a new jury trial provision.<sup>37</sup> This provision stated:

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979.

(b) The bankruptcy court may order the issues arising under section 303 of title 11 [governing involuntary bankruptcies] to be tried without a jury.<sup>38</sup>

A Senate Committee report accompanying the 1978 Act explained that section 1480(a) "continues any current right of a litigant in a case or proceeding under title 11 or related to such a case, to a jury trial."<sup>39</sup> A House Report also stated that "[b]ankruptcy courts will be required to hold jury trials to adjudicate what are under present law called 'plenary suits,' that is, suits that are brought in State or Federal courts other than the bankruptcy courts."<sup>40</sup>

The intent of subsection (b) is plain. It expressly and intentionally reversed the jury trial practice for involuntary bankruptcies under the 1898 Act. Rather than being one of the few situations in which a right to a jury trial in bankruptcy was statutorily granted, involuntary bankruptcies were singled out as situations in which the bankruptcy court was explicitly authorized to deny a jury trial.<sup>41</sup>

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Act has been compiled in a multivolume set, A. RESNICK & E. WYPYSKI, BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY (1979).

37. Pub. L. No. 95-598, § 241(a), 92 Stat. 2549, 2671 (1978) (codified at 28 U.S.C. § 1480 (repealed 1984)). The jury trial provision was derived from a proposal made by the Commission on the Bankruptcy Laws of the United States. Composed of members of Congress, judges, and bankruptcy practitioners, the Commission was established by Congress in 1970 to "study, analyze, evaluate and recommend changes" that should be made in the nation's bankruptcy laws. S.J. Res. 88, 91st Cong., 2d Sess., 116 CONG. REC. 22,115-16 (1970). The Commission reported to Congress in 1973 with an analysis of the problems in the existing bankruptcy laws and the text of a proposed new bankruptcy statute. COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess. pts. 1-2 (1973) [hereinafter COMMISSION REPORT].

38. 28 U.S.C. § 1480 (1982) (repealed 1984).

39. S. REP. NO. 989, 95th Cong., 2d Sess. 157, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5943. The Senate Report referred to proposed 28 U.S.C. § 1875, which was worded similarly to § 1480 with respect to the scope of the jury trial right. *See* S. 2266, 95th Cong., 1st Sess. 293 (1977).

40. H.R. REP. NO. 595, 95th Cong., 1st Sess. 12 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 5973.

41. *See* Davis v. Central Bank (*In re* Davis), 23 Bankr. 773, 777 (Bankr.

The impact of subsection (a) on preexisting law, however, was less easily determined. The provision was subject to conflicting interpretations that divided both courts and commentators. One line of authority concluded that Congress intended only to preserve jury trial rights in existence prior to the effective date of the 1978 Act and did not intend to create new jury trial rights.<sup>42</sup> These cases held that applying section 1480(a) required a determination whether the case would have been triable to a jury under the 1898 Act. This required the court to analyze whether the matter would have been brought as a summary or plenary proceeding, and if the latter, whether it would have been entitled to a trial by jury under state or federal law.<sup>43</sup> Other courts, concluding that Congress intended to

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9th Cir. 1982) (holding that bankruptcy court did not abuse its discretion in denying debtors' demand for jury trial of issues raised by involuntary petition); B. WEINTRAUB & A. RESNICK, *supra* note 14, at 6-30 (§ 1480(b) "departed from the former law in that the court was given the power to order that all issues arising with respect to the grounds for an involuntary petition be tried without a jury"); Levy, *supra* note 22, at 11 (under § 1480(b) there is no right to jury trial of any issues arising under § 303).

42. See *Huffman v. Brandon (In re Harbour)*, 59 Bankr. 319, 325 (W.D. Va. 1986) (§ 1480(a) "merely preserved the right to trial by jury that existed prior to the enactment of the 1978 bankruptcy code"); *McLouth Steel Corp. v. Marblehead Lime Co. (In re McLouth Steel Corp.)*, 55 Bankr. 357, 361 (E.D. Mich. 1985) (language and legislative history of § 1480(a) indicate "the new statute is to have no impact on the right to a jury trial"); *Farmers & Merchants Nat'l Bank v. Aylesworth (In re Arnett Oil)*, 44 Bankr. 603, 604 (N.D. Ind. 1984) (legislative history indicates that "Section 1480(a) contemplated the preservation of any right to a jury trial in a proceeding arising under Title 11 that was in effect on September 30, 1979"); *Masto v. Coast Trading Co., (In re Coast Trading Co.)*, 31 Bankr. 666, 666 (Bankr. D. Or. 1982) ("[T]he Code preserved the rights to a jury trial under the old Act and it did not expand these rights to new or different areas of litigation."); *In re Lafayette Radio Elecs. Corp.*, 7 Bankr. 187, 188 (Bankr. E.D.N.Y. 1980) ("§ 1480 contemplated the preservation of any right to a jury trial . . . that was provided by any statute in effect on September 30, 1979.") (emphasis in original).

Commentators sharing this view of § 1480(a) included B. WEINTRAUB & A. RESNICK, *supra* note 14, at 6-30 (§ 1480(a) "preserved the same right to a trial by jury that existed before its enactment," other than with respect to involuntary petition issues); Kennedy, *supra* note 30, at 28 (§ 1480(a) "seems calculated, whether inadvertently or otherwise, to require the bankruptcy court to draw the old time-worn distinction [between summary and plenary jurisdiction] for the purposes of determining the right of a jury trial"); Comment, *supra* note 22, at 434 ("preferable" view is that "there is no right to a jury trial in the bankruptcy court unless such a right existed before September 30, 1979").

43. See, e.g., *Coast Trading Co.*, 31 Bankr. at 666 ("The first step in deciding whether one has a right to a jury trial is to make a determination of whether the instant complaint would have been a summary or a plenary action."); *Belfance v. Sizzler Family Steak Houses (In re Portage Assocs.)*, 16

abandon the summary/plenary dichotomy when it enacted the 1978 Act, held that the analytical method required under section 1480(a) was the same as that applied by the district courts in a civil case.<sup>44</sup> The court was required to analyze both the nature of the claim and the relief sought. If equitable in nature, there was no right to a jury trial. If legal, however, there was a jury trial right regardless of whether there would have been such a right under the 1898 Act.<sup>45</sup>

### 1. The Summary/Plenary Approach

A slight majority of courts adopted the summary/plenary method of analysis.<sup>46</sup> A typical example of this line of cases is

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Bankr. 445, 447 (Bankr. N.D. Ohio 1982) (“[A] bankruptcy court must first determine whether the action in question would have been a summary or plenary proceeding if brought under the former Act.”); *Zimmerman v. Mozer* (*In re Mozer*), 10 Bankr. 1002, 1004 (Bankr. D. Colo. 1981) (analysis must begin “with an inquiry as to whether . . . the matter . . . would have been categorized as a ‘plenary’ or ‘summary’ suit”); *cf.* *Pettigrew v. Graham* (*In re Graham*), 747 F.2d 1383, 1389 n.12 (11th Cir. 1984) (agreeing that analysis required determination whether there would have been right to jury trial under 1898 Act but concluding that Congress meant to preserve only jury trial rights that existed in federal court, not state court).

44. *See* *Air Transp. Ass’n of Am. v. Professional Air Traffic Controllers Org.* (*In re Professional Air Traffic Controllers Org.*), 23 Bankr. 271, 275 (D.D.C. 1982) (“[C]ontinuing the summary/plenary jurisdictional distinction to determine a party’s right to a jury trial seems at odds with the stated purposes of the new Bankruptcy Code.”); *Interfirst Bank Dallas v. Basin Refining* (*In re Basin Refining*), 30 Bankr. 578, 583 (Bankr. N.D. Tex. 1983) (“[T]he right to a jury trial under 28 U.S.C. § 1480 . . . is governed by the nature of the cause of action since by adopting the Bankruptcy Code Congress intended to abolish the cumbersome and time consuming determination of what cases and procedures were summary or plenary.”); *In re Newman*, 14 Bankr. 1014, 1015 (Bankr. S.D.N.Y. 1981) (“Now that the distinction between summary and plenary actions has been eliminated . . . , the right to a jury trial in bankruptcy will depend upon the nature of the cause of action.”); *Pinson v. Reynolds* (*In re First Fin. Group*), 11 Bankr. 67, 69 (Bankr. S.D. Tex. 1981) (“[T]he same principles which govern jury trials in district court logically apply to bankruptcy courts.”). Professor Levy agreed with this view of § 1480. Levy, *supra* note 22, at 10 (stating preference for interpretation of § 1480 as extending the right to jury trial “to any issue whose nature would have entitled a party to jury trial, without regard to the ‘summary-plenary’ issue”).

45. For discussions of the analytical method employed by federal courts under the seventh amendment in nonbankruptcy cases, see generally J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* 483-503 (1985); F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 409-47 (3d ed. 1985); 5 J. MOORE, J. LUCAS & J. WICKER, *MOORE’S FEDERAL PRACTICE* 38-33 to 38-90 (2d ed. 1987 & Supp. 1987-1988); 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* §§ 2301-2307 (1971 & Supp. 1987).

46. *See Graham*, 747 F.2d at 1388; *McLouth Steel Corp.*, 55 Bankr. at 361-62; *Hadar Leasing Int’l Co. v. D.H. Overmyer Telecasting Co.* (*In re D.H.*

*Hadar Leasing International Co. v. D.H. Overmyer Telecasting Co. (In re D.H. Overmyer Telecasting Co.)*.<sup>47</sup> A repossession action was commenced in the bankruptcy court by the lessor of the property, who had previously filed a proof of claim in the debtor's chapter 11 proceeding. The debtor counterclaimed for damages, and the lessor demanded a jury trial. The bankruptcy court denied the jury demand and the district court affirmed. After concluding there was no constitutional right to a jury trial in a bankruptcy court,<sup>48</sup> the district court held that section 1480 likewise conveyed no right to a jury trial in this bankruptcy setting, even though outside of bankruptcy the demand for damages might have given rise to a jury trial right.<sup>49</sup> According to the court, section 1480(a) required it to determine "whether the issues presented in the pleadings would have been triable by a jury under the former Bankruptcy Act."<sup>50</sup> It noted that under the 1898 Act "the bankruptcy court was granted summary jurisdiction over the issues concerning the debtor's property which was in the actual or constructive possession of the bankruptcy court."<sup>51</sup> The court thus concluded

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Overmyer Telecasting Co.), 53 Bankr. 963, 979-80 (N.D. Ohio 1984); *Arnett Oil*, 44 Bankr. at 604; *Country Junction, Inc. v. Levi Strauss & Co. (In re Country Junction, Inc.)*, 41 Bankr. 425, 430 (W.D. Tex. 1984), *aff'd*, 798 F.2d 1410 (5th Cir. 1986); *Atlas Fire Apparatus v. Beaver (In re Atlas Fire Apparatus)*, 56 Bankr. 927, 935 (Bankr. E.D.N.C. 1986); *Lombard-Wall, Inc. v. New York City Hous. Dev. Corp. (In re Lombard-Wall, Inc.)*, 44 Bankr. 928, 936 (Bankr. S.D.N.Y. 1984), *rev'd*, 48 Bankr. 986 (S.D.N.Y. 1985); *McLouth Steel Corp. v. AJF, Inc. (In re McLouth Steel Corp.)*, 38 Bankr. 316, 317 (Bankr. E.D. Mich. 1984), *aff'd*, 55 Bankr. 357 (E.D. Mich. 1985); *First Int'l Servs. Corp. v. Apollo Sign Co. (In re First Int'l Servs. Corp.)*, 37 Bankr. 856, 859 (Bankr. D. Conn. 1984); *Beck v. Fairchild Aircraft Corp. (In re Sunair Int'l)*, 32 Bankr. 142, 144 (Bankr. S.D. Fla. 1983); *Coast Trading Co.*, 31 Bankr. at 666-67; *Jahn v. Lamb (In re Lamb)*, 29 Bankr. 950, 950-51 (Bankr. E.D. Tenn. 1983); *Salomon v. Luzar (In re Black & Geddes, Inc.)*, 25 Bankr. 278, 280 (Bankr. S.D.N.Y. 1982); *Air Transp. Ass'n of Am. v. Professional Air Traffic Controllers Org. (In re Professional Air Traffic Controllers Org.)*, 22 Bankr. 212, 213 (Bankr. D.D.C.), *aff'd*, 23 Bankr. 271 (D.D.C. 1982); *Kransdorf v. Murray (In re Fidelity Am. Fin. Corp.)*, 20 Bankr. 115, 116-17 (Bankr. E.D. Pa. 1982); *Hadar Leasing Int'l Co. v. D.H. Overmyer Telecasting Co. (In re D.H. Overmyer Telecasting Co.)*, 18 Bankr. 107, 108 (Bankr. N.D. Ohio 1982); *Portage Assocs.*, 16 Bankr. at 448; *Mozzer*, 10 Bankr. at 1004-05; *Lafayette Radio Elecs. Corp.*, 7 Bankr. at 188.

47. 53 Bankr. 963 (N.D. Ohio 1984).

48. *Id.* at 979. The court relied on *Katchen v. Landy*, 382 U.S. 323 (1966), which it read as holding that "there is no constitutional right to a jury trial in a bankruptcy court because such proceedings are equitable in nature." 53 Bankr. at 979. The *Katchen* decision is discussed extensively in Part III of this Article. See *infra* notes 136-98 and accompanying text.

49. 53 Bankr. at 980.

50. *Id.*

51. *Id.*

that there would have been no right to a jury trial for this action under the prior Act and hence no right to a jury trial under section 1480(a).<sup>52</sup>

## 2. The Pure Seventh Amendment Approach

The alternative interpretation of section 1480(a) was also well represented in case law.<sup>53</sup> For instance, in *Martin Baker Well Drilling v. Koulovatos* (*In re Martin Baker Well Drilling*),<sup>54</sup> the plaintiffs moved to strike the defendants' demand for a jury trial.<sup>55</sup> In determining whether defendants were entitled to a jury trial under section 1480(a), the bankruptcy court rejected the summary/plenary line of cases.<sup>56</sup> It concluded that "[t]his approach runs counter to Congress' basic aim of eliminating the enormous volume of wasteful litigation under the old Act over summary jurisdiction."<sup>57</sup> The court believed it "unlikely that Congress intended to abolish the summary/plenary distinction as to jurisdiction, while retaining the same distinction as the basis for determining jury trial

52. *Id.* The court also held that the lessor's demand for a jury trial should be denied because, by filing a proof of claim against the estate, it had "voluntarily submitted to the summary jurisdiction of the bankruptcy court." *Id.*

Other courts, sharing this interpretation of § 1480, reinforced their analysis by citing House and Senate reports that discuss the preservation of existing jury trial rights. *See, e.g., Portage Assocs.*, 16 Bankr. at 447-48; *see also infra* note 70 (discussing positions taken by the House and Senate on preserving the jury trial right).

53. *See Nickinello v. Roberson* (*In re Huey*), 23 Bankr. 804, 804 (Bankr. 9th Cir. 1982); *Lombard-Wall, Inc. v. New York City Hous. Dev. Corp.* (*In re Lombard-Wall, Inc.*), 48 Bankr. 986, 993 (S.D.N.Y. 1985); *Air Transp. Ass'n of Am. v. Professional Air Traffic Controllers Org.* (*In re Professional Air Traffic Controllers Org.*), 23 Bankr. 271, 274 (D.D.C. 1982); *Pereira v. Checkmate Communications Co.* (*In re Checkmate Stereo & Elecs.*), 21 Bankr. 402, 408 (E.D.N.Y. 1982); *Busey v. Fleming* (*In re Fleming*), 8 Bankr. 746, 748 (N.D. Ga. 1980); *Young v. Peter J. Saker, Inc.* (*In re Paula Saker & Co.*), 37 Bankr. 802, 807 (Bankr. S.D.N.Y. 1984); *Martin Baker Well Drilling v. Koulovatos* (*In re Martin Baker Well Drilling*), 36 Bankr. 154, 155-56 (Bankr. D. Me. 1984); *Interfirst Bank Dallas v. Basin Refining* (*In re Basin Refining*), 30 Bankr. 578, 583 (Bankr. N.D. Tex. 1983); *Gagel v. Kingston Greene Partners* (*In re GWF Investment*), 24 Bankr. 435, 436 (Bankr. S.D. Ohio 1982); *Boroff v. Carriero* (*In re Carriero*), 21 Bankr. 132, 133 (Bankr. D. Mass. 1982); *Pettigrew v. Graham* (*In re Graham*), 16 Bankr. 606, 610 (Bankr. N.D. Ga. 1981); *In re Newman*, 14 Bankr. 1014, 1015 (Bankr. S.D.N.Y. 1981); *Pinson v. Reynolds* (*In re First Fin. Group*), 11 Bankr. 67, 69 (Bankr. S.D. Tex. 1981); *Brown v. Frank Meador Buick* (*In re Frank Meador Buick*), 8 Bankr. 450, 455 (Bankr. W.D. Va. 1981).

54. 36 Bankr. 154 (Bankr. D. Me. 1984).

55. *Id.* at 155. The plaintiffs sought recovery for preferential and fraudulent transfers, conversion, fraud, and defamation. *Id.*

56. *Id.* at 155-56.

57. *Id.* at 155.

rights.”<sup>58</sup> Instead, the court held that “under the Bankruptcy Code, the same right to jury trial exists as exists in other federal courts.”<sup>59</sup> Accordingly, the court determined which of the plaintiffs’ claims were legal rather than equitable and granted the jury demand as to them.<sup>60</sup>

The *Martin Baker Well Drilling* court made no attempt to reconcile its method of analysis with section 1480’s language, which merely disclaimed any intent to “affect” jury trial rights “provided by any statute in effect on September 30, 1979.”<sup>61</sup> Other courts that rejected the summary/plenary method of analysis, however, adopted the suggestion of a commentator that the word “statute” be interpreted as including the seventh amendment.<sup>62</sup> If an action carried a right to a jury trial under the seventh amendment,<sup>63</sup> these courts reasoned, then section 1480 preserved that right when the action was tried in bankruptcy.<sup>64</sup>

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58. *Id.* at 156.

59. *Id.*

60. *Id.* The court granted the jury demand with respect to the counts seeking damages for conversion, fraud, misrepresentation, interference with contractual relationships, and defamation. *Id.* at 156 n.2. Ironically, the summary/plenary method of analysis would have yielded the same result under § 1480. That result would obtain because the action by the debtor in possession would have been pursued by a plenary suit under the 1898 Act, in which action there would have been a right to a jury trial. *See, e.g., Belfance v. Sizzler Family Steak Houses (In re Portage Assocs.)*, 16 Bankr. 445, 448 (Bankr. N.D. Ohio 1982) (granting jury demand under § 1480 because, under 1898 Act, trustee would have had to bring plenary suit in which there was a right to a jury trial). Another case illustrates why the method of analysis employed by the court under § 1480 was sometimes crucial to the ruling on the jury demand. *See Lombard-Wall Inc. v. New York City Hous. Dev. Corp. (In re Lombard-Wall Inc.)*, 48 Bankr. 986, 993 (S.D.N.Y. 1985) (finding right to jury trial because counterclaim against creditor was legal in nature), *rev’d* 44 Bankr. 928 (Bankr. S.D.N.Y. 1984) (denying jury demand because action would have been within bankruptcy court’s summary jurisdiction since creditor filed claim against estate).

61. 28 U.S.C. § 1480(a) (repealed 1984).

62. *See Levy, supra* note 22, at 9-10. Professor Levy argued that it was unlikely that Congress meant to preserve jury trial rights granted by statute but not common law jury trial rights protected by the seventh amendment. He suggested that to circumvent this problem, courts could “interpret the word ‘statute’ as including constitutional provisions. Since bankruptcy courts are federal courts, the seventh amendment to the United States Constitution then would apply and would fill the gap.” *Id.* at 10.

63. The analysis applied in nonbankruptcy courts under the seventh amendment is discussed *infra* note 132 and accompanying text.

64. *See, e.g., Pinson v. Reynolds (In re First Fin. Group)*, 11 Bankr. 67, 69 (Bankr. S.D. Tex. 1981) (adopting Professor Levy’s interpretation of § 1480);

Although not always fully acknowledged,<sup>65</sup> a pure seventh amendment reading of section 1480 would have resulted in a vast expansion of jury trial rights beyond those existing under the 1898 Act. For example, under the 1898 Act it was well established that claims against the bankruptcy estate were resolved by summary proceedings without the aid of a jury.<sup>66</sup> The summary/plenary interpretation of section 1480 therefore led to the conclusion that jury trial rights were not conveyed under the 1978 Act with regard to such claims, because none had previously existed either under a statute or under the seventh amendment. A pure seventh amendment reading of section 1480, by contrast, would have examined the constitutional entitlement to a jury trial *outside* the bankruptcy context. This analysis would suggest that so long as the creditor asserted a legal claim for damages against the estate, the claim would be

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Brown v. Frank Meador Buick (*In re* Frank Meador Buick), 8 Bankr. 450, 454 (Bankr. W.D. Va. 1981) (same).

Interestingly, some courts that adopted the summary/plenary approach to § 1480 agreed that the term *statute* should be read to include the seventh amendment. They distinguished their analysis, however, by considering whether there would have been a constitutional right to a jury trial of the action *in bankruptcy* prior to the adoption of the 1978 Act. Thus their analysis took into account authority holding that there was no constitutional right to a jury trial of summary proceedings under the 1898 Act. See, e.g., First Int'l Servs. Corp. v. Apollo Sign Co. (*In re* First Int'l Serv. Corp.), 37 Bankr. 856, 859-60 (Bankr. D. Conn. 1984).

Still other courts seemed to get tangled up in the language of § 1480. For example, the district court in Country Junction, Inc. v. Levi Strauss & Co. (*In re* Country Junction, Inc.), 41 Bankr. 425 (W.D. Tex. 1984), *aff'd*, 798 F.2d 1410 (5th Cir. 1986), started out by stating that § 1480 required a determination of whether there would have been a right to a jury trial under the 1898 Act. *Id.* at 430. This preference action, the court concluded, would have been a plenary action under the 1898 Act and thus possibly entitled to a jury trial. Rather than concluding that this result was preserved by § 1480, however, the court reasoned that because the case was now subject to the broadened "summary jurisdiction" of the bankruptcy courts under the 1978 Act and 1898 Act, there was no right to a jury trial in summary proceedings, there was no such right under § 1480. *Id.*

65. *But see* Levy, *supra* note 22. Professor Levy admitted that application of a seventh amendment analysis to § 1480 "has the effect of greatly increasing the number of jury trials to be conducted by the bankruptcy courts beyond those cases in which there would have been both a right to plenary jurisdiction and an issue as to which a right to jury trial exists in such proceedings." *Id.* at 8.

66. See, e.g., Pepper v. Litton, 308 U.S. 295, 307 (1939) ("[T]he bankruptcy court in passing on allowance of claims sits as a court of equity."); *In re* Equity Funding Corp. of Am., 396 F. Supp. 1266, 1276 (C.D. Cal.) (exercise of summary jurisdiction over claims against bankrupt's subsidiaries, which court viewed as claims against bankruptcy estate, held not to violate seventh amendment), *aff'd*, 519 F.2d 1274 (9th Cir. 1975).

triable by a jury. The fact that such a claim previously had not been triable by a jury when asserted in the bankruptcy context would be irrelevant.<sup>67</sup>

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67. See *American Universal Ins. Co. v. Pugh* (*In re Pugh*), 72 Bankr. 174, 176 (D. Or. 1986) (creditor arguing that, due to elimination of summary/plenary dichotomy, § 1480 should be interpreted to allow parties "the same right to jury trial as they would have in other federal courts, regardless of how their actions would have been characterized prior to the Code'" (quoting from Appellant's brief)), *aff'd*, 821 F.2d 1352 (9th Cir. 1987); *In re Newman*, 14 Bankr. 1014, 1015 (Bankr. S.D.N.Y. 1981) ("Now that the distinction between summary and plenary actions has been eliminated . . . , the right to a jury trial in bankruptcy will depend upon the nature of the cause of action."); *First Fin. Group*, 11 Bankr. at 69 ("[T]he right to jury trials under the Code must be determined by the nature of the cause of action and not by the historical nature of the court."); *Frank Meador Buick*, 8 Bankr. at 455 ("This Court need only look to the right of trial by jury generally and does not need to determine a right of trial by jury with the inordinate burdens placed upon the Court with summary jurisdiction under the Act of 1898."); Comment, *supra* note 14, at 541 (courts adopting this interpretation of § 1480 "have concluded that under the Code, the same right to a jury trial exists as in other federal courts").

Allowing jury trials for the adjudication of disputed claims follows logically from the position taken by the courts that applied a pure seventh amendment analysis to § 1480. Nevertheless, there is no reported instance of a court granting a jury trial under such circumstances. *But cf. In re Kaufman*, 78 Bankr. 309, 311-12 (Bankr. N.D. Fla. 1987) (lifting automatic stay to permit liquidation of claim against estate in state court, where creditor will be entitled to jury trial). Despite broad assertions that jury trial rights in bankruptcy are equivalent to those existing in federal district court, these courts may really have been advocating what has been identified as a third interpretation of § 1480: "As to [the essential administrative tasks of the bankruptcy court], there was no right to a jury trial. But as to disputes between a trustee and adverse claimants, one was to look to nonbankruptcy law to determine whether there was a jury trial right." D. BAIRD & T. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 964 (1985).

Perhaps these courts recognized a distinction between claims against the estate and claims by the estate against third parties. They may have viewed the allowance and disallowance of claims *against* the estate as essential administrative tasks that would continue to be resolved without a jury, regardless of whether they would have been triable by a jury outside of bankruptcy. As for legal claims asserted by the estate against third parties, however, the pure seventh amendment interpretation of § 1480 recognized the existence of jury trial rights, even though under the 1898 Act such claims would have come within the bankruptcy court's summary jurisdiction—for example, a preference claim against someone who had previously filed a proof of claim against the estate. Although this interpretation is less sweeping than one that applies the seventh amendment without distinction, it too results in an expansion of jury trial rights over those existing under the 1898 Act. Thus it too can be questioned as being inconsistent with the language and legislative history of § 1480. See *infra* notes 68-79 and accompanying text.

### 3. Legislative History of Section 1480

The legislative history of section 1480, though sparse and generally uninformative, fails to support the pure seventh amendment approach to interpreting the provision.<sup>68</sup> Instead, Congress appears to have enacted the provision to ensure that by expanding the bankruptcy court's jurisdiction and by allowing matters to be adjudicated there that previously had been tried in state or federal district court, it would not infringe on the parties' existing rights to jury trial.<sup>69</sup> Congress accordingly adopted a provision that simply preserved jury trial rights in

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68. As with many other provisions of the 1978 Act, the provision for jury trials in bankruptcy originated with the Commission on Bankruptcy Law of the United States. The Commission's jury trial provision would have eliminated the right to a jury trial of involuntary petition issues, but in all other instances would have preserved "the right to a jury trial of any issue . . . as recognized and enforced prior to the effective date of the Act." COMMISSION REPORT, *supra* note 36, pt. 1, at 45 (§ 2-207(b)). The Commission explained that

[I]f either party would have been entitled to a jury trial of the issues remaining after a determination of nondischargeability pursuant to § 17c of the present Act, or of the issues in a plenary action to recover on a cause of action enforceable by the trustee under §§ 60b, 67d, 70a, or 70e, he may demand such a trial in accordance with applicable Rules of Bankruptcy Procedure.

*Id.* at 46. Thus, the Commission identified proceedings in which a right to a jury trial existed and stated that those rights would be continued, even though its proposal required the trial to be convened in the bankruptcy court. Although the Commission's proposed language was modified slightly, no one in Congress ever proposed or expressed a desire to broaden the scope of the provision beyond that suggested by the Commission. *See infra* notes 69-70.

