JURY TRIALS, BANKRUPTCY JUDGES, AND ARTICLE III: THE CONSTITUTIONAL CRISIS OF THE BANKRUPTCY COURT*

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The author dedicates this article to the memory of the Honorable Vincent J. Commisa, former Chief United States Bankruptcy Judge for the District of New Jersey, in recognition of his many years of service to that court.

Preamble

The 1990's has been greatly celebrated by the general populace as the last decade of the 20th century, and the precursor to the commencement of the 21st century. In a similar vein, those familiar with the current state of the nation's bankruptcy laws view the beginning of the 1990's as the early years of the still-adolescent Bankruptcy Code's second decade of existence. Lest there be any doubt, anyone with even a tertiary awareness of that body of law would attest to its most turbulent infancy. The strife surrounding the Bankruptcy Code shows no sign of abating as we enter the last decade of this century. Indeed, the legal world will witness early in this decade an anniversary that looms ever larger.

While 1992 may be spoken of with great anticipation as, among other things, the advent of the integrated European Community, for those involved with the practice of bankruptcy law it also marks the passage of ten years since the landmark decision of the United States Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[1]: a cataclysmic event whose shock waves continue to rumble throughout the bankruptcy courts. As if the tremors of that ruling were not enough to shake the nascent bankruptcy system to its very foundation, the system's ongoing recovery may once again be thrown into turmoil with the coming of a constitutional crisis where article I judges are vested with article III powers. Such a scenario might well be colloquially described as *Marathon II*.

This long dreaded occurrence is now taking shape over the still-unresolved controversy as to whether a bankruptcy judge has the power to conduct a jury trial in that specialized

[1] 458 U.S. 50 (1982) (Brennan, J., plurality opinion).

forum known as the United States Bankruptcy Court. The crucial decision of the United States Supreme Court in *Granfinanciera, S.A. v. Nordberg*,[2] explicitly left that paramount question for another day. Whatever the Court's reason for plainly refusing to opine on the issue, it hastened the inevitable conflict among the circuit courts.

At the time of this writing, at least five of the circuits were at odds over the jury trial issue. The United States Court of Appeals for the Second Circuit has held that article I bankruptcy judges may conduct jury trials in the bankruptcy court,[3] while other circuits have found that such an event would be an unauthorized exercise of an essential judicial power reserved to article III judges.[4] The Court granted the petition for certiorari filed in the Second Circuit decision, no doubt realizing full well the quandary of the courts below. Unfortunately, the Court vacated the judgment of the Second Circuit and remanded the case for consideration on a question of appellate jurisdiction,[5] which, subsequently was reinstated by the court of appeals.

Without a doubt, this issue has generated more than its share of legal commentary.[6] Previously, this author has discussed the limitations upon the exercise of article III powers by a bankruptcy court.[7] That article called upon the United States Supreme Court to clarify the so called "jury trial rule."[8] In a subsequent article, this author examined the promulgation and resulting abrogation of Rule 9015.[9] That article concluded that the Amendments to the Bankruptcy

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2 109 S. Ct. 2782 (1989).

3 *See* Ben Cooper, Inc. v. Insurance Co. of Pennsylvania (*In re* Ben Cooper), 896 F.2d 1394, 1404 (2d Cir. 1990) *vacated and remanded*, 111 S. Ct. 425 (1990), *reinstated*, 924 F.2d 36 (2d Cir. 1991).

4 *See, e.g.*, *In re* United Missouri Bank of Kansas City, N.A., 901 F.2d 1449 (8th Cir. 1990), *reh'g and reh'g en banc denied*, (June 18, 1990); Kaiser Steel Corp. v. Frates (*In re* Kaiser Steel Corp.), 911 F.2d 380 (10th Cir. 1990).

5 *Ben Cooper*, 111 S. Ct. 425 (1990), *reinstated*, 924 F.2d 36 (2d Cir. 1991).

6 *See* Bever & Cantrell, *Jury Trials in the Bankruptcy Courts: Awaiting a Final Verdict*, 20 ST. MARY'S L.J. 799 (1989); Cyr, *The Right to Trial by Jury in Bankruptcy: Which Judge is to Preside?* 63 AM. BANKR. L. J. 53 (1989); Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967 (1988).

7 *See* Sabino, *Jury Trials in the Bankruptcy Court: A Continuing Controversy*, 90 COM. L.J. 342 (1985) [hereinafter *Jury Trials I*].

8 *Id.* at 345. *See also infra* note 84 (*Jury Trials I*, provided, in part, a basis for the abrogation of Rule 9015).

9 *See* Sabino, *Jury Trials in the Bankruptcy Court: The Controversy Ends*, 93 COM. L.J. 238 (1988) [hereinafter *Jury Trials II*].

Rules had laid the jury trial controversy to rest.[10] Unfortunately, recent decisions demonstrate that the jury trial controversy is far from being resolved. Accordingly, this article shall explore the depth and breadth of whether a jury trial may be conducted in a non-article III bankruptcy court. The article will expose the origins of the controversy, and the recent *Granfinanciera* decision and its progeny that now lie in conflict. Finally, some extrapolation as to the resolution of the dispute will be presented.

Indeed, the jury trial controversy has far-reaching implications that go to the very heart of the bankruptcy court's scope of authority. A ruling by the Court on the power to conduct jury trials in bankruptcy court may eviscerate the jurisdictional infrastructure of the modern Bankruptcy Code, and indicate a complete return to the summary/plenary dichotomy which existed in bankruptcy proceedings prior to the 1978 enactment of that reform legislation.

The power of a bankruptcy judge to conduct a jury trial poses a question of such a constitutional dimension that it may very well thrust calamity upon the bankruptcy system. A ruling by the Court refusing to authorize bankruptcy courts to conduct jury trials may set into motion another disruptive set of judicial and legislative squabbles similar to those which occurred in the decade following *Marathon*.

I. *MARATHON* AND THE "ESSENTIAL ATTRIBUTES OF THE JUDICIAL POWER"

The first vital step in analyzing the jury trial issue is to consider the United States Supreme Court's seminal decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[11] In *Marathon*, the Court emphasized that "the essential attributes of the judicial power" are reserved to article III courts.[12] In a plurality opinion, Justice Brennan recognized two facts pertinent to the resolution of the jury trial question. First, the Court noted that under the Bankruptcy Act of 1978 (Act) "the bankruptcy courts exercise all ordinary powers of district courts, including the

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[10] *Id.* at 258.

[11] 458 U.S. 50 (1982) (Brennan, J., plurality opinion). The Fifth Circuit has decreed *Marathon* as the benchmark the lower courts must look to as "the progenitor of the new bankruptcy court jurisdictional scheme." Holland America Ins. Co. v. Succession of Roy, 777 F.2d 992, 998 (5th Cir. 1985).

[12] *Marathon*, 458 U.S. at 87.

power to preside over jury trials . . . ."[13] The Court then concluded that the new jurisdictional scheme of the Act had "impermissibly removed most, if not all, of the 'essential attributes of the judicial power' from the [a]rticle III district court, and ha[d] vested those attributes in a non-[a]rticle III adjunct."[14] This clear recitation of the power to conduct jury trials as an "essential attribute" of the article III power, and the declaration that the same power was impermissibly vested in the article I bankruptcy court, seems adequate on its face to declare that the bankruptcy courts are without the requisite power to conduct jury trials. Acceptance of this proposition, however, was not universal.

In *Lerblance v. Rodgers* (*In re Rodgers & Sons, Inc.*),[15] Bankruptcy Judge Wilson declared that the *Marathon* language which "included the authority to conduct jury trials in a long laundry list of [a]rticle III powers" was merely *obiter dictum*.[16] Similarly, in *Walsh v. Long Beach Honda* (*In re Galideen Industries, Inc.*),[17] District Judge Patel opined that it was the totality of the powers listed in *Marathon* that "*taken together* constituted an impermissible delegation of judicial power."[18] In *Galideen*, the district judge further stated that "[t]he Court did not hold that allowing bankruptcy courts to conduct jury trials, in and of itself, constitute[s] an unwarranted encroachment upon the judicial power of the United States."[19]

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[13] *Id.* at 85 (citing 28 U.S.C. § 1480 (1976 ed., Supp. IV)).

[14] *Id.* at 87.

[15] 48 Bankr. 683 (Bankr. E.D. Okla. 1985).

[16] *Id.* at 685. Notwithstanding the bankruptcy court's assertion, it should be remembered that, in the absence of any clear authority to the contrary, a lower federal court is obliged to follow *dicta* emanating from the Supreme Court. Lewis v. Sava, 602 F. Supp. 571, 573 (S.D.N.Y. 1984). *See also* United States v. Bell, 524 F.2d 202, 206 (2d Cir. 1975) (*dicta* must be given "considerable weight and cannot be ignored").

[17] 59 Bankr. 402 (N.D. Cal. 1986).

[18] *Id.* at 407 (emphasis in original). *Accord* Dailey v. First Peoples Bank of N.J., 76 Bankr. 963, 968 (D.N.J. 1987) (*Marathon* listed a number of powers exercised by the bankruptcy court "which, *in the aggregate*, constituted an impermissible delegation of judicial power") (emphasis in the original).

[19] *Galideen*, 59 Bankr. at 402. The opinion also stated: "[t]he Court in *Marathon* was principally concerned with the very broad grant of jurisdiction contained in 28 U.S.C. § 1471(c) which enabled bankruptcy courts to adjudicate essentially state law claims." *Id.* at 405. Indeed, in another case, Bankruptcy Judge Holland expressed some doubt about the continued vitality of *Marathon* with respect to the jury trial issue when he said "it is far from clear whether this [jury trial] power [enumerated] above, in the absence of other judicial prerogatives which were removed by the [19]84 Amendments would by itself be sufficient to sustain the *Mara-*

One of the stronger declarations repudiating the *Marathon* decision on the jury trial issue was made by District Judge Buchmeyer in *M&E Contractors, Inc. v. Kugler-Morris General Contractors, Inc.*,[20] in which the court found *Marathon* inconsequential on the question of the bankruptcy court's power to conduct jury trials. The *M & E* Court held:

> The ability to conduct a jury trial is not an exclusive function of an [article] III court. *Marathon* is not to the contrary; Justice Brennan merely listed the ability to hold jury trials as a characteristic of the discredited bankruptcy scheme. He did not state, explicitly or implicitly, that only [article] III courts may preside over jury trials.[21]

In sum, a number of courts have concluded that "[p]ermitting a bankruptcy court to preside over jury trials does not offend the principles set forth in *Marathon*."[22]

The better reasoned cases, however, unequivocally recognize that *Marathon* clearly espouses that the power to conduct jury trials is an "essential attribute" of article III courts alone. The proper view of *Marathon* is well represented by the decision reached in *Terry v. Proehl (In re Proehl)*,[23] where Chief District Judge Turk expounded:

> In cataloging the [article] III powers granted to the bankruptcy judges, the Supreme Court specifically noted the power to preside over jury trials . . . . Implicit in the [*Marathon*] decision is the conclusion that it would be an unconstitutional delegation to permit a bankruptcy judge to preside over a jury trial.[24]

The *Proehl* decision was discussed in *Cameron v. Anderson (In re American Energy, Inc.)*,[25] where Bankruptcy Judge Hill found that "[t]he Supreme Court in its *Marathon* decision was quite clear in its holding that the grant of [a]rticle III powers to bankruptcy judges

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thon holding." Acolyte Electric Corp. v. City of New York, 69 Bankr. 155, 182 (Bankr. E.D.N.Y. 1986).

20 67 Bankr. 260 (N.D. Tex. 1986).

21 *Id.* at 266. *Accord* Otte v. Monsanto Co. (*In re* McCrary's Farm Supply Inc.), 57 Bankr. 423, 425 (Bankr. E.D. Ark. 1985) (*Marathon* does not prohibit jury trials in the bankruptcy court).

22 Lerblance v. Rodgers (*In re* Rodgers & Sons, Inc.), 48 Bankr. 683, 687 (Bankr. E.D. Okla. 1985). *See* Taxel v. Electronic Sports Research (*In re* Cinematronics, Inc.), 111 Bankr. 902 (S.D. Cal. 1990), *rev'd*, 916 F.2d 1444 (9th Cir. 1990). In *Cinematronics*, District Judge Rhoades held that, *inter alia*, an argument that article III prohibits bankruptcy judges from conducting jury trials "assumes too much" from the "vague dictum" of *Marathon*. *Id.* at 905.

23 36 Bankr. 86 (W.D. Va. 1984).

24 *Id.* at 87 (footnote omitted).

25 50 Bankr. 175 (Bankr. D.N.D. 1985).

was an unconstitutional delegation to an adjunct court."[26] Of the article III powers specifically mentioned in *Marathon* was the power to preside over jury trials.[27] This *ratio decendi* was also cogently set forth by Bankruptcy Judge Schneider in *Hoffman v. Brown* (*In re Brown*)[28] in which the bankruptcy court relied on *Marathon* in concluding that it was powerless to conduct jury trials.[29] The most recent pronouncements of some bankruptcy courts continue to agree wholeheartedly with that proposition.[30]

A. The Emergency Rule

Nearly two years elapsed before Congress passed remedial legislation to address the concerns raised by *Marathon*. To avoid a total collapse of the system and provide some interim basis to maintain a bankruptcy court, the Director of the Administrative Office of the United States Courts promulgated a Model Emergency Rule for the conduct of bankruptcy proceedings which was adopted by all the circuits.[31]

In retrospect, the Emergency Rule proved to be a prototype for the Bankruptcy Code amendments yet to come.[32] The Emergency Rule provided for the reference of bankruptcy cases to the bankruptcy judges, and contained an option for the district court to withdraw said reference. Further, it prohibited the bankruptcy judges from conducting jury trials. Moreover, the Emergency Rule established *de novo* review by the district court of all bankruptcy court orders and judgments, and introduced the notion of "related proceedings." Related proceedings were defined as proceedings that, absent the bankruptcy, would have been brought in a district or state court. In such cases, the bankruptcy judge was limited to submitting proposed findings and a proposed judgment to the district court.[33] Significant here, of

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26 *Id.* at 180.

27 *Id.* at 181.

28 56 Bankr. 487 (Bankr. D. Md. 1985).

29 *Id.* at 490 (citing *Jury Trials I*, *supra* note 7, at 342-45).

30 *See, e.g.*, Poissonnerie La Belle Maree, Inc. v. Johnson (*In re* Johnson), 115 Bankr. 712, 715 (Bankr. S.D. Ala. 1990) (quoting Ellenberg v. Bouldin (*In re* Bouldin), Ch.7 Case No. A85-00262-ADK, Adv. No. 86-0729A (N.D. Ga. Jan. 19, 1990)(Westlaw, 1990 WL 95746)).

31 1 COLLIER ON BANKRUPTCY ¶3.01[1][b][vi] (15th ed. 1987).

32 *See* TREISTER, TROST, FORMAN, KLEE, & LEVIN, FUNDAMENTALS OF BANKRUPTCY LAW § 2.01(a) at 31 (2d ed. 1988) (describing the Emergency Rule as the "forerunner" to the subsequent Bankruptcy Code amendments).

33 Model Emergency Bankruptcy Rule, *reprinted in* 1 COLLIER ON BANKRUPTCY ¶3.01[1][b][vi] (15th ed. 1987).

course, was the fact that the Emergency Rule forbade bankruptcy judges from presiding over jury trials.

B. After BAFJA - The Statutory Conflict

To be sure, the enactment of the Bankruptcy Reform Act of 1978[34] brought with it a number of amendments to title 28 of the United States Code. Significant to the instant discussion was the addition of section 1480 which stated, in part:

> 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.[35]

This new section was generally read as authorizing the bankruptcy courts to conduct jury trials wherever a right to such a trial existed on September 30, 1979.[36] Given this impetus of apparently greater authority to conduct jury trials, a number of bankruptcy courts were motivated to explore the boundaries of section 1480. Such ventures into unchartered waters were brought to an abrupt halt with the *Marathon* decision declaring the bankruptcy courts unconstitutional, and the subsequent adoption of the Model Emergency Bankruptcy Rule with its strict prohibition against the conduct of jury trials by the bankruptcy judges.[37]

In response to *Marathon*, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA or the 1984 Amendments).[38] Notwithstanding differing opinions on the scope of BAFJA, "Congress created the new jurisdictional scheme of the 1984 Amendments from the plurality opinion in *Marathon*. To interpret the 1984 Amendments a court must necessarily refer to the *Marathon* decision."[39] As postulated by the United States Court of Appeals for the Fifth Circuit, BAFJA "was designed to narrow the delegation of authority to bankruptcy judges."[40]

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[34] Pub. L. No. 95-598, § 241(a), 1978 U.S. CODE CONG. & ADMIN. NEWS, (92 Stat.) 2549.

[35] *Id.* at 2671.

[36] *See, e.g.*, Eisenberg v. Guardian Group, Inc. (*In re* Adams, Browning & Bates, Ltd.), 70 Bankr. 490, 496 (Bankr. E.D.N.Y. 1987).

[37] Model Emergency Bankruptcy Rule (d)(1)(D), *reprinted in* 1 COLLIER ON BANKRUPTCY ¶3.01[1][b][vi] (15th ed. 1987).

[38] Pub. L. No. 98-353, 1984 U.S. CODE CONG. & ADMIN. NEWS, (98 Stat.) 333 (codified in various sections of 5 U.S.C., 11 U.S.C., & 28 U.S.C.).

[39] American Community Serv., Inc. v. Wright Marketing, Inc. (*In re* American Community Serv., Inc.), 86 Bankr. 681, 683 n.1 (D. Utah 1988).

[40] Holland Am. Ins. Co. v. Succession of Roy, 777 F.2d 992, 998 (5th Cir. 1985).

Because the statute evolved from nearly two years of political infighting and manipulation, the 1984 Amendments were (and continue to be) a much criticized piece of reform legislation.[41] Pertinent to the tortuous route taken by Congress in resolving the jurisdictional questions was the lobbying against the elevation of bankruptcy judges to article III status.[42] By maintaining the bankruptcy court as an article I tribunal, Congress sidestepped the strictures of *Marathon* by creating a multilayered system wherein the bankruptcy court's jurisdiction is severely curtailed and numerous safeguards ensure that control remains within the district court.

An understanding of the 1984 Amendments is essential in the context of this discussion. Turning to its statutory revisions, BAFJA vested the district courts with original and exclusive jurisdiction over all cases arising under title 11.[43] Original but not exclusive jurisdiction of all civil proceedings arising under title 11 also lies with the district courts.[44]

Since BAFJA, the bankruptcy judges constitute "a unit of the district court to be known as the bankruptcy court for that district."[45] The district courts are empowered to refer to the bankruptcy judges for the district 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.[46]

Bankruptcy judges may hear, determine, and enter appropriate orders and judgments in all cases under title 11, and in all *core proceedings* arising under title 11 that are referred by the district court.[47] BAFJA provides a non-exclusive list of what constitutes the so-called "core" proceedings.[48]

As the universe of core proceedings is by statute finite, a second

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41 *See* Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, The Judicial Conference, And the Legislative Process*, 22 HARV. J. ON LEGIS. 1 (1985). Professor Countryman has remarked that "the best that can be said of the 1984 Amendments to the new Code is that a hitherto unacceptable situation has now been rendered intolerable by a process that reflects no credit on any branch of the federal government." *Id.*

42 *Id.* at 29-32.

43 28 U.S.C. § 1334(b) (1988).

44 28 U.S.C. § 1334(a) (1988).

45 28 U.S.C. § 151 (1988).

46 28 U.S.C. § 157(a) (1988). BAFJA does provide an "escape hatch" from the reference to the bankruptcy court. The district court may withdraw, in whole or in part, any matter referred to the bankruptcy court, upon its own motion or a timely motion by a party, for cause. 28 U.S.C. § 157(d) (1988). Such a motion would be heard by the district judge. *See* BANKR. R. 5011.

47 28 U.S.C. § 157(b)(1) (1988) (emphasis added).

48 28 U.S.C. § 157(b)(2) (1988).

category was created to fill the breach. In "non-core" or "related" proceedings,[49] the bankruptcy judge submits proposed findings of fact and conclusions of law to the district court for *de novo* review.[50] Any final order or judgment is entered by the district court.[51]

Appeals in bankruptcy cases are taken in the same manner as appeals in other civil proceedings.[52] Bankruptcy Rule 8013 stipulates the bankruptcy court's findings of fact shall not be set aside unless clearly erroneous.[53] They are to be "reviewed with extreme deference on appeal."[54]

BAFJA's impact upon the question of the bankruptcy courts' power to conduct jury trials was felt in a number of ways. First, the 1984 Amendments repealed section 1480, albeit by a most circuitous route. Second, BAFJA enacted section 1411, preserving the right to a jury trial for personal injury torts and wrongful death actions.[55] Lastly, the aforementioned causes of action were mandated to be tried in the article III district court[56] and were specifically exempted from the "core" jurisdiction of the bankruptcy forum.[57] All of the foregoing points are of great import to the jury trial controversy, as they played a major role in the development of the issue.

1. The Repeal of Section 1480

In *Jacobs v. O'Bannon* (*In re O'Bannon*),[58] Bankruptcy Judge Steen engaged in a painstaking analysis of BAFJA's enabling pro-

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49 28 U.S.C. § 157(c)(1) (1988). The interchangeability of names can be explained in part by the statute itself. The law stipulates that a bankruptcy judge may hear a proceeding "that is not a core proceeding but that is otherwise related" to a case under title 11; thus, the terms "non-core" and "related" are used synonymously.

50 *Id.*

51 *Id.* An alternative is offered, however, provided all parties consent. If consent is given, the proceeding may be heard, determined, and have appropriate orders and judgments entered by the bankruptcy judge, with review (but not *de novo*) by the district court. 28 U.S.C. § 157(c)(2) (1988). *See* Teitelbaum v. Choquette & Co., Inc. (*In re* Outlet Dep't Stores, Inc.), 82 Bankr. 694, 695 (Bankr. S.D.N.Y. 1988).

52 28 U.S.C. § 158(c) (1988).

53 BANKR. R. 8013.

54 *In re* Sasson Jeans, Inc., 90 Bankr. 608, 610 (S.D.N.Y. 1988). While acknowledging that the burden of demonstrating that a particular finding of fact is clearly erroneous is a heavy one, the court noted that such findings are not unreviewable. *Id.*

55 *See* Pub. L. No. 98-353, § 102(a), 1984 U.S. CODE CONG. & ADMIN. NEWS, (98 Stat.) 335 (codified at 28 U.S.C. § 1411 (1988)).

56 28 U.S.C. § 157(b)(5) (1988). Nor can the district court abstain from hearing these actions. 28 U.S.C. § 1334(c)(2) (1988).

57 28 U.S.C. § 157(b)(2)(B) and (0) (1988).

58 49 Bankr. 763 (Bankr. M.D. La. 1985).

visions as they affected section 1480. Using both a technical chronology and traditional legal analysis, the court concluded section 1480 was indeed repealed.[59] Notably, the *O'Bannon* court opined that to consider section 1480 still viable under one of the contradictory effective date provisions would also mean Congress had reenacted the entire jurisdictional scheme of the 1978 Bankruptcy Reform Act, which of course *Marathon* found unconstitutional.[60] Other courts have agreed with the *O'Bannon* holding that section 1480 was repealed by BAFJA.[61]

Nevertheless, there were other courts which believed section 1480 still to be the law and merely supplemented by section 1411.[62] The bankruptcy court in *Lerblance v. Rodgers* (*In re Rodgers*

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59 *Id.* at 767-68.

