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Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031

Paulette J. Delk*

I. INTRODUCTION

Although American bankruptcy courts hear hundreds of individual, partnership, and corporate bankruptcy cases every year involving complex environmental, tax, tort, and contract issues, bankruptcy courts and the parties before them may not benefit from the assistance of special masters. Rule 9031 of the Federal Rules of Bankruptcy Procedure¹ makes Rule 53 of the Federal Rules of Civil Procedure (“FRCP”)² governing the appointment and duties of the special master inapplicable in bankruptcy cases. While many courts and commentators recognize that federal courts have inherent authority to appoint special masters,³ bankruptcy courts have not relied upon this inherent power freely in light of Rule 9031, which could be construed as so restricting the bankruptcy court’s authority to appoint special masters as to foreclose the possibility of relying on any other power completely. In this Article, the Author attempts to demonstrate that bankruptcy courts regularly hear cases in which the court and the parties could benefit from the services of a special master and that bankruptcy courts are hampered in their ability to handle cases in the most just and efficient manner possible because of their inability to appoint special masters. Part II of this Article examines the role of the special master in the federal courts generally. It examines the scope of tasks traditionally performed by special masters, as well as the expanded role that special masters have played in recent years as the courts increasingly have relied on special masters in case management. Part III examines the nature of complex bankruptcy cases and the role that special masters could play in these cases. Part IV provides background

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1. FED. R. BANKR. P. 9031; *see infra* note 56 and accompanying text.

2. FED. R. CIV. P. 53.

3. *See, e.g., Veneri v. Draper*, 22 F.2d 33, 35 (4th Cir. 1927); *United States v. Conservation Chem. Co.*, 106 F.R.D. 210, 217-21 (W.D. Mo. 1985); *Jordan v. Wolke*, 75 F.R.D. 696, 700-01 (E.D. Wis. 1977); Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 415 n.80 (1986) [hereinafter Brazil, *Special Masters*]; Margaret G. Farrell, *Coping with Scientific Evidence: The Use of Special Masters*, 43 EMORY L.J. 927, 943 (1994) [hereinafter Farrell, *Coping with Scientific Evidence*]; I.H. Jacob, *The Inherent Jurisdiction of the Court*, 23 CURRENT LEGAL PROBS. 23, 34 (1970); *see infra* notes 131-43 and accompanying text.

on the history and rationale for Rule 9031. Part V explores the roles of the examiner and trustee in bankruptcy, and compares those roles with the role of the special master. Part VI discusses the concept of the federal courts' inherent authority to appoint persons to assist the court in performing specific, well-delineated judicial tasks in furtherance of the efficient administration of cases.

II. SPECIAL MASTERS IN FEDERAL COURTS GENERALLY

A. A Brief History

The practice of appointing special masters to provide assistance to courts is a long and well-established one. Some historians believe that the practice of appointing persons to assist the court, through a formal process, was first established in early Roman law through the use of the *judex*—a private person appointed by a praetor, with the consent of the parties to an action, to hear and decide the case.⁴ Special masters were used in England at least as far back as the seventeenth century (introduced in the British legal system by the Normans, some historians believe), although the actual benefit to the court, and, especially to the parties, was questionable at that time.⁵ The practice of appointing special masters to assist the court continued in America beginning at least as early as the eighteenth century.⁶ Not long thereafter, the federal judiciary began to use

4. See 1 DAN B. DOBBS, *LAW OF REMEDIES* § 2.8(1), at 190 (2d ed. 1993); 1 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 416 (A. Goodhart & H. Hanbury eds., 7th ed. rev. 1956); 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *HISTORY OF ENGLISH LAW* 193 (1959); 2 CHARLES P. SHERMAN, *ROMAN LAW IN THE MODERN WORLD* §§ 849, 881, at 404, 434 (1937); James R. Bryant, *The Office of Master in Chancery: Early English Development*, 40 A.B.A. J. 498, 498 (1954); see also *Simpson v. Canales*, 806 S.W.2d 802, 806-11 (Tex. 1991) (reviewing the history of special masters).

5. See generally 1 HOLDSWORTH, *supra* note 4, at 424-25 (describing generally the abuses in the system); Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 452 (1958) (citing 6 THE WORKS OF JEREMY BENTHAM 43 (Bowring ed., 1843)); 9 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 360 (3d ed. 1944) (describing the masters' practice of delaying proceedings for the purpose of charging a special fee for acceleration, and increasing the number of appearances before the master and the number of services that the masters were required to perform to increase fees); Linda J. Silberman, *Masters and Magistrates Part I: The English Model*, 50 N.Y.U. L. REV. 1070, 1075-79 (1975) (describing the history of the special master system in England).

6. See James R. Bryant, *The Office of Master in Chancery: Colonial Development*, 40 A.B.A. J. 595, 598 (1954) (describing the history and process of development of the special master in colonial America); Linda J. Silberman, *Masters and Magistrates Part II: The American Analog*, 50 N.Y.U. L. REV. 1297, 1321-22 (1975) (noting that special

special masters on a regular basis to handle discrete aspects of cases, such as taking and reporting testimony,⁷ determining questions at issue where facts and evidence were complex and voluminous,⁸ and auditing and stating accounts.⁹ Early on, federal courts held that they had the authority to appoint special masters through their “inherent power to provide themselves with appropriate instruments required for the performance of their duties.”¹⁰ Courts pointed to this inherent power as their authority to appoint special masters even over the objections of the parties.¹¹ Many courts held, however, that this inherent power was bound by limitations imposed through Article III of the United States Constitution¹² and determined that it was inappropriate to refer to the special master matters that were determinative of a “fundamental issue of liability” because the special masters do not meet the requirements imposed by Article III.¹³ As a result, in the absence of the full consent of all of the parties, the most widely accepted practice was to refer matters to the special master that were narrow, well-defined, and specific.¹⁴

masters have been a part of the federal judiciary of the United States since its inception).

7. *See, e.g.*, *Holt Mfg. Co. v. C.L. Best Gas Traction Co.*, 245 F. 354, 357 (N.D. Cal. 1917).

8. *See, e.g.*, *United States ex rel. Brading-Marshall Lumber Co. v. Wells*, 203 F. 146, 148-49 (E.D. Tenn. 1913).

9. *See, e.g.*, *Thompson v. Smith*, 23 F. Cas. 1092 (C.C. Ohio 1869).

10. *In re Peterson*, 253 U.S. 300, 312 (1920); *see also supra* notes 131-43 and accompanying text.

11. *Peterson*, 253 U.S. at 312. According to the *Peterson* court:

This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our government it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters. . . .

Id.

12. U.S. CONST. art. III, § 1:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

13. *See Stauble v. Warrob*, 977 F.2d 690, 695-96 (1st Cir. 1992) (citing *In re Bituminous Coal Operators' Ass'n*, 949 F.2d 1165, 1168 (D.C. Cir. 1991); *Burlington N. R.R. v. Dep't of Revenue*, 934 F.2d 1064, 1073 (9th Cir. 1991)). The attributes most commonly cited are lifetime tenure and the protection from the diminution of salary.

14. Where the parties have not consented, the courts traditionally treat the special master's report as advisory, to be adopted by the court only to the extent that the court agrees with it after making an independent review of the entire record. *See, e.g.*, Heckers

B. Current Use of Special Masters

As a part of the 1938 enactment of the FRCP, Rule 53(b) specifically authorized the appointment of special masters.¹⁵ FRCP 53(b) was drafted to follow the basic practices and guidelines of the earlier Equity Rules¹⁶ and to clarify certain of those practices. Like the Equity Rules, FRCP 53(b) contemplates specific and well-defined duties for the special master in the federal court system. Although some courts have expanded the role of the special master in a manner that has generated some controversy¹⁷ and have justified the appointment of special masters for controversial reasons,¹⁸ there remain some clear-cut and uncontroversial roles for special masters. These roles involve duties, such as accounting and computation, determining relevant issues under circumstances where the evidence is voluminous,¹⁹ and advising the court on severable issues that are highly technical in nature.²⁰ The appointment of special masters to perform these duties is seldom questioned by the parties, courts, or commentators. These tasks and duties assigned to and performed by special masters are generally held to be invaluable aids to the federal courts. In complex litigation, where there are often hundreds, and sometimes thousands,

v. Fowler, 69 U.S. (2 Wall.) 123, 131-33 (1864); Mastin v. Noble, 157 F. 506, 508 (8th Cir. 1907); Holt Mfg. Co. v. C.L. Best Gas Traction Co., 245 F. 354, 356 (N.D. Cal. 1917); *In re Thomas*, 45 F. 784, 787 (D.C.S.C. 1891).

15. FED. R. CIV. P. 53(b).

16. Rules of Practice for the Courts of Equity of the United States, 42 U.S. (1 How.) xli-lxx (1842).

17. The use of special masters in pretrial management has been questioned by many as an improper expansion of the traditional use of special masters because it requires the exercise of judicial authority, which special masters do not have. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION § 20.14, at 16 (3d ed. 1982); Wayne D. Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1 AM. B. FOUND. RES. J. 143, 143-44 (1983) [hereinafter Brazil, *Referring Discovery Tasks*] (The author found that, although Rule 53 may not authorize the use of special masters to perform pretrial management matters, courts still may appoint special masters to perform these duties through their inherent authority.).

