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JURY TRIALS IN THE BANKRUPTCY COURTS: AWAITING A FINAL VERDICT

ANN VAN BEVER*
V. CRAIG CANTRELL**

I. INTRODUCTION

This article surveys the ongoing debate regarding jury trials in the bankruptcy courts. The issue is approached first from the historical perspective and then from an analysis of the current, confused positions of the courts. The cases are reviewed with an eye toward two questions: whether bankruptcy courts have the authority to preside over jury trials and whether a seventh amendment right to a jury trial exists in any bankruptcy proceedings. The article then suggests potential resolutions of the tangled issues raised whenever a jury trial is demanded in the bankruptcy context.

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II. HISTORICAL BACKGROUND

A. *Jury Trials Under the 1898 Act*

The right to a jury trial is guaranteed by the seventh amendment to the United States Constitution,[1] which provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." The amendment, on its face, was intended by its framers to maintain the rights to jury trial that were in existence at the time of its adoption in 1791. At that time separate courts of law and courts of equity existed, thus the right to a trial by jury in the courts of law was preserved. No tradition of jury trials existed in the courts of equity.

After the Federal Rules of Civil Procedure extinguished the two separate courts and provided for all claims, both legal and equitable in nature, to be heard in the federal courts,[2] the right to a jury trial was determined by the nature of the issue to be tried.[3] Actions of a legal nature were analogous to suits at common law and were entitled to jury trial. Actions of an equitable nature were not entitled to be tried before a jury.[4]

The right to a jury trial in bankruptcy matters was determined by statute. Under the Bankruptcy Act of 1898,[5] the right to a jury trial depended largely on the forum where the proceeding was brought. If the proceeding fell into the summary jurisdiction of the bankruptcy court, it was equitable in nature and no right to jury trial existed. The action was heard by the bankruptcy referee, the forerunner of the modern bankruptcy judge, without a jury. All other bankruptcy related disputes were heard in the district court or the state court with plenary jurisdiction. There the right to a trial by jury was determined either by the seventh amendment or by non-bankruptcy state or federal law.

The 1898 Act provided for two exceptions in which jury trials could be demanded and had in the bankruptcy court. In an involuntary case, the person against whom the petition was filed was entitled

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1. U.S. CONST. amend. VII.

2. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 508 (1959).

3. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472-73 (1962).

4. Tull v. United States, __ U.S. __, __, 107 S. Ct. 1831, 1835, 95 L. Ed. 2d 365, 372-73 (1987).

5. Act of July 1, 1898, ch. 541, 30 Stat. 544, 551,. *repealed* by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2542, 2682.

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to a jury trial on the issues of insolvency and commission of the acts of bankruptcy.[6] In addition, legal issues, such as liability or damages, arising in dischargeability issues were entitled to be heard by a jury.[7]

The Supreme Court, in *Katchen v. Landy*,[8] appeared to confirm the view that no right to jury trial existed in the bankruptcy courts because of the equitable nature of those courts.[9] In the *Katchen* case, the bankruptcy trustee brought an action to recover a voidable preference from a creditor who had filed a claim against the bankruptcy estate.[10] The Supreme Court noted that the bankruptcy courts were essentially courts of equity[11] and had summary jurisdiction to adjudicate controversies related to property over which the courts had actual or constructive possession.[12] In addition, the bankruptcy courts were authorized to summarily handle matters which arose in the ordinary course of administering the estate.[13] However, where the trustee sought to recover property held by another party, as in a preference action, the action could only be brought in the district court under its plenary jurisdiction.[14] In the district court, the creditor could demand a jury trial.[15]

The Supreme Court held that a creditor might be entitled to a jury trial on the preference issue if he filed no claim in the bankruptcy court and simply defended the trustee's preference action in the district court.[16] When the preference issue arose, however, as part of the claims allowance process, then the issue was converted from a legal to an equitable one and become triable in the bankruptcy court. The

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6. *Id.* Section 19(a) provided:

> A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, . . . and any act of bankruptcy alleged in such petition to have been committed . . . .

Id.

7. *Id.* § 17(c)(5); *In re* Swope, 466 F.2d 936, 938 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973); Walter E. Heller & Co. v. Merrill (*In re* Merrill), 433 F. Supp. 455, 458 (N.D. Ala. 1977), *modified*, 594 F.2d 1064, 1068 (5th Cir. 1979).

8. 382 U.S. 323 (1966).

9. *Id.* at 336-37.

10. *Id.* at 325.

11. *Id.* at 327 (citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934) and *Pepper v. Litton*, 308 U.S. 295, 304 (1939)).

12. *Id.*

13. *Id.*

14. 11 U.S.C. § 96 (1964).

15. *Katchen*, 382 U.S. at 336-37.

16. *See id.*

issue was transformed into a question of what *share* of the estate the creditor was entitled to receive. This type of equitable claim was properly adjudicated under the bankruptcy court's summary jurisdiction, where no seventh amendment right to jury trial existed.[17]

The Supreme Court in *Katchen* also pointed out that preferences and claims allowance under the Bankruptcy Act were part of a specific statutory scheme to promptly resolve disputed claims without a jury.[18] To require the trustee to bring the preference action in the district court rather than to allow the claim objection to be heard summarily in the bankruptcy court would wreck the Congressional scheme.[19]

Katchen v. Landy seemed to settle any questions regarding jury trial rights under the Bankruptcy Act. If the determination was made that the action could be brought before the bankruptcy referee, no jury trial right existed. If the action had to be brought under the plenary jurisdiction of the district court, then normal jury trial rights, as determined by the seventh amendment, were available.

B. *Jury Trials Under Section 1480 of the Code*

When the bankruptcy laws were rewritten by Congress in 1978,[20] the drafters included a revised jury trial provision in the new Code.[21] The new provision was as follows:

> (a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979.
>
> (b) The bankruptcy court may order the issues arising under section 303 of title 11 [governing involuntary bankruptcy petitions] to be tried without a jury.

The Senate Committee Report that accompanied Section 1480(a) stated that it . . . "continue[d] any current right of a litigant in a case

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17. *Id.*

18. *Id.* at 328-29.

19. *Id.* at 339-40. The summary proceedings in bankruptcy court were intended to expeditiously dispose of administrative matters. *See id.* at 328-29.

20. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978)(hereinafter "Bankruptcy Code" or "Code").

21. Codified at 28 U.S.C. § 1480 (1982)(repealed 1984).

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or proceeding under title 11 or related to such case, to a jury trial."[22] The House Report explained that "bankruptcy courts will be required to hold jury trials to adjudicate what are under present law called 'plenary suits', that is, suits that are brought in State or Federal Courts other than the bankruptcy courts."[23]

The new provision reversed the jury trial right of a debtor against whom an involuntary petition had been filed as provided under the old 1898 Act.[24] This change from the former law was clearly set forth in subsection (b) of the new statute. The meaning of subsection (a), however, was the source of much controversy for several years.

The majority view was that if the matter could have been brought as a plenary proceeding under the 1898 Act and would have been entitled to a jury trial under state or federal law, then the litigants had the right to demand a jury trial in the bankruptcy court under the new Code.[25] The minority view held that Congress' intent in enacting the Code was to extinguish the summary/plenary analysis and that the bankruptcy courts were to analyze instead whether the issues were legal or equitable in nature in determining jury trial rights.[26] This approach required the bankruptcy courts to apply the seventh amendment test used by the district courts.[27] Under either line of reasoning,

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22. S. REP. NO. 989, 95th Cong., 2d Sess. 157 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5943.

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

24. 28 U.S.C. § 1480(b) (1982)(repealed 1984).

25. Masto v. Coast Trading Co., Inc. (*In re* Coast Trading Co., Inc.), 31 Bankr. 666, 667 (Bankr. D. Or. 1982); Belfance v. Sizzler Family Steak Houses (*In re* Portage Assoc., Inc.), 16 Bankr. 445, 448 (Bankr. N.D. Ohio 1982); Zimmerman v. Mozer (*In re* Mozer), 10 Bankr. 1002, 1004 (Bankr. D. Colo. 1981); G.S.F. Corp. v. Inleasing Corp. (*In re* G.S.F. Corp.), 7 Bankr. 807, 810 (Bankr. D. Mass. 1980); *In re* Lafayette Radio Electronics Corp., 7 Bankr. 187, 188 (Bankr. E.D.N.Y. 1980).

26. *E.g.*, Pettigrew v. Graham (*In re* Graham), 747 F.2d 1383, 1387-88 (11th Cir. 1984); Air Transport Ass'n of Am. v. Professional Air Traffic Controllers Org. (*In re* Professional Air Traffic Controllers Org.), 23 Bankr. 271, 275 (D.D.C. 1982); Busey v. Fleming (*In re* Fleming), 8 Bankr. 746, 748 (N.D. Ga. 1980); Young v. Peter J. Saker, Inc. (*In re* Paula Saker & Co., Inc.), 37 Bankr. 802, 805 (Bankr. S.D.N.Y. 1984); Martin Baker Well Drilling, Inc. v. Koulovatos (*In re* Martin Baker Well Drilling, Inc.), 36 Bankr. 154, 156 (Bankr. D. Me. 1984); Interfirst Bank Dallas, N.A. v. Basin Refining, Inc. (*In re* Basin Refining, Inc.), 30 Bankr. 578, 583 (Bankr. N.D. Tex. 1983); Pinson v. Reynolds (*In re* First Financial Group of Texas, Inc.), 11 Bankr. 67, 69-70 (Bankr. S.D. Tex. 1981); Brown v. Frank Meador Buick, Inc. (*In re* Frank Meador Buick, Inc.), 8 Bankr. 450, 454 (Bankr. W.D. Va. 1981).

27. Ross v. Bernhard, 396 U.S. 531, 533-38 (1970).

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all authorities agreed that the bankruptcy courts had the power to conduct jury trials under the Code.

