

# Jury Trials After *Granfinanciera*: Three Proposals for Reform

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In *Granfinanciera, S.A. v. Nordberg*,<sup>1</sup> the United States Supreme Court held that the seventh amendment right to a trial by jury applies in certain kinds of bankruptcy proceedings. Pursuant to this ruling, a party is entitled to a jury trial if the proceeding meets the following three-part test enunciated by the Court: (1) the cause of action would have been brought at law (and not in equity) in 18th-century England before the courts merged, (2) the remedy sought is characterized as legal (as opposed to equitable), and (3) the proceeding does not concern a public right that can be and has been assigned to an article I court lacking a jury (i.e., the proceeding must involve a private right).<sup>2</sup> Also, entitlement to a jury trial requires that the party making the jury demand not have filed a claim against the estate in the bankruptcy case.<sup>3</sup> The Court, however, explicitly declined to decide whether the bankruptcy court has the statutory or constitutional authority to conduct a trial by jury when that right exists.<sup>4</sup> Subsequently, several federal courts of appeals have ruled on the bankruptcy court's power to conduct a jury trial, resulting in a split of authority and an open-ended dilemma facing bankruptcy judges, attorneys, creditors, debtors, and trustees throughout the nation.

Inasmuch as the Supreme Court dodged the issue in *Granfinanciera*, and abdicated its responsibility, first, by failing to decide *In re Ben Cooper, Inc.*<sup>5</sup> after having granted certiorari, and, second, by denying a subsequent petition for certiorari in May of 1991, the purpose of this Article is to propose congressional action that will resolve the problem in a manner that

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<sup>1</sup> 492 U.S. 33 (1989).

<sup>2</sup> *Id.* at 42.

<sup>3</sup> *Langenkamp v. Culp*, 111 S. Ct. 330 (1990); *Granfinanciera*, 492 U.S. at 58-59; *Katchen v. Landy*, 382 U.S. 323, 336-37 (1966).

<sup>4</sup> *Granfinanciera*, 492 U.S. at 64.

<sup>5</sup> 896 F.2d 1394 (2d Cir.), *cert. granted*, 110 S. Ct. 3269, *vacated and remanded*, 111 S. Ct. 425 (1990), *opinion reinstated*, 924 F.2d 36 (2d Cir.), *cert. denied*, 111 S. Ct. 2041 (1991).

passes constitutional muster and that has the significant and far-reaching effects of judicial economy and efficiency.

When Congress enacted the 1978 Bankruptcy Reform Act,<sup>6</sup> which became effective on October 1, 1979, one of the main purposes was to create an independent court with broad jurisdiction to determine all matters that would arise under the Bankruptcy Code, or in or related to a bankruptcy case, and to eliminate the pre-Code concepts of summary and plenary jurisdiction that had existed under the Bankruptcy Act. In 1982, in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.* [hereinafter referred to as *Marathon*],<sup>7</sup> the Supreme Court declared this broad grant of jurisdiction to the bankruptcy courts unconstitutional, and congressional debate ensued for the next two years. At that time, one of the proposals to cure the jurisdictional infirmities was to make the bankruptcy court an article III court, thus granting life tenure to the bankruptcy judges along with the safeguard of no diminution of salary.<sup>8</sup>

While, by hindsight, this would have been the most appropriate solution, it was not adopted. In the words of Representative Kindness: "One answer is, OK, let us go with article III judges. That is expensive. That is the Rolls Royce choice. Let us try a tuneup instead."<sup>9</sup> Hence, the Bankruptcy Amendments and Federal Judgeship Act of 1984 [hereinafter referred to as "the 1984 Amendments"]<sup>10</sup> did not provide article III status for the bankruptcy court but, instead, designated the bankruptcy court as a unit of the district court,<sup>11</sup> which was given original jurisdiction over bankruptcy cases and proceedings<sup>12</sup> as well as the authority to refer such cases and proceedings to the bankruptcy court,<sup>13</sup> except proceedings involving personal injury tort or wrongful death.<sup>14</sup> The 1984 Amendments also created categories for bankruptcy proceedings, designating them as core and noncore, and Congress provided for the bankruptcy court to have the power to enter final orders and judgments in core proceedings, but not without

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<sup>6</sup> Pub. L. No. 95-598, 92 Stat. 2549 (1978).