18. *See LaBuy v. Howard Leather Co.*, 352 U.S. 249, 251-55 (1957). In *LaBuy*, the Supreme Court indicated that under Rule 53, calendar congestion, complexity of the issues, and the possibility of a lengthy trial were insufficient reasons to appoint a special master whose duties were to carry out the full fact-finding function on the merits of the case. *Id.* at 259. The Court determined that the use of the master in this manner displaced the court rather than aiding it. *Id.*

19. *See In re Peterson*, 253 U.S. 300, 312 (1920).

20. *See Danville Tobacco Ass'n v. Bryant-Buckner Ass'n*, 333 F.2d 202, 208-09 (4th Cir. 1964) (where a district court appointed an official in a tobacco association to assist it in making judgments regarding tobacco marketing, a highly technical market).

of claims in a single case, special masters have been assigned to assist the court in performing a variety of discrete functions.²¹ In complex cases, district court judges often appoint special masters to summarize and evaluate claims, and to develop and implement case management and evaluation plans.²² Two frequently cited, complex cases in which special masters were appointed to evaluate claims and develop case management plans are the Alabama DDT case²³ and the Ohio asbestos case.²⁴ In these cases, the special masters are credited with developing innovative plans and data collection systems that greatly aided the courts in streamlining the cases and bringing about their resolution.²⁵ The Alabama DDT and Ohio asbestos cases involved an extraordinary amount of evidence and claims, and, for that reason, may be viewed as unusual cases. But there are other complex litigation cases, without the extraordinary volumes of evidence and claims found in the Alabama DDT and the Ohio asbestos cases, in which special masters have been used quite effectively. Special masters were appointed, in these more commonplace cases,

21. For a thorough analysis of the use of special masters in complex litigation, see Brazil, *Special Masters*, *supra* note 3, at 394. See also Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 478-91 (1986) (noting that special masters are used often in complex litigation to provide expert, technical assistance, but, just as frequently, they are used to provide advice on techniques for gathering and analyzing large amounts of empirical data).

22. To the extent that the special master's assigned duties include discovery responsibilities, some have questioned the district court's authority under Rule 53 to make such assignments to special masters. See generally Brazil, *Special Masters*, *supra* note 3, at 395-98. Nevertheless, special masters are frequently appointed to supervise discovery in complex cases. See, e.g., Nat'l Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 558 (N.D. Cal. 1987) (special master appointed to resolve discovery disputes where egregious discovery disputes found to exist); United States v. Conservation Chem. Co., 106 F.R.D. 210, 214 (W.D. Mo. 1985) (affirming the appointment of a special master in a case involving voluminous technical and scientific data); *In re Agent Orange Prod. Liab. Litig.*, 94 F.R.D. 173, 173-75 (E.D.N.Y. 1982) (affirming the appointment of a special master in a case involving more than four million documents); United States v. Int'l Bus. Machs. Corp., 76 F.R.D. 97, 98-99 (S.D.N.Y. 1977); Fisher v. Harris, Upham & Co., 61 F.R.D. 447, 449-53 (E.D.N.Y. 1973).

23. Wilhoite v. Olin Corp., No. CV-83-C-5021-NE (N.D. Ala. filed 1983); Hagood v. Olin Corp., No. CV-83-C-5917-NE (N.D. Ala. filed 1983).

24. *In re Related Asbestos Cases* (N.D. Ohio filed 1983).

25. See, e.g., Jerome I. Braun, *Special Masters in Federal Court*, 161 F.R.D. 211, 215-20 (1995); Margaret G. Farrell, *The Role of Special Masters in Federal Litigation*, C842 ALI-ABA 931, 946-51 (1993) [hereinafter Farrell, *Role of Special Masters*]; Jonathan S. Liebowitz, *Special Masters: An Alternative Within the Court System*, 48 DISP. RESOL. J. 64, 66-67 (1993).

to supervise discovery depositions, evaluate services, conduct surveys, receive confidential and privileged documents, and review highly technical documents.²⁶

In recent years, judges and lawyers have given increased attention to active judicial case management, including devices such as: pretrial scheduling, and settlement conferences; discovery limits and deadlines; innovative methods of hearing and disposing of motions; and case monitoring. Judicial intervention through these case management devices reduces both the duration and expense of litigation. Costs are reduced when judicial management causes settlement of a case at an earlier stage of the process—thus eliminating the transaction costs of motions and discovery that otherwise might have occurred. Costs and duration are also reduced when pretrial conferences succeed in refining issues, which, in turn, may reduce the number and extent of motions and discovery.²⁷

26. See, e.g., *In re* U.S. Dep't of Def., 848 F.2d 232, 235-37 (D.C. Cir. 1988) (special master appointed to review sensitive government documents because the special master already had security clearance and was an intelligence expert with the ability to develop a sample of the documents and to summarize the reasonable positions that the parties might take on the possible exemption of each document); *In re* Armco, Inc., 770 F.2d 103, 105 (8th Cir. 1985) (affirming the district court's appointment of the special master to supervise and conduct pretrial matters, including discovery activity, the production and arrangement of exhibits and stipulations of fact, and the power to hear motions for summary judgment or dismissal); *First Iowa Hydro Elec. Co-op. v. Iowa-Illinois Gas & Elec. Co.*, 245 F.2d 613, 628 (8th Cir. 1957) (special masters appointed to take discovery depositions that the court felt needed continuous supervision, and externally imposed an order that a master could provide), *cert. denied*, 355 U.S. 871 (1957); *Costello v. Wainwright*, 387 F. Supp. 324, 327-28 (M.D. Fla. 1973) (In this class action suit brought by Florida prisoners alleging constitutional deprivations caused by inadequate health care provided in the prison system, the court appointed a special master to aid the court in evaluating the quality of medical services provided to the inmates. The special master assisted the court by "organizing, directing and conducting a comprehensive survey of the health care services provided by the Florida Division of Corrections to inmates committed to its custody, and to report his findings to the Court."); *TransAmerican Natural Gas Corp. v. Mancias*, 877 S.W.2d 840, 843 (Tex. App. 1994) (The appellate court affirmed a district court's appointment of a special master to receive discovery documents that opposing counsel alleged to be confidential and privileged by ruling that it was proper for the court to appoint a special master with special training to assist in reviewing documents of such a technical nature to determine questions of privilege and discoverability.); see also *United States v. Conservation Chem. Co.*, 106 F.R.D. 210, 216 (W.D. Mo. 1985); *In re* Agent Orange Prod. Liab. Litig., 94 F.R.D. 173, 174 (E.D.N.Y. 1982).

27. See generally *Jaquette v. Black Hawk County, Iowa*, 710 F.2d 455, 463 (8th Cir. 1983); MAUREEN SOLOMON & DOUGLAS SOMERLOT, TASK FORCE ON REDUCTION OF LITIG. COST AND DELAY, JUD. ADMIN. DIVISION, A.B.A., CASEFLOW MANAGEMENT IN THE TRIAL COURT (1987); MAUREEN SOLOMON & DOUGLAS SOMERLOT, LAW. CONF. TASK FORCE ON REDUCTION OF LITIG. COST AND DELAY, A.B.A., DEFEATING DELAY: DEVELOPING AND IMPLEMENTING A COURT DELAY REDUCTION PROGRAM (1986); Terry

Special masters have come to represent an important element in the use of these case management devices and in the overall search for ways of bringing cases to a just and acceptable end as quickly as possible.²⁸ Special masters have been important to the courts, particularly in settlement discussions, because of the more informal nature of the role of the special master.²⁹ Courts also have begun to appoint special masters with increasing frequency at the pretrial stage to facilitate settlements by delegating some tasks to the special master to minimize direct judicial involvement in settlement efforts early on and to avoid the appearance of bias or prejudice.³⁰ Effective and efficient case management requires flexibility.³¹ Lawyers and judges have come to accept that

Hackett, *California Adopts New Case Management Rules to Reduce Delay*, 75 JUDICATURE 108 (1991); Maureen Solomon & Holly Bakke, *Case Differentiation: An Approach to Individualized Case Management*, 73 JUDICATURE 17 (1989); Hubert L. Will, *Judicial Responsibility for the Disposition of Litigation*, 75 F.R.D. 117, 125 (1978).

28. See generally Liebowitz, *supra* note 25 (describing how special masters can assist the courts in controlling the length of complex litigation). Federal courts also are increasingly turning to court-appointed managerial experts for assistance. For a thorough discussion of the courts' use of these experts and their authority to appoint them, see generally Ellen E. Deason, *Managing the Managerial Expert*, 1998 U. ILL. L. REV. 341.

29. See, e.g., Jerome I. Braun, *Special Masters in Federal Court*, 161 F.R.D. 211, 218 (1995) (noting the role of the special master in facilitating settlement discussions, advising the court, and evaluating the claims of parties); Farrell, *Role of Special Masters*, *supra* note 25, at 946-49 (noting the role of the special master in discovery and settlements, and as advisors, fact finders, and case managers); Liebowitz, *supra* note 25, at 65 (reviewing a case in which a special master held eighty-five hearings in which 166 plaintiffs had claims against three defendants and in which the use of the special master had a significant impact on the court's ability to conclude the case at all).

30. Judicial participation in the settlement process is the subject of much debate. While some believe that judges can and should play a major role in helping parties achieve settlement, others believe that the extent and nature of the judge's role in settlement matters should be limited so that the judge can maintain neutrality and can render a disinterested opinion should settlement discussions fail. See, e.g., DORIS MARIE PROVINE, *SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES* 23 (1986) (discussing disagreement among trial judges as to the proper involvement of the judiciary in the use of particular settlement techniques); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 322-23 (1986) (reviewing and discussing the change in emphasis from narrowing issues in the pretrial phase to promoting settlement).