The jurisdictional scheme of the Code, including the bankruptcy court's authority to hold jury trials, was held unconstitutional by *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*[28] Writing for the plurality, Justice Brennan found that the Code violated the Constitution because it invested bankruptcy judges, who lacked all the attributes granted by Article III,[29] with all the powers of Article III.[30] Among those powers was the power to hold jury trials.[31]

After *Northern Pipeline*, the prevailing view was that non-Article III bankruptcy courts could not constitutionally preside over jury trials.[32] Congress was slow to react to *Northern Pipeline*, even though the Supreme Court stayed the effect of its ruling until December 24, 1982. Consequently, the Judicial Conference propounded an Emergency Rule in September 1982,[33] which was then submitted to all the districts, that expressly prohibited bankruptcy judges from conducting jury trials.[34] During this period, all jury trials involving bankruptcy matters were held in the district courts.[35]

In 1983, revisions to the Bankruptcy Rules took effect. Among the new rules was Rule 9015[36] which provided procedural guidelines for jury trials in the bankruptcy courts. Because the new rules were pro-

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28. 458 U.S. 50, 87-88 (1982)(hereafter referred to as *Northern Pipeline*).

29. *Id.* at 88. Specifically, bankruptcy judges lack lifetime tenure and protection from salary diminishment. U.S. CONST. art. III, § 1.

30. *Northern Pipeline*, 458 U.S. at 87.

31. *Id.* at 85.

32. *See, e.g.*, Terry v. Proehl (*In re* Proehl), 36 Bankr. 86, 87-88 (W.D. Va. 1984)(interpreting *Northern Pipeline* decision as prohibiting bankruptcy judges from presiding over jury trials); Cameron v. Anderson (*In re* American Energy, Inc.), 50 Bankr. 175, 181 (Bankr. D.N.D. 1985)(*Northern Pipeline* prohibits bankruptcy judges from conducting jury trials).

33. Subsection (d)(1) of the Emergency Rule provides that "the bankruptcy judges may not conduct: . . . (D) jury trials." Vihon, *Delegation of Authority and the Model Rule: The Continuing Saga of Northern Pipeline*, 88 COM. L.J. 64, 77-78 (1983)(reprinting resolution of Judicial Conference of Sept. 23, 1982, and emergency rule sent out by Administrative Office of Courts).

34. The Director of the Administrative Office of the United States Courts transmitted the rule to all federal courts of appeal, district courts and bankruptcy courts along with instructions that the judicial council in each circuit could order its adoption by the district courts under 28 U.S.C. § 332(d) and 11 U.S.C. § 105.

35. *See* Huffman v. Brandon (*In re* Harbour), 59 Bankr. 319, 324-25 (W.D. Va. 1986); Eisenberg v. Guardian Group, Inc. (*In re* Adams, Browning & Bates, Ltd.), 70 Bankr. 490, 496-97 (Bankr. E.D.N.Y. 1987).

36. FED. BANKR. R. 9015, 11 U.S.C. app. at 140 (Supp. IV 1986).

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posed by the Supreme Court and enacted by Congress,[37] some courts held that Rule 9015 took precedence over the Emergency Rules and that bankruptcy courts were thus authorized to hold jury trials.[38]

C. *The Effect of BAFJA on Jury Trials*

Finally, on July 10, 1984, the Bankruptcy Amendments and Federal Judgeship Act of 1984[39] (hereafter BAFJA) took effect. BAFJA included a new jury trial provision, codified at section 1411 of the Code. Rather than resolving the jury trial issue, however, section 1411 was addressed only to a limited number of cases. Section 1411 states:

> (a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.
>
> (b) The district court may order the issues arising under section 303 [governing involuntary bankruptcies] of title 11 to be tried without a jury.[40]

After BAFJA, a great debate ensued among the courts and legal scholars regarding its effect on jury trial rights. Some took the view that the absence of any language with respect to a litigant's right to a jury trial outside the narrow scope of personal injury or wrongful death tort claims was an indication that bankruptcy courts could conduct jury trials for all cases in which a seventh amendment right existed.[41] Others viewed the statute as denying jury trial rights in bankruptcy court to all litigants except those with personal injury and

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37. 28 U.S.C. § 2075 (1982).

38. *E.g.*, George Woloch Co. v. Longview Capital Plastic Pipe, Inc. (*In re* George Woloch Co.), 49 Bankr. 68, 69-70 (E.D. Pa. 1985); Young v. Peter J. Saker, Inc. (*In re* Paula Saker & Co., Inc.), 37 Bankr. 802, 809 (Bankr. S.D.N.Y. 1984).

39. Pub. L. No. 98-353, 98 Stat. 333.

40. 28 U.S.C. § 1411 (Supp. IV 1986).

41. *E.g.*, M & E Contractors, Inc. v. Kugler-Morris Gen. Contractors, Inc., 67 Bankr. 260, 267 (N.D. Tex. 1986); Zimmerman v. Cavanagh (*In re* Kenval Mktg. Corp.), 65 Bankr. 548, 554 (E.D. Pa. 1986); Price-Watson Co. v. Amex Steel Corp. (*In re* Price-Watson Co.), 66 Bankr. 144, 152 (Bankr. S.D. Tex. 1986); Reda, Inc. v. Harris Trust & Sav. Bank (*In re* Reda, Inc.), 60 Bankr. 178, 182 (Bankr. N.D. Ill. 1986); Lerblance v. Rodgers (*In re* Rodgers & Sons, Inc.), 48 Bankr. 683, 688 (Bankr. E.D. Okla. 1985); Morse Elec. Co., Inc. v. Logicon, Inc. (*In re* Morse Elec. Co., Inc.), 47 Bankr. 234, 238 (Bankr. N.D. Ind. 1985); Baldwin-United Corp. v. Thompson (*In re* Baldwin-United Corp.), 48 Bankr. 49, 56 (Bankr. S.D. Ohio 1985).

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wrongful death tort claims.[42]

The language of section 1411 combined with Bankruptcy Rule 9015 created a period of significant confusion. Adding to the chaos was the fact that the legislative history surrounding the enactment of section 1411 is very sparse. The original House versions of the bill left former section 1480 virtually intact.[43] No discussion of the jury trial provision is included in the accompanying committee reports. When the bill came up for vote, however, an amendment repealed old section 1480 without instituting any replacement provision.[44] The bill went to the Senate in this version. The Senate sought to amend the bill by adding a provision that specifically left unaffected any right to jury trial except that involuntary bankruptcy issues could be tried without a jury.[45]

A committee was formed to resolve the differences between the House and Senate versions of BAFJA. The present version of section 1411 emerged from this compromise bill, but no official explanation was included with the text of the bill to clarify its meaning.[46] One of the members of the committee, Senator Dennis DeConcini, gave an interview following the passage of BAFJA[47] and stated that the committee intended to retain jury trial rights as they had existed under section 1480. These comments have been identified as indicative of congressional intent by some courts.[48]

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42. Huffman v. Perkinson (*In re* Harbour), 840 F.2d 1165, 1171-72 (4th Cir. 1988) *petition for cert. filed*, 56 U.S.L.W. 3755 (U.S. Apr. 25, 1988); McLouth Steel Corp. v. Marblehead Lime Co. (*In re* McLouth Steel Corp.), 55 Bankr. 357, 362 (E.D. Mich. 1985); Berryman v. Smith (*In re* Smith), 84 Bankr. 175, 179 (Bankr. D. Ariz. 1988); Hoffman v. Brown (*In re* Brown), 56 Bankr. 487, 489-90 (Bankr. D. Md. 1985); Mauldin v. Peoples Bank of Indianola (*In re* Mauldin), 52 Bankr. 838, 839-40 (Bankr. N.D. Miss. 1985); Cameron v. Anderson (*In re* American Energy, Inc.), 50 Bankr. 175, 180 (Bankr. D.N.D. 1985); Bokum Resources Corp. v. Long Island Lighting Co. (*In re* Bokum Resources Corp.), 49 Bankr. 854, 867-68 (Bankr. D.N.M. 1985); Jacobs v. O'Bannon (*In re* O'Bannon), 49 Bankr. 763, 765 (Bankr. M.D. La. 1985).

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

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

45. *See* 130 CONG. REC. S6082 (daily ed. May 21, 1984).

46. H.R. CONF. REP. NO. 882, 98th Cong., 2d Sess. 1 (1984); 130 CONG. REC. S8989, H7597, H7610 (daily ed. July 23, 1984).

47. 3 A.B.I. Newsletter 1, 3 (Winter 1984-85).

48. Lerblance v. Rodgers (*In re* Rodgers & Sons, Inc.), 48 Bankr. 683, 686-87 (Bankr. E.D. Okla. 1985).

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Another complication was that section 1411 did not repeal section 1480 in a straightforward manner, leading some courts to conclude that section 1411 did not replace section 1480, but instead supplemented it.[49] Most authorities now agree with Judge Steen's painstaking analysis of BAFJA's enabling provisions in *Jacobs v. O'Bannon (In re O'Bannon)*[50] and conclude that section 1480 was repealed.[51]

In 1987, new Bankruptcy Rules went into effect. One of the significant changes was the elimination of former Bankruptcy Rule 9015. Since some courts had relied on Rule 9015 as authority for bankruptcy courts to preside over jury trials,[52] the removal was significant. The Advisory Committee's notes to the new Bankruptcy Rules indicate that the abrogation of Rule 9015 was intended to remove its use as authority to decide jurisdictional issues.[53] At least one commentator has written that the abrogation of Rule 9015 is proof that bankruptcy courts do not have the power to hold jury trials.[54]

III. CONFLICTING VIEWS ON THE AUTHORITY OF BANKRUPTCY COURTS TO CONDUCT JURY TRIALS

Since the *Northern Pipeline* decision and the subsequent enactment

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49. Price-Watson Co. v. Amex Steel Corp. (*In re* Price-Watson Co.), 66 Bankr. 144, 154 (Bankr. S.D. Tex. 1986).