<sup>7</sup> 458 U.S. 50 (1982).

<sup>8</sup> U.S. CONST. art. III, § 1.

<sup>9</sup> 130 CONG. REC. H1811 (daily ed. Mar. 21, 1984) (statement of Representative Kindness).

<sup>10</sup> Pub. L. No. 98-353, 98 Stat. 333.

<sup>11</sup> 28 U.S.C. § 151 (1990).

<sup>12</sup> 28 U.S.C. § 1334 (1990).

<sup>13</sup> 28 U.S.C. § 157(a) (1990). It is common practice for almost all bankruptcy cases and proceedings to be referred to the bankruptcy court under this provision.

<sup>14</sup> 28 U.S.C. § 157(b)(5) (1990).

consent of all parties in noncore proceedings (in which the bankruptcy court must recommend proposed findings of fact and conclusions of law to the district court, which then enters the final order or judgment after de novo review of any contested matters).<sup>15</sup>

The 1984 Amendments also repealed 28 U.S.C. section 1480, which was the relevant statutory provision concerning jury trials and which, in effect, preserved any existing right to trial by jury (other than certain issues concerning involuntary bankruptcy petitions). In its place, Congress enacted 28 U.S.C. section 1411, which 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 of title 11 to be tried without a jury.

It is this rather ambiguous language, coupled with the absence of any express congressional intent to grant or not to grant the power to try jury cases to the bankruptcy court, that has resulted in the split of authority among the circuits on this issue. The first case decided at the appellate level was *Ben Cooper*,<sup>16</sup> in which the Second Circuit held that the bankruptcy court may conduct jury trials in core proceedings. Note that it is generally agreed that, under the present jurisdictional framework, bankruptcy judges cannot conduct jury trials without consent in noncore proceedings since the “reexamination clause” of the seventh amendment would be violated when the district judge reviews de novo any contested findings of fact or conclusions of law.<sup>17</sup> The Second Circuit based its decision on two independent statutory provisions, 28 U.S.C. section 157(b), which grants the bankruptcy judges the power to conduct trials and to enter final orders and judgments in core proceedings, and 28 U.S.C. section 151, which authorizes each bankruptcy judge as a judicial officer of the district court to “exercise

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<sup>15</sup> 28 U.S.C. § 157(b)-(c) (1990).

<sup>16</sup> 896 F.2d 1394 (2d Cir.), *cert. granted*, 110 S. Ct. 3269, *vacated and remanded*, 111 S. Ct. 425 (1990), *opinion reinstated*, 924 F.2d 36 (2d Cir.), *cert. denied*, 111 S. Ct. 2041 (1991).

<sup>17</sup> *In re Cinematronics, Inc.*, 916 F.2d 1444, 1451 (9th Cir. 1990); *Beard v. Braunstein*, 914 F.2d 434, 443 (3d Cir. 1990). The “reexamination clause” states that “no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of common law.” *Cinematronics*, 916 F.2d at 1451, *quoting* U.S. CONST. amend. VII.

the authority conferred under this chapter with respect to any action, suit, or proceeding and [to] preside alone and hold a regular or special session of the court . . . ." These provisions, construed in a manner that can be reconciled with the Supreme Court's decision in *Granfinanciera*, serve as a legally sufficient basis for the bankruptcy court to conduct jury trials, according to the Second Circuit.<sup>18</sup>

The court in *Ben Cooper* also was satisfied that jury trials in the bankruptcy court in core proceedings would not violate either article III of the Constitution or the seventh amendment. In this regard, the court stated:

If bankruptcy courts have the power to enter final judgments without violating Article III, it follows that jury verdicts in the bankruptcy courts do not violate Article III. The primary purpose of this Article is to ensure a federal judiciary free from pressure from the other branches of government . . . . If anything, jurors are less likely to feel pressure from the executive and legislative branches than are bankruptcy judges, who depend on the other branches for reappointment to office.<sup>19</sup>

The Second Circuit also relied on cases upholding the authority of article I judges to conduct jury trials when not otherwise violative of article III—specifically, in the instances of District of Columbia judges<sup>20</sup> and federal magistrates.<sup>21</sup> With respect to the seventh amendment, the Second Circuit found no constitutional problem since any facts determined by a jury in a core proceeding would not be subject to reexamination in the district court, functioning in its appellate capacity in reviewing final orders and judgments of the bankruptcy court (as distinguished from de novo review of proposed findings in noncore proceedings).<sup>22</sup> Thus, the court in *Ben Cooper* decided that jury trials in core proceedings are statutorily and constitutionally permissible in the bankruptcy court.<sup>23</sup>

The United States Supreme Court granted certiorari,<sup>24</sup> and oral arguments in *Ben Cooper* were scheduled for December 3, 1990. However, instead of deciding the issue, which affects thousands of debtors and creditors in bankruptcy cases throughout the country, the Supreme Court vacated the judgment of the Second Circuit and remanded the case on account of a

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<sup>18</sup> 896 F.2d at 1402.

<sup>19</sup> *Id.* at 1403 (citations omitted).

<sup>20</sup> *Pernell v. Southall Realty*, 416 U.S. 363 (1974).

<sup>21</sup> *Collins v. Foreman*, 729 F.2d 108 (2d Cir.), *cert. denied*, 469 U.S. 870 (1984).

<sup>22</sup> *Ben Cooper*, 896 F.2d at 1403.

<sup>23</sup> *Id.* at 1404.

<sup>24</sup> 110 S. Ct. 3269 (1990).

jurisdictional question concerning whether there was an appeal of a final order.<sup>25</sup> This issue had not been raised by either the petitioner or the respondent but was addressed, in favor of jurisdiction being proper, in a brief filed by the United States, which had intervened because of the national significance of the issue in this case. On remand, the Second Circuit ruled that jurisdiction is proper, basically agreeing with the position taken by the United States in its brief, and the court reinstated its previous judgment and opinion at 896 F.2d 1394.<sup>26</sup> In May, 1991, the Supreme Court denied certiorari.<sup>27</sup>

The other two circuits that have considered the issue at hand have held that bankruptcy judges are not authorized to conduct jury trials. The Eighth Circuit, in the case of *In re United Missouri Bank of Kansas City, N.A.*,<sup>28</sup> ruled that there is no statutory basis for jury trials in the bankruptcy court and that, therefore, it would not be necessary to address the constitutional questions. The case involved a core proceeding, in the nature of an alleged preferential transfer, and both the bankruptcy court and the district court found that the jury trial could be conducted by the bankruptcy judge. On appeal, the Eighth Circuit reversed, explaining that neither 28 U.S.C. section 157, nor any other provision of the 1984 Amendments, contains any express language authorizing the bankruptcy court to hold jury trials.<sup>29</sup> The Eighth Circuit stressed the fact that, in contrast, Congress has given express statutory authority to federal magistrates to conduct jury trials (with consent) in certain kinds of proceedings.<sup>30</sup> Furthermore, the Eighth Circuit refused to find any implied authority since "the power to conduct jury trials is not indispensable to bankruptcy judges' ability to execute the authority conferred by the 1984 Act."<sup>31</sup> The court stated: "In fact, it appears Congress did not even consider the need to provide jury trial authority."<sup>32</sup> Moreover, after *Marathon*, "Congress, at the time of the 1984 Act, was extremely wary of its authority to clothe Article I courts with Article III powers."<sup>33</sup>

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<sup>25</sup> 111 S. Ct. 425 (1990).

<sup>26</sup> 924 F.2d 36 (2d Cir. 1991).

<sup>27</sup> *Insurance Co. of Pennsylvania v. Ben Cooper, Inc.*, 111 S. Ct. 2041 (1991).

