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## Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984

Lawrence P. King

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# Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984

Lawrence P. King\*

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## I. INTRODUCTION

On July 10, 1984, the President signed into law the Bankruptcy Amendments and Federal Judgeship Act of 1984.<sup>1</sup> This legislation was the long-awaited congressional response to the Supreme Court's invalidation on constitutional grounds of provisions

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1. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (to be codified in scattered sections of 11 U.S.C. and 28 U.S.C.).

of the Bankruptcy Reform Act of 1978. The Supreme Court found unconstitutional a basic jurisdictional provision in the Bankruptcy Reform Act of 1978<sup>2</sup> and held that the jurisdiction given to a bankruptcy court under the 1978 Act was too broad for a nonarticle III court.<sup>3</sup>

The 1984 amendments could have eliminated the constitutional defects of the 1978 Act by converting the bankruptcy courts to article III courts.<sup>4</sup> But faced with the well-organized opposition of the rest of the federal judiciary, which adamantly had refused to accept life tenure for bankruptcy judges since it was first proposed in 1977,<sup>5</sup> Congress did not adopt this simple solution to the jurisdiction problem. The subject of this Article is the complex and convoluted judicial system Congress created in the 1984 amendments.

## II. JURISDICTION OF THE UNITED STATES DISTRICT COURT

Section 1334(a) of the Judicial Code, as amended in 1984, vests original and exclusive jurisdiction in the United States district court over all *cases* arising under the Bankruptcy Code.<sup>6</sup> The word "case" is a term of art and comports with the usage in the Bankruptcy Code<sup>7</sup> and the Bankruptcy Rules.<sup>8</sup> "Case" comprises

2. 28 U.S.C. § 1471, Pub. L. No. 95-598, 92 Stat. 2549 (1978) was invalidated by the Supreme Court in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

3. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84-87 (1982). Judges appointed pursuant to article III must be appointed for a term of good behavior, that is, life tenure, and their salaries must not be subject to reduction while in office.

4. In fact, Representative Peter Rodino, Chairman of the House Judiciary Committee, introduced H.R. 6978 in the 97th Congress, 2d Session, which provided for the appointment of bankruptcy judges under article III of the Constitution. This bill was approved by the Subcommittee on Monopolies and Commercial Law and the full Judiciary Committee. It did not go further in that Congress, and in the 98th Congress, 1st Session, it was reintroduced as H.R. 3. This bill was also approved by both the Subcommittee and the full Judiciary Committee, but when it finally came to the floor of the House, the article III provisions were stricken and a provision appointing bankruptcy judges for a term of 14 years was inserted. See H.R. REP. NO. 9, pt. 1, 98th Cong., 1st Sess. 1-4 (1983); 130 CONG. REC. H1796 (daily ed. Mar. 21, 1984) (H.R. 5174 was the bill acted upon and was the replacement for H.R. 3.).

5. H.R. 6, 95th Cong., 1st Sess. (1977), was the first of the several drafts of bankruptcy bills to establish the bankruptcy courts as article III courts. See KLEE, LEGISLATIVE HISTORY OF THE NEW BANKRUPTCY LAW, in 2 App. COLLIER ON BANKRUPTCY x, xi (L. King 15th ed. 1984).

6. The terms "Bankruptcy Code" or "Code" are used herein to denote provisions in Title 11, United States Code.

7. See, e.g., 11 U.S.C. § 301 (1982) ("A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition . . .").

8. See, e.g., BANKR. R. 1002. The distinction between "case" and "proceeding" was

the entire Chapter 7, 9, 11, or 13 case that is commenced pursuant to section 301, 302, or 303 of the Bankruptcy Code by the filing of a "petition,"<sup>9</sup> another word of art.

Disputes often arise during the pendency of a Chapter 7, 9, 11, or 13 case that require judicial resolution. Section 1334(b) refers to these disputes as "proceedings." There may, therefore, be numerous proceedings within a case. Section 1334(b) provides that the United States district courts have original, but not exclusive, jurisdiction over civil proceedings arising in or related to Code cases or under the Code itself. Under the Bankruptcy Rules, these proceedings are labeled either adversary and governed by Part VII of the Rules, or contested and governed by Rules 9014 and 9013. Accordingly, subsections (a) and (b) carefully distinguish between the words "case" and "proceeding," recognizing that a case commenced under the Bankruptcy Code differs substantially from a typical civil action commenced in state or federal court to resolve a two-party dispute.

Subsections (a) and (b) of section 1334 track the wording of subsections (a) and (b) of section 1471, which was added by the Bankruptcy Reform Act of 1978. Although section 1334 replaces section 1471 insofar as these two subsections are concerned, the intent is the same: all jurisdiction over and under Title 11 of the United States Code is vested in the United States District Court, an article III court. Section 1471(c), however, also had transferred all of the district court's bankruptcy jurisdiction to the United States bankruptcy courts. These bankruptcy courts were and are nonarticle III courts. This subsection caused the United States Supreme Court to hold section 1471 and other sections unconstitutional. The broad and pervasive jurisdiction contained in section 1471(a) and (b) could not be vested constitutionally, as provided in subsection (c), in a court whose judges were not appointed for a term of good behavior and whose salaries were subject to diminution while in office.<sup>10</sup> Section 1334 does not contain any provision

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previously contained in the 1973 Bankruptcy Rules. See former BANKR. R. 101 and Advisory Committee's note thereto.

9. See *supra* notes 7-8. A "complaint" commences an adversary proceeding pursuant to Bankruptcy Rule 7003; a "motion" commences a contested matter pursuant to Bankruptcy Rule 9014.

10. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). Section 1471 was designed to accord the bankruptcy court expanded or pervasive jurisdiction over all issues relating to the debtor's estate. In contrast, under prior law jurisdiction was bifurcated into categories of "summary" and "plenary" jurisdiction. The bankruptcy courts had only summary jurisdiction, which was present only if the court had actual or construc-

similar to former section 1471(c). It grants broad and pervasive jurisdiction to the article III district court, and the district judges, in their discretion, may exercise this jurisdiction.<sup>11</sup>

### III. REFERENCE TO THE UNITED STATES BANKRUPTCY COURT

The real issue addressed by the 1984 amendments is the jurisdiction of the bankruptcy court.<sup>12</sup> The 1984 amendments do not require the district courts to refer bankruptcy cases to the bankruptcy courts but allows them to do so.<sup>13</sup> Each district court may refer all, some, or no cases and proceedings or parts thereof to the bankruptcy judges of the district. The authority to refer cases and proceedings under section 157(a) has been exercised by local rule or order in all federal judicial districts. Accordingly, bankruptcy judges continue to handle most, if not all, bankruptcy cases.

Two basic considerations appear to have motivated the 1984 legislation. The first was the congressional attempt to cure the unconstitutional jurisdictional defects. As this Article makes clear, another case undoubtedly will wend its way to the Supreme Court and challenge the constitutionality of the 1984 amendments.<sup>14</sup> The second consideration was the district courts' already ample work-

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tive possession of the property in issue or if the adverse claimant expressly or impliedly consented to jurisdiction. Much time and money were expended in ascertaining whether the bankruptcy court had jurisdiction over a matter.

11. Not surprisingly, the district judges prefer not to exercise their bankruptcy jurisdiction. The district courts are overburdened with their civil and criminal dockets without the annual addition of some 300,000 new bankruptcy cases. This consideration must have been on the collective congressional mind when Congress added § 157 to Title 28 in 1984, and provided that the district court may refer all of its bankruptcy jurisdiction to the bankruptcy court.

12. Pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 336 (to be codified at 28 U.S.C. § 151), the bankruptcy judges constitute a unit of the district court in each district, to be known as the bankruptcy court for the district. The superseded provision, 28 U.S.C. § 151(a) (1982), labeled what was denominated as an adjunct of the district court the United States Bankruptcy Court. Technically speaking, it is no longer a United States bankruptcy court although it is a bankruptcy court pursuant to § 151.

13. 28 U.S.C. § 157(a) provides: "Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."

14. There are cases pending which raise the constitutionality of the 1984 amendments to the Judicial Code concerning the jurisdiction of the bankruptcy courts. See *In re J. Catton Farms, Inc.*, No. 183-00655 (Bankr. C.D. Ill. filed Apr. 30, 1983); *In re Mason & Dixon Lines, Inc.*, No. B-84-00377C-11 (Bankr. M.D.N.C. filed Mar. 29, 1984); *In re Production Steel*, No. 382-01255 (Bankr. M.D. Tenn. filed Apr. 22, 1982); *In re Tom Carter Enters.*, 12 BANKR. CT. DEC. (CRR) 536 (1984); *In re Shearn Moody, Jr.*, No. B-83-01490C-11 (Bankr. M.D.N.C. filed Nov. 14, 1983).

load and the evident lack of desire and inability of the district court judges to take on more work. Accordingly, the 1984 legislation attempts to meet the constitutional objections without overloading the United States district judges.

#### A. *Jurisdiction of the Bankruptcy Court*

Section 157(a) permits the district courts to make a general reference of all Title 11 cases and proceedings to the bankruptcy judges. The issue thereby raised concerns the overall authority of the bankruptcy judges over these cases and proceedings. More precisely, what is the difference between section 157(a), as added in 1984, and section 1471(c), as added in 1978 and held invalid in 1982? In invalidated section 1471(c), Congress delegated jurisdiction to a nonarticle III court. In section 157(a), both Congress and the district courts delegated jurisdiction to a nonarticle III court. Interestingly, section 157 is captioned "Procedures." The following discussion will illustrate that a more accurate caption would have been "Jurisdiction."

Section 157 spells out the role of the bankruptcy judge in some detail. It deals with something more than mere procedure, paper shuffling, time periods, and similar matters. First, the section creates a dichotomy between "core" and "noncore" proceedings.<sup>15</sup> Second, section 157 specifies the ultimate judicial authority of the bankruptcy judge regarding both core and noncore proceedings. The authority differs sharply and the determination whether a proceeding is core or noncore has significant substantive and procedural consequences. Whether the nonarticle III bankruptcy judge should be permitted to exercise its discretion in making this determination may have constitutional implications.<sup>16</sup> Any limitation on this role will necessarily define the part to be played by the article III district judge.

##### 1. Entry of Final Orders

The determination whether a particular proceeding is a core or noncore proceeding defines the ultimate power or, in constitutional terms, the jurisdiction of the bankruptcy court. Section 157(b)(1)

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15. 28 U.S.C. § 157(b)(2), discussed *infra* text accompanying notes 41-60, provides a list of core proceedings. Presumably all others (if there are any others) are within the noncore category and subject to 28 U.S.C. § 157(c) except as provided in § 157(b)(5).

