

# THE BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984: AN UNCONSTITUTIONAL VESTING OF SUBJECT MATTER JURISDICTION

*In 1984 Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 in response to the Supreme Court's holding in Northern Pipeline Co. v. Marathon Pipe Line Co. This Comment argues that portions of the Act unconstitutionally seek to expand federal subject matter jurisdiction in the bankruptcy context. Although this expansion is applicable to all mass tort litigation, this Comment uses asbestosis litigation as an example.*

## INTRODUCTION

On August 26, 1982, Johns-Manville Corporation (Johns-Manville) filed for reorganization under title 11 of the Bankruptcy Code.<sup>1</sup> At the time of the filing, Johns-Manville was defending several thousand asbestosis lawsuits which potentially threatened its economic existence.<sup>2</sup> By filing bankruptcy, Johns-Manville brought itself within the protection of the bankruptcy code's automatic stay provisions, giving it time to work out a settlement structure which would leave it a viable corporation.<sup>3</sup> At the same time as the Johns-

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1. *Pacor v. Higgins*, 743 F.2d 984, 986 (3d Cir. 1984) (citing *In re Johns-Manville*, Nos. 2 B 11656 to 82 B 11676 (Bankr. S.D.N.Y., filed Aug. 26, 1982)). Pacor was a third party distributor of Johns-Manville products who sought to have the lawsuit pending against it consolidated with the *Johns-Manville* case, either on a theory of agency or third-party liability. Johns-Manville is a leading producer of asbestos products. See generally Comment, *Product Liability Claims in the Bankruptcy Courts after the 1984 Amendments: Four Standards to Limit "Related to" Jurisdiction*, 17 U.C.D. L. REV. 1247 (1984).

2. See, e.g., *Roberts v. Johns-Manville Corp.*, 12 BANKR. CT. DEC. (CRR) 879, 881 (Bankr. S.D.N.Y. 1984) (Roberts was one of some 25,000 people nationwide who have sued Johns-Manville for personal injuries arising out of exposure to asbestos and asbestos products).

3. *Id.* The court held that 11 U.S.C. § 362 (a)(1)-(8) (1982) was applicable.

Manville filing, the Supreme Court decided *Northern Pipeline Co. v. Marathon Pipe Line Co.*,<sup>4</sup> a case which held that the Bankruptcy Act of 1978 (Bankruptcy Act)<sup>5</sup> effectively granted the bankruptcy courts unconstitutionally excessive subject matter jurisdiction.

In *Marathon*, the Court ruled that bankruptcy judges could not adjudicate state law claims solely based upon the limited subject matter jurisdiction constitutionally available to "legislative courts"—those courts created by Congress pursuant to its power under article I of the Constitution.<sup>6</sup> The Court, however, did not address whether federal district court judges—article III judges—could hear state law claims when federal jurisdiction was based solely upon concurrent bankruptcy proceedings. Although the *Marathon* decision was limited to deciding the constitutionality of bankruptcy judges' power to sit as article III judges, prior case law requires constitutional authority for any federal court to exercise subject matter jurisdiction.<sup>7</sup>

As a result of the *Marathon* decision and the Johns-Manville bankruptcy filing, Congress was faced with two related problems: first, amending the Bankruptcy Act to bring the powers delegated to the bankruptcy courts within constitutional limits; second, responding to the public outrage caused by the perceived abuse of a judicial system which enables a presently solvent company to hide from pending state court lawsuits by filing for reorganization under the bankruptcy code.<sup>8</sup> Consequently, under the 1984 Bankruptcy Act, where a debtor is also a defendant in a tort action, the trial of that tort action is removed to the federal district court from the state court in which it is pending.<sup>9</sup> Because the district court judge is an article III judge, *Marathon's* prohibition against article I judges, such as bankruptcy judges, exercising jurisdiction over state-created causes of action, is avoided.<sup>10</sup> Nonetheless, this solution to the *Marathon* holding is incomplete; it fails to answer the threshold question of whether subject matter jurisdiction exists at all for the claim to be

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Section 362 in effect provides that once a debtor files for bankruptcy no civil judicial proceeding may commence nor may continue against the debtor until the bankruptcy case is resolved or the bankruptcy court approves.

4. 458 U.S. 50 (1982).

5. Pub. L. No. 95-598, 92 Stat. 2549.

6. *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

7. *See, e.g., Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). In *Osborn*, federal jurisdiction was proper because the bank was created by a federal charter which determined its substantive rights and liabilities.

8. N.Y. Times, Aug. 10, 1982, § 4, at 2, col. 1.

9. *See* 28 U.S.C. § 157(b)(5) (Supp. II 1984). *See infra* note 14.

10. 130 CONG. REC. S8891 (daily ed. June 29, 1984). *Marathon* listed several factors which distinguished article III courts from article I courts. Justice Brennan reasoned that the major distinguishing factor was that article III judges serve for life, whereas article I judges sit for fixed periods of time and are subject to removal from office much more easily than article III judges.

heard in a federal court.

Portions of the 1984 Bankruptcy Act seem to indicate Congress believed that the Court in its *Marathon* decision sanctioned such federal district court jurisdiction.<sup>11</sup> However, this Comment focuses on those portions<sup>12</sup> of the 1984 Bankruptcy Act which mandate trial of debtor-creditor tort cases in federal district court, and argues that the provisions are unconstitutional grants of subject matter jurisdiction.