<sup>28</sup> 901 F.2d 1449 (8th Cir. 1990).

<sup>29</sup> *Id.* at 1454.

<sup>30</sup> *Id.* (citing 28 U.S.C. § 636(a)(3), (c)(1)).

<sup>31</sup> *Id.* at 1456.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

Similarly, the Tenth Circuit, in the case of *In re Kaiser Steel Corp.*,<sup>34</sup> which also involved core proceedings, held that bankruptcy judges are not authorized to conduct jury trials. The court stated:

We reach our decision on statutory grounds, interpreted in light of the Supreme Court's decision [in *Marathon*] invalidating the bankruptcy jurisdictional scheme established by the Bankruptcy Reform Act of 1978, . . . and Congress's response in enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984. . . . Although Congress may have granted bankruptcy judges the authority to conduct jury trials under the broad jurisdictional provisions of the 1978 Act, . . . we find that such authority does not exist under the 1984 Act.<sup>35</sup>

In support of its ruling, the court pointed out that both 28 U.S.C. section 1471(c) (which provided for the bankruptcy court to "exercise all of the jurisdiction conferred by this section on the district courts") and 28 U.S.C. section 1481 (which, with two exceptions not applicable here, granted to the bankruptcy court "the powers of a court of equity, law and admiralty . . .") were repealed in response to *Marathon*, and that these provisions were replaced by the present jurisdictional scheme, which designates the bankruptcy court as a unit of the district court and creates the statutory categories of core and noncore proceedings.<sup>36</sup> The Tenth Circuit also emphasized that, under the 1984 jurisdictional scheme, the bankruptcy judges were given "the *personal* power to hear and determine cases," and that such fact-finding power cannot be delegated to a jury.<sup>37</sup> Finally, this court, as did the court in *United Missouri Bank of Kansas City, N.A.*, also relied on the lack of any express authorization for the bankruptcy court to conduct jury trials, in contrast with Congress's express authorization for jury trials to be held by federal magistrates with consent.<sup>38</sup>

Thus, the posture of the issue of whether or not bankruptcy judges may try jury cases is as follows: The appellate courts are divided, the Supreme Court has avoided the question on three occasions, and Congress has failed to express its intention.

The most appropriate solution, constitutionally and pragmatically, is to make the bankruptcy court an article III court with life tenure and no

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<sup>34</sup> 911 F.2d 380 (10th Cir. 1990).

<sup>35</sup> *Id.* at 389.

<sup>36</sup> *Id.* at 389-90.

<sup>37</sup> *Id.* at 391.

<sup>38</sup> *Id.* at 391-92.

diminution of salary.<sup>39</sup> The purpose of these safeguards is to make certain that the judicial branch of government is independent from the legislature and the executive branch,<sup>40</sup> and the rationale for such independence can be traced to the concern of the framers of our Constitution that the United States of America not parallel England, where “the King of Great Britain . . . had ‘made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.’”<sup>41</sup> In this regard, Alexander Hamilton stated: “Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . . In the general course of human nature, *a power over a man’s subsistence amounts to a power over his will.*”<sup>42</sup>

The advantages of creating an article III bankruptcy court would be: (1) resolution of the jury trial issue in a constitutional manner, (2) jurisdiction in one independent court of all bankruptcy cases and proceedings arising in or related to such cases, (3) expeditious disposition of all matters arising in or related to bankruptcy cases, and (4) attracting the best qualified judges to the bankruptcy court. On the other hand, if the bankruptcy court is required to wait indefinitely until the district court tries any cases for which a jury demand is properly made, the inevitable consequences of such bifurcation will be delay in the administration of bankruptcy cases, loss and/or depreciation of assets of the estate, and less probability of obtaining confirmation of reorganization plans under Chapter 11. Furthermore, bankruptcy trustees desiring to pursue any preference or fraudulent transfer actions that are subject to a trial by jury are likely to encounter the same delay that had been considered as one of the major problems of the antiquated summary/plenary jurisdictional scheme under the Bankruptcy Act.

