



1993

## In re Grabill Corporation: Another No for Jury Trials in the Bankruptcy Courts

William J. Delany

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Bankruptcy Law Commons](#)

---

### Recommended Citation

William J. Delany, *In re Grabill Corporation: Another No for Jury Trials in the Bankruptcy Courts*, 38 Vill. L. Rev. 203 (1993).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol38/iss1/5>

This Note is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

1993]

## Notes

### IN RE GRABILL CORPORATION: ANOTHER "NO" FOR JURY TRIALS IN THE BANKRUPTCY COURTS

#### I. INTRODUCTION

The United States Supreme Court has interpreted the Seventh Amendment to grant a right to a jury trial in certain bankruptcy proceedings.<sup>1</sup> A debate has emerged among federal courts over whether bankruptcy courts have the authority to conduct jury trials or whether such courts must refer jury trial cases to a district court.<sup>2</sup> The authority

1. *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 64-65 (1989) (holding that Seventh Amendment right to jury trial applied to fraudulent conveyance action referred to bankruptcy court).

2. Complicating the jury trial issue is the fact that a bankruptcy proceeding may be either of two types: core or non-core. 28 U.S.C. § 157 (1988). Several circuit and district courts have determined that bankruptcy courts do not have the power to conduct jury trials in any proceeding. *See, e.g.,* *Rafoth v. National Union Fire Ins. Co. (In re Baker & Getty Fin. Servs., Inc.)*, 954 F.2d 1169, 1173 (6th Cir. 1992) (holding that bankruptcy courts lack statutory authority to conduct jury trials); *Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.)*, 911 F.2d 380, 391-92 (10th Cir. 1990) (holding that bankruptcy courts lack statutory authority to conduct jury trials); *In re United Mo. Bank*, 901 F.2d 1449, 1457 (8th Cir. 1990) (same); *Taxel v. Marine Midland Business Loans, Inc. (In re Palomar Elec. Supply, Inc.)*, 138 B.R. 959, 961-63 (S.D. Cal. 1992) (holding that jury trials in bankruptcy courts are unconstitutional in non-core matters and finding no statutory grant of power to conduct jury trials in core matters); *Torcise v. Community Bank of Homestead*, 131 B.R. 503, 507 (S.D. Fla. 1991) (finding no express authority and refusing to grant such authority due to Congress' silence on issue); *Growers Packing Co. v. Community Bank of Homestead*, 134 B.R. 438, 442-44 (S.D. Fla. 1991) (finding no express or implied power for bankruptcy court to conduct jury trials); *Gumport v. Growth Fin. Corp. (In re Transcon Lines)*, 121 B.R. 837, 841 (C.D. Cal. 1990) (finding that "bankruptcy courts have neither the express nor the implied authority to conduct jury trials over congressionally designated 'core' or 'non-core' matters that require jury resolution"); *Fimsa, Inc. v. Marina Bay Drive Corp. (In re Marina Bay Drive Corp.)*, 123 B.R. 222, 222 (S.D. Tex. 1990) (requiring that reference to bankruptcy court be withdrawn because bankruptcy court could not conduct jury trial).

One circuit court and several district courts have held that bankruptcy courts may conduct jury trials. *See, e.g.,* *Ben Cooper, Inc. v. Insurance Co. of Pennsylvania (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1404 (2d Cir.) (finding implied grant of authority to bankruptcy courts to conduct jury trials), *vacated*, 111 S. Ct. 425, *and reinstated*, 924 F.2d 36 (2d Cir. 1990), *and cert. denied*, 111 S. Ct. 2041 (1991); *Citicorp N. Am., Inc. v. Finley (In re Washington Mfg. Co.)*, 133 B.R. 113, 118 (M.D. Tenn. 1991) (finding implied right of authority for bankruptcy courts to conduct jury trials based on intent of Congress derived from history of statutory grants of power to bankruptcy courts); *Salisbury v. Wallace (In re Wallace)*, 127 B.R. 1000, 1001 (N.D. Tex. 1991) (holding that bankruptcy courts have authority to conduct jury trials where right to jury trial is invoked); *Leonard v. Wessel (In re Jackson)*, 118 B.R. 243, 252 (E.D. Pa. 1990) (finding no

(203)

of bankruptcy courts was granted by Congress pursuant to Article I of the United States Constitution,<sup>3</sup> through the Bankruptcy Amendments and Federal Judgeship Act of 1984.<sup>4</sup> This authority is limited. It is di-

express or implied congressional authority to conduct jury trials in bankruptcy courts, but judicially creating such power based on policy considerations).