### THE BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984

The Bankruptcy Amendments and Federal Judgeship Act of 1984<sup>13</sup> (1984 Amendments) includes section 157<sup>14</sup> and section 1334<sup>15</sup> of title 28. Section 157(b)(5) requires, for cases in which a

11. See 28 U.S.C. § 157(b)(5) (Supp. II 1984); see also 130 CONG. REC. S8891 (daily ed. June 29, 1984). Remarks of the drafters in the congressional record indicate that while the Senate recognized the unconstitutionality of the 1984 amendments, a majority of those members of the house serving on the joint committee did not.

12. See *infra* note 14.

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

14. This Comment will not attempt to challenge the validity of all portions of section 157. The relevant portions are as follows:

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy may hear and determine all cases under title 11 and all core proceedings arising under title 11 or arising in a case under title 11 referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

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

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

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order the personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

15. 28 U.S.C. § 1334 (Supp. II 1984) states:

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

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have

debtor under the protection of bankruptcy is a party to a personal injury or wrongful death action, that the trial be held in the federal district court.<sup>16</sup> This grant of subject matter jurisdiction to the federal district courts raises serious constitutional questions.<sup>17</sup>

The scope of subject matter jurisdiction held by the bankruptcy courts is defined in terms of "core proceedings."<sup>18</sup> These core proceedings are those traditionally associated with bankruptcy proceedings under pre-1971 bankruptcy law.<sup>19</sup> Section 157 (b)(2)(B) expressly excludes personal injury or wrongful death causes of action from the definition of "core" claims.<sup>20</sup> Even without these section 157(b)(4) exclusions,<sup>21</sup> it appears that absent a federal question or diversity, no constitutional basis for federal jurisdiction exists, thus preventing any federal court from deciding such state tort claims.<sup>22</sup>

The 1984 Amendments, as summarized above,<sup>23</sup> represent a compromise between House and Senate versions of the bill,<sup>24</sup> although the Senate version did not require tort claims to be tried in the district court.<sup>25</sup> The legislative history of the compromise bill reveals the constitutional concerns shared by many of the principal

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original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

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

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

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such a case, and of the estate.

16. See 28 U.S.C. § 157(b)(5) (Supp. II 1984). See *supra* note 14.

17. 130 CONG. REC. S8891 (daily ed. June 29, 1984).

18. 28 U.S.C. § 157(b)(2)(A)-(O) (Supp. II 1984). This portion of the bankruptcy code defines core proceedings. Among the traditional functions of the bankruptcy court covered by these subsections are subsection (D), orders in respect to obtaining credit, and subsection (E), orders to turn over property of the estate.

19. See 28 U.S.C. § 157(b)(2)(A)-(O) (Supp. II 1984).

20. See 28 U.S.C. § 157(b)(2)(B) (Supp. II 1984). See *supra* note 14.

21. See 28 U.S.C. § 157(b)(4) (Supp. II 1984). See *supra* note 14.

22. See *infra* notes 57-130 and accompanying text.

23. See *supra* notes 13-22 and accompanying text.

24. See 130 CONG. REC. S8891 (daily ed. June 29, 1984).

25. *Id.*

drafters.<sup>26</sup>

### *Congressional Constitutional Concerns*

In the absence of a committee report for the 1984 Amendments, the legislative history must be gleaned from the floor speeches of the Amendments' main drafters.<sup>27</sup> As these speeches reveal, Congress entertained serious constitutional doubts regarding portions of the 1984 Amendments.<sup>28</sup> Senator Orrin G. Hatch, a chief draftsman of the 1984 Amendments, summarized the relevant constitutional problems as follows:

[P]roblems arise because the conference bill retains the broad jurisdictional language allowing a bankruptcy court to adjudicate any case related to a bankruptcy claim. This means that a purely State law case could be litigated in a Federal court with the Federal question jurisdiction necessary under the Constitution for Federal court adjudication. . . .

Article III, Section 2 of the Constitution specifies the types of cases that may be litigated in Federal courts. . . . [C]ases "arising" under Federal law and cases "between citizens of different States." Cases based solely on State law cannot be adjudicated in *any Federal court* where there is no diversity and where the only Federal connection is that one of the parties is a chapter 11 debtor.

In *Marathon*, the Supreme Court decided that bankruptcy judges could not adjudicate State law claims. *Marathon* did not decide, however, that Article III courts could constitutionally adjudicate all State law claims. . . .<sup>29</sup>

Perhaps Senator Hatch foresaw the problems which might be created by mandating that such tort claims be tried in the federal court. Illustrative of these problems is *Roberts v. Johns-Manville*.<sup>30</sup> In *Roberts*, a federal judge ruled that although the 1984 Amendments required that a trial be held in the district court, they did not require that such trials be held immediately. The *Roberts* judge recognized

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26. *Id.* Senator Hatch, a chief draftsman of the compromise bill, stated: I have only one regret as I reflect upon this conference product. It involves the deletion of the Senate-passed mandatory abstention provision. With its deletion, purely State law claims which *do not arise* under the Bankruptcy Code are allowed to be tried in State courts. This presents an important constitutional concern. State tort or contract cases in which one party happens to be bankrupt are still State law claims. *They are not Federal questions.*

(emphasis added).