69. The jury trial provision was rarely mentioned during the lengthy hearings leading up to enactment of the 1978 Act. The statements of two witnesses who testified before the House Judiciary Subcommittee on Civil and Constitutional Rights are revealing, however. Daniel Cowans, a former bankruptcy judge and treatise author, stated that he did not foresee any constitutional limitations on the jurisdiction of bankruptcy courts "unless, somehow or other, someone were deprived of a jury trial right." *Bankruptcy Act Revision: Hearings on H.R. 31 and 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong. 1st & 2d Sess. 316 (1975-1976). Similarly, Professor Shapiro of Harvard Law School, responding by letter to an inquiry from the subcommittee, stated his belief that there was strong support for permitting a non-article III court to adjudicate bankruptcy matters, provided that "the right to trial by jury is not violated." *Id.* at 2702. Although both witnesses were ultimately proved wrong in their views concerning article III, *see* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982), their testimony suggests that Congress may have been motivated by the need to preserve constitutionally protected rights. Certainly there is nothing in the legislative history to suggest a contrary motive. There was never any suggestion during any of the hearings related to the 1978 Act that creating new jury trial rights beyond those already existing under current law was desirable.

existence prior to the effective date of the 1978 Act. Nothing in the language of section 1480 or its legislative history suggested that Congress desired to expand the right to jury trials beyond the preexisting practice.<sup>70</sup>

Interpreting section 1480 to reflect Congress's intent to preserve preexisting jury trial rights required courts to determine whether a particular action would have been triable by a jury under the 1898 Act.<sup>71</sup> Criticism of this interpretation rested primarily on Congress's explicit intent to eliminate the distinction between summary and plenary jurisdiction.<sup>72</sup> Congress undeniably meant to eliminate this troublesome distinction by its broad jurisdictional grant to the bankruptcy courts.<sup>73</sup> This does not mean, however, that resort to the distinction is

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70. As noted previously, the House Judiciary Committee report explained that § 1480(a) "continues any current right of litigants in bankruptcy cases, and cases related to bankruptcy cases, such as plenary actions, to a jury trial," H. REP. NO. 595, 95th Cong., 1st Sess. 448 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6404, and that it "requires that the right of jury trial be preserved as it is under present law," *id.* at 12, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 5973 (footnote omitted). The report further stated that "[b]ankruptcy courts will be required to hold jury trials to adjudicate what are under present law called 'plenary suits,' that is, suits that are brought in State or Federal courts other than the bankruptcy courts." *Id.* Similarly, the Senate Judiciary Committee report explained that the jury trial provision "continues any current right of a litigant in a case or proceeding under title 11 or related to such a case, to a jury trial." S. REP. NO. 989, 95th Cong., 2d Sess. 157, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5943.

71. See *supra* notes 46-52 and accompanying text.

72. See, e.g., *Busey v. Fleming (In re Fleming)*, 8 Bankr. 746, 748 (N.D. Ga. 1980) (noting elimination of distinction between summary and plenary jurisdiction and concluding that "the sole inquiry now is whether the Seventh Amendment . . . provides a right to jury trial on the contested issues"); *Martin Baker Well Drilling v. Koulovatos (In re Martin Baker Well Drilling)*, 36 Bankr. 154, 156 (Bankr. D. Me. 1984) ("[I]t is unlikely that Congress intended to abolish the summary/plenary distinction as to jurisdiction, while retaining the same distinction as the basis for determining jury trial rights."); *In re Newman*, 14 Bankr. 1014, 1015 (Bankr. S.D.N.Y. 1981) ("Now that the distinction between summary and plenary actions has been eliminated . . . the right to a jury trial in bankruptcy will depend upon the nature of the cause of action.").

73. See, e.g., SEN. REP. NO. 989, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5783, 5804 ("It is the purpose of [the jurisdictional provisions] to eliminate entirely the present jurisdictional dichotomy between summary and plenary jurisdiction."); H. REP. NO. 595, 95th Cong., 1st Sess. 445 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6400 ("Actions that formerly had to be tried in State court or in Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy courts. The idea of possession or consent as the sole bases for jurisdiction is eliminated.").

inappropriate in determining jury trial rights. Indeed, the language and the history of section 1480 seem to require such an approach.<sup>74</sup> Moreover, the seventh amendment serves as a familiar analogy for an analysis of jury trial rights resting on historical jurisdictional concepts. Under the seventh amendment, distinctions between law and equity long abolished elsewhere<sup>75</sup> remain significant in determining when there is a right to a jury trial.<sup>76</sup> The distinction continues to be relevant in the jury trial context because the seventh amendment is expressed in terms of preserving jury trial rights existing at the time the seventh amendment was ratified.<sup>77</sup> Applying a similar analysis to the 1978 Act, one could recognize that Congress intended to eliminate the summary/plenary distinction in the Act's jurisdictional grant. Yet one could conclude that section 1480 nevertheless required a determination of what rights existed under that prior jurisdictional scheme because it spoke merely of "not affecting jury trial rights."<sup>78</sup> Although the analysis is cumbersome, it is supported by the language and history of section 1480.<sup>79</sup>

Both the summary/plenary method and the pure seventh amendment approach to interpreting section 1480 permitted the conclusion that statutory jury trial rights existed in certain

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74. See *supra* notes 68-70 and accompanying text.

75. The adoption of the Federal Rules of Civil Procedure resulted in the merger of law and equity in the federal courts. See FED. R. CIV. P. 2.

76. See, e.g., J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 45, at 485 ("The historical test in the federal courts after law and equity merged meant that claims formerly triable 'at law' were entitled to a jury and those formerly maintainable 'in equity' did not merit a jury as of right.") (footnote omitted); Luneburg & Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887, 901 (1981) ("[D]espite the merger of law and equity under the Federal Rules of Civil Procedure, the historical distinction between legal and equitable actions remains crucial to seventh amendment problems.") (footnotes omitted).

77. See, e.g., J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 45, at 488 ("[C]ontinued utilization [of seventh amendment's historical test] seems required to honor the constitutional mandate."); Luneburg & Nordenberg, *supra* note 76, at 901 ("The seventh amendment by its own terms was intended to 'preserve' the right to trial by jury; thus, its application has long been governed by an historical test.") (footnote omitted).

78. 28 U.S.C. § 1480(a) (repealed 1984).

79. Cf. *McLouth Steel Corp. v. Marblehead Lime Co. (In re McLouth Steel Corp.)*, 55 Bankr. 357, 361-62 (E.D. Mich. 1985) (concluding that "[u]sing the summary/plenary framework to determine the right to a jury trial does not interfere with Congress' intent to eliminate time consuming jurisdictional battles," but instead is consistent with that intent because it does not create even more delay by expanding jury trial rights).

bankruptcy matters.<sup>80</sup> Although the exact number of jury trials conducted under section 1480 is not known,<sup>81</sup> there are over a dozen reported decisions granting jury trials under this provision.<sup>82</sup> When a jury trial was granted, there was apparent agreement that the bankruptcy judge was authorized to conduct it.<sup>83</sup>

### C. NORTHERN PIPELINE AND ITS AFTERMATH

The uncertainty concerning jury trials in bankruptcy was exacerbated in 1982 by the Supreme Court's plurality decision holding the 1978 Act's jurisdictional scheme unconstitutional.<sup>84</sup>

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80. Under the pure seventh amendment method of analysis, any issue that was legal rather than equitable in nature was entitled to be tried by a jury under § 1480. Under the summary/plenary method of analysis, any issue that was legal in nature *and* would have been pursued by a plenary proceeding under the 1898 Act was triable by a jury.

81. The Administrative Office of the Courts did not compile statistics concerning the number of jury trials conducted in the bankruptcy courts under § 1480. Telephone interview with Mary Boone, Bankruptcy Statistics Branch of the Administrative Office of the Courts (June 5, 1987).

82. See *Nickinello v. Roberson* (*In re Huey*), 23 Bankr. 804, 805 (Bankr. 9th Cir. 1982); *Lombard-Wall Inc. v. New York City Hous. Dev. Corp.* (*In re Lombard-Wall Inc.*), 48 Bankr. 986, 993 (S.D.N.Y. 1985); *Farmers & Merchants Nat'l Bank v. Aylesworth* (*In re Arnett Oil*), 44 Bankr. 603, 604 (N.D. Ind. 1984); *Young v. Peter J. Saker, Inc.* (*In re Paula Saker & Co.*), 37 Bankr. 802, 811 (Bankr. S.D.N.Y. 1984); *Martin Baker Well Drilling v. Koulovatos* (*In re Martin Baker Well Drilling*), 36 Bankr. 154, 156 (Bankr. D. Me. 1984); *Ravenna Indus. v. Reliable Patternworks* (*In re Ravenna Indus.*), 34 Bankr. 314, 316 (Bankr. N.D. Ohio 1983); *Beck v. Fairchild Aircraft Corp.* (*In re Sunair Int'l*), 32 Bankr. 142, 146 (Bankr. S.D. Fla. 1983); *Jahn v. Lamb* (*In re Lamb*), 29 Bankr. 950, 953 (Bankr. E.D. Tenn. 1983); *Salomon v. Luzar* (*In re Black & Geddes, Inc.*), 25 Bankr. 278, 281 (Bankr. S.D.N.Y. 1982); *Gagel v. Kingston Greene Partners* (*In re GWF Inv.*), 24 Bankr. 435, 436 (Bankr. S.D. Ohio 1982); *Belfance v. Sizzler Family Steak Houses* (*In re Portage Assocs.*), 16 Bankr. 445, 449 (Bankr. N.D. Ohio 1982); *Brown v. Frank Meador Buick* (*In re Frank Meador Buick*), 8 Bankr. 450, 455 (Bankr. W.D. Va. 1981); *Jensen v. Patterson* (*In re Patterson*), 6 Bankr. 149, 150 (Bankr. S.D. Ohio 1980).

83. See, e.g., *Huey*, 23 Bankr. at 805 (remanding to bankruptcy court for jury trial, holding that § 1480 superseded local rule requiring district court to conduct jury trials); *Lombard-Wall Inc.*, 48 Bankr. at 993 (holding that action "must be tried by a jury in the bankruptcy court"); R. JORDAN & W. WARREN, BANKRUPTCY 1058 (1985) (1978 Act "contemplated that bankruptcy judges could conduct jury trials"); King, *supra* note 14, at 703 (under § 1480 "trial before a jury would be held in the bankruptcy court because of the pervasive jurisdiction granted to that court in section 1471(c)").

84. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In the plurality opinion, Justice Brennan concluded that the 1978 Act violated article III of the Constitution by vesting the "essential attributes of the judicial power" in bankruptcy judges who lacked lifetime tenure and protection against salary diminution. *Id.* at 87 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)). The plurality rejected arguments that the broad exercise of

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Court rejected the argument that bankruptcy courts should be viewed as adjuncts to the district court, reasoning that "the bankruptcy courts exercise all ordinary powers of district courts, including the power to preside over jury trials."<sup>85</sup> Some courts interpreted this statement to mean that it is unconstitutional for non-article III bankruptcy judges to conduct jury trials.<sup>86</sup> An Emergency Rule proposed by the Judicial Conference that apparently shared this view was adopted by all district courts after the *Northern Pipeline* judgment went into effect.<sup>87</sup> The rule expressly prohibited bankruptcy judges from

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jurisdiction by bankruptcy judges could be viewed as consistent with either the congressional creation of article I legislative courts, *id.* at 63-76, or the permissible utilization of adjuncts to article III courts, *id.* at 76-87. Justice Rehnquist, in a concurring opinion joined by Justice O'Connor, concluded more narrowly that the 1978 Act violated article III insofar as it authorized a bankruptcy judge to hear and decide the type of bankruptcy-related, state-law claims then before the Court. *Id.* at 89-92. Justices Rehnquist and O'Connor concluded, however, that this impermissible grant of authority was "not readily severable from the remaining grant of authority to bankruptcy courts," and thus they concurred in the judgment. *Id.* at 91-92; *see also infra* notes 347, 357 (discussing *Northern Pipeline* decision).

85. 458 U.S. at 85 (plurality opinion).

86. *See, e.g.,* Cameron v. Anderson (*In re American Energy*), 50 Bankr. 175, 181 (Bankr. D.N.D. 1985); Terry v. Proehl (*In re Proehl*), 36 Bankr. 86, 87 (W.D. Va. 1984).

87. The Supreme Court initially stayed its judgment in the *Northern Pipeline* case until October 4, 1982, to give Congress "an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." 458 U.S. at 88 (plurality opinion). It later extended the stay through December 24, 1982. 459 U.S. 813, 813 (1982). Although Congress still had not acted by that date, the Court declined to stay its judgment any further. The decision became effective on December 25, 1982. 459 U.S. 1094, 1094 (1982).

The Judicial Conference anticipated that Congress would not reconstitute the bankruptcy courts before the *Northern Pipeline* stay terminated. It directed the Administrative Office of the Courts to provide each circuit with a model rule that could be adopted by each district court to "permit the bankruptcy system to continue without disruption in reliance upon jurisdictional grants remaining in the law as limited by *Northern Pipeline*." Vihon, *Delegation of Authority and the Model Rule: The Continuing Saga of Northern Pipeline*, 88 COM. L.J. 64, 76 (1983) (reprinting the resolution of the Judicial Conference of Sept. 23, 1982, and the emergency rule sent out by the Administrative Office of the Courts). The rule was based on the assumption that the grant of bankruptcy jurisdiction to the district courts remained intact and that district courts could constitutionally delegate some of their duties to bankruptcy judges. *Id.* at 77. Under the Emergency Rule, bankruptcy judges could conduct proceedings and enter final judgments in some bankruptcy matters, subject to the district court's right to withdraw the reference of the matter from the bankruptcy judge and subject to the district court's de novo review. *Id.* at 78. Bankruptcy judges, however, were prohibited from entering judg-

conducting jury trials.<sup>88</sup> Although courts continued to recognize the existence of jury trial rights under section 1480, decisions under the Emergency Rule required the district judge to conduct any jury trials that took place.<sup>89</sup>

Further confusion resulted in August 1983 when revised Bankruptcy Rules took effect.<sup>90</sup> Among the new rules, which had been approved by the Supreme Court and Congress, was Rule 9015, governing the procedure for demanding and conducting jury trials.<sup>91</sup> Some courts interpreted Rule 9015 to reauthorize jury trials in the bankruptcy courts, even though the emergency rule continued in effect in all districts.<sup>92</sup> Faced with what they viewed as a conflict between the Emergency Rule and Rule 9015, several bankruptcy courts held that Rule 9015 superseded the locally adopted Emergency Rule.<sup>93</sup>

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ments or dispositive orders without the parties' consent in any "related proceedings." *Id.* These were defined as "those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court." *Id.*; see Countryman, *Emergency Rule Compounds Emergency*, 57 AM. BANKR. L.J. 1 (1983); King, *The Unmaking of a Bankruptcy Court: Aftermath of Northern Pipeline v. Marathon*, 40 WASH. & LEE L. REV. 99, 115-17 (1983).

88. Subsection (d)(1) of the Emergency Rule, as distributed by the Administrative Office of the Courts, provided that "the bankruptcy judges may not conduct: . . . (D) jury trials." See Vihon, *supra* note 87, at 78.

89. See, e.g., *Ravenna Indus. v. Reliable Patternworks (In re Ravenna Indus.)* 34 Bankr. 314, 316 (Bankr. N.D. Ohio 1983); *Beck v. Fairchild Aircraft Corp. (In re Sunair Int'l)*, 32 Bankr. 142, 144 (Bankr. S.D. Fla. 1983); *Jahn v. Lamb (In re Lamb)*, 29 Bankr. 950, 953 (Bankr. E.D. Tenn. 1983).

90. See 461 U.S. 975, 975 (1983) (prescribing Bankruptcy Rules and declaring that they should take effect on Aug. 1, 1983).

91. See Fed. Bankr. R. 9015, 11 U.S.C. app. at 140 (Supp. IV 1986).

92. Rule 9015 did not expressly provide that bankruptcy courts could conduct jury trials. It nevertheless used the word *court, id.*, which was defined by Rule 9001 to include bankruptcy courts established under the 1978 Act, Fed. Bankr. R. 9001, 11 U.S.C. app. at 136 (Supp. IV 1986). Accordingly, some courts read Rule 9015 as indicating that jury trials could take place in bankruptcy courts. See *Lombard-Wall Inc. v. New York City Hous. Dev. Corp. (In re Lombard-Wall Inc.)*, 48 Bankr. 986, 992 (S.D.N.Y. 1985) ("[R]ule 9015 . . . permits the bankruptcy courts to hold jury trials."); *Young v. Peter J. Saker, Inc. (In re Paula Saker & Co.)*, 37 Bankr. 802, 809 (Bankr. S.D.N.Y. 1984) (rule 9015 "affords no room for any construction that bankruptcy courts are not to conduct jury trials but are to refer all such matters to the district courts"); *Martin Baker Well Drilling v. Koulovatos (In re Martin Baker Well Drilling)*, 36 Bankr. 154, 158 (Bankr. D. Me. 1984) (incorporating Fed. Bankr. R. 9001(2), which defines *court* to include the bankruptcy court, into rule 9015); *Nashville City Bank & Trust Co. v. Armstrong (In re River Transp. Co.)*, 35 Bankr. 556, 559 (Bankr. M.D. Tenn. 1983) ("Rule 9015 . . . contains absolutely no hint that the United States bankruptcy court's exclusive power to hold jury trials in bankruptcy cases and proceedings . . . is abridged or curtailed . . .").

93. See, e.g., *Paula Saker & Co.*, 37 Bankr. at 809 (holding that "local dis-

## II. JURY TRIAL RIGHTS UNDER THE 1984 AMENDMENTS

Whether there existed a right to a jury trial in bankruptcy thus remained unsettled in the years following adoption of the 1978 Act. Courts were divided on the extent to which section 1480 established rights to a jury trial, and, after *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>94</sup> it was unclear whether bankruptcy judges could conduct jury trials. Any hopes that Congress would act to clarify the confusion when it responded to *Northern Pipeline*, however, were ultimately disappointed. The jury trial provision enacted by Congress as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 Amendments)<sup>95</sup> only further confused matters.

Apparently repealing section 1480,<sup>96</sup> the 1984 Amendments included a new jury trial provision. Section 1411 declares:

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.

(b) The district court may order the issues arising under section 303 [governing involuntary bankruptcies] of title 11 to be tried without a jury.<sup>97</sup>

Rather than resolving the important question of what bankruptcy matters are entitled to be tried by a jury, the current statute merely addresses the issue with respect to narrow categories of cases. Beyond these categories the statute is conspicu-

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district court rules cannot prevail over nationwide uniform rules promulgated by the Supreme Court in the exercise of its exclusive authority"); *Martin Baker Well Drilling*, 36 Bankr. at 158 ("In case of such a conflict [between local rule and rule 9015], the new Bankruptcy Rules must prevail."); *River Transp.*, 35 Bankr. at 559 ("Because the new bankruptcy rules continue to allow bankruptcy judges to preside over jury trials, they must override the contrary premise contained in the local rule.").

94. 458 U.S. 50 (1982).

95. Pub. L. No. 98-343, 98 Stat. 333 (codified at various sections of 11 and 28 U.S.C.).

96. The effect of the 1984 Amendments on § 402(b) of the 1978 Act, which included the jury trial provision, is difficult to ascertain because several of its provisions appear to work at cross-purposes. Compare *id.* § 113, 98 Stat. 333, 343 (§ 402(b) shall not become effective) with *id.* § 121, 98 Stat. 333, 345 (§ 402(b) shall take effect on the date of enactment of the 1984 Amendments). Most courts and commentators sensibly conclude, however, that § 1480 was repealed outright or by implication by the 1984 Amendments. See, e.g., *American Universal Ins. Co. v. Pugh* (*In re Pugh*), 72 Bankr. 174, 177 (D. Or. 1986); King, *supra* note 14, at 703 n.79.

97. 28 U.S.C. § 1411 (Supp. III 1985).

ously silent about the extent of jury trial rights and the authority of bankruptcy judges to conduct jury trials.

Not surprisingly, courts struggling to interpret and apply section 1411 reach conflicting conclusions concerning the existence of jury trial rights in bankruptcy.<sup>98</sup> Although these courts dutifully cite section 1411 as the governing statute,<sup>99</sup> many frequently ignore the statute and analyze whether there exists a constitutional right to a jury trial.<sup>100</sup> The tendency to leap to constitutional analysis may be due to the belief that the statute confers no jury trial rights in the particular case or to the belief that analysis under the seventh amendment is easier than trying to make sense of the inscrutable section 1411. Even those courts that do attempt to interpret section 1411 are divided as to its meaning. Some conclude that the statute grants the right to a jury trial only for the types of claims actually specified in subsection (a).<sup>101</sup> Others hold that section 1411 preserves jury trial rights for all cases according to seventh amendment principles.<sup>102</sup> Congress's failure to address comprehensively the question of jury trial rights in bankruptcy has thus produced confusion in the lower courts.<sup>103</sup>

#### A. SECTION 1411'S PUZZLING LANGUAGE

The wording of section 1411 causes confusion because of its narrow scope and uncertain implications. Subsection (a) permits jury trial for "personal injury and wrongful death tort

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98. See *infra* notes 170-98 and accompanying text.

99. See, e.g., *Acolyte Elec. Corp. v. City of New York*, 69 Bankr. 155, 182-84 (Bankr. E.D.N.Y. 1986); *Leird Church Furniture Mfg. Co. v. Union Nat'l Bank (In re Leird Church Furniture Mfg. Co.)*, 61 Bankr. 444, 445 (Bankr. E.D. Ark. 1986); *Otte v. Monsanto Co. (In re McCray's Farm Supply)*, 57 Bankr. 423, 424 (Bankr. E.D. Ark. 1985); *Mauldin v. Peoples Bank (In re Mauldin)*, 52 Bankr. 838, 840 (Bankr. N.D. Miss. 1985).

100. See, e.g., cases cited *supra* note 99.

101. See *Jefferson Nat'l Bank v. I.A. Durbin, Inc. (In re I.A. Durbin, Inc.)*, 62 Bankr. 139, 146 (S.D. Fla. 1986); *Morgan v. Lefton (In re Hendon Pools)*, 57 Bankr. 801, 802 (E.D. Mich. 1986); *Nordberg v. Republic Nat'l Bank (In re Chase & Sandborn Corp.)*, 55 Bankr. 538, 539 (Bankr. S.D. Fla. 1985); *Cameron v. Anderson (In re American Energy)*, 50 Bankr. 175, 180 (Bankr. D.N.D. 1985).

102. See, e.g., *Wolfe v. First Fed. Sav. & Loan Ass'n (In re Wolfe)*, 68 Bankr. 80, 87-88 (Bankr. N.D. Tex. 1986); *Energy Resources Co. v. Rosen (In re Energy Resources Co.)*, 49 Bankr. 278, 281 n.2 (Bankr. D. Mass. 1985); *Lerblance v. Rodgers (In re Rodgers & Sons)*, 48 Bankr. 683, 687 (Bankr. E.D. Okla. 1985).

103. See also *infra* notes 290-308 and accompanying text (discussing confusion in case law over authority of bankruptcy judges to conduct jury trials).

claim[s]."<sup>104</sup> By preserving jury trial rights for this limited class of cases, Congress may have meant that all other bankruptcy matters should be tried without a jury.<sup>105</sup> If that is the correct interpretation of subsection (a), however, then subsection (b) seems superfluous. At the same time, the authorization in subsection (b) to try involuntary bankruptcy issues *without* a jury suggests that in its absence the right to a jury trial would exist.<sup>106</sup> If true, how does one discern the source and scope of that right?

## B. LEGISLATIVE HISTORY OF SECTION 1411

Compounding the confusion concerning section 1411's meaning is the sparse history surrounding its enactment. In the deliberations prior to enacting the 1984 Amendments, Congress's discussion of the jury trial question was limited. At the same time, the explanations of section 1411 that can be found in the record are conflicting.

### 1. House and Senate Proposals

In response to the *Northern Pipeline* decision, bills were introduced in Congress to restructure the bankruptcy courts. Several House bills that proposed giving article III status to bankruptcy judges would have essentially reenacted section 1480 without change.<sup>107</sup> There was virtually no discussion of the jury trial provision in the committee reports accompanying these bills.<sup>108</sup> In the Senate a 1983 bill introduced by Senators

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104. 28 U.S.C. § 1411(a) (Supp. III 1985).

105. See, e.g., B. WEINTRAUB & A. RESNICK, *supra* note 14, at 6-32 ("Does [§ 1411(a)] mean that all *other* issues are not to be tried by a jury? Or did Congress intend that common law and statutory rights to trial by jury will continue to determine this question?") (emphasis in original); King, *supra* note 14, at 706-07 ("[S]ection 1411(a) would be totally redundant if the right to jury trial continued to exist in other types of disputes.").

106. See, e.g., R. JORDAN & W. WARREN, *supra* note 83, at 1057-58 (enactment of § 1411(b) "is some indication that Congress believed that after the 1984 Amendments the same rights of jury trial that existed under the Bankruptcy Reform Act are continued, except as specifically altered by § 1411(a)"); Greenfield, *supra* note 14, at 362 ("Section 1411(b) would appear to be unnecessary.").

107. See H.R. 5174, 98th Cong., 2d Sess., 130 CONG. REC. H1727 (daily ed. Mar. 19, 1984); H.R. 3, 98th Cong., 1st Sess., 129 CONG. REC. H31-32 (daily ed. Jan. 3, 1983); H.R. 6978, 97th Cong., 2d Sess., 128 CONG. REC. H5884 (daily ed. Aug. 12, 1982).

108. See H.R. REP. NO. 9, 98th Cong., 1st Sess. (1983); H.R. REP. NO. 807, 97th Cong., 2d Sess. (1982). There was no committee report accompanying H.R. 5174.

Thurmond and Heflin proposed retaining the non-article III status of bankruptcy judges, but contained a slightly reworded jury trial provision.<sup>109</sup> The committee report explained, however, that the reworded provision was intended to continue the jury trial practice existing under section 1480.<sup>110</sup> It thus appears that prior to enacting the 1984 Amendments there was no congressional sentiment on the part of the relevant congressional committees to change existing jury trial rights in bankruptcy.

The bill ultimately enacted was amended on the House floor by a substitute amendment proposed by Representatives Kastenmeier and Kindness.<sup>111</sup> The amendment proposed repealing section 1480 but did not suggest any replacement provision.<sup>112</sup> There is no explanation in the record for this omission. It is thus unclear whether the absence of a replacement provision was inadvertent or was based on a determination that there should be no statutorily conferred rights to a jury trial in bankruptcy.

When the House-passed bill was sent to the Senate, however, Senator Thurmond sought to amend it by adding the jury trial provision that had been part of the Senate bill.<sup>113</sup> The de-

109. See S. 1013, 98th Cong., 1st Sess., 129 CONG. REC. S4259 (daily ed. Apr. 7, 1983). This bill proposed adding at 28 U.S.C. § 1477 the following provision:

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to jury trial.

(b) The district court may order the issues arising under section 303 to be tried without a jury.

*Id.*; see S. REP. NO. 55, 98th Cong., 1st Sess. 68 (1983) (text of S. 1013).

110. S. REP. NO. 55, 98th Cong., 1st Sess. 20 (1983) ("Section 1477 of S. 1013 regarding jury trials is basically the same as section 1480 of existing law, except that the language of the section has been simplified."); *id.* at 43 ("Section 1477 as added by the bill, is virtually the same to [sic] the jury trial provisions of section 1480 of the 1978 Act.").

111. See H.R. 5174, 98th Cong. 2d Sess., 130 CONG. REC. H1789-92 (daily ed. Mar. 20, 1984).

112. See *id.* at H1789-92. Section 113 of the bill provided that § 402(b) of the 1978 Act "shall not take effect." *Id.* at H1791. The existing jury trial provision, § 1480, was among the sections covered by § 402(b); thus this provision had the effect of repealing § 1480.