Some courts have solely determined that bankruptcy courts have no authority to conduct jury trials in *non-core proceedings*. See, e.g., *Taxel v. Electronic Sports Research (In re Cinematronics, Inc.)*, 916 F.2d 1444, 1450-51 (9th Cir. 1990) (holding that bankruptcy courts have no authority to conduct jury trials in non-core proceedings because of constitutional limitations); *Beard v. Braunstein*, 914 F.2d 434, 442-43 (3d Cir. 1990) (same); *Novak v. Lorenz (In re Novak)*, 116 B.R. 626, 627 (N.D. Ill. 1990) (finding that in non-core proceedings, because of chance that second jury trial would be required on de novo review by district court, practicalities weigh in favor of removal from bankruptcy court to district court for jury trial); *American Community Servs., Inc. v. Wright Mktg., Inc. (In re American Community Servs., Inc.)*, 86 B.R. 681, 689 (D. Utah 1988) (holding that in non-core proceedings, constitutional concerns require that district court preside over jury trial); *Reda, Inc. v. Harris Trust & Sav. Bank (In re Reda, Inc.)*, 60 B.R. 178, 182 (Bankr. N.D. Ill. 1986) (finding jury trials impermissible in bankruptcy courts in non-core proceedings).

Certain courts have held that bankruptcy courts may not conduct jury trials in non-core proceedings without the consent of the parties. See, e.g., *West Elecs., Inc. v. National Union Fire Ins. Co. (In re West Elecs., Inc.)*, No. 91-3781(GEB), 1992 U.S. Dist. LEXIS 10957, at \*28 (D.N.J. Jan. 9, 1992); *National Enters. v. Koger Partnership, Ltd. (In re Nat'l Enters.)*, 128 B.R. 956, 963 (E.D. Va. 1991) (holding that bankruptcy court is powerless to conduct jury trials in non-core proceeding where parties have not consented to final determination).

Some courts have solely determined that bankruptcy courts do have the authority to conduct just trials in *core proceedings*. See, e.g., *Miller v. Baron (In re Great Am. Mfg. & Sales, Inc.)*, 129 B.R. 633, 636-37 (C.D. Cal. 1991) (adopting reasoning of *Ben Cooper* and finding implied grant of power to bankruptcy courts to conduct jury trials in core proceedings); *Reading China & Glass Co. v. India Exotics (In re Reading China & Glass Co.)*, 126 B.R. 35, 37 (E.D. Pa. 1991) (holding that bankruptcy court had authority to conduct jury trial in core proceeding); *Walsh v. California Commerce Bank (In re Interbank Mortgage Corp.)*, 128 B.R. 269, 272-73 (N.D. Cal. 1991) (holding that bankruptcy courts have implied power to conduct jury trials in core proceedings concerning preferential payments and that power is constitutional); *Kroh Bros. Dev. Co. v. United Mo. Bank (In re Kroh Bros. Dev. Co.)*, 108 B.R. 228, 230 (W.D. Mo. 1989) (finding implied authority for bankruptcy courts to conduct jury trials in core proceedings); *Dailey v. First Peoples Bank*, 76 B.R. 963, 967 (D.N.J. 1987) (finding implied power for bankruptcy courts to conduct jury trials in core proceedings because "Congress would have made explicit its desire to abrogate the authority to hear jury cases had it intended to do so"); *McCormick v. American Investors Management, Inc. (In re McCormick)*, 67 B.R. 838, 843 (D. Nev. 1986) (finding implied power to conduct jury trials in bankruptcy court in core proceedings and proceedings where parties consent to final determination); *M & E Contractors, Inc. v. Kugler-Morris Gen. Contractors, Inc.*, 67 B.R. 260, 269 (N.D. Tex. 1986) (finding that bankruptcy court may conduct jury trials in core proceedings); *Walsh v. Long Beach Honda (In re Gaildeen Indus.)*, 59 B.R. 402, 407 (N.D. Cal. 1986) (same).

3. U.S. CONST. art. I, § 8, cl. 4.

4. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333; see also *Ex parte Bakelite Corp.*, 279 U.S. 438, 449 (1929) (noting power of Congress to create courts other than courts created pursuant to Article III of United States Constitution); *United Missouri*, 901 F.2d at

rectly limited by Congress' statutory grant of authority.<sup>5</sup> In addition, Congress' statutory grant of authority is itself limited by the Constitution.<sup>6</sup> Therefore, to determine whether bankruptcy courts have the authority to empanel juries requires an inquiry into whether such authority was granted by Congress, and, if the authority was so granted, whether the exercise of such authority is within the confines of the Constitution.<sup>7</sup>

Complicating the jury trial issue further is the requirement under the Bankruptcy Amendments and Federal Judgeship Act of 1984 that a proceeding in bankruptcy be characterized by the bankruptcy judge as either "core" or "non-core".<sup>8</sup> This characterization is significant because the Bankruptcy Amendments and Federal Judgeship Act of 1984 often treats core and non-core matters differently.<sup>9</sup> Also, with respect to

---

1451-52 (stating that "Article I courts are courts of special jurisdiction created by Congress"); *Plastiras v. Idell* (*In re Sequoia Auto Brokers, Ltd.*), 827 F.2d 1281, 1284 (9th Cir. 1987) ("Congress created bankruptcy courts pursuant to its substantive authority over bankruptcies.") (citing U.S. CONST. art. I, § 8, cl. 4); Jeffrey T. Ferriell, *Constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 63 AM. BANKR. L.J. 109, 121 (1989).