Also contained in the same portion of the congressional record are remarks of Senators Dole and Thurmond as well as a few congressmen, all of whom felt the need to preserve on the record their constitutional objections to portions of the 1984 Amendments.

27. *Id.*

28. *Id.*

29. *Id.*

30. 12 BANKR. CT. DEC. (CRR) 879 (Bankr. S.D.N.Y. 1984).

that under *Erie Railroad Co. v. Tompkins*,<sup>31</sup> California substantive law would apply to the tort claim because California was the place in which the injury occurred.<sup>32</sup> Under California law, a claim for pain and suffering or disfigurement would not survive the claimant if he died prior to trial.<sup>33</sup> Although trial could be held in a California state court prior to the plaintiff's impending death from asbestosis, trial in the federal court unavoidably would be delayed. The federal district court recognized that because of the seriousness of plaintiff's injury, plaintiff would likely die before a federal trial could occur. Nonetheless, the judge, compelled to abide by the 1984 Amendments, required that the trial be held in the federal district court.<sup>34</sup> The 1984 Amendments thus effectively acted to bar a substantial portion of the plaintiff's potential recovery.

This Comment discusses four questions raised by the language of the 1984 Amendments. Does section 157(b)(5)<sup>35</sup> mandate, or merely permit, a federal district court to take jurisdiction in an unliquidated tort case? Does that tort claim arise under article III of the United States Constitution? Does that same tort claim arise under the bankruptcy statute? For purposes of subject matter jurisdiction, is a tort claim which has not arisen under the Constitution or under the bankruptcy statutes ancillary to the bankruptcy?

#### MANDATORY OR PERMISSIVE JURISDICTION?

Courts have differed in interpreting the language of section 157(b)(5). Some have *required* the tort claims to be held at the district court level,<sup>36</sup> others merely have *allowed* a district court to hear them.<sup>37</sup> Section 157(b)(5) states:

The district court *shall* order that personal injury tort and wrongful death claims *shall* be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.<sup>38</sup>

Whether this language is a positive command of exclusive jurisdiction or a mere discretionary matter similar to ancillary jurisdiction is unclear. In *In re UNR Industries, Inc.*,<sup>39</sup> the court held that the language of section 157(b)(5) was clear; it *required* the district court to

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31. 304 U.S. 64 (1938). Under *Erie*, when the basis of a federal district court's jurisdiction is diversity, the federal court is bound to follow state law.

32. *Roberts*, 12 BANKR. CT. DEC. (CRR) at 881.

33. *Id.*

34. *Id.*

35. 28 U.S.C. § 157 (b)(5) (Supp. II 1984); *see also In re UNR Indus., Inc.*, 45 Bankr. 322 (N.D. Ill. 1984).

36. *See In re UNR Indus., Inc.*, 45 Bankr. 322 (N.D. Ill. 1984).

37. *See infra* notes 42-47 and accompanying text.

38. 28 U.S.C. § 157(b)(5) (Supp. II 1984) (emphasis added).

39. 45 Bankr. 322 (N.D. Ill. 1984).

hear the tort claim.<sup>40</sup> Recognizing the doubtful constitutionality of the 1984 Amendments,<sup>41</sup> one court resorted to novel statutory construction to reach desired results.<sup>42</sup> Contrary to the literal statutory construction of section 157 in *UNR Industries*,<sup>43</sup> the Sixth Circuit<sup>44</sup> avoided the constitutional issue of section 157 by applying the permissive abstention section, section 1334(c)(1). In *Citibank, N.A. v. White Motor Corp.*,<sup>45</sup> the court remanded the tort claims against the defendant-debtor to the state court for trial.<sup>46</sup> Although this leads to the constitutionally correct result, the legislative history of the 1984 Amendments reveals that the *Citibank* interpretation of section 1334 is contrary to legislative intent.<sup>47</sup> Furthermore, *Citibank* casts doubt on the validity of the *UNR Industries* holding that section 157(b)(5) requires federal jurisdiction over tort claims involving bankrupt defendants.

### JUDICIAL INTERVENTION

Federal courts are courts of limited subject matter jurisdiction.<sup>48</sup> The basis of their jurisdiction is found in article III, section 2 of the Constitution.<sup>49</sup> As early as *Marbury v. Madison*,<sup>50</sup> and as recently as *Northern Pipeline Co. v. Marathon Pipe Line Co.*,<sup>51</sup> the Supreme Court has struck down congressional acts which attempt to grant unconstitutional subject matter jurisdiction.

Congress passed the 1984 Bankruptcy Amendments after close scrutiny of their content.<sup>52</sup> Although such scrutiny should be considered before declaring an act unconstitutional,<sup>53</sup> it is still the Court, however, which ultimately interprets the Constitution.<sup>54</sup> A state-cre-

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40. *Id.*

41. *Citibank, N.A. v. White Motor Corp.*, 761 F.2d 270 (6th Cir. 1985).

42. *Id.*

43. 45 Bankr. 322 (N.D. Ill. 1984).