16. The relevant provisions specifying the authority of the bankruptcy judge in core proceedings are contained in 28 U.S.C. § 157(b)(1) and, for noncore proceedings, in § 157(c), both of which are discussed *infra* pp. 680-95.

provides that bankruptcy judges have authority to enter final orders in core proceedings. It states that bankruptcy judges may "hear and determine" all cases under Title 11 and all core proceedings arising in or related thereto. That language obviously means that bankruptcy judges may enter final orders in core proceedings.

The consequence of determining that a proceeding is a core proceeding has far-reaching implications in bankruptcy appellate procedures. The appellate process, which is set out in section 158 of Title 28, as added in 1984, revolves around the final order entered by a bankruptcy judge pursuant to section 157(b)(1) or (c)(2).<sup>17</sup> A major distinction between the bankruptcy judge and the district judge lies beneath the surface of the language of section 158. If, on the one hand, the district judge enters the final order, section 158 does not prescribe the appellate procedure in an appeal from that order; it is wholly inapplicable. Since it is a final order of the district court, appeals would follow the normal appellate procedure contained in the Federal Rules of Appellate Procedure applicable to any order of the district court that is appealed to the court of appeals. If, on the other hand, it is a final order of the bankruptcy judge, as authorized under section 157(b)(1) or (c)(2),<sup>18</sup> an appeal will follow the appellate procedure prescribed by section 158.<sup>19</sup>

## 2. Submission of Proposed Findings

Since the statute provides that the bankruptcy judge may enter final orders in core proceedings, noncore proceedings must have a different authority. Section 157(c)(1) is the counterpart to section 157(b)(1) and concerns noncore proceedings. Theoretically, the 1984 amendments have rendered the bankruptcy judge's role much more limited and the district judge's role more broad. In

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17. Section 158(a) provides: "The district courts . . . shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title." "Final order" is used in two different ways in § 157(b)(1) and in § 158. The final order entered pursuant to the grant of authority in § 157(b)(1) may, for purposes of § 158, be either final with a right of appeal, or interlocutory which requires permission to appeal. But whether final or interlocutory, it is entered by the bankruptcy judge whereas, under § 157(c)(1), the bankruptcy judge may enter only proposed findings and the district judge must enter the final order in the particular proceeding.

18. Section 157(c)(2), discussed *infra* pp. 682-86, permits entry of a final order by the bankruptcy judge on consent of the parties in a noncore proceeding.

19. See *infra* notes 37-39 and accompanying text.

noncore proceedings, section 157(c)(1) specifies that the bankruptcy judge is to "submit proposed findings of fact and conclusions of law to the district court." Any final order is to be entered by the district judge after "considering" the proposed findings and conclusions, or after "reviewing de novo" any matter in the proposed findings and conclusions to which a party has "timely and specifically" objected.

Section 157(c)(1) is rife with problems and temptations. The major temptation is for the district judge to rubber-stamp the proposed findings and conclusions of the bankruptcy judge. It would come as a surprise to no one, particularly Congress, if a submission of a bankruptcy judge to a district judge were to include an order to be signed by the district judge. Will the district judge take the time to "consider" the submission? What does "consider" mean? One would suppose, at the very least, that consider means "to read," but that can encroach upon the district judge's busy calendar. Furthermore, the district judge "must" review de novo when there is an objection. What does "review" mean? Certainly the district judge can order a new trial. But what is minimally acceptable?<sup>20</sup> If Congress had intended a trial by the district judge, it could have specified this much more clearly. Obviously a new trial is not intended. But what distinguishes "review" from "consider"?<sup>21</sup>

The purpose of section 157(c)(1) is to make the legislative scheme appear constitutional in any case that may come before the Supreme Court. Congress provided that, except for core matters and absent consent of the parties, the article III court is the final arbiter at the trial level. Thus, excessive jurisdiction is not given to the nonarticle III court. The bankruptcy court is not even a finder of fact. It submits facts that the article III court can disregard for any reason. In practical terms, however, the nonarticle III court's proposed findings and conclusions will be *the* findings and conclu-

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20. Under the Emergency Rule in existence from December 25, 1982, until July 10, 1984, which had a similar "de novo" provision, it was held that a new trial is not required. The district court should, nevertheless, examine the record without giving deference to proposed findings. *Moody v. Amoco Oil Co.*, 734 F.2d 1200 (7th Cir.), *cert. denied*, 105 S. Ct. 386 (1984). It is perhaps unrealistic to conclude that many district judges will follow this directive.

21. As will be pointed out in the text *infra* notes 37-39, even if bankruptcy appellate panels are established by the judicial council of the circuit, the parties nevertheless must consent to having the panel instead of the district court hear the appeal. Presumably, appellees will not readily consent to use of the appellate panel because of the perception that a district judge is more likely to affirm the bankruptcy judge's order.



sions. "Consider" and "review" will disintegrate into rubber-stamped acceptances of the bankruptcy court's findings and conclusions. The constitutional protection for article III judges to adjudicate noncore proceedings has been accomplished semantically and cosmetically. But actually little or no change will occur.

One effect of section 157 is the added opportunity for counsel to employ delaying tactics. A built-in litigation ploy now is available for one side of a disputed matter to assert that the proceeding is noncore. Pursuant to section 157(b)(3), the bankruptcy judge shall make such a determination, either on timely motion or sua sponte.<sup>22</sup> Presumably, the order on this motion is an interlocutory order and not subject to a right of appeal. Nevertheless, a party seeking delay can apply for leave to appeal, which can consume the time and resources of the court.

### 3. Jurisdiction by Consent

The district court, pursuant to section 157(c)(2), may refer a noncore proceeding to the bankruptcy judge to hear and determine with the *consent* of the parties. The bankruptcy court thus may enter a final order on consent of the parties in noncore matters. This creates two major issues. First, a lack of specificity exists regarding the concept of "consent." Some procedural guidelines are needed to develop this concept. For example, the time and method for manifesting consent needs clarification. Should there be a cut-off time for parties to consent? Should a formal method be required to express consent? Rules should set forth precisely the procedures so that the parties and judges all know with certainty what to do and when. Similarly, if a deadline or a formal expression is not required, that should be stated. Certainty, regardless of the merits, is necessary in such procedural matters; it is a provision that will be used frequently.

The second issue requiring a basic policy consideration is the proper manifestation of consent. Does the consent have to be expressed or may it be implied by failure to object?<sup>23</sup> This issue

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22. See 28 U.S.C. § 158(a). As a matter of fact, the bankruptcy judge will have to make the (b)(3) determination at some point in the proceeding. That determination sets in motion either the appeal process of § 158 or the submission of proposed findings and conclusions as required by § 157(c). Either the 10 day period for filing a notice of appeal will commence, see BANKR. R. 8002, or the time to object to the proposed findings or conclusions will start to run. Such time, as of this writing, is set, if at all, by local rule.

23. A district court decision has held that consent under § 157(c)(2) can be implied. *Lombard-Wall Inc. v. N.Y.C. Housing Dev. Corp.* (*In re Lombard-Wall, Inc.*), No. 82 B

reestablishes an unsavory aspect of pre-1978 law, the delegation of which was one of the basic reasons for promulgation of the Bankruptcy Reform Act of 1978.<sup>24</sup> Prior to the 1978 Code, one of the avenues permitting the exercise of summary jurisdiction by referees in bankruptcy (who became bankruptcy judges in 1973) was consent of the parties. Implied consent was possible and was deemed to occur by a failure to object timely to the exercise of summary jurisdiction.<sup>25</sup> The notion had been spelled out in section 2a(7) of the Bankruptcy Act of 1898 and was prescribed more fully in Bankruptcy Rule 915 when the Rules went into effect in 1973.<sup>26</sup> Section 2a(7) and Rule 915 required that an objection to the exercise of summary jurisdiction had to be asserted in the answer to the complaint or by motion.<sup>27</sup>

An underlying premise of the consent concept was that subject matter jurisdiction was not at issue.<sup>28</sup> Even though subject matter jurisdiction could not be waived and its lack could be raised by way of objection at any time, either collaterally or within the same proceeding, the summary-*plenary* jurisdictional issue in bankruptcy matters was more akin to personal jurisdiction, which could be waived. Thus, the practice developed of requiring a timely objection, the absence of which was deemed to be consent to the exercise of summary jurisdiction by the bankruptcy court.<sup>29</sup> Nothing in the 1984 amendments or in the accompanying legislative his-

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11556, slip op. (S.D.N.Y. 1985). This holding, along with other conclusions reached in the opinion, is made without any legal analysis and may well be constitutionally unsound. It is becoming apparent that district judges are in a rush to rid themselves of proceedings arising in bankruptcy cases and have little or no regard for the 1984 legislation or the interests of the parties in obtaining authoritative, well-analyzed rulings in their disputes. Those judges were quick to bar the independence of the bankruptcy court but even quicker to assure that bankruptcy judges do all the work whether or not in contravention of the Constitution or the laws of the United States.

24. See *supra* note 10.

25. See 2 COLLIER ON BANKRUPTCY ¶ 23.08[4] (J. Moore 14th ed. 1978).

26. Section 2a(7) of the Bankruptcy Act of 1898 provided, in part:

[W]here in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court . . . he shall be deemed to have consented to such jurisdiction.

Rule 915(a) of the 1973 Bankruptcy Rules provided: "a party waives objection to jurisdiction of an adversary proceeding or a contested matter and thereby consents to such jurisdiction if he does not make objection by a timely motion or answer, whichever is first served."

27. See *supra* note 25.

28. See Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 J. NAT'L ASS'N REF IN BANKR. 36, 74 (1962).

29. See *supra* notes 25-28; see also *supra* note 10.

tory indicates whether Congress intended implied consent to suffice under section 157(c)(2).<sup>30</sup>

A provision in the Magistrates Act<sup>31</sup> that is similar to section 157(c)(2) may prove instructive to the interpretation of section 157(c)(2). In the Magistrates Act provision, jurisdiction is given to magistrates to enter final orders if the parties file an express, written consent. A number of courts of appeals have upheld the constitutionality of the statute on the basis of this consent feature.<sup>32</sup> On the first occasion that the statute was challenged, however, it was held unconstitutional by the Ninth Circuit Court of Appeals.<sup>33</sup> If that opinion had not been overturned by the Ninth Circuit sitting en banc,<sup>34</sup> different bankruptcy legislation might be in effect today. In any event, other circuits followed closely, in time and result, on the heels of the en banc decision.<sup>35</sup>

While many circuits have resolved the constitutionality of the express consent provision in the Magistrates Act, the Supreme Court has not yet spoken. Accordingly, section 157(c)(2) may be subject to constitutional attack. Does it or does it not conform to the plurality decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*?<sup>36</sup> Perhaps a requirement of express writ-

30. See *Lombard-Wall Inc. v. N.Y.C. Housing Dev. Corp. (In re Lombard-Wall Inc.)*, No. 82 B 11556, slip op. (S.D.N.Y. 1985) (district court offered no analysis but permitted a finding of consent by implication).