Section eight, clause four of Article I of the United States Constitution states that Congress shall have the power "[t]o establish a uniform Rule of Naturalization, and uniform Law on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. Article I courts differ from Article III courts because the protection and power given to Article I judges are not equal to that given to Article III judges. See Ferriell, *supra*, at 121-22. For example, while Article III judges have life tenure, Article I judges do not. *Id.* In fact, it is because Article III judges have the protection of life-time tenure and salary that the Constitution vests the power to preside over judicial matters of the United States in Article III judges. *Id.* at 121-22. Article III of the Constitution requires the judges to "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." *Id.* at 121 (quoting U.S. CONST. Art. III, § 1).

5. *United Missouri*, 901 F.2d at 1452 (noting that "[t]he authority of the Article I court is . . . limited . . . by the powers given to it by Congress"); *Sequoia Auto Brokers*, 827 F.2d at 1284 ("Congress vests bankruptcy courts with their jurisdiction and their authority has no 'inherent' source."); see also *Baker & Getty*, 954 F.2d at 1173 (searching for authority from Congress for bankruptcy courts to conduct jury trials); *Ben Cooper*, 896 F.2d at 1402 (examining whether bankruptcy courts have statutory power to conduct jury trials).

6. *United Missouri*, 901 F.2d at 1452 (noting that "authority of the Article I court is . . . circumscribed by the constitution"); see also *Ben Cooper*, 896 F.2d at 1402 (analyzing whether bankruptcy courts have the "constitutional authority to conduct [jury] trials").

7. See, e.g., *Ben Cooper*, 896 F.2d at 1402-04 (analyzing statutory and constitutional authority of bankruptcy courts).

8. 28 U.S.C. § 157 (1988). For a discussion of core and non-core proceedings, see *infra* notes 51-58 and accompanying text. This Note does not examine the method of determination to arrive at the characterization of core or non-core. Rather, this Note begins its analysis with the assumption that a proceeding has been designated as either core or non-core.

9. For a discussion of the difference in treatment between core and non-core proceedings in the Bankruptcy Amendments and Federal Judgeship Act of 1984, see *infra* notes 51-58 and accompanying text.

the jury trial issue, courts have recognized different considerations depending upon whether the proceeding is core or non-core.<sup>10</sup>

The United States Court of Appeals for the Seventh Circuit addressed the issue of whether bankruptcy courts have a statutory grant of authority to empanel juries in *In re Grabill Corp.*<sup>11</sup> In *Grabill*, a bankruptcy trustee for Grabill Corporation (Grabill) brought an action in the United States District Court for the Northern District of Illinois against the National Bank of North Carolina; the case was referred to a bankruptcy court.<sup>12</sup> The trustee alleged that the loan payments that the bank received from Grabill prior to the institution of bankruptcy proceedings were preferential and fraudulent.<sup>13</sup> The trustee demanded a return of the payments.<sup>14</sup> The National Bank of North Carolina requested a jury trial.<sup>15</sup> Although the parties agreed that the bank was entitled to a jury trial, the parties differed over whether the bankruptcy court could properly conduct such a trial.<sup>16</sup>

Before reaching its decision in the *Grabill* case, the Seventh Circuit considered the decisions of other circuit courts on the jury trial issue.<sup>17</sup> The decisions of six circuit courts are currently the most persuasive authority on the jury trial issue in federal courts.<sup>18</sup> Of these six circuit courts, United States Courts of Appeals for the Third and Ninth Circuits

10. For a discussion of the significance of the core/non-core distinction in judicial decisions on the jury trial issue, see *supra* note 2.

11. 967 F.2d 1152 (7th Cir. 1992). For a further discussion of the facts of *Grabill*, see *infra* notes 181-91 and accompanying text.

12. Steinberg v. NCNB Nat'l Bank (*In re Grabill Corp.*), 133 B.R. 621, 622 (N.D. Ill. 1991), *rev'd*, *In re Grabill Corp.*, 967 F.2d 1152 (7th Cir. 1992). For a further discussion of the procedural history of *Grabill*, see *infra* notes 184-95 and accompanying text.

13. *Grabill*, 133 B.R. at 622-23. The trustee alleged that loan payments totaling \$21,056,297 were made within a year prior to the filing of involuntary Chapter 7 proceedings. *Id.* at 622.

14. *Id.* at 622-23.

15. *In re Grabill Corp.*, 967 F.2d 1152, 1152 (7th Cir.1992).

16. *Id.* at 1152-53.

17. *Id.* at 1153. Prior to *Grabill*, six circuit courts, and various district courts, addressed the jury trial issue. For a list of the cases addressing the jury trial issue, see *supra* note 2.