113. See 130 CONG. REC. S6082 (daily ed. May 21, 1984). Senator Thormond explained this addition as follows:

We have also added a provision regarding jury trials. . . . It simply states that nothing in chapter 87 of title 28 or in title 11 affects any right to trial by jury. It does not affect in any way current law determining when a party is entitled to a jury trial.

*Id.*

The jury trial provision of this amendment was virtually identical to the jury trial provision originally in S. 1013. See *supra* note 109; 130 CONG. REC.

bate over this amendment further confused the issue. Senator Heflin, discussing the meaning of section 1480, asserted that "[w]hen Congress passed this provision as part of the [1978 Act], it intended to maintain the status quo on jury trial rights as such rights had existed prior to the expansion of the Bankruptcy Court's jurisdiction."<sup>114</sup> He explained, however, that because the courts developed conflicting interpretations of section 1480,<sup>115</sup> a reworded jury trial provision was needed. "The purpose of this change is to eliminate any possible ambiguity as to Congress' original intent in connection with the preservation of rights to jury trials."<sup>116</sup>

Senator Heflin's statement that the intent underlying section 1480 had been to "maintain the status quo" and "not . . . to alter rights to jury trials which might have existed under State or Federal law prior to 1978"<sup>117</sup> supports a summary/plenary analysis of the provision.<sup>118</sup> Senator Heflin, however, also gave a contrary explanation of section 1480's intent:

Congress never intended that the filing of a bankruptcy petition by a debtor act as an escape hatch from jury trials.

Thus, where a debtor, creditor or noncreditor third party would have had a right to a jury trial on an issue of fact pursuant to Federal or State law *absent application of the bankruptcy laws*, this amendment ensures that such rights remain intact. This is true whether or not an entity requesting a jury trial has filed a proof of claim with the bankruptcy court.<sup>119</sup>

By stressing the preservation of jury trial rights that would have existed outside the bankruptcy context, Senator Heflin's latter statement supports a pure seventh amendment approach to analyzing section 1480.<sup>120</sup> Such an approach does not simply preserve the status quo. Rather, section 1480 expanded jury trial rights beyond those existing under the 1898 Act if, as Senator Heflin suggested, it preserved the jury trial rights pos-

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S6108 (daily ed. May 21, 1984). It was to be added at § 1411 of title 28, rather than § 1477, however. *Id.*

114. 130 CONG. REC. S7618 (daily ed. June 19, 1984).

115. According to Senator Heflin,

[A]s drafted, the provision engendered confusion as to how to determine when a litigant was entitled to a jury trial. Moreover, courts differed on what was meant by the phrase "any statute in effect on September 30, 1979." It was not clear whether "statute" encompassed the U.S. Constitution as well as the various State constitutions.

*Id.* at S7618-19.

116. *Id.* at S7618.

117. *Id.* at S7618-19.

118. See *supra* notes 42-43 46-52 and accompanying text.

119. 130 CONG. REC. S7619 (daily ed. June 19, 1984) (emphasis added).

120. See *supra* notes 44-45, 53-60 and accompanying text.

essed by a creditor absent the debtor's bankruptcy.<sup>121</sup> Considered together, Senator Heflin's statements illustrate section 1480's ambiguity and create further uncertainty concerning the intended meaning of the jury trial provision then being considered.<sup>122</sup>

## 2. The Conference Committee Bill

A conference committee was convened to resolve the differences between the House and Senate versions of the bankruptcy amendments.<sup>123</sup> The compromise bill that emerged from the committee contained a new and narrowly worded jury trial provision. Rather than preserving "any [existing] right to trial by jury," as had the Senate version,<sup>124</sup> the bill addressed only the preservation of jury trial rights for personal injury and wrongful death tort claims.<sup>125</sup> Because the conference report contained only the text of the compromise bill,<sup>126</sup> there is no of-

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121. Under the 1898 Act, a creditor in effect lost jury trial rights when his or her debtor filed for bankruptcy. With minor exceptions there was no right to jury trial of summary proceedings, including those to determine the allowance and disallowance of claims against the estate. *See supra* notes 19-30 and accompanying text.

122. Senator Heflin's statements, coming over five years after the enactment of § 1480, are of questionable authority as to the meaning of that provision. *See, e.g.*, *United States v. Clark*, 445 U.S. 23, 33 n.9 (1980) ("[T]he views of some Congressmen as to the construction of a statute adopted years before by another Congress have 'very little, if any, significance.'") (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968)). Nevertheless, his colloquy with Senator Thurmond is entitled to some weight in interpreting the reworded jury trial provision (§ 1411) then under consideration, because Senator Thurmond was the sponsor and floor manager of the bankruptcy amendments bill. *See, e.g.*, *Rice v. Rehner*, 463 U.S. 713, 728 (1983) (construction given by bill's sponsor is authoritative guide to its interpretation); *Bowsher v. Merck & Co.*, 460 U.S. 824, 832 (1983) (same); *Lewis v. United States*, 445 U.S. 55, 63 (1980) (statements of "the sponsor and floor manager of [a] bill . . . are entitled to weight").

Senator Heflin inquired of Senator Thurmond whether he would agree "that the intent of the amendment you are making [in § 1411] is only to simplify the language of existing law and [that] there is no intention to effect any substantive change." 130 CONG. REC. S7619 (daily ed. June 19, 1984). Senator Thurmond agreed that Senator Heflin had correctly expressed the intent of the wording change. *Id.*

123. Among other differences, the House had passed a bill containing no jury trial provision, whereas the Senate-passed bill contained a jury trial provision that either preserved or expanded jury trial rights beyond those that had existed in 1978. *See supra* notes 111-22 and accompanying text.

124. *See* 130 CONG. REC. S6108 (daily ed. May 21, 1984) (statement of Sen. Thurmond) (language of proposed amendment).

125. *Id.* at H7472 (daily ed. June 29, 1984) (statement of Rep. Rodino).

126. H.R. CONF. REP. NO. 882, 98th Cong., 2d Sess. 1 (1984).

ficial explanation for the change in the scope of the jury trial provision.<sup>127</sup> Nevertheless, Congress enacted it in this form.

Senator DeConcini, who had been a member of the conference committee, later explained in an interview that the broader Senate language was accidentally deleted from section 1411 by the bill's drafters. He believed that the conference committee's intent had been to retain jury trial rights as they existed under section 1480.<sup>128</sup> Senator DeConcini's statement of

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127. 130 CONG. REC. S8989, H7597, H7610 (daily ed. July 23, 1984) (enrolled bills and joint resolutions signed). The floor debates on the conference committee bill also shed little light on the reasons for eliminating the broader jury trial provision. In the House, Representative Fish, a member of the conference committee, explained merely that "[a] personal injury or wrongful death tort claim against a bankrupt estate can be tried in a Federal district court with a jury." *Id.* at H7490 (daily ed. June 29, 1984). He said nothing about jury trial rights in other actions. In addition, Representative Kastenmeier, also a conferee, explained the intent concerning wrongful death and personal injury tort claims as follows:

[I]n those rare cases where the parties insist, a personal injury or wrongful death case may be tried to judgment by a district court judge. Finally, the conference report states that *in this narrow range of cases* the parties do not lose any right to a jury trial that they may have had if the claim had been cognizable outside the bankruptcy context.

*Id.* at H7492 (emphasis added). Representative Kastenmeier's reference to a narrow range of cases in which jury trial rights are preserved suggests that no other statutory rights to a jury trial were intended to be conveyed. On the other hand, it is possible that he meant that only in this narrow category of cases were jury trial rights existing *outside* of bankruptcy preserved, leaving open the possibility that as to all other cases jury trial rights as they existed *in* bankruptcy under the 1898 and 1978 Acts were preserved. If that was the conference committee's intent, however, the provision as enacted failed to make that clear. See *infra* note 128 and accompanying text (discussing alleged mistake in drafting § 1411).

In the Senate, Senator Thurmond explained that "[n]ew language on the issue of jury trials is included." 130 CONG. REC. S8888 (daily ed. June 29, 1984). He then read the language of § 1411(a) without giving any explanation for the deletion of the broader Senate language concerning the preservation of jury trial rights. *Id.*

128. Senator DeConcini explained:

Strange as it may seem, in light of the changes in language from the text of the old law to the language of the new Section 1411(a), I believe there was no intent on the part of Congress to alter or modify the rights to jury trial that might have existed under the Reform Act.

The change in statutory language came about as a result of compromises that the conferees settle[d] upon in resolving the issue of abstention in personal injury and wrongful death cases. The question arose as to whether or not the right to jury trial would be protected in such cases when tried in the district courts. The conferees agreed upon the importance of safeguarding this right to jury trial if it existed under applicable nonbankruptcy law. The language of Section 1411(a) as it now reads was crafted with that end in mind. However,

the conference committee's purpose is plausible, especially given the lack of evidence indicating a desire to eliminate jury trial rights granted by the 1978 Act.<sup>129</sup> Nevertheless, in considering what weight, if any,<sup>130</sup> to accord Senator DeConcini's statement, two factors are significant. First, there is no indication that any member of the House, which initially passed a bill containing no jury trial provision, agrees with his views. Second, despite Senator DeConcini's explanation that omitting the broader language was a drafting oversight, the technical amendments that he and Senator Dole later introduced did not propose amending section 1411 to reinsert the language.<sup>131</sup> Thus Senator DeConcini's suggestion that Congress intended a broader-than-enacted section 1411, even when considered alongside similar indications in the legislative history, is not compelling enough to permit reading into the provision words that Congress did not enact. Instead, in cases other than those involving personal injury and wrongful death claims, litigants in bankruptcy-related actions must look to the seventh amendment for a right to jury trial.

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the conferees simply inadvertently failed to pick up the broader language of the former provision. There was no desire on the part of any of the conferees to limit the right to jury trial in other areas.

*Dole/DeConcini Interviewed*, 3 ABI NEWSL. 1, 3 (Winter 1984-1985).

The other participant in the joint interview, Senator Dole, did not dispute Senator DeConcini's statement. His comments concerning § 1411, however, addressed the intended placement of the provision governing the venue of wrongful death and personal injury tort claims as the second sentence of § 1411(a), rather than as a separate provision at 28 U.S.C. § 157(b)(5). *Id.*

129. See *supra* notes 107-10 and accompanying text.

130. Senator DeConcini's after-the-fact, extracongressional statement is not sufficiently reliable as an expression of congressional intent to warrant ignoring the language of § 1411 as enacted. See, e.g., *Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 (1979) ("[I]solated statements by individual Members of Congress . . . , all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment."); *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978) ("[A]s an expression of Congress' understanding as to the scope of the pre-existing . . . statute, such *post hoc* observations by a single member of Congress carry little if any weight."); cf. *Chandler v. Roudebush*, 425 U.S. 840, 860 n.36 (1976) (characterizing as "not probative" Senator's explanation some 10 months after enactment of statute that his remarks had been erroneously transcribed in Congressional Record).

131. See S. 529, 99th Cong., 1st Sess., 131 CONG. REC. S2251 (daily ed. Feb. 27, 1985). Nor did the 1986 bankruptcy amendments make any changes in § 1411. See *Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986*, Pub. L. No. 99-554, 100 Stat. 3097.

### III. THE SEVENTH AMENDMENT'S PROTECTION OF JURY TRIALS IN BANKRUPTCY

Until recently the question of the right to a jury trial in bankruptcy matters seemed relatively simple. Under the 1898 Act, it was assumed that the seventh amendment<sup>132</sup> was inapplicable to bankruptcy courts because they were courts of equity.<sup>133</sup> The Supreme Court's 1966 decision in *Katchen v. Landy*<sup>134</sup> appeared to confirm this view. The 1978 Act expanded the bankruptcy courts' jurisdiction, however, to include matters previously encompassed by the seventh amendment's

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132. The seventh amendment provides in part that "[i]n Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. Although susceptible to several interpretations, it is well established that the common law referred to is the common law of England at the time of the amendment's ratification in 1791. *See, e.g.*, *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (Story, J.) ("[T]he common law here alluded to is not the common law of any individual state . . . but it is the common law of England, the grand reservoir of all our jurisprudence."). For the history surrounding the adoption of the seventh amendment, see Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 291-99 (1966); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653-730 (1973).

Because jury trials were available at that time only in courts of law, and not in the courts of chancery, the seventh amendment is interpreted as preserving jury trial rights only for actions of a legal rather than equitable nature. *See, e.g.*, *Tull v. United States*, 107 S. Ct. 1831 (1987). The Court in *Tull* noted that the seventh amendment "require[s] a jury trial . . . in those actions that are analogous to 'Suits at common law.' Prior to the Amendment's adoption, a jury trial was customary in suits brought in the English *law* courts. In contrast, those actions that are analogous to 18th-century cases tried in courts of equity or admiralty do not require a jury trial." *Id.* at 1835 (emphasis in original); *see also* *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830) ("By *common law*, [the seventh amendment's Framers] meant . . . not merely suits, which the *common law* recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . .") (emphasis in original). Unfortunately, determining the precise nature of complex actions in a modern federal court system in which law and equity are administered by the same courts poses great difficulties. *See generally* J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 45, at 487-503 (analyzing *Beacon Theatres* and its progeny and discussing right to a jury trial for statutory causes of action); F. JAMES & G. HAZARD, *supra* note 45, at 425-51 (discussing right to jury trial in a merged system).

133. *See, e.g.*, J. MOORE & W. PHILLIPS, *DEBTORS' AND CREDITORS' RIGHTS* 6-1 to 6-2 (1966) (stating that there is no constitutional right to jury trial in proceedings in bankruptcy or in controversies arising in proceedings in bankruptcy); *see also supra* note 30 and accompanying text.

134. 382 U.S. 323 (1966).

jury trial guarantee. With that expansion, the consensus of opinion disappeared. Today courts and commentators are deeply divided over whether the seventh amendment guarantees jury trial rights in bankruptcy.<sup>135</sup> Many of these diverse opinions result from disagreement over the meaning and current effect of *Katchen*.

A. *KATCHEN V. LANDY*

As stated by the Supreme Court, the issue in *Katchen* concerned the subject matter jurisdiction of the bankruptcy courts.<sup>136</sup> The significance of the decision, however, derives from its statements concerning the scope of the seventh amendment. At the time, it was well established that there was no right to a jury trial for matters falling within the bankruptcy court's summary jurisdiction. The creditor, who sought a jury trial, therefore argued that a finding in favor of summary jurisdiction was precluded by the seventh amendment.<sup>137</sup> The Supreme Court rejected this argument, holding that the bankruptcy court had summary jurisdiction over the preference counterclaim.<sup>138</sup> In reaching its decision, the Court concluded that there was no constitutional right to a jury trial of a preference claim asserted as an objection to a claim against the bankruptcy estate.<sup>139</sup>

*Katchen* was an officer of a bankrupt corporation. Four months prior to the bankruptcy, he made several payments from corporate funds on two corporate notes on which he was an accommodation maker.<sup>140</sup> When *Katchen* later filed claims against the bankruptcy estate, the trustee counterclaimed, asserting that the payments *Katchen* made on the notes constituted voidable preferences because they benefitted him by reducing his potential liability as the accommodation maker.<sup>141</sup> In addition, the trustee demanded judgment in the amount of the preferences. *Katchen* argued that the bankruptcy court

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135. See *infra* notes 172-98 and accompanying text.

136. Specifically, the Court characterized the issue as "whether a bankruptcy court has summary jurisdiction to order the surrender of voidable preferences asserted and proved by the trustee in response to a claim filed by the creditor who received the preferences." 382 U.S. at 325.

137. *Id.* at 336.

138. *Id.* at 335.

139. *Id.* at 336-40.

140. *Id.* at 325. *Katchen* exercised "sole control" over the account from which the payments were made. *Id.*

141. *Id.* at 325. For a discussion of the concept of indirect preferences, see D. EPSTEIN & J. LANDERS, *DEBTORS AND CREDITORS* 485 (2d ed. 1982).

lacked jurisdiction to order the surrender of the preferences.<sup>142</sup>

The bankruptcy court ruled in favor of the trustee, holding that it had jurisdiction to determine the preference claim.<sup>143</sup> The bankruptcy court also determined that the payments made by Katchen were preferential and entered judgment against him in their amount.<sup>144</sup> The Tenth Circuit affirmed en banc.<sup>145</sup>

The Supreme Court recognized the dilemma posed by this situation. On the one hand, although statutorily invested with "jurisdiction at law and in equity,"<sup>146</sup> bankruptcy courts are "essentially courts of equity, . . . and they characteristically proceed in summary fashion to deal with the assets of the bankrupt they are administering."<sup>147</sup> On the other hand, if Katchen had not filed his claims in the bankruptcy proceeding, the trustee would have been forced to bring "a plenary action . . . in the federal courts [where] the creditor could [have] demand[ed] a jury trial."<sup>148</sup> Thus the Court analyzed whether an equitable bankruptcy court could determine this otherwise legal claim without violating the seventh amendment.

The Court first determined that the trustee's preference counterclaim fell within the bankruptcy court's summary jurisdiction.<sup>149</sup> Such jurisdiction included the power to allow and disallow claims, which necessarily encompassed the power to determine the validity of debts alleged to underlie the claim.<sup>150</sup> The trustee was obligated to raise any objections to claims, and the bankruptcy court was then obligated to rule on the objections.<sup>151</sup>

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142. 382 U.S. at 325.

143. *See id.*

144. *See id.* The bankruptcy court also ruled that Katchen's claims against the estate would not be allowed until the judgment against him was satisfied. *Id.*

145. 336 F.2d 535 (10th Cir. 1964). The dissenters argued that the creditor should not be forced to choose between the exercise of his right to file a claim against the bankruptcy estate and his right to have the preference claim against him determined by a jury. *Id.* at 541.

146. 382 U.S. at 327 n.2 (quoting § 2a of the 1898 Act, 11 U.S.C. § 11(a) (1964)).

147. *Id.* at 327.

148. *Id.* at 327-28.

149. *Id.* at 335.

150. *Id.* at 329.

151. *Id.* "The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*, . . . and thus falls within the principle . . . that bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession." *Id.* at 329-30 (quoting *Gardner v. New Jersey*, 329 U.S. 565, 573 (1947)).

Having established the contours of the bankruptcy court's summary jurisdiction, the Court noted that one possible objection to a claim, as set forth in section 57g of the 1898 Act, was that the claimant had received a voidable preference that had not been surrendered.<sup>152</sup> If the trustee objected to a claim on that basis, the claim could not be allowed until the preference matter was resolved. The Court reasoned that a section 57g objection was thus "part and parcel of the allowance process and [was] subject to summary adjudication by a bankruptcy court."<sup>153</sup>

The Court then considered whether the bankruptcy court's summary jurisdiction extended to the judgment entered against Katchen for the payments on the notes. Rejecting the argument that such affirmative relief was only obtainable in a plenary suit, the Court reasoned that in ruling on the claim objection, the bankruptcy court could decide all other essential issues.<sup>154</sup> It would have to decide, for example, whether Katchen indirectly received a voidable preference, and in what amount, to determine how much Katchen would have to surrender before his claim would be allowed.<sup>155</sup> Once the bankruptcy court decided these issues, a plenary action would be a "meaningless gesture" since principles of *res judicata* and collateral estoppel would apply.<sup>156</sup> Instead, it was "well within the equitable powers of the bankruptcy court to order return of the preference during the summary proceedings on allowance and disallowance of claims."<sup>157</sup> The Court's holding on the statutory question, then, was that the 1898 Act conferred "summary jurisdiction to compel a claimant to surrender preferences that under § 57g would require disallowance of the claim."<sup>158</sup>

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152. *Id.* at 330. Section 57g provided: "The claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under this title, shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments, or encumbrances." 11 U.S.C. § 93(g) (1964) (codified as amended at 11 U.S.C. § 502(d) (1982)).

153. 382 U.S. at 330. The Court found support for this conclusion in other parts of the 1898 Act, pointing to provisions allowing recovery, by means of summary proceeding, of dividends previously paid creditors when claims were later reconsidered and rejected. *Id.* at 331-32. The Court also cited decisions upholding the bankruptcy court's summary jurisdiction to recover excess payments made to attorneys prior to bankruptcy. *Id.* at 333.

154. *Id.* at 333-35.

155. *Id.* at 334.

156. *Id.* at 334-35.

157. *Id.* at 334-35.

158. *Id.* at 335. The Court expressly declined to rule on a broader consent

In response to Katchen's seventh amendment objection to the finding of jurisdiction, the Court held that there was no constitutional right to a jury trial of the preference claim in this particular context. The Court reasoned that the preference claim was presented as part of the essentially equitable process of adjudicating claims against the bankruptcy estate.<sup>159</sup> Underlying the Court's rejection of the seventh amendment argument was the concept of transforming a legal claim into an equitable one. According to the Court, the 1898 Act "converts the *creditor's legal claim* into an equitable claim to a pro rata share of the *res*, a share which can neither be determined nor allowed until the creditor disgorges the alleged voidable preference he has already received."<sup>160</sup> The trustee's preference counterclaim, which would be viewed as an action at law if asserted by way of plenary action, was now part of the equitable claim allowance-disallowance proceeding and thus was not triable by a jury.<sup>161</sup>

Finally, the Court rejected Katchen's argument that *Bea-*

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theory that some lower courts had relied on to sustain summary jurisdiction over trustees' counterclaims. *Id.* at 332-33 n.9. Section 23b of the 1898 Act provided that "[s]uits by the receiver and the trustee" could be brought only in the courts where they could have been brought if a bankruptcy petition had not been filed, unless the defendant consented to jurisdiction elsewhere (including the bankruptcy court). 11 U.S.C. § 46(b) (1964) (repealed 1979). The Court declined to consider whether Katchen had consented to suit in the bankruptcy court, because it concluded that "determination of objections to claims, whether or not affirmative relief is decreed, does not constitute adjudication of a suit by the trustee." 382 U.S. at 333 n.9. Instead, the Court said its decision was "governed by the 'traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure.'" *Id.* (quoting *Gardner v. New Jersey*, 329 U.S. 565, 573 (1947)). Accordingly, the Court expressed no opinion on whether the bankruptcy court's summary jurisdiction empowered it to determine a trustee's demand for affirmative relief when "all of the substantial factual and legal bases for [it] have not been disposed of in passing on objections to the claim." *Id.*

159. 382 U.S. at 336. The Court explained:

[A]lthough petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee, when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity.

*Id.* (citation omitted). The Court further declared that since "the proceedings of bankruptcy courts are inherently proceedings in equity, there is no Seventh Amendment right to a jury trial for determination of objections to claims, including § 57g objections." *Id.* at 336-37 (citations omitted).

160. *Id.* at 336 (emphasis added) (citation omitted).

161. *Id.* at 336.

*con Theatres v. Westover*<sup>162</sup> and *Dairy Queen v. Wood*<sup>163</sup> required the bankruptcy court to order the trustee to pursue the preference claim in a plenary proceeding. In such a proceeding, Katchen would have been able to demand a jury trial. Although the bankruptcy court possessed the power to issue such an order, the Court held that precedent did not require it to do so.<sup>164</sup> The *Dairy Queen* doctrine, "if applicable at all," would apply regardless of whether the trustee sought affirmative relief.<sup>165</sup> The Court reasoned that unnecessary delays and expenses would be incurred if every time a trustee presented a section 57g objection, and a jury trial was demanded, the bankruptcy proceedings were suspended while a plenary preference action was pursued.<sup>166</sup> Such a result would be inconsistent with both the 1898 Act and the rule of *Beacon Theatres* and *Dairy*

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162. 359 U.S. 500 (1959). In *Beacon Theatres* the Court held that when a jury trial is demanded in a lawsuit comprised of both legal and equitable claims with overlapping issues, the legal claims normally must be tried to the jury first to preserve the jury trial right. *Id.* at 510-11; see generally McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1 (1967); Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486, 490-502 (1975).

163. 369 U.S. 469 (1962). In *Dairy Queen* the Court expanded the impact of its *Beacon Theatres* holding by declining to accept the plaintiff's characterization of the relief sought. *Id.* at 477-80. Although the complaint requested the equitable remedy of an accounting, the Court concluded that, given the procedures currently available in the federal courts, the legal remedy of damages would be adequate, thus giving rise to a right to a jury trial. *Id.*

164. *Katchen*, 382 U.S. at 338-39.

165. *Id.* at 339.

166. *Id.* To some commentators the Court's discussion of the congressional desire for prompt trials suggests the existence of congressional power to override the seventh amendment whenever jury trials would be inconvenient. See Note, *Congressional Provision for Nonjury Trial Under the Seventh Amendment*, 83 YALE L.J. 401, 413-16 (1973) (reading *Katchen* as supporting view that "[w]hen Congress indicates in legislation which creates a statutory cause of action that the suit should be tried without a jury, courts should accede to that declaration."); *infra* note 272. In fact, however, the Court was addressing the specific question whether the bankruptcy court was required to stay its equitable proceedings while the trustee pursued a separate preference suit at law in a nonbankruptcy court. The Court's conclusion that such delay would be inconsistent with congressional intent is similar to the conclusion the Court later reached in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). In that case, the Court rejected the suggestion that the district court should have stayed the equitable proceeding brought by the Securities and Exchange Commission to allow a parallel private legal action to reach the trial stage first. *Id.* at 338 n.24. Although such a procedure would have preserved the defendants' right to jury trial, the Court found it inconsistent with the congressional desire for "prompt enforcement actions by the SEC unhindered by parallel private actions." *Id.*

*Queen*, "which is itself an equitable doctrine."<sup>167</sup> The Court stressed that *Katchen's* situation, unlike that before the Court in the earlier cases, "involved a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury" and that Congress intended the trustee's objection to be determined summarily.<sup>168</sup> Moreover, the Court noted that both *Beacon Theatres* and *Dairy Queen* recognized situations in which an equitable claim might be resolved first, even though a jury trial of an overlapping legal claim could be precluded.<sup>169</sup>

#### B. CONFLICTING VIEWS OVER *KATCHEN'S* CURRENT EFFECT

The implications of the *Katchen* decision, uncertain under the bankruptcy statute then in effect,<sup>170</sup> are even less certain

167. *Katchen*, 382 U.S. at 339.

168. *Id.* The Court concluded that "[t]o implement congressional intent, . . . it [was] essential to hold that the bankruptcy court may summarily adjudicate the § 57g objection; and . . . the power to adjudicate the objection carries with it the power to order surrender of the preference." 382 U.S. at 340.

169. In *Beacon Theatres* the Court stated that

[i]f there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first.

359 U.S. at 510. The Court also stated, however, that "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Id.* at 510-11 (footnote omitted).

170. Although *Katchen* made clear that the bankruptcy court could determine a trustee's preference counterclaim against a creditor who filed a claim against the bankruptcy estate, its application to other counterclaims was not certain. Scholarly commentary debated whether the decision implied that the bankruptcy court also had summary jurisdiction over permissive counterclaims not providing a basis for a § 57g objection. Those who interpreted the decision broadly argued that it was based on a consent theory, despite the Court's express refusal to consider that issue. See, e.g., Current Decision, 38 U. COLO. L. REV. 609, 613 (1966); Recent Decision, 17 W. RES. L. REV. 1198, 1201 (1966). Under this view, a creditor who filed a claim against the bankruptcy estate opened itself up to any claims the trustee might have against it. Others, more faithful to the opinion, believed *Katchen* was limited to counterclaims that also provided a basis for objection to the creditor's claim against the estate. See, e.g., Seidman, *Katchen v. Landy—Some Implications*, 71 COM. L.J. 241, 242 (1966); Note, *Bankruptcy—Summary Jurisdiction*, 27 LA. L. REV. 315, 317-18 (1967); Comment, *Katchen v. Landy and Summary Jurisdiction in Bankruptcy*, 52 VA. L. REV. 1530, 1540-41 (1966).