31. 28 U.S.C. § 636(c) (1982). For decisions interpreting the Magistrates Act, see *infra* notes 33-36.

32. See *infra* note 35.

33. *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 712 F.2d 1305 (9th Cir. 1983).

34. *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (en banc) (8-3 decision), *cert. denied*, 105 S. Ct. 100 (1984).

35. See *Fields v. Washington Met. Transit Auth.*, 743 F.2d 890 (D.C. Cir. 1984); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984); *Lehman Brothers Kuhn Loeb, Inc. v. Clark Oil & Refining Corp.*, 739 F.2d 1313 (8th Cir. 1984) (en banc), *cert. denied*, 105 S. Ct. 906 (1985); *Campbell v. Wainwright*, 734 F.2d 1480 (11th Cir. 1984); *Puryear v. Ede's Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Collins v. Foreman*, 729 F.2d 108 (2d Cir.), *cert. denied*, 105 S. Ct. 218 (1984); *Goldstein v. Kelleher*, 728 F.2d 32 (1st Cir.), *cert. denied*, 105 S. Ct. 172 (1984); *Williams v. Mussomelli*, 722 F.2d 1130 (3d Cir. 1983); *Wharton-Thomas v. United States*, 721 F.2d 922 (3d Cir. 1983).

36. 458 U.S. 50 (1982). The Supreme Court had upheld the constitutionality of the 1978 Federal Magistrates Act in *United States v. Raddatz*, 447 U.S. 667 (1980), holding that because the ultimate decisionmaking authority regarding all pretrial motions lay with the district courts and not the magistrates, the Act did not violate article III of the Constitution. *Northern Pipeline*, 458 U.S. at 79. In *Northern Pipeline*, however, the Court stated that although Congress possessed broad discretion to assign factfinding functions to an adjunct of the district court to aid in adjudicating congressionally created statutory rights, it did not possess that same broad discretion with respect to rights not created by Congress. Because the Bankruptcy Reform Act of 1978 did not retain the essential attributes of judi-

ten consent is itself constitutionally invalid. Certainly, the existence of rules permitting deemed or implied consent would constitute a second rung of attack and would render the decisions under the Magistrates Act less persuasive. If section 157(c)(2) provides for deemed consent in any way, will too much jurisdiction, however one defines "too much," be given to nonarticle III courts? These are questions to which the Supreme Court will have to respond.

The consent issue also has an impact on appellate procedure. First, because consent to jurisdiction will lead to entry of a final order by the bankruptcy judge, the appellate procedure of section 158 and Part VIII of the Bankruptcy Rules, including the "clearly erroneous" doctrine,<sup>37</sup> are applicable. Second, section 158 provides for the establishment of bankruptcy appellate panels similar to those provided for under the 1978 Code. One major difference from the prior practice under the 1978 Code, however, has been instituted. Once bankruptcy appellate panels are established by the judicial council of the circuit and referral to such panels is approved by majority vote of all district judges of the circuit, the parties to the appeal must agree unanimously to use the panel instead of appealing to the district court. Under the Bankruptcy Reform Act of 1978, party consent was immaterial.<sup>38</sup> If the appellate panel was established, the district court had no appellate jurisdiction. That is no longer true under section 158. Only the district court has appellate jurisdiction unless the parties to the appeal consent to the jurisdiction of the bankruptcy appellate panel.

The legislative history to the 1984 amendments does not explain the added requirement of the parties' consent to the use of appellate panels. It may have been included to bolster the constitutional validity of the entire legislative scheme. At the trial level, it is possible in two instances for a party's rights to be adjudicated by the nonarticle III bankruptcy judge: either in a core proceeding pursuant to section 157(b)(1), or by consent in a noncore proceeding pursuant to section 157(c)(2). If the judicial council of the circuit establishes appellate panels of bankruptcy judges, this level of appeal also is handled by nonarticle III judges. Perhaps, in an overabundance of caution, Congress saw fit not to impose a nonarticle III appellate tribunal, but to permit its use only if all the par-

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cial power in an article III court, but instead vested such judicial power in an adjunct to the district court, it was unconstitutional. 458 U.S. at 87.

37. Pursuant to Bankruptcy Rule 8013, findings of fact of the bankruptcy judge shall not be set aside on appeal unless they are clearly erroneous.

38. 28 U.S.C. §§ 160, 1334(a), 1482 (1982).

ties were of the same mind. As indicated previously, however, consent may not be the relevant ingredient. If such broad jurisdiction cannot be given validly to the nonarticle III court, consent would be irrelevant and the 1984 amendments to Title 28 should suffer the same fate as the jurisdictional provisions of the Bankruptcy Reform Act of 1978.<sup>39</sup>

One final lesson from *Northern Pipeline* may have some implications on the validity of the consent feature. As stated earlier, consent was one of the avenues for conferring summary jurisdiction on the bankruptcy court under the pre-1978 law. The Supreme Court never had ruled on the constitutionality of the exercise of summary jurisdiction, that is, when summary jurisdiction could be exercised or if the bankruptcy court had sufficient power to exercise it at all. Footnote 31 in Justice Brennan's opinion in *Northern Pipeline* calls into question the constitutionality of the entire prior judicial system in bankruptcy matters.<sup>40</sup> No one can foretell how the Supreme Court will construe the 1984 amendments, but responsible legislators should have avoided a substantial risk of a constitutional defect which easily could have been accomplished by establishing an article III bankruptcy court.

### B. Core Proceedings

Thus far, this Article has discussed the jurisdictional issues arising under section 157 even though that section is entitled "Procedures." On the procedural front, section 157 contains the bare necessities; many gaps have to be filled in by local court rules, and ultimately, by rules promulgated by the Supreme Court. Both for jurisdictional and procedural analysis, it is necessary to consider section 157(b)(2), because it, together with subsections (b)(1), (c)(1), and (b)(3) of section 157, pose a key question concerning the bankruptcy judge's power: what is a core proceeding?

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39. While the 1984 amendments are in operation, however, the use of appellate panels may encourage another layer of litigation strategy. The decision to agree to the appellate panel route or to insist on use of the district court may have nothing to do with the merits of either process, but instead may reflect whatever tactical benefits or advantages counsel may perceive.

40. Justice Brennan stated:  
Appellants and Justice White's dissent also rely on the broad powers exercised by the bankruptcy referees immediately before the Bankruptcy Act of 1978. . . . But those particular adjunct functions, which represent the culmination of years of gradual expansion of the power and authority of the bankruptcy referee, see 1 Collier, *supra* n.3, at ¶1.02, have never been explicitly endorsed by this Court.  
*Northern Pipeline*, 458 U.S. at 79 n.31 (citation omitted).

Clauses A through O of section 157(b)(2) set forth a long laundry list of matters delineated as core proceedings.<sup>41</sup> This listing, together with subsection (b)(1), in effect grants broad and pervasive jurisdiction to the bankruptcy court, thereby calling into question the constitutional validity of the 1984 amendments under *Northern Pipeline*. Even a cursory analysis of section 157(b)(2) reveals that the general scope of core proceedings is questionable.

One significant feature of section 157(b)(2) is that it contains at least four catch-all phrases. Congress probably intended to be overly protective against a court holding that the section was intended to be an exclusive list. Subsection (b)(2) begins by providing what core proceedings "include." As used in both the Bankruptcy Code and the Bankruptcy Act, the word "means" in a definitional section is exclusive, but the word "include" is nonexclusive.<sup>42</sup> Therefore, the use of the term "include" would have itself been a sufficient safeguard. But the drafters added "are not limited to." Thus, without even considering the specific items in the list, the provision clearly was worded adequately to preclude any interpretation of the list as being exclusive. Nonetheless, a third nonexclusivity feature is contained in the first item in section

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41. Section 157(b)(2)(A)-(O) provides as follows:

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interest [sic] for the purposes of confirming a plan under chapter 11 or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

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

(D) orders in respect to obtaining credit;

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

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

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

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

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

(J) objections to discharges;

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

(L) confirmations of plans;

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

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

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

42. See 2 COLLIER ON BANKRUPTCY ¶ 101.00[2] (L. King 15th ed. 1984).

157(b)(2): "(A) matters concerning the administration of the estate." While estate administration matters are not defined, the clause appears to contemplate a very broad panoply of proceedings integral to a case under the Code. Its overbreadth may, in fact, render the remaining clauses unnecessary. Other items in subsection (b)(2), such as objections to discharge and allowance of claims, are listed separately but easily could be considered matters concerning the administration of the estate.

Section 157(b)(2)'s final catch-all, clause (O), which is the last clause in this listing, includes "proceedings affecting the liquidation of the assets of the estate." Matters of administration are, as noted, core proceedings. Additionally, proceedings affecting the liquidation of the assets of the estate also are core proceedings. Anything can be included under clauses (A) and (O) taken together, and they certainly would have been sufficient. But clause (O) continues. It is not limited to matters affecting liquidation, but goes on to add proceedings affecting the adjustment of the debtor-creditor or debtor-shareholder relationship. What possibly could be overlooked by these four catch-all provisions? Why are clauses (B) through (N)—and for that matter clause (O)—even needed? One may conclude that Congress intended to make as clear as it could those matters that should be considered within the jurisdiction of the nonarticle III bankruptcy court. This would enable bankruptcy courts to enter final orders and would leave very little for the district court to do in the bankruptcy arena. These clauses alone appear to give the bankruptcy courts all the pervasive jurisdiction formerly granted by section 1471(b) and (c).<sup>43</sup>

The listings in section 157(b)(2) do not indicate that the bank-

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43. Compare the procedural scheme set forth in 28 U.S.C. § 1471:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all the property, wherever located, of the debtor, as of the commencement of such case.

ruptcy court would not have jurisdiction over the *Northern Pipeline* cause of action if it had arisen under the 1984 amendments. One could argue that it would be a core proceeding. It certainly affects the liquidation of the assets of the estate. The Chapter 11 debtor in *Northern Pipeline* sued for breach of contract. The cause of action (a chose in action) was an asset of the estate and had to be liquidated. Northern Pipeline, the Chapter 11 debtor, had sued Marathon for breach of contract. It is therefore likely that the proceeding also affected the adjustment of the debtor-creditor relationship. If the breach of contract action would be a core proceeding under the 1984 amendments, Congress has not complied with the Supreme Court's mandate and has enacted a constitutionally invalid statute.<sup>44</sup>

The next major item listed as a core proceeding is the allowance or disallowance of claims against the estate.<sup>45</sup> As mentioned, one could consider this item as part of the administration of the estate. A key element in any type of case under the Code, whether a Chapter 7, 9, 11, or 13 case, is the filing of a proof of claim. Under both the Code and the Rules, if no party in interest objects, a claim is deemed allowed.<sup>46</sup> Judges do not have to hold hearings

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44. See also *supra* note 10. Some courts have held that certain actions by the debtor, including actions to collect an account receivable, are too similar to the cause of action involved in the *Northern Pipeline* case and are, therefore, noncore proceedings. See *Mohawk Indus. v. Robinson Indus.*, 46 Bankr. 464 (D. Mass. 1985) (action against supplier for breach of warranties); *In re Pierce*, 11 COLLIER BANKR. CAS. 2D (MB) 1036 (D. Colo. 1984) (action against lessor for breach of lease); *In re Atlas Automation, Inc.*, 42 Bankr. 246 (Bankr. E.D. Mich. 1984) (action to collect accounts receivable).