18. See *Rafoth v. National Union Fire Ins. Co. (In re Baker & Getty Fin. Servs., Inc.)*, 954 F.2d 1169, 1172-74 (6th Cir. 1992) (holding no statutory authority for bankruptcy courts to conduct jury trials in core proceedings); *Taxel v. Electronic Sports Research (In re Cinematronics, Inc.)*, 916 F.2d 1444, 1450-51 (9th Cir. 1990) (holding that in non-core proceedings the Constitution precludes bankruptcy courts from conducting jury trials when the parties have not consented to final judgment); *Beard v. Braunstein*, 914 F.2d 434, 442-43 (3d Cir. 1990) (same); *Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.)*, 911 F.2d 380, 390-92 (10th Cir. 1990) (holding no statutory authority for bankruptcy courts to conduct jury trials in core proceedings); *In re United Mo. Bank*, 901 F.2d 1449, 1457 (8th Cir. 1990) (same); *Ben Cooper, Inc. v. Insurance Co. (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1403-04 (2d Cir.) (holding jury trial permissible in bankruptcy court), *vacated and remanded*, 111 S. Ct. 425, *reinstated*, 924 F.2d 36 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2041 (1991).

have held that bankruptcy courts could not conduct jury trials in *non-core proceedings*.<sup>19</sup> Both of these courts concluded that even if a grant of authority to bankruptcy courts to conduct jury trials could be inferred, such a grant would nonetheless be unconstitutional in non-core proceedings because of problems regarding judicial review.<sup>20</sup> The Sixth, Eighth and Tenth Circuits have determined that in *core proceedings*, bankruptcy courts are not statutorily authorized to empanel juries.<sup>21</sup> Because these courts determined that Congress did not grant the power to bankruptcy courts to conduct jury trials, they did not decide the question of whether such a statutory grant of power would be constitutional.<sup>22</sup> In contrast to the Sixth, Eighth and Tenth Circuits, the United States Court of Appeals for the Second Circuit has held that bankruptcy courts do have an implied grant of authority to empanel juries in core proceedings.<sup>23</sup> The Second Circuit court also upheld the constitutionality of such authority.<sup>24</sup>

With this backdrop, the Seventh Circuit in *Grabill* followed the approach taken by the Sixth, Eighth and Tenth Circuits, holding that Congress did not grant bankruptcy courts the authority to hold jury trials in core proceedings.<sup>25</sup>

This Note analyzes the views taken by federal courts, especially that of the Seventh Circuit, on the jury trial issue to determine how this issue

19. *Cinematronics*, 916 F.2d at 1451; *Beard*, 914 F.2d at 443.

20. *Cinematronics*, 916 F.2d at 1450-51; *Beard*, 914 F.2d at 442-43. For a discussion of judicial review problems in bankruptcy cases, see *infra* notes 107-18 and accompanying text.

21. See, e.g., *Baker & Getty*, 954 F.2d at 1173; *Kaiser Steel*, 911 F.2d at 392; *United Missouri*, 901 F.2d at 1457.

22. *Baker & Getty*, 954 F.2d at 1173 n.10 ("As bankruptcy courts are not statutorily authorized to conduct jury trials, this court will not address whether such an authorization would violate Article III of and the Seventh Amendment to the United States Constitution."); *Kaiser Steel*, 911 F.2d at 392 (finding no authorization for bankruptcy judges to conduct jury trials, court concluded that "[w]here the seventh amendment requires a jury trial to be held in bankruptcy, that trial must take place in the district court"); *United Missouri*, 901 F.2d at 1457 (refusing to address constitutional issues because court found no statutory authorization for bankruptcy judges to conduct jury trials). For a further discussion of the constitutional considerations surrounding jury trials in the bankruptcy courts, see *infra* notes 66-150 and accompanying text.

23. *Ben Cooper, Inc. v. Insurance Co. (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1402 (2d Cir.), *vacated and remanded*, 111 S. Ct. 425, *reinstated*, 924 F.2d 36 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2041 (1991).

24. *Id.* at 1403-04. The Second Circuit limited its holding to core proceedings. *Id.* at 1403. The court avoided addressing the jury trial issue in the non-core proceeding context because the case only involved a core proceeding. *Id.* For a discussion of the core and non-core distinction, see *infra* notes 51-58 and accompanying text. For a discussion of the additional constitutional problems the *Ben Cooper* court would have faced had the matter before the court been non-core, see *infra* notes 110-14 and accompanying text.

25. *In re Grabill Corp.*, 967 F.2d 1152, 1158 (7th Cir. 1992). For further discussion of the *Grabill* holding, see *infra* notes 196-229 and accompanying text.

should be resolved in light of the relevant policy considerations. The next section of this Note discusses the authority of bankruptcy courts as it relates to the jury trial issue.<sup>26</sup> Also addressed is the manner in which courts other than the Seventh Circuit have dealt with the jury trial issue.<sup>27</sup> This Note then presents an analysis of *In re Grabill Corp.*<sup>28</sup> This Note asserts that the *Grabill* court properly determined that Congress has neither expressly nor impliedly authorized bankruptcy courts to conduct jury trials. However, although the *Grabill* court seemingly made the proper legal decision, the court's policy determinations warrant closer scrutiny.<sup>29</sup> Contrary to the *Grabill* court's analysis, this Note concludes that policy considerations in fact favor the presence of jury trials in limited bankruptcy court proceedings.<sup>30</sup> In the final section, this Note proposes that because of the gravity of these policy concerns and the inability of federal judges to authorize jury trials in bankruptcy courts, Congress should grant bankruptcy courts the power to empanel juries in core proceedings where a Seventh Amendment guarantee is implicated.<sup>31</sup>