The Supreme Court itself has interpreted *Katchen* broadly in subsequent decisions. In *Curtis v. Loether*, 415 U.S. 189 (1974), the Court stated that

under current law. Since the case was decided, Congress has expanded bankruptcy court jurisdiction to include matters previously litigated only in nonbankruptcy courts.<sup>171</sup> This jurisdictional expansion raises questions about the current applicability, validity, and meaning of *Katchen*.

Some authorities interpret *Katchen* broadly by taking the position that under current law there is no constitutional right to jury trial in any bankruptcy matters.<sup>172</sup> They accept *Katchen's* description of bankruptcy courts as essentially courts of equity and conclude that the seventh amendment's guarantee of jury trial rights is inapplicable to all matters coming within bankruptcy jurisdiction, whether exercised by bankruptcy or district judges.<sup>173</sup> Although no decisions endorse this view fully, some courts appear to support this approach.<sup>174</sup>

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*Katchen* upheld Congress's power to entrust enforcement of statutory rights to a "specialized court of equity free from the strictures of the Seventh Amendment." *Id.* at 195. In his dissent in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), Justice White, *Katchen's* author, described *Katchen* as recognizing the authority of the referee to "adjudicate counterclaims against a creditor who files his claim against the estate." *Id.* at 99. Most recently, in Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245 (1986), the Court stated that "in *Katchen* . . . this Court upheld a bankruptcy referee's power to hear and decide *state law* counterclaims against a creditor who filed a claim in bankruptcy when those counterclaims arose out of the same transaction." *Id.* at 3258 (emphasis added).

171. See *supra* notes 1-5, 73 and accompanying text. Although the 1984 Amendments restricted the authority of bankruptcy judges, see *infra* notes 186-94 and accompanying text, bankruptcy jurisdiction remains as broad as it was under the 1978 Act. Compare 28 U.S.C. § 1334 (Supp. III 1985) (jurisdictional provision under 1984 Amendments) with *id.* § 1471 (1982) (repealed 1984) (jurisdictional provision under 1978 Act). Under both provisions the district court is granted "original and exclusive jurisdiction of all cases under title 11" and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." *Id.* § 1334 (Supp. III 1985); *id.* § 1471 (1982) (repealed 1984). The 1984 Amendments, however, deleted the provision that appeared at § 1471(c) that directed the bankruptcy court to exercise all of the jurisdiction conferred by the provision on the district court. See *id.* § 1471(c) (1982) (repealed 1984).

172. 1 COLLIER, *supra* note 14, ¶ 3.01, at 3-92 to 3-101; King, *supra* note 14, at 702-08.

173. 1 COLLIER, *supra* note 14, ¶ 3.01, at 3-97 (when district court exercises jurisdiction under 28 U.S.C. § 1334, sitting as bankruptcy court, "the doctrine of *Katchen v. Landy* would seem to apply, and, since the proceeding is ipso facto an equitable proceeding, no jury trial is mandated by any law or by the United States Constitution"); King, *supra* note 14, at 706 ("There is no right to a jury in the bankruptcy court [or] in the district court.") (footnote omitted).

174. For example, the bankruptcy court in *Allard v. Benjamin (In re DeLorean Motor Co.)*, 49 Bankr. 900 (Bankr. E.D. Mich. 1985), stated that "generally, there is no right to jury trial under the Bankruptcy Code. 'Cases, causes, and claims arising under title 11 are summary proceedings and are to

At the other end of the spectrum are decisions that either ignore *Katchen* or consider it irrelevant to analyzing whether jury trial rights exist in current bankruptcy courts.<sup>175</sup> These courts take the view that bankruptcy courts should determine jury trial rights according to the same seventh amendment analysis applied by district courts in nonbankruptcy cases.<sup>176</sup> Courts adopting this view base their jury trial decisions on the nature of the claim and the relief requested.<sup>177</sup> They disregard whether the matter in question would have been classified as summary or plenary under the 1898 Act<sup>178</sup> and whether it is the type of proceeding in which a bankruptcy judge is now authorized to enter a final judgment.<sup>179</sup> Rather, if the case is eq-

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be tried by the Court sitting without a jury.' " *Id.* at 913 (quoting *McLouth Steel Corp. v. AJF (In re McLouth Steel Corp.)*, 38 Bankr. 316, 317 (Bankr. E.D. Mich. 1984), *aff'd sub nom. McLouth Steel Corp. v. Marblehead Lime Co. (In re McLouth Steel Corp.)*, 55 Bankr. 357 (E.D. Mich. 1985)). The court based its conclusion on *Katchen*, noting that "[t]here can be 'no right to jury trial where the U.S. Supreme Court has said none exist[s].'" *Id.* Accordingly, the court held there was no right to a jury trial in this action by the trustee to enforce the debtor's prepetition cause of action for damages. *Id.*; see also *In re Manning*, 71 Bankr. 981, 985 (Bankr. N.D. Ala. 1987) (holding that "the debtor's counterclaim is to be tried in the bankruptcy court, which is a court of equity, [and] . . . ordinarily there is no right to a jury trial in a court of equity"); *Nordberg v. Republic Nat'l Bank (In re Chase & Sandborn Corp.)*, 55 Bankr. 538, 539 (Bankr. S.D. Fla. 1985) (stating, without questioning its constitutionality, that § 1411 "restricts the right to jury trial in the bankruptcy court to the right of an individual in personal injury or wrongful death action brought under nonbankruptcy law").

175. See *Moratzka v. Wencil (In re Wencil)*, 71 Bankr. 879, 883 (Bankr. D. Minn. 1987); *Leird Church Furniture Mfg. Co. v. Union Nat'l Bank (In re Leird Church Furniture Mfg. Co.)*, 61 Bankr. 444 (Bankr. E.D. Ark. 1986) (no mention of *Katchen*); *Otte v. Monsanto Co. (In re McCrary's Farm Supply)*, 57 Bankr. 423, 424 (Bankr. E.D. Ark. 1985); *Boss-Linco Lines v. Laidlaw Transp. (In re Boss-Linco Lines)*, 55 Bankr. 299 (Bankr. W.D.N.Y. 1985) (same); *Mauldin v. Peoples Bank (In re Mauldin)*, 52 Bankr. 838 (Bankr. N.D. Miss. 1985) (same); *Energy Resources Co. v. Rosen (In re Energy Resources Co.)*, 49 Bankr. 278, 282 (Bankr. D. Mass. 1985); *Lerblance v. Rodgers (In re Rodgers & Sons)*, 48 Bankr. 683 (Bankr. E.D. Okla. 1985) (same).

176. See cases cited *supra* note 175; see also S. BERNSTEIN, *supra* note 14, at 46 ("One could draw the inference [from the wording of § 1411] that the Seventh Amendment applied to all legal issues regarding money damages . . ."); Comment, *supra* note 14, at 546 ("[Because] bankruptcy courts sit as adjuncts to the district courts, . . . [they] should, therefore, decide whether a party is entitled to a jury trial in much the same manner as the district courts, although guided by the bankruptcy rules.") (footnote omitted).

177. See, e.g., *Leird Church Furniture Mfg. Co.*, 61 Bankr. at 445; *Energy Resources Co.*, 49 Bankr. at 281.

178. See, e.g., *Wencil*, 71 Bankr. at 883 n.3; *Energy Resources Co.*, 49 Bankr. at 281.

179. See *infra* notes 189-92 and accompanying text (discussing procedures in core proceedings).

uitable in nature, these courts rule that there is no right to a jury trial.<sup>180</sup> If legal in nature, however, they grant the jury trial demand.<sup>181</sup> Courts adopting this approach thus apply a pure seventh amendment analysis similar to that applied by some courts under section 1480.<sup>182</sup>

The greatest number of cases take an approach between the two extremes. To understand these cases, however, it is first necessary to understand the current procedural structure of the bankruptcy courts. When it enacted the 1984 Amendments, Congress chose not to give article III status to bankruptcy judges, which would have been the most direct and certain way to solve the *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>183</sup> problem.<sup>184</sup> Instead, Congress continued to employ judges appointed for fourteen-year terms,<sup>185</sup> seeking to comply with the uncertain command of the Supreme Court by limiting the bankruptcy judges' authority over certain

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180. See, e.g., *Wencl*, 71 Bankr. at 885 (no right to jury trial in action to avoid fraudulent conveyances).

181. See, e.g., *Leird Church Furniture Mfg. Co.*, 61 Bankr. at 446 (jury demand conditionally granted as to debtor's counterclaim for damages for tortious interference with business relations).

182. The bankruptcy court in *Otte v. Monsanto Co. (In re McCrary's Farm Supply)*, 57 Bankr. 423 (Bankr. E.D. Ark. 1985), for example, in ruling on whether the defendant to a preference action was entitled to a jury trial, stated that "[t]he right to a jury trial is properly determined by the nature of the matter involved, and whether it is a cause of action at law or equity." *Id.* at 424. Because "[t]he suit is in the nature of an action at law," the court held that the defendant was entitled to a jury trial under the seventh amendment. *Id.* It did so despite recognizing that under *Katchen* there probably would have been no right to a jury trial because the defendant previously filed a claim against the estate. *Id.* The court viewed the *Katchen* holding as applicable only to cases under the 1898 Act. *Id.* (stating that "if this action had been a proceeding under the old Bankruptcy Act, *Katchen v. Landy* would have required a different result") (citation omitted). The bankruptcy court in *Lerblance v. Rodgers (In re Rodgers & Sons)*, 48 Bankr. 683 (Bankr. E.D. Okla. 1985), similarly stated that "[t]he right to a jury trial in bankruptcy depends upon the nature of the cause of action." *Id.* at 688. This court rejected the view that proper analysis of the jury trial issue required consideration of whether the matter would have come within the bankruptcy court's summary or plenary jurisdiction under the 1898 Act. *Id.* It held that under the seventh amendment "the right to jury trial depends on whether the proceeding is at law or is in equity." *Id.* Concluding that the action to avoid fraudulent transfers was equitable in nature, the court denied the jury demand. *Id.* at 689; see *supra* notes 53-60 and accompanying text.

183. 458 U.S. 50 (1982).

184. For a discussion of the events leading up to the enactment of the 1984 Amendments, see Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 2-33 (1985).

185. See 28 U.S.C. § 152(a)(1) (Supp. III 1985).

matters.<sup>186</sup>

Under the 1984 Amendments' jurisdictional provision, all bankruptcy jurisdiction is vested in district courts.<sup>187</sup> Elsewhere, however, the 1984 Amendments provide that district courts can refer "any or all" bankruptcy matters to the bankruptcy judges for their district.<sup>188</sup> Once referred, the bankruptcy judge's authority over the matter depends on whether it is determined to be a "core proceeding."<sup>189</sup> If it is, the bankruptcy judge may hear it and enter a final order, subject to ordinary appellate review by the district court.<sup>190</sup> Unfortunately, rather than providing a definition of a "core proceeding," Congress merely set forth a nonexclusive list of matters encompassed by the term.<sup>191</sup> They include such matters as the allowance and disallowance of claims, administration of the estate, proceedings to recover preferences and to set aside fraudulent conveyances, and confirmation of plans. Congress apparently viewed these as traditional matters at the heart of

186. See *id.* § 157(c) (limiting authority of bankruptcy judges over noncore proceedings).

187. *Id.* § 1334; see *supra* note 171.

188. *Id.* § 157(a) ("Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."). All district courts exercise this authority by local rule or order. King, *supra* note 14, at 678 (Because "authority to refer cases and proceedings under section 157(a) has been exercised by local rule or order in all federal districts . . . bankruptcy judges continue to handle most, if not all, bankruptcy cases.").

189. See 28 U.S.C. § 157(b)(1) (Supp. III 1985).

190. *Id.* § 157(b)(1); *id.* § 158(a), (c); FED. BANKR. R. 8013 (prescribing "clearly erroneous" standard of review); see also *Production Steel v. Bethlehem Steel Corp.* (*In re Production Steel*), 48 Bankr. 841, 844 (M.D. Tenn. 1985) ("The standard for appeal of core matters to the district court is the same as in other civil matters appealed from the district court to the circuit courts of appeal.").

191. Section 157(b)(2) provides as follows:

Core proceedings include, but are not limited to—

- (A) matters concerning the administration of the estate;
- (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or un-

the bankruptcy power.<sup>192</sup>

If the referred bankruptcy matter is a noncore or related proceeding, then the bankruptcy judge may not enter a final order unless the parties consent to that procedure.<sup>193</sup> Without their consent, the bankruptcy judge may only hear the matter and submit proposed findings of fact and conclusions of law to the district judge, who is then required to review de novo those matters to which any party objects.<sup>194</sup>

Courts that adopt a middle position on the issue of jury trial rights base their approach on the statutory distinction between core and noncore proceedings. Attempting to translate *Katchen* into the current terminology, these courts hold that there is no constitutional right to a jury trial in core proceedings.<sup>195</sup> They reach this conclusion by equating core proceed-

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liquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

28 U.S.C.A. § 157(b)(2) (West Supp. 1987).

192. See *infra* note 347 (discussing *Northern Pipeline's* suggestion that some bankruptcy matters might involve public rights that Congress could assign to non-article III court). For a discussion of the conflicting case law interpreting § 157(b), see Countryman, *The Bankruptcy Judges: Jurisdiction by Neglect*, 92 COM. L.J. 1, 6-15 (1987).

193. 28 U.S.C. § 157(c)(1)-(2) (Supp. III 1985).

194. *Id.* § 157(c)(1).

195. See, e.g., *Huffman v. Perkinson* (*In re Harbour*), 840 F.2d 1165, 1178 (4th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3755 (U.S. Apr. 25, 1988); *Nordberg v. Granfinanciera, S.A.* (*In re Chase & Sanborn Corp.*), 835 F.2d 1341 (11th Cir. 1988), *cert. granted*, 56 U.S.L.W. 3841 (U.S. June 13, 1988) (No. 87-1716); *Jefferson Nat'l Bank v. I.A. Durbin, Inc.* (*In re I.A. Durbin, Inc.*), 62 Bankr. 139, 144-45 (S.D. Fla. 1986); *Morgan v. Lefton* (*In re Hendon Pools*), 57

ings with the old notion of summary jurisdiction and by reading *Katchen* as holding that such proceedings are equitable in nature and thus not entitled to be tried before a jury.<sup>196</sup>

Although courts adhering to this third view accept *Katchen* as controlling, they do not interpret it as broadly as do other authorities. Rather than embracing the view that there is never a constitutional right to jury trial in a proceeding before the bankruptcy court, they restrict their holdings to matters classified as core proceedings. To the extent they express a view concerning the right to a jury trial in noncore proceedings, these courts recognize that such rights exist in accordance with traditional seventh amendment principles.<sup>197</sup> These courts are

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Bankr. 801, 803 (E.D. Mich. 1986); *McLouth Steel Corp. v. Marblehead Lime Co.* (*In re McLouth Steel Corp.*), 55 Bankr. 357, 362-63 (E.D. Mich. 1985); *Transpro Corp. v. NTW, Inc.* (*In re NTW, Inc.*), 69 Bankr. 656, 663 (Bankr. E.D. Va. 1987); *Acolyte Elec. Corp. v. City of New York*, 69 Bankr. 155, 183 (Bankr. E.D.N.Y. 1986); *DuVoisin v. Anderson* (*In re Southern Indus. Banking Corp.*), 66 Bankr. 370, 375 (Bankr. E.D. Tenn. 1986); *In re Poole*, 63 Bankr. 527, 533-34 (Bankr. N.D. Ala. 1986); *Mansker v. Campbell* (*In re Mansker*), 60 Bankr. 803, 806 (Bankr. D. Mass. 1986); *Billebault v. Schmid* (*In re Schmid*), 54 Bankr. 520, 523 (Bankr. E.D. Pa. 1985); *Niedermayer v. Duncan* (*In re Duncan*), 51 Bankr. 71, 72 (Bankr. D. Md. 1985); *Thorp Credit v. Lee* (*In re Lee*), 50 Bankr. 683, 684 (Bankr. D. Md. 1985); *Cameron v. Anderson* (*In re American Energy*), 50 Bankr. 175, 180-81 (Bankr. D.N.D. 1985); *Baldwin-United Corp. v. Thompson* (*In re Baldwin-United Corp.*), 48 Bankr. 49, 56 (Bankr. S.D. Ohio 1985).

196. For example, the bankruptcy court in *Baldwin-United Corp.* read *Katchen* as holding that "matters which fall within the traditional summary jurisdiction of the Bankruptcy Court carry no right to a trial by jury." 48 Bankr. at 56. Noting that the *Katchen* rationale may have been "outmoded" under the 1978 Act, the court stated that

the 1984 Amendments seem to breathe new life into that doctrine. Since Congress apparently intended "core" proceedings to include matters which were within the traditional summary jurisdiction of the Bankruptcy Courts under the 1898 Act, it follows under *Katchen* that a party has no constitutional right to a jury trial in "core" proceedings . . . .

*Id.*; see also *I.A. Durbin, Inc.*, 62 Bankr. at 145 (adopting majority rule that "a core proceeding is a proceeding created by the bankruptcy code and since bankruptcy is equitable in nature, all core proceedings are also equitable"); *Mansker*, 60 Bankr. at 806 ("[S]ince *Katchen v. Landy* held that matters which fell within the traditional summary jurisdiction of the Bankruptcy Courts carried no right to a jury trial, it follows there is no constitutional right to a jury trial in 'core' proceedings.") (citation omitted); *American Energy*, 50 Bankr. at 180 ("'[C]ore' proceedings are those which are considered equitable in nature and for which traditionally no right to a jury trial exists."); *Norton & Lieb*, *supra* note 14, at 164 ("With respect to 'core' proceedings, they would be mostly statutory or equitable in nature and thus would carry no right to trial by jury . . . .").

197. See, e.g., *American Energy*, 50 Bankr. at 181 (concluding "that jury trials must remain available to cases 'at law' (related non-core)"); *Baldwin-United Corp.*, 48 Bankr. at 56 (although designation of action as noncore does

apparently unwilling to eliminate jury trial rights in matters previously pursued by plenary proceedings and now classified as noncore.<sup>198</sup>

### C. JURISDICTIONAL DICHOTOMY UNDER THE 1898 ACT

To resolve the uncertainty *Katchen* poses for the current structure of bankruptcy courts, it is necessary to reconsider the jurisdictional context in which *Katchen* was decided. This inquiry helps to explain how bankruptcy courts under the 1898 Act were viewed as courts of equity. With that understanding it is possible to analyze the effects caused by the subsequent expansion of bankruptcy jurisdiction.

The *Katchen* Court characterized bankruptcy courts as “essentially courts of equity,” even though they were vested by statute with “such jurisdiction *at law* and in equity as will enable them to exercise original jurisdiction in proceedings under . . . title [11].”<sup>199</sup> The Supreme Court had previously explained, however, that “[t]he words ‘at law’ were probably inserted to meet clause (4) of § 2 [of the 1898 Act], which empowers such courts to arraign, try and punish certain designated persons for violations of the act.”<sup>200</sup> In other respects, the Court explained, “courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.”<sup>201</sup> In *Pepper v. Litton*<sup>202</sup> the Court stated more narrowly that “for many purposes ‘courts of bankruptcy are essen-

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not “automatically entitle [party] to a jury trial[,] courts . . . have traditionally recognized the right to a jury trial in cases involving a breach of an employment contract”).

198. This analysis, which rests on the distinction between core and noncore proceedings, is not identical to the summary/plenary analysis some courts utilized under § 1480. See *supra* notes 46-52 and accompanying text. For example, a preference action against someone who had not filed a claim against the estate would now be classified as a core proceeding. See 28 U.S.C. § 157(b)(2)(F) (Supp. III 1985). Under the analysis employed by these courts, such an action would not carry a right to jury trial. Because this action would have been brought as a plenary proceeding under the 1898 Act, however, a summary/plenary analysis would recognize a right to jury trial. See, e.g., *Beck v. Fairchild Aircraft Corp. (In re Sunair Int'l)*, 32 Bankr. 142, 144-46 (Bankr. S.D. Fla. 1983) (granting jury demand under § 1480 in preference action because litigants would have been entitled to jury trial in plenary proceeding).

199. 382 U.S. at 327 & n.2 (quoting Bankruptcy Act of 1898, ch. 541, § 2, 30 Stat. 544, 545 (repealed 1979)) (emphasis added).

200. *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934).

201. *Id.*

202. 308 U.S. 295 (1939).

tially courts of equity.’”<sup>203</sup> It said that “[b]y virtue of § 2 a bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the [1898] Act, it applies the principles and rules of equity jurisprudence.”<sup>204</sup> The Court specifically noted that “the bankruptcy court in passing on allowance of claims sits as a court of equity.”<sup>205</sup> The Supreme Court’s characterization of bankruptcy courts as courts of equity thus appears to result from a functional analysis. The Court’s conclusion was based upon the nature of the tasks performed by the bankruptcy courts and the principles they applied in resolving disputes.

At the time the Supreme Court decided *Katchen*, the bankruptcy courts’ work was limited to matters falling within their summary jurisdiction.<sup>206</sup> Though never defined precisely, summary jurisdiction was based on the concept of bankruptcy courts as administrators of a res—the bankruptcy estate.<sup>207</sup> Bankruptcy courts possessed jurisdiction over all matters relating to the administration and distribution of the estate.<sup>208</sup> In addition, in certain circumstances bankruptcy courts resolved disputes between trustees and others.<sup>209</sup> To fall within the bankruptcy court’s summary jurisdiction without the defendant’s consent, however, the dispute must have involved property deemed part of the res that the court was empowered to administer.<sup>210</sup>

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203. *Id.* at 304 (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934)) (emphasis added).

204. *Id.*

205. *Id.* at 307.

206. *See supra* notes 20-22 and accompanying text.

207. *See, e.g., Katchen*, 382 U.S. at 329-30. The Court stated that “[t]he whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res, . . . and thus falls within the principle . . . that bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession.” *Id.* (quoting *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947)).

208. These matters could include the allowance and disallowance of claims, the determination of priorities and validity of liens, and the supervision of the work of the trustee. *See generally* Countryman, *supra* note 192, at 1-3 (categorizing bankruptcy court jurisdiction under the 1898 Act); Treister, *supra* note 20, at 78-81 (describing bankruptcy court jurisdiction).

209. *See infra* note 210.

210. Thus, a bankruptcy court could exercise its summary jurisdiction to order a third party to turn over property belonging to the estate if the third party’s claim to it was “merely colorable” rather than “real and substantial.” *Harrison v. Chamberlin*, 271 U.S. 191, 194 (1926). The Supreme Court also upheld the bankruptcy court’s summary jurisdiction to recover excessive attorneys’ fees paid by the bankrupt prior to bankruptcy. The Court reasoned that

It was in the context of administering a res that bankruptcy courts were essentially courts of equity.<sup>211</sup> At the same time, however, other matters essential to the administration of the bankruptcy case were carried out by nonbankruptcy courts. Collecting assets from third parties, for example, generally was pursued by a plenary suit in a state or federal district court.<sup>212</sup> This aspect of the bankruptcy case, which helped determine the

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the fees, to the extent they were excessive, remained part of the bankruptcy estate. *In re Wood & Henderson*, 210 U.S. 246, 257-58 (1908).

211. In *Prudence Realization Corp. v. Geist*, 316 U.S. 89 (1942), for example, the Supreme Court stated that

[t]he court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's estate is committed, and it is for that court . . . to define and apply federal law in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination to other claims which, in other respects, are of the same class.

*Id.* at 95 (emphasis added) (citation omitted).

Similarly, the Eighth Circuit, in an early case under the 1898 Act, tied its discussion of the equitable nature of the bankruptcy courts to their administration of bankruptcy estates:

The administration and distribution of the property of bankrupts is a proceeding in equity, and when authorized by act of Congress it becomes a branch of equity jurisprudence. Property in the custody of a court of equity for administration is always held by it in trust for those to whom it rightfully belongs. The jurisdiction to inquire and determine who the lawful owners of it are, and to that end to call before it all claimants by a reasonable notice or order to present their claims to the court within a reasonable time, or to be barred of any right or interest in the property in its custody, or in its proceeds, is a power inherent in every court of equity, incidental and indispensable to the authority to administer the property in its possession and to distribute its proceeds.

*In re Rochford*, 124 F. 182, 187 (8th Cir. 1903) (citations omitted); see also *Bachrach v. Central Hanover Bank & Trust Co.* (*In re Commonwealth Light & Power Co.*), 141 F.2d 734, 736 (7th Cir.) (stating that bankruptcy court, as court of equity, "is empowered to allow or disallow claims and to determine controversies in relation thereto, and has full power to inquire into the validity of any claim asserted against the estate and to sift the circumstances surrounding any claim, to see that injustice or unfairness is not done in the administration of the bankrupt estate"), *cert. dismissed*, 322 U.S. 766 (1944); Jackson, *Translating Assets and Liabilities to the Bankruptcy Forum*, 14 J. LEGAL STUD. 73, 86 n.35 (1985) (stating that "the concept of bankruptcy as an equitable device with proceedings against a trust res makes perhaps most analytical sense" in context of liquidation of claims against the estate).

212. See, e.g., *Hollywood Nat'l Bank v. Bumb*, 409 F.2d 23, 24 (9th Cir. 1969) ("If the property is not in the court's possession and a third person asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated in a plenary action, with the rights and remedies incident thereto."); V. COUNTRYMAN, *CASES AND MATERIALS ON DEBTOR AND CREDITOR* 326 (2d ed. 1974) ("[W]here the summary jurisdiction does not exist because the property is in possession of a bona fide adverse claimant who seasonably objects to the summary proceeding, the

size of the res to be distributed, was not necessarily equitable in nature. Instead, a plenary action was governed either by legal or equitable principles depending upon the nature of the claim asserted and the relief sought.<sup>213</sup>

For example, when a trustee sued to enforce a breach of contract claim held by the bankrupt prior to bankruptcy, the plenary action was of a legal nature and thus triable to a jury.<sup>214</sup> Likewise, in *Schoenthal v. Irving Trust Co.*,<sup>215</sup> the Supreme Court held that the defendants to a preference action brought by a bankruptcy trustee were entitled to have the action tried at law by a jury. The Court concluded that the suit could not be tried in equity because there was an adequate remedy at law.<sup>216</sup> In so ruling, the Court rejected the view of some lower courts that had sustained equity jurisdiction over preference suits.<sup>217</sup> The lower courts reasoned that because "proceedings in bankruptcy are in their nature proceedings in equity, preferences, as creations of the Bankruptcy Act, must likewise be cognizable in equity."<sup>218</sup> The Supreme Court, however,

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bankruptcy court as such will generally have no jurisdiction and a plenary proceeding must be brought . . .").

213. See J. MOORE & W. PHILLIPS, *supra* note 133, at 6-2. The authors describe plenary actions as "litigation involving the trustee and third parties brought in the form of an ordinary civil action. If the action is brought in the federal court, the right of jury trial, when timely demanded, is determined according to the nature of the issues, just as in any other civil action." *Id.* (quoting 5 MOORE'S FEDERAL PRACTICE ¶ 38.30 (2d ed. 1948)); see *supra* note 25 and accompanying text.

214. See, e.g., *Tamasha Town & Country Club v. McAlester Constr. Fin. Corp.*, 252 F. Supp. 80, 85 (S.D. Cal. 1966) ("Plenary proceedings involve all of the normal attributes of court trial, including formal pleadings, cross-examination of witnesses and the right to jury trial.").

215. 287 U.S. 92 (1932).

216. The Court noted that

In England, long prior to the enactment of our first Judiciary Act, common law actions of trover and money had and received were resorted to for the recovery of preferential payments by bankrupts. Suits to recover preferences constitute no part of the proceedings in bankruptcy but concern controversies arising out of it. They may be brought in the state courts as well as in the bankruptcy courts. The question whether remedy must be by action at law or may be pursued in equity notwithstanding objection by defendant depends upon the facts stated in the bill. And, in absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have, a suit in equity cannot be maintained.

*Id.* at 94-95 (footnote and citations omitted).