Other courts have held, however, that § 157(b)(2) is clearly stated and such actions by a debtor affect the debtor-creditor relationship, involve assets of the estate that require liquidation (clause (O)), or involve property of the estate that is subject to a turnover proceeding under clause (E). See *Lesser v. A-Z Assocs. (In re Lion Capital Group)*, No. 84-B-10668-72 (Bankr. S.D.N.Y. filed 1985) (proceeding to collect capital contributions from limited partners); *Baldwin-United Corp. v. Thompson (In re Baldwin-United Corp.)*, No. 1-83-02495 (Bankr. S.D. Ohio filed 1985) (action to collect promissory note). In *Baldwin-United Corp.* the court said that actions to collect accounts receivable traditionally were pursued in the bankruptcy court. This is not accurate. Prior to 1978 trustees brought suit in the bankruptcy court in the hope that the defendant would not object in its answer or by motion and thereby waive the lack of summary jurisdiction. This was one of the abusive practices that the 1978 Code attempted to eliminate from the system. On proper and timely objection there was no summary jurisdiction to entertain an action to collect accounts receivable. See 2 COLLIER ON BANKRUPTCY at 492 n.33 (J. Moore 14th ed. 1974). As mentioned, there is now ample authority in 28 U.S.C. § 157(b)(2) to determine that such actions are core proceedings. If such a determination is made, however, the next step is to declare the jurisdictional scheme of the 1984 amendments unconstitutional under the authority of *Northern Pipeline*.

45. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 104(a), 98 Stat. 333, 340 (to be codified at 28 U.S.C. § 157(b)(2)(B)).

46. 11 U.S.C. § 502 provides that a proof of claim is deemed allowed unless a party in



and enter orders allowing claims in the absence of objections. An order is entered only when an objection is filed to the allowance of a claim. If an objection is raised, a hearing is held resulting in an order of either allowance or disallowance.

Section 5011 of the Code provides that a timely proof of claim may be filed.<sup>47</sup> Rule 3002 specifies the time for filing a proof of claim, and Rule 3001 specifies the form and place for filing a proof of claim. These are routine, normal, formalistic matters that are within the administration of any type of case under the Code. Aside from objections to form and time of filing, any other disputes concerning a proof of claim raised by objection are not matters of bankruptcy law. State law or nonbankruptcy federal law usually governs. For example, there is no bankruptcy law with respect to liability on a loan or other contract.<sup>48</sup> This raises a question: does the underlying need for interpretation or application of state law affect the decision whether a matter is a core or noncore proceeding? Congress clearly did not intend any such effect because, pursuant to section 157(b)(3), that factor alone is not determinative in classifying a proceeding as core or noncore.<sup>49</sup>

Clause (C) of section 157(b)(2) raises additional problems in connection with the issue of the allowance and disallowance of claims. That clause lists counterclaims by the estate against persons filing claims as core proceedings. Suppose that Marathon had filed a claim in Northern Pipeline's Chapter 11 case as a creditor. Clause (C) provides that Northern Pipeline's counterclaim against Marathon for damages flowing from the alleged breach of contract would be a core proceeding in which the bankruptcy court may enter a final order. In other words, the 1984 amendments appear to

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interest, including the trustee, objects. Rule 3001(f) provides that a properly executed and filed proof of claim constitutes "prima facie evidence of the validity and amount of the claim."

47. While 11 U.S.C. § 501 is stated permissively, if an unsecured creditor desires to participate in any distribution, a proof of claim must be filed in a Chapter 7 or 13 case or must be deemed filed in a Chapter 11 case. *See* 11 U.S.C. § 1111(a) (1982).

48. 11 U.S.C. § 502(b)(1) (1982) renders nonallowable a claim that is unenforceable against the debtor under applicable law. Thus, if the creditor could not have recovered against the debtor absent the case under the Code, the trustee may use the same reason to object to the allowance of the claim. Normally, any such reason would be based on state law.

49. Whether Congress has properly read the Supreme Court's decision in *Northern Pipeline* is an open question until the Court decides the validity of the 1984 amendments. Many of the matters listed as core proceedings, determinable by the nonarticle III bankruptcy judge, depend upon the application and interpretation of state law and do not involve federal bankruptcy law at all. Congress' conclusion in 28 U.S.C. § 157(b)(3) to the contrary notwithstanding, the entire scheme of subsection (b)(2) may well be defective constitutionally.

permit the same proceeding, involving the same issues, to be within the jurisdiction of the nonarticle III court irrespective of the Supreme Court's holding in *Northern Pipeline*. This example demonstrates another way in which a "*Northern Pipeline II*" may come to the Supreme Court to test the 1984 amendments. The Court may well be indifferent to whether the action arises as a counterclaim rather than as an original claim in determining the constitutional powers of a nonarticle III court. Aside from language and cosmetics, Congress appears to have re-created the jurisdictional scheme of former section 1471(b) and (c) in the 1984 amendments.

Clause (C) also relates to the concept of implied consent. An important issue under pre-1978 law was whether the bankruptcy court had summary jurisdiction to decide counterclaims raised by the trustee after a creditor had filed a proof of claim. Two lines of thought developed that depended on the type of counterclaim concerned. Case law created a general principle that if the counterclaim was in the nature of a compulsory counterclaim (as in Federal Rule of Civil Procedure 13), the bankruptcy court had summary jurisdiction to determine it.<sup>50</sup> The other line of thought involved permissive counterclaims arising out of different transactions. This line was in a state of development in the courts when the 1978 Code was enacted. The cases were mixed on whether summary jurisdiction existed for permissive counterclaims<sup>51</sup> and the Supreme Court had not ruled. The important factor is that the law was in a state of flux. Now, however, Congress seems to have resolved the issue. The word used in clause (C) is "counterclaims." Clause (C) does not distinguish between compulsory and permissive counterclaims. Unless clause (C) is otherwise limited to compulsory counterclaims, the cause of action in *Northern Pipeline*, if raised in a counterclaim, would be a core proceeding. It appears doubtful that the authority of the bankruptcy court to enter a final order would be upheld by the Supreme Court because such authority seems clearly inconsistent with the Court's ruling in *Northern Pipeline*.<sup>52</sup> This demonstrates yet another provision that raises a

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50. See, e.g., *In re Carnell Constr. Co.*, 424 F.2d 296 (3d Cir. 1970); *Cherno v. Engine Air Serv., Inc.*, 330 F.2d 191 (2d Cir. 1964); see also 2 COLLIER ON BANKRUPTCY ¶ 23.08, at 557-60 (J. Moore 14th ed. 1978); Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 J. NAT'L ASS'N REF. IN BANKR. 76-84 (1962).

51. See Seligson & King, *supra* note 50, at 78-80; 2 COLLIER ON BANKRUPTCY, *supra* note 50, at 557-60.

52. Counterclaim jurisdiction may be totally at risk constitutionally. See *Schor v.*

constitutional issue affecting the entire statute.

Clause (C) also raises a matter concerning litigation strategy. One of the major benefits of the 1978 Code was the elimination of the practice of jurisdiction by entrapment or by ambush. Pursuant to pre-1978 law, many creditors hesitated to file a proof of claim because of certain unpredictable consequences. Attorneys for creditors feared that, by filing a proof of claim, the creditor would be submitting to the exercise of summary jurisdiction for something that it did not necessarily want adjudicated by the bankruptcy court. But the pervasive jurisdiction under the 1978 Code made it unnecessary to worry about filing a proof of claim. No consequence relating to jurisdiction flowed from that act.

The 1984 amendments may have re-created such strategic considerations. The Supreme Court in *Katchen v. Landy*<sup>53</sup> decided that, under pre-1978 law, the filing of a proof of claim submitted the creditor to summary jurisdiction with respect to any preference-recovery action. Fortunately, the problem may not be as broad as it was earlier because of the distinctions existing between current law and that interpreted by the Court in *Katchen*. Unlike pre-1978 law, preferences are treated separately in section 157(b)(2)(F). They do not come within the counterclaim provision because recovery of a preference is specifically listed as a core proceeding. In other situations, however, the counterclaim provision does raise the spectre of jurisdiction by ambush, because the full play of the bankruptcy court's authority arises merely with a creditor's filing of a proof of claim.

It may even be that the grant of jurisdiction to the bankruptcy court over classic bankruptcy actions to recover preferences and fraudulent transfers overreaches the guidelines set forth in the Supreme Court's decision in *Northern Pipeline*. Prior to the 1978 Code, these actions were not automatically within the province of the bankruptcy court. They were within the jurisdiction of the district court sitting as a bankruptcy court or the state court that had concurrent jurisdiction under sections 23, 60, and 70 of the former Bankruptcy Act. As mentioned, *Katchen v. Landy* held that bankruptcy court jurisdiction arose when the creditor-transferee filed a proof of claim. The 1984 amendments now provide, however, that the bankruptcy court has jurisdiction to enter final orders in all

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Commodity Futures Trading Comm'n, 740 F.2d 1262 (D.C. Cir. 1984) (administrative law judge may not adjudicate counterclaims not involving Commodity Exchange Act).

53. 382 U.S. 323 (1966).

such actions.<sup>54</sup> Fraudulent transfer actions can arise under two governing sections. Section 548 gives rise to a trustee's power, qua trustee, to contest a transfer as fraudulent,<sup>55</sup> and pursuant to section 544(b), the trustee succeeds to the rights of unsecured creditors with allowable claims. If there is any creditor who can, under state law, contest a prebankruptcy transfer as fraudulent, the trustee may assert that right and bring the action. Pursuant to section 157(b)(2)(H), actions under both sections 548 and 544(b) can be brought in the bankruptcy court for entry of final orders. It is difficult, if not impossible, to perceive any conceptual difference between the trustee's use of an individual creditor's right to sue under section 544(b) and the debtor suing for breach of contract as it did in *Northern Pipeline*.