60 *Id.*

61 *See, e.g.*, Morgan v. Lefton (*In re* Hendon Pools of Mich.), 57 Bankr. 801, 802 (E.D. Mich. 1986); DuVoisin v. Anderson (*In re* Southern Indus. Banking Corp.), 66 Bankr. 370, 372 (Bankr. E.D. Tenn. 1986). *See also* King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 703 (1985).

62 Price-Watson Co. v. Amex Steel Corp. (*In re* Price-Watson Co.), 66 Bankr. 144, 154 (Bankr. S.D. Tex. 1986). Cited in support of this position were comments made in an interview given after the passage of the 1984 Amendments by Senator Dennis DeConcini, an architect of both the 1978 Reform Act and BAFJA. *See American Bankruptcy Institute Newsletter*, Vol. III, No. 3 at 3 (Winter 1984/1985) [hereinafter ABI Newsletter]. To be sure, the legislative history of BAFJA is itself uniquely confusing. No Senate or House Report was submitted with the legislation, and the House Conference Report did not contain a Joint Explanatory Statement. Statements of the legislative leaders made in the Congressional Record were set out as the sole legislative history. *See* BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984, 1 Legislative History, 1984 U.S. CODE CONG. & AD. NEWS 576-606. Truly, the 1984 Amendments represent a trap for the unwary when one attempts to divine the legislative intent behind its enactments. Senator DeConcini's comments were expounded upon in Lerblance v. Rodgers (*In re* Rodgers & Sons, Inc.), 48 Bankr. 683 (Bankr. E.D. Okla. 1985). The *Rodgers* Court referred to Senator DeConcini's statement that the Senator believed "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 . . . . There was no desire on the part of any of the conferees to limit the right to jury trial in other areas." *Id.* at 687 (quoting ABI Newsletter). Senator DeConcini had gone on to state that failure to pick up the broader language of section 1480 was inadvertent and that section 1411 was drafted more as a response to insure that the right to a jury trial would be protected in personal injury tort and wrongful death cases. *Id.*

Consider the acerbic commentary in Davis v. Clark (*In re* Clark), 75 Bankr. 337 (N.D. Ala. 1987), offering another motivation for the addition of section 1411 to title 28. The district court stated that:

> It is an open secret that in order to obtain a quick solution to the recent bankruptcy dilemma, Congress inserted the right to jury trial in personal injury and wrongful death claims as a compromise with the lawyers who represent personal injury plaintiffs. These lawyers did not press their luck or commit professional suicide and demand jury trials for legal malpractice suits.

& Sons, Inc.)[63] relied upon the comments of Senator DeConcini, a drafter of the 1984 Amendments, and explained that "[t]he Congressional record confirms that the intent was to supplement the language of [s]ection 1480 rather than limit the right to jury trial."[64] Bankruptcy Judge Wilson further noted the floor statement of Senator Strom Thurmond respecting section 1411 that "[n]ew language on the issue of jury trials is included."[65]

Rodgers was examined in *Wolfe v. First Federal Savings and Loan Association of Paragould* (*In re Wolfe*)[66] where the court noted that "[a]n accurate reading of section 1411 shows that it merely modifies the right to jury trials in [b]ankruptcy [c]ourts without eliminating them altogether."[67] The *Wolfe* court opined that this construction was preferable to "assuming that [s]ection 1411 is an unartfully drafted prohibition against jury trials in [b]ankruptcy [c]ourts."[68] Chief Bankruptcy Judge McGuire found it "more reasonable" to conclude that a matter as significant as jury trials would have been explicitly prohibited if that were Congress' aim.[69]

The *Wolfe* court's conclusion, based upon the lack of a straightforward legislative prohibition on jury trials in the bankruptcy court, became a basic tenet of the supporters of a continuation of section 1480. The reasoning was seized upon by the district court in *Galideen*, where the court posited that "the 1984 Amendments were in a large part . . . ratification of the Emer-

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Id. at 339-40.

63 48 Bankr. 683 (Bankr. E.D. Okla. 1985).

64 *Id.* at 687. *Contra* Pro Machine, Inc. v. Hardinge Bros. Inc. (*In re* Pro Machine, Inc.), 87 Bankr. 998, 1002 n.7 (Bankr. D. Minn. 1988). Noting these statements "were not made in a committee report or even on the Senate floor," the bankruptcy court refused to consider them authoritative. *Id.* (citing Garcia v. United States, 469 U.S. 70, 76 (1984)).

65 *Rodgers*, 48 Bankr. at 687 (quoting 130 CONG. REC. S8887, S8888 (daily ed. June 29, 1984) (statement of Senator Thurmond)). Senator Thurmond's statement is quite plain and asserts in pertinent part, that:

> New language on the issue of jury trials is included. Section 1411 will now provide that this Chapter of title 28 and title 11 do not affect a right to trial by jury under applicable non-bankruptcy law with regard to personal injury or wrongful death tort claim.
>
> To read into it that section 1411 was designed to "supplement" existing law would appear to be an unwarranted extension of his comments. It is equally plausible to interpret the quotation as meaning the "new language" replaces the "old" section 1480.

Id.

66 *Id.* 68 Bankr. 80 (Bankr. N.D. Tex. 1986).

67 *Id.* at 87.

68 *Id.* at 88.

69 *Id.*

gency Rule. Had Congress intended to prohibit bankruptcy judges from conducting jury trials it need only have enacted the proscription contained in the Emergency Rule. Congress did not do so."[70] For this reason, the district court concluded Congress intended bankruptcy judges to conduct jury trials.[71]

This ill-advised adherence to section 1480 by some courts has been a strong contributing factor to the prolongation of the jury trial dispute. As subsequent cases discussed below reveal, however, section 1480 was indeed repealed and should no longer be relied upon as authoritative in deciding if bankruptcy judges may conduct jury trials.

C. *The Misunderstood Bankruptcy Rules of 1983*

Much of the controversy over the power of the bankruptcy courts to conduct jury trials is directly attributable to the promulgation of the 1983 version of the Bankruptcy Rules of Procedure,[72] which *a fortiori* included Bankruptcy Rule 9015, the so-called "jury trial rule."[73] The Rule itself was essentially a procedural vehicle which provided the means to initiate a jury trial in bankruptcy proceedings.[74] Nevertheless, a number of courts seized upon the enactment of the jury trial rule as a substantive ground to exercise the power to conduct jury trials in the bankruptcy forum.

This exhortation of Rule 9015 as substantive rather than procedural was asserted by Chief Bankruptcy Judge Lifland in *Official Creditors' Committee of Honeycomb, Inc. v. Fidelity Bank, N.A. (In re Honeycomb, Inc.)*.[75] The *Honeycomb* court noted previous decisions in the Southern District of New York interpreting the 1983 Bankruptcy Rules "as conferring its jury trial jurisdiction on bankruptcy courts," and authorizing and empowering bank-

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70 Walsh v. Long Beach Honda (*In re* Galideen Industries), 59 Bankr. 402, 406 (N.D. Cal. 1986).

71 *Id. See also* Baldwin-United Corp. v. Thompson (*In re* Baldwin-United Corp.), 48 Bankr. 49, 56 (Bankr. S.D. Ohio 1985) ("Nothing in the 1984 Amendments prohibits a [b]ankruptcy [c]ourt from conducting a jury trial.").

72 97 F.R.D. 57 (1983).

73 *Id.* at 150. "Rule 9015 Jury Trial" provided, in pertinent part, that:

> (a) TRIAL BY JURY. Issues triable of right by jury shall, if timely demanded, be by jury, unless the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury.

Id.

74 *Id.*

75 72 Bankr. 371 (Bankr. S.D.N.Y. 1987).

ruptcy judges to conduct jury trials.[76] Similarly, District Judge Gerry noted that "when the Supreme Court adopted Rule 9015, which it did after *Marathon* came down, it impliedly affirmed the constitutional validity of jury trial in bankruptcy courts."[77] Lastly, there was the reliance of District Judge Spellman on the fact that "since Bankruptcy Rule 9015, which governs the procedures for a jury trial in bankruptcy courts, has not been repealed and because there is no explicit prohibition of jury trials, the bankruptcy courts are allowed to conduct them."[78]

Other courts, however, sharply disagreed with this determination. The proper perspective of the 1983 version of the jury trial rule was neatly summarized by District Judge Kaiser in *Huffman v. Brandon (In re Harbor)*[79] where he found his conclusion that the bankruptcy court did not have the power to conduct a jury trial was not altered by Bankruptcy Rule 9015.[80] Interestingly, the district judge noted this interpretation was based on the 1983 Advisory Committee Note to Rule 9015 which had referred readers to the jury trial provisions contained in the statute.[81]

Subsequent amendments to the Bankruptcy Rules, while a source of confusion, provide guidance as to the resolution of the

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[76] *Id.* at 375. The *Honeycomb* court relied mainly upon Hassett v. Weissman (*In re* O.P.M. Leasing Serv., Inc.), 48 Bankr. 824, 830 (S.D.N.Y. 1985) ("Under Bankruptcy Rule 9015 there is no question that a bankruptcy court has the authority to conduct a jury trial") and Lombard-Wall, Inc. v. N.Y.C. Housing Dev. Corp. (*In re* Lombard-Wall, Inc.), 48 Bankr. 986, 992 (S.D.N.Y. 1985) (Rule 9015 permits jury trials in the bankruptcy courts). Likewise, consider the perspective on Rule 9015 enunciated by the *Rodgers* court:

> It is significant that Rule 9015, adopted by the Supreme Court and enacted by Congress, without change, more than a year after the *Marathon* decision and several months after promulgation of the Emergency Rule, contains no indication that the bankruptcy court's exclusive power to hold jury trials in cases and proceedings is abridged or curtailed by either[ ] *Marathon* or the Emergency Rule.

Rodgers, 48 Bankr. 683, 686 (Bankr. E.D. Okla. 1985)(footnote omitted). *Accord Baldwin-United*, 48 Bankr. at 56 ("Rule 9015 was left untouched by Congress and is still viable").

[77] Dailey v. First Peoples Bank of N.J., 76 Bankr. 963, 968 (D.N.J. 1987) (citations omitted).

[78] Jefferson Nat. Bank v. I.A. Durbin, Inc. (*In re* I.A. Durbin, Inc.), 62 Bankr. 139, 146 (S.D. Fla. 1986).

[79] 59 Bankr. 319 (W.D. Va. 1986).

[80] *Id.* at 324. Judge Kaiser noted that "[i]n my view the function of Bankruptcy Rule 9015 is to merely implement a . . . right to a jury trial if one exists . . . Bankruptcy Rule 9015 does not create an independent right to a jury trial." *Id.*

[81] *See id.*

jury trial controversy. These changes were brought about by the 1987 revisions to the Bankruptcy Rules, particularly Rule 9015.

D. The Promulgation of the 1987 Rules

The evolution of the 1987 version of the Bankruptcy Rules of Procedure (Bankruptcy Rules) was itself an interesting process, which shed much light on the jury trial controversy.[82] The first step was taken in November, 1985 with the issuance of the Preliminary Draft of Proposed Bankruptcy Rules (Preliminary Draft) by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.[83] The Judicial Conference's Advisory Committee specified its tentative view that it was not proposing changes to Rule 9015 because that provision was merely a procedural device, and not one dealing with the substantive power of a bankruptcy judge to conduct a jury trial.[84]

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[82] The Bankruptcy Rules of Procedure took effect on August 1, 1987. The existing Bankruptcy Rules are presently under consideration for amendment, and, based upon prior history, shall likely emerge on August 1, 1991 as the Federal Rules of Bankruptcy Procedure. *See* Sabino, *New Bankruptcy Rules for the New Decade*, 1 BANKR. L. REV. 22, 29 (1990). This small, but not insignificant, change may help to clarify that these rules are procedural not substantive.

[83] Preliminary Draft of Proposed Bankruptcy Rules, 107 F.R.D. 403 (1985). Accompanying the Preliminary Draft was a transmittal letter from the Judicial Conference's Advisory Committee on Bankruptcy Rules. *Id.* at 414. Last among a number of comments made by the Advisory Committee in that letter was a paragraph entitled "Special Consideration," addressing the jury trial issue and Bankruptcy Rule 9015. *Id.* at 418.

[84] *Id.* The full text of the commentary reads as follows:

SPECIAL CONSIDERATION

> Rule 9015 provides the procedure for requesting a jury trial. Amendments are not proposed to this rule. Questions of a litigant's right to a jury trial in proceedings within the jurisdictional grant of 28 U.S.C. § 1334 and the meaning of 28 U.S.C. § 1411 have been the subject of litigation since the enactment of the 1984 amendments. Because Rule 9015 only deals with the method of requesting a jury trial and not the right to a jury trial or the power of a bankruptcy judge to conduct a jury trial, the Advisory Committee's tentative view is that no amendment to Rule 9015 is required.

Id. Implicit in that position was the Advisory Committee's belief that the jury trial rule was in no way substantive and thus any modification was unnecessary. The Preliminary Draft was disseminated to the bench and bar by the Judicial Conference, with public hearings set for February, March and April 1986 and written comments to be submitted to the Committee on Rules of Practice and Procedure no later than May 20, 1986. Letter from District Judge Gignoux to the bench and bar (November 21, 1985), 107 F.R.D. 413 (1985).

At the three public hearings, "little or no testimony was addressed to Rule 9015." Letter from Prof. Walter J. Taggart, Reporter for the Advisory Committee on Bankruptcy Rules, to Anthony Sabino (June 12, 1987). The limited written commentary varied. *Id.* (citing REPORTER'S SUMMARY OF COMMENTS AND TESTI-

After deliberating on the issue, the Advisory Committee decided to completely abrogate Bankruptcy Rule 9015.[85] This represented a complete reversal of the position taken in the Preliminary Draft by the Advisory Committee, and clearly placed the Advisory Committee on the side of those opposed to the continued use of Rule 9015 as a basis to conduct jury trials in the bankruptcy courts.

This revised draft became known as the Proposed Bankruptcy Rules of Procedure, and was transmitted by the Judicial

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MONY; RECORD OF COMMITTEE ACTION, at 154). The Los Angeles County Bar Association opined that any rule should address five specific issues about jury trials in bankruptcy cases. *Id. See also* COMMENTS OF THE EXECUTIVE COMMITTEE OF THE SECTION ON COMMERCIAL LAW AND BANKRUPTCY OF THE LOS ANGELES COUNTY BAR ASSOCIATION ON PROPOSED AMENDMENTS TO BANKRUPTCY RULES, at 9 (May 5, 1986). The Association of the Bar of the City of New York expressed its agreement with the Preliminary Draft and recommended no change to Rule 9015. *Id. See also* REPORT OF COMMITTEE ON BANKRUPTCY AND CORPORATE REORGANIZATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, at 3 (May 16, 1986). The Report further stated that a "bankruptcy judge should be able to preside over jury trials." *Id.* at 3. Lastly, this author advocated an amendment to the jury trial rule to make it clear that the bankruptcy courts were not empowered to entertain such a proceeding. *Id. See also* Letter from the Anthony Sabino to District Judge Gignoux (May 6, 1986) (citing *Jury Trials I, supra* note 7, at 345). Moreover, while not part of the aforestated official commentary submitted to the Judicial Conference, the National Bankruptcy Conference did release a position paper on the Preliminary Draft as a whole. *See* 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 (1986). In that document the Conference, a well known body comprised of bankruptcy judges, practitioners and scholars, stated its belief that bankruptcy judges should be empowered to conduct jury trials and therefore Rule 9015 should be maintained. *Id.* at 362-63.

85 Letter from the Advisory Committee on Bankruptcy Rules to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (June 23, 1986), 114 F.R.D. 205, 215 (1987). A Committee Note explaining the abrogation of the Rule was added. *Id.* The Committee Note to Rule 9015 stated in full:

> 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 matters, a local rule in substantially the form of Rule 9015 can be adopted pending amendment of these rules.

Advisory Committee Note, 114 F.R.D. 205, 392 (1987).

Conference to the United States Supreme Court in late 1986.[86] On March 30, 1987 the Court, pursuant to its rulemaking powers,[87] transmitted the Proposed Bankruptcy Rules to the Congress.[88] In keeping with its historical preference for non-interference in such matters, Congress took no action, and the 1987 version of the Bankruptcy Rules of Procedure automatically became effective on August 1, 1987.[89]

E. After the Fall of the Jury Trial Rule

In abrogating Bankruptcy Rule 9015, the rulemaking process attempted to achieve the desirable result of extinguishing the controversy over the power of bankruptcy judges to conduct jury trials. Unfortunately, differing interpretations of the Advisory Committee Note abrogating Rule 9015 quickly arose. Indeed, it would appear that few or none of the aspects of the controversy were laid to rest when Rule 9015 was abrogated.

In discussing the then-proposed 1987 Bankruptcy Rules, the bankruptcy court in *Price-Watson Co. v. Amex Steel Corp.* (*In re Price-Watson Co.*)[90] expressed its belief that the purpose of abrogating Rule 9015 was not to negate the power to conduct jury trials in the bankruptcy courts, but rather to leave the determination of that ability to judicial decision.[91] The *Price-Watson* court's view was apparently based upon the last sentence of the Advisory Committee Note, which stated if the court of appeals or Supreme Court defines a right to jury trial in bankruptcy matters, a local

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86 3 Bankr. L. Rep. (CCH) No. 188 at 8 (November 14, 1986).

87 *See* 28 U.S.C. § 2075 (1988). The statute provides:

> Bankruptcy rules
>
> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under Title 11.
>
> Such rules shall not abridge, enlarge, or modify any substantive right.
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

Id.

88 Order of the Chief Justice (March 30, 1987), 114 F.R.D. 193 (1987).

89 *See id.*

90 66 Bankr. 144 (Bankr. S.D. Tex. 1986).

91 *Id.* at 159. Chief Bankruptcy Judge Wheless posited that "[i]f this is a proper interpretation, then the promulgated Rules . . . would simply be neutral on the point." *Id. Accord* Wm. S. Newman Brewing Co., v. C. Schmidt and Sons, Inc. (*In re* Wm. S. Newman Brewing Co.), 87 Bankr. 236, 240 n.2 (Bankr. N.D.N.Y. 1988) ("This court accords no special significance to the Rule's abrogation.").

rule in substantially the same form of former Rule 9015 could be adopted pending further amendment to the Bankruptcy Rules.[92]

Other courts strongly disagreed, however, with any purported revival of Rule 9015. Apparently not wishing to repeat the errors of misconstruction made with respect to the former jury trial rule, these post-Rule 9015 tribunals found the abrogation of the procedural rule highly significant in deciding the power of the bankruptcy courts to conduct jury trials.

Illustratively, in *Kraus - Thomson Organization, Ltd. v. McCorhill Publishing, Inc. (In re McCorhill Publishing, Inc.)*,[93] Bankruptcy Judge Schwartzberg found that "[n]ot only did former Bankruptcy Rule 9015 not create by implication a right to a jury trial in bankruptcy cases, but any such implication disappeared when Bankruptcy Rule 9015 was abrogated."[94]

1. *Weeks*

One of the more erudite opinions of this period dealing with the entire jury trial controversy was that of the bankruptcy court in *Weeks v. Kramer (In re G. Weeks Securities, Inc.)*.[95] The plaintiff in *Weeks* had requested, and the parties had stipulated to, a jury trial before the bankruptcy judge. Nevertheless, the court decided *sua sponte* it would determine if, among other things, it had the authority to preside over a jury trial.[96] After scrutinizing the core/non-core nature of the underlying causes of action,[97] the court addressed the jury trial issue.

From the outset, the *Weeks* court emphasized that the parties could not confer on the bankruptcy court jurisdictional authority

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92 Advisory Committee Note, 114 F.R.D. 205 (1987). One court of appeals took an essential neutralist approach. In American Universal Ins. Co. v. Pugh, 821 F.2d 1352 (9th Cir. 1987), the Ninth Circuit noted "it is important to emphasize the distinction between the power of a bankruptcy court to *conduct* a jury trial and the power of that court to determine whether there is a *right* to a jury trial." *Id.* at 1355 (emphasis in original). The court of appeals found the bankruptcy court "an appropriate tribunal" to determine the latter question. *Id.* Such an approach has the distinct advantage of permitting a bankruptcy judge to determine if an action falls within the ambit of the bankruptcy court's traditional equitable jurisdiction or if it involves matters of law that should be referred back to an article III district court.

93 90 Bankr. 633 (Bankr. S.D.N.Y. 1988).

94 *Id.* at 636. The court went on to point out that the elimination of the so-called jury trial rule reflected "a Congressional initiative to withdraw jury trial authority from the jurisdiction of bankruptcy courts." *Id.* at 636-37 (citing *Jury Trial II*, *supra* note 9, at 242).

95 89 Bankr. 697 (Bankr. W.D. Tenn. 1988).

96 *Id.* at 702.

97 *Id.* at 703-08.

which did not already exist.[98] Judge Brown noted that "there is no statutory right to a jury trial in bankruptcy proceedings" except in personal injury and wrongful death actions allowed in section 1411 of the Judicial Code, and possibly for deciding involuntary bankruptcy petitions pursuant to section 303 of title 11.[99] Significantly, the court opined that section 1411 jury trials were to be held in the district court, not in bankruptcy court.[100]

The court next summarized a number of realistic factors that persuaded it to find jury trials in bankruptcy court to be a basically unworkable proposition. In particular, the *Weeks* court cited concerns about the docket, staffing and compliance with congressional mandates for a quick resolution of bankruptcy proceedings.[101]

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[98] *Id.* at 708-09 (citation omitted). The *Weeks* court made the candid observation that the enabling statutes of the bankruptcy laws authorize the hearing of bankruptcy cases by bankruptcy judges, "not juries. Congress, for example, could have used the term 'court' rather than 'judge' which would lend itself more easily to an argument for jury trials." *Id. Accord* Haden v. Edwards (*In re* Edwards), 104 Bankr. 890 (Bankr. E.D. Tenn 1989). The *Edwards* court, finding the logic of *Weeks* persuasive, further opined that:

> The language of [section] 157 of title 28 in referring to "bankruptcy judges" should be compared to the language of 28 U.S.C.A. § 1334 (West Supp. 1989) which vests jurisdiction of bankruptcy cases and proceedings in the "district courts." Further, the language of [section] 157 should also be contrasted with the language of former [section] 1471 of title 28 which contained the original jurisdictional grant of title 11 cases and proceedings under the Bankruptcy Code of 1978. Section 1471 provided for the "bankruptcy court" to "exercise all of the jurisdiction conferred . . . on the district courts." The change in statutory language subsequent to [*Marathon*] from "bankruptcy court" to "bankruptcy judge" appears, in this court's opinion, to be more than just facially significant.

Id. at 897 n. 8.

[99] *Weeks*, 89 Bankr. at 709. Section 303 provides a jury trial for the contesting of an involuntary bankruptcy petition, but does not specify the forum for that hearing. *See* 11 U.S.C. § 303 (1988).