The United States is now in a recession. There were 782,960 bankruptcy cases filed during the 1990 calendar year, and, on December 31, 1990, there were 1,033,230 cases pending.<sup>43</sup> Every day, thousands of creditors and debtors have their legal disputes adjudicated in the bankruptcy court. The time has come to create a bankruptcy court constitutionally equipped to serve the growing number of litigants crowding into the bankruptcy courtrooms. According to one authority:

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<sup>39</sup> U.S. CONST. art. III, § 1.

<sup>40</sup> Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57–60 (1982).

<sup>41</sup> O’Donoghue v. United States, 289 U.S. 516, 531 (1933) (quoting The Declaration of Independence (U.S. 1776)).

<sup>42</sup> THE FEDERALIST NO. 79, at 491 (A. Hamilton) (H. Lodge ed. 1888).

<sup>43</sup> Federal Judicial Workload Statistics at 58, Admin. Office of the U.S. Courts (Dec. 31, 1990).

Viewing bankruptcy courts as courts of equity operating outside of the scope of the seventh amendment is no longer accurate. Instead, bankruptcy courts are courts of law and equity authorized to hear matters retaining their legal nature even though asserted in bankruptcy proceedings. Consequently, the Constitution requires that jury trial rights in these cases be recognized, whether or not Congress statutorily acknowledges the existence of such rights.<sup>44</sup>

Returning to the pre-Code dichotomy of summary/plenary jurisdiction would be ridiculous; the core/noncore distinction will be rendered unnecessary if an article III bankruptcy court is created; the current bifurcation of bankruptcy cases between the bankruptcy court and the district court constitutes duplicity and judicial waste; jury trials of bankruptcy proceedings in the district court will cause prejudicial delay to debtors and creditors; and Representative Kindness's argument that the Rolls Royce choice is too expensive<sup>45</sup> no longer applies since the salary of a bankruptcy judge now constitutes ninety-two percent of the salary of a federal district court judge. It is the author's assertion, however, that our judicial system should be the Rolls Royce for it is the pearl of our democratic society, that the salary and prestige of approximately 300 bankruptcy judges vis-à-vis that of the other federal judges should not be determinative of such a significant national issue, and that the recent increase in salary of 435 Representatives from \$96,600 to \$125,100 unmistakably reveals Congress's decision to give themselves the Rolls Royces and Cadillacs in Washington, while leaving the bankruptcy courts temporarily, inefficiently, and perhaps unconstitutionally "tuned-up."

The argument in favor of creating an independent article III bankruptcy court is not new. In a recent law review article authored by Peter Rodino (former Chairman of the House of Representatives Judiciary Committee) and Alan Parker (former General Counsel for the Judiciary Committee), an article III bankruptcy court was urged as the simplest and best solution. This article included the following important statement:

It needs to be remembered that the concept of a bankruptcy court that is separate and independent has been supported through the years almost universally by those who have studied and used the bankruptcy system. The Commission on the Bankruptcy Laws proposed such a separate system. The National Bankruptcy Conference, the Commercial Law

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<sup>44</sup> Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967, 1053 (1988).

<sup>45</sup> See *supra* note 9.



League of America, the American Bankers Association, the American Bar Association, and the Association of the Bar of the City of New York all called for the creation of an independent bankruptcy court. In all of the thirty-five days of hearings in the House of Representatives and the twenty days of hearings in the Senate, not one witness reached a conclusion that the old bankruptcy system should be retained. The only opposition to the creation of an independent bankruptcy court came from the Judicial Conference.<sup>46</sup>

Similarly, a well-known bankruptcy attorney testified in Congress in 1982 as follows:

I would respectfully submit that in these cases, the independence and prestige of the bankruptcy court is important. Bankers do not understand why multimillion dollar issues involving the availability of setoff, adequate protection of property interests, availability of cash to distressed companies—issues of life and death for industrial enterprises of the size of Wickes Corporation, Itel, White Motor, Penn-Dixie Industries, Braniff, McAlloy Steel, McLoth Steel, AM International, Saxon Industries—why these issues should be determined by non-tenured quasi-magistrates.<sup>47</sup>