44. *Citibank, N.A. v. White Motor Corp.*, 761 F.2d 270 (6th Cir. 1985). *See supra* note 15.

45. 761 F.2d 270 (6th Cir. 1985).

46. *Id.*

47. 130 CONG. REC. S8891 (daily ed. June 29, 1984).

48. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3522 (2d ed. 1984).

49. U.S. CONST. art. III, § 2.

50. 5 U.S. (1 Cranch) 137 (1803).

51. 458 U.S. 50 (1982).

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

53. *See Marathon*, 458 U.S. at 61.

54. The *Marathon* court stated:

[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch

ated tort claim, by itself, does not pose a federal question for purposes of subject matter jurisdiction. Thus, article III permits such a tort claim to be heard in federal court only in cases in which jurisdiction is based upon diversity of citizenship,<sup>55</sup> or if the tort claim is pendent to a federal claim.<sup>56</sup>

### *A Claim Must Arise Under Both the Constitution and the Statute*

Article III, section 2, clause 1 of the United States Constitution provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their Authority. . . ."<sup>57</sup> A tort claim seemingly does not arise under the Constitution simply because a debtor seeks the protection of federal bankruptcy acts to avoid the claim. Further, even if a court were to conclude that a tort claim does arise under federal law when the defendant is a debtor in bankruptcy, a second hurdle must be overcome: the person seeking a trial in a federal forum also must show that the case arises under section 157 of the bankruptcy amendments.<sup>58</sup>

### *Tort Causes of Action Do Not Arise Under Article III of the Constitution*

In *Verlinden B.V. v. Central Bank of Nigeria*,<sup>59</sup> the Supreme Court reaffirmed *Osborn v. Bank of the United States*<sup>60</sup> as providing the controlling test to determine whether an action arises under article III.<sup>61</sup> Under the *Osborn* test, "it [is] a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the Constitution or law of the United

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exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is the responsibility of this Court as ultimate interpreter of the Constitution.

*Id.* at 62 (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)). Further, the Court noted that several other courts had considered Congress' substantial doubts regarding the constitutionality of the 1978 Bankruptcy Act, which were much the same concerns that the 98th Congress indicated in its passage of the 1984 Amendments. *Marathon*, 458 U.S. at 57 n.9.

55. 28 U.S.C. § 1332 (1982). Section 1332 provides that the "district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the value of \$10,000 . . . and is between — (1) citizens of different states. . . ."

56. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

57. U.S. CONST. art. III, § 2.

58. *See generally* *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (jurisdiction was proper because the Federal Sovereign Immunities Act determined when a sovereign could be sued).

59. 461 U.S. 480 (1983).

60. 22 U.S. (9 Wheat.) 738 (1824).

61. *Verlinden*, 461 U.S. at 492.



States, and sustained by the opposite construction."<sup>62</sup> The Court upheld federal jurisdiction in *Osborn* because the bank was a creature of a federal charter, and its rights and obligations were determined by that charter.<sup>63</sup> However, the Court noted that the character of the parties and the character of the case must remain separate.<sup>64</sup> As an example of this separation, the Court indicated that although a naturalized citizen is a citizen via a legislative act, that act alone is insufficient to gain access to a federal court for a matter unrelated to the naturalization acts.<sup>65</sup> In other words, merely because a special provision of United States law allows for naturalization, that same law does not give naturalized citizens an additional right to a federal forum.

Although federal subject matter jurisdiction has been upheld based upon a party's status as an entity of federal creation, it has been done only when the act which conferred exclusive federal jurisdiction also defined the rights and obligations of the entity.<sup>66</sup> The 1984 Amendments fail to do this. Instead, the amendments work in a manner much the same as a naturalization act. The defendant is a debtor by the grace of a federal act, but that act does not define his rights or obligations for unliquidated tort claims: it merely defines the manner of liquidation.<sup>67</sup>

In *Verlinden B.V. v. Central Bank of Nigeria*,<sup>68</sup> the Court upheld federal jurisdiction based upon the Foreign Sovereign Immunities Act.<sup>69</sup> The *Verlinden* Court reasoned that the Foreign Sovereign Immunities Act must be read as a whole; as such, the jurisdictional portions of the act were within congressional powers under the necessary and proper clause of article I. Arguably, the Court's decision in *Verlinden*, by analogy, effectively negates the proposition that a defendant's status as a debtor is insufficient to federalize an unliquidated tort claim for purposes of subject matter jurisdiction.<sup>70</sup> Such

62. *Osborn*, 22 U.S. (9 Wheat.) at 822.

63. *Id.* at 756.

64. *Id.* at 814.

65. *Id.* at 827.

66. *See generally* *United States v. Union Pac. R.R.*, 98 U.S. 569 (1879) (railroad was created under a federal charter which created many of its rights and obligations); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (Foreign Sovereign Immunities Act contains substantive law which determines when a sovereign can be sued).

67. *See generally* 28 U.S.C. § 157(b)(5) (Supp. II 1984). *See supra* note 14.

68. 461 U.S. 480 (1983).