## II. BACKGROUND

The determination of whether bankruptcy courts have the power to empanel juries requires an analysis of the authority of bankruptcy courts. In this section of this Note, the authority of bankruptcy courts to conduct jury trials is analyzed through an investigation of the statute granting authority to bankruptcy courts and the constitutional ramifications that arise if the power to conduct jury trials is found in that statute. This section also outlines how circuit courts have resolved these two inquiries.<sup>32</sup> This analysis demonstrates that while it is possible to imply a

26. For a further discussion of the authority of bankruptcy courts, see *infra* notes 32-150 and accompanying text.

27. For a further discussion of other cases that have addressed the jury trial issue, see *infra* notes 151-78 and accompanying text.

28. For a further discussion of *Grabill*, see *infra* notes 179-247 and accompanying text.

29. For a discussion of the policy considerations surrounding the jury trial issue, see *infra* notes 254-72 and accompanying text.

30. For a discussion of the policy considerations that weigh in favor of Congress granting the power to the bankruptcy courts to empanel juries, see *infra* notes 293-307 and accompanying text.

31. For a further discussion of this Note's conclusion, see *infra* notes 273-93 and accompanying text. For a discussion of core proceedings, see *infra* notes 51-56. For a discussion of the cases in which courts have found a Seventh Amendment right to a jury trial, see *infra* notes 71-98 and accompanying text. For a discussion of the safeguards that Congress could incorporate into legislation granting bankruptcy courts the power to conduct jury trials, see *infra* notes 308-10 and accompanying text.

32. For a discussion of the constitutional ramifications of Congress granting bankruptcy courts the power to conduct jury trials, see *infra* notes 66-150 and accompanying text. For a discussion of how circuit courts have addressed the jury trial issue, see *infra* notes 151-78 and accompanying text.

congressional grant of authority, most of the circuit courts that have addressed this issue have refused to do so. Also evident is that there are serious constitutional constraints that limit Congress' ability to vest bankruptcy courts with this authority.<sup>33</sup>

A. *The Authority of Bankruptcy Courts as Statutorily Defined by Congress*

The authority of bankruptcy courts is vested by Congress through legislation.<sup>34</sup> Therefore, each power exercised by the bankruptcy courts must be linked to a statute granting that power.<sup>35</sup> The statutory power can be either express or implied in the statute.<sup>36</sup>

Congress first granted authority to bankruptcy courts under the Bankruptcy Act of 1898 (1898 Act).<sup>37</sup> That statute did not address jury trials, and as a general matter, jury trials were not conducted in the bankruptcy courts under the 1898 Act.<sup>38</sup> In an attempt to reconstruct and expand the power of the bankruptcy courts, Congress replaced the 1898 Act with the Bankruptcy Reform Act of 1978 (1978 Act).<sup>39</sup> The

33. The constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA), which vests the bankruptcy courts with their authority, has itself been seriously questioned by commentators. See Ferriell, *supra* note 3, at 110. This Note assumes that the BAFJA is constitutional. For a complete discussion of the constitutionality of the BAFJA, see Ferriell, *supra* note 4, at 110.

34. See 28 U.S.C. § 151 (1988). Section 151, titled "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.

*Id.*; see also *In re United Mo. Bank*, 901 F.2d 1449, 1451-52 (8th Cir. 1990) ("Article I courts are courts of special jurisdiction created by Congress . . .").

35. *Plastiras v. Idell (In re Sequoia Auto Brokers, Ltd.)*, 827 F.2d 1281, 1284 (9th Cir. 1987) ("Congress vests bankruptcy courts with their jurisdiction and their authority has no 'inherent' source."); *Taxel v. Marine Midland Business Loans, Inc. (In re Palomar Elec. Supply, Inc.)*, 138 B.R. 959, 963 (S.D. Cal. 1992) ("[B]ankruptcy court judges cannot conduct jury trials . . . unless they have a statutory basis for such authority.").

36. See, e.g., *United Missouri*, 901 F.2d at 1453-57 (analyzing whether BAFJA expressly or impliedly granted authority to bankruptcy courts to conduct jury trials); *Sequoia Auto Brokers*, 827 F.2d at 1283-85 (analyzing whether bankruptcy courts have express or implied authority to exercise civil contempt powers).

37. Act of July 1, 1898, ch. 541, 30 Stat. 544; *United Missouri*, 901 F.2d at 1452. For a thorough discussion of the history of bankruptcy jurisdiction, see Ferriell, *supra* note 4, at 113-21.

38. *United Missouri*, 901 F.2d at 1452. The *United Missouri* court did note that there were two narrow statutory exceptions that provided for jury trials in bankruptcy courts under the 1898 Act. *Id.* These two exceptions involved "involuntary petitions and the dischargeability of debts." *Id.*

39. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.