Section 157(b)(2)(B) contains an important exception that bifurcates jurisdiction with respect to a personal injury tort claim, depending on the purpose for which adjudication of the claim is necessary.<sup>56</sup> A proceeding for the liquidation or estimation of a contingent or unliquidated personal injury tort or wrongful death claim for the purpose of distribution or entitlement to distribution in, for example, a Chapter 11 case, is not a core proceeding although the injured person is required to file a proof of claim that will be allowed or disallowed. It may be necessary to have a determination of liability in order to conclude whether a class has accepted or rejected a plan by the requisite majorities for purposes of confirmation. This need to determine liability or the extent of liability arises in a Chapter 11 or 13 case but not in a Chapter 7 liquidation case. For purposes of confirming a plan, the adjudication of liability would be a core proceeding subject to entry of a final order by the bankruptcy judge. For distribution purposes,

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54. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 104(a), 98 Stat. 333, 340 (to be codified at 28 U.S.C. § 157(b)(2)(F), (H) and possibly (K)). One court reached the misplaced conclusion that the preference provision is unconstitutional on the theory that such actions cannot be heard by a nonarticle III judge. *See In re Associated Grocers of Neb. Coop.*, 12 BANKR. CT. DEC. (CRR) 737 (Bankr. D. Neb. 1984).

55. 11 U.S.C. § 548 (1982) gives the trustee power to avoid fraudulent transfers made within one year prior to the commencement of the Title 11 case.

56. Section 157(b)(2)(B) of the 1984 amendments provides that core proceedings include the

allowance or disallowance or claims against the estate . . . and estimation of claims or interest [sic] for the purposes of confirming a plan under chapter 11 or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11.

*Id.*

however, the adjudication of liability is not a core proceeding and, therefore, the bankruptcy court cannot enter a final order.

The fact that the bankruptcy court may not enter a final order when a trial is necessary for distribution purposes does not mean it becomes a noncore proceeding under subsection (c)(1) in which the bankruptcy court may only submit proposed findings and conclusions. The bankruptcy court is not permitted to be involved at all. Paragraph (5) of section 157(b) provides for the direct and nondelgatable involvement of the district court. It states not only that the district court *shall* determine where the personal injury action shall be tried, but it greatly limits the alternatives available to that court. Section 157(b)(5) permits the action to be tried only in a federal district court and may not be tried in a bankruptcy or state court. The district court for the district in which the Code case is pending is required to decide either that the personal injury action will be tried there or in the district court located in the district in which the claim arose.<sup>57</sup>

Two other factors also relate to the bifurcated jurisdiction under section 157(b)(2)(B). First, the jury trial provision, as amended in 1984,<sup>58</sup> retains the right to trial by jury in bankruptcy cases only in personal injury actions. Personal injury actions are triable only in the federal district court under section 157(b)(5); accordingly, a jury trial may take place only in the district court. Second, because section 157(b)(5) specifically provides for these

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57. Two courts have held that while § 157(b)(5) requires trial by the district court, that does not mean that a trial will be necessary immediately or in every situation involving a personal injury tort claim. See *In re UNR Indus., Inc.*, 11 COLLIER BANKR. CAS. 2D (MB) 687 (Bankr. N.D. Ill. 1984); *In re Johns-Manville Corp.*, 36 Bankr. 727 (Bankr. S.D.N.Y. 1984); see also *In re Revere Copper & Brass Inc.*, Nos. 83 B 10791, 82 B 12077 to 12086, slip op. (S.D.N.Y. Sept. 12, 1984) (decision involving § 157(d) but the theory was the same: in the absence of a dispute there is nothing to withdraw from the bankruptcy court). The subsection becomes applicable only when a trial becomes necessary and not before. The mere fact that a proof of claim is filed does not automatically mandate a trial. There may not be an objection filed to the claim or it may be settled through negotiation, particularly through negotiation with Chapter 11 classes of creditors or claimants in connection with a plan. Procedurally, nothing in the amendments requires a change from the usual claim filing method pursuant to § 501 of the Code and Rnles 3001, 3002, and 3003. If an issue is joined, however, and trial becomes necessary, it must be held in the district court.

Since the personal injury action is not even a noncore proceeding, the district judge may not re-refer the matter to the bankruptcy judge for trial. The district judge may, however, refer whatever can be referred to a magistrate pursuant to the Magistrates Act. The only power to refer to a bankruptcy judge is 28 U.S.C. § 157(a), but § 157(b)(5) provides in essence that the bankruptcy judge may not try this type of action.

58. Section 1411(a) of the 1984 amendments provides, in part: "this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." *Id.*

claims to be tried in the federal district court, the mandatory abstention feature of 28 U.S.C. § 1334(c)(2) is inapplicable.<sup>59</sup> These related provisions emphasize Congress' directive that the district court shall try these types of claims and not the bankruptcy court under the reference of section 157(a), whether through the special master process or by the designation of the bankruptcy judge as a magistrate, for which the authority otherwise would exist.

The bifurcated jurisdiction can give rise to inconsistent judgments. The same action may be tried before both the bankruptcy judge and the district judge. These judges may reach different conclusions. Nothing indicates that the doctrine of res judicata or even collateral estoppel is relevant. In fact, the application of either doctrine would undermine Congress' intent to use two different courts for the two different purposes set forth in the statute.<sup>60</sup>

### C. *Withdrawal of Cases and Proceedings*

In accordance with the perceived need to have some supervision of the article I bankruptcy court by the article III district court, section 157(d) contains provisions permitting, and under some circumstances requiring, withdrawal of cases and proceedings or parts thereof from the bankruptcy court.<sup>61</sup> The first sentence of subsection (d) permits withdrawal on timely motion of a party or on the district court's own motion, in each case for cause shown. The second sentence requires withdrawal under certain specified circumstances. Several observations may be made about both sentences.

#### 1. Permissive Withdrawal

Although the first sentence of section 157(d) allows withdrawal as a matter of discretion, cause must be shown. Even though the district judge may withdraw a case or proceeding sua sponte, cause

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59. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 104(a), 98 Stat. 333, 341 (to be codified at 28 U.S.C. § 157(b)(4)).

60. Nondischargeability of a debt is a core proceeding under § 157(b)(2)(I). But if liability falls under § 157(b)(5) the whole proceeding should be heard by the district court. *In re Lagrotteria*, 12 BANKR. CT. DEC. (CRR) 457 (Bankr. N.D. Ill. 1984).

61. Section 157(d) of the 1984 amendments provides:

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

must still be shown, that is, the district judge in some manner must specify a sound reason for withdrawal. It is disconcerting that a party disfavoring withdrawal will be at a distinct disadvantage, because it will have to contest the action of the arbiter who will decide the contest.

Nothing in the legislation or otherwise indicates what may constitute cause. One form of cause may be a subsequent order to abstain, issued pursuant to 28 U.S.C. § 1334(c)(1) or (2).<sup>62</sup> Thus withdrawal may be used as the first step in transferring a proceeding from the bankruptcy court to, ultimately, the state court.<sup>63</sup>

## 2. Mandatory Withdrawal

The second sentence of section 157(d) requires withdrawal of a proceeding on timely motion of a party if *both* the Bankruptcy Code and another federal law "regulating organizations or activities affecting interstate commerce" must be considered to resolve the proceeding.<sup>64</sup> This provision had no counterpart in the Bankruptcy Reform Act of 1978 or the Bankruptcy Act of 1898. Apparently, it represents a congressional concern incited by lobbyists for private interest groups that bankruptcy courts either cannot or should not interpret nonbankruptcy federal laws. Regardless of

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62. Section 1334(c)(1) and (2) of the 1984 amendments states:

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

63. The first sentence of § 157(d) requires a motion made by a party to be timely. Again, the statute does not indicate what constitutes a timely motion. Presumably, the standards of timeliness are left for determination by bankruptcy rules.

It would seem that a demand for trial by jury should not be deemed cause for withdrawal of a proceeding from the bankruptcy judge. 28 U.S.C. § 1411(a) limits the right to trial by jury to personal injury and wrongful death tort actions which, as indicated in the text, are tried in the district court and are not subject to withdrawal in any event. See *supra* note 58 for text of § 1411(a).

64. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 104(a), 98 Stat. 333, 341 (to be codified at 28 U.S.C. § 157(d)).

Congress' reason for passing it, the mandatory withdrawal feature should receive little actual use in the courts. Some examples may be informative.

Labor union lawyers conceivably would regard section 157(d) as requiring withdrawal of a proceeding to reject a collective bargaining agreement in a Chapter 11 case pursuant to section 1113 of the Bankruptcy Code. In order to reject such a contract section 1113 must be considered, because its requirements are conditions precedent to the court's permitting rejection. But federal labor law clearly is not involved. Both the Supreme Court, in *NLRB v. Bildisco & Bildisco*,<sup>65</sup> and Congress, in section 1113, have said that, with regard to permission to reject collective bargaining agreements,<sup>66</sup> the Bankruptcy Code supersedes the labor laws. Thus, nothing in the National Labor Relations Act must be considered. If the particular matter required interpretation and application of some part of the labor law, then both laws would be involved and mandatory withdrawal could be raised. But that would not be the routine situation.

Another example is an action brought under the antitrust laws for treble damages. In order to resolve that proceeding the antitrust laws must be interpreted to determine if there was a violation, if there is liability, and the extent of damages. But that is only one-half of the issue. In order to trigger mandatory withdrawal, Title 11 of the Bankruptcy Code also must be considered to resolve the proceeding. Yet nothing in the Bankruptcy Code must be considered in order to resolve the proceeding based on the antitrust laws. The debtor, if it is the plaintiff, either is or is not entitled to damages. If the creditor brings the action against the debtor, the claim will be allowed or disallowed, but on the basis of the antitrust laws and not on the basis of the Bankruptcy Code.

When one properly analyzes section 157(d), it becomes apparent that very few, if any, proceedings will require consideration of both sets of laws and thereby cause mandatory withdrawal. In *In re White Motor Corp.*,<sup>67</sup> the district court applied the provision on

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65. 104 S. Ct. 1188 (1984).

66. 11 U.S.C. § 365 (1982) covers the assumption and rejection of executory contracts generally, but 11 U.S.C. § 1113, which was added by the 1984 amendments, covers the treatment of collective bargaining agreements specifically.