31. Increasingly, courts have found a variety of innovative ways in which special masters can assist the court. See, e.g., *In re Joint E. & S. Dist. Asbestos Litig.*, 129 F.R.D. 434, 435 (E.D.N.Y. & S.D.N.Y. 1990) (special master appointed expressly to achieve settlement of this complex case); *In re Agent Orange Prod. Liab. Litig.*, 94 F.R.D. 173, 173-75 (E.D.N.Y. 1982) (The use of a special master to supervise discovery and prepare the pretrial order was justified in light of the "sheer volume of documents to be reviewed, the number of witnesses to be deposed, [and] the need for a speedy

differences in complexity and subject matter of lawsuits present the need for different types of case management practices. The appointment of special masters is one of the case management practices frequently employed by the courts because it has proven to be particularly effective and efficient.

III. POTENTIAL USE OF SPECIAL MASTERS IN BANKRUPTCY CASES

In bankruptcy cases requiring the estimation of claims, computation of damages, valuation hearings, and, in cases of corporate debtors, highly technical companies, the appointment of a special master could prove to be particularly beneficial to the bankruptcy court. Often, a large, complex, corporate Chapter 11³² case with numerous claimants³³ requires estimation of claims, computation of damages, and valuation hearings. The bankruptcy court is required to estimate any unliquidated or contingent claim, the “fixing or liquidation of which . . . would unduly delay the closing of the case.”³⁴ Where there are numerous claims of this type, a special master could be appointed by the bankruptcy court to review the potential claims and to develop a method or propose a formula for estimating the claims in question.³⁵ Particularly in cases where the debtors are

processing of all discovery problems in order to meet the trial date”); *Costello v. Wainwright*, 387 F. Supp. 324, 325-26 (D.C. Fla. 1973) (special master appointed to evaluate the quality of medical services).

32. 11 U.S.C. §§ 1101-1174 (2000). Chapter 11 is primarily designed for the reorganization of the debts of a business through a reorganization plan. The plan must be voted upon by specified creditors and shareholders, and must be confirmed by the court.

33. Corporations and sole proprietorships filed 9,947 Chapter 11 cases in the twelve-month period ending June 30, 2000. *See Filings*, Bankr. L. Daily (BNA) (Aug. 15, 2000) (reporting based on data released by the Administrative Office of the United States Courts); *see also* Alexander D. Bono, *Class Action Proofs of Claim in Bankruptcy*, 96 COM. L.J. 297, 297 (1991) (noting the rise in class action issues arising in bankruptcy cases).

34. 11 U.S.C. § 502(c) (2000). For examples of situations in which the courts have estimated claims in a Chapter 11 context, *see In re Thomson McKinnon Securities, Inc.*, 191 B.R. 976, 979-81 (Bankr. S.D.N.Y. 1996) (estimation of claims involving trust accounts and churning claims against the debtor); *Beatrice Co. v. Rusty Jones, Inc.*, 153 B.R. 535, 536-37 (N.D. Ill. 1993) (estimation of contingent claims and validation of liquidated claims in a Chapter 11 case).

35. At least one commentator has suggested that special masters could be helpful to a bankruptcy court “when it must estimate the values of a large number of claims in which the debtor has admitted liability. In these situations, special masters may obviate the need for any oral hearing, [because] valuation of damages often involves more concrete, objective factors than does evaluating liability.” David Kauffman, *Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy*, 35 STAN. L. REV. 153, 170 (1982) (internal citations omitted).

involved in highly technical areas, the appointment of a special master with specific expertise could prove to be an invaluable service to the court and could expedite matters considerably.

In *In re White Motor Credit Corp.*,³⁶ the bankruptcy court, presiding over a Chapter 11 case involving a corporation and five of its affiliates in which there were 160 products liability suits pending in state and federal courts across the country, with the potential for the existence of many more unfiled suits, proposed the appointment of a special master for just that purpose.³⁷ The court proposed appointing the special master to assist it in developing a program for resolving the 160 pending product liability cases and for identifying and resolving the potential unfiled product liability cases, and to “conduct hearings on non-settled claims.”³⁸ The court cited as reasons for the use of the special master: (1) the amount of time that it was already spending on this case on a daily basis; (2) the fact that travel to the residences of the parties and the witnesses may be required; and (3) the inappropriate use of the court’s time in addressing what would be “‘matters of account and . . . difficult computation of damages.’”³⁹ These are the same reasons why district courts appoint special masters, and they are the same tasks that special masters appointed by the district courts perform.⁴⁰ Ultimately, the bankruptcy court was unable to appoint a special master in this case—not because the services of a special master were not warranted—but due to jurisdictional issues.⁴¹

The only case in which a bankruptcy court successfully appointed a special master is a case in a Puerto Rican bankruptcy court, which involved the reorganization of a broadcasting company.⁴² Upon the petition of the creditors’ committee, the bankruptcy court appointed a special master for the express purpose of negotiating and conducting the sale of two television stations.⁴³ The

36. 11 B.R. 294 (Bankr. N.D. Ohio 1981).

37. *See id.* at 296. The appointment of a special master to assist in the formulation of a program to determine and resolve product liability claims was approved in this case, but, on appeal, the court determined that the state courts where cases were initially pending were the proper forums for resolving these cases and not the bankruptcy court. *In re White Motor Credit*, 761 F.2d 270, 275 (6th Cir. 1985). The state courts were deemed to be the proper forums because there were some defendants in the tort cases who could not be transferred out of the jurisdiction, meaning that the cases would “have to be tried twice in different courts” if the federal court heard some of the cases. *Id.* at 273-74. Thus, in the interest of justice and judicial economy, and because state issues predominated, these cases remained in the state courts and were tried by state judges.

38. *In re White*, 11 B.R. at 295.

39. *Id.* at 297 (quoting FED. R. CIV. P. 53(b)).

40. *See supra* notes 22-26 and accompanying text.

41. *In re White*, 761 F.2d at 271.

42. *In re Am. Colonial Broad. Corp.*, 758 F.2d 794 (1st Cir. 1985).

43. *Id.* at 796.

sale of this kind of asset requires special knowledge and expertise, and the court saw the need for the assistance of an individual with special knowledge in this area. The court did not give the special master the final decision in this matter; rather, it retained the power to make the final decision regarding whether to allow the sale to go forward, thus maintaining the special master's duty as a specific, discrete one—not one that was case determinative.⁴⁴ The order appointing the special master was appealed by the losing bidder, the debtor, but the appeal was unsuccessful because both the district court and the court of appeals held that the order was not a final one—thus, it could not be appealed unless an applicable exception existed (and the court of appeals held that no such exception applied in this case).⁴⁵ This case stands alone among reported bankruptcy cases in which a bankruptcy judge appointed a special master and in which the special master actually performed the designated services.

In many districts, the most frequent need for a special master in a bankruptcy case is in the self-employed, small-business Chapter 13 cases⁴⁶ in which there is reason to believe that greater assets and income exist than noted in the schedules, but where the debtor's records are in a chaotic state, and require extensive effort to track down and sort through to verify the accuracy of the bankruptcy schedules. This assistance could be very helpful to the creditors and to the court, but it would not be an efficient use of the court's time. The standing Chapter 13 trustees⁴⁷ are unable to devote the time that would be required to fulfill this task because of the sheer volume of Chapter 13 cases in many districts.⁴⁸ As a result, the potential benefit to creditors, in many of these cases, would merit the appointment of a special master.

In Chapter 11 cases, there are frequent motions to modify the automatic stay⁴⁹ in which the court must determine the value of the property at the center of the controversy in order to decide if the automatic stay should be modified.

44. See *supra* note 14 and accompanying text.

45. *In re Am. Colonial*, 758 F.2d at 798-803.

46. 11 U.S.C. §§ 1301-1330 (2000). This Chapter, as its title suggests, is designed to provide for the "Adjustment of Debts of an Individual with Regular Income." Debtors propose a payment plan generally of a three-to-five-year duration, which must be confirmed by the court, and, in return, the debtors receive a discharge from most remaining debts upon completion of the plan.

47. 11 U.S.C. § 1302(a) (2000); see also 28 U.S.C. § 586(b) (1994). These statutes permit the appointment of a person to serve as the trustee in the Chapter 13 cases filed in a particular region when the number filed in the region warrants the full-time attention of a single trustee. Many districts have the services of a standing trustee, and some districts with extremely large Chapter 13 filings have the services of more than one standing trustee.

48. See *Filings*, *supra* note 33 (For the twelve-month period ending June 30, 2000, there were 380,770 Chapter 13 cases filed.).

49. 11 U.S.C. § 362 (2000).

Often, both the creditor and the debtor present appraisals of the property, but the court must reach an independent decision as to the actual value of the property for purposes of deciding whether the creditor's motion to modify the automatic stay should be granted. Also, in Chapter 11 cases, the court must determine whether the plan of reorganization is feasible.⁵⁰ Whether the plan is feasible or not depends, in large part, on financial information regarding the debtor and whether the data demonstrate, *inter alia*, that the debtor's capital structure and earning power are adequate to support the plan of reorganization.⁵¹ Creditors who object to the plan of reorganization may present data to dispute the debtor's projections. The court must analyze all of the information in order to make an independent determination regarding the feasibility of the plan of reorganization. In both instances, a special master could provide valuable assistance to the court in analyzing the various appraisals and financial data provided by the debtor and creditors.