[100] *Weeks*, 89 Bankr. at 709. To be sure, the court disposed of any seventh amendment concerns, holding that "[t]he absence of statutory authority does not deprive a litigant to a jury trial . . . . The litigants [could] then resort to another appropriate court — either state court or federal — for the jury trial." *Id.* (citation omitted).

[101] *Id.* at 710. The court expounded:

> There are practical reasons why jury trials are not compatible with this [c]ourt's normal judicial activity. The [c]ourt does not suggest that it is too busy to conduct jury trials, but jury trials are, by nature, more time consuming then [sic] bench trials, and one could conclude that the [c]ourt's docket and case pace demands do not accommodate jury trials. *In re* Southern Industrial Banking Corp., 66 Bankr. 370, 375, 15 B.C.D. 249 (Bankr. E.D. Tenn. 1986), (quoting *In re* Best Pack Seafood, Inc., 45 Bankr. 194, 195 (Bankr. D.Me. 1984)).

As its final analysis, the *Weeks* court considered the crucial constitutional implications of the jury trial issue. Returning to the seminal decision in *Marathon*, the court posited that "[o]ne lesson from *Marathon* is that the bankruptcy court may have broad jurisdiction but it is not unlimited in its use thereof."[102] Stating the court's belief that it was not authorized by Congress to conduct jury trials, the *Weeks* court, acknowledging its status as an article I tribunal, refused to "creatively find" jury trial license.[103]

> This [c]ourt is not "physically equipped nor staffed to" properly and efficiently handle jury panels and trials. *In re* Astrocade, 79 Bankr. 983, 991, 16 B.C.D. 1306, 1312 (Bankr. S.D. Ohio 1987). The rapid pace of bankruptcy cases and proceedings do not mesh with jury procedures. "Congress enacted the Bankruptcy Code to provide a prompt resolution of all bankruptcy causes of action in order to expedite the settlement of the debtor's estate. Jury trials would 'dismember' the statutory scheme." *In re* Chase & Sanborn Corp., 835 F.2d 1341, 1350 (11th Cir. 1988), *cert. granted*, 486 U.S. 1054 (1988). Taken in isolation, this adversary proceeding would not destroy this Court's functions. To permit jury trials as a general concept is another issue.

Id.

While this writing essentially confines itself to the legal theories at issue in the instant controversy, the author is by no means without awareness of the practical difficulties associated with jury trials in bankruptcy courts. It is suggested here that simple pragmatism demands any right to a jury trial in bankruptcy proceedings be exercised elsewhere, given all the realistic obstacles, as aforediscussed, to implementing jury trials within the bankruptcy courts.

102 *Id.* at 713.

103 *Id.* Refuting an argument that the bankruptcy courts, upon the reference of a case by the district court, become vested with the same jury trial authority as the article III court, the court noted that the relevant statute classifies the bankruptcy bench as a "unit" of the district court, not its equivalent. *Id.* (citations omitted). "[T]his [c]ourt," wrote Judge Brown, "should not broaden the statutory authority it does possess beyond the [c]ongressional and *Marathon* limits placed upon the [c]ourt." *Id.* To this end, the bankruptcy court further opined:

> Arguably, Congress could have clearly specified that the bankruptcy courts are *not* authorized to conduct jury trials. Dailey v. First Peoples Bank of New Jersey, 76 Bankr. 963, 967 (D.N.J. 1987). It is a more compelling argument to this [c]ourt that Congress could easily have expressed its intention that the bankruptcy courts *were* authorized to conduct such trials. The absence of that positive expression and the presence of statutory language to the contrary, coupled with the *Marathon* limits placed on this [c]ourt's authority make it clear to this [c]ourt that Congress did not authorize jury trials in the bankruptcy courts.

Id. at 714 (emphasis in original).

By way of analogy, the *Weeks* court compared the limited statutory authorization for jury trials conducted by federal magistrates to the lack of a similar provision for bankruptcy judges:

> [T]he statutory authority for consensual jury trials before a magistrate

The court concluded that it was unauthorized to conduct jury trials, even with the consent of the parties.[104] Congress, ruled that the court, "must provide a statutory procedure, similar to that for magistrates, to instill jury authority in the bankruptcy court . . . . To engraft jury authority on these courts, without statutory safeguards, will invite [c]onstitutional clashes . . . ."[105] In the interim, parties are merely deprived of one forum, and their seventh amendment right to a jury trial is preserved in the state and article III courts.[106]

Notwithstanding the demise of Rule 9015, the jury trial controversy refused to die. Relief was sought from the Court, but as we shall see below, the much anticipated decision left open as many questions as it endeavored to answer.

2. *Granfinanciera*

The decision of the United States Supreme Court in *Granfinanciera v. Nordberg*[107] formulates the jury trial controversy as it exists today. The question presented was whether a party

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> is significant to the extent that it evidences Congressional ability to authorize non-[a]rticle III courts to conduct jury trials. The absence of a similar statute for bankruptcy courts is equally significant.

Id. (citing King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 703, 704 (1985).

Distinguishing the two article I courts, the *Weeks* court found that the "appointment, jurisdiction, and powers of the United States magistrates are proscribed by statute and are unique from those attributes of the bankruptcy court." *Id.* (citing 28 U.S.C. § 636). Lastly, Judge Brown noted that appeals of magistrate jury trials go directly to the court of appeals. *Id.* at 715 (citing 28 U.S.C. § 636(c)(3) (1988)). "By contrast," noted the tribunal, "appeal from the bankruptcy courts in this [c]ircuit is to the district court. 28 U.S.C. § 158(a) (1988); Bankruptcy Rule 8001(a). This distinction bolsters the conclusion that Congress did not express an intention for the bankruptcy courts to conduct such jury trials." *Id.* at 715. *See* American Community Serv., Inc. v. Wright Mktg., Inc. (*In re* American Community Serv., Inc.), 86 Bankr. 681, 689 (D. Utah 1988) (potential *de novo* review by the district court clashes with the constitutional requirement of unreviewable factual findings by a jury).

104 *Weeks*, 89 Bankr. at 715 (citing *Jury Trials II*, *supra* note 3, at 238).

105 *Id.* at 715.

106 *Id.* In *dicta* earlier in his opinion, Judge Brown offered:

> This [c]ourt has not been persuaded that there is an inherent jury trial power in the bankruptcy court. Inherent power connotes essential power. Unlike such arguably necessary judicial powers as contempt or sanction, this [c]ourt does not need jury trial authority.

Id. at 710 (footnote omitted).

The court's use of the term "essential power" is strictly similar to the "essential attributes" language of *Marathon*. While the term is cast somewhat differently in this usage, shades of the Supreme Court's edict in *Marathon* indeed persist.

107 109 S. Ct. 2781 (1989).

who had not previously filed a claim against the bankruptcy estate had a right to a jury trial in a subsequent lawsuit brought by the bankruptcy trustee to recover an allegedly fraudulent conveyance. The Court held that the seventh amendment entitled such a defendant to a trial by jury, "notwithstanding Congress' designation" of such actions as proceedings "core" to the bankruptcy court's ostensibly summary jurisdiction.[108] Importantly, the Court specified that "[t]he sole issue before us is whether the seventh amendment confers on petitioners a right to a jury trial in the face of Congress' decision to allow a non-article III tribunal to adjudicate the claims against them."[109]

Of paramount importance to the instant discussion was the Court's stark refusal to answer the question of the bankruptcy court's power to conduct jury trials: an action which engendered even more controversy.[110] Delivering the opinion of the Court, Justice Brennan found that the Court "need not consider whether jury trials conducted by a bankruptcy court would satisfy the [s]eventh [a]mendment's command" which forbade the reexamination of factual findings by a jury; this in spite of the power of district courts to set aside "clearly erroneous" factual findings pursuant to the existing Bankruptcy Rules.[111]

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108 *Id.* at 2787 (citing 28 U.S.C. § 157(b)(2)(H) (1988)). *See* Stober v. Steelinter USA, Inc. (*In re* Industrial Supply Corp.), 108 Bankr. 799, 801 (Bankr. M.D. Fla. 1989) (Chief Bankruptcy Judge Paskay finding that, notwithstanding the supposed removal of the summary/plenary dichotomy by the enactment of the Bankruptcy Code, "*Granfinanciera* did indirectly reinstate the concept").

109 *Granfinanciera*, 109 S. Ct. at 2795. Concurrent with its decision in *Granfinanciera*, the Supreme Court vacated the judgment and remanded in Perkinson v. Huffman, 109 S. Ct. 3234 (1989). In the decision below, the Fourth Circuit had faced issues striking similar to those in *Granfinanciera*. *See* Huffman v. Perkinson (*In re* Harbour), 840 F.2d 1165 (4th Cir. 1988). The petition for *certiorari* raised as a principal issue whether suits involving substantive issues of state law must be presided over by an article III jurist, rather than an article I bankruptcy judge. *See* Perkinson v. Huffman, 109 S. Ct. 3234 (1988) (summary of petition for review). Consistent with its holding in *Granfinanciera*, the Court refused to address the matter of the jury trial power of bankruptcy judges in *Perkinson*, returning the case to the circuit for further consideration. *See id.*

110 "We are not obliged," stated the Court, "to decide today whether bankruptcy courts may conduct jury trials in fraudulent conveyance suits," such as the one brought here by a trustee against a party otherwise unrelated to the bankruptcy. *Granfinanciera*, 109 S. Ct. at 2794. "Nor need we decide whether . . . Congress ha[d indeed] authorized bankruptcy courts to hold jury trials in such actions, that [such] authorization "comports with [a]rticle III[ ]" given that such proceedings would be before an article I judge subject to the review of, or withdrawal of, the action by the district court. *Id.* at 2794-95.

111 *Id.* (citing BANKR. R. 8013 ("Findings of fact, . . . shall not be set aside unless clearly erroneous.")).

Through constitutional analysis, the Court ruled that, under the seventh amendment, a party's right to a trial by jury in fraudulent conveyance actions turns on whether the party submitted a claim against the debtor's estate.[112] Justice Brennan determined that such a right was not premised upon legislative definitions of the estate, nor upon a congressional denial of a jury trial right to those who had not filed claims in the bankruptcy proceeding and are subsequently sued by the trustee.[113]

Carefully delimiting the purview of the Court's holding, Justice Brennan closed with an explicit proviso avoiding the jury trial issue.[114] Yet this conclusion did more than set the stage for the current dilemma. It drew immediate criticism from Justice White. In a scathing dissent, the Justice asserted that the majority was being "rather coy about disclosing which federal statute it is invalidating today."[115] Opining that neither the Congress nor any court would know how to respond to the decision, Justice White disregarded the majority's denials that it was being "coy" or "obtuse,"[116] and reiterated the contention that, regardless of any disclaimer to the contrary, the decision did indeed void one or more statutes as unconstitutional.[117]

Notwithstanding the Court's desire not to rule on the issue of the bankruptcy judges' power to conduct jury trials, the *Granfinanciera* Court's opinion contains general textual references that must be evaluated in addressing the question.[118] In a paren-

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112 *Id.* at 2797.

113 *Id.* "[P]urely taxonomic change," declared the Court, "cannot alter our [s]eventh [a]mendment analysis. Congress cannot eliminate a party's [s]eventh [a]mendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." *Id.* at 2800 (citation omitted).

114 The majority explained that:

> We do not decide today whether the current jury trial provision—28 U.S.C. § 1411 (1982 ed., Supp. IV) - permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions like the one respondent initiated. Nor do we express any view as to whether the [s]eventh [a]mendment or [a]rticle III allows jury trials in such actions to be held before non-[a]rticle III bankruptcy judges subject to the oversight provided by the district courts pursuant to the 1984 Amendments. We leave those issues for future decisions.

Id. at 2802 (footnote omitted).

115 *Id.* at 2806 n. 2 (White, J., dissenting).

116 *Id.* at 2802 n. 19.

117 *Id.* at 2806 n. 2. (White, J., dissenting). The majority, of course, replied that it was being neither coy nor obtuse. *Id.* at 2802 n.19.

118 By and large, these intimations, both explicit and subtle, tend to outline the Court's frame of reference on the all-important matter of the article I status of the bankruptcy courts and the inherent limitations therein.

thetical note, Justice Brennan poked barbs at the current statutory structure concerning jury trials in section 1411 bankruptcy proceedings.[119] Terming it "notoriously ambiguous," the Justice asserted that the notion that jury trials are available only in personal injury or wrongful death actions was debatable.[120] Further, Justice Brennan recognized that the predecessor statute to section 1411 was "apparently repealed" by the 1984 Amendments to the Bankruptcy Code.[121] Moreover, the Court emphasized the limitations of congressional power to block the application of the seventh amendment by assigning causes of action to a legislative court sitting without a jury.[122]

Critically, the Court relied upon its recent decision in *Thomas v. Union Carbide Agricultural Products Co.*[123] for the proposition that Congress' power to place actions beyond the ken of the seventh amendment "is limited, however, just as its power to place *adjudicative authority* in non-[a]rticle III tribunals is circumscribed."[124] To be certain, the *Granfinanciera* Court further warned that Congress was not even free to assign initial fact-finding to legislative courts merely because such courts have been created as adjuncts of article III courts.[125] The Court reasoned that if Congress had such a power, "Congress could render the [s]eventh [a]mendment a nullity."[126]

The upshot of *Granfinanciera* is clear. Employing a seventh amendment analysis, the Supreme Court found the congressional scheme embodied in the Bankruptcy Code could not de-

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119 *Id.* at 2789 n.3.

120 *Id.*

121 *Id.* at 2789-90 n.3. In the process, the Court chided the "confused legislative history" of the various provisions for puzzling the commentators. *See id.*

122 *Id.* at 2795 (citing Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 457-58 (1977)). The Congress does not have the "puissant authority" to "eviscerate the [s]eventh [a]mendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law . . . ." *Id.*

123 473 U.S. 568 (1985).

124 *Granfinanciera*, 109 S. Ct. at 2796 (emphasis added).

125 *Id.* at 2797 n.10.

126 *Id.* The Court drew an important distinction between the instant situation and its previous decision in Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986), where it validated the CFTC's power to adjudicate state law counterclaims to a federal action brought by a commodities investor pursuant to the Commodities Futures Act. Refusing to find an analogue between *Schor* and the situation in *Granfinanciera*, the Court noted that "[p]arallel reasoning is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which to pursue their claims." *Granfinanciera*, 109 S. Ct. at 2799 n.14.

prive a party of its right to a jury trial where that right would otherwise be available. Notwithstanding the ruling, the Court utterly refused to indicate where the jury trial should properly be held.[127] The natural result of that posture was the instant controversy now roiling amongst the lower courts. To be sure, when Justice Brennan opined that the Court left that question for another day, he may have done so in full anticipation of that day coming quickly.

F. After Granfinanciera—*The Divergence Deepens*

Following the Court's ruling in *Granfinanciera*, the district courts began to implement the decision in their own manner. As might be expected, the unanswered question of the power of bankruptcy judges to conduct jury trials immediately gave rise to a wide divergence of opinion. Once again, a rift developed between those courts favoring the bankruptcy court as a jury trial forum, and those opposed to an article I tribunal exercising such a judicial prerogative.

In *Perino v. Cohen* (*In re Cohen*),[128] the court was faced with a noteworthy set of facts. The plaintiff, an alleged blind person, claimed he was ejected from the debtor's restaurant when he entered with his guide dog.[129] After filing a claim in the bankruptcy case, the plaintiff sought to litigate the discrimination action, and have it found to be nondischargeable under the Bankruptcy Code.[130] To accomplish this, plaintiff sought withdrawal of the reference to the bankruptcy court, and a jury trial before the district judge.[131]

In his memorandum opinion, Chief District Judge Brieant established that plaintiff's claim was in the nature of a tort, and thereby triable before a jury at common law.[132] Citing

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127 "Like Freddy Krueger or Jason, the issue of whether a [b]ankruptcy [j]udge can conduct a jury trial refuses to die. In *Granfinanciera* the Supreme Court breathed new life into the jurisdictional monster, yet declined to assist in dealing with the havoc it wreaks." Wilkey v. Inter-Trade, Inc. (*In re* Owensboro Distilling Co.), 108 Bankr. 572, 575 (Bankr. W.D. Ky. 1989) (footnote omitted). Continuing his cinema-inspired criticism, Bankruptcy Judge Stosberg "hesitate[d] to predict how many sequels of *Jurisdictional Nightmare in Bankruptcy Court* the Supreme Court will produce!" *Id.* at 575 n.1.

128 107 Bankr. 453 (S.D.N.Y. 1989).

129 *Id.* at 454.

130 *Id.* at 455 (citing 28 U.S.C. § 523(a)(6)). Claims based upon willful or malicious conduct by the debtor may be declared to give rise to debts not dischargeable in bankruptcy. *See* 28 U.S.C. § 523(a)(6).

131 *Cohen*, 107 Bankr. at 454.

132 *Id.* at 455. The court opined that the action was "clearly a legal claim, rather

Granfinanciera as authority, the court concluded that the plaintiff was entitled to a jury trial.[133]

Alluding briefly to the core/non-core distinction, the district court held that the statutes bestowing the power to hear and decide core proceedings also contemplated that jury trials be conducted in the bankruptcy court in core proceedings.[134] Focusing upon the core/non-core distinction, the court found that the plaintiff's tort claim did not fall within the "statutory exclusion," because it was not a personal injury tort "in the traditional, plain-meaning sense."[135] Viewing this case as "directly related to the plaintiff's unliquidated claim as a creditor in the bankruptcy," the district court declined to withdraw the reference, and remanded the case to the bankruptcy judge with instructions to afford the plaintiff a jury trial before that court.[136] Thereafter, *Cohen* became a leading case permitting bankruptcy court jury trials after *Granfinanciera*.

One of the more analytical opinions addressing the bankruptcy jury trial controversy after the *Granfinanciera* decision was *Hughes-Bechtol, Inc. v. Air Enterprises, Inc.* (*In re Hughes-Bechtol, Inc.*)[137] Parsing the somewhat complicated procedural history, the bankruptcy court was faced with the debtor's application for removal of certain state court actions, and the defendants' motion for abstention and remand to the state court.[138] The de-

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than an equitable claim . . . . exactly the sort of claim which would be tried at common law before a civil jury." *Id.*

133 *Id.*

134 *Id.* "This implication follows generally" from section 157, the core/non-core enactment, and particularly from the subparagraphs therein that exclude from bankruptcy jurisdiction personal injury or wrongful death actions, which must be tried before the article III district court. *Id.* (citing 28 U.S.C. § 157(b)(2)(B) (personal injury tort jurisdictions) and § 157(b)(5) (wrongful death claims jurisdiction)).

135 *Id.*

136 *Id.* at 455-56. The district court disposed of the jury trial dispute as follows:

> The [b]ankruptcy [c]ourt may and should conduct the jury trial because judicial efficiency and fairness to both parties will be served if the entire controversy, as to liability, damages and dischargeability, is adjudicated by one judicial officer in one proceeding. The [b]ankruptcy [j]udge should be that officer. The [s]eventh [a]mendment provisions, and cases decided thereunder, limiting the power of any federal court to modify or disregard a jury verdict, because the Constitution is paramount, will take precedence over any statutory provisions for *de novo* review of factual findings of the [b]ankruptcy [c]ourt.

Id. at 455.

137 107 Bankr. 552 (Bankr. S.D. Ohio 1989).

138 *Id.* at 553-54.

fendant's demand for a jury trial played a pivotal role in the disposition of the case.[139]

Bankruptcy Judge Waldron thoroughly reviewed the pertinent law, and held that the proceedings at bar were core, and were properly removed to the federal forum.[140] Consequently, the court recommended that the district judge not abstain, but retain jurisdiction in the federal court.[141]

The court then moved to the jury trial question. The *Hughes-Bechtol* court began its analysis by searching for any statutory or constitutional authority for a jury trial in a bankruptcy proceeding. As to the former, Bankruptcy Judge Waldron naturally turned to section 1411 of the Judicial Code, and recognized that the statutory language was ambiguous thereby causing confusion among the courts that had interpreted and applied it.[142] Equally frustrating for the court was the non-existence of a Bankruptcy Rule on that point, given the abrogation of former Bankruptcy Rule 9015.[143] Taking refuge in *Granfinanciera*, the court determined the defendant's jury demand rested upon the seventh amendment.[144] Accordingly, testing that demand under the Court's ruling in *Granfinanciera*, the *Hughes-Bechtol* court concluded a right to trial by jury did exist.[145]

Relying heavily upon the majority opinion in *Granfinanciera*, Bankruptcy Judge Waldron considered the summary jurisdiction of the bankruptcy court, and its concomitant power to determine a case as a court of equity without empaneling a jury.[146] Given the fact that, *inter alia*, the defendant had filed a claim in a bankruptcy forum, the court ruled that this created an equitable pro-

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139 *Id.*

140 *Id.* at 554-60.

141 *Id.* at 560. Germane to the instant writing was Judge Waldron's postulation of the existence, vis'-a-vis' the exercise, of jurisdiction in bankruptcy cases:

> The existence of jurisdiction in a bankruptcy case or proceeding rests on a broad and complete constitutionally authorized direct grant of authority by Congress to the district courts over all matters and proceedings that are connected to a bankruptcy case. The exercise of jurisdiction by a bankruptcy court in a bankruptcy case or proceeding rests on a limited and circumscribed reference of derivative authority from the district court to the bankruptcy court over most, but not all, proceedings that are connected to a bankruptcy case.

Id. at 554 (quoting *In re* Commercial Heat Treating of Dayton, Inc., 80 Bankr. 880, 884-85 (Bankr. S.D. Ohio 1978)).

142 *Id.* at 561.

143 *Id.* at 562.

144 *Id.* at 562-63.

145 *Id.* at 564.

146 *Id.* at 564-66.

ceeding disposing of the need for a jury.[147]

Citing primarily to *Granfinanciera*, but also significantly to *Marathon*, the *Hughes-Bechtol* court considered the former pronouncement "as a decision exploring the permissive boundaries of the exercise of judicial authority by a non-[a]rticle III court."[148] Critically, the court read *Granfinanciera* as probing the numerous concerns raised in *Marathon* as to guarding the sanctity of the article III courts.[149] Against this background of "serious constitutional issues" regarding the article I bankruptcy court, the *Hughes-Bechtol* court examined the existence of authority for a jury trial in bankruptcy court.[150]

Significant to Judge Waldron was the fact that in the 1984 Amendments to the Bankruptcy Code, Congress did not expressly define the power of a bankruptcy judge to conduct a jury trial.[151] The court opined that this lack of an explicit statement led to divisiveness on the issue by the courts with each side citing the absence of a clear declaration either authorizing or prohibiting a right to jury trial in bankruptcy court as authority for its decision.[152] Noting that bankruptcy courts are units of the district court, the court found it helpful that United States Magistrates have express authority to conduct jury trials under

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147 *Id.* at 566. Judge Waldron opined that:

> Although the above determination could arguably terminate any further consideration by this court of the jury trial issues in this proceeding, as a result of the significance of this issue in both this court and in connection with any determination by the district court, this court will also address the remaining item in the suggested analysis of jury trials in bankruptcy proceedings whether the bankruptcy court is authorized to conduct a jury trial.

Id. at 566-67.