217. See, e.g., *Off v. Hakes*, 142 F. 364, 366 (7th Cir. 1905); *Reed v. Guaranty Sec. Corp.*, 291 F. 580, 581 (D. Mass. 1923), *aff'd in part*, 299 F. 265 (1st Cir. 1924).

218. Note, *Equity Jurisdiction of Suit by Trustee in Bankruptcy to Recover Preference*, 42 YALE L.J. 450, 450-51 (1933) (footnote omitted).

viewed this preference action as a controversy arising out of the bankruptcy, rather than a proceeding in bankruptcy.<sup>219</sup> It had recognized a similar distinction in *Bardes v. Hawarden Bank*,<sup>220</sup> concluding that the 1898 Act vested courts of bankruptcy with jurisdiction over bankruptcy proceedings which were "generally . . . in the nature of proceedings in equity."<sup>221</sup> The 1898 Act did not, however, confer jurisdiction over "'controversies at law and in equity.'"<sup>222</sup> The Court stated that the latter were "controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings."<sup>223</sup>

Thus, under the bifurcated jurisdictional scheme of the 1898 Act, some bankruptcy matters, particularly those relating to the administration and distribution of the bankruptcy estate, were resolved in the bankruptcy court acting as a court of equity. Other bankruptcy matters, usually those involving efforts by the trustee to bring assets into the bankruptcy estate, were resolved in nonbankruptcy courts, where litigants might be constitutionally entitled to a jury trial. The 1978 Act, however, expanded bankruptcy jurisdiction to encompass all of these matters.<sup>224</sup> The effect of this jurisdictional expansion on pre-existing jury trial rights depends upon whether the seventh amendment permits Congress to eliminate jury trial rights by means of its forum assignment.

#### D. RESTRICTIONS ON CONGRESSIONAL ELIMINATION OF JURY TRIAL RIGHTS

Some courts have concluded that *Katchen* permits Congress to convert legal claims arising out of bankruptcy into equitable ones, thereby "displacing any Seventh Amendment right of trial by jury."<sup>225</sup> Based on this rationale, the bank-

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219. *Schoenthal*, 287 U.S. at 95.

220. 178 U.S. 524 (1900).

221. *Id.* at 535.

222. *Id.* at 536 (quoting Bankruptcy Act of July 1, 1898, ch. 541, § 2, 30 Stat. 544, 545 (repealed 1979)). The Court concluded that the 1898 Act vested the circuit, but not the district, courts with jurisdiction over controversies at law and in equity. *Id.* Jurisdiction was granted, however, only to the extent the suit could have been brought there in the absence of bankruptcy. *Id.*

223. *Id.* at 538. The Court therefore affirmed the district court's dismissal for lack of subject matter jurisdiction of this fraudulent conveyance action brought by a trustee in bankruptcy. *Id.* at 539.

224. See *supra* notes 1-5, 73 and accompanying text.

225. *DuVoisin v. Anderson (In re Southern Ind. Banking Corp.)*, 66 Bankr.

ruptcy court in *DuVoisin v. Anderson (In re Southern Industrial Banking Corp.)* held that the defendants to hundreds of preference actions were not entitled to jury trials.<sup>226</sup> The court recognized that preference actions previously had been held to be actions at law to which the seventh amendment applied. It concluded, however, that the expansion of bankruptcy jurisdiction to include the adjudication of such matters transformed such actions into "proceedings in bankruptcy" intended to be tried without a jury.<sup>227</sup> Relying on *Katchen*, the court found this transformation to be constitutionally permissible.<sup>228</sup>

The *Katchen* Court appeared to endorse the view that Congress could transform actions at law into equitable proceedings, and thereby eliminate jury trial rights, merely by assigning adjudication of the actions to the equitable bankruptcy court.<sup>229</sup> Indeed, *Katchen* frequently is cited as upholding "the power of

370, 375 (Bankr. E.D. Tenn.), *appeal dismissed*, 70 Bankr. 196 (E.D. Tenn. 1986).

226. *Id.* The debtor corporation was a former industrial loan and thrift company. The trustee in bankruptcy brought hundreds of preference actions against former investors of the debtor, and more than 400 of the preference defendants demanded jury trials. *See id.* at 371.

227. *Id.* at 374; *see also* Huffman v. Perkinson (*In re Harbour*), 840 F.2d 1165 (4th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3755 (U.S. Apr. 25, 1988). In *Harbour* the court stated that

Now, Congress also has determined that actions such as the trustee's [preference and fraudulent conveyance actions] in this case are core bankruptcy proceedings requiring summary disposition by a bankruptcy judge. As such, they assume the historical equitable posture of all such bankruptcy proceedings, and the litigants involved in these actions have no seventh amendment right to a trial by jury.

*Id.* at 1178 (footnote omitted); Nordberg v. Granfinanciera, S.A. (*In re Chase & Sanborn Corp.*), 835 F.2d 1341 (11th Cir. 1988) ("If . . . Congress may convert a creditor's legal right into an equitable claim and displace any seventh amendment right to trial by jury, Congress may likewise treat other core proceedings in bankruptcy such as actions to avoid fraudulent transfers or preferences."), *cert. granted*, 56 U.S.L.W. 3841 (U.S. June 13, 1988) (No. 87-1716).

228. 66 Bankr. at 375. *Collier on Bankruptcy* makes a similar argument. Relying on *Katchen*, it suggests that there is no right to a jury trial in core proceedings because they are inherently proceedings in equity. 1 COLLIER, *supra* note 14, ¶ 3.01, at 3-96 to 3-97. The treatise also interprets *Katchen* as eliminating jury trials in noncore proceedings, even when tried by the district judge, because

[i]f the case is tried by a district court, it is not sitting *qua* district court, but as the court to which all bankruptcy jurisdiction has been granted by section 1334(a) and (b). In such capacity, the doctrine of *Katchen v. Landy* would seem to apply, and, since the proceeding is ipso facto an equitable proceeding, no jury trial is mandated by any law or by the United States Constitution.

*Id.* ¶ 3.01, at 3-97; *see* King, *supra* note 14, at 703-06.

229. *See supra* notes 160-61 and accompanying text.

Congress to take some causes of action outside the scope of the Seventh Amendment by providing for their enforcement . . . in a specialized court."<sup>230</sup> To determine the limits on this congressional circumvention of the seventh amendment, the context of the Court's statements in *Katchen* must be carefully considered.

When the *Katchen* Court spoke of converting legal claims into equitable ones, it was referring specifically to claims belonging to a creditor of the bankrupt.<sup>231</sup> In *Barton v. Barbour*<sup>232</sup>, the Court discussed the same transformation in a similar context.<sup>233</sup> That context was one in which the event of bankruptcy had transformed the nature of the claim. When a defendant or potential defendant to an action at law files for bankruptcy, the nature of the plaintiff's claim is automatically changed by these circumstances. The plaintiff no longer is asserting a claim against a solvent defendant, which might have enabled the plaintiff to obtain a judgment against the defendant's nonexempt assets. Instead, the intervening bankruptcy means that the plaintiff becomes one of many creditors seeking to share a limited fund.<sup>234</sup> The plaintiff's recovery, if any, will be governed by equitable principles applied by the bankruptcy court in administering the res within its exclusive control.<sup>235</sup>

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230. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 45, at 498; *see also* F. JAMES & G. HAZARD, *supra* note 45, at 451 ("[T]he Court has held in *Katchen v. Landy* that Congress could exclude jury trial in special procedures in the courts where necessitated by practical considerations of the kind associated with equity.") (footnote omitted) (emphasis in original).

231. Thus the Court said that the 1898 Act "converts the creditor's legal claim into an equitable claim to a pro rata share of the res." 382 U.S. at 336.

232. 104 U.S. 126 (1881).

233. The *Barton* Court explained that

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

*Id.* at 134 (emphasis added); *see also* *Robinson v. Hinkley* (*In re Hinkley*), 58 Bankr. 339, 343 (Bankr. S.D. Tex. 1986) (holding that "a bankruptcy court is a court of equity when passing on claims").

234. *See Transpro Corp. v. NTW Inc. (In re NTW Inc.)*, 69 Bankr. 656, 659 (Bankr. E.D. Va. 1987) (creditor "does not seek entry of a money judgment against the debtor, but the equitable allowance of its claim against the bankruptcy estate").

235. *See id.* ("[T]he entitlement of [the creditor] to a proportionate share of [the debtor's] estate in bankruptcy, is by its nature equitable despite the fact that Transpro's claim to entitlement may be grounded in a claim at law.");

The transformation of the plaintiff's legal claim for a money judgment into an equitable claim to a portion of the res is thus brought about, not by a mere change in forums, but by a change in factual circumstances.

The expansion of bankruptcy jurisdiction to include matters previously pursued only by plenary suit, however, works no such factual transformation.<sup>236</sup> As was true under the 1898 Act, a trustee under the present Act is permitted to sue third parties to recover assets for the estate. As discussed earlier, a trustee formerly could proceed by an action at law, in which case the seventh amendment provided a right to a jury trial.<sup>237</sup> The same result should still obtain despite the expansion of bankruptcy jurisdiction, because the only change that has occurred is that Congress has established an additional, nonexclusive forum for the adjudication of these matters.<sup>238</sup> Neither the nature of the claim nor the relief sought is in any way altered by the bankruptcy filing<sup>239</sup> or by the bankruptcy courts' jurisdictional expansion.<sup>240</sup>

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*Hayutin v. Grynberg*, 52 Bankr. 657, 661 (Bankr. D. Colo. 1985). The court in *Hayutin* noted that the suit involved "claims to property over which the bankruptcy court has jurisdiction. . . . Were it not for bankruptcy, these issues may be triable in state court to a jury. But 'when the same issue arises as part of allowance and disallowance of claims, it is triable in equity.'" *Id.* (quoting *Katchen*, 382 U.S. at 336). Equitable principles will govern not only the claim itself but also any defenses that may be asserted against it. This is because, as the *Katchen* Court stated, a defense to a claim is "part and parcel" of the equitable claims adjudication process. 382 U.S. at 330.

236. Cf. *1616 Reminc Ltd. Partnership v. Atchison & Keller Co. (In re 1616 Reminc Ltd. Partnership)*, 704 F.2d 1313, 1317 (4th Cir. 1983) (contrasting creditor's "equitable claim to a pro rata share of the res" in *Katchen* with the present debtor in possession's common law breach of contract claim) (quoting *Katchen*, 382 U.S. at 336).

237. See *supra* notes 214-23 and accompanying text.

238. Under § 1334(b) district courts are granted "original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. § 1334(b) (Supp. III 1985). A trustee may therefore choose to sue a third party in a state court rather than in the bankruptcy court to enforce a cause of action that became property of the estate or to recover a preference or fraudulent conveyance.

239. The effects of bankruptcy with regard to the debtor's actions are the substitution of the trustee for the debtor as plaintiff and the inclusion in the estate of the resulting recovery. See 11 U.S.C. § 323 (1982) (trustee is representative of estate and has authority to sue); *id.* § 541(a)(1) (estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case"). The principles governing resolution of the suit are the same as if the debtor sued outside bankruptcy.

240. See *In re Wood & Henderson*, 210 U.S. 246, 262 (1908) (Brewer, J., dissenting). Justice Brewer noted that "the recovery of an amount due or of property belonging to an individual or an estate is ordinarily by a common law

Support for this analysis can be found in *Ross v. Bernhard*,<sup>241</sup> in which the Supreme Court held that the seventh amendment guarantees the right to a jury trial in a shareholder derivative suit.<sup>242</sup> The Court noted that the question of the shareholder's standing to sue on behalf of the corporation presented an equitable issue. The suit on the corporation's underlying claim, however, might be legal in nature.<sup>243</sup> Citing its decision in *Fleitmann v. Welsbach Street Lighting Co.*,<sup>244</sup> the Court emphasized that "legal claims are not magically converted into equitable issues by their presentation to a court of equity in a derivative suit."<sup>245</sup>

In *Fleitmann*, the Court held that a shareholder could not maintain a treble damages action against a corporation under the Sherman Act.<sup>246</sup> Because the shareholder was required to bring its derivative suit in a court of equity, permitting the treble damages action would have deprived the defendant of its right to a jury trial. The Court concluded that the statute should not be interpreted to permit the denial of jury trial rights.<sup>247</sup>

These cases can be construed as establishing that a legal claim is not magically transformed into an equitable one merely because it is asserted in what traditionally has been viewed as a court of equity.<sup>248</sup> Unless the claim has been *factually* transformed, such as in *Katchen* and *Barton*, the right to a jury trial remains. If, as in *Fleitmann*, a jury trial is unavailable in the equity court, then the court cannot hear the legal claim because doing so would deprive the parties of their jury trial rights.<sup>249</sup> If, however, as in *Ross*, the claim is presented in

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action. That the claimant is an estate and in the hands of a trustee or receiver does not change the nature of the proceeding." *Id.*

241. 396 U.S. 531 (1970).

242. *See id.* at 532-33.

243. *Id.* at 538. The Court stated "that the derivative suit has dual aspects: first, the stockholder's right to sue on behalf of the corporation, historically an equitable matter; second, the claim of the corporation against directors or third parties on which, if the corporation had sued and the claim presented legal issues, the company could demand a jury trial." *Id.*

244. 240 U.S. 27 (1916).

245. *Ross*, 396 U.S. at 538.

246. 240 U.S. at 29.

247. *Id.* (agreeing "with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law").

248. *See supra* notes 225-28 and accompanying text.

249. *See Fleitmann*, 240 U.S. at 29.

a merged court of law and equity, then the court can hear the claim and grant the jury trial demand.<sup>250</sup> Under this analysis, actions by a bankruptcy trustee once pursued by plenary actions at law in state or district courts retain their legal nature even though they now may be maintained in the bankruptcy court. Therefore, the seventh amendment applies, entitling the parties to a jury trial.<sup>251</sup>

It might be argued that the foregoing conclusion cannot be reconciled with the Supreme Court's decision in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*.<sup>252</sup> The *Atlas Roofing* Court rejected a seventh amendment challenge to a federal statute authorizing the government to sue for civil penalties in an administrative proceeding.<sup>253</sup> The Court

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250. See 396 U.S. at 540 ("[I]t is no longer tenable for a district court, administering both law and equity in the same action, to deny legal remedies to a corporation, merely because the corporation's spokesmen are its shareholders rather than its directors.").

251. Several district and bankruptcy courts have reached this conclusion. See *Doyle v. Mellon Bank (E.) Nat'l Ass'n (In re Globe Parcel Serv.)*, 75 Bankr. 381, 383 (E.D. Pa. 1987) ("The mere fact that a plaintiff raises his legal claims before a court of equity in the context of an equitable proceeding does not somehow convert claims that are otherwise legal—triable before a court of law—into equitable ones."); *M & E Contractors v. Kugler-Morris Gen. Contractors*, 67 Bankr. 260, 266-67 (N.D. Tex. 1986) ("Congress cannot transform a legal proceeding into an equitable proceeding and thus abrogate the terms of a constitutional provision."); *aff'g Wolfe v. First Fed. Sav. & Loan Ass'n (In re Wolfe)*, 68 Bankr. 80, 85-86 (Bankr. N.D. Tex. 1986) ("[L]imited legal actions which the Bankruptcy Court finds are core proceedings and require a jury trial under the Seventh Amendment cannot be released from that requirement by claiming that their adjudication by the Bankruptcy Court transforms such legal actions into an equitable proceeding."); *Zimmerman v. Cavanagh (In re Kenval Mktg. Corp.)*, 65 Bankr. 548, 553 (E.D. Pa. 1986) (after classifying a matter as a core proceeding, "the court is still required to determine whether the action is one at law or lies in equity in deciding the right to a jury trial"); *Edelman v. Michigan Blueberry Growers Ass'n (In re Silver Mills Frozen Foods)*, 80 Bankr. 848, 854 (Bankr. W.D. Mich. 1987) ("[I]f mere classification of a matter as a core proceeding [could] abolish a litigant's right to a jury trial under the Seventh Amendment[,] Congress could nullify the Seventh Amendment simply by reclassifying every action out from under the Amendment's protection.") (footnote & citation omitted); *Eisenberg v. Guardian Group, Inc. (In re Adams, Browning & Bates, Ltd.)*, 70 Bankr. 490, 497 (Bankr. E.D.N.Y. 1987) ("This Court is unable to accept the view that Congress . . . has the right to strip Seventh Amendment protection from traditional actions-at-law simply by vesting jurisdiction to decide [them] in the bankruptcy court.").

252. 430 U.S. 442 (1977).

253. See *id.* at 455-61. The statute at issue in *Atlas Roofing* was the Occupational Safety and Health Act of 1970, which authorized the Occupational Safety and Health Review Commission to impose civil penalties on employers found to maintain unsafe working conditions. The penalties were imposed following an evidentiary hearing before an administrative law judge. *Id.* at 445-

explicitly recognized that Congress's choice of a forum for particular litigation could eliminate jury trial rights that might have existed had another forum been chosen.<sup>254</sup> The decision may suggest therefore that Congress, by assigning the litigation of legal actions to the bankruptcy court, can eliminate previously existing jury trial rights.<sup>255</sup>

Although *Atlas Roofing* does give Congress some latitude to escape the seventh amendment's requirements, the limits the Court placed on its holding render it inapplicable to the present bankruptcy situation. Throughout the opinion, for instance, the Court stressed that the decision was applicable only to congressionally created *public rights*.<sup>256</sup> Although the con-

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46. The Court rejected the employer's argument that, because it would have been entitled to a jury trial had the government been authorized to sue for civil penalties in federal court, its seventh amendment rights were violated by this administrative procedure. *Id.* at 450.

The *Atlas Roofing* Court declined to decide whether the seventh amendment guarantees a right to jury trial in government actions in federal court to collect civil penalties. *Id.* at 449 n.6. The Court subsequently held, however, that under the seventh amendment a defendant in an action for civil penalties under the Clean Water Act is entitled to a jury trial on the question of liability, but not on the question of the amount of penalty to be awarded. *See Tull v. United States*, 107 S. Ct. 1831, 1836, 1840 (1987).

254. 430 U.S. at 460-61. The Court stated that "history and our cases support the proposition that the right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved." *Id.*

255. The Court stated its holding in *Atlas Roofing* as follows:

At least in cases in which 'public rights' are being litigated—*e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.

430 U.S. at 450.

For a detailed critique of the *Atlas Roofing* decision, see Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281, 1281 (1978) (arguing that *Atlas Roofing* "seriously weakened the protection" afforded by the seventh amendment).

256. *See* 430 U.S. at 450. The Court noted that "the cases discussed . . . stand clearly for the proposition that when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction." *Id.* at 455 (emphasis added); *see also* Kirst, *supra* note 255, at 1287 ("The Court in *Atlas* . . . stated a new rule to explain why the right to a jury trial does not apply to administrative proceedings . . ."); *Lunenburg & Nordenberg, supra* note 76, at 960-61 ("The *Atlas* holding is limited to the area of public rights where the adjudication takes place in a tribunal other than a federal court of law."). Although in *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986), the Supreme Court permitted

cept of public rights remains ill defined,<sup>257</sup> it is not broad enough under any viable definition to encompass most of the estate-enhancing actions pursued by bankruptcy trustees.<sup>258</sup> The bulk of such actions are between private individuals or entities and are based on state common law, such as tort and contract actions held by the debtor prior to bankruptcy. These types of common law actions were pursued by the debtor in possession in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>259</sup> and there a majority of the Court held that they did not fall within the public rights exception to article III.<sup>260</sup> Consequently, it appears that most of the actions Congress added to the bankruptcy courts' jurisdiction, especially

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the adjudication of a state common law counterclaim by an administrative agency, no seventh amendment issue was raised in that case. *See id.* at 3249. The Court's opinion gives no indication that either party demanded a jury trial, and furthermore, both parties voluntarily submitted to the agency adjudication rather than pursuing their claims in the courts. *Id.* at 3251. Thus, any seventh amendment rights that might otherwise have existed were surely waived.

257. The Supreme Court has continued to struggle with the concept in cases following *Atlas Roofing*. Compare *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) (plurality opinion) (holding that "[t]he distinction between public rights and private rights has not been definitively explained in our precedents" and that "a matter of public rights must at a minimum arise 'between the government and others'") (quoting *Ex Parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)) (footnote omitted) with *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 586-89 (1985) (rejecting view that government must be party for action to involve public right and concluding that "the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced") (quoting *Northern Pipeline*, 458 U.S. at 68).

258. Some commentators, discussing the implications of *Northern Pipeline*, question whether any bankruptcy matters are properly considered to involve public rights. *See Baird, Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon*, 1982 SUP. CT. REV. 25, 44 (questioning suggestion that summary proceedings involve public rights because they involve restructuring of debtor-creditor relations); Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 452 (1983) ("Bankruptcy cases are not controversies 'between the government and others' but rather involve essentially private litigation between private parties."); *infra* note 347.

259. *See* 458 U.S. 50, 56 (plurality opinion) ("Northern [the debtor in possession] . . . filed in [the bankruptcy] court a suit against appellee Marathon[, in which it] sought damages for alleged breaches of contract and warranty, as well as for alleged misrepresentation, coercion, and duress.").

260. *Id.* at 71-72 (plurality opinion) ("Appellant Northern's right to recover contract damages to augment its estate is 'one of private right, that is, of the liability of one individual to another under the law as defined.'") (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)); *id.* at 91 (Rehnquist, J., concurring) ("To whatever extent different powers granted under that Act might be sus-

those now designated as noncore,<sup>261</sup> fall within the category of cases identified as "not at all implicated" by the Supreme Court's decision in *Atlas Roofing*.<sup>262</sup>

Among the actions added to the bankruptcy courts' jurisdiction, however, are a few that are congressionally created. Preference and fraudulent conveyance actions, once pursued by plenary actions and now classified as core proceedings, are created by federal statute.<sup>263</sup> Despite their federal statutory origin, however, they do not fit within *Atlas Roofing's* description of public rights cases. The Court identified such cases as ones "where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights."<sup>264</sup> Even if that description was meant to be merely il-

tained under the 'public rights' doctrine, I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained." (citation omitted).

261. See *supra* notes 193-94 and accompanying text.

262. See 430 U.S. at 458 ("Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated."). Even commentators who argue that the seventh amendment permits Congress to eliminate jury trial rights in some circumstances recognize that the right should remain inviolate in "those actions unmistakably cognizable in common law courts in 1791 in England." Note, *supra* note 166, at 418; accord F. JAMES & G. HAZARD, *supra* note 45, at 417 (arguing that "the legislature has some latitude to change the scope of the jury-trial right if doing so . . . does not withdraw jury trial in an area where historically it was firmly established"); Lunenburg & Nordenberg, *supra* note 76, at 977 (stating that "[i]f a cause of action existed in 1791 and was then jury triable, Congress could not destroy the right merely by consigning its adjudication to a newly created court").

263. See 11 U.S.C. § 547 (1982 & Supp. IV 1986) (preferences); *id.* § 548 (fraudulent transfers and obligations); *id.* § 544(b) (1982) (incorporating into bankruptcy law state fraudulent conveyance law). Although the seventh amendment refers to the preservation of jury trial rights "[i]n Suits at common law," see *supra* note 132 and accompanying text, the Supreme Court has rejected the argument that the amendment is therefore inapplicable to statutory causes of action. See *Tull v. United States*, 107 S. Ct. 1831, 1835 (1987) ("This analysis applies not only to common law forms of action, but also to causes of action created by congressional enactment."); *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (9-0 decision) ("The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.").

264. 430 U.S. at 458. Preference and fraudulent conveyance actions are also unlike actions against the government under the Federal Tort Claims Act. The Supreme Court suggested in dicta that such claims fall outside the guarantee of the seventh amendment due to "the power of the sovereign to attach conditions to its consent to be sued." *United States v. Sherwood*, 312 U.S. 584, 587 (1941); see *Kirst, Jury Trial and the Federal Tort Claims Act: Time to Recognize the Seventh Amendment Right*, 58 TEX. L. REV. 549 (1980) (arguing that seventh amendment guarantees right to jury trial in Federal Tort Claims Act cases).

lustrative and not definitional,<sup>265</sup> actions by a bankruptcy trustee to recover property for the bankruptcy estate can hardly be characterized as involving anything other than private rights.<sup>266</sup> Moreover, preference and fraudulent conveyance actions, traditionally authorized by bankruptcy law, are unlike the newly created cause of action in *Atlas Roofing*.<sup>267</sup> In the 1978 Act, Congress simply authorized bankruptcy judges to preside over the adjudication of previously existing causes of action.<sup>268</sup> The elimination of jury trial rights in such actions,

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265. Professors Lunenburg and Nordenberg argue that “[a] close reading of *Atlas* indicates the opinion considers a suit in which the government enforces a statute as merely an example of those public right actions within the scope of the decision.” Lunenburg & Nordenberg, *supra* note 76, at 963. Accordingly, they suggest that “*Atlas* applies to causes of action that result in monetary recoveries inuring to the immediate benefit of private individuals, even if the private beneficiaries of those recoveries are the sole prosecutors of the actions against other private individuals, so long as there is a substantial public benefit to be derived from litigating such actions.” *Id.* at 966; *cf.* *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 585-86 (1985) (rejecting bright line test requiring government as party in order to come within public rights exception to article III).

266. Any recovery obtained accrues to the benefit of the bankruptcy estate and thus ultimately to the unsecured creditors, rather than to the public at large. Preference actions, for example, are intended to assist in “secur[ing] fairness in the distribution of an insolvent debtor’s assets among its creditors.” Broome, *Payments on Long-Term Debt as Voidable Preferences: The Impact of the 1984 Bankruptcy Amendments*, 1987 DUKE L.J. 78, 78. Fraudulent conveyance actions seek to achieve the same goal. Assets that the debtor previously diverted from the estate are brought back into the estate for distribution to the general creditors. Such recoveries are permitted under bankruptcy law even without a showing of fraudulent intent on the part of the debtor where the property was exchanged for less than “reasonably equivalent value” at a time when the debtor was insolvent. 11 U.S.C. § 548(a)(2)(A) (1982 & Supp. III 1985). Thus the goal is primarily one of augmenting distribution to creditors rather than punishment of defrauding debtors. *See, e.g.*, B. WEINTRAUB & A. RESNICK, *supra* note 14, at 7-35 (“[The] Code recognizes that creditors’ rights are jeopardized whenever a debtor whose assets are not sufficient to pay liabilities disposes of property for less than reasonably equivalent value, regardless of the debtor’s motive.”).

267. *See supra* note 253.

268. Under the 1898 Act, preference and fraudulent conveyance actions could be brought in either state courts or federal district courts. The latter were granted jurisdiction over such actions in their capacity as courts of bankruptcy. Act of July 1, 1898, ch. 541, § 23, 30 Stat. 544, 552 (as amended) (repealed 1979). These plenary actions were placed on the civil dockets, however, rather than the bankruptcy dockets of district courts and were heard by the district judges themselves, rather than bankruptcy referees. *See supra* note 24. The 1978 Act also vested nonexclusive jurisdiction over preference and fraudulent conveyance actions in the district courts. It directed bankruptcy judges to hear and decide such matters, however. 28 U.S.C. § 1471(b)-(c) (1982) (repealed 1984). Bankruptcy judges continue to be authorized to conduct such

therefore, is not justified by *Atlas Roofing's* rationale that "Congress is not required by the Seventh Amendment to choke the already crowded federal courts with *new types of litigation*."<sup>269</sup>

The nature of the forums involved also distinguishes *Atlas Roofing* from the bankruptcy situation. In *Atlas Roofing* the Court was concerned with "an administrative forum with which the jury would be incompatible."<sup>270</sup> A similar conclusion of incompatibility cannot be reached about the federal bankruptcy courts, however. As the post-1978 history of bankruptcy law indicates,<sup>271</sup> jury trials, even if not welcome in the bankruptcy courts, are not incompatible with these courts.<sup>272</sup> Un-

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proceedings under the 1984 Amendments, which classified these actions as core proceedings. 28 U.S.C. §§ 157(b), 1334 (Supp. III 1985).