Finally, in focusing directly on the issue of jury trials, Professor Gibson of the University of North Carolina at Chapel Hill wrote:

Congress wisely decided in 1978 to consolidate all bankruptcy-related matters in the bankruptcy court. It should not undercut that policy by retaining a clumsy and inefficient court structure that requires some matters to be tried in the district court and forces the bankruptcy proceeding into abeyance while awaiting the district court's decision. Instead, in recognition of the need to execute the seventh amendment's requirements efficiently, Congress should reconstitute the bankruptcy courts as article III courts with full powers to conduct jury trials in all types of bankruptcy proceedings.<sup>48</sup>

An article III bankruptcy court is by far the most appropriate solution to the jury trial question and to the overall jurisdictional framework. However, if this solution is not adopted, perhaps a Speedy Bankruptcy Act,

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<sup>46</sup> Rodino & Parker, *The Simplest Solution*, 7 BANKR. DEV. J. 329, 333 (1990).

<sup>47</sup> H. REP. NO. 807, to accompany H.R. 6978, 97th Cong., 2d Sess. 12 (1982) (statement of H. Minkel).

<sup>48</sup> Gibson, *supra* note 44, at 1054.

analogous to the Speedy Trial Act,<sup>49</sup> is in order. More specifically, if the bankruptcy judges are not to be made article III judges with life tenure, then let the district judges conduct all bankruptcy proceedings in which a jury trial is properly requested. Furthermore, in order not to delay the administration of bankruptcy cases, and in order not to decrease the possibility of success in Chapter 11 cases, it is suggested that such a Speedy Bankruptcy Act require the district judges to begin the actual trials of such jury proceedings within ninety days of the jury trial demand (even if more district judges must be appointed to effectuate this provision).

The importance of the Speedy Trial Act is duly recognized, and there is no question that there is a significant difference between the loss of liberty and the entitlement to monetary damages. However, this nation is now in the throes of severe economic adversity, many of the largest employers in the United States are filing Chapter 11 bankruptcies, and consumer bankruptcies abound. The Supreme Court has declared that, under certain circumstances in bankruptcy proceedings, the seventh amendment right to a jury trial is guaranteed.<sup>50</sup> The question is where will that jury trial occur? Thousands of debtors, creditors, and other parties in bankruptcy cases should not have to wait at the end of the line, even if those first in line are the criminally accused in our society. This article is not in any way advocating less protection for the accused, for such protection is the hallmark of our judicial system. However, the protection for the criminally accused must be properly balanced with the rights of innocent Americans who are parties in bankruptcy cases and proceedings. Thus, in order to facilitate the proper administration of the vast number of complicated bankruptcy cases, to preserve the right under the seventh amendment to a trial by jury, and to protect property rights and interests of the multitude of parties in bankruptcy cases, it is proposed that speedy adjudication of jury trial proceedings be effected. In all probability, without a Speedy Bankruptcy Act, jury trials of bankruptcy proceedings will be placed at the end of the district court calendar and significant rights and interests will be lost or substantially prejudiced by delay.

Again, article III is the most appropriate solution. However, if that route is not chosen, and if the alternative proposal of a Speedy Bankruptcy Act is not enacted, a third approach could be for Congress to expressly grant authority for bankruptcy judges to conduct jury trials in core proceedings and, with the consent of all parties, in noncore proceedings. Such a provision should not violate article III of the Constitution or the seventh amendment,

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<sup>49</sup> 18 U.S.C. §§ 3152–3156, 3161–3174 (1990).