67. 42 Bankr. 693 (N.D. Ohio 1984). The court found little legislative history pertaining to § 157(d).

On the floor of the Senate, Senators Dole and Hefin virtually repeated the language of the subsection without explanation. What is interesting, however, is that both referred only to the district judge as the one to withdraw a proceeding. No mention was made of the



a quantitative basis. Both ERISA and the Code were involved. The court concluded that what was required primarily was consideration of the bankruptcy law. The court held that section 157(d) does not require withdrawal unless resolution of the dispute requires substantial and material consideration of federal law other than the Bankruptcy Code. Section 157(d) is not to be construed as an escape hatch through which most disputes can flow from the bankruptcy court to the district court.

### 3. Motions for Withdrawal

A major concern of the bankruptcy bar is where to bring a motion for withdrawal. In considering where a motion for withdrawal should be lodged and heard, as between the bankruptcy court and the district court, one finds in section 157 a convoluted and disorganized system. The statute clearly and succinctly states that the district court may withdraw a case or proceeding pursuant to section 157(d). It also explicitly states that the district court may, and under some circumstances must, abstain from hearing a particular proceeding, thus leaving it to a state court for adjudication.<sup>68</sup> The two subsections that confuse the system are (b)(3) and (a) of section 157. Subsection (b)(3) provides that the *bankruptcy court*,<sup>69</sup> not the district court, shall determine whether a proceeding is a core or a noncore proceeding. In terms of efficiency of administration with regard to the courts, counsel, and the parties, it would be most reasonable for the bankruptcy court also to determine any motion for withdrawal or abstention. As already indi-

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bankruptcy judge's authority to do so. 130 CONG. REC. S6085-87 (daily ed. May 21, 1984) (statements of Sens. Dole and Heflin). In discussing an earlier version of the bill, S. 1013, the Senate Report states: "The district court thus retains full power to withdraw or limit the reference of a bankruptcy case or proceeding to the bankruptcy court at any time for any reason." S. REP. NO. 55, 98th Cong., 1st Sess. 16 (1983).

Senator DeConcini referred to withdrawal in the following terms:

The district court should withdraw such proceedings only if the court determines that the assertion that other laws regulating organizations or activities affecting interstate commerce are in fact likely to be considered, and should not allow a party to use this provision to require withdrawal where such laws are not material to resolution of the proceeding.

130 CONG. REC. S7622 (daily ed. June 19, 1984) (statement by Sen. DeConcini) (speaking of mandatory withdrawal).

68. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 101(a), 98 Stat 333, 333 (to be codified at 28 U.S.C. § 1334(c)); *see supra* note 67.

69. 28 U.S.C. § 157(b)(3) does not use the word "court" but uses "judge." Some argue there is no longer any bankruptcy court. This is called selective reading. 28 U.S.C. § 151 constitutes the bankruptcy judges of the district as a unit of the district court "to be known as the bankruptcy court for that district." Yes, Virginia, there is a bankruptcy court.

cated, subsection (a) of section 157 permits the district court to refer all cases and proceedings to the bankruptcy court. If the district court has made such a reference, are motions to withdraw and abstain necessarily included? If they are included, why does subsection (d) specify that the district court *must* withdraw in some instances and *may* withdraw in other instances on its own motion?

Other procedural difficulties have become apparent. A party may bring a motion in the district court even though all the proceedings in the case have been under the supervision of the bankruptcy court. The district court where the motion is brought will not know what has been happening in the case. Additionally, the statute does not provide the bankruptcy court with a way of learning that such a motion has been made and that the district court is considering it. The courts, the Administrative Office of the United States courts, or the Bankruptcy Rules Committee can develop procedures that would involve and inform both the clerk of the district court and the clerk of the bankruptcy court in districts where there is a separation in the paper-handling process.<sup>70</sup> But however well the procedure may be worked out, the mere decision to place the responsibility with the district court automatically creates time delays in reaching results in the particular proceeding, which can have an adverse effect on the progress of the case itself. While the district court hears a motion for withdrawal, is the proceeding pending before the bankruptcy judge stayed? Absent a stay order, the proceeding may continue. Rules should be drawn to treat this situation similarly to stays pending appeal.<sup>71</sup>

Another difficulty is whether to classify the proceedings for withdrawal and abstention as core or noncore proceedings if they are heard by a bankruptcy court. If they are core proceedings and the bankruptcy court thus may enter a final order, one would surmise that such an order is interlocutory in nature and not subject to appeal as of right.<sup>72</sup> Additionally, an order granting a mo-

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70. Bankruptcy courts may or may not have a separate bankruptcy clerk's office in a particular district. Section 156(b) of the 1984 amendments permits bankruptcy judges to appoint a clerk for the bankruptcy court of the district if the bankruptcy judges certify that the number of cases and proceedings pending under § 1334 warrant a separate clerk's office. Absent a certification, the district court clerk's office will also serve the bankruptcy court.

71. See, e.g., BANKR. R. 7002 and 8005.

72. This would be the conclusion with respect to an order denying a motion to withdraw or abstain. It might not be considered interlocutory if the bankruptcy court granted the motion. A decision to abstain, however, is not appealable. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 101(a), 98 Stat. 333, 333 (to be codified at 28 U.S.C. § 1334(c)(2)). This section refers only to the district court but if §

tion to abstain is, pursuant to section 1334(c)(2), not reviewable by appeal or otherwise. Thus, the bankruptcy judge's order would not be appealable, a consequence hardly contemplated by Congress. If a motion to withdraw or abstain is deemed a noncore proceeding, the bankruptcy court may enter only proposed findings and conclusions. The district court still has the responsibility to enter the final order. Thus, the district court might as well have heard the motion in the first place. Section 157 provides no help in determining the characterization of the motions. This lack of clarification itself may indicate that Congress meant what it wrote: the motions to withdraw and abstain are to be filed and heard in the district court.

#### *D. Abstention*

Section 1334(c)(1) provides for discretionary abstention. This provision varies little from former section 1471(d),<sup>73</sup> which was repealed by the Bankruptcy Amendments of 1984.<sup>74</sup> One difference in the two provisions, however, is that abstention formerly was within the province of the bankruptcy court. The present language refers to the district court exclusively.

Section 1334(c)(2) is new. It requires abstention if a number of requirements coexist. Section 1334(c)(2) is not self-executing, and there is no provision for the court to act on its own motion as there is with respect to withdrawal. The requirements are of such a nature, however, as to limit considerably the occasions for use of subsection (c)(2). Rarely will they all be present. The first requirement is a timely motion of a party to the proceeding. Again, the statute does not define a timely motion but, presumably, leaves that for the rules to prescribe. If a motion is made too late by whatever standards, is it precluded or may it be considered under subsection (c)(1) for discretionary abstention? It would appear possible to consider it under subsection (c)(1), but the court does not have to grant the motion. In any event, mandatory abstention does not in-

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158(d) authorizes the bankruptcy court to hear an abstention motion and enter a final order, that order also would not be appealable. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 104(a), 98 Stat. 333, 341 (to be codified at 28 U.S.C. § 158(a)) ("The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges.") *See also* 1 COLLIER ON BANKRUPTCY ¶ 3.03[7][d] (L. King 15th ed. 1980).

73. Former 28 U.S.C. § 1471(d) provided that a district court or a bankruptcy court, in the interest of justice, could abstain from hearing a particular proceeding.

74. Pub. L. No. 98-353, 98 Stat. 333 (1984) (effectively repealing 28 U.S.C. § 1471(d)).

volve a jurisdictional issue. If no timely motion is made, but all the other requirements are present, abstention is not mandated.

How does abstention work procedurally? In an adversary proceeding the trustee or debtor in possession files a complaint under Part VII of the Bankruptcy Rules.<sup>75</sup> The complaint is filed in the bankruptcy court because of the reference that was made automatically under section 157(a).<sup>76</sup> Assume that the defendant believes that the requirements for mandatory abstention are present. Congress seems to have created a system requiring a motion for withdrawal to the district court, which would be discretionary, and an attached motion for mandatory abstention alleging cause.

The statute has another ambiguous procedure for mandatory abstention. Suppose that no action was pending in the state court before the Code case was filed. The language in section 1334(c)(2) states that the district court shall abstain from hearing such proceeding if an action "is commenced . . . in a state forum of appropriate jurisdiction." This language does not make clear whether the state action must have been commenced prior to the Code case. For the most part, it is unlikely that a party will commence an action in state court after the commencement of the Code case.<sup>77</sup> This provision will be more applicable, if at all, to situations in which a prepetition proceeding is pending in the state court.

Mandatory abstention also requires that the proceeding be based on a state law claim or cause of action. One may consider whether the cause of action asserted in *Northern Pipeline* would have been subject to mandatory abstention. That cause of action was based on breach of contract, which was a state law cause of action *related* to a case under Title 11 but that did not *arise* under Title 11 or in a case under Title 11. State law proceedings that fall within the enumerated core proceedings of section 157(b)(2) could become the subject of the mandatory abstention provisions of section 157(d). Arguably, however, the language "related to a case under title 11" in section 157(a) could exclude core proceedings in

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75. Part VII of the Rules of Bankruptcy Procedure prescribes the procedure to be followed in adversary proceedings. Rule 7001 sets forth a list of matters denoted as adversary proceedings.

76. See *supra* text accompanying notes 12-13.

77. If the debtor is the plaintiff, it normally would bring the action in the bankruptcy court rather than the state court because, if for no other reason, there would be less delay in obtaining a resolution of the proceeding. If the cause of action belongs to the third party, that party would be stayed from commencing an action in state court by the operation of 11 U.S.C. § 362(a). The appropriate procedure would be to file a proof of claim in the bankruptcy court setting forth the basis of the alleged liability of the debtor.

section 157(b)(2) from mandatory abstention even though many of the matters there listed are based on state law considerations or essentially are state law causes of action.

Mandatory abstention requires the action to be one that could not have been commenced in a federal court in the absence of jurisdiction under section 1334(b). If there is any basis for federal jurisdiction, the mandatory abstention feature is not applicable. Such jurisdiction need not be based on the Bankruptcy Code or section 1334. The statute simply requires that the suit otherwise could not have been brought in a *federal* court. If it could have been brought in a federal court, absent bankruptcy, on the basis of diversity of citizenship or the presence of a federal question, section 1334(c)(2) does not apply. A probable purpose of this subsection is to preserve "state's rights" on the theory that not every case should be tried in the bankruptcy court, particularly if purely state law issues are involved. If the action could not have been brought in federal court absent bankruptcy, it should be litigated in state court if one of the parties so desires.<sup>78</sup> The claim in the *Northern Pipeline* case would not have been subject to mandatory abstention because diversity of citizenship existed.