69. Pub. L. No. 94-583, 90 Stat. 2891 (codified at scattered sections of the U.S.C.).

70. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

an argument likely would state that because Congress is empowered to pass bankruptcy laws under its necessary and proper powers, it therefore can prescribe jurisdiction to a federal district court. However, the argument is fallacious.

On its face, *Verlinden* stands for the proposition that even if state law provides the rule of decision, Congress still is empowered to give the federal judiciary exclusive jurisdiction.<sup>71</sup> Nevertheless, *Verlinden* held that Congress may not expand the limits of the lower federal courts' jurisdiction beyond the Constitution.<sup>72</sup> In dicta, the Court maintained its holdings that a statute which acted simply as a jurisdictional statute without substantive purpose cannot pass article III scrutiny.<sup>73</sup> But the Court refused to determine the point at which the "speculative possibility that a federal question may arise at some point in the proceeding. . ." violates article III.<sup>74</sup>

It appears that Congress has not chosen to draft the 1984 Amendments so that a federal question is a mere "speculative possibility."<sup>75</sup> The trial of a tort claim in the federal district court appears to reach the point of "speculative possibility" referred to in *Verlinden*.<sup>76</sup> Contrary to the statutes in *Verlinden* which defined the rights and obligations of a sovereign to be sued in the first instance, section 157(b)(5) does not provide substantive law for the rights and obligations of a debtor *prior to liquidation* of the tort claim; section 157 grants the federal district court *exclusive* jurisdiction to hear unliquidated tort claims by or against the bankrupt debtor.<sup>77</sup> This statutory vesting of subject matter jurisdiction constitutionally cannot be self-supporting.

#### *Unliquidated Tort Claims Do Not Arise Under the Bankruptcy Amendments*

In order for a case to arise under a valid federal statute, a plaintiff's cause of action must include as an "essential element," a right or immunity embodied either in the Constitution or in the laws of the United States.<sup>78</sup> "The right or immunity must be such that it will be supported if the . . . laws . . . are given one construction . . . and defeated if they receive another."<sup>79</sup> Using this statutory construction test,<sup>80</sup> unliquidated tort claims present no federal ques-

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71. *Id.*

72. *Id.* at 491.

73. *Id.* at 496.

74. *Id.* at 493.

75. *Id.*

76. *Id.*

77. 28 U.S.C. § 157(b)(5) (Supp. II 1984).

78. *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13 (1936).

79. *Id.*

80. See *supra* notes 78-79 and accompanying text.

tions in cases in which the rights and immunities are defined clearly by state law. While the ultimate payment of a judgment is the subject of bankruptcy proceedings, the law which determines tort liability in the first instance is not.<sup>81</sup>

In *Louisville & Nashville Railroad Company v. Mottley*,<sup>82</sup> the plaintiff, in order to obtain federal jurisdiction, alleged that he was unable to honor his contractual obligation because of an act of Congress. The Court stated: "Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the constitution."<sup>83</sup> By applying similar reasoning to the trial of a tort claim in a federal district court based upon section 157(b)(5),<sup>84</sup> only one conclusion may be reached: the plaintiff's complaint only will allege *state* tort questions. Hence, the cause of action does not arise under section 157(b)(5).

The effect of section 157 is similar to the effects of the federal removal statutes.<sup>85</sup> Under the provisions of section 157, a bankrupt defendant effectively may remove to the federal court an action pending in state court. The reasoning behind the section, although tenuous, is based upon the impact which filing bankruptcy has upon the liquidation of any judgment rendered in a state court.<sup>86</sup> Recently, the Supreme Court reaffirmed its rejection of this theory of removal—premised on possible federally-based defenses—in *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*.<sup>87</sup>

The defendant trustees in *Construction Laborers* contended that section 514 of the Employees Retirement Income Security Act (ERISA)<sup>88</sup> preempted state law, thereby precluding the state tax board from levying a tax claim.<sup>89</sup> The Court, relying upon Justice

81. See generally *Roberts v. Johns-Manville*, 12 BANKR. CT. DEC. (CRR) 879 (Bankr. S.D.N.Y. 1984).

82. 211 U.S. 149 (1908).

83. *Id.* at 152.

84. 28 U.S.C. § 157(b)(5) (Supp. II 1984).

85. 28 U.S.C. § 1441(a) (1982). "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts . . . have original jurisdiction, may be removed by the defendant . . . to the district court. . . ."

86. See generally *Roberts v. Johns-Manville*, 12 BANKR. CT. DEC. (CRR) 879 (Bankr. S.D.N.Y. 1984). 11 U.S.C. § 362 stays liquidation of judgment.

87. 463 U.S. 1 (1983).

88. 29 U.S.C. § 1001 (1982).

89. *Construction Laborers*, 463 U.S. at 6; see also *Public Serv. Comm. v. Wycoff Co.*, 344 U.S. 237, 248 (1952) (stating "it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense . . . to a threatened cause of

Cardozo's opinion in *Gully v. First National Bank*,<sup>90</sup> effectively held that before the defendant could raise a defense based upon federal preemption, the plaintiff first must prove a violation of a state law claim.<sup>91</sup> Similar reasoning should apply for the trial of tort claims. If a tort plaintiff brings suit in a state court, the defendant might claim that his status as a debtor under the court's protection preempts full payment of the judgment. Nonetheless, following the rationale of *Construction Laborers*,<sup>92</sup> the defendant-debtor may not claim federal preemption until the plaintiff has won his state court action. Since selecting the court in which a case is to be tried often has substantive impact on the outcome of the case, plaintiffs should not be deprived of the procedural benefits available under state law simply because a defendant raises a federally-created defense to the payment of the judgment.<sup>93</sup> Indeed, some cases exist in which the defendant is adequately insured and the reason for filing bankruptcy is unrelated to the tort actions.<sup>94</sup> In such cases the defense is unwarranted.