1978 Act did not contain an express grant of power to bankruptcy courts to empanel juries.<sup>40</sup> Because of the expansive language chosen by Congress, however, courts interpreted the 1978 Act to include this grant of power to bankruptcy courts to conduct jury trials on the basis of congressional intent.<sup>41</sup> This interpretation was rendered moot when in 1982, the United States Supreme Court held in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>42</sup> that the 1978 Act was unconstitutional as violative of the separation of powers doctrine.<sup>43</sup> As a response to the Supreme Court's invalidation of the 1978 Act, the Administrative Office of the United States Courts drafted the Emergency Rule as a temporary replacement for the 1978 Act.<sup>44</sup> The Emergency Rule expressly forbade jury trials in bankruptcy courts.<sup>45</sup>

Subsequent to the installment of the Emergency Rule, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act (BAFJA) in 1984.<sup>46</sup> The BAFJA is the current statute that confers power on the bankruptcy courts.<sup>47</sup> Pursuant to the BAFJA, bankruptcy courts func-

40. See 28 U.S.C. § 1480 (1982); *United Missouri*, 901 F.2d at 1452 (noting that "section 1480 did not expressly provide authority for bankruptcy judges to conduct jury trials").

41. *United Missouri*, 901 F.2d at 1453 (stating that "it is apparent from the extremely broad grant of jurisdiction and the legislative history that Congress intended bankruptcy courts exercise" power to conduct jury trials); *Walsh v. Long Beach Honda (In re Gaildeen Indus.)*, 59 B.R. 402, 404 (N.D. Cal. 1986) (noting that 1978 Act "was generally interpreted as expressing a Congressional intent to allow bankruptcy judges to hold jury trials"); *cf.* *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 55 (1982) (noting that enumerated powers of bankruptcy court included "the power to hold jury trials").

42. 458 U.S. 50, 87 (1982).

43. *Northern Pipeline*, 458 U.S. at 87. The Court found the 1978 Act unconstitutional for reasons not directly related to the jury trial issue. For a discussion of the Court's invalidation of the 1978 Act, see *infra* notes 125-46 and accompanying text.

44. Memorandum of William E. Foley, Director, Administrative Office of the United States Courts [hereinafter Emergency Rule] reprinted in 1 COLLIER ON BANKRUPTCY ¶ 3.01(1)(b)(vi) (15th ed. 1988). For an analysis of the Emergency Rule, see Ferriell, *supra* note 4, at 118-21.

45. See Emergency Rule, *supra* note 44, at § (d)(1)(D). Section (d)(1) of the emergency rule states:

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those cases and proceedings except that the bankruptcy judges may not conduct:

(D) jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a district judge.

*Id.*

46. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

47. *Id.*; *In re United Mo. Bank*, 901 F.2d 1449, 1453 (8th Cir. 1990). Because the Emergency Rule expressly forbade jury trials, it is important to note that the BAFJA was enacted to replace, not supplement, the Emergency Rule.

tion as adjuncts of the district courts.<sup>48</sup> As a result, district courts have substantial authority over bankruptcy courts. For example, district courts have the authority to grant or deny bankruptcy courts the power to preside over cases.<sup>49</sup> District courts also have the authority to recall cases from bankruptcy courts at any stage in a bankruptcy proceeding.<sup>50</sup>

The BAFJA creates a distinction between “core proceedings” and “non-core proceedings.”<sup>51</sup> In core proceedings, bankruptcy courts have the power to “hear and determine” the facts in cases.<sup>52</sup> The district courts are vested with the power to review bankruptcy court decisions.<sup>53</sup> However, in reviewing decisions involving core proceedings, district courts are required follow the same rules of judicial review as appellate courts.<sup>54</sup> Congress has expressly designated certain matters as “core” under the BAFJA.<sup>55</sup> These matters include fraudulent transfer cases and preferential payments.<sup>56</sup>

In non-core proceedings, bankruptcy courts only have the power to make recommendations of findings of fact and conclusions of law to the district courts.<sup>57</sup> These findings and conclusions are subject to *de novo*

*See* Walsh v. Long Beach Honda (*In re Gaildeen Indus.*), 59 B.R. 402, 404 n.4 (N.D. Cal. 1986) (noting that “it is clear that the Emergency Rule was superseded by the 1984 statutory amendments and, therefore, is no longer controlling”).

48. *See* 28 U.S.C. § 151. Section 151 states that “[i]n 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.” *Id.*

49. *Id.* § 157. Section 157(a) states: “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.” *Id.* (emphasis added).

50. *See id.* § 157(d). Section 157(d) states: “The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown.” *Id.*

51. *Id.* § 157(b). When Congress is silent on the issue, the bankruptcy judge determines whether a matter is a core or non-core proceeding. *Id.* § 157(b)(3). Section 157(b)(3) states: “The bankruptcy judge shall determine, on the judge’s own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11.” *Id.*

52. *See id.* § 157(b)(1). Section 157(b)(1) states: “Bankruptcy judges 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 . . . and may enter appropriate orders and judgments, subject to review under section 158 of this title.” *Id.*

53. *See id.* § 158(c).