50. 49 Bankr. 763 (Bankr. M.D. La. 1985).

51. Morgan v. Lefton (*In re* Hendon Pools of Michigan, Inc.), 57 Bankr. 801, 802 (E.D. Mich. 1986); Du Voisin v. Anderson (*In re* Southern Industrial Banking Corp.), 66 Bankr. 370, 372 (Bankr. E.D. Tenn. 1986).

52. *See, e.g.*, George Woloch Co. v. Longview Capital Plastic Pipe, Inc. (*In re* George Woloch Co.), 49 Bankr. 68, 69-70 (E.D. Pa. 1985); Young v. Peter J. Saker, Inc. (*In re* Paula Saker & Co., Inc.), 37 Bankr. 802, 809 (Bankr. S.D.N.Y. 1984).

53. *See* 11 U.S.C.A. RULE 9015 advisory committee notes (West Supp. 1988). The Advisory Committee Notes are as follows:

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

Id.

54. Sabino, *Jury Trials in the Bankruptcy Court: The Controversy Ends*, 93 COM. L.J. 238, 239-40 (1988).

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of BAFJA, case law regarding jury trials in bankruptcy proceedings has raised numerous legal, practical and constitutional questions. Although views on this issue cover a broad spectrum, authorities have primarily addressed two questions: (i) whether bankruptcy courts have *authority* to conduct jury trials; and (ii) whether a seventh amendment *right* to jury trial exists in bankruptcy proceedings.

A number of courts and commentators have concluded that no authority exists to allow bankruptcy courts to conduct jury trials.[55] This question is separate from the issue of whether any seventh amendment right to jury trial exists in bankruptcy proceedings.[56] A majority of these courts have based their conclusion on an interpretation of *Northern Pipeline* that Article III prohibits such activity by non-Article III bankruptcy judges.[57] For example, in *Cameron v. Anderson (In re American Energy, Inc.)*,[58] the court noted that one of the Article III powers specifically mentioned by the Supreme Court in *Northern Pipeline* was the power to preside over jury trials.[59] Based on *Northern Pipeline* and the absence of a specific grant of power to

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55. *See, e.g.*, Jefferson Nat'l Bank v. Durbin, Inc. (*In re* Durbin, Inc.), 62 Bankr. 139, 146 (S.D. Fla. 1986); McLouth Steel Corp. v. Marblehead Lime Co. (*In re* McLouth Steel Corp.), 55 Bankr. 357, 363 (E.D. Mich. 1985); Terry v. Proehl (*In re* Proehl), 36 Bankr. 86, 88 (W.D. Va. 1984); Howison v. Country Hills Assocs. (*In re* W.G.M.C., Inc.), 96 Bankr. 5, 6 (Bankr. D. Me. 1989); Weeks v. Kramer (*In re* G. Weeks Securities, Inc.), 89 Bankr. 697, 715 (Bankr. W.D. Tenn. 1988); Pro Machine, Inc. v. Hardinge Bros., Inc. (*In re* Pro Machine, Inc.), 87 Bankr. 998, 1001-02 (Bankr. D. Minn. 1988); Hoffman v. Brown (*In re* Brown), 56 Bankr. 487, 489-91 (Bankr. D. Md. 1985); Cameron v. Anderson (*In re* American Energy, Inc.), 50 Bankr. 175, 180-81 (Bankr. D.N.D. 1985); Bokum Resources Corp. v. Long Island Lighting Co. (*In re* Bokum Resources Corp.), 49 Bankr. 854, 868-69 (Bankr. D.N.M. 1985); *see also* Sabino, *Jury Trials in the Bankruptcy Court: The Controversy Ends*, 93 COM. L.J. 238, 245 (1988)(contending that abrogation of Bankruptcy Rule 9015 eliminated any statutory authority for jury trials).

56. *See infra*, notes 88-118 and accompanying text.

57. Terry v. Proehl (*In re* Proehl), 36 Bankr. 86, 87 (W.D. Va. 1984)(implicit in *Northern Pipeline* decision is conclusion that permitting bankruptcy judge to preside over jury trial would be unconstitutional delegation); *Brown*, 56 Bankr. at 488 (1978 Bankruptcy Code, which expressly gave bankruptcy courts power to conduct jury trials, declared invalid as unconstitutional granting of Article III powers to Article I court); Cameron v. Anderson (*In re* American Energy, Inc.), 50 Bankr. 175, 181 (Bankr. D.N.D. 1985)(Supreme Court in *Northern Pipeline* decision quite clear in holding that grant of Article III powers to bankruptcy judges an unconstitutional delegation to adjunct court); *see also* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853 (1986). Regarding the Commodity Futures Trading Commission, Justice Sandra Day O'Connor stated: "CFTC, unlike the bankruptcy courts under the 1978 Act, does not exercise 'all ordinary powers of district courts,' and thus may not, for instance, preside over jury trials or issue writs of habeas corpus." *Id.*

58. 50 Bankr. 175 (Bankr. D.N.D. 1985).

59. *Id.* at 181.

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hold jury trials in matters other than tort cases, the *American Energy* court was reluctant to find that bankruptcy courts had the power to hear jury trials.[60]

Other courts have determined that presiding over jury trials is not an "essential attribute of judicial power"[61] available only to Article III judges, and have determined that authority does exist for bankruptcy judges to conduct jury trials in core proceedings.[62] This is supported by the rationale that in core proceedings, bankruptcy judges are empowered to enter final orders without consent of the parties as adjuncts of the federal district courts.[63] These courts have therefore concluded that, to the extent such rights exist, bankruptcy judges may hold jury trials in core proceedings.[64]

Conversely, due to the fact that bankruptcy courts may not enter

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60. *Id.*

61. Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 87 (1982)(quoting Justice Brennan, author of the plurality opinion).

62. McCormick v. American Investors Management, Inc. (*In re* McCormick), 67 Bankr. 838, 840 (D. Nev. 1986)(better view of *Northern Pipeline* followed by majority of courts that have faced issue is that Constitution does not forbid jury trials in bankruptcy court); M & E Contractors, Inc. v. Kugler-Morris Gen. Contractors, Inc., 67 Bankr. 260, 266 (N.D. Tex. 1986)(ability to conduct jury trial not exclusive function of Article III court); Walsh v. Long Beach Honda (*In re* Gaildeen Indus.), 59 Bankr. 402, 407 (N.D. Cal. 1986)(*Northern Pipeline* Court did not hold that allowing bankruptcy courts to conduct jury trials would constitute unwarranted encroachment upon judicial power of United States); Dailey v. First Peoples Bank of New Jersey, 76 Bankr. 963, 968 (Bankr. D.N.J. 1987)(*Northern Pipeline* did not specifically void power to hear cases tried by jury); Otte v. Monsanto Co. (*In re* McCrary's Farm Supply Inc.), 57 Bankr. 423, 425 (Bankr. E.D. Ark. 1985)(trial by jury not prohibited by Supreme Court decision in *Northern Pipeline*); Lerblance v. Rodgers (*In re* Rodgers and Sons, Inc.), 48 Bankr. 683, 687 (Bankr. E.D. Okla. 1985)(permitting bankruptcy judge to sit in jury trials does not offend principles set forth in *Northern Pipeline*).

63. 28 U.S.C. § 157(b)(1) (Supp. IV 1986).

64. *See* Dailey v. First Peoples Bank of New Jersey, 76 Bankr. 963, 967 (D.N.J. 1987)(Bankruptcy Code intended bankruptcy judges to conduct jury trials); M & E Contractors v. Kugler-Morris Gen. Contractors, Inc., 67 Bankr. 260, 267 (N.D. Tex. 1986)(bankruptcy judges may conduct jury trials if the action would require jury under seventh amendment); Zimmerman v. Cavanagh (*In re* Kenval Mktg. Corp.), 65 Bankr. 548, 553 (E.D. Pa. 1986)(classification as core proceeding does not eliminate right to jury trial); Hassett v. Weissman (*In re* O.P.M. Leasing Services, Inc.), 48 Bankr. 824, 830 (S.D.N.Y. 1985)(no question that bankruptcy court has authority to conduct jury trial when bankruptcy court has power to issue final judgment in case); Macon Prestressed Concrete Co. v. Duke, 46 Bankr. 727, 730 (M.D. Ga. 1985)(authority granted by 28 U.S.C.A. § 157(a) vests bankruptcy court with same authority to conduct jury trial as exists in district court); Official Creditors' Comm. of Honeycomb, Inc. v. Fidelity Bank (*In re* Honeycomb, Inc.), 72 Bankr. 371, 375 (Bankr. S.D.N.Y 1987)(court has authority or power to hold jury trials in proceedings where substantive right to jury trial exists).

final judgments in non-core proceeding without the parties' consent,[65] a majority of courts have denied the availability of jury trials before bankruptcy courts in non-core proceedings.[66] The reasoning behind this holding is that insufficient Article III authority exists with respect to non-core proceedings to allow bankruptcy judges to exercise such Article III power.[67] Other courts have focused on the practical implications of conducting jury trials in non-core proceedings,[68] which are complicated by the provisions for de novo review of such proposed findings of fact and conclusions of law by the district courts.[69] The court in *Macon Prestressed Concrete Co. v. Duke*[70] noted that even though the bankruptcy court had the same authority as the district court to hear jury trials under 28 U.S.C. § 157(a), in practice the power was pointless.[71] Absent the consent of the parties, a jury trial in the bankruptcy court of a non-core proceeding would merely be advisory.[72] Other courts have agreed.[73]

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65. 28 U.S.C. § 157(c)(2) (Supp. IV 1986). It has been held that bankruptcy courts may conduct jury trials in non-core proceedings where all parties consent. *Cf.* McCormick v. American Investors Management, Inc. (*In re* McCormick), 67 Bankr. 838, 842 (D. Nev. 1986); Craig v. Air Brake Controls, Inc. (*In re* Crabtree), 55 Bankr. 130, 133 (Bankr. E.D. Tenn. 1985); Arnold Print Works, Inc. v. Apkin (*In re* Arnold Print Works, Inc.), 54 Bankr. 562, 569 (Bankr. D. Mass. 1985).