A further question also must be addressed: Does the bankruptcy court's control of the debtor's estate create a federal nexus sufficient to federalize the litigation? Courts have held that state law contract actions are federalized by the court's constructive possession of the debtor's estate.<sup>95</sup> When an entity files bankruptcy, the court supervises the payment of all debts of the debtor. The payment of debts which result from obligations defined by liquidated contracts entered into before the debtor's bankruptcy are termed "turnover payments."<sup>96</sup> These "turnover payments" are at the heart of a traditional bankruptcy.<sup>97</sup> In a bankruptcy action in which the debtor does not retain possession of the estate, it is simply the court which makes the debt, or turnover, payments.<sup>98</sup> No underlying litigation is involved; rather, all that is involved is payment of an acknowledged debt. In contrast, section 157 mandates trial of tort claims in cases

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action").

90. 299 U.S. 109 (1936).

91. *Construction Laborers*, 463 U.S. at 11.

92. *Id.*

93. *See Roberts*, 12 BANKR. CT. DEC. (CRR) at 881 n.4.

94. *See, e.g., In re White Farm Equip. Co.*, 38 Bankr. 718 (Bankr. N.D. Ohio 1984). In this case, products liability suits were not responsible for the bankruptcy; rather, the debtor had adequate insurance to cover liability. The court remanded the case to the bankruptcy court for purposes of estimating the amount of damage.

95. *In re Perry, Adams & Lewis Securities*, 30 Bankr. 845, 855 (Bankr. W.D. Mo. 1983). In this case, the trustee sought return of payments made to corporate officers just prior to the filing of the bankruptcy.

96. *See, e.g., In re S.E. Hornsby & Sons Sand & Gravel Co.*, 12 BANKR. CT. DEC. (CRR) 713 (Bankr. M.D. La. 1985).

97. *See generally In re Baldwin-United Corp.*, 48 Bankr. 49 (Bankr. S.D. Ohio 1985) (intimating that a turnover proceeding is implicitly a core proceeding).

98. *See generally In re S.E. Hornsby & Sons Sand & Gravel Co.*, 12 BANKR. CT. DEC. (CRR) 713 (Bankr. M.D. La. 1985).

in which tort liability and valuation are disputed.<sup>99</sup> Moreover, contract liability is fixed by the terms of the contract; it has a predetermined effect on the estate of the debtor. On the other hand, tort liability and valuation are much more complex; each case must be decided on its own merits. The court would have to maintain control of the estate until all claims were valued, a process which undoubtedly would be delayed by consolidating in one federal district court hundreds of cases pending in numerous state courts.

However, under section 502(c)(1) of title 11, a bankruptcy judge is authorized to estimate "any contingent or unliquidated claim, fixing, or liquidation . . . which . . . would unduly delay the closing of the case."<sup>100</sup> Interpreting this language in order to prevent one statute from interfering with the rights established under another statute,<sup>101</sup> courts have been able to balance the competing interests of plaintiffs—trying the underlying tort action in state court—with those of the defendant—preserving his estate. Nevertheless, if the court were to allow possession of the debtor's estate to determine jurisdiction, countless problems could arise.<sup>102</sup>

For example, in *In re Baldwin-United Corp.*,<sup>103</sup> the court held that simply by filing a proof of claim, a party indicates a willingness to have the bankruptcy court determine both "the *validity* and amount of that claim."<sup>104</sup> This holding seems to revive a previously rejected theory of jurisdiction, commonly known as "jurisdiction by ambush;"<sup>105</sup> however, "[i]t remains to be seen whether these decisions

99. See 28 U.S.C. § 157(b)(5) (Supp. II 1984).

100. 11 U.S.C. § 502(c)(1) (1982).

101. *Citibank, N.A. v. White Motor Corp.*, 761 F.2d 270 (6th Cir. 1985).

102. For example, if this approach were followed, jurisdiction could be established over nondebtor third-party defendants, in which case a problem of improper joinder of claims easily could be imagined. A plaintiff could name as a defendant a third-party by claiming that this party might be liable to the primary defendant. In this manner, if the only federal nexus was the primary defendant's status as a debtor, a plaintiff could circumvent federal jurisdictional requirements.

103. 48 Bankr. 49 (Bankr. S.D. Ohio 1985).

104. *Baldwin-United*, 48 Bankr. at 54; see also *In re Marketing Resources Int'l Corp.*, 43 Bankr. 71 (Bankr. E.D. Pa. 1984).