54. *Id.* Section 158(c) states that “[a]n appeal . . . shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts.” *Id.*

55. *Id.* § 157(b)(2).

56. *Id.* Section 157(b)(2) expressly states: “Core proceedings include, but are not limited to . . . proceedings to determine, avoid, or recover preferences [and] . . . proceedings to determine, avoid, or recover fraudulent conveyances . . . .” *Id.*

57. *Id.* § 157(c)(1). Section 157(c)(1) states that in non-core proceedings,

review by the district courts, unless the parties consent to allow the bankruptcy judge to make a final determination of the matter.<sup>58</sup>

No language in the BAFJA expressly addresses the issue of whether bankruptcy courts have the power to conduct jury trials in core proceedings or non-core proceedings.<sup>59</sup> In fact, only section 1411 of the BAFJA expressly discusses jury trials.<sup>60</sup> That section reserves the right to a jury trial for personal injury and wrongful death claims; it does not, however, address the right to jury trials in bankruptcy courts.<sup>61</sup> Thus, courts and commentators have generally recognized that the BAFJA contains no express grant of authority to bankruptcy courts to conduct jury trials.<sup>62</sup>

---

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 has timely and specifically objected.

*Id.*

58. *Id.* § 157(c). If the parties consent to allow the bankruptcy judge to make a final determination of a non-core matter pursuant to § 157(c)(2), the case, for purposes of appeal, is treated the same as if the case were a core proceeding. *Id.* § 157(c)(2). Section 157(c)(2) specifically states:

Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

*Id.* For the text of § 157(c)(1), see *supra* note 57.

59. *Gumport v. Growth Fin. Corp. (In re Transcon Lines)*, 121 B.R. 837, 841 (C.D. Cal. 1990) (noting that BAFJA "does not contain any specific or express authority granting a bankruptcy judge the power or authority to conduct jury trials").

60. See 28 U.S.C. § 1411 (1988) (reserving right to jury trial for personal injury and wrongful death claims). For the text of § 1411, see *infra* note 61.

61. 28 U.S.C. § 1411. Section 1411, entitled "Jury trials," states: "Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." *Id.* § 1411(a). Therefore, under this section, if a personal injury or wrongful death claim was referred to a bankruptcy court and the right to a jury trial was extinguished as a result, this section would preserve the right to a jury trial.

62. *Rafoth v. National Union Fire Ins. Co. (In re Baker & Getty Fin. Servs., Inc.)*, 954 F.2d 1169, 1173 (6th Cir. 1992) ("[N]o statutory language supports jury trials in the bankruptcy courts."); *In re United Mo. Bank*, 901 F.2d 1449, 1454 (8th Cir. 1990) (same); *Ben Cooper, Inc. v. Insurance Co. (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1402 (2d Cir.) (same), *vacated and remanded*, 111 S. Ct. 425, *reinstated*, 924 F.2d 36 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2041 (1991); *Taxel v. Marine Midland Business Loans, Inc. (In re Palomar Elec. Supply, Inc.)*, 138 B.R. 959, 962 (S.D. Cal. 1992) (same); *Citicorp N. Am., Inc. v. Finley (In re Washington Mfg. Co.)*, 133 B.R. 113, 118 (M.D. Tenn. 1991) (same); *Torcise v. Community Bank*, 131 B.R. 503, 506 (S.D. Fla. 1991) (same); *Growers Packing Co. v. Community Bank*, 134 B.R. 438, 442 (S.D. Fla. 1991) (same); *Walsh v. California Commerce Bank (In re Interbank Mortgage Corp.)*, 128 B.R. 269, 272 (N.D. Cal. 1991) (same); *Gumport v. Growth Fin. Corp. (In re Transcon Lines)*, 121 B.R. 837, 841-42 (C.D. Cal. 1990) (same); *Leonard v. Wessel (In re Jackson)*, 118 B.R. 243, 250 (E.D. Pa. 1990) (same); *McCormick v. American Investors*

While a statute may not contain an express grant of authority, federal courts recognize that in limited circumstances power may be implied from a statute based on congressional intent.<sup>63</sup> For example, under the 1978 Act, prior to its invalidation, federal courts implied the authority for bankruptcy courts to conduct jury trials.<sup>64</sup> When interpreting the BAFJA, however, federal courts have debated over whether the BAFJA contains a similar implied grant of authority.<sup>65</sup>

*B. The Constitutionality Requirement for Congressional Grants of Authority to Bankruptcy Courts*

In addition to statutory limitations on bankruptcy courts' authority, the United States Constitution limits the power that Congress may confer on bankruptcy courts.<sup>66</sup> Thus, although Congress has statutorily granted certain power to bankruptcy courts, if the exercise of that power exceeds the limitations set by the Constitution, then the grant of power is unconstitutional and invalid.<sup>67</sup> Article III and the Seventh Amend-

---

Management, Inc. (*In re McCormick*), 67 B.R. 838, 841 (D. Nev. 1986) (same); S. Elizabeth Gibson, *Jury Trials and Core Proceedings: The Bankruptcy Judge's Uncertain Authority*, 65 AM. BANKR. L.J. 143, 151 (Winter 1991) [hereinafter Gibson, *Jury Trials*] (recognizing "lack of express statutory authority for bankruptcy judges to conduct jury trials"); Anthony M. Sabino, *Jury Trials, Bankruptcy Judges, and Article III: The Constitutional Crisis of the Bankruptcy Court*, 21 SETON HALL L. REV. 258, 304 (1991) (finding no statutory basis for power of bankruptcy courts to conduct jury trials).