Moving directly to the heart of the issue, the tribunal stated:

> This court believes that a fair reading of *Granfinanciera* reflects a consistent concern by the Supreme Court that the separation of powers doctrine reflected in the independence of the [f]ederal [j]udiciary pursuant to [a]rticle III of the Constitution requires the Supreme Court to exercise continual vigilance to prevent encroachment by the other branches of the government. It is also clear that the Supreme Court has determined that Congress has limited power to provide authority for non-[a]rticle III courts to adjudicate issues requiring a jury trial.

Id. at 567.

148 *Id.* at 568.

149 *Id.* at 569.

150 *Id.*

151 *Id.* at 569-70.

152 *Id.* at 570 (citations omitted).

circumstances specifically stated in a federal statute.[153] For those reasons, the court held that it was "clear that Congress ha[d] not enacted any legislation specifically authorizing a bankruptcy court to conduct a jury trial."[154] In light of the decisions of the United States Supreme Court, the *Hughes-Bectol* court found it difficult to declare that Congress intended to permit bankruptcy courts to conduct jury trials.[155]

In the absence of express statutory authority, the *Hughes-*

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[153] *Id.* at 570 (citing 28 U.S.C. § 151). The court observed:

> It may be noted that district courts do not have specific statutory authority to conduct jury trials; however, it must be remembered that they have the essential attributes of life tenure and irreducible salary consistent with the full judicial authority of [a]rticle III of the Constitution. It is more significant to note that United States Magistrates have specific statutory authority expressly stating the circumstances under which they may conduct jury trials.

Id.

[154] *Id.* at 571. As additional support, the court noted that "Congress consented to the abrogation of BANKR. R. 9015 which governed jury trials in bankruptcy court." *Id. Accord* Howison v. Country Hills Assoc. (*In re* W.G.M.C., Inc.), 96 Bankr. 5 (Bankr. D. Me. 1989) ("The recent abrogation of Bankruptcy Rule 9015, which had provided procedures to conduct jury trials in bankruptcy court, lends further support to the conclusion that there is no provision for jury trials in bankruptcy courts").

[155] *Hughes-Bechtol*, 107 Bankr. at 571. The court reached this conclusion while assuming that a jury trial held in bankruptcy court would pass constitutional muster. *See id.* The court further reasoned that if one were to conclude legislative authorization was given by Congress for the conduct of jury trials by bankruptcy judges, "other significant constitutional concerns" would prevent that article I court from doing so. *Id.* Specifically, appeals of bankruptcy court decisions are directed to the district court. *Id.* (citing 28 U.S.C. § 158(a) and BANKR. R. 8001(a)). This process the court posited "raises a clear constitutional impediment" to jury trials held by bankruptcy judges in non-core proceedings. *Id.* Addressing this "tension that exists as a result of these separate constitutional and statutory requirements," the court ruled that:

> If, pursuant to the provisions of the [s]eventh [a]mendment, the district court may not conduct a second jury trial (no fact tried by a jury, shall be otherwise reexamined in any court of the United States [other] than according to the rules of the common law), the district court will obviously not be able to fulfill its [a]rticle III responsibility and its statutory duty (28 U.S.C. § 157(c)(1)) to review *de novo* a bankruptcy judge's proposed findings of fact and conclusions of law.

Hughes-Bechtol 107 Bankr. at 571. *See also* Manley Truck Line, Inc. v. Mercantile Bank of Kansas City, 106 Bankr. 696, 697 (D. Kan. 1989) (statutory provision for *de novo* district court review of bankruptcy court decisions in non-core proceedings renders jury trials in bankruptcy court impractical); Kaiser Steel Corp. v. Frates (*In re* Kaiser Steel Corp.), 95 Bankr. 782, 785 (Bankr. D. Colo. 1989), *affirmed*, 109 Bankr. 968 (D. Colo. 1989), *remanded*, 911 F.2d 380 (10th Cir. 1990) (bankruptcy court jury trial futile in view of requirement of *de novo* trial before article III district judge in non-core matters); Wedtech Corp. v. Banco Popular De Puerto Rico (*In re* Wedtech Corp.), 94 Bankr. 293, 296 (S.D.N.Y. 1988) ("[A] *de novo* review of the jury's findings would violate the essence of a trial by jury").

Bechtol court held that a bankruptcy judge should not conduct jury trials in non-core proceedings which might produce a constitutional conflict.[156] Furthermore, following a brief historical comparison to jury trials before a justice of the peace in the District of Columbia,[157] the court found that a bankruptcy court presiding over a jury trial in a core proceeding would "exercise full judicial authority," just as an article III court, and thus would "no longer be acting as a unit" of the district court pursuant to the principles of *Marathon*.[158] Again avoiding a discussion of the constitutional difficulties, the court stated that bankruptcy court should not conduct jury trials.[159] Judge Waldron concluded that the requirements of the seventh amendment and article III prohibit a jury trial in bankruptcy court where parties do not consent thereto, and a lack of specific legislative authority likewise prevents a jury trial in that article I forum, even if parties do consent.[160]

With *Granfinanciera* having set the stage for even more internecine bickering, and the differences among the bankruptcy courts ever widening over the issue, the unanswered question of the power of the bankruptcy judges to conduct jury trials came under intense scrutiny by the federal appellate courts. The divergence of opinion on the issue soon widened to become a chasm between at least three of the circuits.

II. *Ben Cooper*—The Second Circuit Poses the Challenge

Ben Cooper, Inc. v. Insurance Company of Pennsylvania (In re Ben Cooper, Inc.)[161] was initiated as an adversary proceeding by a reorganization debtor, Ben Cooper, against its insurer over a dispute regarding a post-petition insurance policy.[162] The Insurance Company of the State of Pennsylvania (ICSP) opposed the bankruptcy court's jurisdiction over the adversary proceeding.[163] Bankruptcy Judge Blackshear, however, ruled that the claims

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156 *Hughes-Bechtol*, 107 Bankr. at 571-72.

157 *Id.* at 572 (citing Capital Traction Co. v. Hoff, 174 U.S. (1899) and Pernell v. Southall Realty, 416 U.S. 363 (1974)).

158 *Hughes-Bechtol* 107 Bankr at 572.

159 *Id.* The court also noted the "additional impediments to conducting a jury trial," such as a lack of proper facilities and personnel, making jury trials "incompatible with the presently existing structure of bankruptcy courts." *Id.*

160 *Id.* at 573.

161 896 F.2d 1394 (2d Cir. 1990), *vacated and remanded*, 111 S. Ct. 425 (1990) *reinstated*, 924 F.2d 36 (2d Cir. 1991).

162 *Id.* at 1396-97.

163 *Id.*

made by Ben Cooper were "core" and retained jurisdiction.[164]

ICSP fared better on the appeal where District Judge Stanton reversed the bankruptcy court.[165] The district judge found the action to be merely "related" to the debtor's Chapter 11 proceeding, and, among other things, withdrew the reference of the case to the bankruptcy court.[166] Moreover, the district court held that the withdrawal was justified because the insurer was entitled to a jury trial on at least some of the issues.[167] Ben Cooper's appeal to the Second Circuit followed.[168] Apparently, the litigants agreed that the primary issues on the appeal were 1) whether the adversary proceeding was core, and 2) whether ICSP was entitled to a jury trial.[169]

The United States Court of Appeals for the Second Circuit reversed the district court's ruling, and held that the proceeding was core. More importantly, the undivided panel ruled that ICSP was entitled to a jury trial,[170] "and that such trial should be in the bankruptcy court."[171] Unfortunately, it is unclear how the appellate court moved from the main issues as posited before it to its ultimate holding.

Writing for the panel, Circuit Judge Timbers bifurcated the analysis, first tackling the jurisdictional issue.[172] Reviewing the non-exclusive list of what constitutes core proceedings, the Second Circuit focused upon those "matters concerning the administration of the estate" that are defined by statute as core.[173] Recognizing the broad nature of such a jurisdictional provision, the court looked to the statements of "several influential legislators," and found indications that Congress intended that bankruptcy jurisdiction "be construed as broadly as possible within the constitutional constraints of *Marathon*."[174] Judge Timbers quickly proceeded to state that a post-petition contract, such as

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164 *Id.*
165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.*
169 *Id.* at 1397.
170 *Id.* at 1396.
171 *Id.*
172 *Id.* at 1397.
173 *Id.* at 1398 (citing 11 U.S.C. § 157(b)(2)(A) (1988)).
174 *Id.* Further, the opinion found additional support in the statutory proviso that, in determining whether a proceeding is non-core, such a determination "shall not be made solely on the basis that its resolution may be affected by [s]tate law." *Id.* at 1399 (quoting 11 U.S.C. § 157(b)(3) (1988)). The panel viewed the foregoing "as a demonstration of Congress' intent that bankruptcy courts are not precluded

the one at issue, is "integral to the estate administration."[175] For this reason, the Second Circuit held that the bankruptcy court had core jurisdiction over this dispute.[176] Having found jurisdiction vested with the article I judge, the panel turned to whether ICSP was entitled to a jury trial.[177]

Characterizing the *Granfinanciera* opinion as "somewhat opaque," the Second Circuit observed that it was difficult to decipher the Court's opinion on whether bankruptcy courts have the power to hold jury trials.[178] Despite this infirmity, Judge Timbers concluded that the *Granfinanciera* holding contained several passages which might affect the determination of the jury trial question.[179]

Such a passage was the "public" versus "private rights" dichotomy, originally expounded upon in *Marathon*. While *Marathon* held that an article I court could resolve core bankruptcy claims because they were "public rights" central to Congress' constitutional bankruptcy power, the appellate court found that *Granfinanciera* "equivocated on that statement."[180] Contending that the Court premised its holding that the fraudulent conveyance action in *Granfinanciera* carried a seventh amendment right to a jury trial based on the conclusion that such a cause is a private right, Judge Timbers opined that a determination that the *Ben Cooper* litigation is a private, legal action would compel a holding that the proceeding is non-core."[181]

Critically, the Second Circuit then extended its analysis as follows:

> Fortunately, we need not read *Granfinanciera* so broadly. That opinion contains several passages indicating the Court's contemplation that its holding may result in jury trials in the bankruptcy court . . . . [W]e find that *Granfinanciera* does not foreclose the possibility of jury trials in the bankruptcy court. We therefore will analyze the question anew; addressing first

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from adjudicating state law claims when such claims are at the heart of the administration of the bankruptcy estate." *Id.*

175 *Id.*

176 *Id.* at 1400. The *Ben Cooper* panel relied heavily upon the First Circuit's decision in Arnold Print Works, Inc. v. Apkin (*In re* Arnold Print Works, Inc.), 815 F.2d 165 (1st Cir. 1987).

177 *Id.*

178 *Id.* at 1401. The *Ben Cooper* court noted that the Supreme Court had explicitly left open the jury trial question. *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

> whether the claims on the instant appeal are inherently legal, and second whether any statutory or constitutional provision bars the bankruptcy court from conducting jury trials.[182]

Looking to insurance law precedent, the court concluded the action was legal in nature, and therefore a jury trial right inured to the benefit of ICSP.[183] Finally, the tribunal reached the issue of whether a bankruptcy court has the constitutional and statutory authority to hold such trials.[184]

Looking to section 1411 of title 28, the statute dealing with wrongful death and personal injury suits in bankruptcy, the Second Circuit noted that Congress had given little guidance as to the availability of, and forum for, jury trials.[185] Yet the panel overcame the absence of an explicit statutory provision, and unequivocally held in favor of bankruptcy courts conducting jury trials.[186] In so ruling, Circuit Judge Timbers reconciled two provisions of title 28 granting bankruptcy judges authority to hear trials and issue final orders[187] in any action.[188]

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182 *Id. Accord* Luper v. Langley (*In re* Lee Way Holding Co.), 115 Bankr. 586, 590 (S.D. Ohio 1990) ("The Supreme Court leaves the door open to jury trials being conducted by bankruptcy judges.").

183 *Ben Cooper*, 896 F.2d at 1401-02.

184 *Id.* at 1402.

185 *Id.* at 1402. Circuit Judge Timbers observed that the statute "offers almost no guidance . . . . This provision does not even make clear whether jury trials are afforded for other actions, let alone the proper forum for these trials." *Id.*

186 *Id.* at 1402. At least one commentary called the rationale of this part of the Second Circuit's opinion "somewhat elliptical." Flumenbaum & Karp, *Jury Trials and Bankruptcy; Summary Judgment*, 203 N.Y.L.J. 7, Mar. 28, 1990.

187 *Ben Cooper*, 896 F.2d at 1402 (citing 28 U.S.C. § 157(b)).

188 *Id.* (citing 28 U.S.C. § 151 (1988)). The court posited that:

> Our holding rests on two separate but related provisions. The first provision is 28 U.S.C. [§]151 (1988), which states that "[e]ach bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit or proceeding." The second provision is section 157(b), which, as stated previously, gives bankruptcy judges the authority to conduct trials and issue final orders in core proceedings. *Granfinanciera* teaches that such proceedings, if legal in nature, are subject to the [s]eventh [a]mendment, but that opinion does not alter Congress' intent that they be heard by a bankruptcy court with authority to issue final orders. Construing the Bankruptcy Code to allow jury trials in the bankruptcy court is the only way to reconcile these various concerns.

Id. See Data Compass Corp. v. Datafast, Inc. (*In re* Data Compass Corp.), 92 Bankr. 575 (Bankr. E.D.N.Y. 1988), wherein Bankruptcy Judge Hall found "the authority to conduct a jury trial [in bankruptcy court] is implicit in 28 U.S.C. § 157(b) . . . ." *Id.* at 582. As its rationale, the court asserted that the enactment of the Bankruptcy Code eliminated the summary/plenary distinction that would have previously compelled the severance of a jury trial action. *Id.* Judge Hall posited that "*Marathon*

While acknowledging that former Bankruptcy Rule 9015, the so-called "jury trial rule", had been abrogated two years previously, the tribunal did not view this as an impediment.[189] Making short shrift of the eradication of that controversial provision, the court gave tacit approval to other court holdings which relied upon Federal Rule of Civil Procedure 38 or local rules modeled after the former bankruptcy rule.[190]

Almost as an afterthought, the circuit court addressed possible constitutional barriers to the bankruptcy court's conducting jury trials.[191] The tribunal surmounted this obstacle in essentially two ways. First, the seventh amendment requirement that no fact tried by a jury be re-examined had been satisfied, Circuit Judge Timbers opined, because district court review of final orders in core proceedings was not plenary.[192] Having found no prohibition in the seventh amendment, the Second Circuit conducted an article III analysis with the same result.[193] The Second Circuit held, therefore, that

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did not hold this elimination to be unconstitutional *per se*, and the 1984 Amendments did not reinstate the distinction." The court continued that "to hold that jury trials must be held in a forum other than the [b]ankruptcy [c]ourt is counter to the intent of Congress in establishing a centralized forum . . . ." *Id.*

189 *Ben Cooper*, 896 F.2d at 1403.

190 *Id.* at 1402-03. Notwithstanding the abrogation of the jury trial rule, some courts persisted in seeking authority elsewhere, in one instance looking to the Federal Rules of Civil Procedure. Leonard v. Wessel (*In re* Jackson), 90 Bankr. 126, 132 (Bankr. E.D. Pa. 1988) (concluding that FED. R. CIV. P. 38 continues to govern jury trials in bankruptcy courts). *See also* Woodward v. Sanders (*In re* SPI Communications & Mktg., Inc.), 112 Bankr. 507, 512 (Bankr. N.D.N.Y. 1990) (applying the Federal Rules of Civil Procedure in the absence of a bankruptcy jury trial rule; following *Ben Cooper*).

191 *Ben Cooper*, 896 F.2d at 1403.

192 *Id.* The court argued that:

> [T]he [s]eventh [a]mendment may well render unconstitutional jury trials in non-consensual non-core proceedings, because of the requirement that findings of fact by the bankruptcy court be reviewed de novo by the district court. 28 U.S.C. § 157 (c)(1). District court review of final orders in *core* proceedings, however, is limited to the analogous review that courts of appeals have over district courts. 28 U.S.C. § 158 (1988)); *In re* Daniels-Head & Assocs., 819 F.2d 914, 918-19 (9th Cir.1987). Since the jury verdict in a core proceeding is subject only to the traditional standards of appellate review, such proceeding does not violate the [s]eventh [a]mendment.

Id. (emphasis in original).

193 *Id.* The *Ben Cooper* Court opined:

> The essential predicate question, even more fundamental, is whether the statutory authority of bankruptcy judges to enter final judgments in core proceedings runs afoul of [a]rticle III . . . . The conclusion that core jurisdiction is constitutional, however, is implicit in our analysis in [s]ection II of this opinion . . . .
>
> If bankruptcy courts have the power to enter final judgments

jury trials on core proceedings in bankruptcy court do not run afoul of article III, and that the adversary proceeding at issue should be tried before a jury in the bankruptcy court.[194]

Truly, the opinion of the Second Circuit is the strongest and most recognizable advocate for the conducting of jury trials by bankruptcy judges. It remains to be seen how the Supreme Court shall deal with the question given the especially strong counterpoints offered by the circuits that have disputed the *Ben Cooper* holding. Once again, however, the Court has passed over the opportunity to review the jury trial controversy by vacating and remanding *Ben Cooper* to the Second Circuit to decide the jurisdictional issues.[195]

III. *UNITED MISSOURI BANK* AND *KAISER STEEL*—THE CHALLENGE ACCEPTED

Standing in counterpose to the Second Circuit's decision in *Ben Cooper* is that of the United States Court of Appeals for the Eighth Circuit in *In re United Missouri Bank of Kansas City, N.A.*[196] The *United Missouri Bank* court held, contrary to the courts below, "that a bankruptcy judge lacks the statutory authority to conduct jury trials" in a preferential transfer action.[197] Significantly, the court acknowledged the "grave constitutional problems"

> without violating [a]rticle III, it follows that jury verdicts in the bankruptcy courts do not violate [a]rticle III. In addition, found the tribunal, "the practice of jury trials in [a]rticle I courts has been upheld when the authority of the [a]rticle I judges does not otherwise run afoul of [a]rticle III."

Id.

194 *Id.* at 1403-04.

195 111 S. Ct. 425 (1990).

196 901 F.2d 1449 (8th Cir. 1990), *reh'g and reh'g en banc denied* (June 18, 1990); Drewes v. Zip Food Mills, Inc., 119 Bankr. 197, 198 (D.N.D. 1990) (Hill, J.) ("bankruptcy judges lack either express or implicit authority to conduct jury trials," such a trial "cannot be conducted in the Bankruptcy Court.").

197 *In re* United Missouri Bank 901 F.2d at 1450. The *ratio decendi* of the bankruptcy and district courts bears mention at this point. In Kroh Bros. Dev. Co. v. United Mo. Bank of Kansas City, N.A. (*In re* Kroh Bros. Dev. Co.), 108 Bankr. 710 (Bankr. W.D. Mo. 1989), Bankruptcy Judge See contended that bankruptcy judges and federal magistrates "are similarly situated" article I judges, who simply require "an adequate grant of statutory authority" to conduct jury trials. *Id.* at 714. The bankruptcy court found this authority in 28 U.S.C. § 151 (bankruptcy court is "unit" of the district court) and 28 U.S.C. § 157 (district court reference of title 11 cases to the bankruptcy court). *In re* United Missouri Bank, 901 F.2d at 1450.

District Judge Sachs, likewise, had "no serious doubt that the bankruptcy court, like the magistrate court, is not precluded by Article I status from conducting jury trials . . . ." Kroh Bros. Dev. Co. v. United Mo. Bank, 108 Bankr. 228, 229 (W.D. Mo. 1989). Moreover, the district court opined that legislative awareness of

presented in the case but it reached only the statutory question.[198]

Briefly looking to the facts, the trustee of the bankrupt Kroh Brothers Development Company had brought an adversary proceeding against United Missouri Bank seeking the recovery of approximately $4 million of allegedly fraudulent transfers.[199] The bank had not previously appeared nor had it filed a claim in the bankruptcy court, but it did file a jury trial demand after the *Granfinanciera* decision.[200]

In deciding the controversy, the *United Missouri Bank* court focused on *Granfinanciera* and *Ben Cooper*.[201] The tribunal took from *Granfinanciera* the proposition that a party to an adversary proceeding in which private rights are implicated may have a seventh amendment right to a jury trial.[202] Above all else, the Eighth Circuit distinguished the *Granfinaciera* Court's decision on the right to a jury trial from the instant decision as to which judge should hold the trial.[203]

Commencing its analysis in earnest, the panel made a historical review of the authority of the article I bankruptcy courts.[204] Particularly telling were the Eighth Circuit's observations as to the traditional boundaries of such legislatively-mandated tribunals.

The *United Missouri Bank* court posited that bankruptcy courts lack constitutional and legislative authority to conduct jury

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former Bankruptcy Rule 9015 is a "further indication of Congressional approval of jury trials conducted by bankruptcy judges." *Id.* at 229 n. 1.

198 *United Missouri Bank*, 901 F.2d at 1450 n. 1. "The central issue we confront," wrote Chief Judge Lay, "is whether a bankruptcy judge . . . has the statutory and constitutional authority to conduct jury trials in a core proceeding in bankruptcy." *Id.* (citation and footnote omitted).

199 *Id.* at 1450.

200 *Id.*

201 *Id.* at 1451. "In all due respect to our sister circuit," wrote the panel, "we must disagree with the Second Circuit's holding that a bankruptcy judge has the statutory authority to conduct jury trials." *Id.* at 1451.

202 *Id.*

203 *Id.* n. 8. Chief Judge Lay opined that:

> It is important to distinguish between the issue decided in *Granfinanciera* and the issue this court decides. The Supreme Court decided the *right* to a jury trial without deciding which judge, the district court judge or the bankruptcy judge would conduct the trial. In this case, however, we consider only the issue of which judge shall preside at the jury trial.

Id. (emphasis in original).

204 *Id.* at 1451-54.

trials.[205] After noting that the summary jurisdiction of bankruptcy courts vested by the Bankruptcy Act of 1898[206] was comprised of equitable matters that did not involve jury trials,[207] the opinion recalled that plenary matters were heard either in the district court or in the bankruptcy court with the consent of the parties.[208]

Bringing this overview into the era of the modern Bankruptcy Code, Chief Judge Lay noted four critical facts. First, in promulgating the 1978 Bankruptcy Code it was clear from Congress' "extremely broad" jurisdictional grant that the legislature expected bankruptcy courts to conduct jury trials.[209] Second, the Court had interpreted the new bankruptcy laws it struck down as giving the article I bankruptcy court the power to conduct jury trials.[210] Third, the Eighth Circuit observed that the Court, in response, struck down this pervasive grant of jurisdiction as unconstitutional.[211] Fourth, the 1984 Amendments to the Bank-

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205 *Id.* at 1451-52. The court observed that:

> Article I courts are courts of special jurisdiction created by Congress that cannot be given the plenary powers of [a]rticle III courts. Northern Pipeline Const. Co. v. Marathon Pipe Line Co., . . . The authority of the [a]rticle I court is not only circumscribed by the constitution, but limited as well by the powers given to it by Congress. *See Ex parte* Bakelite Corp., . . . *see also* Plastiras v. Idell (*In re* Sequoia Auto Brokers, Ltd., Inc.), . . . ("Congress vests bankruptcy courts with their jurisdiction and their authority has no 'inherent' source."). Although we view this issue in light of the 1984 Act, the historical role of bankruptcy judges illustrates an absence of legislatively authorized power to conduct a jury trial on preferential transfers.