105. In effect the theory of jurisdiction by ambush reinstates a portion of the 1898 Bankruptcy Act which recognized a party's ability to consent unwittingly to the bankruptcy court's jurisdiction by filing a proof of claim in a case. In *Marketing Resources*, the filing of a proof of a claim by the creditor was deemed sufficient to subject him to the bankruptcy court's general jurisdiction. 43 Bankr. at 71. The ramifications of this type of summary jurisdiction is exemplified by the extension of the theory in *In re Lombard-Wall, Inc.*, 12 BANKR. CT. DEC. (CRR) 678, 683-84 (Bankr. S.D.N.Y. 1984). In *Lombard-Wall*, the court held that a creditor's consent to the bankruptcy court's jurisdiction, implied from the filing of a claim and the subsequent failure to object to a reorganization plan, not only subjected the creditor to the court's jurisdiction, but also

[supporting jurisdiction by ambush] represent a major new current in jurisdictional thinking or are merely a small wave on a troubled sea."<sup>106</sup>

Finally, in dealing with the "arising under" language of article III,<sup>107</sup> one must address a theory related to jurisdiction by ambush—the theory of protective jurisdiction. Under protective jurisdiction, Congress can grant subject matter jurisdiction to the federal judiciary in situations in which it has general legislative power to regulate in a given area. Such a grant of jurisdiction, in and of itself, is a law of the United States for purposes of article III. Consequently, under a protective jurisdiction theory, federal courts have subject matter jurisdiction despite the fact that Congress has not enacted any substantive rules of decision. In such cases, state law would be controlling.<sup>108</sup>

Protective jurisdiction is traced back to Chief Justice Marshall's opinion in *Osborn v. Bank of the United States*.<sup>109</sup> In *Osborn*, the court held that a federally chartered bank could sue in federal court even if state law controlled and no diversity of citizenship existed. Because the trustee in a bankruptcy case is an officer of the federal court,<sup>110</sup> *Osborn* arguably suggests that claims which result from the success of a plaintiff's tort action should be under the federal court's protective jurisdiction. However, the law which created the bank in *Osborn* controlled its rights and obligations;<sup>111</sup> Congress has not defined a debtor's tort rights and obligations.

Although individual members of the Court have endorsed the theory of protective jurisdiction, never has a majority of the Court endorsed such a theory,<sup>112</sup> although the Court approached endorsement in *Textile Workers Union of America v. Lincoln Mills of Alabama*.<sup>113</sup> In *Lincoln Mills*, the Court reasoned that because the case arose under section 301 of the Taft-Hartley Act, the lower federal courts were required to apply federal common law regarding labor-management.<sup>114</sup> Thus, in reality, the *Lincoln Mills* case arose under

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served to deprive him of the right to a jury trial.

106. Hendel & Reinhardt, *Evolution of Bankruptcy Court Jurisdiction After the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 90 COM. L.J. 272, 275-76 (1985).

107. But see *infra* notes 115-32 and accompanying text for a discussion of the ancillary jurisdiction question.

108. Mishkin, *The Federal "Question" in the District Courts*, 53 COL. L. REV. 157, 184-96 (1953).

109. 22 U.S. (9 Wheat.) 738 (1824).

110. 11 U.S.C. § 702 (1982) (providing for appointment of a trustee in bankruptcy who gathers all the debtor's assets with which to pay outstanding debts.)

111. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738.

112. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). The decision was arrived at by a 6-3 vote against upholding protective jurisdiction.

113. 353 U.S. 448 (1957).

114. *Id.*

federal substantive law rather than state law.

UNLIQUIDATED TORT CLAIMS ARE NOT PENDENT OR ANCILLARY  
TO BANKRUPTCY

In *Citibank, N.A. v. White Motor Corp.*,<sup>115</sup> the Sixth Circuit Court of Appeals noted that the effect of section 157 is similar to the effects of pendent or ancillary jurisdiction.<sup>116</sup> The Supreme Court developed the doctrines of pendent and ancillary jurisdiction in order to expand a lower federal court's power to hear all relevant matters relating to a "case" properly before it.<sup>117</sup> Under the current definition of ancillary jurisdiction,<sup>118</sup> however, unliquidated<sup>119</sup> tort claims are not a proper ancillary subject for the federal courts.

The genesis of ancillary jurisdiction in part can be attributed to the Supreme Court's decision in *Osborn v. Bank of the United States*<sup>120</sup> in which Chief Justice Marshall stated:

[W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.<sup>121</sup>

In the 1966 *United Mine Workers v. Gibbs* case,<sup>122</sup> the Court finally formulated the current test of ancillary jurisdiction: a federal district court will have jurisdiction if the federal and state claims are "derive[d] from a common nucleus of operative fact" and are such that they would "ordinarily be expected [to be tried] . . . in one judicial proceeding."<sup>123</sup> Under this test, a federal claim must exist to which the state claim can be ancillary. No such federal claim exists when the only federal question is the defendant's status as a debtor.<sup>124</sup> The operative facts which give rise to a tort action gener-

115. 761 F.2d 270 (6th Cir. 1985).

116. *Id.* at 273.

117. See generally C. WRIGHT, LAW OF FEDERAL COURTS §§ 7-16 (4th ed. 1983).

118. See *infra* notes 115-32 and accompanying text.

119. A liquidated tort claim is one in which the defendant's liability for monetary damages either is known or is undisputed. On the other hand, an unliquidated claim either is contingent or is disputed. See generally Comment, *Product Liability Claims in the Bankruptcy Courts After the 1984 Amendments: Four Standards to Limit "Related to" Jurisdiction*, 17 U.C.D. L. REV. 1247, 1258 n.38 (1984).