<sup>50</sup> *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).

according to the constitutional analysis provided by the Second Circuit in *Ben Cooper*,<sup>51</sup> as set forth earlier in this Article. With respect to jury trials of noncore proceedings, the appellate courts are in accord that they cannot be conducted without consent in the bankruptcy court because the “reexamination clause” of the seventh amendment would be violated when the bankruptcy court jury verdicts are reviewed de novo by the district court under 28 U.S.C. section 157(c)(1).<sup>52</sup> Therefore, under this proposal, nonconsensual noncore jury proceedings would be tried in the district court, subject to the same requirement of the Speedy Bankruptcy Act described above—namely, that the trial actually begin in the district court within ninety days of the jury trial demand. As suggested above, the legislation could include an express provision, similar to that with respect to the federal magistrates,<sup>53</sup> whereby jury trials of noncore proceedings could be conducted in the bankruptcy court with the consent of all parties.<sup>54</sup> A jury verdict in the bankruptcy court then would not be subject to reexamination by the district court, functioning in its appellate capacity.<sup>55</sup>

In conclusion, where jury trials will occur in bankruptcy proceedings must be determined immediately. Three options have been proposed: article III is the best; the other two alternatives are feasible. Congressional action is mandated now—judges, lawyers, debtors, creditors, employers, employees, individuals, partnerships, corporations, all are waiting to learn where the seventh amendment right to a jury trial may be actualized without substantial prejudice to the rights and interests of parties in bankruptcy cases. Unfortunately, Congress failed to create an article III bankruptcy court in 1978 and in 1984 because of politics as well as the prestige and ego of many federal judges.<sup>56</sup> The time has come to constitutionally codify and dignify

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<sup>51</sup> 896 F.2d 1394, 1403–04 (2d Cir.), *cert. granted*, 110 S. Ct. 3269, *vacated and remanded*, 111 S. Ct. 425 (1990), *opinion reinstated*, 924 F.2d 36 (2d Cir.), *cert. denied*, 111 S. Ct. 2041 (1991).

<sup>52</sup> *In re Cinematronics, Inc.*, 916 F.2d 1444, 1451 (9th Cir. 1990); *Beard v. Braunstein*, 914 F.2d 434, 443 (3d Cir. 1990).

<sup>53</sup> 28 U.S.C. § 636(a)(3), (c)(1).

<sup>54</sup> Under current law, it appears that 28 U.S.C. § 157(c)(2) permits the jury trial of noncore proceedings in the bankruptcy court with the consent of all parties. However, an express provision in the legislation proposed by this third alternative would clarify congressional intent with respect to jury trials of all types of bankruptcy proceedings in one section of Title 28 of the United States Code.

<sup>55</sup> 28 U.S.C. § 158.

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[I]n 1977 when H.R. 8200 was considered and passed by the House of Representatives it included an article III bankruptcy court. The Judicial Conference and former Chief Justice Warren Burger, however, were more successful in lobbying

the role of the bankruptcy court in presiding over cases affecting millions of individuals and businesses throughout this country—an awesome responsibility. The time has come to preserve the sanctity and integrity of our *entire* federal judicial system by taking appropriate congressional action. We need an article III bankruptcy court! Creating an article III bankruptcy court is a permanent solution (instead of a “tuneup”) that will facilitate the availability of jury trials in bankruptcy proceedings by giving the bankruptcy judges complete control over their calendars. It also will have the effects of judicial economy (since the core/noncore distinction will no longer apply and the district courts will not be required to review proposed findings de novo), and of avoiding much unnecessary litigation concerning whether a particular proceeding is core or noncore, or in which forum a jury trial should be conducted. Finally, it will efficiently and constitutionally reconcile the purposes of the 1978 Bankruptcy Reform Act<sup>57</sup> with the holdings in *Marathon*<sup>58</sup> and *Granfinanciera*,<sup>59</sup> article III of the Constitution, and the seventh amendment.

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the Senate, and a compromise was reached which created a nonarticle III court. It was this compromised court structure that was held unconstitutional by the Supreme Court in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*

Rodino & Parker, *supra* note 46, at 334.

<sup>57</sup> Pub. L. No. 95-598, 92 Stat. 2549 (1978).

<sup>58</sup> 458 U.S. 50 (1982).

<sup>59</sup> 492 U.S. 33 (1989).