Among the multitude of bankruptcy cases filed annually,⁵² there are many cases that require specific and easily delineated tasks, such as the estimation of claims,⁵³ computation of damages, and analysis and assessment of appraisals and

50. 11 U.S.C. § 1129 (a)(11) (2000).

51. See, e.g., *In re Merrimack Valley Oil Co.*, 32 B.R. 485, 488-91 (Bankr. D. Mass. 1983); *In re Landmark at Plaza Park Ltd.*, 7 B.R. 653, 658-60 (Bankr. D.N.J. 1980).

52. See *Filings*, *supra* note 33. In the twelve-month period ending June 30, 2000, there were 1,276,922 bankruptcy petitions filed; in the twelve-month period ending June 30, 1999, 1,352,030 petitions were filed.

53. Under the Bankruptcy Act of 1898, ch. 541, § 57(d), 30 Stat. 544 (repealed 1979), not all claims were required to be estimated. Section 57(d) of the Act provided that if the estimation of a contingent or unliquidated claim would unduly delay the administration of the estate or any proceeding under this Act, the claim would not be allowed. The result was that the creditor's claim would be unaffected by the discharge in bankruptcy, and the creditor could pursue the debtor after the claim was fixed or liquidated despite the debtor's discharge. Section 502(c) of the Code requires the estimation of contingent or unliquidated claims when the fixing or liquidation of those claims would unduly delay the administration of the case. 4 COLLIER ON BANKRUPTCY ¶ 502.04[1], at 502-51 (Lawrence P. King ed., 15th ed. rev. 2001). Congress wanted "to afford the debtor complete bankruptcy relief," and § 502(c) was one means that Congress used to achieve this goal. H.R. REP. NO. 95-595, at 352 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6308. Section 502(c)'s estimation of the claims requirement adds to the number of claims in which the court directly must involve itself by taking evidence to determine the proper estimation. Where a claim is fixed, liquidated, and well-documented, the claim is automatically allowed without a review by the court, unless a party in interest objects to the claim. 11 U.S.C. § 502(c) (2000).

In the reorganization under Chapter 11 of one chemical company, the potential existed for the individual estimation of 187 contingent and unliquidated claims against the debtor. *In re Borne Chem. Co.*, 16 B.R. 509, 512 (Bankr. D.N.J. 1980).

financial data. These kinds of tasks make the appointment of a special master a practical and desirable addition to the tools available to assist the district court and bankruptcy judge in bankruptcy cases. Moreover, these tasks involve the kind of services that masters historically have performed.⁵⁴

IV. SPECIAL MASTERS PROHIBITED IN BANKRUPTCY

A. Source of the Prohibition

Although there are many kinds of proceedings in which a bankruptcy court may benefit from the services of a special master, bankruptcy courts are not authorized to appoint special masters at this time. Because of a bankruptcy rule that expressly prohibits the appointment of a special master in bankruptcy cases, special masters may not be appointed by bankruptcy judges.⁵⁵ The Bankruptcy Code provides no statutory prohibition against the appointment of special masters; the only prohibition against the appointment of a special master in bankruptcy cases is set forth in a procedural rule that states: "Masters Not Authorized: Rule 53 F.R.Civ.P. does not apply in cases under the Code."⁵⁶

This procedural rule, Bankruptcy Rule 9031, is a single, simple sentence providing neither guidance nor elucidation.⁵⁷ A Committee Note, also a single, simple sentence, follows the rule, stating: "Committee Note: This rule precludes the appointment of masters in cases and proceedings under the Code."⁵⁸ The note only adds the word "proceedings" to the word "cases" in its "discussion" of the Bankruptcy Rule that makes FRCP 53 of the FRCP inapplicable under the Code.⁵⁹ This single-sentence rule and the lack of a true explanation or discussion in the Committee Note calls into question the authority of even the district court to appoint a special master in a bankruptcy case.⁶⁰ The rule is not limited in its application to bankruptcy cases that are before the

54. 1 DOBBS, *supra* note 4, § 6.6(1), at 133 (noting that masters traditionally performed specific tasks associated with taking evidence).

55. FED. R. BANKR. P. 9031.

56. FED. R. BANKR. P. 9031. In contrast, the Bankruptcy Code expressly prohibits bankruptcy judges from appointing receivers in bankruptcy cases. 11 U.S.C. § 105(b) (2000).

57. FED. R. BANKR. P. 9031.

58. FED. R. BANKR. P. 9031.

59. FED. R. BANKR. P. 9031.

60. See *supra* notes 56-58 and accompanying text.

bankruptcy court.⁶¹ Rather, it is apparently applicable to all courts hearing a bankruptcy case, including the district court.⁶²

The only other published and official explanation for Rule 9031 comes from the Advisory Committee on Bankruptcy Rules' preface to the then-proposed Rules of Bankruptcy Procedure in which the Committee provided discussion of each of the proposed rules.⁶³ In its discussion of proposed Rule 9031, the Advisory Committee reviewed former Bankruptcy Rule 513,⁶⁴ which made FRCP 53 applicable in bankruptcy cases, and explained: "There does not appear to be any need for the appointment of special masters in bankruptcy cases

61. FED. R. BANKR. P. 1001 provides: "The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code. . . . These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding." Should the United States district court withdraw the reference of a bankruptcy case or proceeding from the bankruptcy court, the district court judge would be prohibited from appointing a special master in the bankruptcy case or proceeding because of Rule 9031, despite the fact that the case or proceeding is one in which the appointment of a special master greatly would assist the court in "secur[ing] the just, speedy, and inexpensive determination of [the] case." *Id.*

62. See Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 271 ("The propriety of appointing special masters in bankruptcy cases is subject to some dispute. This consideration led the author to use a semantic substitute—the court-appointed 'special advisor'—in the Manville Bankruptcy-Trust litigation." (footnotes omitted)). Mark Peterson, the special advisor to the court in *In re Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. 473, 573 (E.D.N.Y. & S.D.N.Y. 1995), *aff'd*, 100 F.3d 944 (2nd Cir. 1996), the case referred to by Judge Weinstein, was appointed to develop a plan for restructuring the trust payment schedule and refinancing the trust, and to evaluate the claims by the type of disease. These are duties traditionally assigned to special masters. See also *Minerex Erdoel, Inc. v. Sina, Inc.*, 838 F.2d 781, 783 (5th Cir. 1988), *cert. denied*, 488 U.S. 817 (1988); *In re Elcona Homes Corp.*, 810 F.2d 136, 140 (7th Cir.1987) (Both cases support the proposition that district courts may not allow the appointment of a special master in a bankruptcy case through their reference powers.).

63. [A] COLLIER ON BANKRUPTCY app. pt. 2(b), at 2-120 to 2-124 (Lawrence P. King ed., 15th ed. rev. 2001).

64. FED. R. BANKR. P. 513, titled *Special Masters*, provided: "if a reference is made in a bankruptcy case by a judge to a special master, the Federal Rules of Civil Procedure applicable to masters apply." FED. R. BANKR. P. 513 (repealed Aug. 1, 1983), *reprinted in* 12 COLLIER ON BANKRUPTCY, at 5-103 (James Wm. Moore & Lawrence P. King eds., 14th ed. 1978). COLLIER ON BANKRUPTCY explains: "The word 'judge' meant the United States district judge, not the bankruptcy judge." [A] COLLIER ON BANKRUPTCY app. pt. 2(b), at 2-122 (Lawrence P. King ed., 15th ed. rev. 2001). Accordingly, former Rule 513 generally applied only when a Chapter X case was retained by the district judge although it probably would apply when a district judge removed any case from the bankruptcy court to the district court. See FED. R. BANKR. P. 102(b) (repealed Aug. 1, 1983).

by bankruptcy judges. The Advisory Committee, therefore, has decided that former Rule 513 not be continued in the rules and that Rule 53 F. R. Civ. P. not be made applicable.⁶⁵ The Advisory Committee has given no further explanation for its decision that there no longer would be a need for the appointment of special masters in bankruptcy cases.⁶⁶ Given the language of Rule 9031,⁶⁷ making FRCP 53 inapplicable in all bankruptcy cases, no judge, whether of the district court or bankruptcy court, is authorized to appoint a special master. This kind of prohibition did not extend to district court judges under the Bankruptcy Act.⁶⁸ It is difficult to believe that this was the intended result of the rule, but it is the necessary result when the clear and unambiguous language of the rule is applied as written.

B. Evolution of the Bankruptcy Rules

Having a grasp of the history of the Bankruptcy Rules is helpful in understanding the absence of a more complete discussion in the Committee Notes⁶⁹ and in understanding the Committee's failure to recognize that the rule is broad enough to prevent district court judges from exercising what has come to be considered by many as an inherent power.⁷⁰ The concept of having a formal, separately published set of rules to govern procedure in the bankruptcy courts is a relatively recent one.⁷¹ Until 1976, when the final rules of the initial set of procedural rules were promulgated by the Supreme Court and became effective,⁷² the Bankruptcy Act of 1898⁷³ contained all of the procedural, as well

65. [A] COLLIER ON BANKRUPTCY app. pt. 2(b), at 2-122 (Lawrence P. King ed., 15th ed. rev. 2001).

66. One commentator has suggested that Rule 53 was made inapplicable to bankruptcy cases through Rule 9031 because of "the expense of special masters in bankruptcy, and . . . 'public perceptions of cronyism.'" Kauffman, *supra* note 35, at 171 n.82. Rule 53 has been construed as requiring the parties' consent. Where the creditors and the court agree that the special masters can perform certain tasks more efficiently, the creditors agree to bear that expense. The bankruptcy estate would not bear the cost. The expense of the special master should not be a concern because it would be incurred only if the parties consent.