269. 430 U.S. at 455 (emphasis added); *see also id.* at 461 ("The Seventh Amendment is no bar to the creation of *new rights* or to their enforcement outside the regular courts of law.") (emphasis added); Luneburg & Nordenberg, *supra* note 76, at 971 (noting that *Atlas Roofing* could be interpreted to mean that "where a particular type of new litigation already has been statutorily created and committed to the original jurisdiction of the regularly established federal district courts, Congress cannot transfer the adjudication of that cause of action to a different forum and thereby avoid the need for a jury trial").

270. 430 U.S. at 450.

271. *See supra* notes 42-60, 175-98 and accompanying text.

272. Some courts conclude that jury trials are incompatible with bankruptcy proceedings because of the need for expeditious resolution of such matters. *See, e.g., DuVoisin v. Anderson (In re Southern Indus. Banking Corp.)*, 66 Bankr. 370, 375 (Bankr. E.D. Tenn. 1986); *Pennels v. Barnes (In re Best Pack Seafood)*, 45 Bankr. 194, 195 (Bankr. D. Me. 1984). Relying on *Katchen's* discussion of the congressional desire for "the prompt trial of a disputed claim without the intervention of a jury," *see supra* text accompanying note 168, these courts conclude that "Congress may accommodate the right to trial by jury to the need for expeditious proceedings." *Pennels*, 45 Bankr. at 195; *accord DuVoisin*, 66 Bankr. at 375. This Article does not interpret *Katchen* as authorizing Congress to eliminate seventh amendment rights just because it wants cases decided quickly. Instead, the Article contends that *Katchen* merely recognized that the event of bankruptcy can transform legal claims into equitable ones. *See supra* notes 231-35 and accompanying text. The Court's discussion of the desire for expeditious decisions did not concern whether Congress could deny jury trial rights in legal actions. Rather, it involved whether a court was required to delay equitable proceedings so that another court could first try a related legal claim. In the context of that timing question, the Court considered Congress's desire for expedited action; it did not look to congressional intent to determine whether the seventh amendment should be overridden. *Cf. Redish, supra* note 162, at 522 (questioning relevance of Congress's desire for prompt trials); *see also Pernell v. Southall Realty*, 416 U.S. 363, 384 (1974) (rejecting "the notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial").

like administrative agencies, bankruptcy courts possess the procedural mechanisms to summon and impanel jurors,<sup>273</sup> and jury trials have in fact been conducted there.<sup>274</sup>

Neither *Katchen* nor *Atlas Roofing* supports the view that the seventh amendment permits Congress to eliminate jury trial rights by expanding the jurisdiction of the bankruptcy courts. Instead, matters previously pursued by actions at law in nonbankruptcy courts retain their legal nature when pursued in the bankruptcy courts, and the seventh amendment guarantees litigants jury trial rights in these actions.

#### E. BANKRUPTCY COURTS AS COURTS OF LAW AND EQUITY

Concluding that a right to a jury trial is automatically precluded just because the matter comes within the bankruptcy courts' jurisdiction was perhaps correct under the 1898 Act. At that time the bankruptcy courts' summary jurisdiction centered on the equitable administration of a res.<sup>275</sup> Now that bankruptcy jurisdiction has been expanded to include matters of a legal nature, however, bankruptcy courts are properly viewed as merged courts of law and equity, like federal district courts.<sup>276</sup> Accordingly, the seventh amendment requires examination of the nature of claims asserted and relief sought to determine the existence of jury trial rights.<sup>277</sup>

The foregoing approach does not categorically reject jury trials in all matters now classified as core proceedings.<sup>278</sup> Despite the substantial overlap between core proceedings and summary jurisdiction, the two categories are not identical. As discussed above,<sup>279</sup> some matters now expressly classified by Congress as core, such as preference and fraudulent conveyance actions, previously were pursued only by plenary actions in which jury trials were sometimes available.<sup>280</sup> This Article con-

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273. As a unit of the district court, the bankruptcy court could be authorized to utilize existing jury trial procedures. See 28 U.S.C. § 1866 (1982) (selection and summoning of jury panels).

274. See *supra* note 82 and accompanying text; *infra* note 308 and accompanying text.

275. See *supra* notes 206-11 and accompanying text.

276. See *supra* note 75.

277. See *supra* note 132.

278. But see *supra* notes 195-96 and accompanying text.

279. See *supra* note 263 and accompanying text.

280. See G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 183-84 (1940). Professor Glenn argued:

It follows that whether the trustee's [fraudulent conveyance] suit should be at law or in equity is to be judged by the same standards

tends that plenary actions at law retain their legal nature even though they now may be pursued in the bankruptcy courts and that Congress lacks authority to override the seventh amendment's command with regard to them. This approach thus recognizes the continuation of jury trial rights in such core proceedings in the bankruptcy courts.

This approach does not suggest, however, that jury trial rights be determined in the bankruptcy courts just as they would be in the district courts.<sup>281</sup> Although the general method of analysis employed by bankruptcy and district courts should be the same, *Katchen* continues to require that bankruptcy's factual transformation of legal causes of action into equitable claims to a share of the estate be considered.<sup>282</sup> That is, to determine whether the seventh amendment guarantees a right to a jury trial in a particular action, the bankruptcy context in which the claim is asserted must be taken into account. It is not sufficient to look only to whether compensatory damages are sought. If damages are sought from the bankruptcy estate or in connection with an objection to a claim against the estate, *Katchen* teaches that the claim has been transformed by bankruptcy into an equitable claim triable without a jury.

What this approach requires, then, is that jury trial rights be preserved for actions that retain their legal nature despite their assertion in the bankruptcy courts. Matters viewed as equitable because of the nature of the relief sought will not be triable by jury;<sup>283</sup> nor will matters involving the equitable

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that are applied to any other owner of property which is wrongfully withheld. If the subject matter is a chattel, and is still in the grantee's possession, an action in trover or replevin would be the trustee's remedy; and if the fraudulent transfer was of cash, the trustee's action would be for money had and received. Such actions at law are as available to the trustee to-day as they were in the English courts of long ago. If, on the other hand, the subject matter is land or an intangible, or the trustee needs equitable aid for an accounting or the like, he may invoke the equitable process, and that also is beyond dispute.

*Id.* (footnotes omitted). Not all courts agree with Professor Glenn's analysis, however. Some view fraudulent conveyance actions as inherently equitable, regardless of the relief sought. *See, e.g.,* *Moratzka v. Wencl* (*In re Wencl*), 71 Bankr. 879, 883-85 (Bankr. D. Minn. 1987). *But see* *Hassett v. Weissman* (*In re O.P.M. Leasing Servs.*), 48 Bankr. 824, 826-28 (S.D.N.Y. 1985) (adopting Prof. Glenn's analysis).

281. *But see supra* notes 175-82 and accompanying text.

282. *See supra* notes 231-35 and accompanying text.

283. For example, an action by a trustee seeking an injunction or specific performance would have been equitable when pursued by a plenary suit under the 1898 Act, and it remains equitable when brought in the bankruptcy court under current law.

administration of the bankruptcy estate.<sup>284</sup> Matters previously pursued by actions at law in nonbankruptcy courts, however, will retain their jury trial entitlements.<sup>285</sup>

This approach results in a system of jury trial rights similar to that which Congress attempted to create under the 1978 Act. In section 1480 of the 1978 Act, Congress preserved jury trial rights that existed prior to the expansion of the bankruptcy courts' jurisdiction.<sup>286</sup> Although replaced in 1984 by a much narrower provision, the approach proposed by this Article is based on the view that the seventh amendment continues to require that jury trial rights be recognized.<sup>287</sup> Thus, notwithstanding Congress's failure to provide for the right to jury trial in bankruptcy except in a narrow category of cases, jury trials continue to be available in both core and noncore bankruptcy proceedings pursuant to the seventh amendment.

#### IV. AUTHORITY OF BANKRUPTCY JUDGES TO CONDUCT JURY TRIALS

##### A. CONFLICTING VIEWS

If the seventh amendment guarantees litigants the right to a jury in certain bankruptcy matters, it must be determined who may conduct the jury trial. The logical choice is a bankruptcy judge.<sup>288</sup> In the 1984 Amendments, however, Congress failed to state expressly whether bankruptcy judges are authorized to conduct jury trials.<sup>289</sup> As a result courts have deter-

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284. Thus, claims against the estate and objections to creditors' claims are equitable in nature and are not entitled to be tried by a jury.

285. This category of claims, to which the seventh amendment applies, includes fraudulent conveyance and preference actions seeking legal relief, which are core proceedings, and all noncore proceedings in which legal relief is sought.

286. See *supra* notes 68-79 and accompanying text.

287. The seventh amendment preserves jury trial rights only in actions of a legal nature. Unlike 28 U.S.C. § 1480 (1982), it does not preserve any preexisting jury trial rights granted by *statute* to actions of an equitable nature.

288. Though bankruptcy jurisdiction is vested in the district courts, most bankruptcy matters are heard by a bankruptcy judge. See *supra* note 188. Indeed, the consolidation of bankruptcy litigation in the bankruptcy court was one of the goals underlying Congress's enactment of the 1978 Act. See *supra* notes 1-5 and accompanying text. Thus, if a bankruptcy matter is to be tried to a jury, it would appear to be preferable to allow the bankruptcy judge to conduct the trial, rather than to require this litigation to be split off from all related bankruptcy matters and added to the district court's jury trial backlog.

289. In evaluating the various positions taken by the courts, discussed *infra* notes 290-308 and accompanying text, the lack of any express statutory authorization for bankruptcy judges to conduct jury trials should not be dispositive.

mined the appropriate procedure for themselves. Once again a variety of views have emerged.

One line of authority holds that bankruptcy judges possess no authority to conduct jury trials and that a district judge therefore must try any bankruptcy matter in which a jury trial

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District judges have no such statutory authorization. Chapter 121 of title 28, United States Code, which governs jury trials in the federal courts, contains no express authorization for district judges to conduct jury trials. Nor is such authorization included in chapter 5 of title 28, which governs the district courts. Nevertheless, authority to preside over jury trials is clearly implicit in the grant of jurisdiction to them over matters at law. The same conclusion could be reached concerning bankruptcy judges.

Congress apparently repealed the statutory provision that would have made jury trial procedures expressly applicable to bankruptcy courts. Section 243 of the 1978 Act amended 28 U.S.C. § 1869(f) to include bankruptcy courts within the definition of the courts to which the jury trial provisions of the judicial code apply. Pub. L. No. 95-598, 92 Stat. 2549, 2671 (1978). Section 402(b) of the 1978 Act provided that § 243 would take effect on April 1, 1984, later extended to June 28, 1984. *Id.* at 2682. The 1984 Amendments contained conflicting provisions concerning its effect on § 402(b). Section 113 declared that § 402(b) "shall not be effective," Pub. L. No. 98-353, 98 Stat. 333, 343 (1984), whereas § 121(a) provided that § 402(b) would go into effect on the effective date of the 1984 Amendments. *Id.* at 345. These are the same conflicting provisions that govern the effect of the 1984 Amendments on the 1978 Act's jury trial provision, which most have interpreted as causing the provision's repeal. *See supra* note 96.

In the analogous case of magistrates, however, Congress enacted a statutory provision expressly stating the circumstances under which they may conduct jury trials. *See* 28 U.S.C. § 636(c)(1) (1982) (providing that "[u]pon the consent of the parties, a full-time United States magistrate . . . may conduct any or all proceedings in a jury . . . civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves").

Although these actions by Congress might suggest that it did not intend bankruptcy judges to conduct jury trials, there are indications to the contrary. When Congress enacted the 1984 Amendments, it declined to enact the emergency rule's express prohibition against the conduct of jury trials by bankruptcy judges, even though in other respects it generally adopted the Emergency Rule's approach to the exercise of bankruptcy jurisdiction. *See, e.g.,* Dailey v. First Peoples Bank, 76 Bankr. 963, 967 (D.N.J. 1987) ("Had Congress intended to abrogate the bankruptcy court's authority to empanel juries, it would have enacted the Emergency Rule to accomplish that."); Walsh v. Long Beach Honda (*In re* Gaildeen Indus.), 59 Bankr. 402, 406 (N.D. Cal. 1986) ("Had Congress intended to prohibit bankruptcy judges from conducting jury trials it need only have enacted the proscription contained in the Emergency Rule.").

It thus seems more likely that Congress failed to enact a provision clearly stating the bankruptcy judges' authority to conduct jury trials because of its uncertainty about applicable constitutional requirements. If that is the case, then clarification of the constitutional issues might lead to a clarification of the congressional intent regarding the conduct of jury trials by bankruptcy judges. *See infra* notes 309-397 and accompanying text.

is properly demanded.<sup>290</sup> Some courts reaching this conclusion interpret *Northern Pipeline* as indicating that article III is violated if non-article III bankruptcy judges conduct jury trials.<sup>291</sup> Other courts in this group avoid the constitutional question and conclude that bankruptcy judges should not conduct jury trials in the absence of express statutory authorization.<sup>292</sup> Finally, some courts follow local bankruptcy rules requiring all bankruptcy jury trials to be conducted by a district judge.<sup>293</sup>

A majority of courts disagree with the view that bankruptcy judges lack authority to conduct jury trials, but for practical reasons they conclude that they should not do so in noncore proceedings without the parties' consent.<sup>294</sup> These

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290. See *Jefferson Nat'l Bank v. I.A. Durbin, Inc. (In re I.A. Durbin, Inc.)*, 62 Bankr. 139, 146 (S.D. Fla. 1986); *Terry v. Proehl (In re Proehl)*, 36 Bankr. 86, 86-88 (W.D. Va. 1984); *Hoffman v. Brown (In re Brown)*, 56 Bankr. 487, 488-91 (Bankr. D. Md. 1985); *Cameron v. Anderson (In re American Energy)*, 50 Bankr. 175, 180-81 (Bankr. D.N.D. 1985); *Bokum Resources Corp. v. Long Island Lighting Co. (In re Bokum Resources Corp.)*, 49 Bankr. 854, 868-69 (Bankr. D.N.M. 1985); *Atlas Automation v. Jensen, Inc. (In re Atlas Automation)*, 42 Bankr. 246, 247-48 (Bankr. E.D. Mich. 1984). Some commentators agree that bankruptcy judges lack authority to conduct jury trials. See, e.g., King, *supra* note 14, at 704 (arguing that "there is no authorization in Title 11 or Title 28 for bankruptcy judges to conduct jury trials"); Sabino, *supra* note 14, at 345 (stating that "bankruptcy courts, for reason of the present limitations of their powers, cannot conduct jury trials").

291. *Proehl*, 36 Bankr. at 87 ("Implicit in the *Northern Pipeline* decision is the conclusion that it would be an unconstitutional delegation to permit a bankruptcy judge to preside over a jury trial."); *American Energy*, 50 Bankr. at 181 ("The Supreme Court in its *Marathon* decision was quite clear in its holding that the grant of Article III powers to bankruptcy judges was an unconstitutional delegation to an adjunct court."). For discussions of the *Northern Pipeline* language on which these courts rely, see *supra* notes 85-86 and accompanying text and *infra* notes 334-35 and accompanying text.

292. *I.A. Durbin, Inc.*, 62 Bankr. at 146 (finding no authority under § 1411 and concluding that "[n]owhere else in the code is the bankruptcy court empowered to conduct a jury trial"); *Brown*, 56 Bankr. at 490 ("[B]ased upon *Northern Pipeline* and prior case law which denied the right to trial by jury in the bankruptcy court, and in light of the absence of express statutory authorization therefor in [1984 Amendments], this Court concludes that it is powerless to conduct jury trials.").

293. *Bokum Resources Corp.*, 49 Bankr. at 869 (relying on local rule stating that "[a] district judge shall conduct jury trials in all bankruptcy cases and proceedings in which a party has a right to trial by jury and a jury is timely demanded") (quoting Miscellaneous No. 1426, Amendment to Local Rule 31, 1(c)); *Atlas Automation*, 42 Bankr. at 247 (relying on local administrative order that requires bankruptcy judge to administer jury trial case until it is ready for a final pretrial conference, at which point it is transferred to the district court for trial).

294. See *Macon Prestressed Concrete Co. v. Duke*, 46 Bankr. 727, 730-31 (M.D. Ga. 1985); *Mohawk Indus. v. Robinson Indus.*, 46 Bankr. 464, 466 (D. Mass. 1985); *Johnson v. State Farm Mut. Auto. Ins. Co. (In re Guenther)*, 65

courts infer such authority from a variety of sources: section 1411,<sup>295</sup> Bankruptcy Rule 9015, which prior to its abrogation<sup>296</sup> prescribed the procedure for jury trials;<sup>297</sup> or 28 U.S.C. § 157(a), which authorizes district courts to refer bankruptcy matters to bankruptcy judges.<sup>298</sup> Other courts conclude that bankruptcy judges possess the authority because of the absence of any express statutory prohibition.<sup>299</sup> Several of these courts expressly

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Bankr. 650, 652 (Bankr. D. Colo. 1986); R.I. Lithograph Corp. v. Aetna Casualty & Sur. Co. (*In re* R.I. Lithograph Corp.), 60 Bankr. 199, 205 (Bankr. D.R.I. 1986); Reda, Inc. v. Harris Trust & Sav. Bank (*In re* Reda, Inc.), 60 Bankr. 178, 182 (Bankr. N.D. Ill. 1986); Blackman v. Seton (*In re* Blackman), 55 Bankr. 437, 441-42 (Bankr. D.D.C. 1985); Arnold Print Works v. Apkin (*In re* Arnold Print Works), 54 Bankr. 562, 569-70 (Bankr. D. Mass. 1985), *aff'd in part, rev'd in part*, 61 Bankr. 520 (D. Mass. 1986), *vacated*, 815 F.2d 165 (1st Cir. 1987) (affirming bankruptcy court on other grounds); Palmisano v. Briggs (*In re* Northern Design), 53 Bankr. 25, 27 (Bankr. D. Vt. 1985); Barry v. Pierce (*In re* Atlantic Energy), 52 Bankr. 17, 17 (Bankr. S.D. Fla. 1985); L.A. Clarke & Son v. Bullock Constr. (*In re* L.A. Clarke & Son), 51 Bankr. 31, 32 (Bankr. D.D.C. 1985); Morse Elec. Co. v. Logicon, Inc. (*In re* Morse Elec. Co.), 47 Bankr. 234, 238 (Bankr. N.D. Ind. 1985); Smith-Douglass, Inc. v. Smith (*In re* Smith-Douglass, Inc.), 43 Bankr. 616, 618 (Bankr. E.D.N.C. 1984).

295. *Blackman*, 55 Bankr. at 440 ("[T]he new statute specifically adverts to the right to trial by jury without in any way indicating that the bankruptcy court unit of the district court is prohibited from conducting jury trials."); *L.A. Clarke & Son*, 51 Bankr. at 32 (same).

296. The amendments to the Bankruptcy Rules, effective August 1, 1987, eliminated Rule 9015. The Committee Note explained:

Former section 1480 of title 28 preserved a right to trial by jury in any case or proceeding under title 11 in which jury trial was provided by statute. Rule 9015 provided the procedure for jury trials in bankruptcy courts. Section 1480 was repealed. Section 1411 added by the 1984 amendments affords a jury trial only for personal injury or wrongful death claims, which 28 U.S.C. § 157(b)(5) requires be tried in the district court. Nevertheless, Rule 9015 has been cited as conferring a right to jury trial in other matters before bankruptcy judges. In light of the clear mandate of 28 U.S.C. § 2075 that the "rules shall not abridge, enlarge, or modify any substantive right," Rule 9015 is abrogated. In the event the courts of appeals or the Supreme Court define a right to jury trial in any bankruptcy matter, a local rule in substantially the form of Rule 9015 can be adopted pending amendment of these rules.

Committee Note to Abrogation of Bankr. R. 9015, *reprinted in* BANKRUPTCY SERVICE § 62:175 (1987).

297. *Blackman*, 55 Bankr. at 440 ("The Bankruptcy Rules expressly vest power to conduct jury trials in the bankruptcy court."); *Atlantic Energy*, 52 Bankr. at 17 ("Under existing bankruptcy law and B.R. 9015, this court is authorized and empowered to conduct jury trials."); *L.A. Clarke & Son*, 51 Bankr. at 32 n.1 (holding that "Bankruptcy Rules promulgated by the Supreme Court specifically contemplate jury trials in bankruptcy courts").

298. *Macon Prestressed Concrete Co.*, 46 Bankr. at 730 (concluding "that the authority granted to it by 28 U.S.C.A. § 157(a) . . . vests the bankruptcy court with the same authority to conduct a jury trial as exists in this court").

299. *McCormick v. American Investors Management* (*In re* McCormick),

hold that such authorization does not violate article III.<sup>300</sup>

Despite finding sufficient authority, courts in this latter group conclude that the current procedural structure of the bankruptcy courts<sup>301</sup> makes it impractical for bankruptcy judges to conduct jury trials in most noncore proceedings. The 1984 Amendments state explicitly that a bankruptcy judge cannot enter a final judgment in a noncore proceeding<sup>302</sup> unless the parties consent.<sup>303</sup> Because of that limitation, these courts hold that any jury trials of noncore matters in which the parties do not consent must occur before a district judge.<sup>304</sup>

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67 Bankr. 838, 842 (D. Nev. 1986) (“[I]t is significant that the prohibition of jury trials was ‘one of the few provisions of the Emergency Rule which Congress did not see fit to enact.’”) (quoting *Baldwin-United Corp. v. Thompson* (*In re Baldwin-United Corp.*), 48 Bankr. 49, 56 (Bankr. S.D. Ohio 1985)); *Arnold Print Works v. Apkin* (*In re Arnold Print Works*), 54 Bankr. 562, 569 (Bankr. D. Mass. 1985) (“[T]here is authority that a bankruptcy judge has the implied power to conduct jury trials in all instances when such right exists, except the expressly excluded limited class of personal injury or wrongful death claims.”), *aff’d in part, rev’d in part*, 61 Bankr. 520 (D. Mass. 1986), *vacated*, 815 F.2d 165 (1st Cir. 1987) (affirming bankruptcy court on other grounds); *Morse Elec. Co. v. Logicon, Inc.* (*In re Morse Elec. Co.*), 47 Bankr. 234, 238 (Bankr. N.D. Ind. 1985) (relying on authority stating that bankruptcy judge is authorized to conduct jury trials except in the cases expressly excluded by statute); *Smith-Douglass, Inc. v. Smith* (*In re Smith-Douglass, Inc.*), 43 Bankr. 616, 618 (Bankr. E.D.N.C. 1984) (finding “no direct prohibition under the Bankruptcy Amendments and Federal Judgeship Act of 1984 against jury trials being conducted by the bankruptcy court”).

300. See, e.g., *Blackman*, 55 Bankr. at 440-41 (citing with approval authority holding that “the bankruptcy court’s power to conduct a jury trial . . . is neither contrary to the Supreme Court’s *Northern Pipeline* . . . decision . . . nor contrary to the provisions of Article III of the Constitution”) (footnote omitted); *L.A. Clarke & Son*, 51 Bankr. at 32 n.1 (“nothing in the Constitution forbids an Article I federal court from conducting a jury trial”); cf. *McCormick*, 67 Bankr. at 843 (holding that “the bankruptcy court is both authorized and constitutionally permitted to conduct jury trials in core proceedings and, with consent of the parties, in non-core proceedings”).

301. See *supra* notes 187-94 and accompanying text.

302. 28 U.S.C. § 157(c)(1) (Supp. III 1985).

303. *Id.* § 157(c)(2). If the parties consent to the bankruptcy court’s entry of final judgment, these courts recognize the bankruptcy judge’s authority to conduct the jury trial of a noncore proceeding. See, e.g., *Mauldin v. Peoples Bank* (*In re Mauldin*), 52 Bankr. 838, 842 (Bankr. N.D. Miss. 1985) (“In a related or non-core proceeding, no jury trial is available unless all parties consent to the bankruptcy judge presiding over the case and entering the final order or judgment resulting from the jury verdict.”); *Lerblance v. Rodgers* (*In re Rodgers & Sons*), 48 Bankr. 683, 688 (Bankr. E.D. Okla. 1985) (“[T]his Court is empowered to conduct a jury trial in core proceedings and non-core proceedings in which all parties so consent.”).

304. As one bankruptcy court explained:

Because the debtor’s adversary complaint is a noncore proceeding, the bankruptcy court is unable to enter a final judgment without the con-

A third line of authority, not necessarily inconsistent with the second, holds that bankruptcy judges possess authority to conduct jury trials in *core* proceedings.<sup>305</sup> Courts taking this position find authority from the same sources relied upon by

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sent of the parties. Such consent is lacking in this case. Therefore, any jury verdict rendered in this Court and any order entered by this Court in accordance with that verdict would be subject to de novo review upon appeal to the district court under 28 U.S.C. § 157(c)(1). This review would include the holding of a new jury trial if timely requested.

It would be impractical and make no sense in terms of judicial economy for the bankruptcy court to hold a jury trial in a noncore proceeding where the parties have not given their consent to the bankruptcy court's exercise of jurisdiction. The likelihood of a second jury trial in the district court is great. The waste of time and resources in having the bankruptcy court conduct its own jury trial in such circumstances is obvious. . . .

Reda, Inc. v. Harris Trust & Sav. Bank (*In re Reda, Inc.*) 60 Bankr. 178, 182 (Bankr. N.D. Ill. 1986) (citations omitted); *see also* Dailey v. First Peoples Bank, 76 Bankr. 963, 968 (D.N.J. 1987) ("It therefore appears that Congress contemplated no role for a jury in 'otherwise related' [i.e. noncore] proceedings; would a jury's findings be mere proposals?"); Palmisano v. Briggs (*In re Northern Design*), 53 Bankr. 25, 27 (Bankr. D. Vt. 1985) ("It would be an exercise in futility for the Bankruptcy Court to conduct a hearing solely for the purpose of submitting proposed findings and conclusions of law to the District Court only to have this hearing followed by a jury trial on the same issues."); Morse Elec. Co. v. Logicon, Inc. (*In re Morse Elec. Co.*), 47 Bankr. 234, 238 (Bankr. N.D. Ind. 1985) ("because this adversary proceeding is a related proceeding, the Bankruptcy Court cannot enter final judgment in the matter" and, therefore, a jury trial would not be effective); Smith-Douglass, Inc. v. Smith (*In re Smith-Douglass, Inc.*), 43 Bankr. 616, 618 (Bankr. E.D.N.C. 1984) ("[T]he inability of bankruptcy judges to enter final judgments, absent consent of the parties, in noncore proceedings makes jury trials in such proceedings impractical."); Norton & Lieb, *supra* note 14, at 163-64 ("[I]n a 'related to' proceeding it would be impracticable to conduct a jury trial before the bankruptcy judge [because] a jury's verdict could at most be advisory and included in the bankruptcy judge's draft of findings of fact submitted for de novo review in the district court.").

305. *See* Zimmerman v. Cavanagh (*In re Kenval Marketing Corp.*), 65 Bankr. 548, 553 (E.D. Pa. 1986); Walsh v. Long Beach Honda (*In re Gaildeen Indus.*), 59 Bankr. 402, 406-07 (N.D. Cal. 1986); Hassett v. Weissman (*In re O.P.M. Leasing Servs.*), 48 Bankr. 824, 830 (S.D.N.Y. 1985); Official Creditors' Comm. of Honeycomb v. Fidelity Bank (*In re Honeycomb*), 72 Bankr. 371, 374-78 (Bankr. S.D.N.Y. 1987); Wolfe v. First Fed. Sav. & Loan Ass'n (*In re Wolfe*), 68 Bankr. 80, 89 (Bankr. N.D. Tex.), *aff'd sub nom.* M & E Contractors v. Kugler-Morris Gen. Contractors, 67 Bankr. 260 (N.D. Tex. 1986); Otte v. Monsanto Co. (*In re McCrary's Farm Supply*), 57 Bankr. 423, 424-25 (Bankr. E.D. Ark. 1985); Boss-Linco Lines v. Laidlaw Transp. (*In re Boss-Linco Lines*), 55 Bankr. 299, 308 (Bankr. W.D.N.Y. 1985); *cf.* M & E Contractors v. Kugler-Morris Gen. Contractors, 67 Bankr. 260, 267 (N.D. Tex. 1986) (finding authority for bankruptcy judges to conduct jury trials in core proceedings, but concluding it would violate article III for bankruptcy judge to hear noncore proceedings based on state law without parties' consent).

the previous group,<sup>306</sup> but do so in cases not requiring them to consider whether bankruptcy judges should preside over jury trials in noncore proceedings. Thus it is not known whether they believe it permissible for bankruptcy judges to conduct jury trials in all proceedings,<sup>307</sup> or whether they think it appropriate only in those proceedings in which bankruptcy judges may enter final judgments.<sup>308</sup>

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306. See *supra* notes 295-99 and accompanying text.