66. Sullivan v. Maryland Casualty Co. (*In re* Ramex), 91 Bankr. 313, 316 (E.D. Penn. 1988); Dailey v. First Peoples Bank, 76 Bankr. 963, 968 (D.N.J. 1987); Kaiser Steel Corp. v. Frates (*In re* Kaiser Steel Corp.), 95 Bankr. 782, 785 (Bankr. D. Colo. 1989); T.R. Paris and Family, Inc. v. First Nat'l Bank in Robinson (*In re* T.R. Paris & Family, Inc.), 89 Bankr. 760, 767 (Bankr. S.D. Ill. 1988); Reda, Inc. v. Harris Trust & Sav. Bank (*In re* Reda, Inc.), 60 Bankr. 178, 182 (Bankr. N.D. Ill. 1986); Smith-Douglass, Inc. v. Smith (*In re* Smith-Douglass, Inc.), 43 Bankr. 616, 618 (Bankr. E.D.N.C. 1984).

67. *Id. But see* THB Corp. v. Essex Builders Co., Inc. (*In re* THB Corp.), 94 Bankr. 797, 800 (Bankr. D. Mass. 1988); Price Watson Co. v. Amex Steel Corp. (*In re* Price-Watson Co.), 66 Bankr. 144, 157 (Bankr. S.D. Tex. 1986)(holding that bankruptcy courts may conduct jury trials in non-core proceedings). The *Price-Watson* court cited *United States v. Radatz*, 447 U.S. 667 (1980), for the proposition that the power of bankruptcy judges as adjuncts of the federal district courts are analogous to those of federal magistrates. *Id.*

68. *E.g.*, Pied Piper Casuals, Inc. v. Insurance Co. of State of Penn., 72 Bankr. 156, 160 (S.D.N.Y. 1987); M & E Contractors, Inc. v. Kugler-Morris Gen. Contractors, Inc., 67 Bankr. 260, 267 (N.D. Tex. 1986); Interconnect Telephone Serv., Inc. v. Farren, 14 C.B.C.2d 885, 888 (S.D.N.Y 1986); Eisenberg v. Guardian Group, Inc. (*In re* Adams, Browning & Bates, Ltd.), 70 Bankr. 490, 497 (Bankr. E.D.N.Y. 1987); L.A. Clarke and Son, Inc. v. Bullock Constr., Inc. (*In re* L.A. Clarke and Son, Inc.), 51 Bankr. 31, 32 (Bankr. D.D.C. 1985).

69. 28 U.S.C. § 157(c)(1) (Supp. IV 1986).

70. 46 Bankr. 727 (M.D. Ga. 1985).

71. *Id.* at 730.

72. *Id.*

73. *See, e.g.*, Vreugdenhil v. Hoekstra, 773 F.2d 213, 215 n.2 (8th Cir. 1985); McCormick v. American Investors Management, Inc. (*In re* McCormick), 67 Bankr. 838, 839 (D. Nev.

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Not only does this pose practical problems with respect to such review,[74] but it raises constitutional questions of whether the seventh amendment prohibition against re-examination of facts tried before a jury[75] would be violated.[76]

In addition to Article III considerations, the question of whether sufficient statutory authority exists for the exercise of such power has also been extensively debated.[77] Prior to 1978, the law was clear that no right to jury trial existed in bankruptcy proceedings.[78] This was altered with the enactment of the Bankruptcy Code in 1978 containing section 1480,[79] which preserved the right to jury trial to the extent that it had existed under prior law.[80] This conclusion was further bolstered in 1983 with the enactment of Bankruptcy Rule 9015 which established procedures for jury trials.[81] Significant confusion therefore resulted from the Supreme Court's holding in *Northern Pipeline*,

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1986); Smith-Douglass, Inc. v. Smith (*In re* Smith-Douglass, Inc.), 43 Bankr. 616, 618 (Bankr. E.D.N.C. 1984).

74. *See, e.g.*, Sullivan v. Maryland Casualty Co. (*In re* Ramex), 91 Bankr. 313, 316 (E.D. Penn. 1988)(required de novo review mandates second trial in district court if either party objected, and such cumbersome, time consuming process requiring two jury trials hardly furthers expeditious determination of bankruptcy matters); Pied Piper Casuals, Inc. v. Insurance Co. of State of Penn., 72 Bankr. 156, 160 (S.D.N.Y. 1987)(de novo review appears incompatible with right to jury trial); Mohawk Indus., Inc. v. Robinson Indus., Inc., 46 Bankr. 464, 466 (D. Mass. 1985)(unable to require findings of fact and conclusions of law by court where both parties have requested jury trial); T.R. Paris & Family, Inc. v. First Nat'l Bank in Robinson (*In re* T.R. Paris and Family, Inc.), 89 Bankr. 760, 767 (Bankr. S.D. Ill. 1988)(jury trials impractical in bankruptcy court due to jurisdictional provisions); Stewart v. Strasburger (*In re* Astrocade, Inc.), 79 Bankr. 983, 991 (Bankr. S.D. Ohio 1987)(no practical reason for jury trial in non-core bankruptcy proceeding). *But see* Price-Watson Co. v. Amex Steel Corp. (*In re* Price-Watson), 66 Bankr. 144, 149-52 (Bankr. S.D. Tex. 1986), and *infra*, notes 135-139 and accompanying text.

75. ". . . no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

76. *See* American Communities Serv., Inc. v. Wright Mktg., Inc. (*In re* American Community Serv., Inc.), 86 Bankr. 681, 689-90 (D. Utah 1988). For an extensive discussion of this issue, see generally Gibson, *Jury Trial in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967, 1048 (1988), and *infra*, notes 107-110 and accompanying text.

77. *See generally* Sabino, *Jury Trials in the Bankruptcy Court: The Controversy Ends*, 93 COM. L.J. 238, 242-46 (1988).

78. *See supra*, notes 8-19 and accompanying text (discussing *Katchen v. Landy*); *see also* Schoenthal v. Irving Trust, 287 U.S. 92, 96-97 (1932).

79. Pub. L. No. 95-568, § 241(a), 92 Stat. 2549, 2671 (1978)(codified at 28 U.S.C. § 1480)(repealed 1984).

80. *See supra*, notes 20-27 and accompanying text.

81. *See* Order Enacting the Bankruptcy Rules, 461 U.S. 975 (1983); FED. BANKR. R. 9015.

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the enactment of section 1411 in 1984,[82] and the abrogation of Bankruptcy Rule 9015 in 1987 with the amendment of the bankruptcy rules.[83]

Regarding Bankruptcy Rule 9015, a number of recent decisions have cited its abrogation as authority for the position that bankruptcy courts lack authority to conduct jury trials.[84] The limited scope of section 1411 has also served as the basis for some courts' conclusion that no statutory authority exists for jury trials in bankruptcy cases.[85] Other courts have simply disregarded section 1411 also as evidencing an absence of statutory authority for the power of bankruptcy courts to conduct jury trials.[86] Finally, one early line of cases focused on the absence of any express prohibition against jury trials in the bankruptcy forum as authority for them to take place.[87]

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82. Pub. L. No. 98-353, 98 Stat. 335.

83. *See supra*, note 53.

84. Howison v. Country Hills Assoc. (*In re* W.G.M.C., Inc.), 96 Bankr. 5,7 (Bankr. D. Me. 1989) (abrogation of Bankruptcy Rule 9015 supports conclusion that no right to jury trials in bankruptcy courts); Weeks v. Kramer (*In re* G. Weeks Securities, Inc.), 89 Bankr. 697, 715 (Bankr. W.D. Tenn. 1988)(no statutory authority for jury trials in bankruptcy court regardless of consent); Pro Machine, Inc. v. Hardinge Bros., Inc. (*In re* Pro Machine, Inc.), 87 Bankr. 998, 1002 (Bankr. D. Minn. 1988)(no statutory right to jury trial in bankruptcy unless allowed by 28 U.S.C. § 1411); Berryman v. Smith (*In re* Smith), 84 Bankr. 175, 178 (Bankr. D. Ariz. 1988)(no statutory authority for court to grant jury trial in non-dischargeability claims). *See generally* Sabino, *Jury Trials in the Bankruptcy Court: The Controversy Ends*, 93 COM. L.J. 238, 239-42, 256-58 (1988). *But cf.* Dailey v. First Peoples Bank of New Jersey, 76 Bankr. 963, 967 (D.N.J. 1987)(reflecting prior cases which relied on continued existence of Bankruptcy Rule 9015 as authority for such courts to conduct jury trials).

85. Huffman v. Perkinson (*In re* Harbour), 840 F.2d 1165, 1179 (4th Cir. 1988); *petition for cert. filed*, 56 U.S.L.W. 3755 (U.S. Apr. 25, 1988); Jefferson Nat'l Bank v. I.A. Durbin, Inc. (*In re* Durbin, Inc.), 62 Bankr. 139, 146 (S.D. Fla. 1986); McLouth Steel Corp. v. Marblehead Lime Co. (*In re* McLouth Steel Corp.), 55 Bankr. 357, 362 (E.D. Mich. 1985); Pro Machine, Inc. v. Hardinge Bros., Inc. (*In re* Pro Machine, Inc.), 87 Bankr. 998, 1001-02 (Bankr. D. Minn. 1988); Berryman v. Smith (*In re* Smith), 84 Bankr. 175, 177 (Bankr. D. Ariz. 1988); Hoffman v. Brown (*In re* Brown), 56 Bankr. 487, 490 (Bankr. D. Md. 1985); King, *Jurisdiction and Procedure Under the Bankruptcy Amendment of 1984*, 38 VAND. L. REV. 675, 702-08 (1985)(asserting that § 1411 effectively repealed § 1480, extinguishing any jury trial right in bankruptcy proceedings).