The final requirement for mandatory abstention is that the state court action can be timely adjudicated. This requirement probably derives from section 57 of the Bankruptcy Act of 1898, which provided that if adjudication, estimation, or liquidation of contingent or unliquidated claims would unduly delay the administration of the estate, the claims should be disallowed. The court should consider the state court calendar and the status of the Code case. Some considerations for the bankruptcy court's determination whether to mandate abstention and await the state court adjudication are the type of case, that is, if it is a Chapter 7 liquidation or a Chapter 11 reorganization case, if it is a complex case, and if it is going to take long to close the case, to administer it, or to confirm a plan.

### *E. Jury Trial*

Former 28 U.S.C. § 1480 contained a broad right of trial by jury in bankruptcy cases. It provided that, to the extent the right

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78. Early drafts of section 1334(c)(2) indicate that Congress originally intended to include personal injury tort actions in the mandatory abstention provisions but § 157(b)(4) as finally enacted exempts these actions from the mandatory abstention provisions of § 1334(c)(2).

existed under any statute on September 30, 1979, the right was retained. The trial before a jury would be held in the bankruptcy court because of the pervasive jurisdiction granted to that court in section 1471(c). The 1984 amendments added section 1411 to Title 28, which contains the limited provision in subsection (a) that Title 11 "do[es] not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." This provision does not refer to other causes of action, such as breach of contract, in which there would be a right to trial by jury absent bankruptcy. Section 1480 no longer is applicable because if it was not repealed outright, it was at least implicitly repealed by section 1411.<sup>79</sup> If repeal were not the intention, section 1411 would have been unnecessary. Section 1480 already addressed the subject matter of section 1411. Accordingly, section 1411 severely limits the scope of former section 1480 and limits the right to trial by jury. As will be discussed, the entire jurisdictional structure of the 1984 amendments also leads to this conclusion.

Two basic questions arise. First, if there is a proceeding in the bankruptcy court in which, absent bankruptcy, there would be a right to trial by jury, may the bankruptcy court, on timely demand, order a jury trial? Second, can the personal injury tort claim be tried by jury only in the district court, or may it also be tried by a jury in the bankruptcy court?

The bankruptcy court is a court of equity, in which there is no

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79. The 1984 amendments contain inconsistent provisions with respect to the repeal or continuing effectiveness of Title 28 sections added in 1978 with an effective date of April 1, 1984. One of those sections was § 1480, which contained the broad retention of the right to trial by jury. Section 113 of Pub. L. No. 98-353, 98 Stat. 343 (1984), provides that § 402(b) of Pub. L. No. 95-598, 92 Stat. 2682 (1978), shall not become effective. Section 402(b) encompasses 28 U.S.C. § 1480. Section 121 of Pub. L. No. 98-353, 98 Stat. 345 (1984), however, states that § 402(b) and (e) of Pub. L. No. 95-598, 98 Stat. 333 (1984), shall become effective on the date of enactment of the 1984 amendments, which was July 10, 1984. Many of the provisions in Title 28 that originally were to become effective on April 1, 1984, are inconsistent with the provisions in Title 28 as changed or added in 1984. The obvious intent of Congress was to repeal the 1978 provisions but this was done very inartfully. Nevertheless, at least two decisions have held that § 113 overrides § 121 and causes a repeal. Thus, § 1411 rather than § 1480 controls the right to jury trial in proceedings arising in or related to cases under the Bankruptcy Code. In fact, if § 1480 remained in effect, § 1411 would be unnecessary; its provisions would be encompassed within § 1480. See *Precon, Inc. v. JRS Realty Trust*, Civ. No. 84-0085-P (D. Me. 1985); *In re Long*, 43 Bankr. 692 (Bankr. N.D. Ohio 1984). Other courts have held that § 1480 was implicitly repealed because § 1411 covers the same subject matter. *In re Riggsby*, 745 F.2d 1153 (7th Cir. 1984) (§ 1293 implicitly repealed); *G.S.H., Inc. v. Pemberton (In re Nilsson)*, 12 BANKR. CT. DEC. (CRR) 473 (Bankr. C.D. Cal. 1984) (repeal of § 1478, the former removal provision).

right of trial by jury.<sup>80</sup> That is perhaps one reason why Congress limited the operation of section 1411 as it did. The only matter that the bankruptcy court, by virtue of section 157(b)(5), cannot hear under any circumstances is a personal injury or wrongful death tort claim. Subsection (b)(5) provides that these actions shall be tried in the federal district court. It is in the federal district court that the right to trial by jury exists. A district court is a court of law, and not only a court of equity.

Thus, there is no right to a jury trial in core proceedings. Moreover, there is no authorization in Title 11 or Title 28 for bankruptcy judges to conduct jury trials. In the Bankruptcy Act 1898, section 19 gave a right to jury trial on the issues contained in an involuntary bankruptcy petition. Nothing in the Bankruptcy Act of 1898 prevented the bankruptcy judge, then a referee in bankruptcy, from conducting a jury trial if properly demanded pursuant to section 19. In 1966, however, the Judicial Conference of the United States adopted a resolution barring referees in bankruptcy from conducting jury trials.<sup>81</sup> Thus, it was necessary to refer trials on involuntary petitions to the district court. Debtors demanded jury trials almost routinely in order to cause delay and take advantage of whatever leverage such demand offered. But one could not have stated with any authority that Congress thought the referees in bankruptcy were not qualified to conduct the jury trials. The bankruptcy rules that became effective in 1973 authorized the referees, redesignated by the rules as bankruptcy judges,<sup>82</sup> to conduct jury trials.<sup>83</sup> In the 1984 setting, there is no such authorization.

The Supreme Court recognized the lack of a general right to

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80. "[I]t is well settled, however, that trials without a jury in bankruptcy proceedings are not a violation of constitutional right, because such proceedings are equitable in nature. Thus a summary proceeding in the bankruptcy court to turn over property . . . carries with it no right to a jury trial." 2 COLLIER ON BANKRUPTCY at 238 (J. Moore 14th ed. 1978) (citing *Barton v. Barbour*, 104 U.S. 126 (1881)); *In re Christensen*, 101 F. 243 (D. Iowa 1900).

81. Proceedings, Judicial Conference of the United States 22 (1960); 1A COLLIER ON BANKRUPTCY ¶ 17.28A[6] (J. Moore 14th ed. 1978).

82. See former BANKR. R. 901(7).

83. Former Bankruptcy Rule 409(c) provided that if a right to jury trial existed in an action to determine the dischargeability of a debt and was timely demanded, the bankruptcy judge could conduct the trial if local rules of the district court so provided. Former Rule 115(b), which established the procedure for the hearing on an involuntary petition, provided that the bankruptcy judge would conduct the jury trial, if timely demanded, and if the demand or local rule did not specify otherwise (for example, that the bankruptcy judge would conduct it).

trial by jury in the bankruptcy court in *Katchen v. Landy*.<sup>84</sup> The Court held that the bankruptcy court had jurisdiction to award an affirmative judgment in favor of the bankrupt estate when the trustee in bankruptcy asserted, as a counterclaim, a voidable preference received by the creditor. Normally, preference actions were within the concurrent jurisdiction of the district court and the state court, in which there was a right to jury trial.<sup>85</sup> But when the transferee was also a creditor and filed a proof of claim, the Court concluded that the bankruptcy court had summary jurisdiction to determine the validity and amount of a preference and to award an affirmative judgment. The Court held the nonexistence of a right to a jury trial in the bankruptcy court to be of no moment.<sup>86</sup>

In the wake of the 1973 Rules and the 1970 amendments to the Bankruptcy Act, which expanded the right to a jury,<sup>87</sup> the 1978 Reform Act gave full rights and powers to the bankruptcy court to conduct jury trials. The pervasive jurisdiction of section 1471(c) carried with it the full authority to conduct jury trials in all proceedings in which the right existed as provided in section 1480. *Northern Pipeline*, however, held the jurisdictional scheme unconstitutional. The 1984 amendments represent a retrenchment of jurisdiction in an effort to keep the statute constitutionally valid. But one should not read the restrictive provisions of the 1984 amendments more broadly than written. Neither should the 1984 amendments be interpreted as incorporating the scheme of the 1978 Act merely because it provided an efficient system of judicial administration. It would seem that district judges have caused an untenable situation in keeping the bankruptcy court from being an article III court with its full panoply of powers and at the same time using the article I bankruptcy court to do all the work the Supreme Court has said only an article III court can do.

A jury is not appropriate in noncore proceedings heard by the bankruptcy court because the bankruptcy court cannot enter a final order. Instead, the bankruptcy court merely enters proposed findings of fact and conclusions of law. When the proposed findings are sent to the district court for entry of the final order, nothing in section 157(c)(1) authorizes the district court to convene a jury. The findings of fact already have been made as far as the district court is concerned. At most, it need only consider the pro-

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84. 382 U.S. 323 (1966).

85. See §§ 23b and 60b of the Bankruptcy Act of 1898.

86. *Katchen*, 382 U.S. at 337-38.

87. See § 17c(3) of the Bankruptcy Act of 1898; see also BANKR. R. 115 and 409.



posed findings or review the findings de novo if an objection has been made.

The unavailability of jury trials is clear. There is no right to a jury in the bankruptcy court.<sup>88</sup> Nor is there such a right in the district court. All the matters in which there otherwise might be a right to trial by jury, other than personal injury matters, are not heard by the district court in the first instance. If withdrawal occurs, the matter can come before the district court but it does not begin there. Withdrawal is merely a second step in the process; it will not serve to retain a right to trial by jury. The personal injury action, on the other hand, does not start in the bankruptcy court, but rather begins and ends in the district court. While it was probably unnecessary to state that the right to a jury trial was retained, Congress decided to make it clear. In fact, section 1411(a) would be totally redundant if the right to jury trial continued to exist in

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88. It should be noted that several courts, including several district courts, have held that there is a right to jury trial in bankruptcy matters other than personal injury actions and that the bankruptcy court may conduct them. No authority is stated in the decisions nor is there any analysis to support the conclusions. What comes through clearly is that the district judges, having defeated the article III proposal for bankruptcy courts, do not now want to have anything to do with proceedings arising in bankruptcy cases and treat the bankruptcy judges as continuing to have the outlawed pervasive jurisdiction contained in the 1978 Reform Act. See *Macon Prestressed Concrete Co. v. Duke*, 85-1-MAC (M.D. Ga. 1985) (while there is no authority for bankruptcy judge to conduct jury trial, there is also no prohibition); *In re Arnett Oil, Inc.*, 44 Bankr. 603 (N.D. Ind. 1984) (defendant has right to jury trial in preference recovery action). *Contra In re Best Pack Seafood, Inc.*, 45 Bankr. 194 (Bankr. D. Me. 1984) (preference action is a core proceeding which is not triable by a jury). See also *In re Gibbons Constr. Co.*, 12 BANKR. CT. DEC. (CRR) 463 (E.D. Ky. 1984) (the 1984 amendments removed the bar contained in the Emergency Rule and bankruptcy judge can try jury case); *In re Smith-Douglass, Inc.*, 43 Bankr. 616 (Bankr. E.D.N.C. 1984) (no prohibition in 1984 amendments).