Id. (citations omitted).

206 Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1979), *reprinted in* 1 app. COLLIER ON BANKRUPTCY 1 (15th ed. 1987).

207 *Id.* at 1452 (citing Katchen v. Landy, 382 U.S. 323, 336-37 (1966)).

208 *Id.* (citing *Marathon*, 458 U.S. 50, 58 (1982)). Specifically, the panel found that:

> Until 1973, there was no indication as to which forum was to conduct these jury trials. The bankruptcy rules promulgated by the Judicial Conference in 1973 required jury trials on dischargeability claims to be held in the district court unless a local rule provided otherwise . . . . Jury trials involving involuntary petitions were to be conducted by the bankruptcy judge unless trial was demanded before the district court or a local rule required jury trials in the district court . . . . Thus, there was no statutory authority for bankruptcy judges to conduct jury trials under the 1898 Act, and the procedural rules governing the bankruptcy courts did not grant this authority until 1973.

Id.

209 *Id.* at 1452-53.

210 *Id.* at 1453 n.10 (citing *Marathon*, 458 U.S. 50, 58 (1982)).

211 *Id.* at 1453.

ruptcy Code revoked jury trial authority[212] with Congress establishing a bifurcated system allocating bankruptcy court jurisdiction between core and non-core proceedings.[213]

The Eighth Circuit concluded from the foregoing that there was no express statutory pronouncement on whether or not bankruptcy judges have authority to conduct jury trials.[214] Since Congress is the source of authority for the article I bankruptcy courts, however, the tribunal turned to a review of the relevant statutes in search of an express grant of authority with the avowed purpose of determining the intent of Congress.[215]

Chief Judge Lay first exposited the results of the tribunal's search for some express authority vested in the bankruptcy courts. The *United Missouri Bank* Court failed to find a pronouncement of such a right.[216] Since express authorization was clearly lacking, the tribunal next looked to see whether Congress implied that the bankruptcy court was empowered to conduct jury trials.[217] The court noted the bankruptcy judge below had urged that a comprehensive reading of the statutes demonstrated Congress' implicit intent to grant jury trial authority to the article I bankruptcy judges.[218] The Eighth Circuit strongly disagreed, emphasizing that such a conclusion was contrary to the legislative intent.[219]

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212 *Id.* at 1453 n.11 (citing repeal of 28 U.S.C. § 1480 by the 1984 Amendments).

213 *Id.* at 1453. As to "non-core" matters, the panel opined that the statutory process governing such proceedings "is in our judgment incompatible with any implication that Congress has provided the bankruptcy court the authority to try jury cases in non-core proceedings." *Id.* (footnote omitted). *Contra* Perino v. Cohen (*In re* Cohen), 107 Bankr. 453, 485 (S.D.N.Y. 1989).

214 *Id.* at 1453. The court noted, however, that the actual right to a jury trial was preserved. *Id.* (citing 28 U.S.C. § 1411 (1988)).

215 *Id.*

216 *Id.* at 1454. The court's review was as follows:

> As the Second Circuit acknowledged, the 1984 Act, and in particular section 157, does not contain any specific or express language granting a bankruptcy judge authority to conduct jury trials. . . . The references to jury trials in the 1984 Act address only the authority of the district court. . . . Congress has previously provided express statutory authority to conduct jury trials to a non-[a]rticle III tribunal . . . and thus, we believe, is aware of the language necessary to expressly grant that authority. The language of the 1984 Act does not grant jury trial authority.

Id. (footnotes and citations omitted).

217 *Id.*

218 *Id.*

219 *Id.* at 1455 (footnote omitted). In its parenthetical discussion, the court detailed the basis for its reasoning:

> The one statement in the legislative history that arguably supports

The panel recognized that *Granfinanciera* demands a jury trial be provided in a "private rights" cause of action, such as the one before it.[220] The court agreed that even if jury trials in bankruptcy courts were not expressly authorized, the authority could be implied if it were required to effectuate the legislation.[221] The panel did not, however, think the jury trial power so vital as to effectuate the bankruptcy laws that, by necessity, it had to be implied.[222]

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jury trial authority is, at the same time, too vague and ambiguous to do so. In discussing the powers of bankruptcy judges, Representative Kindness stated: "The bankruptcy judge will conduct the trial, [and] make a recommendation to the district court[. . . .]" 130 CONG. REC. H6242 (Mar. 21, 1984). This statement was made during the debate over [a]rticle III status for bankruptcy judges. Representative Kindness also pointed out that his amendment, to create non-[a]rticle III bankruptcy judges which was eventually adopted, was "essentially a legislative enactment of the emergency bankruptcy rule, the model rule that has been in effect, under which the bankruptcy courts have been operating . . . . [The amendment] add[s] the endorsement of the Congress to the emergency rule, the model rule under which the court has been operating[. . . .]" *Id.* The Emergency Rules were adopted by the Judicial Conference in response to the *Marathon* decision, to provide operating rules for the bankruptcy courts until Congress enacted a new system. The Emergency Rules prohibited bankruptcy judges from conducting jury trials. *See* Emergency Rule (d)(1)(D), *reprinted in* 1 COLLIER ON BANKRUPTCY, § 3.01(1)(b)(vi) (15th ed. 1989). Thus, if anything can be gleaned from this commentary, it is that Congress intended to continue the Emergency Rule's prohibition against bankruptcy judges conducting jury trials.

Id. at 1455 n. 16. The court's review was as follows:

We regret this argument as contrary to Congress' intent. The legislative history of the 1984 Act, while not particularly illuminating on this issue, does not support this argument. The possibly relevant legislative history reveals only a debate over whether to vest bankruptcy judges with [a]rticle III status. . . . There is no discussion in the legislative record that suggests Congress intended to grant bankruptcy judges the authority to conduct jury trials.

Id. (footnotes and citations omitted).

220 *Id.* at 1455.

221 *Id.* at 1455 (citing 2A SUTHERLAND, STAT. CONST. § 55.04 (1984)).

222 *Id.* at 1456. The Eighth Circuit posited that:

It is not enough that the implied power is consistent with the legislation from which it is implied. "The power to be implied . . . must be practically indispensable and essential in order to execute the power actually conferred." However, the power to conduct jury trials is not indispensable to bankruptcy judges' ability to execute the authority conferred by the 1984 Act. Bankruptcy judges are vested with fairly broad power to "hear and determine" and "enter appropriate orders and judgments" in core proceedings, but we do not believe this broad grant of authority contemplates that the authority to conduct jury trials is an indispensable power necessary to carry out the authority actually conferred by the section.

Finally, the *United Missouri Bank* Court examined the reasoning of *Ben Cooper*, but once again disagreed.[223] The Eighth Circuit forcefully concluded that it could find no express or implied statutory authority for bankruptcy courts to conduct jury trials.[224]

Most recently, the Eighth Circuit has been joined by the Tenth Circuit, in opposing the conclusions of the *Ben Cooper* court. In *Kaiser Steel Corp. v. Frates* (*In re Kaiser Steel Corp.*),[225] the court of appeals set forth the essential reasoning of both *Ben Cooper* and *United Missouri Bank* and flatly agreed with the Eighth Circuit that bankruptcy judges are not authorized to conduct jury trials.[226]

After parsing through various procedural aspects of its judgment, the panel turned to the "final issue": the "proper forum" for the exercise of the jury trial entitlement.[227] Noting the split between the appellate courts, the Tenth Circuit determined the position espoused in *United Missouri Bank* to be better reasoned.[228]

Like the Eighth Circuit, the *Kaiser Steel* court reached its decision on statutory grounds, primarily analyzing the development

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Id. (citations omitted).

223 *Id.* at 1456 (footnote omitted). The Eighth Circuit opined:

> The Second Circuit's conclusion is premised upon the reasoning that since Congress could not deprive a private litigant of his [s]eventh [a]mendment right by designating an [a]rticle I forum to hear subject matter pertaining to private rights, Congress intended that the [a]rticle I forum have the authority to conduct jury trials. We find this to be a faulty syllogism. We think it more plausible that Congress simply intended to transfer all proceedings relating to the bankruptcy estate to the sole jurisdiction of the bankruptcy court without regard to whether a party was entitled to a jury trial, or which forum would conduct the trial. In fact, it appears Congress did not even consider the need to provide jury trial authority.

Id. To be sure, the Eighth Circuit questioned the suggestion in *Ben Cooper* that *Granfinanciera* contemplated bankruptcy judges conducting jury trials. The Supreme Court "did not even implicitly sanction" such a result, leaving the issue unresolved. *Id.* at 1456 n. 17.

224 *Id.* at 1457. *Accord* Poissonnerie La Belle Maree, Inc. v. Johnson (*In re* Johnson), 115 Bankr. 712 (Bankr. S.D. Ala. 1990) (agreeing with *United Missouri Bank*; "[m]erely because it is difficult to reconcile the holding in *Granfinanciera* with the 1984 Act is not persuasive enough to imply that Congress intended something it apparently never though of, much less considered"); Roth v. Iacovelli (*In re* Southeast Connectors, Inc.), 113 Bankr. 85 (S.D. Fla. 1990) (withdrawing reference to bankruptcy court of action triable before a jury in light of *Granfinanciera*).

225 911 F.2d 380 (10th Cir. 1990).

226 *Id.* at 389.

227 *Id.*

228 *Id.*

of the Bankruptcy Code after *Marathon*.[229] Positing that Congress may have granted jury trial power to the bankruptcy judges in the original version of the Code, the panel found that such authority was not incorporated into the 1984 Act."[230]

The *Kaiser Steel* court then carefully examined the Bankruptcy Code as promulgated in 1978.[231] Those broad jurisdictional provisions were struck down by *Marathon*, noted the panel, emphasizing the Court's focus on the improper allocation of jury trial power to bankruptcy judges, and the absence of a full review of bankruptcy court decisions by the district court.[232] The court observed, in response to *Marathon*, Congress was compelled to revoke these provisions.[233]

After reviewing the divergent opinions in *Ben Cooper* and *United Missouri Bank*,[234] the *Kaiser Steel* court stated that it found the analysis of the latter case persuasive.[235] Circuit Judge Tacha opined that the 1984 Amendments significantly reduced the independent power of bankruptcy judges.[236] The court found the repeal of section 1481 particularly important; the statute had vested bankruptcy judges with the full "powers of a court of equity, law and admiralty.[237]

Further, the Tenth Circuit disagreed with the Second Circuit that the powers of a bankruptcy judge to issue final orders necessarily includes the power to conduct jury trials.[238] Moreover, with a view to the seventh amendment's prohibition against the re-examination of factual findings by a jury, Judge Tacha contended that the existence of a jury would necessarily contravene the bankruptcy judge's statutory power to "determine" the mat-

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229 *Id.* at 389-90.
230 *Id.* at 389.
231 *Id.* at 389-90.
232 *Id.*
233 *Id.* at 390.
234 *Id.* at 390-91.
235 *Id.* at 391.
236 *Id.*
237 *Id.* (citing 28 U.S.C. § 1481 (repealed)). The court noted that "[n]o similar provisions exist under the 1984 Act." *Id.*
238 *Id.* Finding "[t]he plain language of [§]157(b)(1) belies this interpretation," the *Kaiser Steel* court held as follows:

> A literal reading of this language indicates that Congress granted the bankruptcy judges the *personal* power to hear and determine cases. The personal nature of the power to "hear and determine" cases does not implicitly authorize the bankruptcy judge to delegate his or her duty to make final factual determinations to a jury; in fact, it suggests the impropriety of such delegation.

Id. (emphasis in original)

ter given this unavoidable constraint on his review of the jury's findings.[239]

Finally, as were other courts, this tribunal was swayed by the lack of statutory authorization for jury trials in bankruptcy courts similar to that accorded federal magistrates.[240] The court found that "[t]he absence of such a provision is particularly compelling" to a finding that, unlike magistrates, bankruptcy judges are not empowered to conduct jury trials.[241]

In conclusion, the Tenth Circuit agreed with the holding of *United Missouri Bank* that Congress had not specifically intended to vest authority to conduct jury trials within the bankruptcy court.[242] Significantly, the *Kaiser Steel* panel suggested that prior to *Granfinanciera*, Congress could have presumed no right to a jury trial existed.[243] Holding that the post-BAFJA Code does not permit bankruptcy judges to conduct jury trials, the tribunal declared that where a jury trial right exists in bankruptcy proceedings, "that trial must take place in the district court, sitting in its original jurisdiction in bankruptcy."[244]

In brief, this is where the controversy as to the power of bankruptcy judges to preside over jury trials has come to rest. The Supreme Court must decide if the court in *Ben Cooper* was correct in finding in favor of such authority, or the Eighth and Tenth Circuits which concluded no such power exists.

IV. Discussion

Having expounded upon the pertinent statutes and rules of procedure, their history, and the relevant case law, it is now the proper time to analyze all the foregoing in the hope of reaching some dispositive conclusions that might resolve the question of the power of bankruptcy judges to conduct jury trials. Key to this discussion are four critical areas: the existence of statutory authority for jury trials in bankruptcy court; the role of the former jury trial rule and the effect of its abrogation; the limits on the bankruptcy court's authority as an article I court; and, the precedents set by the Supreme Court in *Marathon* through

239 *Id.*
240 *Id.* at 391-92.
241 *Id.* at 392.
242 *Id.*
243 *Id.*
244 *Id.*

Granfinanciera. Let us begin with a review of the statutory provisions.

A. The Statutory Analysis

As we have seen, the Bankruptcy Code, and its related jurisdictional provisions in the Judicial Code, title 28, endured cataclysmic change in the modern Code's first half-decade of existence. Pertinent to this discussion was the rejection of the pervasive grant of jurisdiction contained in the original enactment of the Code in 1978,[245] and the substitution of the core/non-core division of proceedings in place today.[246]

As part and parcel of this circumscription of the authority of bankruptcy judges in title 11 cases, there was the putting aside of former section 1480, the statute most frequently cited by courts rationalizing in favor of jury trials in the bankruptcy court. Notwithstanding the lack of unmistakable clarity in the 1984 Amendments, it is nevertheless plain enough that the far-ranging section 1480 was done away with, and replaced by more constrained statutes, specifically section 1411 and section 157(b)(5). Working in conjunction, these two current provisions act to preserve the right to a jury trial in the district court for personal injury and wrongful death actions. Note well that the statutes address the jury issue solely as to these two specific tort actions, and provide for a jury trial in the district court, not in the bankruptcy court.[247]

As to this issue, the *Weeks* decision is quite instructive. There, Bankruptcy Judge Brown wholly endorsed this view of section 1411 being quite restrictive as to the limited causes of action amenable to a jury trial. The *Weeks* opinion declared that, pursuant to the statute, such trials must be in the district court. Unlike other courts, the *Weeks* court did not err by either relying upon, or otherwise attempting to incorporate, former section 1480 into its analysis.

Further, the accepted rules of statutory construction strongly militate against reading into the relevant laws any authority for the bankruptcy courts to conduct jury trials. Con-

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245 *See* former 28 U.S.C. § 1471.

246 *See* 28 U.S.C. § 157.

247 Consider also that section 1411 that the district court *may* order section 303 issues to be tried without a jury. *See* 28 U.S.C. § 1411(b)(emphasis added). It is not illogical to conclude that if it permitted a jury trial in such matters, the district court would retain the controversy and preside over any jury trial itself.

sider, in the first instance, the restrictive boundaries imposed by section 1411 and section 157(b)(5) in light of the doctrine of *expressio unius est exclusio alterius*.[248]

Pursuant to this precept, the United States Supreme Court has held that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[249] It could well be argued that the specification that jury trials in personal injury or wrongful death suits be heard in the district court, and not the bankruptcy court, operates to exclude the conduct of jury trials on other matters before the article I tribunal.[250] Further, in response to courts which have drawn implications from a failure of Congress to enact more particularized legislation, it should be noted that the Court "is generally reluctant to draw inferences from Congress' failure to act."[251]

Once more, it should today be beyond cavil that former section 1480 is without force and effect in the scheme of bankruptcy jurisdiction.[252] Indeed, the offhanded reference by Justice Brennan in *Granfinanciera* to the statute as repealed[253] should be regarded as the last word on the matter. This discussion would be incomplete, however, without a fuller dissertation as to the inherent unreliability of former section 1480 in the aftermath of BAFJA.

Senator DeConcini's remarks, for instance, as cited in *Lerblance v. Rodgers (In re Rodgers & Sons)*,[254] simply do not tell the whole story. In the same published interview, Senator Robert

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248 "A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

249 I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

250 To be sure, any reliance on, among other things, the caption of section 1411 ("Jury Trials") as indicating authority for jury trials in the bankruptcy courts is severely misplaced. "[R]eliance on headings is not a favored method of statutory construction. Section headings . . . may be utilized to interpret a statute, if at all, only where the statute is ambiguous." Scarborough v. Office of Personnel Management, 723 F.2d 801, 811-12 (11th Cir. 1982).

251 Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988). *See also* United States v. Albertini, 472 U.S. 675, 680 (1985) (federal courts interpreting federal statutes do not possess "a license . . . to rewrite language enacted by the legislature").

252 "Most authorities now agree . . . and concluded section 1480 was repealed [by BAFJA]." Bever & Cantrell, *Jury Trials In The Bankruptcy Courts: Awaiting A Final Verdict*, 20 ST. MARY'S L. J. 799, 807 (1989).

253 *Granfinanciera*, 109 S. Ct. 2782, 2789-90 n.3.

254 48 Bankr. 683 (Bankr E.D. Okla. 1985).

Dole, another key figure in BAFJA's passage, indicated that the enabling provision which would effectively repeal section 1480 should be deemed the controlling statute, and not the contradictory section which might appear to revive section 1480.[255] Senator Dole then recommended that new section 1411 be read *in pari materia* with the new section 157(b)(5) requirement that personal injury and wrongful death cases be tried in the district court.[256] The bankruptcy court in *Jacobs v. O'Bannon* (*In re O'Bannon*),[257] finding Senator Dole's interpretation more logical, opined that reading the two sections together suggested jury trials should only be held in the district court.[258] Accordingly, Senator DeConcini's remarks are seemingly at odds with, and also less persuasive than, those of his colleague. Notably, a subsequent bill, proposed to make technical corrections to BAFJA, did nothing to reinstate the broad jury trial language of the former section 1480; a point one bankruptcy court deemed "most important."[259]

Moreover, the deference given to Senator DeConcini's *post facto* comments ignores the significance of contemporaneous floor statements made by key House members in securing BAFJA's passage.[260] The perception that the supposed neglect of Congress to incorporate the jury trial prohibition of the Model Emergency Rule into the 1984 Amendments was a grant of permission to continue section 1480 is shattered by examining the Congressional Record for the House of Representatives.

In its legislative genesis, BAFJA was embodied in the House bill entitled H.R. 5174.[261] Critical to its evolution was the addition of the Kastenmeier-Kindness amendment, named after the two Representatives who played a pivotal role in BAFJA's struggle to become law. The Kastenmeier-Kindness Amendment was significant in that it promulgated much of the present day juris-

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255 Jacobs v. O'Bannon (*In re* O'Bannon), 49 Bankr. 763, 767 n.11 (Bankr. M.D. La. 1985)(citing *American Bankruptcy Institute Newsletter* Vol. III, No. 3 (Winter 1884/1985)).

256 *Id.* at 768 n.14.

257 *Id.*

258 *Id.* This would be consistent with the enunciated policy of the Supreme Court that in reviewing a statute, a court should not be guided by a single sentence, but should look "to the provisions of the whole law, and to its object and policy." Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987).

259 *In re* Tripplett, 115 Bankr. 955, 959 n.6 (Bankr. N.D. Ill. 1990).

260 *See generally* 130 CONG. REC. H1846-49 (daily ed. Mar. 21, 1984) (remarks of Rep. Kastenmeier).

261 H.R. 5174, 98th Cong., 2d Sess. (1984).

dictional scheme that eventually permitted the 1984 Amendments to be enacted as a compromise bill.[262]

In bringing his proposal to the house floor, Representative Kastenmeier noted the amendment was "virtually identical" to the Model Emergency Rule and was essentially a codification thereof.[263] Representative Kindness echoed his co-sponsor[264] and encouraged his colleagues "to add the endorsement of Congress" to the Model Emergency Rule.[265]

These excerpts clearly indicate the intent of BAFJA's major proponents in the House to enact the Model Emergency Rule *in toto* and thereby include in the new law the prohibition against jury trials in the bankruptcy courts. So observed the court in *Bokum Resources Corp. v. Long Island Lighting Co. (In re Bokum Resources Corp.)*.[266] Based on the House remarks, Bankruptcy Judge Gueck concluded that section 1480 did not survive BAFJA, and the new section 1411 merely preserves the jury trial right for personal injury tort and wrongful death claims.[267] Turning to the alleged exclusion of the jury trial prohibition, the court opined that Congress must have determined it was not necessary to address the jury trial issue because the 1984 Amendments already contained a restrictive jurisdictional provision.[268]

The foregoing analysis of BAFJA's history by the *Bokum Resources Corp.* court lends weight to observations, such as that made by District Judge Sweet, that he was "persuaded that, had Con-

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262 *See* 1 app. COLLIER, BANKRUPTCY 1663, 1686-88 (15th ed. 1990) (legislative history of BAFJA). Representative Kastenmeier stated "my amendment has been at work in the last 18 months under the emergency bankruptcy rule . . . . It has proven successful. Nothing need be changed. Congressional enactment of the [Model Emergency] rule is the purpose of my amendment, and that is all that is necessary." 130 CONG. REC. H1846 (daily ed. Mar. 21, 1984) (remarks of Rep. Kastenmeier).

263 *Id.* at H1849.

264 *Id.* at H1847 (remarks of Rep. Kindness).

265 *Id.*

266 49 Bankr. 854, 864 (Bankr. D.N.M. 1985).

267 *Id.* at 866-67.

268 The court stated:

> Congress demonstrated its capacity to draft a statute which applied to all types of issues when it felt such a statute was necessary . . . . Congress must have concluded it was unnecessary to include an all-inclusive jury right statute in the 1984 [Amendments] due to the more restrictive jurisdictional grant which that Act contains.

Id. at 868. *See also* Cameron v. Anderson (*In re* American Energy, Inc.), 50 Bankr. 175, 180 (Bankr. D.N.D. 1985) ("Congress by striking the broader language of section 1480(a) from section 1411(a) left bankruptcy courts with a strong suggestion that the only right to trial by jury that is retained" is for personal injury tort and wrongful death actions).

gress specifically addressed the jury issue, it would have explicitly withdrawn jury proceedings to the district court."[269] In sum, all the foregoing clearly demonstrates that any statutory basis for the bankruptcy courts to conduct jury trials no longer exists.[270]

B. Rectifying The Jury Trial Rule Dilemma

Another focal point of the instant controversy has been the jury trial rule, as embodied in the now abrogated Bankruptcy Rule 9015. The genesis of this issue was a continued misapplication of the original jury trial provision, as promulgated in 1983. For this reason, the chronology of the 1983 Bankruptcy Rules' formulation demands scrutiny. No less an authority than Professor Countryman has noted the Advisory Committee has virtually completed working on the rules before *Marathon* was decided and the committee did not consider that decision or the events leading to the enactment of the 1983 Rules.[271] The timing of events certainly bears this assertion out.