86. Walsh v. Long Beach Honda (*In re* Gaildeen Indus., Inc.), 59 Bankr. 402, 405 (N.D. Cal. 1986); Blackman v. Setan (*In re* Blackman), 55 Bankr. 437, 440 (Bankr. D.D.C. 1985); L.A. Clark & Son, Inc. v. Bullock Constr., Inc. (*In re* L.A. Clark & Son, Inc.), 51 Bankr. 31, 32 n.1 (Bankr. D.D.C. 1985); Bokum Resources Corp. v. Long Island Lighting Co. (*In re* Bokum Resources Corp.), 49 Bankr. 854, 866-67 (Bankr. D. N.M. 1985); Lerblance v. Rodgers (*In re* Rodgers & Sons, Inc.), 48 Bankr. 683, 686-87 (Bankr. E.D. Okla. 1985).

87. McCormick v. American Investors Management (*In re* McCormick), 67 Bankr. 838, 842 (D. Nev. 1986)(no express statutory provision prohibiting bankruptcy courts from conducting jury trials.); *see also, e.g.*, Morse Elec. Co. v. Logicon, Inc. (*In re* Morse Electric Co.),

IV. CONFLICTING VIEWS ON THE SEVENTH AMENDMENT RIGHT IN BANKRUPTCY CASES

A. *Analyses of the Seventh Amendment Issue*

The most fundamental question in the debate regarding jury trials remains whether any such right exists in bankruptcy proceedings under the seventh amendment. This issue has been the subject of considerable confusion since the implementation of the Bankruptcy Code in 1978.[88] The current disagreement stems both from the effects of the Code as well as the failure of Congress to adequately address this problem in BAFJA. Prior to 1978, a distinction existed between summary and plenary matters with respect to the bankruptcy jurisdiction.[89] Bankruptcy courts were viewed as courts of equity and jury trials were prohibited in matters falling within their summary jurisdiction.[90] These pertained primarily to questions involving administration and distribution of the bankruptcy estate-in other words, proceedings which involve a *res*.[91] All other matters were considered to be plenary and were adjudicated in non-bankruptcy forums where jury trials were available.[92] Using the summary/plenary analysis, the Supreme Court in *Katchen v. Landy*[93] concluded that no right to jury trial existed in summary bankruptcy proceedings.[94]

The Bankruptcy Code expanded the bankruptcy courts' jurisdiction to include both summary and plenary matters, including matters which were previously litigated only in non-bankruptcy courts before a jury.[95] This broadened jurisdiction was retained in BAFJA,[96] however, as reflected by the core/non-core provisions of 28 U.S.C. § 157.[97]

A number of recent decisions have returned to the *Katchen* doctrine and the summary/plenary distinction in determining whether a

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47 Bankr. 234, 238 (Bankr. N.D. Ind. 1985); Smith-Douglass, Inc. v. Smith (*In re* Smith-Douglass, Inc.), 43 Bankr. 616, 618 (Bankr. E.D.N.C. 1984).

88. *See supra*, notes 20-27 and accompanying text.
89. *See supra*, notes 5-17 and accompanying text.
90. *See supra*, notes 5-17 and accompanying text.
91. *See supra*, notes 5-17 and accompanying text.
92. *See supra,* notes 5-17 and accompanying text.
93. 382 U.S. 323 (1966).
94. *Id.* at 336-37.
95. *See supra*, notes 20-27 and accompanying text.
96. *See supra*, note 39 and accompanying text.
97. 28 U.S.C. § 157 (Supp. IV 1986).

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right to jury trial exists. By analogizing the summary/plenary, core/non-core jurisdictional systems, these courts have reached the conclusion that no right to jury trial exists in core proceedings.[98] The core/non-core scheme was set up by Congress in response to *Northern Pipeline* to establish the bankruptcy court's jurisdiction over the types of matters traditionally heard by the bankruptcy judge.[99] For exam-

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98. *See, e.g.*, Huffman v. Perkinson (*In re* Harbour), 840 F.2d 1165, 1177 (4th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3755 (U.S. Apr. 25, 1988); Nordberg v. Granfinanciera, S.A. (*In re* Chase & Sanborn Corp.), 835 F.2d 1341, 1349-50 (11th Cir. 1988), *cert. granted*, 56 U.S.L.W. 3841 (U.S. June 13, 1988)(No. 87-1716); Kaiser Steel Corp. v. Frates (*In re* Kaiser Steel Corp.), 95 Bankr. 782, 785 (D. Colo. 1989); Bedford Computer Corp. v. Ginn Publishing, Inc. (*In re* Bedford Computer Corp.), 63 Bankr. 79, 81 (D.N.H. 1986); Jefferson Nat'l Bank v. I.A. Durbin, Inc. (*In re* I.A. Durbin, Inc.), 62 Bankr. 139, 144-45 (S.D. Fla. 1986); Morgan v. Lefton (*In re* Hendon Pools), 57 Bankr. 801, 803 (E.D. Mich. 1986); McLouth Steel Corp. v. Marblehead Lime Co. (*In re* McLouth Steel Corp.), 55 Bankr. 357, 362-63 (E.D. Mich. 1985); Kroh Bros. Dev. Co. v. Bazan (*In re* Kroh Bros. Dev. Co.), 91 Bankr. 889, 892 (Bankr. W.D. Mo. 1988); Baker v. Tadych (*In re* Tadych), 89 Bankr. 785, 787-88 (Bankr. E.D. Wis. 1988); Caruthers v. Fleet Finance, Inc. (*In re* Caruthers), 87 Bankr. 723, 726-27 (Bankr. N.D. Ga. 1988); Braun v. Zarling (*In re* Zarling), 85 Bankr. 802, 803 (Bankr. E.D. Wis. 1988); Berryman v. Smith (*In re* Smith), 84 Bankr. 175, 179-81 (Bankr. D. Ariz. 1988); Mansker v. Campbell (*In re* Mansker), 60 Bankr. 803, 806 (Bankr. D. Mass. 1986); Transpro Corp. v. NTW, Inc. (*In re* NTW, Inc.), 69 Bankr. 656, 663 (Bankr. E.D. Va. 1987); Acolyte Elec. Corp. v. City of New York, 69 Bankr. 155, 183 (Bankr. E.D.N.Y. 1986); DuVoisin v. Anderson (*In re* Southern Indus. Banking Corp.), 66 Bankr. 370, 375 (Bankr. E.D. Tenn. 1986); *In re* Poole Funeral Chapel, Inc., 63 Bankr. 527, 533-34 (Bankr. N.D. Ala. 1986); Thorp Credit, Inc. of Maryland v. Lee (*In re* Lee), 50 Bankr. 683, 684 (Bankr. D. Md. 1985); Cameron v. Anderson (*In re* American Energy, Inc.), 50 Bankr. 175, 180-81 (Bankr. D.N.D. 1985); Baldwin-United Corp. v. Thompson (*In re* Baldwin-United Corp.), 48 Bankr. 49, 56 (Bankr. S.D. Ohio 1985).

99. *See* 28 U.S.C. § 157 (Supp. IV 1986)(defining core and non-core proceedings). Section 157(b)(2) provides:

(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 interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or 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;

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ple, in *Jefferson National Bank v. I.A. Durbin, Inc. (In re I.A. Durbin, Inc.)*,[100] the district court found that "a core proceeding is a proceeding created by the bankruptcy code and since bankruptcy is equitable in nature, all core proceedings are also equitable."[101] Since the seventh amendment preserves only jury trial rights in actions at law, the *I.A. Durbin* court concluded "there is no right to trial by jury in core proceedings."[102] This reasoning paralleled the Supreme Court's summary/plenary analysis in *Katchen v. Landy*. Many other courts have also adopted this analysis.[103]

Unfortunately, the core proceedings identified in 28 U.S.C. § 157 are subject to varying interpretation,[104] and some courts have narrowly construed those proceedings deemed to be core.[105] These cases generally concede, however, that a right to jury trial may exist in non-core proceedings under the seventh amendment, yet indicate that such proceedings should be heard before the federal district court.[106]

This approach is also problematic in that the categories of summary/plenary and core/non-core are not identical.[107] Certain core

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(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 assests of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

Id.

100. 62 Bankr. 139 (S.D. Fla. 1986).

101. *Id.* at 145.

102. *Id.*

103. *See, e.g.*, Acolyte Electric Corp. v. City of New York, 69 Bankr. 155, 180 (Bankr. E.D.N.Y. 1986)(applying *Katchen* analysis); Stamps v. Sexton Bros. Tire Co. (*In re* Major Tire Co.), 64 Bankr. 305, 306 (Bankr. N.D. Ga. 1986)(examining summary and plenary analysis in light of core/noncore provisions); Pennels v. Barnes (*In re* Best Pack Seafood, Inc.), 45 Bankr. 194, 195 (Bankr. D. Me. 1984)(applying core proceeding analysis).

104. *See, e.g.*, Sun West Distrib., Inc. v. Grumman Energy Systems Co. (*In re* Sun West Distributors, Inc.), 69 Bankr. 861, 863 (Bankr. S.D. Calif. 1987); *In re* National Equip. and Mold Corp., 71 Bankr. 24, 26 (Bankr. N.D. Ohio 1986).

105. *See, e.g., Acolyte Elec. Corp.*, 69 Bankr. at 175 (holding that turnover action involving state law contract claim not core proceeding).

106. *See supra*, note 98.