67. See *supra* notes 56-58 and accompanying text.

68. See *infra* notes 85-89 and accompanying text.

69. See *supra* notes 58-59 and accompanying text.

70. See *infra* notes 131-43 and accompanying text.

71. See generally Lawrence P. King, *The History and Development of the Bankruptcy Rules*, 70 AM. BANKR. L.J. 217 (1996) (discussing in great detail the history and process of bankruptcy rulemaking).

72. See Bankruptcy Rules & Official Forms, 425 U.S. 1003 (1975); Bankruptcy Rules & Official Bankruptcy Forms, 411 U.S. 989, 991 (1972); King, *supra* note 71, at 220 (describing the decision to draft and promulgate the rules in parts, so that the

as the substantive provisions, of bankruptcy law.⁷⁴ Prior to that time, experience in drafting separate procedural rules for bankruptcy was extremely limited.⁷⁵

In 1964, Congress granted bankruptcy rulemaking authority to the Supreme Court.⁷⁶ For the first time, it was possible to draft a complete set of rules to provide for all procedural matters that may arise in bankruptcy cases. The Advisory Committee charged with drafting the rules decided to approach this awesome task chapter by chapter.⁷⁷ As draft rules were completed by the Committee, they were disseminated to the bench and bar for comment. Finally, in April of 1976, after many years of tedious and faithful work by the Committee, the final set of rules were promulgated.⁷⁸

The enactment of the Bankruptcy Code,⁷⁹ with its extensive changes to the bankruptcy laws, made revisions to the rules an absolute necessity. The Code was enacted in 1978 with an effective date of October 1, 1979, but it was not until January 1, 1979, that a new Advisory Committee began its work on the new set of rules. This gave the Advisory Committee a mere nine months to draft a new set of rules to complement extensively modified bankruptcy laws. Even with the existence of a model to follow, nine months was a very short time when

effective dates of the first set of rules are different for different parts of the package of rules).

73. Bankruptcy Act of 1898, Pub. L. No. 55-171, 30 Stat. 544 (repealed 1978).

74. See King, *supra* note 71, at 217 (“At least seventy percent of the Bankruptcy Act, if not more, was procedural.”).

75. See King, *supra* note 71, at 217-18. An Advisory Committee on Bankruptcy Rules was appointed in 1960 by the Chief Justice as Chair of the Judicial Conference of the United States to study the bankruptcy procedural rules contained in the General Orders in Bankruptcy and Official Forms and to recommend amendments. These committee members gained experience with drafting proposed rules, although the scope of their review was quite limited.

76. The statute read as follows:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act. Such rules shall not abridge, enlarge, or modify any substantive right. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Bankruptcy Act, Pub. L. No. 88-623, § 1, 78 Stat. 1001 (current version at 28 U.S.C. § 2075 (1994)).

77. King, *supra* note 71, at 224.

78. See Bankruptcy Rules and Official Bankruptcy Forms, 425 U.S. 1003 (1975).

79. 11 U.S.C. §§ 101-1330 (2000) (as enacted by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978)) [hereinafter Bankruptcy Code].

compared to the twelve years that the first Advisory Committee took to draft the initial set of rules.⁸⁰ In light of this short time period, the Advisory Committee decided that the best course of action was to draft a set of interim rules.⁸¹ The sole goal of the Advisory Committee in drafting the interim rules was to fill the gaps between the new Code and the existing rules; this goal was completed in August of 1979.⁸² These interim rules were adopted as local rules and were used between the effective date of the new Code and the promulgation of the replacement rules. No effort was made at that point to make a detailed study of the existing rules to determine which rules required modification or deletion in light of the broader range of cases that the bankruptcy court could hear under the Code.

The Advisory Committee then began its work on the permanent set of rules. During the time that the Committee was taking comments on the interim rules, the United States Supreme Court decided a landmark case, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁸³ The far-reaching implications of this case caused concern among members of the bankruptcy bar and bench, who promptly turned their attention to it. No changes were made to the proposed permanent rules as a direct result of this case because the Committee did not think that the rules contained anything that pertained to jurisdiction and because it was hoped that proposed legislation would resolve the entire issue.⁸⁴ If the Committee had reviewed its work on the rules in light of the *Northern Pipeline* decision before sending them on to the Judicial Conference and the Supreme Court, it is possible that matters, like the appointment of special masters, might have been discussed more thoroughly and different decisions might have been made.

80. King, *supra* note 71, at 220-33.

81. See King, *supra* note 71, at 237.

82. JUD. CONF. OF THE U.S., COMM. ON RULES OF PRAC. & PROC., PRELIMINARY DRAFT OF PROPOSED NEW BANKRUPTCY RULES AND OFFICIAL FORMS, xix (1982).

83. 458 U.S. 50 (1982). In this case, a Chapter 11 debtor filed suit in the bankruptcy court against Marathon for damages based on a breach of contract and warranty, as well as misrepresentation, coercion, and duress. *Id.* at 56. Under the Bankruptcy Act of 1898, this kind of action would have been outside of the jurisdiction of the bankruptcy court, and the proper place to bring the action would have been the state court. The Bankruptcy Code had broadened the jurisdiction of the bankruptcy court so that it had jurisdiction to hear this kind of claim—one that was not directly a part of the bankruptcy matter. *Id.* at 54-55. The Supreme Court held that this broadened jurisdiction unconstitutionally vested the bankruptcy judges with “judicial power” without granting them the protection of Article III status. *Id.* at 87.

84. H.R. 6978, 97th Cong. (2d Sess. 1982) (reintroduced in the 98th Congress as H.R. 3, 98th Cong. (1983)). Granting bankruptcy judges Article III status would have done much toward resolving the jurisdictional issue.

C. *Evolution of the Bankruptcy Court*

A discussion of the role and status of the bankruptcy judge under the Bankruptcy Act provides some background against which the prohibition against special masters in bankruptcy cases under the Code can be better understood. This is helpful in understanding why the Committee thought that there would be no need to make FRCP 53 applicable under the Code.

Until 1973 under the Bankruptcy Act, the person who presided over bankruptcy cases held the position of “referee in bankruptcy.”⁸⁵ The “referee in bankruptcy” had limited jurisdiction over most bankruptcy cases. In Chapter X corporate reorganizations, the jurisdiction of the “referee in bankruptcy” was so limited that the “referee” served only as a special master to hear and report generally or upon specified matters to the district court judge.⁸⁶ When the “referee” acted in a Chapter X case, former Bankruptcy Rule 513 applied to make FRCP 53 applicable in those instances, rendering the “referee in bankruptcy” a special master appointed by the district court.⁸⁷ Under the Chandler Act of 1938,⁸⁸ the duties and workload of the “referee in bankruptcy” increased tremendously, but the jurisdiction of the court was still limited. In 1973, the title “referee in bankruptcy” was changed to “United States bankruptcy judge” due, in part, to recognition of the increased duties required of this

85. See H.R. REP. NO. 95-595, at 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5969.

86. The Bankruptcy Act of 1898, ch. 541, § 117, 30 Stat. 544 (1898) (repealed 1978); *see, e.g.*, *Faucher v. Lopez*, 411 F.2d 992, 995 (9th Cir. 1969) (The district court appointed the bankruptcy referee as special master to decide issues of fraud in the bankruptcy case.).

87. FED. R. BANKR. P. 513 (repealed Aug. 1, 1983), *reprinted in* 12 COLLIER ON BANKRUPTCY, at 5-103 (James Wm. Moore & Lawrence P. King eds., 14th ed. 1978) (“If a reference is made in a bankruptcy case by a judge to a special master, the Federal Rules of Civil Procedure applicable to masters apply.”); *see also* 12 COLLIER ON BANKRUPTCY ¶ 513.6, at 5-106 (James Wm. Moore & Lawrence P. King eds., 14th ed. 1978) (discussing the district court judge’s retention of jurisdiction in Chapter X corporate reorganization proceedings and that judge’s reference of a proceeding under Chapter X to a referee in bankruptcy acting as a special master). The court in *United States v. Manning*, 215 F. Supp. 272, 293 (W.D. La. 1963), described the role of the bankruptcy referee:

Rule 53 of the Federal Rules of Civil Procedure allows a district court to appoint a ‘standing’ master for its district or a ‘special master’. As used in [the] rules the word “master” includes a referee, an auditor, and an examiner. Rule 53. . . . A Referee in Bankruptcy has even more power than a master: he may render a binding judgment.

88. Chandler Act, ch. 575, § 60e, 52 Stat. 883 (1938) (repealed 1979).

position.⁸⁹ Nevertheless, the new bankruptcy judges still did not have any greater jurisdiction than before.