The first step was taken on February 12, 1982, via the transmittal of the Preliminary Draft of Proposed Bankruptcy Rules from the Advisory Committee on Bankruptcy Rules to the Committee on Rules of Practice and Procedure of the Judicial Conference.[272] The Preliminary Draft was disseminated to the bench and bar with three dates set for public hearings; the last hearing to be held on June 24-25, 1982. August 1, 1982 was established as a deadline for the submission of written comments.[273] The *Marathon* decision was released on June 28, 1982, subsequent to

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269 Pied Piper Casuals, Inc. v. Ins. Co. of Pennsylvania, 72 Bankr. 156, 160 n.5 (S.D.N.Y. 1987). "It can generally be said then, that under existing law, the bankruptcy court has authority to exercise full district court jurisdiction over those matters that historically were not tried by jury; and that it lacks full authority regarding those matters that historically were triable by jury." Pro Machine, Inc. v. Hardinge Bros., Inc. (*In re* Pro Machine, Inc.), 87 Bankr. 998, 1000-01 (Bankr. D. Minn. 1988) (footnote omitted). The court went on to say "more likely than not it was the intent of Congress in enacting 28 U.S.C. section 157 that bankruptcy courts would not conduct jury trials." *Id.* at 1001.

270 *Accord* Friedman v. Gold Advice, Inc. (*In re* Fort Lauderdale Hotel Partners, Ltd.), 103 Bankr. 335, 336 (Bankr. S.D. Fla. 1989) (Section 1480 has been repealed, and its successor, section 1411, "is far more restrictive.").

271 Countryman, *supra* note 41, at 27.

272 Letter from Circuit Judge Aldisert, Chairman of the Advisory Committee, to District Judge Gignoux, Chairman of the Committee on Rules of Practice and Procedure, 92 F.R.D. 510 (Feb. 12, 1982).

273 Letter from District Judge Gignoux, Chairman of the Standing Committee on Rules of Practice and Procedure, to the bench and bar (March 1, 1982), 92 F.R.D. 509 (Mar. 1, 1982).

all of the public hearings and barely a month before the end of the written commentary period.

The Preliminary Draft's only explicit *post facto* reference to *Marathon* was made in an August 9, 1982 letter from Circuit Judge Aldisert, Chairman of the Advisory Committee on Bankruptcy Rules, to District Judge Gignoux, Chairman of the Judicial Conference's rules committee.[274] The letter stated that the rules had been drafted in order to accommodate any future congressional amendments to the bankruptcy courts' jurisdiction necessitated by *Marathon*.[275]

The United States Supreme Court approved the new Rules and transmitted them to Congress on April 25, 1983.[276] Preoccupied with an internal political battle over the enactment of new bankruptcy legislation addressing *Marathon*, Congress took no action and the new Bankruptcy Rules took effect on August 1, 1983.[277]

The implication of the foregoing chain of events is clear. The Preliminary Draft of the 1983 Bankruptcy Rules, and virtually all of the commentary directed thereto, came into being well before *Marathon* was decided. As to the singular reference to *Marathon* in Judge Aldisert's letter,[278] given the extremely short gap in time between *Marathon* and the date of that letter, it would be difficult to posit that the 1983 Rules had taken full cognizance of *Marathon*, especially with respect to the jury trial rule. To be sure, Judge Aldisert's letter informed the Judicial Conference that the Bankruptcy Rules were intended to accommodate future amendments necessitated by *Marathon*. Yet this falls somewhat short of vilifying Rule 9015 as comporting with *Marathon*. If anything, a more rational reading of the Advisory Committee letter would be to interpret it as stating that the new Rules, as rules of procedure, were not so confined that they could not be adapted to future amendments of the Bankruptcy Code.[279] Indeed, the

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274 Letter from Circuit Judge Aldisert, Chairman of the Advisory Committee, to District Judge Gignoux, Chairman of the Committee on Rule of Practice and Procedure (Aug. 9, 1982), *reprinted in* 1 COLLIER, ON BANKRUPTCY 1240 (15th ed. 1987).

275 *Id.*

276 Order of the Supreme Court, 97 F.R.D. 57 (Apr. 25, 1983).

277 *See id.*

278 *See* Letter from Judge Aldisert, *supra* note 272, at 1242.

279 Consider also that, in the Preface to the Preliminary Draft for the 1983 Bankruptcy Rules, the Advisory Committee stated "[t]here is a greater possibility for jury trials under the Code than under the [repealed] Act," and made reference to former section 1480. 92 F.R.D. 514, 518. Since this implies the jury trial rule was promulgated in reliance upon that statute, the repeal of section 1480 as discussed

letter did intimate that the 1983 Rules should not be read with a mindfulness of the restrictive parameters set forth in *Marathon*.

Moreover, the fact that neither Congress nor the Supreme Court chose to act on the 1983 Rules is not dispositive with respect to the jury trial rule: the text of Bankruptcy Rule 9015 is wholly unchanged from its first recital in the Preliminary Draft, made months before *Marathon*. This clearly refutes the assertion made by some courts that "these Rules were promulgated by the Supreme Court and were allowed by Congress to become law without change well after *Marathon* and the Emergency Rules."[280] What is perhaps the more accurate answer, one which the previous statement overlooks, is that the Supreme Court and Congress saw no need to change rules of procedure to deal with the substantive issues of *Marathon*. Most certainly, the Court could not have foreseen the utilization of a procedural device such as Rule 9015 as a substantive basis to bestow upon bankruptcy judges the power to conduct jury trials. Indeed, the aforementioned letter of Circuit Judge Aldisert most likely contemplated a similar belief.[281]

Significant here were two court of appeals decisions upholding the validity of the 1983 Rules. Utilizing the "unmistakable clarity" standard of *Hanna v. Plumer*, [282] the United States Court of Appeals for the Second Circuit presumed the new Bankruptcy Rules were constitutional in *Salomon v. Kaiser* (*In re Kaiser*).[283] The court thought it was unlikely that the United States Supreme Court would have promulgated rules of procedure for the bankruptcy and district courts if *Marathon* had invalidated the jurisdiction of both courts.[284] Noteworthy here is that the appellant's argument was directed at the jurisdiction of both the bankruptcy courts and the district courts[285] and the court framed its response in the conjunctive, joining both lower courts under the penum-

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previously herein appears to be exactly the type of future amendment necessitated by *Marathon* that Judge Aldisert stated the Bankruptcy Rules were intended to accommodate. Given this avowed flexibility of the Rules, one way the issue might be reconciled is by viewing Rule 9015 as no longer applicable to the bankruptcy courts since its statutory basis, section 1480, was repealed subsequent to the promulgation of the Rules.

280 McCormick v. American Investors Management, Inc. (*In re* McCormick), 67 Bankr. 838, 843, (D. Nev. 1986).

281 *See* Letter from Judge Aldisert, *supra* note 272.

282 380 U.S. 460, 470 (1965).

283 722 F.2d 1574, 1579 (2d Cir. 1983).

284 *Id.*

285 *Id.* at 1576.

bra of its findings.[286]

In *Frank v. Arnold (In re Morrissey)*,[287] the United States Court of Appeals for the Third Circuit overruled the district court's referral of a bankruptcy court appeal to a United States Magistrate.[288] Concluding its directions on remand to the district court, the tribunal opined on the standard of review contained in new Bankruptcy Rule 8013.[289] In *dicta*, Circuit Judge Aldisert posited that, regarding any conflict between the new rule and the model rule, the new rule must control.[290] The Third Circuit stipulated that any procedural rules, as distinguished from jurisdictional, must yield to the new Bankruptcy Rules.[291]

Analyzing the above, the Second Circuit in *Kaiser* viewed the 1983 Rules as valid when applied to *both* the article III district court and the bankruptcy court. In no manner did the *Kaiser* Court address the validity of the Rules when applied to the bankruptcy courts in isolation, nor did it endeavor to segregate the availability of any single rule to one forum or the other. Obviously, no one could realistically question the ability of the article III district court to conduct a jury trial. *Kaiser*, therefore, offers no comfort to those seeking to employ it to validate Rule 9015, as the decision addressed the two lower courts in unison.

The *Morrissey* decision, while correct in its holding that new procedural rules must overcome any predecessors, is troublesome because it was subsequently victimized by misinterpretation. One cannot argue with Circuit Judge Aldisert's analysis of the 1983 Rules in their true state as procedural provisions. It was the later extrapolation by some courts of Rule 9015 into a rule of substance that led to the Advisory Committee's criticism in the 1987 Committee Note abrogating the rule. By taking task with those who misused the jury trial rule as the basis for a substantive right, the 1987 Advisory Committee verifies as correct *Morrissey's* treatment of the 1983 Rules as procedural devices and nothing more.

The foregoing evolution demonstrates that the courts which used *Kaiser* and *Morrissey* as a springboard to interpret Rule 9015

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286 *Id.* at 1579.
287 717 F.2d 100 (3d Cir. 1983).
288 *Id.* at 101.
289 *Id.* at 104.
290 *Id.*
291 *Id.* at 105.

as giving bankruptcy courts the power to conduct jury trials[292] were incorrect.[293] In expressing its dismay at the use of Rule 9015 for substantive purposes and noting that any rules must not abridge, enlarge or modify a substantive right, the Advisory Committee Note of 1987 clearly sets itself against such positions.[294]

The abrogation of Rule 9015 was a considered and well reasoned step by the judicial branch to end the controversy over the power to conduct jury trials in the bankruptcy courts. The position finally adopted by the Advisory Committee on Bankruptcy Rules, as approved by the Supreme Court and Congress, recognized the need to withdraw the procedural basis for a jury trial power adhering in bankruptcy judges. Bankruptcy Judge Schwartzberg phrased it well in *New Castle Associates v. Kraus-Thomson Organization, Ltd. (In re McCorhill Publishing, Inc.)*[295] when he declared that the abrogation of Rule 9015 likewise banished any claim that bankruptcy courts still retained some vestigial power to conduct jury trials.[296] The court stated the proposition correctly in recognizing that the withdrawal of the procedural jury trial rule reflected the "Congressional initiative" to foreclose jury trials in the bankruptcy courts.[297] Indeed, the identical findings of the *Hughes-Bechtol* opinion[298] lend further support to the validity of this proposition.

Contrast the foregoing to the long stretch made by the court in *Price-Watson Co. v. Amex Steel Corp. (In re Price-Watson Co.)*,[299] where it asserted that the abrogation of Rule 9015 merely left the question open for future judicial resolution.[300] Such a view simply does not do justice to the clear intent of the Advisory Com-

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292 *See, e.g.*, Nashville Bank & Trust Co. v. Armstrong (*In re* River Transp. Co.), 35 Bankr. 556 (Bankr. M.D. Tenn. 1983).

293 Propositions such as that stated in Robinson v. Hinkley (*In re* Hinkley), 58 Bankr. 339, 344 (Bankr. S.D. Tex. 1986), that "the Supreme Court, in promulgating Rule 9015, must adhere to the view that there is a substantive right to a jury trial in the bankruptcy court," and assertions like that made by Bankruptcy Judge Bason in Blackman v. Seton (*In re* Blackman), 55 Bankr. 437, 440 (Bankr. D.D.C. 1985), that "[t]he Bankruptcy Rules expressly vest power to conduct jury trials in the bankruptcy court" must fall before this analysis.

294 *See* Advisory Committee Note, 114 F.R.D. 392 (1987).

295 90 Bankr. 633 (Bankr. S.D.N.Y. 1988).

296 *Id.* at 636.

297 *Id.*

298 *See* Hughes-Bechtol v. Air Enter. Inc. (*In re* Hughes-Bechtol, Inc., 107 Bankr. 552, 571 (Bankr. S.D. Ohio 1989).

299 66 Bankr. 144 (Bankr. S.D. Tex. 1986).

300 *Id.* at 152.

mittee in its abrogation of the rule. Undeniably, the Committee sought to end, once and for all, the fragmented case law that fueled the controversy for so many years. The *Price-Watson* interpretation serves only to propagate inconsistent holdings, not bring about a decisive ruling.

Indeed, the black letter text of the Advisory Committee Note[301] tells us, in no uncertain terms, that the statutory basis for jury trials in bankruptcy court, former section 1480, no longer exists.[302] Its replacement, section 1411, and its companion, section 157(b)(5), are severely circumscribed as to where a jury trial should be held, and for what precise causes of action.[303] It also recognized the historical abuse of Rule 9015 as a substantive device.[304] It is certainly an arduous task to argue that, in abrogating the jury trial rule, the Advisory Committee countenanced bankruptcy judges possessing the power to preside over jury trials. If anything, the Advisory Committee Note demands the opposite conclusion.

To be sure, the Advisory Committee Note recognized the possibility of a future decision defining a right to a jury trial in bankruptcy matters. Crucial here is the fact that the language of the Note speaks of a *right* to a jury trial, not the *power* of the bankruptcy court to conduct a jury trial.[305] The better view of that statement is to interpret it as foreseeing a possible future rule change responsive to an as yet undefined jury trial right;[306] not as anticipating some grant of authority to the bankruptcy courts to conduct jury trials.

Indeed, the choice of words in the *Marathon* opinion should dispel any doubt whatsoever that the Court does not consider the article I bankruptcy judges to be empowered to preside over jury proceedings. Recall also that the Advisory Committee Note points out that the jury trial rule was abrogated because it violated the statutory prohibition that the rules could not "abridge, enlarge, or modify any substantive right."[307]

In short, the jury trial rule, as originally promulgated in

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301 114 F.R.D. 193, 392 (1987).

302 *Id.*

303 *Id.*

304 *Id.*

305 *Id.* (emphasis added).

306 This writing does not address the controversy over the right to a jury trial in bankruptcy matters, as that ongoing controversy has evolved since the seminal case of Katchen v. Landy, 382 U.S. 323 (1966).

307 114 F.R.D. 193, 392 (1987) (citing 28 U.S.C. § 2075).

1983, was a procedural device run amok. Recognizing this misuse of Rule 9015 as a substantive basis for investing a jury trial power in bankruptcy judges, the courts, and Congress, after careful deliberation, abrogated the Rule. Certainly, it was felt that nothing less than the total elimination of the jury trial rule would provide relief. This critical development speaks mightily against any assertion that bankruptcy judges are today empowered to conduct jury trials.

C. *Not All Article I Courts Are Created Equal*

A temptation several courts have succumbed to in finding authority for jury trials before bankruptcy judges is to make a favorable comparison between bankruptcy tribunals and their article I relations, the United States Magistrates. While both adjudicative bodies are alike, in that they are legislative, non-article III courts, crucial differences abound, making them non-coordinate bodies. Primarily, the distinctions lie in the fact that one, the magistrates enjoy well-defined statutory authority for, *inter alia*, undertaking a jury trial, and two, such grant of jurisdiction is carefully circumscribed.

As a rule, magistrates possess only limited powers.[308] Their ability to conduct misdemeanor trials[309] is subject to the accused giving written consent to the waiver of his absolute right to be tried by the district court.[310] Consent of the parties is required for a magistrate to serve as a special master[311] or to conduct a proceeding in a jury matter.[312] Moreover, the voluntariness of the parties' consent in such instances is carefully protected.[313]

This matter of explicit statutory authorization to the magistrates was seized upon by District Judge Winder in *American Community Services, Inc. v. Wright Marketing, Inc. (In re American Community Services, Inc.)*.[314] The court found that unlike the article I magistrates, Congress had not statutorily delegated to bank-

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[308] *See* Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 712 F.2d 1305 (9th Cir. 1983), *reconsidered and remanded*, 725 F.2d 537 (9th Cir. 1984) (*en banc*) (Kennedy, J.), *cert. denied*, 469 U.S. 824 (1984), for a discussion of the many restrictions on the exercise of the article III judicial power by article I magistrates.

[309] 28 U.S.C. § 636(a)(3) (1988).

[310] 18 U.S.C. § 3401(b) (1988).

[311] 28 U.S.C. § 636(b)(2) (1988).

[312] 28 U.S.C. § 636(c)(1) (1988).

[313] 28 U.S.C. § 636(c)(2) (1988). *See* Comment, *Magistrate Trials: The New Hierarchy of Class 2 Adjuncts and Article III Judges*, 58 ST. JOHN'S L. REV. 559, 559 (1984) (the statute "sets forth procedures to ensure that no litigant is coerced to consent").

[314] 86 Bankr. 681 (D. Utah 1988).

ruptcy judges the authority to preside over jury trials.[315] The district court contrasted the lack of express power for the bankruptcy court to conduct jury trials to the statutory mandate given magistrates to do so.[316] Moreover, Judge Winder pointed out that the United States Supreme Court explicitly upheld the magistrate provisions of the Judicial Code as constitutional because the system of reference provided for the district court's maintaining ultimate authority over final decisions.[317]

As aforementioned, the court in *Weeks v. Kramer* (*In re G. Weeks Securities Inc.*)[318] also found the lack of parallel statutory authority fatal to any comparison of bankruptcy court jury trials to those before a magistrate.[319] Among other things, Bankruptcy Judge Brown noted the dissimilarity in appellate review between decisions rendered by magistrates and those issued by bankruptcy judges.[320]

To be sure, this article III concern continues to play a role in proscribing the permissible scope of action allowed a magistrate. Consider, for example, *Ford v. Estelle*,[321] where the Fifth Circuit found that the Magistrate's Act, specifically 28 U.S.C. § 636(b)(1)(B), does not permit district courts to refer prisoner civil rights actions to magistrates for jury trial because such a trial "involves fact-finding intrinsically incapable of review *de novo*."[322] Clearly, the matter of appellate review is vital in ascertaining the limits of authority of any article I court; be it the magistrates or the bankruptcy courts.

A key illustration of the tension between the article I magistrates and the article III courts is the United States Supreme Court's pronouncement in *Gomez v. United States*.[323] The principal question, wrote Justice Stevens, was the ability of a magistrate to preside at the selection of a jury in a felony trial without the defendant's consent.[324] In *Gomez*, the magistrate exercised the full gamut of jury selection powers: questioning the veniremen, instructing them on points of law, the charged offenses, various presumptions and burdens, and, lastly, admonishing the panel

315 *Id.* at 688.
316 *Id.* at 689.
317 *Id.* (citing United States v. Raddatz, 447 U.S. 667 (1980)).
318 89 Bankr. 697 (Bankr. W.D. Tenn. 1988).
319 *Id.* at 714.
320 *Id.* at 715.
321 740 F.2d 374 (5th Cir. 1984).
322 *Id.* at 380-81.
323 109 S. Ct. 2237 (1989).
324 *Id.* at 2239.

not to discuss the case with anyone.[325]

Finding that the performance of such tasks exceeded the statutory authority of the magistrate, the Court stated that if the magistrate were to conduct the jury selection, "we harbor it would raise serious doubts about the district judge's ability to provide meaningful review.[326] Quite simply, Justice Stevens expressed the view that the exercise of this power by the article I magistrate was too important to be left to a secondary review by the article III district judge.[327] As for the permissibility of such an undertaking being accorded by statute, the Court held that the lack of a specific reference to jury selection in the magistrate statutes or their legislative history was persuasive that Congress did not intend for the legislatively mandated magistrates to perform this function.[328]

Certainly, any comparison of the power of magistrates to that of bankruptcy judges in seeking jury trial authority for the latter is a suspect, if not dangerous, exercise. While both tribunals share article I status, they diverge in terms of their explicitly legislated authorization. Magistrates benefit from clearly defined provisions upon which to ground the exercise of their judicial functions. Moreover, this body of law is most certainly subject to various constitutional limitations, pursuant to the omnipresent article III.

As demonstrated, bankruptcy courts have no such foundation to build upon. "It is undisputed that [b]ankruptcy [c]ourts have no such express statutory authority" as do magistrates for conducting jury trials, as noted by Chief Bankruptcy Judge Kahn in *Poissonnerie La Belle Maree, Inc. v. Johnson (In re Johnson)*.[329] Moreover, judicial decisions, particularly the Supreme Court's in *Gomez v. United States*,[330] evince a clear intent by the Supreme Court to maintain a firm grip on any utilization of article III powers by magistrates. Already weakened by the lack of parallel statutory authority, the bankruptcy court should be considered to be at least as proscribed from conducting jury trials as their fellows on the magistrate bench.

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325 *Id.*

326 *Id.* at 2247. In a pragmatic footnote, Justice Stevens noted that even supposing a meaningful review by the district judge was possible, "the time consumed by such review would negate time initially saved by the delegation." *Id.* at 2247 n.29.

327 *See id.* at 2247.

328 *Id.*

329 115 Bankr. 712, 715 (Bankr. S.D. Ala. 1990).

330 109 S. Ct. 2237 (1989).

D. *The Supreme Court Speaks To Article III*

Once again, any proper analysis of this controversy brings us back to the seminal holding of *Marathon*. Notwithstanding the difficulties some courts had with *Marathon*, a comprehensive reading of that decision refutes any notion that the Court intended anything other than that the right to preside over a jury trial was an "essential attribute" of the judicial power in which the non-article III bankruptcy court could not share. At the outset, the opinion catalogued the powers vested in the bankruptcy courts by the 1978 Code, including, *inter alia*, the power to preside over jury trials.[331] "The inexorable command" of article III, opined the Court, is that the collective judicial power of the United States must be exercised by judges enjoying the cherished protections of article III: namely lifetime tenure and undiminished compensation while in office.[332]

With this foundation in place, the Court turned to the question of whether the 1978 Act violated article III's command that the United States judicial power "be vested in courts whose judges enjoy the protections and safeguards specified in that [a]rticle."[333] The Court answered that question with an unequivocal "yes," finding the new Bankruptcy Code vested all of the "essential attributes" of the judicial power in the "adjunct" bankruptcy courts.[334] The opinion specified that the bankruptcy court was exercising all the ordinary powers of the district court, which included presiding over jury trials,[335] and that this was an exercise of powers far greater than those lodged in other adjunct courts as approved by the Court in earlier decisions.[336] To be sure, the repeated, detailed references to the jury trial power as

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331 Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 55 (1982).

332 *Id.* at 58-59.

333 *Id.* at 62.

334 *Id.* at 84-85.

335 *Id.* at 85.

336 *Id.* at 86 (citing Crowell v. Benson, 285 U.S. 22 (1932) and United States v. Raddatz, 447 U.S. 667 (1980)). Furthermore, the Court explained in a footnote that "exercise of the judicial power must be met at all stages of [the] adjudication," taking heed of the fact that a case is "shaped at the trial level." *Id.* at 86 n.39. This would appear to refute statements such as "a jury is a jury, no matter who presides over the trial." Price-Watson Co. v. Amex Steel Corp. (*In re* Price-Watson Co.), 66 Bankr. 144, 159 (Bankr. S.D. Tex. 1986). *See also* George Woloch Co. v. Longview Capital Plastic Pipe, Inc. (*In re* George Woloch Co.), 49 Bankr. 68, 70 (E.D. Pa. 1985) ("The notion that a jury trial is likely to produce a different result depending upon whether the presiding judge is a district court or a bankruptcy judge seems far-fetched").

an "essential attribute" make it clear that *Marathon* stands for the proposition that the bankruptcy courts, as article I courts, cannot conduct jury trials. Further pronouncements by the Court have only strengthened the force of these statements.