107. As discussed *supra*, in notes 20-27 and accompanying text, summary jurisdiction under the 1898 Act focused on a *res* and administration or distribution of the bankruptcy estate. The non-exclusive list of proceedings set forth in 28 U.S.C. § 157 contains actions, including fraudulent and preferential transfers, which were previously considered plenary and were resolved in non-bankruptcy forums. *See* 1 COLLIER ON BANKRUPTCY (MB) ¶ 3.01 [7][b][i] (15th ed.).

proceedings have been held to include matters which were formerly found only in plenary actions.[108] Questions remain as to whether a jury trial right exists in core proceedings, and whether Congress may, by designating such proceedings as "core," eliminate the right to jury trial which previously existed under the summary/plenary system.[109] Stringent arguments against this interpretation of the *Katchen* opin-

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108. *See* Huffman v. Perkinson (*In re* Harbour), 840 F.2d 1165, 1179 (4th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3755 (Apr. 28, 1988). Noting that "Congress, in the 1984 Act, granted bankruptcy courts the authority to 'hear and determine' matters that previously could only be determined in plenary proceedings, as well as matters that could be determined in summary proceedings." *Id.*; *see also, e.g.*, Nordberg v. Granfinanciera, S.A. (*In re* Chase & Sanborn Corp.), 835 F.2d 1341, 1349 (11th Cir. 1988)(core proceeding includes cause of action to avoid fraudulent transfer), *cert. granted*, __ U.S. __, 108 S. Ct. 2818, 100 L. Ed. 2d 920 (1988); Leonard v. Wessell (*In re* Jackson), 90 Bankr. 126, 134 (Bankr. E.D. Pa. 1988)(category of core proceedings *not* equitable in nature); Wolfe v. First Fed. Sav. and Loan Ass'n of Paragould (*In re* Wolfe), 68 Bankr. 80, 86 (Bankr. N.D. Tex. 1986), *aff'd*, M & E Contractors, Inc. v. Kugler-Morris Gen. Contractors, Inc., 67 Bankr. 260, 267 (N.D. Tex. 1986)(that certain contested issues historically sound in law does not *per se* exclude their inclusion as core proceedings).

109. This question was thoroughly discussed in *Nordberg*, where the court stated:

> This is in accord with *Katchen v. Landy*, 382 U.S. 323, 86 S. Ct. 467, 15 L. Ed. 2d 391 (1966) where the Supreme Court stated "[t]he Bankruptcy Act, passed pursuant to the power given to Congress by Art. I, Sec. 8, of the Constitution to establish uniform laws on the subject of bankruptcy, converts a creditor's legal claims into an equitable claim . . . ." . . . *Id.* 382 U.S. at 336-37, 86 S. Ct. at 476. If pursuant to this constitutional power, Congress may convert a creditor's legal right into an equitable claim and displace any seventh amendment right to trial by jury, Congress may likewise treat other core proceedings in bankruptcy such as actions to avoid fraudulent transfers or preferences. *See In re* Southern Indus. Banking Corp., 66 B.R. 370, 375 (Bankr. E.D. Tenn. 1986). "Congress may accommodate the right to a trial by jury to the need for expeditious proceedings." Best Pack Seafood, 45 B.R. 194, 195 (Bankr. D. Me. 1984).

Nordberg, 835 F.2d at 1349. But see a contrary position taken by the court in *M & E Contractors*:

> The premise that no jury trial need be considered by the bankruptcy court because all bankruptcy matters are "inherently equitable" can be traced, as noted by Judge McGuire, to an overly broad reading of Katchen v. Landy, 382 U.S. 323, 86 S. Ct. 467, 15 L. Ed. 2d 391 (1966). *See, e.g., In re* O'Bannon, 49 B.R. 763, 765-66 (Bankr. M.D. La. 1985). *Katchen* was decided under the 1898 act, in which bankruptcy courts possessed only summary jurisdiction; it cannot be read for the proposition that all core proceedings are, by definition, equitable. To ascertain whether the seventh amendment attaches, reference must be made to the common law at the time of the adoption of the amendment, Dimick v. Schiedt, 293 U.S. 474, 55 S. Ct. 296, 79 L. Ed. 603 (1935); "legal claims are not magically converted into equitable issues by their presentation to a court of equity," and Congress cannot transform a legal proceeding into an equitable proceeding and thus abrogate the terms of a constitutional provision.

M & E Contractors, 67 Bankr. at 266-67.

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ion and its view of Congressional power have been made.[110] Still, other authorities have concluded that Congress had the power to reduce seventh amendment rights by expansion of bankruptcy jurisdiction,[111] relying in large part on the *Katchen* decision.[112]

A divergent line of cases has completely abandoned the summary/plenary distinction in determining whether a right to jury trial exists, and has adopted a pure seventh amendment test.[113] This approach requires an analysis of the nature of the claim and the type of relief which is requested,[114] consistent with the analysis normally applied in non-bankruptcy forums to determine a party's seventh amendment entitlement to a jury trial.[115] These cases have commonly found that jury trials are appropriate in core proceedings, in those instances where the issues involved are legal rather than equitable in nature.[116] Even where a creditor might otherwise have a right to a jury trial, one line of authority has held that a creditor may waive its right to a jury trial by consent.[117] This occurs commonly where a

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110. *See* Gibson, *Jury Trial in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967, 1003-10 (1988).

111. *See Nordberg*, 835 F.2d at 1349.

112. 382 U.S. 323 (1966).

113. *See* American Universal Ins. v. Pugh, 821 F.2d 1352, 1355 (9th Cir. 1987); American Community Serv., Inc. v. Wright Mktg., Inc. (*In re* American Community Serv., Inc.), 86 Bankr. 681, 690-91 (D. Utah 1988); M & E Contractors, Inc. v. Kugler-Morris Gen. Contractors, Inc., 67 Bankr. 260, 266 (N.D. Tex. 1986); Zimmerman v. Cavanagh (*In re* Kenval Mktg. Corp.), 65 Bankr. 548, 553-54 (E.D. Pa. 1986); Hassett v. Weissman (*In re* O.P.M. Leasing Serv., Inc.), 48 Bankr. 824, 827 (S.D.N.Y. 1985); Macon Prestressed Concrete Co. v. Duke, 46 Bankr. 727, 730 (M.D. Ga. 1985); Farmers and Merchants Nat'l Bank v. Aylesworth (*In re* Arnett Oil, Inc.), 44 Bankr. 603, 604 (N.D. Ind. 1984); Leonard v. Wessell (*In re* Jackson), 90 Bankr. 126, 134-35 (Bankr. E.D. Pa. 1988); Moratzka v. Wencl (*In re* Wencl), 71 Bankr. 879, 882-83 (Bankr. D. Minn. 1987); Leird Church Furniture Mfg. Co. v. Union Nat'l Bank of Little Rock (*In re* Leird Church Furniture Mfg. Co.), 61 Bankr. 444, 445 (Bankr. E.D. Ark. 1986); Otte v. Monsanto Co. (*In re* McCrary's Farm Supply, Inc.), 57 Bankr. 423, 424 (Bankr. E.D. Ark. 1985); Mauldin v. Peoples Bank of Indianola (*In re* Mauldin), 52 Bankr. 838, 841 (Bankr. N.D. Miss. 1985); Energy Resources Co., Inc. v. Rosen (*In re* Energy Resources Co., Inc.), 49 Bankr. 278, 282 (Bankr. D. Mass. 1985); Lerblance v. Rodgers (*In re* Rodgers & Sons), 48 Bankr. 683, 688 (Bankr. E.D. Okla. 1985).

114. *See supra*, note 113; *see also infra*, notes 133 and 150 and accompanying text.

115. *See* Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970)(court set forth three pronged test for examining issues presented to determine: (i) if jury trial allowed for issue prior to 1791; (ii) if remedy sought legal or equitable in nature; and (iii) whether issue can be understood by jury).

116. *See supra*, note 113.

117. *See, e.g.*, Katchen v. Landy, 382 U.S. 323, 336 (1966); Edgecomb Metals Co. v. Eastmet Corp., 89 Bankr. 546, 550 (D. Md 1988); Kraus-Thomson Organization, Ltd. v. McCorhill Publishing, Inc. (*In re* New Castle Assoc.), 90 Bankr. 633, 637-38 (Bankr. S.D.N.Y.

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creditor has filed a proof of claim and demands a jury with respect to a counterclaim or objection to that claim.[118]

B. *Circuit Court Decisions*

Although numerous district and bankruptcy courts have addressed the jury trial question, only a few circuit courts have spoken on this issue.[119] Yet, these cases illustrate the dichotomy of analyses which exists. In *Nordburg v. Granfinanciera (In re Chase & Sanborn Corp.)*,[120] the United States Court of Appeals for the Eleventh Circuit determined that no right to jury trial exists in core proceedings.[121] A chapter 11 trustee in *Nordburg* initiated a fraudulent transfer action to recover a money judgment based on the debtor's pre-petition transfers.[122] The lower court entered judgment against the defendants,[123] who argued on appeal that the request for relief—a money judgment—represented a legal remedy, thereby giving rise to their seventh amendment rights.[124] The appeals court found the defendants' distinction between the equitable relief inherent in a request for return of property and the legal relief in a request for the value of fraudulently conveyed property to be unpersuasive.[125] The rationale underlying this decision harkened back to the *Katchen* decision, by determining that core proceedings, which are created by the Bankruptcy Code and brought in the bankruptcy court, are inherently equitable in nature.[126] This was based on the proposition that Congress may convert legal

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1988); Official Creditors' Comm. of Honeycomb, Inc. v. Fidelity Bank, N.A. (*In re* Honeycomb, Inc.), 72 Bankr. 371, 377-78 (Bankr. S.D.N.Y. 1987).

118. *See supra*, note 117.

119. Huffman v. Perkinson (*In re* Harbour), 840 F.2d 1165, 1171-78 (4th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3755 (April 25, 1988); Nordberg v. Granfinanciera, S.A. (*In re* Chase & Sanborn Corp.), 835 F.2d 1341, 1348 (11th Cir.), *cert. granted*, __ U.S. __, 108 S. Ct. 2818, 100 L. Ed. 2d 920 (1988); American Universal Ins. v. Pugh, 821 F.2d 1352, 1355 (9th Cir. 1987); *see also* Holland Am. Ins. Co. v. Succession of Roy, 777 F.2d 992, 999 (Bankr. 5th Cir. 1985)(*dicta* questioning ability of bankruptcy courts to conduct jury trials post-*Northern Pipeline*).