In 1978, Congress enacted dramatically new bankruptcy legislation, which created and conferred on the bankruptcy courts very broad jurisdiction.⁹⁰ One of Congress's goals in reforming the bankruptcy laws was to create more efficient procedures for administering bankruptcies. To achieve this goal, Congress chose to vest broad powers and jurisdiction directly in the bankruptcy courts.⁹¹ Even before Congress had an opportunity to enact permanent Bankruptcy Rules to accompany its newly enacted Bankruptcy Code,⁹² its efforts were very quickly and successfully challenged in the landmark *Northern Pipeline* case.⁹³ The Supreme Court in *Northern Pipeline* held that the jurisdictional provisions of the Bankruptcy Code of 1978 were unconstitutional primarily because the Code had vested Article III⁹⁴ judicial power in non-Article III judges—judges who lacked lifetime tenure and protection against salary diminution.⁹⁵ Under the Bankruptcy Code, Congress granted to the bankruptcy courts all of the usual powers of the district courts, including the power to hear jury trials and to issue final judgments that were binding and enforceable in the absence of an appeal.⁹⁶ The Supreme Court held that this grant of judicial power without a grant of Article III status was unconstitutional as a violation of the separation of powers.⁹⁷ After the *Northern Pipeline* decision, Congress enacted amendments to the Bankruptcy Code to address the jurisdictional issues raised by the case.⁹⁸ In the 1984 Amendments, Congress gave federal district courts

89. FED. R. BANKR. P. 901(7) (repealed Aug. 1, 1983); see Joseph C. Zavatt, *The Use of Masters in Aid of the Court in Interlocutory Proceedings*, 22 F.R.D. 283, 285 (1958) (“Over the years since the Act of 1898, [the powers of referees in bankruptcy] (subject to review) have been extended . . . to the point where (since 1938) they have the power to grant or deny discharges—a power formerly reserved to the District Court Judge sitting as a bankruptcy court.”).

90. See *supra* note 76.

91. See generally Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. REV. 5 (1995).

92. Bankruptcy Rules, 461 U.S. 973 (1982) (Permanent rules for the 1978 Bankruptcy Code were not promulgated until 1983.).

93. 458 U.S. 50 (1982).

94. See *supra* note 12.

95. *Northern Pipeline*, 458 U.S. at 63.

96. See 28 U.S.C. § 1471(b) (This Section was added by Act of Nov. 6, 1978, Pub. L. 95-598, 92 Stat. 2668 (1978), but did not become effective pursuant to § 402(b) of such Act.).

97. *Northern Pipeline*, 458 U.S. at 85.

98. Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 378 (1984). The amendments to the Code to address the issues in *Northern Pipeline* took a considerable period of time, during which bankruptcy cases were in limbo. The obvious solution was

exclusive jurisdiction “over all cases under title 11” and nonexclusive jurisdiction “of all civil proceedings arising under title 11, or arising in or related to cases under title 11.”⁹⁹ The district courts have exclusive jurisdiction, under

to make the bankruptcy judges Article III judges, but this had been rejected during the enactment process of the Reform Act and continued to be opposed. In a later amendment to the Bankruptcy Code, however, Congress created a Bankruptcy Review Commission, which recommended Article III status for bankruptcy judges to increase the efficiency of the bankruptcy process. The Commission pointed to the costs caused by the Article I status of bankruptcy judges, including those primarily associated with the necessity of drawing jurisdictional lines between core and non-core proceedings, and those caused by the constitutional uncertainty over the definition of core proceedings. NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS § 3.1, at 718, 722-24, 732-35, 737-39 (1997). Both before and after this recommendation, many commentators advocated Article III status for bankruptcy judges. *See, e.g.*, Susan Block-Lieb, *The Costs of a Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L.J. 529, 544-46 (1998) (pointing to the costs caused by dividing bankruptcy jurisdiction between the district and bankruptcy courts, including the delays caused by the division, and the doctrinal and constitutional uncertainty caused, and advocating Article III status for bankruptcy judges); Christopher F. Carlton, *Greasing the Squeaky Wheels of Justice: Designing the Bankruptcy Courts of the Twenty-First Century*, 14 BYUJ. PUB. L. 37, 45-46 (1999). In his article, Mr. Carlton examined several proposals to amend the Bankruptcy Code and recommended Article III status for bankruptcy judges. He quoted the legislative history of the Reform Act of 1978's discussion of granting Article III status to bankruptcy judges:

[T]he Constitution suggests that an independent bankruptcy court must be created under Article III. Article III is the constitutional norm, and the limited circumstances in which the courts have permitted departure from the requirements of Article III are not present in the bankruptcy context. Even if they were present, the text of the Constitution and the case law indicate that a court created without regard to Article III most likely could not exercise the power needed by a bankruptcy court to carry out its proper functions Congress should establish the proposed bankruptcy court under Article III, with all of the protection that the Framers intended for an independent judiciary.

Carlton, *supra*, at 45 n.55 (quoting H.R. REP. NO. 95-598, at 390 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6000). *But see generally* Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567 (1998) (citing historical and constitutional policy reasons why Article I status is desirable for bankruptcy judges).

Granting Article III status to bankruptcy judges, however, would not resolve the problem of the appointment of special masters in bankruptcy. Rule 9031 prohibits the appointment of special masters in any bankruptcy case, whether before an Article III judge or not. *See supra* note 61-62 and accompanying text.

99. 28 U.S.C. § 1334(a)-(b) (1994) (granting district courts original and exclusive jurisdiction over “all cases under title 11,” and original but not exclusive jurisdiction over “all civil proceedings arising under title 11, or arising in or related to cases under title

the 1984 Amendments, over all property of the bankruptcy estate wherever it is located.¹⁰⁰ Through these amendments, Congress chose to give broader jurisdiction over bankruptcy matters to the district courts. Congress dealt with the status of the bankruptcy judges by declaring that they constitute a “unit” of the district court called the bankruptcy court.¹⁰¹ The district courts may refer all bankruptcy cases and proceedings within their jurisdiction to the bankruptcy courts,¹⁰² but, under the 1984 Amendments, the proceedings are divided into “core” and “non-core” matters with bankruptcy judges being permitted to “hear and determine” the matter and enter final judgment only in the “core” proceedings.¹⁰³ During and after the time that *Northern Pipeline* was making its

11”). “Case” refers to the procedure followed in the administration of the debtor’s estate and “proceeding” refers to the disputes occurring during the bankruptcy case. See 1 COLLIER ON BANKRUPTCY ¶¶ 3.01[1][c][i]-[ii], at 3-20 to 3-27 (Lawrence P. King ed., 15th ed. rev. 2001).

100. 28 U.S.C. § 1334(e) (1994).

101. See 28 U.S.C. § 151 (1994). Section 151, “Designation of bankruptcy courts,” states:

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 151 (1994).

102. 28 U.S.C. § 157(a) (1994). Section 157(a) states that: “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.” 28 U.S.C. § 157(a) (1994).

103. 28 U.S.C. § 157(b)(1) (1994). Dividing the bankruptcy proceedings into “core” and “non-core” proceedings permitted Congress to allow bankruptcy judges to hear bankruptcy cases while maintaining Article I status without running afoul of *Marathon*. In its opinion in *Northern Pipeline*, the Court recognized an exception to the separation of powers that permitted Congress to set up legislative courts in specialized areas like bankruptcy where the adjudication of a “public right” is involved. The “core” matters involve issues directly related to the restructuring of the debtor-creditor relationship, the “public right;” these matters may be heard by the bankruptcy judge subject only to appeal. 28 U.S.C. § 158 (1994). Under 28 U.S.C. § 157(c)(1), there are circumstances under which bankruptcy judges may hear “non-core” proceedings:

A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge’s proposed findings and conclusions and after reviewing *de novo* those matters to which any party

way to the Supreme Court, bankruptcy courts were operating under the rules adopted under the Bankruptcy Act and interim rules designed to fill the gaps between the Bankruptcy Code and the original rules under the Act.¹⁰⁴ The first permanent rules were being drafted for the new Bankruptcy Code at the same time as amendments were being made to the Code to address the *Northern Pipeline* jurisdictional issues.¹⁰⁵ These jurisdictional issues also needed to be addressed in the rules. It may have been the haste and confusion of the day that led to the unexplained conclusion that special masters could not be appointed in bankruptcy cases.¹⁰⁶ Whatever the reason, what resulted was Rule 9031 with its inadequately explained prohibition against the appointment of special masters in bankruptcy cases.¹⁰⁷ A court's inability to use as important a case management device as special masters hinges on Rule 9031, a rule with virtually no explanation or justification—and one that appears to have been drafted in haste, without significant consideration given to its significant impact.

V. NO COMPARABLE ROLE EXISTS

Special masters are appointed by the court to assist in cases where the issues are complicated and where exceptional conditions exist, or in matters of account and where there are difficult damages computations.¹⁰⁸ The special master is appointed to assist the court in cases in which the court deems help necessary to

has timely and specifically objected.

28 U.S.C. § 157(c)(1) (1994).

104. *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States*, in [A] COLLIER ON BANKRUPTCY app. pt. 2(b), at 2-116 to 2-119 (Lawrence P. King ed., 15th ed. rev. 2001).

105. *See supra* notes 83-84 and accompanying text.

106. *See generally* [A] COLLIER ON BANKRUPTCY app. pt. 2(b), at 2-122 (Lawrence P. King ed., 15th ed. rev. 2001).

107. The possibility exists that the Committee Notes were drafted with the former practice of having bankruptcy referees act as special masters in Chapter X cases under the former Bankruptcy Act in mind. At least one judge has suggested that Rule 9031 was drafted with this former practice in mind. *See In re S. Portland Shipyard & Marine Rys. Corp.*, 32 B.R. 1012, 1020 n.9 (D. Me. 1983). The *In re S. Portland* court stated:

Rule 9031 was enacted because the new Code, if left intact, would have made the reference of bankruptcy cases superfluous. . . . The new Code was not left intact, however; . . . Rule 9031, which specifically addressed the situation in which all bankruptcy cases are to be heard by Bankruptcy Judges in the first instance, is incongruous in the situation created by *Northern Pipeline* whereby the District Court is to exercise bankruptcy jurisdiction.