120. 22 U.S. (9 Wheat.) 738 (1824).

121. *Id.* at 823. Notably, Justice Marshall uses the word "cause", rather than the constitutional "case", which is perhaps an indication of the reluctance to judicially expand the constitution.

122. 383 U.S. 715 (1966).

123. *Id.* at 725.

124. See *supra* notes 59-114 and accompanying text.

ally are not those of a bankruptcy. As previously stated,<sup>125</sup> some debtors are adequately insured and have declared bankruptcy for matters totally unrelated to tort liability. Further, the bankruptcy status of a defendant acts only as a defense to the full payment of a judgment; it does not define the defendant's tort rights and liabilities. Thus, merely filing a bankruptcy will not leave the court with federal subject matter jurisdiction.

In *Gibbs*, the Court drew a sharp distinction between the constitutional powers given a court and its discretionary exercise of that power.<sup>126</sup> The Court listed several factors which are to be used by a district court in deciding whether to exercise such discretionary power.<sup>127</sup> Specifically, courts should consider judicial economy, fairness, and convenience to the litigants.<sup>128</sup> Moreover, the Court stated that the lower federal courts should hesitate to exercise pendent or ancillary jurisdiction when "state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought."<sup>129</sup> Thus even if a court were incorrectly to assume that ancillary jurisdiction applies to section 157 cases, the Court's reasoning in *Gibbs* is applicable. Given the ordinary predominance of state law issues in a tort action, the exercise of ancillary jurisdiction over such a claim would seemingly constitute an abuse of discretion.

One recent appellate decision<sup>130</sup> demonstrates that in state law cases, judicial survival and fairness to litigants demands that a district court not stretch the concept of ancillary jurisdiction.<sup>131</sup> A single federal district court is not equipped to handle mass litigants,

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125. See *supra* note 94 and accompanying text.

126. *Gibbs*, 383 U.S. at 725.

127. *Id.*

128. *Id.* at 726.

129. *Id.*

130. *In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906 (Judicial Panel on Multidistrict Litigation, April 7, 1977). The court indicates in the *Asbestos Litigation* case why it would be unreasonable to try, with the thousands of claimants, all claims in one forum. Although this case was decided prior to the 1984 Amendments, its logic still is applicable: each defendant's liability would depend on his individual knowledge of the health risk posed by asbestosis.

131. See *Asbestos Litigation*, 431 F. Supp. 906. A similar problem to that of ancillary jurisdiction is presented where the defendant is a nonbankrupt distributor of a given product. In *In re Pacor v. Higgins*, 743 F.2d 984 (3d Cir. 1984), Pacor, a distributor of asbestos for Johns-Manville, sought to have a pending suit in which he was a defendant transferred to the district court which was trying the Johns-Manville controversy. Pacor alleged that if the plaintiff were successful in his suit, then Johns-Manville ultimately might be liable. The Third Circuit Court of Appeals relied on *Aldinger v. Howard*, 427 U.S. 1 (1976), to overcome the fact that the suit against Pacor might have an effect on the Johns-Manville estate; instead the court held that judicial economy itself does not justify federal jurisdiction. 743 F.2d at 994. The *Pacor* holding appears to support the proposition that ancillary jurisdiction should be extremely limited in the trial of tort claims casually related to bankruptcy.



each presenting different claims, and a single litigant is not prepared to lose state-created procedural advantage because of a defendant's status as a debtor in bankruptcy.<sup>132</sup>

#### CONCLUSION

Although clearly the Supreme Court's opinion in *Northern Pipeline Co. v. Marathon Pipe Line Co.*<sup>133</sup> indicated to Congress that the 1978 Bankruptcy Act was unconstitutional, equally clear is that the congressional response as contained in the 1984 Amendments is unconstitutional as well. Perhaps the premise which Congress did not articulate was that many debtors would be able to avail themselves of a federal forum based on diversity of citizenship, due to the nature of mass tort claims. However, the 1984 Amendments are not so limited. They expand federal subject matter jurisdiction beyond diversity, beyond federal questions, and most importantly, beyond article III.

Although one court has avoided the constitutional issue by juxtaposing one section of the 1984 Amendments against the other, clearly the legislative history of the section upon which the court relied was inapplicable. Other courts have not been as willing to interpret the amendments so broadly.

It does not appear that any court has stated that a tort claim is an article III subject. Implicit in the *Marathon* decision is that all state-created causes of action are not to be tried in a bankruptcy forum. Just as *Marathon* indicated that Congress may not provide to article I courts that which the Constitution does not provide, Congress also must realize and be informed by the Court that it cannot provide to article III courts that which the Constitution does not provide. To allow otherwise is to allow Congress, by a simple legislative act, to supersede the limits the founding fathers placed upon the federal judiciary through article I and article III of the Constitution.

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132. See generally *Citibank, N.A. v. White Motor Corp.*, 761 F.2d 270 (6th Cir. 1985).

133. 458 U.S. 50 (1981).