120. 835 F.2d 1341 (11th Cir.), *cert. granted*, __ U.S __, 108 S. Ct. 2818, 100 L. Ed. 2d 920 (1988).

121. *Id.* at 1349-50.

122. *Id.* at 1343.

123. *Id.* at 1343-44.

124. *Id.* at 1348-49.

125. *Id.* at 1349 (citing *Moratzka v. Wencl (In re Wencl)*, 71 Bankr. 879, 883 (Bankr. D. Minn. 1987)).

126. *Id.*

claims to equitable claims by denominating them as "core."[127] The *Nordberg* court also relied on the congressionally recognized need for expeditious resolution of bankruptcy matters in reaching its decision.[128]

Similarly, in *Huffman v. Perkinson (In re Harbour)*,[129] a trustee sought to recover both fraudulent and preferential transfers. The appellants asserted that they were denied their seventh amendment right to a jury trial, due to the "legal" nature of the claims asserted against them. Also citing *Katchen*, the Fourth Circuit found the trustee's claims to be "cast" in the inherently equitable nature of bankruptcy proceedings and therefore not subject to the seventh amendment requirement.[130] This conclusion was reached, despite the fact that such claims had previously been considered plenary and therefore subject to a jury trial under the 1898 Act.[131]

The analyses contained in these decisions contrast sharply with that applied by the United States Court of Appeals for the Ninth Circuit in *American Universal Insurance v. Pugh*.[132] There, the court applied a pure seventh amendment test, and rejected the summary/plenary analysis, looking instead to the nature of the issue to be tried to determine whether a jury trial was appropriate.[133] Pursuant to this approach, where the issue to be tried is equitable, no jury trial right exists, and where legal, a jury trial is required. The debtor's complaint in *American Universal Insurance* requested a money judgment, imposition of a constructive trust and an accounting.[134] Despite the existence of a request for money judgment, the court determined that such request was only a necessary part of inherently equitable requests for relief — namely, imposition of a trust and a request for an

127. *Id.*; *see also supra*, discussion at note 109.

128. Nordberg v. Granfinanciera, S.A. (*In re* Chase & Sanborn), 835 F.2d 1341, 1350 (11th Cir.), *cert. granted*, __ U.S. __, 108 S. Ct. 2818, 100 L. Ed. 2d 920 (1988). "Congress enacted the Bankruptcy Code to provide a prompt resolution of all bankruptcy causes of action in order to expedite the settlement of the debtor's estate. Jury trials would "dismember" the statutory scheme of the Bankruptcy Act." *Id.* (cites omitted).

129. 840 F.2d 1165 (4th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3755 (Apr. 25, 1988).

130. *Id.* at 1172.

131. *Id.*

132. 821 F.2d 1352 (9th Cir. 1987).

133. *Id.* at 1355 (court did not reach issue of whether bankruptcy court had power to conduct jury trial, as it found defendants had no right to one).

134. *Id.* at 1353.

accounting.[135] The significance of this decision is that it reflects an analysis entirely different than that applied in *Nordberg* and *Hoffman*. It relies neither on the summary/plenary distinction, nor the current core/non-core system in reaching its conclusion. Similar analyses, as applied by lower courts have found that jury trials are available in core proceedings,[136] where the nature of the issues involved are deemed to be legal.

C. *Texas Court Decisions*

Several Texas courts have also confronted the jury trial dilemma. In an early post-BAFJA case, *Price-Watson Co. v. Amex Steel Corp. (In re Price-Watson Co.)*,[137] Chief Bankruptcy Judge Wheless of the Southern District of Texas ruled that jury trials were available in non-core proceedings.[138] In reaching this conclusion, Judge Wheless identified the issues involved as related or non-core, and found them to represent claims at common law, requiring a jury in adherence to seventh amendment precepts.[139] Although significant authority exist to the contrary,[140] the rationale for this holding centers on the court's distinction between de novo review and a "de novo trial."[141]

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135. *Id.* at 1356.

136. *See supra*, note 113.

137. 66 Bankr. 144 (Bankr. S.D. Tex. 1986).

138. *Id.* at 149.

139. *Id.* at 148.

140. *See supra*, note 74.

141. *Price Watson*, 66 Bankr. at 149-52. As the court explained:

> However, in related to matters, as noted above, the review is a "de novo" review. This requires the Article III Court to make an independent judgment on the issues, although it is not necessary to retry the case. *Moody v. Amoco Oil Company*, [734 F.2d 1200 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984)], a case based on the interim rule; *In re Lion Capital Group*, [49 Bankr. 329 (S.D.N.Y 1985)], *United States v. Veteto*, [701 F.2d 136 (11th Cir.), *cert. denied*, 464 U.S. 839 (1983)]; *Campbell v. United States District Court*, [501 F.2d 196 (9th Cir. 1974)], *United States v. Raddatz*, [447 U.S. 667 (1980)]. The latter three cases are based on the Magistrates Act.
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> Thus both the U.S. Supreme Court (in [*Northern Pipeline*]) and the U.S. Congress (in 28 U.S.C. § 157(c)(1)) have authorized non-article III Judges to *hear* non-core matters (a fact finding mission) and to make recommendations to the Article III (District) Court which then becomes informed through the use of the record or otherwise (but does not necessarily have to retry the case, in whole or in part) and makes the decision as and when the District Judge is satisfied that he (or she) is sufficiently "informed" to act on the issue. The District Court could retry the case, even with a jury, but why would it? The jury would (presumably) have determined the critical fact issues in the same way this could have been done in a trial before the Bankruptcy Court in a bench trial.

In re Price-Watson Co., 66 Bankr. at 151-52.

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Subsequently, two conflicting opinions from the Northern District of Texas were rendered by Chief Bankruptcy Judge McGuire in *Wolfe v. First Federal Savings and Loan Association (In re Wolfe)*,[142] and by Bankruptcy Judge Abramson in *M&E Contractors, Inc. v. Rodgers Construction, Inc. (In re M&E Contractors, Inc.)*.[143] Judge McGuire utilized a seventh amendment analysis in *Wolfe*, discarding the summary/plenary analysis utilized by many courts,[144] and focusing instead on the nature of the issues to be tried.[145] By contrast, Judge Abramson held in *M&E Contractors* that bankruptcy courts lacked authority to conduct jury trials, even in core proceedings.[146]

The disparate approaches reflected by *Wolfe* and *M&E Contractors* were considered together on appeal,[147] and in a lengthy discussion, District Judge Buchmeyer determined that the seventh amendment test utilized in *Wolfe* was correct, and that bankruptcy courts could conduct jury trials in core proceedings.[148] The District Court further concluded that the scope of the United States Supreme Court's holding in *Northern Pipeline* was limited and not an impediment to jury trials before non-Article III bankruptcy courts.[149] This ruling also rejected "resurrection of the summary plenary distinction" and identified a two prong seventh amendment test to determine the proprietary of a jury trial in the Bankruptcy Court: (i) a determination of

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142. 68 Bankr. 80 (Bankr. N.D. Tex. 1986).

143. No. 384-31135F-11, Adv. No. 385-3025, slip op. (Bankr. N.D. Tex. 1985).

144. *In re Wolfe*, 68 Bankr. at 86. "The summary-plenary analysis is cumbersome, and, as a practical matter, may ultimately require a modified Seventh Amendment analysis because many "summary" proceedings under the Act were summary only by virtue of either explicit or implicit consent by the creditor." *Id.*

145. *Id.* at 89. "The better reasoned approach utilizes a Seventh Amendment analysis as set forth in *Ross*, [396 U.S. 531 (1970)], focusing on the underlying issues and the remedy sought." *Id.*

146. M & E Contractors, Inc. v. Rodgers Constr., Inc. (*In re* M & E Contractors), Case No. 384-31135F-11; Adv. No. 385-3025 (Bankr. N.D. Tex. Jan. 2, 1985).

147. M & E Contractors, Inc. v. Kugler-Morris Gen. Contractors, Inc., 67 Bankr. 260, 261-62 (N.D. Tex. 1986).

148. *Id.* at 262, 267.

149. *Id.* at 266. As Judge Buckmeyer explained:

> The ability to conduct a jury trial is not an exclusive function of an Article III court. *Marathon* is not to the contrary; Justice Brennan merely listed the ability to hold jury trials as a characteristic of the discredited bankruptcy scheme . . . . He did not state, explicitly or implicitly, that only Article III courts may preside over jury trials; indeed, the affirmance of the magistrate system—which permits magistrates to try jury cases with the consent of the parties—supports the conclusion that jury trials may be held in bankruptcy courts.

Id. (cites omitted).

whether proceeding is core or related; and (ii) if core, a determination of whether the proceeding "sounds in law rather than equity."[150]

The availability of a jury trial in a dischargeability action was addressed by Bankruptcy Judge Mahoney in *Mutual Fire, Marine & Inland Insurance Co. v. Frantz (In re Frantz)*.[151] The court denied the jury request, focusing on the equitable nature of a dischargeability proceeding, and while cognizant of seventh amendment considerations,[152] honored the mandate of *Katchen v. Landy* regarding purely summary type proceedings.[153] In an effort to accommodate these concerns and ensure no impairment of the parties seventh amendment rights, the court utilized the practical solution of bifurcating the underlying fraud issues to be tried before a jury in the state courts, leaving the bankruptcy court to determine only the "summary" issues related to dischargeability.[154]

In *Robinson v. Hinkley (In re Hinkley)*,[155] Bankruptcy Judge Leal determined that no jury trial right existed with respect to an objection to claims.[156] This ruling also looked to a seventh amendment analysis, but followed *Katchen* to the extent that it held that allowance or disallowance of claims were equitable, even if they involved issues which might otherwise be tried in state court.[157] Although the *Hink-*

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150. *Id.* at 267 n.10. The specific test enunciated by the court is as follows:

> Two distinct inquiries must, then, be undertaken when a demand for a jury trial is filed in the bankruptcy court. That court must first determine whether a proceeding is core or related, and must be informed in this inquiry not only by the applicable provisions of the Act, but also by *Marathon*. If the proceeding is related, the bankruptcy court may proceed with the jury trial only with the consent of the parties. 28 U.S.C. § 157(c)(2). If, however, the proceeding is core, another step must be taken; the bankruptcy court must then determine whether the particular action would require a jury trial under the seventh amendment, that is, whether the proceeding sounds in law or in equity.