Id. at 1021 n.10. The Committee never may have contemplated bankruptcy judges appointing special masters in bankruptcy cases.

108. FED. R. CIV. P. 53(a)-(b).

further the administration of justice.¹⁰⁹ The role of the special master is to represent the court in carrying out specified duties, as directed by the appointing court. The Bankruptcy Code does not provide for the appointment of a person in a comparable position. The Bankruptcy Code does provide for the appointment of trustees and examiners.¹¹⁰ In fact, the Code mandates that, under certain circumstances, the court must appoint examiners and trustees after a request to do so¹¹¹ is made by a party in interest¹¹² or the United States Trustee.¹¹³

109. See *Ex parte Peterson*, 253 U.S. 300, 312 (1920) (Justice Brandeis, referring to the role of the special master, stated that he or she is an “instrument for the administration of justice [to be employed by the court] when deemed by it essential.”); *United States v. Manning*, 215 F. Supp. 272, 293 (W.D. La. 1963) (noting that the special master is charged with the same obligations of a judicial officer).

110. 11 U.S.C. §§ 704, 1104, 1106, 1202, 1302 (2000) (explaining the duties of a trustee in a Chapter 7 case, the appointment of a trustee or examiner in a Chapter 11 case, the duties of a trustee and examiner, and the duties of trustee in a Chapter 12 case, respectively). For an excellent discussion of the role of the examiner and a comparison of that role to that of the trustee, see Leonard L. Gumpport, *The Bankruptcy Examiner*, 20 CAL. BANKR. J. 71 (1992).

111. 11 U.S.C. § 1104 (2000) provides in relevant part:

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States Trustee, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor. . . .

(c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or by current or former management of the debtor, if

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor’s fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed \$5,000,000.

112. No definition for the term “party in interest” is provided in the Bankruptcy Code. Some guidance is provided in 11 U.S.C. § 102 (2000). The Legislative Statement

When they are appointed, trustees and examiners represent the bankruptcy estate, have very broad duties, and are required to perform comprehensive acts for the benefit of the entire estate,¹¹⁴ such as accounting for property received,

provides that: “[r]ules of bankruptcy procedure or court decisions will determine who is a party in interest for the particular purposes of the provision in question. . . .” 11 U.S.C. § 102 (2000).

113. 28 U.S.C. §§ 581-589 (1994) (These provisions describe the United States Trustee system, which was designed, in large part, to perform and oversee the administration of bankruptcy cases.)

114. 11 U.S.C. § 323(a) (2000) provides, in relevant part, that “[t]he trustee in a case under this title is the representative of the estate.” 11 U.S.C. § 1106 (2000) provides, in relevant part:

A trustee shall—

- (1) perform the duties of a trustee specified in sections 704(2), 704(5), 704(7), 704(8), and 704(9) of this title;
- (2) if the debtor has not done so, file the list, schedule, and statement required under section 521(1) of this title;
- (3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor’s business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
- (4) as soon as practicable—
 - (A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and
 - (B) transmit a copy or a summary of any such statement to any creditors’ committee or equity security holders’ committee, to any indenture trustee, and to such other entity as the court designates

....

(b) An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.

11 U.S.C. § 704 (2000) provides:

The trustee shall—

- (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;
- (2) be accountable for all property received;
- (3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;
- (4) investigate the financial affairs of the debtor;
- (5) if a purpose would be served, examine proofs of claims and object

examining proofs of claims, furnishing information concerning the estate to parties in interest who have made requests, filing periodic reports of the operation of the business with taxing authorities, and making final reports to the court on the administration of the estate.¹¹⁵

In contrast, the special master is appointed by the court to represent the court by performing narrow, well-delineated tasks.¹¹⁶ District courts order the special master to perform these well-delineated tasks in a very limited manner and for a specific proceeding within a case—not for the entire case.¹¹⁷ Special masters have a different mission, different loyalties, and different supervisors than do trustees and examiners. Trustees and examiners are not authorized under the Code to perform the vast majority of tasks that a court would need and appoint a special master to perform.¹¹⁸

It is the general goal of all courts to conserve judicial resources and to enhance the efficiency of the court with regard to its case management.¹¹⁹ Even as “units” of the district court,¹²⁰ bankruptcy courts share this same goal. Trustees and examiners, however, cannot help the bankruptcy courts in reaching this goal of conserving judicial resources and enhancing the efficiency of the courts with regard to case management. In Section 1104, where the Code provides for the appointment of trustees and examiners, there is nothing within

- to the allowance of any claim that is improper;
- (6) if advisable, oppose the discharge of the debtor;
- (7) unless the court orders otherwise, furnish such information concerning the estate and the estate’s administration as is requested by a party in interest;
- (8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and
- (9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

115. 11 U.S.C. § 704 (2), (7), (8), (9) (2000).

116. *See supra* notes 14, 21-31, and accompanying text.

117. *See supra* note 14 and accompanying text. In fact, it is when courts have appointed a special master to perform tasks that amount to full and complete fact-finding in the case that courts find the appointment improper as a substitute for the judicial role.

118. Compare the duties of the trustee and examiner under 11 U.S.C. §§ 704, 1106, 1202, 1302 (2000), with the powers of the special master under FED. R. CIV. P. 53. *See also supra* notes 15-31 and accompanying text.

119. *See supra* notes 27-28 and accompanying text.

120. 28 U.S.C. § 151 (1994).

the outlined duties that would reflect the goal of providing assistance to the court.¹²¹ There are alternate standards provided for the appointment of trustees and examiners,¹²² and the trustee and the examiner have different duties; however, the appointment of these individuals is not designed to assist the courts in the management of the case.

The trustee's duties are to protect the debtor's assets for its creditors and equity security holders.¹²³ The trustee has broad powers to carry out this goal, including ousting the debtor's current management and operating the business directly. The examiner is appointed to conduct an investigation of the debtor.¹²⁴ The Code appears to contemplate that what the examiner will investigate is improper conduct by, toward, or involving the debtor.¹²⁵ The goal of the investigation by the examiner is directed at providing information about the feasibility and wisdom of the continued operation of the Chapter 11 debtor's business. The goal does not appear to be directed at the courts' management of the case as much as it is at the protection of the Chapter 11 debtor's creditors and equity security holders.¹²⁶ The examiner's investigation may provide information that ultimately effects the management of the cases; however, it is not the management of the case itself that the examiner's appointment is designed to effect.

Traditionally, special masters have been appointed in complicated two-party and class-action litigation.¹²⁷ In bankruptcy cases, particularly in proceedings brought to determine the dischargeability of debts¹²⁸ in complex commercial cases, problems related to the computation of damages may be quite complicated and may involve voluminous documents and repeated disputes among different claimants regarding quite similar matters, in much the same way as in two-party and class-action litigation. Although trustees and examiners may be appointed by the bankruptcy court,¹²⁹ the duties of the trustee and examiner as described in the Code¹³⁰ do not include providing case management assistance to the court in litigation matters like the discharge of debts, one of the very areas where complicated matters of account or computation are most likely to occur. In these

121. 11 U.S.C. § 1104(c) (2000).

122. 11 U.S.C. § 1104(a)(1), (c) (2000).

123. *See* 11 U.S.C. § 704 (2000).

124. 11 U.S.C. §§ 1104(c), 1106(a)(3)-(4), (b) (2000).

125. 11 U.S.C. § 1104(c) (2000).

126. 11 U.S.C. § 1104(c) (2000).

127. *See, e.g.,* Brazil, *Special Masters, supra* note 3.

128. 11 U.S.C. § 523(a)(1)-(16) (2000).

129. Examiners only may be appointed in Chapter 11 cases. *See* 11 U.S.C. §§ 103, 901 (2000).

130. *See supra* note 110 and accompanying text.

matters, the bankruptcy court is not authorized to appoint an individual with the expertise to assist the court in expediting these matters.

VI. INHERENT AUTHORITY OF COURTS OF EQUITY

The authority of courts to control and direct the business of the court in the interest of the sound and efficient administration of justice flows from the very nature of a judicial body and requires no grant of power other than that which creates the court and gives it jurisdiction. In fact, much of what courts must do in the conduct of their business is not provided for in any rule or statute and necessarily relies on inherent authority. The court's inherent authority to direct its business in the interest of the efficient administration of justice provides courts with significant leeway in conducting the business of the court. This inherent authority is well established and widely accepted in the federal judiciary.¹³¹

The historical development of the courts' authority to appoint special masters began in English courts of equity.¹³² In this country, former Equity Rule 68, "Appointment and Compensation of Master," and former Equity Rule 59, "Reference to Master—Exception, Not Usual," provided the first statutory basis for the appointment of special masters; FRCP 53 developed as a modification of those rules.¹³³ Courts and commentators have emphasized that beyond FRCP 53, courts of equity have the inherent power to appoint special masters.¹³⁴ While

131. See, e.g., *Veneri v. Draper*, 22 F.2d 33, 35 (4th Cir. 1927) ("There can be no question, we think, that under the federal practice the judge has the power in a proper case to refer a cause to an auditor for the purpose of simplifying the issues and thereby enabling the court and the jury to more readily determine the matters in dispute."); *United States v. Conservation Chem. Co.*, 106 F.R.D. 210, 217-21 (W.D. Mo. 1985) (citing and reviewing numerous cases in which special masters were appointed to assist the court in various ways); *Jordan v. Wolke*, 75 F.R.D. 696, 701 (E.D. Wis. 1977) (appointing a special master pursuant to its inherent authority); Farrell, *Coping with Scientific Evidence*, *supra* note 3, at 943-44; Jacob, *supra* note 3, at 34.