Subsequent to the passage of BAFJA, the United States Supreme Court has twice returned to the article III concerns so vital to the Court's opinion in *Marathon*. In *Thomas v. Union Carbide Agricultural Products Co.*,[337] the Court held that arbitration of matters arising under the Federal Insecticide, Fungicide, and Rodenticide Act by an administrative agency did not contravene article III.[338] In so doing, the Court noted it had long recognized that Congress retains the authority to vest decision-making power in non-article III tribunals.[339] Specifically referring to *Marathon*, the Court observed that the divided Court held "only that Congress may not vest in a non-[a]rticle III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review."[340] Indeed, such a statement would appear to go to the very heart of both *Marathon* and BAFJA.

A crucial post-*Marathon* pronouncement by the Court on the issue may be gleaned from its decision in *Commodity Futures Trading Commission v. Schor*.[341] The direct issue, as framed by the Court, was whether the Commodity Futures Trading Commission (Commission) was empowered to entertain state law counterclaims in reparation proceedings and, if so, whether that grant of authority violated article III.[342] As could well be expected, such an article III inquiry necessitated due consideration of *Marathon* and its statements on the essential attributes of the article III judicial power.[343]

Writing for the majority, Justice O'Connor acknowledged that in these matters the Court had focused upon, *inter alia*, the extent to which the essential attributes of the judicial power are reserved to the article III courts and, conversely, the extent to which the non-article III forum exercises the powers normally

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337 473 U.S. 568 (1985).
338 *Id.* at 594.
339 *Id.* at 583.
340 *Id.* at 584.
341 478 U.S. 833 (1986).
342 *Id.* at 835-36.
343 *Id.* at 841-59.

vested solely in the article III courts.[344] Ruling that the investiture of certain limited powers in the Commission did not violate this test, the opinion made comparisons between *Marathon* and the instant case.[345] Germane to this discussion was the finding that the Commission's enabling legislation left far more of the essential attributes of the judicial power with article III courts than had the provision of the Bankruptcy Act that was found unconstitutional in *Marathon*.[346]

Interestingly, both the *Thomas* and *Schor* opinions were written by Justice O'Connor, who had filed a separate opinion concurring in the judgment in *Marathon*. Readers of these three opinions would do well to bear in mind the implicit warning in *Schor* that the Court would not tolerate the creation of an entire body of non-article III courts empowered to conduct the business of article III courts.[347]

The import of the foregoing is clear. By classifying the ability to preside over jury trials as one of the essential attributes of the judicial power, *Schor*, like *Marathon*, demonstrates that power is normally reserved to the article III courts and not one easily transferable to an article I forum. Critical to the Commission's ability in *Schor* to pass muster under article III scrutiny was the fact that the power to preside over jury trials was not vested in it. Moreover, Justice O'Connor's opinion confirms the language of *Marathon* on the jury trial issue by pointing out the Bankruptcy Code as first promulgated impermissibly vested the power to conduct jury trials, an "essential attribute," in the bankruptcy courts. It would be sheer folly to simply ignore such a specific reference to the jury trial issue as made by the Supreme Court in *Schor*. Indeed, the fact that the *Schor* Court selected the power to preside over jury trials from among the other powers catalogued in *Marathon* is at the least highly indicative of a continued belief by the United States Supreme Court that the bankruptcy courts do not have the power to conduct jury trials. To state otherwise

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344 *Id.* at 851.

345 *Id.* at 851-52.

346 *Id.* at 852. In *Schor's* most telling point on the jury trial issue, Justice O'Connor concluded this portion of the discussion by stating "the [Commission], unlike the bankruptcy courts under the 1978 Act, does not exercise "all ordinary powers of district courts," and thus may not, for instance, preside over jury trials or issue writs of habeas corpus." *Id.* at 853 (citing *Marathon*, 458 U.S. at 85).

347 *Id.* at 855. In addition, Justice O'Connor stated that Article III acts to safeguard the "institutional interests" of our tripartite system, negating any preclusive effect of a party's consent to, or waiver of, jurisdiction. *Id.* at 850-51.

today creates a serious risk of running afoul of both *Marathon* and *Schor*.

On a related judicial front, consider that Justice Kennedy may also be keenly interested in the article III issues raised by the comparison of bankruptcy court jury trial authority to the existing jury trial power of federal magistrates. Prior to his elevation to the Court, Justice Kennedy authored the *en banc* decision of the Ninth Circuit in *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*[348] The upshot of then-Circuit Judge Kennedy's writing clearly shows him to be a staunch defender of article III against any supposed encroachment by tribunals created via legislative fiat.

In deciding the constitutionality of provisions of the Federal Magistrate Act of 1979,[349] Judge Kennedy posited that the qualities of article III judges which make them a separate and independent judiciary "are present constitutional necessities, not relics of antique ideas."[350] The judge continued that the independent character of judgments entered under article III granted such judgments well known qualities of authority and respect.[351] Bypassing arguments regarding the consent of parties to non-article III adjudication, the court emphasized that the true issue was the transfer to another forum of article III jurisdiction: a protective component of the constitutional structure which cannot be waived by the parties.[352]

Notably making extensive usage of *Marathon*, Judge Kennedy held that for the independent role of the judiciary to be preserved, "there must be both the appearance and the reality of control by [a]rticle III judges."[353] Further, the *Pacemaker* court ruled that the required control must exceed simple appellate review.[354] Finding sufficient control of the magistrates under the existing scheme, the court found no violation of article III.[355]

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348 725 F.2d 537 (9th Cir. 1984), *cert. denied*, 469 U.S. 824 (1984). *See supra* note 308 and accompanying text.

349 *Id.* at 539.

350 *Id.* at 541.

351 *Id.*

352 *Id.* at 543-44.

353 *Id.* at 544.

354 *Id.*

355 *Id.* at 544-47. Interestingly, Judge Kennedy did find it of some importance that the district court retained the power of contempt and noted that the "constitutional symmetry" of the magistrate statutes were detracted from by the inclusion of article I bankruptcy judges in the Judicial Conference of the United States, the body which determines the number of magistrates for each district, a key to "exclusive judicial control." *Id.* at 545.

Based upon the foregoing, it would seem that *Marathon*, and the decisions which followed it, provide clear markings as to the Court's views on article III, particularly as to the power of bankruptcy judges to conduct jury trials. Particular note must be taken of Justice O'Connor's active role in shaping this jurisprudence, and the views previously expressed by Justice Kennedy in addressing article III concerns. From all of this, we must conclude the Court would respond in the negative to any assertion of jury trial power by bankruptcy judges.

E. Resolving the Circuit Conflict

Ultimately, we come to the present embodiment of the controversy over the power of the bankruptcy courts to conduct jury trials. A controversy fueled by the decision of the Second Circuit in *Ben Cooper*, and, standing in contradistinction, the decisions of the Eighth Circuit in *United Missouri Bank* and the Tenth Circuit in *Kaiser Steel*. It is here that we see the Court of Appeals for the Second Circuit has forged a course difficult to support, and subject to sharp criticism.

Initially, the scope of the Second Circuit's ruling seems overly broad. It would appear that the issue presented before the *Ben Cooper* court was limited to the core/non-core determination of the underlying action to ultimately decide whether an entitlement to a jury trial existed, not whether there was an entitlement to a jury trial in a bankruptcy court. It is not entirely clear as to the linkage between those matters and the panel's holding.

Turning to the substance of the decision, few would argue that the Second Circuit was unjustified in finding the *Granfinanciera* decision to be "opaque" in some respects. Yet it is quite puzzling as to how the tribunal deciphered that supposedly nebulous decision as containing various passages that supported the conduct of jury trials by bankruptcy judges. In fact, the statement in *Ben Cooper* that *Granfinanciera* does not foreclose bankruptcy court jury trials can rightly be called unwarranted, for the court extended reasoning it had already decried as unclear as the basis for finding that substantial authority resided in the bankruptcy court. One could well agree that, rather than venture further out into the swift and unchartered currents of *Granfinanciera*, the Second Circuit should have retreated to higher ground.

Likewise, Judge Timbers found virtually no guidance in section 1411, yet proceeded hastily from that vacuum to look elsewhere for some statutory authority In doing so, the court first

looked to the classification of bankruptcy judges as judicial officers of the district court. To be sure, this is a provision whose boundaries have yet to be fully tested. Second, this analysis seems to assume too much in the mere labeling of the article I bankruptcy judge as a judicial officer of the district court. Certainly, the boundaries between a non-article III jurist and the federal judiciary needs clearer definition than this reference provides, if the strictures of article III are not to be offended. Lastly, this point in *Ben Cooper* virtually ignores the other cases where greater significance is attributed to the status of bankruptcy judges as "units" of the district court; a significance not to be overlooked in light of *Marathon* and its denouncement of the pervasive authority given bankruptcy judges by the original 1978 enactment of the Code.

The *Ben Cooper* court next turned to section 157. It is suggested here that such an analysis is oversimplified, as it seems to take the core jurisdiction authorized by the statute as an all-encompassing grant. As such, it fails to discriminate to a sufficient degree the core/non-core dichotomy, and possibly reads too much into the jurisdiction over core matters given the bankruptcy courts. Certainly, this is reminiscent of the defects found by *Marathon*, which in turn precipitated the creation of the core/non-core proceedings by the 1984 Amendments.

Lastly, the tribunal's virtual aloofness to the abrogation of former Bankruptcy Rule 9015 is faulty. In condoning those decisions which substituted the general federal rules or local rules for the non-existent Rule 9015 belies the importance of that amendment, and flies in the face of the basic spirit and intent of abrogating the jury trial rule in the first instance.

The flawed reasoning of the Second Circuit was exposed to a high degree in *United Missouri Bank*. In its conservative approach, the Eighth Circuit did not address the constitutional issues, finding the resolution of the statutory question a sufficient basis for its decision. Still, the panel's *ratio decendi* provides a more than adequate basis to support its finding that bankruptcy judges cannot conduct jury trials. From the outset, the tribunal properly reminds us that *Granfinanciera* decided the right to a jury trial in bankruptcy proceedings, but not the forum in which to exercise that right. Unlike the Second Circuit, the *United Missouri Bank* court refused to read into *Granfinanciera* some authority for the conduct of jury trials by bankruptcy judges.

The Eighth Circuit provided some rather cogent observa-

tions as to article I courts, and the bankruptcy courts in particular. As summarized by the court, no legislative authority existed historically for bankruptcy judges to conduct jury trials. In establishing this base line, the appellate court reminded that any assertion of jury trial authority residing in bankruptcy judges represents a sharp change from the traditional, equitable role of that bench. The panel then exposited the critically sequenced events that engendered the jury trial controversy under the modern Bankruptcy Code.

Chief Judge Lay commenced with the apparent intention of Congress in 1978 to grant bankruptcy judges pervasive jurisdiction, including the power to conduct jury trials, and the striking down of this wide authority by the Supreme Court in *Marathon*. Next, the *United Missouri Bank* panel asserted that the Supreme Court did indeed consider the power to conduct jury trials to be an "essential attribute" of the article III power, which it revoked from the bankruptcy court in *Marathon*. In this author's view, that is a point which can never be emphasized enough.

Lastly, the Eighth Circuit noted that BAFJA, as compelled by *Marathon*, established the core/non-core dichotomy, and *a fortiori* deprived the bankruptcy court of any authority to conduct jury trials. In particular here, the panel recognized that the restrictive provisions of the 1984 Amendments are simply incompatible with any notion that therein lies some statutory authority for article I bankruptcy judges to preside over jury trials.

Parenthetically, one should be reminded of the matter of the reconstituted bankruptcy courts being labelled by BAFJA as a "unit" of the district court. As emphasized in the *Weeks* and *Hughes-Bechtol* decisions, the terminology of the 1984 Amendments lends further weight to the assertion that the article I bankruptcy courts play a subservient role to the article III bench. The inability of the former tribunal to exercise the full scope of the judicial power is a key illustration of that inferior role, as mandated by *Marathon*, and codified by BAFJA.

In this fashion, the circuit court very clearly established that these events and their ordination were not mere happenstance. Rather, they represent the initial investiture of a jury trial power in the article I bankruptcy court, and then its revocation as unconstitutional by the Supreme Court. The 1984 Amendments, promulgated in response to *Marathon*, may not be properly interpreted as restoring that forbidden power, but only make sense

when viewed as lacking authorization for jury trials before bankruptcy judges.

Moreover, Chief Judge Lay emphasized that section 157 contains no express language granting bankruptcy judges the power to conduct jury trials. Correctly observing that the amendments wrought by BAFJA speak only to the power of the district courts to hear specific tort claims, the court compared these provisions to the statutory authority of magistrates to preside over jury trials. The panel succinctly commented that Congress, as evidenced by the magistrate statutes, is plainly aware of what it need enact in a statute to authorize an article I judge to conduct a jury trial.

Because BAFJA failed to enact such language, the fact that no expression of statutory authority for bankruptcy judges to conduct jury trials exists anywhere is inescapable. By this reading, the court did fairness not only to the bankruptcy laws, but also to its corollaries empowering similar, but not identical, article I courts.

Importantly, the Eighth Circuit also examined the law for some implication of a bankruptcy jury trial power. As before, however, it found none. Rejecting the analysis by the court below, the tribunal found the sparse legislative history of BAFJA simply included no cognizable indication that Congress wished to emplace jury trial authority in bankruptcy judges.

The panel was likewise correct in finding that *Ben Cooper* made a "faulty syllogism," wherein the Second Circuit equated the jury trial right with jury trial authority. The more rational approach, employed by the *United Missouri Bank* court, was to hold that Congress did not truly consider providing jury trial authority to bankruptcy judges. This interpretation does not bend the statutory scheme in search of an implication of that jury trial power, and comports with the apparent reaffirmation of the strictly circumscribed scope of authority given the post-*Marathon* bankruptcy judges.

Indeed, the Eighth Circuit is credited with the better perspective for its finding that an implied jury trial power is not necessary to effectuate the bankruptcy laws. Rightly so, the panel held that the power to conduct jury trials is not "indispensable and essential" to the intended function of a bankruptcy judge. In this fashion, the court did not attempt to forcibly read into the law some oppressive need for jury trial authority, and thus avoided doing violence to the statutory language. Furthermore,

the view of the Eighth Circuit is easily reconciled to the historical role of the bankruptcy court as one of equity, a status which does not consider the jury trial as indispensable to its proper function.

Little need be added by way of expositing the Tenth Circuit's decision in *Kaiser Steel*. Suffice to say, that tribunal's close tracking of the Eighth Circuit's decision not only serves to reinforce its propriety, but also lends additional emphasis to its stated rationale.

Like *United Missouri Bank*, the *Kaiser Steel* opinion refused to tortuously wrest from the existing Code some statutory authority for jury trials in bankruptcy court. Distancing itself from the Second Circuit on that point, the panel repeated the crucial role of *Marathon* in coming to the conclusion that the present Code does not, and could not, instill the article I bankruptcy bench with the "essential attribute" of the article III jury trial power.

The *Kaiser Steel* court also looked to the fact that the present enabling statutes speak to the personal power of bankruptcy judges to hear cases, not juries. As the panel indicated, this choice of language cannot be taken lightly. The clear conclusion of the foregoing point is that Congress intended the judges of the bankruptcy court, not juries they might empanel, to hear and decide controversies.[356]

Moreover, the Tenth Circuit addressed the inherent problem of reviewability, should a jury be utilized as a fact finder in bankruptcy proceedings. As Judge Tacha correctly noted, the seventh amendment, in forbidding any re-examination of the findings of the jury, unavoidably clashes with the bankruptcy judge's statutory authority to determine the case. This is by itself irreconcilable within the present bankruptcy infrastructure. Clearly, the *Kaiser Steel* court believed this insurmountable difficulty foreclosed any possibility of jury trials in bankruptcy court.

Further, as the teachings of other cases have demonstrated, this obstacle is only exacerbated on appellate review, where the present *de novo* review provisions collide head-on with the historical unreviewability of any factual determinations by a jury. In one commentary, District Judge (formerly Chief Bankruptcy Judge) Conrad Cyr asserted that the interplay of the seventh amendment's restrictions with article III's limitations on the del-

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356 Notably, the circuit court comported very closely with the ruling of Bankruptcy Judge Brown in *Weeks*, where that court also recognized the overt significance of the assignment of adjudicative powers not to the bankruptcy courts, but to its judges.

egation of judicial power to article I bankruptcy judges posed "[t]he most severe constitutional problem."[357]

This difficulty was fully exposited in *Hughes-Bechtol*. Bankruptcy Judge Waldron pointed out the irreconcilable clash between the seventh amendment's prohibition against a reexamination of facts found below by a bankruptcy court jury and the statutory requirement for a review *de novo*, a necessity pursuant to article III. Quite correctly, that court avoided these "constitutional conflicts" by taking the only viable course open to it, deciding bankruptcy judges cannot conduct jury trials. Taken in sum, it is self-evident that those constitutional obstacles over the appealability question strongly militate against any finding that jury trials may proceed in bankruptcy court.

Lastly, the Tenth Circuit also brought to the fore the stunning dissimilarity between the enabling statutes for federal magistrates and those for bankruptcy judges. Due note should be taken of the tribunal's concise statement that it was greatly compelled to find against jury trials in bankruptcy court, as Congress did not legislate a statute permitting bankruptcy judges to conduct jury trials symmetrical to the provision empowering magistrates to do so.

In sum, the positions taken by *United Missouri Bank* and *Kaiser Steel* do much to resolve the erroneous findings of jury trial authority in bankruptcy courts, especially as exacerbated in *Ben Cooper*. While their self-imposed limitation to address only the statutory question may still leave the constitutional issue open, the concise authority provided on the former issue is ample enough to provide controlling authority for future decisions. Moreover, the decisions as a whole provide an important contrast to *Ben Cooper*, and a logical point of comparison for the United States Supreme Court in reviewing the controversy.

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357 Cyr, *The Right To Trial By Jury In Bankruptcy: Which Judge Is To Preside?* 63 AM. BANKR. L.J. 53, 61 (1989). As summarized by Judge Cyr, the dilemma is this:

> If the district court itself may not conduct a second jury trial, and may not provide *de novo* review of the jury verdict, there seems to be no escaping the fact that the district court will be found to have relinquished the judicial control constitutionally required to assure compliance with article III by permitting the bankruptcy judge to preside at any seventh amendment jury trial. It seems likely as well that section 157(c)(1) itself would be transgressed in the absence of a right of *de novo* review by the district court in such circumstances.

Id.

F. *The Portents of* Granfinanciera

1. The Majority Ruling

As exposited above, the Court rather bluntly refused to decide in *Granfinanciera* if bankruptcy judges possessed the power to conduct jury trials. Nevertheless, in writing for the majority, Justice Brennan left a multitude of clear and convincing signs for any who might travel this road again in search of an answer to the instant controversy. When the Court once again embarks on the jury trial issue, the teaching of *Granfinanciera* will be crucial.

Consider first the discussion in *Granfinanciera* regarding the inability of Congress to alter any seventh amendment rights by mere "taxonomic" change. Surely, this is evidence of the Court's distaste for legislative intrusions upon constitutional guarantees, via suspect reclassifications of causes of action or the shifting of adjudicative responsibilities to a "specified court." At a minimum, such strong language strikes a cautionary note for those inclined to believe article I bankruptcy judges may conduct jury trials.

Of equal, if not more, importance is the high tribunal's warning that the legislature is limited in its power to place adjudicative authority in article I courts. In particular, the *Granfinanciera* Court noted that the task of initial fact-finding cannot be freely dispensed to non-article III bodies by Congress. In an oblique reference to the original provisions of the Bankruptcy Code, the Court recognized that the foregoing was true even if Congress labelled that legislative court an "adjunct" to the article III bench. Is this a hint as to a similar disdain for the reconstituted bankruptcy court as a "unit" of the federal court system?

Another signal is given in the unabashed criticism of section 1411; the sole remaining statutory provision relating to the jury power question. Finding fault with both its language and its "confused" legislative history, it would seem highly unlikely for the Court to ever extensively rely upon such a nebulous provision as proper statutory authority for bankruptcy judges to conduct jury trials, let alone expand the scope of that statute. The more likely route would be for the Court to narrow the application of that provision, in view of its inherent weaknesses.

Lastly, the Court rested any doubt as to the status of *Granfinanciera*, vis'-a-vis' the Court's prior decision in *Schor*, by explicitly holding that bankruptcy cases are unlike proceedings before other article I tribunals, as creditors lack an alternative forum to the bankruptcy court. In so ruling, the Court indicated

the need for a greater level of constitutional protections in bankruptcy proceedings. To be sure, this finding comports with the numerous statements in *Schor*, wherein the Court made plain its intent to safeguard article III, and the essential attributes thereof, including the power to conduct jury trials.

Although the Court did not explicitly decide if bankruptcy judges are empowered to conduct jury trials, the majority was unmistakably clear in its view that Congress was not free to create legislative courts and then deposit in them adjudicative responsibilities. The Court stressed that the powers of the article III courts are to be strictly safeguarded. The tenor of the Court's opinion leads one to think that it would not at all favor the conduct of jury trials by bankruptcy judges. While Justice Brennan, the author of both the seminal *Marathon* holding and *Granfinanciera*, shall be absent and Justice Souter remains to be an unknown quantity, it is suggested here that the overall matrix is little changed, leading to the belief that this Court is unlikely to differ much in its views from the panel in *Granfinanciera*.

2. The Other Voices

While the foregoing analysis of the majority opinion in *Granfinanciera* is certainly *de riguer* for this discussion, the other voices heard in that opinion provide much insight into the inclinations of the high bench. In many ways, both the concurring and dissenting opinions assist in the prognostication of what the Court might hold when it decides whether bankruptcy courts may conduct jury trials.

Justice Scalia, concurring in all but one part of the majority opinion and concurring in the judgment, chose to focus upon the "public rights" issues raised in the holding.[358] Essentially, Justice Scalia took the view that Congress could permissibly assign "to tribunals lacking the essential characteristics of [a]rticle III courts" only those "public rights" which arise between the government and others.[359] The Justice relied upon the language of article III, opining that the Constitution unambiguously directs that the judicial power to adjudicate legal controversies between private parties cannot vest in federal court in a non-article III tribunal.

In sum, Justice Scalia took a narrow view of what could be

[358] 109 S. Ct. at 2802 (Scalia, J., concurring in part and concurring in the judgment).
[359] *Id.*

assigned to the article I bankruptcy court, and insisted that legal controversies are within the sole domain of the article III bench. This would seem a clear signal that Justice Scalia considers the non-article III bankruptcy tribunals to be excluded from deciding causes of action grounded in law, per force delimiting the article I bankruptcy judges to sitting as courts of equity.

Lest there by any doubt of Justice Scalia's resolve to preserve the sanctity of the "essential attributes" of the article III courts, note well his comment that "judicial powers" is a term "now drained of constant content," and his demand that "[t]his central feature of the Constitution must be anchored in rules, not set adrift."[360] The only sensible interpretation of the foregoing is that Justice Scalia would most likely oppose article I bankruptcy judges conducting jury trials, either as an unwarranted encroachment upon article III or because, as an equitable tribunal, it need not sit with a jury.