307. A few courts have stated without limitation that bankruptcy courts are authorized to conduct jury trials. They reach this conclusion without discussing the possible difficulties of conducting jury trials in noncore proceedings. See, e.g., *McCormick v. American Investors Management (In re McCormick)*, 61 Bankr. 595, 596 (Bankr. D. Nev. 1986); *Baldwin United Corp. v. Thompson (In re Baldwin-United Corp.)*, 48 Bankr. 49, 56 (Bankr. S.D. Ohio 1985); see also Comment, *supra* note 14, at 554-55 (concluding that bankruptcy judges have authority to conduct jury trials in core and noncore proceedings); cf. *Price-Watson Co. v. Amex Steel Corp. (In re Price-Watson Co.)*, 66 Bankr. 144, 152-60 (Bankr. S.D. Tex. 1986) (holding that bankruptcy judges may conduct jury trials in noncore proceedings because de novo review does not require a second jury trial in district court).

308. The result of the various viewpoints on the right to a jury trial in bankruptcy and the authority of bankruptcy judges to conduct jury trials is that some courts are permitting jury trials to be conducted in the bankruptcy court despite *Northern Pipeline* and the 1984 Amendments. If a court adopts a pure seventh amendment analysis of when a right to a jury trial exists, see *supra* note 175-82 and accompanying text, and if it concludes that the bankruptcy judge has authority to conduct jury trials, at least in core proceedings, then in certain cases it will permit a jury trial to take place in the bankruptcy court. See *Wolfe*, 68 Bankr. at 89; *McCormick*, 61 Bankr. at 596; *McCrary's Farm Supply*, 57 Bankr. at 424-25; *Boss-Linco Lines*, 55 Bankr. at 308; *Barry v. Pierce (In re Atlantic Energy)*, 52 Bankr. 17, 17 (Bankr. S.D. Fla. 1985); cf. *Zimmerman v. Cavanagh (In re Kenval Marketing Corp.)*, 65 Bankr. 548, 555-56 (E.D. Pa. 1986) (but for space and staff limitations, district court would have ordered jury trial to be conducted in bankruptcy court). If, however, a court adopts the majority viewpoint on both issues—that is, it concludes that there is no right to a jury trial in core proceedings and that the bankruptcy court should not conduct jury trials of noncore proceedings—then it will not permit a jury trial to take place in the bankruptcy court unless the parties in a noncore proceeding consent to the entry of judgment by the bankruptcy judge. In any other noncore proceedings in which a court concludes that a jury trial right exists, it will either abstain or recommend withdrawal of the reference so that the trial can take place before a jury in either state court or federal district court. See, e.g., *R.I. Lithograph Corp. v. Aetna Casualty & Sur. Co. (In re R.I. Lithograph Corp.)*, 60 Bankr. 199, 205-06 (Bankr. D.R.I. 1986); *Bokum Resources Corp. v. Long Island Lighting Co. (In re Bokum Resources Corp.)*, 49 Bankr. 854, 869 (Bankr. D.N.M. 1985); *Smith-Douglass, Inc. v. Smith (In re Smith-Douglass, Inc.)*, 43 Bankr. 616, 618 (Bankr. E.D.N.C. 1984). Finally, there are a few courts that have failed to recognize that two distinct issues are involved. Because they combine the question of jury trial rights with the question of the bankruptcy judges' authority, they end up denying the jury demand due to practical considerations or lack of authority, even though they previously concluded that a right to a jury trial was conferred by statute or the sev-

The following sections of the Article accordingly examine whether a jury trial before a bankruptcy judge is both constitutionally sufficient and constitutionally permissible. Because the jury trial rights under discussion are mandated by the seventh amendment, it must be determined whether a trial before a non-article III bankruptcy judge satisfies the seventh amendment's requirements for a trial by jury. Secondly, even if the seventh amendment would be satisfied by such a trial, the requirements of article III of the Constitution must be explored to determine whether it is permissible for bankruptcy judges to exercise this judicial power.

## B. THE SEVENTH AMENDMENT'S REQUIREMENTS

An issue raised briefly during the hearings leading up to the 1978 Act, but addressed infrequently by the courts, is whether a trial before a non-article III judge constitutes a "trial by jury" within the meaning of the seventh amendment.<sup>309</sup> If it does not, then any bankruptcy jury trials required by the seventh amendment will have to be conducted by the district judge. Most decisions considering the meaning of "trial by jury" have focused on the composition of the jury.<sup>310</sup> The seventh amendment's requirements with respect to the presiding judge, on the other hand, have rarely been considered.

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enth amendment. See, e.g., *Arnold Print Works v. Apkin* (*In re Arnold Print Works*), 54 Bankr. 562, 569-70 (Bankr. D. Mass. 1985), *aff'd in part, rev'd in part*, 61 Bankr. 520 (D. Mass. 1986), *vacated*, 815 F.2d 165 (1st Cir. 1987) (affirming bankruptcy court on other grounds); *Morse Elec. Co. v. Logicon, Inc.* (*In re Morse Elec. Co.*), 47 Bankr. 234, 238 (Bankr. N.D. Ind. 1985).

309. In response to constitutional concerns raised concerning the creation of non-article III bankruptcy courts, the House Judiciary Committee in 1976 solicited the views of various constitutional and federal jurisdiction scholars. Among those who responded was Professor David Shapiro. In the course of stating his view that a non-article III court could adjudicate bankruptcy matters, he stated briefly that "the guarantee of the Seventh Amendment does not, I believe, require that a jury trial, if one is to be had, take place in an Article III court presided over by an Article III judge." *Bankruptcy Act Revision: Hearings on H.R. 31 and 32 Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 2702 (1976). Although he was aware of no authority on the point, he explained that "the essence of the Seventh Amendment is the preservation of the right to a jury, not an Article III judge." *Id.* (emphasis in original); see also *Bankruptcy Court Revision: Hearings on H.R. 8200 Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 255 (1977) (testimony of Prof. Countryman referring to Prof. Shapiro's statement).

310. See, e.g., *Colgrove v. Battin*, 413 U.S. 149, 157 (1973) (six-person jury permissible under seventh amendment).

The most extensive judicial consideration of the issue occurred in a nineteenth century Supreme Court decision, *Capital Traction Co. v. Hof*.<sup>311</sup> The Court upheld a statute giving District of Columbia justices of the peace jurisdiction over civil jury trials and permitting appeal from the judgment of the justice of the peace with the right to a new trial by jury.<sup>312</sup> Although it was argued that permitting a second jury trial on appeal violated the seventh amendment's proscription against reexamination of facts found by a jury,<sup>313</sup> the Court held that the trial before the justice of the peace did not constitute a trial by jury within the meaning of the seventh amendment.<sup>314</sup> The Court emphasized that District of Columbia justices of the peace performed only the ministerial tasks of impaneling the jury and entering judgment on the jury's verdict. They did not possess the power to instruct jurors on the law, to advise them on the facts, or to set aside verdicts in appropriate cases.<sup>315</sup> The Court thus concluded that a jury trial in such a forum did not satisfy the seventh amendment's trial by jury requirements.<sup>316</sup>

*Hof's* description of the characteristics required of a judge

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311. 174 U.S. 1 (1899).

312. *Id.* at 45-46.

313. For a discussion of the seventh amendment's reexamination clause, see *infra* notes 370-71 and accompanying text.

314. 174 U.S. at 45.

315. The Court explained that

"[t]rial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. . . .

*Id.* at 13-14 (emphasis added).

316. A trial before the justice of the peace did not constitute a trial by jury within the meaning of the seventh amendment, explained the Court, because

[a] justice of the peace, having no other powers than those conferred by Congress on such an officer in the District of Columbia, was not, properly speaking, a judge, or his tribunal a court; least of all, a court of record. The proceedings before him were not according to the course of the common law; his authority was created and defined by, and rested upon, the acts of Congress only. The act of 1823, in permitting cases before him to be tried by jury, did not require him to superintend the course of the trial or to instruct the jury in matter of law; nor did it authorize him, upon the return of their verdict, to arrest judgment upon it, or to set it aside, for any cause whatever; but made it his duty to enter judgment upon it forthwith, as a thing of course. A body of men, so free from judicial control, was not a common law

conducting a seventh amendment jury trial remains valid.<sup>317</sup> In the more recent case of *Pernell v. Southall Realty*,<sup>318</sup> the Court expanded briefly on this description. It explained that jury trials before English common law justices of the peace were jury trials in "the full constitutional sense" because "[t]hey were judges of record and their courts, courts of record" and the "procedures they followed differed in no essential manner from that of the higher court[s]."<sup>319</sup>

The Supreme Court's description of the vital characteristics of a trial by jury emphasize the court's procedures and the exercise of legal discretion by the judge. They contain no suggestion that the seventh amendment requires the presiding judge to be appointed pursuant to article III of the Constitution. Instead, the characteristics necessary to satisfy constitutional requirements are ones potentially possessed by many types of federal judges, including those serving pursuant to authority other than article III.<sup>320</sup>

The District of Columbia courts illustrate most persuasively that the seventh amendment does not require that only article III judges preside over jury trials. Each day jury trials required by the seventh amendment<sup>321</sup> are conducted in these non-article III courts before judges appointed for fifteen-year

jury; nor was a trial by them a trial by jury, within the meaning of the Seventh Amendment to the Constitution. . . .

*Id.* at 38-39.

317. The Court has since eliminated, however, the requirement that there be twelve jurors. See *Colgrove v. Battin*, 413 U.S. 149, 160 (1973) (permitting six-person civil juries). In addition, Federal law now prohibits the exclusion of women from jury service in federal courts. See 28 U.S.C. § 1862 (1982) ("No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of . . . sex . . .").

318. 416 U.S. 363 (1974).

319. *Id.* at 381. The Court therefore concluded that a jury trial before an English justice of the peace constituted a trial by jury as that concept came to be established in the seventh amendment. *Id.* at 380. It accordingly found that the plaintiff's suggested analogy between the District of Columbia statute, under which the plaintiff was proceeding, and the English forcible entry and detainer statute, which granted a jury trial before a justice of the peace, supported the conclusion that the seventh amendment guaranteed a right to jury trial in the action before it. *Id.* at 380-81.

320. *Cf.* *The Justices v. Murray*, 76 U.S. (9 Wall.) 274, 282 (1869) (facts found by jury in non-article III state court entitled to protection against re-examination under second clause of seventh amendment).

321. In *Hof* the Court stated: "It is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia." 174 U.S. at 5; accord *Pernell*, 416 U.S. at 370.

terms.<sup>322</sup> The Supreme Court has sanctioned this practice without questioning its constitutionality.<sup>323</sup> In *Pernell* it held that a party to an action under the District of Columbia Code to recover real property was entitled to a jury trial under the seventh amendment and remanded the case for trial in that city's superior court.<sup>324</sup> Although the Court did not discuss explicitly whether a trial in this non-article III court satisfied the seventh amendment, that conclusion was an essential underpinning of the Court's holding.<sup>325</sup>

If the seventh amendment is satisfied by jury trials conducted by District of Columbia judges, the same conclusion should follow with respect to bankruptcy judges. Bankruptcy judges, like the *Pernell* superior court judges and unlike the *Hof* justices of the peace, are judges presiding over courts of record.<sup>326</sup> They possess the legal training and ability to instruct jurors on the law,<sup>327</sup> advise them concerning the facts, and set

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322. Under the District of Columbia Court Reform and Criminal Procedure Act of 1970, the current District of Columbia Court of Appeals and the Superior Court of the District of Columbia were established "pursuant to article I of the Constitution." Pub. L. 91-358, 84 Stat. 473, 475 (codified at D.C. CODE ANN. § 11-101(2) (1981)). The judges serving on these courts are appointed by the president with the advice and consent of the Senate for a term of fifteen years. *Id.* at 491 (codified at D.C. CODE ANN. §§ 11-1501 to -1502 (1981)).

323. See *Pernell*, 416 U.S. at 367.

324. *Id.* at 385.

325. The Supreme Court held in *Hof*, discussed *supra* notes 311-17 and accompanying text, that a trial in the former District of Columbia Supreme Court constituted a trial by jury within the meaning of the seventh amendment. 174 U.S. at 45. That court, however, unlike the present District of Columbia courts, was established pursuant to article III of the Constitution. See *O'Donoghue v. United States*, 289 U.S. 516, 551 (1933) ("[T]he Supreme Court and the Court of Appeals of the District of Columbia are constitutional courts of the United States, ordained and established under Art. III of the Constitution . . ."). Thus *Hof* does not hold directly that the seventh amendment is satisfied by jury trials in non-article III courts.

326. Under § 151 bankruptcy judges are designated as "judicial officer[s] of the district court." 28 U.S.C. § 151 (Supp. III 1985). They are authorized to "exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and [to] preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court." *Id.*

327. Section 120 of the 1984 Amendments, as amended in 1986, prescribes the qualifications for persons selected as bankruptcy judges. They include the requirement that candidates be "members in good standing of at least one State bar, the District of Columbia bar, or the bar of the Commonwealth of Puerto Rico, and members in good standing of every other bar of which they are members," and that they "possess and have demonstrated outstanding legal ability and competence, as evidenced by substantial legal experience, ability to deal with complex legal problems, aptitude for legal scholarship and

aside inappropriate verdicts.<sup>328</sup> The seventh amendment thus appears to pose no constitutional obstacle to jury trials conducted by bankruptcy judges.

### C. ARTICLE III'S REQUIREMENTS

Even though a jury trial before a bankruptcy judge may satisfy the seventh amendment's requirements, some courts conclude that article III of the Constitution<sup>329</sup> prohibits bankruptcy judges from exercising such authority.<sup>330</sup> These courts believe that presiding at jury trials is a judicial power reserved exclusively for judges possessing the protections mandated by article III. These protections include the judges' ability to "hold their Offices during good Behaviour" and the assurance that their salaries "shall not be diminished during their Continuance in Office."<sup>331</sup> Bankruptcy judges lack such protections.<sup>332</sup>

The conclusion reached by these courts is not compelled by *Northern Pipeline*.<sup>333</sup> Its plurality opinion referred to jury trials conducted by bankruptcy judges only to illustrate the bank-

writing, and familiarity with courts and court processes." Pub. L. 98-353, 98 Stat. 333, 345 (1984), as amended by Pub. L. 99-554, 100 Stat. 3097, 3098 (1986), reprinted in 28 U.S.C.A. § 152 note (West Supp. 1987).

328. Prior to its abrogation, see *supra* note 296, Bankruptcy Rule 9015(f) provided that Rules 47-51 of the Federal Rules of Civil Procedure were applicable in the bankruptcy court when a jury trial was conducted. Fed. Bankr. R. 9015(f), 11 U.S.C. app. at 140 (Supp. IV. 1986). Rule 50 governs the granting of directed verdicts and judgments notwithstanding the verdict. See FED. R. CIV. P. 50. Rule 51 governs jury instructions. See FED. R. CIV. P. 51. As the Committee Note stated, should the right to jury trial in bankruptcy be clearly established, Rule 9015 could be repromulgated and this procedure once more made applicable to the bankruptcy courts. Comm. Note to Abrogation of Bankr. R. 9015, reprinted in BANKRUPTCY SERVICE § 62:175 (1987).

329. Article III provides in part:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

330. See *supra* note 291 and accompanying text.

331. U.S. CONST. art. III, § 1.

332. Bankruptcy judges are appointed by the court of appeals for their circuit "for a term of fourteen years." 28 U.S.C. § 152(a)(1) (Supp. III 1985). During the term of appointment, they may be removed from office by a majority vote of the judicial council of their circuit for "incompetence, misconduct, neglect of duty, or physical or mental disability." *Id.* at § 152(e).

333. For a discussion of *Northern Pipeline*, see *supra* notes 84-85, 347, 357 and accompanying text.

ruptcy courts' independence from district courts.<sup>334</sup> Because of this independence, the Court held that bankruptcy courts were not constitutionally permissible "adjuncts" to the article III courts.<sup>335</sup> The Court did not suggest, however, that article III would always be violated if bankruptcy judges conducted jury trials.

Jury trials conducted by other non-article III judges suggest that the practice is not absolutely prohibited by article III. As the *Pernell* case illustrates,<sup>336</sup> District of Columbia judges preside over jury trials despite their lack of article III status, and the Supreme Court has acknowledged their right to do so.<sup>337</sup> In addition, United States magistrates, also non-article III judges,<sup>338</sup> are statutorily authorized to preside over jury trials with the consent of the parties.<sup>339</sup> Several courts of appeals have held that this grant of authority to magistrates is consistent with article III.<sup>340</sup>

Affirming the constitutionality of jury trials conducted by some non-article III judges, however, does not settle the question with respect to bankruptcy judges. *Northern Pipeline*

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334. The plurality opinion in *Northern Pipeline* stated that "the bankruptcy courts exercise all ordinary powers of district courts, including the power to preside over jury trials, 28 U.S.C. § 1480 (1976 ed., Supp. IV), the power to issue declaratory judgments, § 2201, the power to issue writs of habeas corpus, § 2256, and the power to issue any order, process, or judgment appropriate for the enforcement of the provisions of Title 11." 458 U.S. at 85.

335. 458 U.S. at 87 ("We conclude that 28 U.S.C. § 1471 . . . has impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.") (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

336. See *supra* notes 324-25 and accompanying text.

337. See *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974).

338. Magistrates lack the protections mandated by article III. They are appointed for terms of eight years, 28 U.S.C. § 631(e) (1982), and may be removed by district court judges for the district in which they serve "for incompetency, misconduct, neglect of duty, or physical or mental disability," *id.* § 631(i). In addition, "[a] magistrate's office shall be terminated if the [judicial] conference determines that the services performed by his office are no longer needed." *Id.* Though magistrates are statutorily protected from the reduction of their salaries during the term for which they are appointed, *id.* § 634(b), such statutory protection could be eliminated by Congress. See *Geras v. Lafayette Display Fixtures*, 742 F.2d 1037, 1039 (7th Cir. 1984).

339. See *supra* note 289.

340. See *Fields v. Washington Metro. Area Transit Auth.*, 743 F.2d 890, 894 (D.C. Cir. 1984); *Geras*, 742 F.2d at 1045; *Collins v. Foreman*, 729 F.2d 108, 120 (2d Cir.), *cert. denied*, 469 U.S. 870 (1984); *Goldstein v. Kelleher*, 728 F.2d 32, 34 (1st Cir.), *cert. denied*, 469 U.S. 852 (1984); *Williams v. Mussomelli*, 722 F.2d 1130, 1132 (3d Cir. 1983).

makes clear that under article III bankruptcy judges are unlike District of Columbia judges,<sup>341</sup> and the statutory authority given bankruptcy judges differs in significant respects from that given federal magistrates.<sup>342</sup> The specific circumstances in which bankruptcy judges might be asked to preside over jury trials must therefore be analyzed in the light of article III's requirements.

### 1. Core Proceedings

Under the procedural scheme established by the 1984 Amendments,<sup>343</sup> bankruptcy judges are authorized to "hear and determine" all core proceedings referred to them by district courts.<sup>344</sup> This authorization includes the power to "enter appropriate orders and judgments," subject to appellate review by the district court.<sup>345</sup> When presiding over these matters, bankruptcy judges are essentially independent of the district courts.<sup>346</sup>

Assuming that it is constitutional to permit bankruptcy judges to hear and enter final judgments in core proceedings,<sup>347</sup>

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341. See 458 U.S. at 71 ("The courts created by the Bankruptcy Act of 1978 do not lie exclusively outside the States of the Federal Union, like those in the District of Columbia and the Territories.")

342. Magistrates, for example, are only permitted to enter final judgments in civil cases when the parties consent. 28 U.S.C. § 636 (1982). Bankruptcy judges, however, are authorized to enter final judgments in core proceedings without the consent of the parties. *Id.* § 157(b) (Supp. III 1985).

343. See *supra* notes 187-92 and accompanying text.

344. 28 U.S.C. § 157(b) (Supp. III 1985).

345. *Id.* Although the statute authorizing bankruptcy judges to enter final judgments in core proceedings has been sustained by one court of appeals and several district courts, see *Arnold Print Works v. Apkin* (*In re Arnold Print Works*), 815 F.2d 165, 169 (1st Cir. 1987); *Associated Grocers of Neb. Coop. v. American Home Prods. Corp.* (*In re Associated Grocers of Neb. Coop.*), 62 Bankr. 439, 447 (D. Neb. 1986); *Production Steel v. Bethlehem Steel Corp.* (*In re Production Steel*), 48 Bankr. 841, 846 (M.D. Tenn. 1985); *Danning v. Lummis* (*In re Tom Carter Enters., Inc.*), 44 Bankr. 605, 609 (C.D. Cal. 1984), its constitutionality remains uncertain. See *infra* note 347. It is beyond the scope of this Article, however, to analyze the challenging constitutional issues presented by this provision of the 1984 Amendments.

346. The independence of the bankruptcy judge from the district court in a core proceeding is not complete, however, because the district judge retains authority to "withdraw, in whole or in part, any case or proceeding referred [to the bankruptcy judge], on its own motion or on timely motion of any party, for cause shown." 28 U.S.C. § 157(d) (Supp. III 1985). This withdrawal power is infrequently exercised in the case of core proceedings, however.

347. Despite several decisions upholding it, see *supra* note 345, the constitutional question raised by granting bankruptcy judges authority to issue final judgments remains unresolved. *Northern Pipeline* held that the 1978 grant to

it remains to be determined whether conducting jury trials is a

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bankruptcy courts of jurisdiction over bankruptcy-related state law actions was not supported by any Supreme Court decision permitting non-article III judges to exercise the judicial power of the United States. 458 U.S. at 76, 87 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring). Whether the bankruptcy judges' current authority over core proceedings may be sustained under one of the Court's previous decisions is also questionable. *Northern Pipeline* acknowledged that in some circumstances Congress can assign adjudicatory functions to non-article III officers who act as adjuncts to article III courts. When it does so, however, "the essential attributes of judicial power [must be] retained in the Art. III court." *Id.* at 81 (plurality opinion) (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)); *see also id.* at 91 (Rehnquist, J., concurring) (bankruptcy court not acting as adjunct to article III court when it resolves "[a]ll matters of fact and law . . . with only traditional appellate review by Art. III courts apparently contemplated"). Because bankruptcy judges are permitted to hear and enter final judgments in core proceedings, subject only to normal appellate review, *see* 28 U.S.C. §§ 157(b), 158 (Supp. III 1985), their exercise of authority does not seem justifiable under the adjunct model. *But see Tom Carter Enters.*, 44 Bankr. at 609 (noting district court retains control over core proceedings by its authority to withdraw reference to bankruptcy judge).

*Northern Pipeline* also acknowledged that Congress has greater latitude to use non-article III adjudicators when public rights are involved. 458 U.S. at 67-70 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring). Although the Court concluded that the state law contract dispute before it did not involve public rights, it did not rule out the application of the concept to all bankruptcy matters. The plurality opinion noted that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, . . . may well be a 'public right.'" *Id.* at 71. The concurring Justices likewise suggested that some "powers granted under [the 1978] Act might be sustained under the 'public rights' doctrine." *Id.* at 91.

Although this has been the basis on which some courts have sustained the authority given bankruptcy judges over core matters, *see* cases cited *supra* note 345, a significant expansion of the public rights concept is required to make it cover all the matters Congress has specified as core. *See, e.g., Baird*, *supra* note 258, at 44 ("[W]hy does a statute that readjusts rights between debtor and creditor confer a 'public right' on the debtor and transform the remaining state-created rights of the creditor into rights that an Article I tribunal can adjudicate?"); *Currie*, *supra* note 258, at 452 n.65 ("If the entry of judgment in a bankruptcy case is enough to transform a purely private litigation into one involving 'public rights,' the Court's carefully repeated distinction is entirely without substance."). *But cf. Briden v. Foley*, 776 F.2d 379, 381 (1st Cir. 1985) (holding constitutional the application of clearly erroneous standard of review to bankruptcy court's findings of fact in preference action, because "[i]t is perfectly permissible for a core proceeding with respect to a public right to be decided in a legislative court"). Moreover, even if all core proceedings are properly viewed as involving public rights, a question remains whether Congress reserved sufficient control over these proceedings for the article III courts. *See Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 599 (1985) (Brennan, J., concurring) (noting that *Northern Pipeline* "was careful to leave open the question whether and to what extent even the resolution of public rights disputes might require some eventual review in an Art. III court").

power uniquely reserved for article III judges. In other words is article III so protective of jury trials that it precludes bankruptcy judges from conducting them even though it permits those judges to conduct bench trials and to enter final judgments?

The policies underlying article III provide no basis for concluding that jury trials were intended to be singled out for special treatment. It is well accepted that the tenure and salary requirements of article III were included to ensure the independence of federal judges from the other branches of government.<sup>348</sup> Indeed, article III serves the dual function of "protect[ing] 'the role of the independent judiciary within the constitutional scheme of tripartite government,' and . . . [of] safeguard[ing] litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'"<sup>349</sup> The potential for domination of the federal judiciary, however, is greater in the case of a bench

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348. The Supreme Court has explained that "[t]he Federal Judiciary was . . . designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial." *Northern Pipeline*, 458 U.S. at 58; see also Currie, *supra* note 258, at 443-44 (noting consistent authority that article III was intended to protect independence of federal judges from the executive and legislative branches); Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional*, 70 GEO. L.J. 297, 303 (1981) ("The framers intended that if Congress and the President wished to establish a federal judicial office, they first would have to guarantee members of that office independence from the other two branches."); Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 613 (1985) (suggesting that article III's tenure and salary requirements protect federal judges in their battles with the other branches of government); Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560, 582 (1980) (arguing that tenure and salary "provisions ensure that the legislative and executive branches will not be able to dominate the judiciary through coercive manipulation of judges' livelihood and continuance in office"). Some commentators suggest that article III was not limited to protecting against interference by the other branches of government. See Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 711 (1979) (arguing that judicial independence from other judges needs to be protected as well); Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 64 n.151 (1981) (arguing that tenure and salary provisions were also intended to protect independence of judiciary from majoritarian pressures).

349. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3256 (1986) (quoting *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 582-83 (1985), and *United States v. Will*, 449 U.S. 200, 218 (1980)) (citation omitted).

trial, when the judge is the factfinder, than it is in the case of a jury trial. Jurors, it has been noted, "are not controlled by any branch of the federal government, and indeed are traditionally relied upon as a protection against governmental tyranny."<sup>350</sup> If there is a difference between the status of bench and jury trials under article III, it is the bench trial that may require more protection.<sup>351</sup>

Moreover, insofar as core proceedings are concerned, bankruptcy courts are comparable to the District of Columbia courts. The Supreme Court has recognized Congress's power under article I to establish the District of Columbia courts and to permit them to operate outside the constraints of article III.<sup>352</sup> District of Columbia courts are permitted to conduct jury trials with no apparent offense to article III.<sup>353</sup> If granting authority to bankruptcy judges over core matters is also upheld as a permissible exercise of Congress's article I powers,<sup>354</sup> then these judges should similarly be able to exercise all powers in such proceedings, including presiding over jury trials.