In one case, a district court found authority in Bankruptcy Rule 9015 for bankruptcy judges to conduct jury trials. That court failed to recognize two fairly important matters: (1) Rule 9015 merely established the procedure for demanding a jury trial if the right existed under the 1978 Bankruptcy Reform Act (28 U.S.C. § 1480) and, (2) if Rule 9015 established the substantive right of jury trial, it would be an invalid exercise of the rulemaking power granted to the Supreme Court by Congress in 28 U.S.C. § 2075 because the rules may only relate to procedural matters and may not create substantive rights. See *infra* note 94; see also *Lombard-Wall Inc. v. N.Y.C. Housing Dev. Corp. (In re Lombard-Wall Inc.)*, No. 82 B 11556 slip op. (S.D.N.Y. 1985). The *Lombard-Wall* court's analysis is as follows:

We note first that the parties have proceeded to this point under the mistaken assumption that a jury trial is unavailable in the bankruptcy court. They have apparently overlooked rule 9015 . . . which permits the bankruptcy courts to hold jury trials. The advisory committee notes to Rule 9015 confirm this interpretation. The notes speak of 'the procedures for requesting trial by jury in a matter [before the] . . . bankruptcy court.' . . . Having concluded that the bankruptcy court may hold a jury trial

. . . .  
*Id.* (Emphasis added).

other types of disputes.

Section 1411(b) provides that the district court may order issues arising under section 303 to be tried without a jury. Former section 1480(b) of Title 28 contained almost precisely the same provision and changed what had been the law under the Bankruptcy Act of 1898, which, as noted, granted the debtor a right to jury trial on the issues raised in an involuntary petition.<sup>89</sup> One difference between former section 1480(b) and section 1411(b) is that section 1480(b) placed the authority to order the issues tried by a jury in the bankruptcy court, while section 1411(b) places it in the district court.

While the judicial scheme of section 1411(b) lacks convenience and efficiency, it certainly seems to reflect what Congress intended in light of the prior history of jury trials in bankruptcy cases and in light of other congressional efforts to draft a statute that minimally appears constitutional. In any event, section 1411(b) is superfluous, irrelevant, and unnecessary. It clearly is copied from former section 1480, changing only the reference to the district court from the bankruptcy court. Even though the provision was needed in the former bankruptcy system, its justification has since been lost. Former section 1480(a) continued the right to trial by jury in the bankruptcy court as it existed by statute on September 30, 1979. Section 19 of the Bankruptcy Act of 1898 contained a statutory right to a jury trial. If subsection (b) had not been included in section 1480, subsection (a) would have retained the *right* to a jury trial on issues of an involuntary petition. The intent was not to retain the *right*, but to place the decision whether to have a jury in the discretion of the bankruptcy judge. Section 1411 does not retain the jury trial as it existed by statute. The issues raised by an involuntary petition filed under section 303 do not create any right to jury trial. Absent a right, there was no need to change it to a privilege that could be denied by the court. No harm would have resulted had subsection (b) of section 1411 been omitted.

A final question regarding the right to a jury arises with respect to removed actions. Section 1452 provides that a party may remove a civil action to the district court if the district court has

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89. Such issues would be the bankrupt's insolvency and the commission of an act of bankruptcy. It should be noted that the right to a jury trial was a matter of legislative grace and not of constitutional necessity. "The right to a jury under § 19a is one accorded the alleged bankrupt solely by the Bankruptcy Act and not by the provisions of the seventh amendment; trials without a jury in bankruptcy proceedings are not a violation of the Constitution." 2 COLLIER ON BANKRUPTCY, *supra* note 80, at 226.

jurisdiction under section 1334(b). Assume that a civil action is pending in state court in which there is a right to trial by jury. A case under the Bankruptcy Code is commenced and the action is removed to the district court. Once there, the proceeding falls under the automatic reference contained in section 157(a), and it is within the province of the bankruptcy court either to enter a final order, if it is a core proceeding, or to submit proposed findings of fact, if it is a noncore proceeding. The mere advent of a bankruptcy case has deprived a party of a right to jury trial that otherwise would have existed. Even though the system appears arbitrary, it should be applied in this manner because Congress' intent is clear. It is up to Congress to amend section 1411 if a change is desirable.

### *F. Appeals*

Traditionally, bankruptcy cases have been appealed to the district court and then to the United States court of appeals. The 1984 amendments maintain this appellate route. Questions arise whether the 1984 amendments contain any alternative routes or eliminate any other routes available under the 1978 Code. Under the Bankruptcy Reform Act of 1978, an alternative was to appeal directly to the court of appeals by agreement of the parties.<sup>90</sup> The parties were not required to obtain consent of the court of appeals, district court, or bankruptcy court. That route no longer is available. Section 158 does not sanction direct appeal to the court of appeals from the bankruptcy court under any circumstances. The only alternative contained in section 158 is the bankruptcy appellate panel,<sup>91</sup> which can be established by the judicial council of each circuit. These panels also existed under the Bankruptcy Reform Act of 1978, but the 1984 amendments have effected two changes to the 1978 method. First, in addition to the requirement that the judicial council establish the bankruptcy appellate panel, the district judges of each district in the circuit must authorize by majority vote a direct appeal from the bankruptcy court to the appellate panel. Accordingly, even if there is a bankruptcy appellate

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90. Former 28 U.S.C. § 1293(b) (effectively repealed by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333). In *Thistlewaite v. First Nat'l Bank of Lafayette (In re Exclusive Indus. Corp.)*, 751 F.2d 806 (5th Cir. 1985), it was held that there was no jurisdiction to hear a direct appeal as a consequence of the 1984 amendments.

91. Former 28 U.S.C. § 160 (effectively repealed by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333).

panel, it does not necessarily mean that the district court is bypassed. It is doubtful, however, that the judicial council would establish bankruptcy appellate panels to which the judges of the district would not permit appeals to be taken. If the district judges do not think it is a good idea to have a bankruptcy appellate panel, the judicial council simply will refrain from authorizing its establishment.

The second change requires all parties to the appeal to consent before the bankruptcy appellate panel can hear the appeal. It may be difficult to get unanimous consent and, therefore, to use the appellate panel because the denial of consent may give some tactical leverage to the party to an appeal that withholds consent. A party may withhold consent in order to cause delay, to be obstinate, to achieve a settlement, or to obtain any other perceived advantage such as a better chance of affirmance. The underlying congressional purpose for requiring consent is to bolster the constitutional underpinning of the entire statute. The bankruptcy judge may enter a final order subject to appeal under section 158 only in a core proceeding or a noncore proceeding with consent. In either event, the party does not have a hearing by an article III judge. Congress may have felt that if bankruptcy appellate panels were established, the party again would be deprived of a hearing by an article III judge because bankruptcy judges would comprise the panels. Therefore, Congress appears both to have assumed that the right to an article III judge is a waivable right and to have required consent in order to forestall a finding of constitutional invalidity.

The distinction between final orders and interlocutory orders is retained. The district court or appellate panel has jurisdiction to hear appeals from final orders but interlocutory orders require leave of the district court or panel.<sup>92</sup>

Section 158(c) contains two unfortunate references. First, section 158(c) states that the time for taking an appeal is as set forth in Rule 8002 of the Rules of Bankruptcy Procedure.<sup>93</sup> Utilization of a rule in this way is appropriate but the subsection is worded poorly. Although the content of Rule 8002 can be changed, the rule

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92. 28 U.S.C. § 158(a) and (b); see *In re Johns-Manville Corp.*, 45 Bankr. 833 (Bankr. S.D.N.Y. 1984) (leave should be granted liberally if it can expedite case).

93. Rule 8002(a) requires a notice of appeal to be filed within 10 days after entry of the order from which appeal is taken, but subdivision (c) permits a short extension of the time under certain circumstances.

number itself cannot be changed.<sup>94</sup> For example, if Part VIII of the Bankruptcy Rules were deleted in order to restructure the rule package, Rule 8002 nonetheless would have to be retained, absent a statutory amendment to section 158. The second troublesome aspect of section 158(c) is the statement that an appeal to either the district court or the bankruptcy appellate panel from final orders of the bankruptcy judge shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts. The reason for this statement's inclusion is unknown and its meaning may be difficult to determine. It might mean that the Federal Rules of Appellate Procedure are applicable, which would make Part VIII of the Bankruptcy Rules superfluous. On the other hand, subsection (c) logically should be considered a very general provision and not a specific procedural reference. Nevertheless, this unfortunate language will have to be considered when drafting and applying new bankruptcy rules.

#### IV. CONCLUSION

The complexity and possible invalidity of the 1984 amendments arise from Congress' refusal to constitute the bankruptcy courts as article III courts. The only group, if any, that this refusal has aided is the district court bench, by keeping their numbers small (except to the extent that additional bankruptcy duties require additions to their numbers) and their status elite. The congressional action works against the needs of all parties involved in the functioning of the Bankruptcy Code and the judicial system itself. Debtors in Bankruptcy Code cases are left uncertain as to the authority of the bankruptcy courts adjudicating proceedings in their cases. New layers of potential litigation tactics have been added, which will further burden the bankruptcy court system and the district court system, both of which have sufficient real and legitimate work to perform. Aside from the merits of the arguments opposing the bankruptcy system instituted pursuant to the 1984 amendments, in view of the Supreme Court's pronouncements in *Northern Pipeline*, it is irresponsible for Congress to have enacted legislation containing such inherent risks of constitu-

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94. 28 U.S.C. § 2075 (1982), which grants authority to the Supreme Court to promulgate rules of bankruptcy procedure, does not permit any such rules to be inconsistent with the statute. This is a change in the rulemaking power made by the Bankruptcy Reform Act of 1978. As 28 U.S.C. § 2075 originally was enacted, it provided that any provision in the Bankruptcy Act that was inconsistent with the rules was deemed to be superseded by the rules. This provision was deleted in 1978.

tional invalidity when the lives of so many financially troubled persons and companies look to the federal bankruptcy laws for a fresh start and reorganized future.