Id.

151. 82 Bankr. 835 (Bankr. S.D. Tex. 1988).

152. *Id.* at 836.

153. *Id.* (*Katchen* and progeny maintain that bankruptcy court is court of equity despite legal issues that might be heard, thus precluding any seventh amendment right).

154. *Id.* at 837.

155. 58 Bankr. 339 (Bankr. S.D. Tex. 1986).

156. *Id.* at 345.

157. *Id.* The *In re Hinkley* court stated:

> The crucial aspect in this issue is whether the defendant has a right to a jury trial on the cause of action which forms the basis of Robinson's proof of claim in the bankruptcy case. The proper inquiry for the bankruptcy judge is to analyze the nature of the cause of action in order to determine if that issue is triable by jury . . . . Similarly, in our case, we hold, based on *Katchen v. Landy*, that no right to a jury exists on an objection to claim even though the same issues may have been triable to the jury in state court.

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ley decision did not specifically embrace a pure seventh amendment test in the nature of *Wolfe*, the court did opine that where issues were otherwise tried by a jury, the bankruptcy judge should be empowered to conduct a jury trial.[158]

Likewise in *T.O.S. Industries, Inc. v. Ross Hill Controls Corp.*,[159] District Judge Hughes held that a right to jury trial existed in a preference action to recover money and for the return of property.[160] This determination was based on the conclusion that such relief was inherently legal and therefore within the ambit of the seventh amendment.[161] The opinion cited several cases which promote application of a seventh amendment test, but failed to adopt any specific analysis.[162] However, the court did conclude that jury trials could be held in limited instances in the bankruptcy courts, despite voicing significant reservation on that point.[163]

Texas courts have therefore generally found that seventh amendment rights may exist in bankruptcy proceedings.[164] This is based

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Id. at 345-46.

158. *Id.* at 344.

159. 72 Bankr. 749 (S.D. Tex. 1987).

160. *Id.* at 751.

161. *Id.* (since money sole relief sought here, creditors entitled to jury trial).

162. *Id.* at 751-52.

163. *See id.* at 752. It should be noted that this case was also a pre-Code case, having been filed in 1982, as pointed out by the court in discussing its concerns in allowing jury trials:

> The remaining issue is where the jury trial will be held: in the bankruptcy or district court. This case, filed in 1982, is proceeding under the 1978 Bankruptcy Code. Pub. L. 98-353, § 553, 98 Stat. 333 (1984). That statute allowed bankruptcy courts to conduct jury trials. . . . Although this court has severe reservations about the propriety of a bankruptcy court conducting a jury trial, if a jury trial is to occur in this case, it may be had in the bankruptcy court. . . . This decision is reached reluctantly, with a full understanding of the historical position of bankruptcy courts. These tribunals are essentially masters in chancery. As an equitable institution, no historical right to conduct jury trials would inhere in them. That congress has seen fit to allow bankruptcy courts to conduct these proceedings is a particular deviation from the general Anglo-American practice absorbed when the Union was formed. As a derogation of existing practice, it should be narrowly construed.

Id. (cites omitted).

164. *See id.* at 751; M & E Contractors, Inc. v. Kugler-Morris Gen. Contractors, Inc., 67 Bankr. 260, 267 (N.D. Tex. 1986); Price-Watson Co. v. Amex Steel Corp. (*In re* Price-Watson Co.), 66 Bankr. 144, 149 (Bankr. S.D. Tex. 1986); Wolfe v. First Fed. Sav. and Loan Ass'n (*In re* Wolfe), 68 Bankr. 80, 89 (Bankr. N.D. Tex. 1986); Robinson v. Hinkley (*In re* Hinkley), 58 Bankr. 339, 344 (Bankr. S.D. Tex. 1986). Two Texas cases have also addressed the issue of jury trial demands made in connection with motions to remand and for mandatory abstention. *Cf.* Chiodo v. NBC Bank-Brooks Field (*In re* Chiodo), 88 Bankr. 780, 783-85 (W.D. Tex. 1988)(judge recommended abstention and remand to state court and held that jury trials may

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largely on a seventh amendment analysis as opposed to adoption of the *Katchen* rationale proposed in other jurisdictions, and may be indicative of a desire by the bankruptcy courts to preserve the full scope of their jurisdiction under the Code. With respect to the authority of such courts to preside over jury trials, the majority of these opinions were reported prior to the abrogation of Bankruptcy Rule 9015[165] and may not be reflective of the current state of the law regarding the bankruptcy courts' authority to conduct jury trials.[166]

V. CONCLUSION AND PROPOSAL

Significant questions and problems persist respecting the authority and necessity for jury trials in bankruptcy proceedings. From a practical standpoint, jury trials are arguably inconsistent with the expeditious resolution of bankruptcy proceedings as mandated by Congress and the courts.[167] Further, an analysis of when such proceedings may be appropriate does not fit squarely within the core/non-core jurisdictional structure created by BAFJA. This raises questions with respect to both the continued applicability of the summary/plenary distinction which existed under the 1898 Act, as well as whether such an

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only be conducted in non-core proceedings by consent); Engra, Inc. v. Ernst & Whinney (*In re* Engra, Inc.), No. 87-0985, slip op. (Bankr. S.D. Tex. December 11, 1987)(holding Article I bankruptcy courts without power to conduct jury trials in related or non-core proceedings).

165. *See* T.O.S. Indus., Inc. v. Ross Hill Controls Corp., 72 Bankr. 749, 751-52 (S.D. Tex. 1987)(noting that case filed prior to 1982 and subject to 1978 Bankruptcy Act); *In re Price-Watson Co.*, 66 Bankr. at 159. In *In re Price-Watson Co.*, the court stated:

> I would point out, however, that under the current version of the *proposed* Bankruptcy Rules the current 9015 would be abrogated. It is my understanding that the purpose of this is *not* to negate such jury trials but to leave to court determination whether a Bankruptcy Court can preside over jury trials under law. In other words the intent, in abrogating current Rule 9015, is not to infer that such jury trial is not proper, but rather is to allow the issue to be developed in a different way, i.e. by case decision. If this is the proper interpretation, then the promulgated Rules, if they become Rules, would simply be neutral on the point.

Id.; *In re Wolfe*, 68 Bankr. at 88. "[I]t is beyond question that Bankruptcy Rule 9015 was left untouched by Congress and is still viable." *Id.*; *see also* Robinson v. Hinkley (*In re* Hinkley), 58 Bankr. 339, 344 (Bankr. S.D. Tex. 1986). "Bankruptcy Rule 9015 promulgated by the United States Supreme Court after the [*Northern Pipeline*] decision provides the procedures by which issues triable by jury shall be demanded . . . ." *Id.*

166. *See supra* note 84.

167. *See, e.g.*, United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd. (*In re* Timbers of Inwood Forest Assoc., Ltd.), 808 F.2d 363, 373 (5th Cir. 1987), *aff'd*, __ U.S. __, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988); Weeks v. Kramer (*In re* G. Weeks Securities, Inc.), 89 Bankr. 697, 710 (Bankr. W.D. Tenn. 1988). "The rapid pace of bankruptcy cases and proceedings do not mesh with jury procedures." *Id.*

analysis is now appropriate when determining seventh amendment rights.[168] Constitutional problems also exist, as reflected by *Northern Pipeline*, regarding whether jury trials are "an essential attribute of judicial power" exercisable only by an Article III court.[169] Finally, the most basic constitutional question addresses the extent to which Congress may alter seventh amendment rights, if at all, in connection with the jurisdiction of bankruptcy courts.[170]

At the writing of this article, the United States Supreme Court is considering the issues raised in the *Nordburg* decision.[171] An opinion by the Court could provide significant clarity with respect to jury trials before non-Article III bankruptcy judges and the application of the seventh amendment to the core/non-core division created by 28 U.S.C. § 157. Further clarification with regard to those specific proceedings which are to be deemed core proceedings is needed. The Supreme Court may choose, however, to defer to Congress by suggesting amendment of sections 157 and 1411.

Congress could resolve the conflict if it were to vest bankruptcy judges with Article III powers, allowing them to preside over jury trials to the extent required by the seventh amendment. Under the current jurisdictional scenario, withdrawal of the reference seems the only practical alternative with regard to non-core proceedings.[172] The reference has also commonly been withdrawn where courts have allowed jury trials in core proceedings. This practice impairs the bankruptcy court's ability to administer and expeditiously resolve bankruptcy proceedings. At this time, either the Supreme Court or Congress could resolve the conflicting points of view regarding jury trials in the bankruptcy forum. As illustrated by the issues raised in this article, a clarification with respect to when and if jury trials may take place before the bankruptcy courts is imperative.

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168. *See supra*, notes 95-116 and accompanying text.

169. 458 U.S. 50, 85-87; *see also supra*, discussion at notes 62-67 and accompanying text.

170. *See supra*, notes 75-76 and 109-112, and accompanying text.

171. Nordberg v. Granfinanciera, S.A. (*In re* Chase & Sanborn Corp.), 835 F.2d 1341, 1348 (11th Cir.), *cert. granted*, __ U.S. __, 108 S. Ct. 2818, 100 L. Ed. 2d 920 (1988).

172. *See supra*, notes 66-69. *But see* Price-Watson Co. v. Amex Steel Corp. (*In re* Price-Watson Co.), 66 Bankr. 144, 151-52 (Bankr. S.D. Tex. 1986)(de novo review does not necessarily require retrial before jury).