## 2. Noncore Proceedings

The issue of jury trials in noncore proceedings is more complicated. In response to *Northern Pipeline*, Congress attempted to satisfy article III by limiting the authority of bankruptcy judges over certain matters identified as noncore.<sup>355</sup> Unless the parties consent to the entry of judgment, the bankruptcy judge may only hear noncore matters and propose findings of fact and conclusions of law to the district judge. The district judge is required to review de novo any matter to which a party objects before entering a final judgment.<sup>356</sup> Although the constitutionality of the entire procedure is not free from doubt,<sup>357</sup> the specific issue addressed in this Article is the pro-

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350. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 227.

351. See also *infra* notes 383-89 and accompanying text.

352. See *Palmore v. United States*, 411 U.S. 389, 410 (1973).

353. See *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974).

354. See *supra* note 347.

355. See 28 U.S.C. § 157(c)(1)-(2) (Supp. III 1985); *supra* notes 193-94 and accompanying text.

356. 28 U.S.C. § 157(c) (Supp. III 1985).

357. By limiting the authority of bankruptcy judges over noncore matters, Congress apparently relied on Supreme Court precedents permitting adjudication by adjuncts to article III courts. See 130 CONG. REC. E1109 (daily ed. Mar. 20, 1984) (remarks of Rep. Kastenmeier). It is unclear, however, whether that authority permits the use of adjuncts over primarily state-law noncore mat-

priety of accommodating jury trials within this structure. That is, even if article III permits a bankruptcy judge to exercise the powers just discussed, does it also permit a bankruptcy judge to preside over jury trials of noncore matters?

Assuming the consent provision is valid under article III,<sup>358</sup> the authority of bankruptcy judges to enter final judgments in noncore matters with the parties' consent does not differ signif-

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ters. The plurality in *Northern Pipeline* stressed that "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated." 458 U.S. at 80. The plurality opinion expressly rejected the argument that "Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights *not* created by Congress." *Id.* at 81-82 (emphasis in original). In *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1985), the Court noted that "where private, common law rights are at stake, our examination of the congressional attempt to control the manner in which those rights are adjudicated has been searching." *Id.* at 3259. In light of these limiting statements, there is substantial doubt whether Supreme Court precedent permits Congress to utilize adjuncts in the adjudication of noncore proceedings.

358. A recent Supreme Court decision strongly suggests that a litigant's consent to non-article III adjudication does not eliminate all constitutional concerns. In *Schor* the Court stated that to the extent that article III ensures that litigants have impartial decision makers, that protection may be waived. 106 S. Ct. at 3256 (holding that "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried"). The Court explained, however, that article III also "serves as 'an inseparable element of the constitutional system of checks and balances.'" *Id.* at 3257 (quoting *Northern Pipeline*, 458 U.S. at 58). This aspect of article III's protection may not be waived by litigants "for the same reason that the parties by consent cannot confer on federal courts subject matter jurisdiction beyond the limitations imposed by Article III, § 2." *Id.* Thus, even when the parties consent to non-article III adjudication, the Court must still ensure that article III's commands are not violated. "When these [structural] Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Id.* at 3257-58; *see also id.* at 3266 (Brennan, J., dissenting) ("Because the individual and structural interests served by Article III are coextensive, I do not believe that a litigant may ever waive his right to an Article III tribunal where one is constitutionally required."); Krattenmaker, *supra* note 348, at 306. Professor Krattenmaker argues that "[t]he tenure and salary protection provisions of article III are essentially structural. They disperse power, preserve the appearance of fairness, protect the independence and integrity of federal judges, and eliminate the need for case-by-case supervision of a judge's independence under the rubric of due process." *Id.* It appears, then, that the constitutional difficulties identified by *Northern Pipeline* involving non-article III bankruptcy judges hearing and entering final judgments in state common-law actions are not entirely eliminated by gaining the litigants' consent to the non-article III adjudication.

icantly from the authority they possess in core proceedings.<sup>359</sup> Because the bankruptcy judge is authorized to take final action, subject only to normal appellate review,<sup>360</sup> it should not matter for article III purposes that the facts are found by a jury rather than a judge.

A similar situation is presented by a provision of the Federal Magistrates Act authorizing magistrates, with the parties' consent, to conduct proceedings and to enter judgments in jury or nonjury civil matters.<sup>361</sup> Nine courts of appeal have upheld this provision, each concluding that article III permits parties to consent to adjudication by a non-article III adjunct.<sup>362</sup> None of these decisions suggests that magistrates possess less constitutional authority to conduct jury, rather than nonjury, trials.<sup>363</sup> Indeed, five of the decisions were issued in appeals from jury trial cases.<sup>364</sup> It seems reasonable to conclude, therefore, that article III poses no obstacle to the conduct of jury trials by bankruptcy judges in noncore proceedings in which the parties consent to the entry of judgment by the bankruptcy judge.

A different problem is raised by noncore proceedings in which the parties do not consent to the entry of judgment by the bankruptcy judge. Under article III, is a bankruptcy judge permitted to conduct a jury trial here as well? Initially, a statutory impediment must be noted. Bankruptcy judges are required to propose findings of fact and conclusions of law.<sup>365</sup> Because juries normally serve as fact finders, the statutory language suggests that Congress did not intend that bankruptcy judges conduct jury trials in noncore proceedings.<sup>366</sup> But even

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359. See *supra* notes 343-54 and accompanying text.

360. See 28 U.S.C. § 158(a) (Supp. III 1985).

361. *Id.* § 636(c) (1982).

362. See *Fields v. Washington Metro. Area Transit Auth.*, 743 F.2d 890, 894-95 (D.C. Cir. 1984) (jury trial case); *Geras v. Lafayette Display Fixtures*, 742 F.2d 1037, 1041-42 (7th Cir. 1984) (same); *Lehman Bros. Kuhn Loeb v. Clark Oil & Ref. Corp.*, 739 F.2d 1313, 1315 (8th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 1158 (1985); *Puryear v. Ede's Ltd.*, 731 F.2d 1153, 1154 (5th Cir. 1984); *Collins v. Foreman*, 729 F.2d 108, 114-20 (2d Cir.) (same), *cert. denied*, 469 U.S. 870 (1984); *Goldstein v. Kelleher*, 728 F.2d 32, 36 (1st Cir.) (same), *cert. denied*, 469 U.S. 852 (1984); *Pacemaker Diagnostic Clinic of Am. v. Instromedix*, 725 F.2d 537, 546 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984); *Williams v. Mus-somelli*, 722 F.2d 1130, 1132 (3d Cir. 1983) (jury trial case); *Wharton-Thomas v. United States*, 721 F.2d 922, 929-30 (3d Cir. 1983); *D.L. Auld Co. v. Chroma Graphics Corp.*, 753 F.2d 1029, 1032 (Fed. Cir.), *cert. denied*, 474 U.S. 825 (1985).

363. *But see Geras*, 742 F.2d at 1048-49 (Posner, J., dissenting) (pointing out limitations on appellate review of jury trials).

364. See *supra* note 362.

365. See 28 U.S.C. § 157(c)(1) (Supp. III 1985).

366. See, e.g., *Pied Piper Casuals v. Insurance Co.*, 72 Bankr. 156, 159-60

if the jury's findings could be incorporated into this procedure, another statutory obstacle is the requirement of de novo review, and possibly a second jury trial,<sup>367</sup> by the district judge.<sup>368</sup> A number of courts have concluded that this requirement makes it impractical for bankruptcy judges to conduct jury trials in noncore proceedings, reasoning that two jury trials would be too costly and time consuming.<sup>369</sup>

The difficulty posed by the de novo review requirement, however, is more fundamental. Subjecting the factual findings of a bankruptcy court jury to de novo review by a district court would violate the reexamination clause of the seventh amendment.<sup>370</sup> Under that provision the district court's ability to re-

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(S.D.N.Y. 1987) (stating that "the jurisdictional provision for non-core proceedings by its terms envisions a bench trial rather than a trial by jury").

Some courts have suggested that the jury's findings could be incorporated into the bankruptcy judge's proposed findings of fact and conclusions of law. See, e.g., *Price-Watson Co. v. Amex Steel Corp.* (*In re Price-Watson Co.*), 66 Bankr. 144, 159 (Bankr. S.D. Tex. 1986) ("I see no inconsistency in a jury making fact findings which are then reported by the Bankruptcy Court to the District Court along with any supplemental findings and with conclusions of law and a recommended judgment."); cf. *Lugenbeel v. Schutte*, 600 F. Supp. 698 (D. Md. 1985). In *Lugenbeel* the court stated that "the magistrate may impanel a jury, conduct the trial, and obtain the jury's verdict on the factual issues in dispute. The magistrate will then include the jury's verdict in his report and recommendation to this Court." *Id.* at 701.

367. See *infra* notes 372-73 and accompanying text.

368. See 28 U.S.C. § 157(c)(1) (Supp. III 1985).

369. See cases cited *supra* note 294.

370. The second clause of the seventh amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. This provision has been consistently interpreted to preclude a reviewing court from setting aside facts found by a jury except under the narrow circumstances permitted at common law. In 1812, Justice Story, sitting as a circuit justice, explained the principles embodied by this provision:

Now, according to the rules of the common law the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown; or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a venire facias de novo is awarded. This is the invariable usage settled by the decisions of ages. Upon a writ of error, the appellate court can examine in general errors of law only, and never can re-try the issues already settled by a jury, where the judgment of the inferior court is affirmed.

*United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750). Justice Story held that the United States could not appeal from a judgment entered on a verdict by the district court to receive a new jury trial in the circuit court. Instead, the United States could seek review only of errors of law. *Id.* at 750. Similarly, in *The Justices v. Murray*, 76 U.S. (9 Wall.) 274 (1870), the Supreme Court held that a statute permitting removal to federal court following a jury trial in state court, with a new jury trial afforded in the federal

view the results of the bankruptcy court jury trial would be limited. It could only review the bankruptcy jury's findings according to ordinary principles of appellate review.<sup>371</sup> This limited review, however, would not satisfy the review *de novo* required by the statute. Although the district court is not necessarily required to conduct a new hearing or convene a new jury in every case,<sup>372</sup> *de novo* review does require the district court "to make an independent judgment of the issues . . . without giving deference to the bankruptcy court's findings and conclusions."<sup>373</sup> Because the reexamination clause requires that deference be given to the facts found by a jury, allowing bankruptcy judges to conduct jury trials in noncore, nonconsensual proceedings would preclude the district court from complying with its statutorily mandated scope of review.

In an analogous context, several courts of appeal have interpreted the Federal Magistrates Act so as to avoid a similar clash between the seventh amendment and a statutory *de novo* review requirement.<sup>374</sup> Magistrates are authorized to "conduct hearings, including evidentiary hearings" in certain criminal and civil proceedings,<sup>375</sup> and to propose findings of fact and con-

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court, violated the seventh amendment. *Id.* at 277; see also *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 359 (1962); *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899); *Knickerbocker Ins. Co. v. Comstock*, 83 U.S. (16 Wall.) 258, 269 (1873); *Barreda v. Silsbee*, 62 U.S. (21 How.) 146, 166-67 (1859).

371. Unless the district court found that an error of law was committed or that the evidence was insufficient as a matter of law to go to the jury, it would be required to accept the facts found by the bankruptcy court jury. See *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 379-80 (1913); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448 (1830); 5 J. MOORE, J. LUCAS & J. WICKER, *supra* note 45, at 38-58 to 38-59.

372. *Cf.* *United States v. Raddatz*, 447 U.S. 667, 674-76 (1980) (holding requirement of Magistrate Act for *de novo* determination satisfied even though district judge did not rehear the testimony on which magistrate based proposed findings and recommendations).

373. *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1210 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984); *accord Raddatz*, 447 U.S. at 675-76; *id.* at 690 (Stewart, J., dissenting) ("The phrase 'de novo determination' . . . means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy."); *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967) (review *de novo* means "that the court should make an independent determination of the issues" without giving "any special weight" to the prior determination of the agency). *But see King*, *supra* note 14, at 681 (questioning thoroughness with which district judges will review bankruptcy proceedings).

374. See *infra* notes 378-79.

375. The statute authorizes hearings with respect to "applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement." 28 U.S.C. § 636(b)(1)(B) (1982).

clusions of law to the district court.<sup>376</sup> The district judge is required to make a "de novo determination of those portions of the . . . proposed findings or recommendations to which objection is made."<sup>377</sup> The Fourth, Fifth, and Eighth Circuits have held that the provision authorizes magistrates to conduct non-jury trials only.<sup>378</sup> Among the reasons relied on by the courts was that "a jury trial before the magistrate involves factfinding intrinsically incapable of review de novo."<sup>379</sup>

Similarly, even if it is permissible for bankruptcy judges to conduct hearings in noncore proceedings without the parties' consent, that authority should not be interpreted to embrace the power to conduct jury trials. Although such a trial would satisfy the seventh amendment's requirement of a "trial by jury," the subsequent de novo review required by the statute would violate the seventh amendment's reexamination clause.<sup>380</sup> To avoid this conflict, jury trials of noncore matters must take place in the district court, unless the parties consent to the entry of judgment by the bankruptcy judge.<sup>381</sup>

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376. *Id.*

377. *Id.* § 636(b)(1).

378. See *In re Wickline*, 796 F.2d 1055, 1059 (8th Cir. 1986); *Wimmer v. Cook*, 774 F.2d 68, 75-76 (4th Cir. 1985); *Ford v. Estelle*, 740 F.2d 374, 380-81 (5th Cir. 1984).

379. *Ford*, 740 F.2d at 380. The Fifth Circuit explained that

The reference employed here [of the case to the magistrate] either effectively denies the right to trial by jury, or impermissibly abrogates the decisive role of the district judge, or both. We fail to see how a district court's review de novo of a jury's verdict could pass muster under the Seventh Amendment's mandate that "no fact tried by a jury, shall be otherwise examined in any Court of the United States, than according to the rules of the common law." We need not reach the Seventh Amendment question, however, for it is hard to imagine that Congress intended to rely on so uncertain a constitutional interpretation with nary a comment in the statute or its legislative history.

*Id.* (citation omitted).

380. See *supra* notes 309-28, 370-73 and accompanying text.

381. A bankruptcy court noted that in a core proceeding the district court may withdraw the reference to the bankruptcy judge and exercise complete authority over the proceeding, even if the bankruptcy judge has rendered a final decision. In this manner, the court reasoned, the district court can exercise de novo review of the core proceeding, rather than appellate review. *Danning v. Lummis (In re Tom Carter Enters., Inc.)*, 44 Bankr. 605, 609 (C.D. Cal. 1984). If this procedure were to be adopted by a district court, the same arguments concerning the impropriety of de novo review of a jury's verdict would be applicable.

### 3. May Congress Eliminate the De Novo Requirement?

Assigning noncore proceedings to a district court to await jury trial frequently delays the underlying bankruptcy case, precisely the problem Congress sought to alleviate by expanding the bankruptcy court's jurisdiction.<sup>382</sup> If the problem under the current scheme is the requirement for de novo review, could Congress, consistent with article III, eliminate that requirement?

An argument can be made that article III does not require a district judge to review de novo facts found by a bankruptcy court jury. Instead, the bankruptcy judge could conduct a jury trial of a noncore matter and submit the verdict and proposed judgment to the district court. The district court could then review de novo all of the bankruptcy judge's rulings to which an objection was made, according them no deference. The jury's factual findings, however, would not be reexamined except according to principles normally governing appellate review of jury verdicts. In this manner the article III district judge would ultimately decide all questions on the law and enter the judgment. The jury's factual findings, however, would not be reexamined in violation of the seventh amendment.

The strongest support for this argument comes from the Supreme Court's decision in *Crowell v. Benson*.<sup>383</sup> The Court there held that permitting an administrative agency to make conclusive factual findings did not violate article III,<sup>384</sup> so long as the district court retained authority to review de novo all questions of law<sup>385</sup> and those jurisdictional facts upon which the agency's authority to act depended.<sup>386</sup> The Court supported

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382. See H.R. REP. NO. 595, 95th Cong., 1st Sess. 14 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 5975 (discussing need for expedition in bankruptcy as one reason for expanding bankruptcy jurisdiction).

383. 285 U.S. 22 (1932).

384. *Id.* at 47 ("[T]he efficacy of the plan depends upon the finality of the [agency's] determinations of fact with respect to the circumstances, nature, extent and consequences of the employee's injuries and the amount of compensation that should be awarded."); *id.* at 54 ("[W]e are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved . . .").

385. *Id.* at 54 ("The reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases.").

386. *Id.* at 63 (interpreting statute so as to avoid unconstitutionality, noting "there is no violation of the purpose of the Congress in . . . denying finality to [the deputy commissioner's] conclusions as to the jurisdictional facts upon which the valid application of the statute depends"). The Court's holding de-

its conclusion regarding the finality of the nonjurisdictional factfinding by analogizing to the use of juries:

[I]n cases [involving private rights], there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges. On the common law side of the Federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself.<sup>387</sup>

If article III permits non-article III officers to make final determinations of fact because they are acting in a manner analogous to jurors, does it not necessarily permit those officers to utilize jurors to accomplish the same task?<sup>388</sup> And is it really constitutionally significant whether a jury sits in a bankruptcy court-

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nying finality to agency findings of jurisdictional facts has since been substantially eroded. See *Northern Pipeline*, 458 U.S. at 82 n.34 (plurality opinion); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936); Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C.L. REV. 993, 1030 n.281 (1986) (asserting that "as the Court's fear of administrative adjudication receded, it began to back away from this foolish position [regarding jurisdictional facts], which effectively was put to rest in *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341, [3]48-49 (1951)").

387. 285 U.S. at 51.

388. In *United States v. Raddatz*, 447 U.S. 667 (1980), the Court upheld the provision of the Magistrates Act permitting district courts to refer suppression motions to magistrates. *Id.* at 707. Justice Marshall, joined by Justice Brennan, dissented, arguing that the Court's opinion rested on the "understanding that the requirements of Art. III are fully applicable when the issues are ones of law, but not when the issues are factual in nature." *Id.* Although the dissenters disagreed with this view of article III, they acknowledged that there were "admittedly few contexts in which independent factfinding by an Art. III judge is constitutionally required." *Id.* at 712. Justice Marshall identified only criminal and deportation cases as situations in which a litigant was "constitutionally entitled to an independent determination of the case-dispositive facts by an Art. III court." *Id.*

Some courts have upheld the authority of magistrates to conduct hearings and enter final judgments with the consent of the parties based upon this distinction between determinations of fact and law. The Seventh Circuit, for example, found that the applicable provision of the Magistrates Act, 28 U.S.C. § 636(c) (1982), did not violate article III, even though the magistrate's decision was not reviewed de novo by an article III court. *Geras v. Lafayette Display Fixtures*, 742 F.2d 1037, 1045 (7th Cir. 1984). In so ruling, the court stressed the ability of the reviewing court to consider fully all questions of law:

Deference to a magistrate with respect to fact-finding thus does not seem to implicate questions of judicial independence because the reviewing court—whether a district court or a court of appeals—would, of course, give any determinations of law full independent consideration. Thus, entry of final judgment by a magistrate is not of constitutional significance if the result is deference only to fact-finding and with full review of legal questions in the Article III courts.

*Id.* at 1044.

room rather than in a district courtroom, so long as the district judge retains authority to review all questions of law?<sup>389</sup>

Although some support can be found for the argument that article III is not violated if a bankruptcy judge or a magistrate conducts a jury trial under circumstances in which adjudication by an article III judge is ultimately required, the argument is flawed. It assumes that a litigant's constitutional rights are fully vindicated by the district judge's nondeferential review of questions of law. The plurality in *Northern Pipeline* rejected such an assumption. It stated that "the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, *as well as the nature of the case as it has been shaped at the trial level.*"<sup>390</sup> The opinion does not identify the values protected by article III that would be lost by allowing a non-article III judge to preside over a jury trial. Nevertheless, the Court's concern appears to involve the many discretionary rulings inevitably made by a presiding judge that are simply not amenable to appellate review.<sup>391</sup>

The unreviewable aspects of a jury trial have been dis-

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389. A district court advanced this argument in upholding the authority of magistrates to conduct jury trials without the parties' consent:

Of course, the district judge cannot review *de novo* the jury's findings of fact. Even if the trial were conducted by a district judge, however, the judge could not revisit the record and review a jury's factual findings. The judge's proper role in reviewing a jury trial conducted by a magistrate is functionally equivalent to the role a judge would play if the judge conducted the jury trial. In other words, the role of a judge is to ensure that the evidence is properly admitted, the instructions properly given, and the trial otherwise properly conducted, so that the jury's fact-finding process is not prejudiced by any errors of law. That role may be performed by the district judge whether or not he actually conducts the trial.

*Lugenbeel v. Schutte*, 600 F. Supp. 698, 700 (D. Md. 1985). Although every court of appeals that has considered the question has disagreed with the conclusion reached by the district court in *Lugenbeel*, none has addressed its argument in constitutional terms. Rather, they have held that *de novo* review of factual as well as legal determinations is *statutorily* required. See cases cited *supra* note 378.

390. 458 U.S. at 86 n.39 (emphasis added). Moreover, the actual holding of *Northern Pipeline* is arguably inconsistent with the proposition that article III permits a non-article III judge to conduct a jury trial without the parties' consent so long as the rulings of law are subject to *de novo* review. The tort and contract issues in *Northern Pipeline* were of a nature to be triable to a jury (although it is not clear that either party demanded a jury trial), and the bankruptcy judge's legal rulings could have been reviewed *de novo* on appeal; nevertheless, the Supreme Court refused to sustain the bankruptcy judge's authority over the case. *Id.* at 87-88.

391. See *id.* at 86 n.39.

cussed in related contexts. Judge Posner, dissenting from the Seventh Circuit's opinion upholding magistrates' authority to conduct jury trials with the parties' consent, argued that the availability of appellate review in an article III court did not satisfy the Constitution:

Appellate control over the conduct of jury trials, as in this case, is especially limited. The tone in which the trial judge addresses the jurors, counsel, and witnesses; his rulings on evidence (especially evidence sought to be excluded as cumulative or prejudicial); his management of the pace of the trial; his decisions on the length and phrasing of the jury instructions; the manner in which he reads or paraphrases the instructions to the jury; his supervision of the jury's deliberations—these discretionary aspects of the trial judge's responsibility are largely beyond the power of an appellate court to correct, yet they can influence a jury's verdict.<sup>392</sup>

In bankruptcy cases, even if review is *de novo*, the deference necessarily given the jury's verdict would, in effect, insulate from review the bankruptcy judge's discretionary rulings. Thus the district judge's *de novo* review of legal rulings, with only limited review of the jury's factual findings, would not serve as the constitutional equivalent of a jury trial conducted by the district judge.

Moreover, even if it were possible for a district court judge to consider *de novo* each of the bankruptcy judge's discretionary actions, the demands of the district judge's caseload make it unlikely that she would do so. As Judge Swygert noted with regard to magistrates, the reviewing district judge will not be eager to substitute her judgment for that exercised by the magistrate during the trial.<sup>393</sup> Instead, the district judge is likely merely to determine if the magistrate's trial rulings are arguably supportable. Judge Swygert emphasized that because the district judge assigned the trial to the magistrate in the first place, she will be reluctant to take it back to conduct the trial all over again.<sup>394</sup>

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392. *Geras v. Lafayette Display Fixtures*, 742 F.2d 1037, 1048-49 (7th Cir. 1984); see also *Louis*, *supra* note 386, at 1041-42 (discussing discretionary decisions by trial judge as to which "the record imperfectly conveys the relevant facts and the [reviewing] court is at a decisional disadvantage"); Note, *supra* note 348, at 592 (arguing that "appellate review is an inadequate corrective [because] [i]t reaches only errors of law, not the subtler corruptions"); *id.* at 594 ("De novo review of the record by a district judge of a magistrate-conducted jury trial may not be sufficient to interject the judicial role that is constitutionally required, because the evidentiary rulings and instructions that fundamentally shape the verdict will have been rendered by the magistrate.").

393. *Muhich v. Allen*, 603 F.2d 1247, 1255 (7th Cir. 1979) (Swygert, J., dissenting).

394. *Id.*

Perhaps the most fundamental problem caused by authorizing bankruptcy judges to conduct jury trials in cases requiring an article III judge is that, in exercising this power, the bankruptcy judge crosses the hazy line separating adjunct and judge.<sup>395</sup> No longer is the bankruptcy judge just an assistant acting under the close supervision of the district judge. Instead, the bankruptcy judge in effect exercises final, unreviewable authority over matters that may significantly affect the outcome of the case.

The premise of article III, according to Professor Resnik, is "that it matters that final decisions are made by specially empowered actors."<sup>396</sup> If this is an accurate conclusion,<sup>397</sup> then even if bankruptcy judges are constitutionally valid adjuncts to the district court, they should not be permitted to conduct jury trials of noncore matters without the parties' consent. Allowing them to do so vests too much authority in these unprotected actors.

### CONCLUSION

Critics of the seventh amendment complain about the cost, inefficiency, and unreliability of jury trials.<sup>398</sup> Nevertheless, the seventh amendment remains a vital part of the Constitution. Its commands may not be ignored just because a matter happens to fall within the jurisdiction of the bankruptcy court. Viewing bankruptcy courts as courts of equity operating outside the scope of the seventh amendment is no longer accurate. Instead, bankruptcy courts are courts of law and equity authorized to hear matters retaining their legal nature even though asserted in bankruptcy proceedings. Consequently, the Constitution requires that jury trial rights in these cases be recognized, whether or not Congress statutorily acknowledges the existence of such rights.

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395. See *Geras*, 742 F.2d at 1044 (noting need for "some clear line of demarcation between the power of an Article III judicial officer and a magistrate"); *id.* at 1046 (Posner, J., dissenting) ("If [a statute] assigns judges' work to magistrates, who do not have the tenure and compensation guarantees in Article III, it violates Article III."); *id.* at 1047 ("The proper role of the judicial adjunct . . . is to advise and assist the real judge.").

396. Resnik, *supra* note 348, at 616.

397. See *United States v. Raddatz*, 447 U.S. 667, 683 (1980) (holding that "delegation [to adjunct] does not violate Art. III so long as the ultimate decision is made by the district court").

398. See, e.g., Redish, *supra* note 162, at 502-07 (discussing literature critical of civil jury trials).

Although the understandable desire for efficiently adjudicating disputes cannot justify overriding the seventh amendment, it is relevant in determining how to implement the seventh amendment's commands. The present procedural structure of the bankruptcy courts is poorly suited for the efficient conduct of jury trials. Notwithstanding the seventh amendment's applicability to certain core proceedings, most cases in which parties are entitled to a jury trial are noncore. Without the parties' consent to entry of judgment by the bankruptcy judge, jury trials in noncore cases must be conducted by a district judge to avoid an unconstitutional *de novo* review of the jury's verdict.

The substantial delay in the underlying bankruptcy proceedings that will inevitably result from bifurcating adjudications of bankruptcy matters demonstrates the need for article III bankruptcy judges. Congress's decision in 1984 to continue to staff the bankruptcy courts with fixed-term judges, while maintaining the broad scope of bankruptcy jurisdiction introduced by the 1978 Act, invites uncertainty and constitutional challenge. The core-noncore scheme itself is difficult to apply, and its validity under article III is arguable. Assuming it is constitutional, however, the inefficient jury trial procedure will remain. Congress wisely decided in 1978 to consolidate all bankruptcy-related matters in the bankruptcy court. It should not undercut that policy by retaining a clumsy and inefficient court structure that requires some matters to be tried in the district court and forces the bankruptcy proceeding into abeyance while awaiting the district court's decision. Instead, in recognition of the need to execute the seventh amendment's requirements efficiently, Congress should reconstitute the bankruptcy courts as article III courts with full powers to conduct jury trials in all types of bankruptcy proceedings.