132. See *supra* text accompanying notes 4-5.

133. Rules of Practice for the Courts of Equity of the United States, 42 U.S. (1 How.) xli-lxx (1842).

134. See, e.g., *Ex parte Peterson*, 253 U.S. 300, 312 (1920) ("Courts have . . . inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause."); *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir. 1982) (The federal courts' equitable power to appoint special masters to supervise implementation of decrees long has been established.), *cert. denied*, 460 U.S. 1042 (1983); *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) ("Beyond the provisions of Rule 53, Federal Rules of Civil Procedure, 28 U.S.C.A., for appointing and

some commentators have suggested that FRCP 53 is not applicable to pretrial phases of a civil lawsuit, they have observed that federal courts may have the power to appoint a special master in pretrial matters under their inherent authority.¹³⁵

The fact that the federal courts' inherent authority to appoint special masters existed prior to FRCP 53 has been thoroughly researched and discussed by Wayne D. Brazil.¹³⁶ He noted that "the Advisory Committee's intent in drafting Rule 53 was to preserve the essentials of the system of referencing as it existed under the Federal Equity Rules between 1912 and 1938."¹³⁷ The "essentials of the system," as they relate to the duties of the special master, included appointing special masters to assist the courts by gathering and analyzing relevant data from complex financial records and making recommendations to the court, to aid in computing damages and in providing other well-defined assistance on specific, narrow issues.¹³⁸

This is exactly the kind of assistance that bankruptcy courts need—assistance in performing very specific and well-focused tasks.¹³⁹ Bankruptcy courts are recognized as courts of equity,¹⁴⁰ and, as such, they have the inherent authority to appoint special masters to perform these same specific, narrow, well-defined tasks that special masters were appointed to perform by

making references to Masters, a Federal District Court has 'the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.'" (quoting *Peterson*, 253 U.S. at 312)); *Westchester Fire Ins. Co. v. Bringle*, 86 F.2d 262, 263 (6th Cir. 1936); *Jordan v. Wolke*, 75 F.R.D. 696, 701 (E.D. Wis. 1977) ("This appointment [of a special master] is made pursuant to the court's general equity powers and not under Rule 53, Federal Rules of Civil Procedure."); *Conn. Importing Co. v. Frankfort Distilleries, Inc.*, 42 F. Supp. 225, 226 (D. Conn. 1940) ("The power of the court so to proceed [to appoint a special master] is beyond question. It exists independent of the rule. Rule 53 serves but to outline the procedure to be followed when the power is exercised."); *Thompson v. Smith*, 23 F. Cas. 1092, 1093 (C.C. Ohio 1869) ("[A]cted under the authority of a well-established principle, that the courts of the United States, in the exercise of their chancery powers, possess an inherent authority, in proper cases, to order a reference to a master."); Kaufman, *supra* note 5, at 462 ("There has always existed in the federal courts an inherent authority to appoint masters. . .").

135. See generally MANUAL FOR COMPLEX LITIGATION § 20.14, at 16 (3d ed. 1982); Brazil, *Referring Discovery Tasks*, *supra* note 17, at 143.

136. Brazil, *Referring Discovery Tasks*, *supra* note 17, at 149-60.

137. Brazil, *Referring Discovery Tasks*, *supra* note 17, at 149 (citing statements of Robert G. Dodge, a member of the original Advisory Committee, and Edgar B. Tolman, the secretary of the Advisory Committee on the rules for civil procedure).

138. Brazil, *Referring Discovery Tasks*, *supra* note 17, at 155.

139. See *supra* notes 33-41 and accompanying text.

140. See *Curtis v. Loether*, 415 U.S. 189, 195 (1974); *Bank of Marin v. England*, 385 U.S. 99, 103 (1966).

courts of equity prior to the enactment of FRCP 53. Bankruptcy courts have not relied upon this inherent authority to appoint special masters presumably because of the existence of Rule 9031.¹⁴¹

The only current prohibition against the appointment of a special master in bankruptcy is this procedural rule. There is no statutory provision within the Bankruptcy Code that prohibits the appointment of special masters. The Code expressly prohibits the appointment of receivers¹⁴² through a specific statutory

141. Significant controversy exists regarding the relationship between written procedural rules and inherent judicial authority, and the extent to which procedural rules can and should limit courts' inherent authority over their process and procedure. The fact that a procedural rule addresses specific issues does not necessarily mean that a court successfully cannot assert its inherent authority to allow it to deal with those same issues. Courts sometimes find that the rules can be interpreted so that pre-existing inherent authority simply supplements the rules. *See, e.g.,* *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991); *Link v. Wabash R.R.*, 370 U.S. 626, 629-33 (1962) (holding that FED. R. CIV. P. 41(b) authorizing dismissals on the motion of the defendant did not deprive courts of their inherent authority to dismiss without such a motion). The Court in *Chambers* rejected the argument that the sanction provisions of FED. R. CIV. P. 11 and 28 U.S.C. § 1927 restrict the court's inherent authority, and stated:

We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct [in this case]. These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions.

Chambers, 501 U.S. at 46. *But see* *Brooks Fashion Stores v. Mich. Employment Sec. Comm'n*, 124 B.R. 436, 440 (Bankr. S.D.N.Y. 1991) ("The Bankruptcy Rules were promulgated by the Supreme Court pursuant to authority granted by Congress in 28 U.S.C. § 2075. As such, the Rules have the force of law."); John Papachristo, Comment, *Inherent Power Found, Rule 11 Lost: Taking a Short Cut to Impose Sanctions in Chambers v. NASCO*, 59 BROOK. L. REV. 1225, 1250-65 (1993) (arguing that the rules should be construed generally to pre-empt inherent authority).

Bankruptcy judges have not appointed special masters routinely pursuant to the inherent equitable powers granted the bankruptcy court under Bankruptcy Code § 105(a): "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (2000). Although § 105 serves as the depository of the bankruptcy court's inherent equitable powers, vesting the court with the power to issue orders necessary to carry out the provisions of the Bankruptcy Code, bankruptcy judges apparently have felt constrained by Rule 9031.

142. 11 U.S.C. § 105(b) (2000) ("Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title."). Under the former Act, the bankruptcy judge had the power to appoint receivers in bankruptcy cases, but the Bankruptcy Code replaced the role of the receiver in bankruptcy with the interim trustee. Under the Bankruptcy Code, there no longer was a need to appoint the receiver as under the former law. *See generally* BENJAMIN WEINTRAUB & ALAN N. RESNICK, *BANKRUPTCY LAW MANUAL* ¶ 6.02, at 6-4 to 6-7 (3d ed. 1992).

provision. If the drafters had specific and strong reasons why special masters should not be appointed in bankruptcy cases, it is likely that they would have drafted an express statutory provision, as opposed to a procedural rule, as they did regarding receivers.¹⁴³ However, the drafters failed to do so.

VII. CONCLUSION

There are many reasons to permit bankruptcy courts to benefit from the unique services of special masters in the unusually complex bankruptcy case or proceeding—chief among them is an interest in the sound and efficient administration of justice. There are very few sound reasons to deny bankruptcy courts the benefit of special masters. In fact, Rule 9031, which is the sole prohibition against the appointment of special masters in bankruptcy cases, cites no reason at all for denying courts the benefit of this well-accepted case management device.

Many authorities have concluded that no express statutory basis is required for courts of equity to appoint a special master.¹⁴⁴ These authorities hold that courts of equity have inherent power and authority to do that which is necessary to carry out their duties, including appointing persons unconnected with the case to assist the courts in performing their duties.¹⁴⁵

The effect of Federal Rule of Bankruptcy Procedure 9031 is to deny both the district court and the bankruptcy court the right to appoint a special master in appropriate cases. In denying these courts the power to appoint special masters in bankruptcy cases, Rule 9031 abridges the inherent power of both the district court and the bankruptcy court to act as courts of equity by employing a traditional tool available to a court of equity.¹⁴⁶ But, more significantly, it deprives debtors and creditors of the opportunity to benefit from this traditional judicial resource.

Congress expressly has authorized the Supreme Court to prescribe rules for the Bankruptcy Court.¹⁴⁷ However, in authorizing the Court to prescribe these rules, Congress provided that: “[s]uch rules shall not abridge, enlarge, or modify any substantive right.”¹⁴⁸ The inherent power of courts to appoint special masters is a long-standing and well-accepted substantive right that, arguably, has been impermissibly abridged by this procedural rule. A procedural rule should

143. 11 U.S.C. § 105(b) (2000).

144. See *supra* notes 131-38 and accompanying text.

145. See *supra* notes 131-38 and accompanying text.

146. See *supra* notes 131-38 and accompanying text.

147. 28 U.S.C. § 2075 (1994) (“The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under Title 11.”).

148. 28 U.S.C. § 2075 (1994).

not function in a way that, even arguably, modifies an inherent right of the court.¹⁴⁹ Rule 9031 should be abrogated, and a new rule that would permit the appointment of special masters in bankruptcy cases consistent with the substantive rights of a court of equity should be promulgated.

149. See *In re Oliver*, 452 F.2d 111, 114 (7th Cir. 1971) (“[N]o rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law.”).