The latter point might also be drawn with some comfort from the dissent of Justice White. The theme of his opinion is that bankruptcy courts are "by their very nature" courts of equity where "a jury would be out of place."[361] Indeed, the dissent posited that requiring juries to be utilized in bankruptcy courts would disrupt and unravel the congressionally created statutory scheme."[362] Justice White's thesis was grounded upon a contention that Congress had rightfully exercised its constitutional authority[363] to define actions such as the one at issue in *Granfinanciera* as being at the core of the bankruptcy bench's equitable jurisdiction, "triable in a bankruptcy court before a bankruptcy judge, and without a jury."[364] *A fortiori*, Justice White is apparently of the view that a bankruptcy judge, sitting in equity, is not authorized to empanel a jury.

Lastly, the dissent of Justice Blackmun, as joined by Justice O'Connor, clearly follows the same path. The closing dissenters repeatedly referred to the bankruptcy courts as "equitable tribunals" where jury trials are impermissible.[365] Few could argue

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360 *Id.* at 2805 (Scalia, J., concurring in part and concurring in the judgment).

361 *Id.* at 2810 (White, J., dissenting).

362 *Id.* at 2812 (White, J., dissenting).

363 U.S. CONST. art. I, § 8, cl. 4. The constitution provides that Congress may "establish . . . uniform laws on the subject of bankruptcies." *Id.*

364 *Granfinanciera*, 109 S. Ct. at 2814 (White, J., dissenting).

365 *Id.* at 2817 (Blackmun, J., dissenting). Indeed, Justice Blackmun described the equitable tribunals that comprise the bankruptcy courts as both "special" and "expert." *Id.* at 2817-18 (Blackmun, J., dissenting).

that it would be at all likely for Justice Blackmun or Justice O'Connor to find that such an unmistakably equitable forum as the bankruptcy court could empanel a jury.

In toto, it would seem clear that the *Granfinanciera* Court would oppose jury trials in bankruptcy courts as being violative of article III.[366] As this is very much the same court that shall decide the controversy today, the ramifications are obvious.

G. *Beyond the Jury Trial Issue*

1. The Bankruptcy Court—A Forum At Constitutional Risk

As if the statutory and constitutional questions surrounding the power of bankruptcy judges to conduct jury trials were not enough, that question, important as it may be standing alone, may yet prove to be simply the key to a Pandora's Box of nightmarish repercussions for the entire existing scheme of bankruptcy jurisdiction. When and if the Court reviews the correctness of the *Ben Cooper* decision, it may either take the Second Circuit to task, or, instead, vilify it on the other pervasive jurisdictional issues raised by that panel.

Bear in mind that *Ben Cooper*, in addition to finding in favor of jury trials in the bankruptcy court, intertwined its *ratio decendi* with a broad interpretation of the "core" proceedings language legislated by BAFJA. It is this core versus non-core dichotomy that has been tremendously divisive throughout the bankruptcy system since the 1984 Amendments were enacted. A wide and deep chasm exists between the circuits which have addressed the issue, with *Ben Cooper* now at the vanguard for those tribunals favoring a widespread application of the core power, and a correspondingly narrow reading of *Marathon*.[367]

Contrast the pervasive view of the Second Circuit with the diametrically opposed stance of the Ninth Circuit in *Piombo Corp. v. Castlerock Properties* (*In re Castlerock Properties*),[368] wherein the tribunal cautioned that any interpretation of BAFJA be tempered

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366 *Accord* Kaiser Steel Corp. v. Frates (*In re* Kaiser Steel Corp.), 109 Bankr. 968, 974 n.6 (*Granfinanciera dicta* indicates the court would hold unconstitutional), *remanded*, 911 F.2d 380 (10th Cir. 1990).

367 *Ben Cooper*, 896 F.2d at 1398-99. *See* Arnold Print Works, Inc. v. Apkin (*In re* Arnold Print Works, Inc.), 815 F.2d 165, 168 (1st Cir. 1987), and Kelley v. Nodine (*In re* Salem Mortgage Co.), 783 F.2d 626, 634 (6th Cir. 1986) (First and Sixth Circuits adoption of expansive views of bankruptcy court jurisdiction, similar to that of *Ben Cooper*.)

368 781 F.2d 159 (9th Cir. 1986).

by a conservative reading of *Marathon*, to the extent that courts should not characterize proceedings as core whenever necessary to avoid raising constitutional problems.[369] Like a virus, this clash of opinions has spread throughout the courts of appeals, inviting the Supreme Court to resolve the disruptive jurisdictional conflict.[370]

Interestingly, the Second Circuit's reliance on the "core" proceeding language of BAFJA may prove to be its undoing. Shortly after *Ben Cooper* was issued, the Court of Appeals for the Eleventh Circuit opined that *Granfinanciera* had cast doubt upon the constitutionality of the authority of the bankruptcy courts.[371] Postulating that the underlying assumption of the 1984 amendments was that article III was not violated by the non-article III bankruptcy courts' resolution of core proceedings,[372] Judge Johnson found this assumption to be open to "serious question" in light of *Granfinanciera* and its apparent adoption of the analysis in *Marathon*.[373]

Worthy of contemplation is the unique commentary analogizing the instant situation to the medieval legend of the demise of King Arthur, and opining that *Ben Cooper* may very well lead "to a constitutional Camlan over the [a]rticle III limitations on bankruptcy jurisdiction."[374] Finding that "[e]ven a rather restrained reading of *Granfinanciera* leads to the conclusion that Congress overstepped constitutional boundaries in investing such broad jurisdiction in the bankruptcy court,"[375] the authors questioned the viability of *Ben Cooper* as an acceptable interpretation of the existing jurisdictional scheme. Indeed, as the champion of BAFJA, the Second Circuit "may have unintentionally set up its worst defeat by baiting the Court to reaffirm *Granfinanciera* in *Marathon III* [sic] - conclusively disarming the round table of non-[a]rticle III bankruptcy judges and mortally wounding

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369 *Id.* at 162. *See* Wood v. Wood (*In re* Wood), 825 F.2d 90, 95 (5th Cir. 1987), and Southeastern Sprinkler Co., Inc. v. Meyertech Corp. (*In re* Meyertech Corp.), 831 F.2d 410, 416 (3d Cir. 1987) (evincing the Fifth and Third Circuits' inclinations to a conservative reading of BAFJA, in the same vein as *Castlerock Properties*).

370 Indeed, Professor Gibson has characterized the core/non-core structure as "difficult to apply and its validity under article III is arguable." Gibson, *supra* note 3, at 1054.

371 Gower v. Farmers Home Admin. (*In re* Davis), 899 F.2d 1136, 1140 n.9 (11th Cir. 1990).

372 *Id.* at 1140.

373 *Id.* at 1140 n.9.

374 *See* Abrams & Lake, *Constitutional Camlan: Can the Bankruptcy Act Survive?* 204 N.Y.L.J. 3,(Aug. 29, 1990).

375 *Id.* at 27, col. 4.

BAFJA."[376] Given that Supreme Court has of late taken an especially keen interest in bankruptcy issues,[377] we may soon learn if those authors correctly foretold the beginnings of a new legal legend.[378]

While nearly everything about BAFJA is fraught with uncertainty, the one undisputed fact is that its controversial provisions have invited further scrutiny by the Court. In attempting to alleviate the infirmities raised by *Marathon*, Congress has merely set the stage for the next landmark decision. In fact, great note should be taken of the comments made by Representative Hamilton Fish of New York at the time of BAFJA's passage in the House of Representatives. Speaking with what may yet prove to be an uncanny gift of prophecy, the Congressman voiced his belief that "the Supreme Court will have to confront the constitutionality of the course Congress has chose to take. . . . I am convinced that a decision in a case which we may call *Marathon II*" is coming.[379] Certainly, the jury trial controversy has created the opportunity for that prediction to come true.

2. Article III Bankruptcy Judges—Oasis of Relief or Just a Mirage?

It would seem that in this post-*Granfinanciera* (and, possibly, pre-*Marathon II*) era, the bankruptcy system has come full circle to once again ask if bankruptcy judges should be accorded article III status. As demonstrated in the foregoing, the oppressive jury

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376 *Id.*

377 The Court decided five bankruptcy-related cases during its 1989-90 term - "an exceptionally high number for a single term." 2 BANKR. L. REP. (BNA) 745 (Aug. 9, 1990).

378 The resolution of the jury trial issue may also impact on the question of the bankruptcy judge's power to punish for contempt. In Plastiras v. Idell (*In re* Sequoia Auto Brokers, Ltd., Inc.), 827 F.2d 1281 (9th Cir. 1987), the Court of Appeals for the Ninth Circuit decided that the bankruptcy courts have no express or implied civil contempt power. The panel held that "a bankruptcy court has no necessity to invoke an inherent contempt power to vindicate its authority; article I bankruptcy judges can enforce compliance with their orders by resorting to article III courts." *Id.* at 1284. Likewise, "no express statutory authority" for granting the civil contempt power to bankruptcy judges was found. *Id.* While certainly not before the Supreme Court in this matter, none could reasonably argue that the Court's decision as to the ability of a bankruptcy judge to conduct a jury trial shall be without significant impact on the no less important matter of the same article I judge's authority to punish for contempt.

379 130 CONG. REC. H7490-91 (daily ed. June 29, 1984) (statement of Rep. Fish). *See also* Trugman, *The Bankruptcy Act of 1984: Marathon Revisited*, 3 YALE L. & POL'Y REV. 231, 237-38 (1984) (discussing similar concerns voiced by several Congressmen at the time of BAFJA's passage).

trial question, and, furthermore, the "insoluble jurisdictional mess" of bankruptcy court jurisdiction,[380] is rooted in the essential doubts over the scope of powers available to the article I bankruptcy judges. What is the solution then? As for a legislative response, the learned commentary has stated that "[a]mong Congress's [sic] options is the obvious; make bankruptcy courts [a]rticle III courts."[381] Indeed, writing in the context of the underlying fraudulent conveyance claims in *Granfinanciera* with respect to the burgeoning litigation of such claims in leveraged buy-out bankruptcies, Professor Russo suggested the "ultimate solution . . . may well be for Congress to reconstitute bankruptcy courts as [a]rticle III courts with full authority to adjudicate fraudulent conveyance actions as well as other types of proceedings."[382]

Yet "having declined in 1978 and 1984 to elevate the bankruptcy courts to such stature, Congress seems unlikely to choose this route."[383] There is little reason to think that the virulent opposition to bestowing article III status upon bankruptcy judges has changed significantly since the passage of BAFJA in 1984.[384] Indeed, the recent Report of the Federal Courts Study Committee (Report)[385] indicates that opposition to such a step is as strong as ever. In particular, the Report firmly espouses the position that the unique status of the article III judiciary is preserved "only if federal judges are carefully selected from a pool of competent and eager applicants and only if they are sufficiently few in number to feel a personal stake in the consequences of their actions. Neither condition can be satisfied if there are thousands of federal judges."[386] Significantly, the Report continues to note that there are now approximately 750 such judgeships. Suggesting that 1,000 is the practical ceiling limit if the article III

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380 Hayden v. Edwards (*In re* Edwards) 104 Bankr. 890, 898 (Bankr. E.D. Tenn. 1989) (citation omitted).

381 Pappone & Welch, *High Court Opens Door to Bankruptcy Trials by Jury*, BANKR. L. REV. 5, 11 (Fall 1989) (footnote omitted).

382 Russo, *Fraudulent Conveyance Claims in Leveraged Buyout Bankruptcies*, 204 N.Y.L.J. 5,(Aug. 6, 1990)(footnote omitted). *See also* "ABI Committee Reports - Judicial Improvement", *American Bankruptcy Institute Newsletter*, Vol. IX, No. 3 at 18-19 (May, June 1990) (statement of chairman Richard Lieb regarding the consideration of an article III "Commercial Court" to handle bankruptcy and similar cases).

383 Pappone & Welch, *supra* note 373, at 11.

384 *See* Countryman, *supra* note 34.

385 Report of the Federal Courts Study Committee (April 2, 1990).

386 *Id.* at 7. *See also Marathon*, 458 U.S. at 118 (White, J. dissenting) ("The addition of several hundred [bankruptcy] specialists may substantially change, whether for good or bad, the character of the federal bench").

bench is to continue to perform its required functions without a significant decline in quality, the committee posited that "we may be approaching the limits of the natural growth" of the federal judiciary.[387]

In this instance, the outcome is glaringly obvious. The elevation to article III status of the existing bankruptcy bench would create in excess of two hundred and eighty additional judgeships. Based upon the figures and beliefs espoused in the Report, this would be highly detrimental to the quality of the judicial branch. While the Report does not necessarily reflect the majority view of either the Congress or the courts, it certainly is strong evidence that any move to advance the bankruptcy judges beyond their present article I authorization shall meet the same fierce challenge that proved insurmountable both when the Code was first enacted and with the 1984 Amendments.

The concerns raised by the Report are not to be taken lightly. A significant dilution of the power and prestige of the article III bench, whether by the creation of an excessive number of judgeships or by any other means, is to be scrupulously avoided. More is not better in this realm. Nevertheless, the fears of a diminution of the federal bench by overexpansion are exacerbated by the tired old cliches that traditionally relegated courts of bankruptcy to some deep substrata in the federal court system, and fostered a view of those courts as inhabiting a netherworld: presiding over an arcane system of law and litigants. As we near the dawn of the twenty-first century, however, must these old-fashioned notions continue to shackle the entire system of bankruptcy court jurisdiction? This author thinks not.

Most assuredly, the very nature of modern bankruptcy proceedings is ample justification for according article III status to those jurists primarily responsible for hearing such cases. Once again, the nation finds itself upon hard times. Given the present gyrations of today's economy, more and more entities shall be seeking protection under the bankruptcy laws, compelling their creditors and other parties in interest to venture into that specialized forum. As more and more persons and businesses are subjected to the sometimes rough justice of the bankruptcy court, can it be denied that they are entitled to an adjudication by a judge enjoying the stature of article III? To do otherwise would likely undermine the faith of the citizenry in the judicial branch,

387 *Id.* at 8.

as well as perpetuate outmoded ideas about the supposed inferiority of the courts of bankruptcy and their judges.

Moreover, putting aside the foregoing concerns arising primarily from difficult economic times, today's bankruptcy court would be no less active in an expanding economy. Bankruptcy proceedings, as specifically in the Chapter 11 reorganization, no longer signify the end of the road for a dying business. Bankruptcy is now a management tool, an option as viable as any other proposed course of corporate action. Who can doubt that the reorganization scenario is now imbedded in our corporate culture, following the filings of Texaco, Eastern, LTV, and so many others? As each day the bankruptcy courts become more and more the commercial equity courts of this nation, who could argue against investing the judges assigned that awesome responsibility with article III status.[388]

In sum, the best course is clearly marked. "[T]hose who exercise the judicial power of the United States under [a]rticle III must be [a]rticle III judges."[389] The power to preside over bankruptcy proceedings is, especially today, a crucial segment of the judicial power. The power to preside over jury trials is an "essential attribute" of that power. If our bankruptcy judges are to be the full-bodied, vigorous adjudicators of that vital body of law, they must have that essential attribute, and, therefore, should be made article III judges.

V. CONCLUSION

The controversy over the power of bankruptcy judges to conduct jury trials has plagued the bankruptcy system since the United States Supreme Court decreed in *Marathon* that such a prerogative was an "essential attribute" of the article III power. Subsequent to that landmark decision, Congress attempted to chart a course between Scylla and Charybdis by addressing this issue and other constitutional infirmities in the 1984 Amend-

388 Importantly, "an [a]rticle 3 bankruptcy court would not elevate bankruptcy judges to the level of district court judges . . . . [B]ankruptcy judges would not be paid the same as district court judges, would not have the same jurisdiction, could not be assigned to other federal district courts as district court judges may be, and would not have the same personnel and facilities as district court judges." 130 CONG. REC. H1847 (daily ed. Mar. 21, 1984) (statement of Rep. Edwards). While not diminishing the importance of the bankruptcy court, this statement goes far to debunk the myth that article III bankruptcy judges would be equal in all respects to other article III federal jurists.

389 Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 550 (9th Cir. 1984 (en banc) (Schroeder, J., dissenting).

ments to the Bankruptcy Code, while continuing the bankruptcy courts as article I tribunals. The abrogation of Bankruptcy Rule 9015, the jury trial rule, was thought by some to be the last step in clarifying the issue, by withdrawing a procedural device often used erroneously as a substantive basis for the conduct of jury trials in bankruptcy courts.

All the foregoing, however, did not yield a final, dispositive solution. The Court's decision in *Granfinanciera*, by explicitly refusing to decide that day if bankruptcy judges are empowered to conduct jury trials, merely serves as a point of demarcation between the historical basis of the controversy and the appellate decisions that may bring the issue squarely before the Court.

In contrasting the opposing poles of *Ben Cooper* and *United Missouri Bank*, and all the cases which precede them, it becomes clear that the forces opposed to bankruptcy judges conducting jury trials have the superior argument. A well reasoned analysis of the relevant statutes makes it self-evident that there is surely lacking a legislative authorization for article I bankruptcy judges to preside over jury trials. Put in the proper light, any contrary reading of the statutory provisions does violence to their plain meaning and any acceptable construction thereof. Much the same can be said for the withdrawal of the jury trial rule; that step representing the abrogation of a procedural appendage, now rendered a nullity with no statutory basis from which to draw validity.

The constitutional barrier of article III is likewise impregnable. By condemning bankruptcy judges to article I status, the legislature has foreclosed that tribunal's exercise of an "essential attribute" of article III: the ability to preside over jury trials. From *Marathon* to *Granfinanciera*, the Court has time and again staked out the boundaries of the article III power, while concomitantly circumscribing the limitations of article I bankruptcy judges. Unless and until Congress changes their status, the bankruptcy courts are restricted to playing a subservient role to the article III bench; a function that does not include the power to conduct jury trials.

A fair reading of *United Missouri Bank* and similar holdings reflects the correctness of all of the foregoing. The *Ben Cooper* decision, on the other hand, finds itself attempting to climb a very slippery slope indeed. Moreover, the Second Circuit's holding tempts fate itself, by stretching the constitutionality of its core/non-core jurisdictional underpinnings. Given this state of

affairs, what does the future hold for bankruptcy judges and jury trials?

Paramount to all other things in the greater scheme of the bankruptcy court system is the inescapable fact that a bankruptcy court is essentially a court of equity.[390] Second only to that penultimate fact "is that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."[391]

It may now be necessary to return to the pre-Code days when it was assumed, "because bankruptcy courts were courts of equity with limited jurisdiction,"[392] that bankruptcy courts are not the appropriate forum for jury trials. It can only be hoped that the Supreme Court shall do so, and permit the still developing bankruptcy court system to forge ahead unburdened by this troublesome controversy.

In conclusion, we are reminded that 1992 marks the tenth anniversary of *Marathon*, the judicial beginning of the instant controversy. Yet it also makes the quincentennial of the voyage of Columbus to the New World. No small irony here, as the term "bankruptcy" itself is derived from "banca rotta," Italian for "broken bench": the draconian fate of medieval guildsmen fallen into insolvency. When the Supreme Court navigates these treacherous waters, let us hope this new voyage finally resolves the controversy over the power of bankruptcy judges to conduct jury trials.

AUTHOR'S NOTE

At the time this article went to press, preparations were underway for a second appeal of Ben Cooper *to the High Court. Mere weeks ago, the Second Circuit resolved a jurisdictional question and reinstated its original opinion.* Ben Cooper, 924 F.2d 36 (2d Cir. 1991). *Indeed, when the Justices survey the landscape upon the return of* Ben Cooper *they shall*

390 Katchen v. Landy, 382 U.S. 323, 327 (1966). *See also* Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 454 n. 11 (1977) (bankruptcy court is "a specialized court of equity"); Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934) (bankruptcy court proceedings "inherently proceeding in equity"); Pepper v. Litton, 308 U.S. 304 (1939); Bank of Marin v. England, 385 U.S. 99, 103 (1966) ("There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction"); NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984); United States v. Energy Resources Co., 110 S. Ct. 2139, 2142 (1990).

391 Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) (White, J., writing for a unanimous Court).

392 Kaiser Steel Corp. v. Frates (*In re* Kaiser Steel Corp.), 109 Bankr. 968, 971 (D. Colo. 1989), *remanded*, 911 F.2d 380 (10th Cir. 1990).

find that the intercircuit conflict is now exacerbated, given the lack of any pending appeal from the circuit decisions in either United Missouri Bank *or* Kaiser Steel. *Interestingly, the author learned from an informed source that no appeal was taken in* Kaiser Steel, *partly in reliance upon the pendency of* Ben Cooper.

For now, other battlefronts have opened in both the east and the west. The Ninth Circuit Court of Appeals has decided that, inter alia, *"bankruptcy courts have no authorization to conduct jury trials" in noncore proceedings.* Taxel v. Electronic Sports Research (In re Cinematronics, Inc.), *916 F.2d 1444, 1451 (9th Cir. 1990) (reversing district court's refusal to withdraw reference of matter to bankruptcy court; holding that bankruptcy judges may hold jury trials in core proceedings). While the opinion focused on the propriety of the district court's denial of a motion to withdraw the reference, Circuit Judge Hug found that "grave [s]eventh [a]mendment problems would arise" if a jury trial were to be conducted by a bankruptcy judge whose decisions were subject to* de novo *review.* Id. *at 1451. Recently, the same conclusion was reached by the Third Circuit in* Beard v. Braunstein, *914 F.2d 434 (3d Cir. 1990). Diverging from its neighboring court of appeals, the court explained that the limitations of the seventh amendment "are not compatible" with the present statutory requirement of review* de novo *in noncore proceedings, thus foreclosing jury trials in the bankruptcy forum.* Id. *at 443.*

The findings of these circuit tribunals, that bankruptcy courts cannot conduct jury trials in noncore matters, now aligns, in numerical order, the Third, Eighth, Ninth, and Tenth Circuits against a single decision of the Court of Appeals for the Second Circuit. This truly presents a strategic challenge for any litigation general.

Finally, the same day that the Court vacated Ben Cooper, *it issued a* per curiam *opinion on a petition for* certiorari *in* Lagenkamp v. Culp, *111 S. Ct. 330, 331 (1990), reh'g denied, 111 S. Ct. 721 (1991), holding that there is no jury trial entitlement for a defendant/creditor in a preference action, where that creditor previously filed a claim in the bankruptcy proceeding. Relying on* Granfinanciera, *the Court reaffirmed the importance of the equity jurisdiction of the bankruptcy court.* Id. *(emphasis in the original). While this might be a mere coincidence, it may also be interpreted as a subtle message from the Justices that the equitable jurisdiction of the bankruptcy court negates jury trials in that article I forum.*

What does this portend for the bankruptcy court system? The obvious upshot is another interval during which the fractious dispute shall continue unabated, engendering even more disruptive, wasteful litigation, that shall no doubt result in additional contradictory opinions by the various circuits. With the reinstatement and upcoming appeal of the formerly vacated Ben

Cooper, *the once crestfallen hopes for a final resolution of the matter have been resurrected. One can only trust in the Court's willingness to settle swiftly the controversy, on statutory and/or constitutional grounds, when it revisits* Ben Cooper *or, quite possibly, reviews* Cinematronics, Perkinson, *or some other yet to be issued appellate ruling. In sum, it is the author's fervent hope that the Justices of the United States Supreme Court take into account all of the complex, diverse issues, policies, and interests at work here, such as those mentioned in this article.*