63. See, e.g., *Ben Cooper*, 896 F.2d at 1402-03 (finding implied authority for bankruptcy courts to conduct jury trials). The rule of construction followed by the federal courts to determine whether the power in question is within the intent of Congress when enacting a statute is to first examine the statutory language of the act. *Blum v. Stenson*, 465 U.S. 886, 896 (1984) (examining intent of Congress concerning award of attorney's fees under § 1988 of Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988)); *Plastiras v. Idell (In re Sequoia Auto Brokers, Ltd.)*, 827 F.2d 1281, 1284-85 (9th Cir. 1987) (examining whether court could infer from BAFJA civil contempt powers). If the statutory language is unpersuasive in determining the intent of Congress, then the federal courts examine the legislative history for an indication of congressional intent. *Blum*, 465 U.S. at 896-97 (examining legislative history of section 1988 to determine intent of Congress); *Sequoia Auto Brokers*, 827 F.2d at 1285 ("When the meaning of statutory language is unclear, we consider legislative history to assist in interpretation.").

64. *United Missouri*, 901 F.2d at 1452-53. For a more expansive list of courts that have implied the authority of bankruptcy courts to conduct jury trials under the 1978 Act, see *supra* note 41.

65. For a list of cases that reflect the debate among federal courts, see *supra* note 2.

66. *United Missouri*, 901 F.2d at 1452 (noting that power of bankruptcy courts is limited by Constitution); *Ben Cooper*, 896 F.2d at 1403-04 (examining whether jury trials in bankruptcy courts are permissible under Constitution).

67. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (finding grant of authority under 1978 Act unconstitutional because it vested bankruptcy courts with power of Article III courts in violation of Article III of Constitution).

ment of the Constitution both present considerable limitations on the authority that Congress may vest in bankruptcy courts.<sup>68</sup> This section of this Note examines these limitations on Congress and, more specifically, the constitutionality of granting bankruptcy courts the authority to conduct jury trials under the Seventh Amendment and Article III.

### 1. *The Relationship Between the Seventh Amendment and Jury Trials in Bankruptcy Courts*

The Seventh Amendment guarantees the right to a jury trial “[i]n [s]uits at common law.”<sup>69</sup> Shortly after the enactment of the BAFJA in 1984, an issue arose in the federal courts over whether cases referred to bankruptcy courts were “suits at common law,” implicating a Seventh Amendment jury trial guarantee.<sup>70</sup> The United States Supreme Court addressed this issue in *Granfinanciera, S. A. v. Nordberg*.<sup>71</sup>

#### a. *The Granfinanciera Case*

In *Granfinanciera*, the trustee for Chase & Sanborn Corporation (Chase), which had filed for Chapter 11 bankruptcy, brought constructive fraud and actual fraud actions against Granfinanciera, S. A. (Granfinanciera) and Medex, Ltda. (Medex) in the United States District Court for the Southern District of Florida.<sup>72</sup> The proceedings were referred to a bankruptcy court.<sup>73</sup> The trustee alleged that Granfinanciera and Medex had received \$1.7 million in payments within one year of the

---

68. See, e.g., *Ben Cooper*, 896 F.2d at 1403-04 (analyzing constitutionality of jury trials in bankruptcy courts under Article III and Seventh Amendment); see also Gibson, *Jury Trials*, *supra* note 62, at 163-68 (noting violation of Seventh Amendment and Article III if power is given to bankruptcy judges to preside over juries).

69. U.S. CONST. amend. VII. The Seventh Amendment to the United States Constitution states: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” *Id.*

70. See, e.g., *Ben Cooper*, 896 F.2d at 1402-03 (examining relation between Seventh Amendment and jury trials in bankruptcy courts). Most courts have held that when a case is referred to a bankruptcy court there is no right to a jury trial, even though a right would have existed had the case remained in the district court. See, e.g., *Baldwin-United Corp. v. Thompson* (*In re Baldwin-United Corp.*), 48 B.R. 49, 56 (Bankr. S.D. Ohio 1985); see also Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 703-04 (1985) (“The bankruptcy court is a court of equity, in which there is no right of trial by jury.”).

71. 492 U.S. 33, 36 (1989). For a complete discussion of the *Granfinanciera* decision and an analysis of the effect of that decision on the authority of the bankruptcy courts, see G. Ray Warner, *Rotten to the “Core”: An Essay on Juries, Jurisdiction and Granfinanciera*, 59 UMKC L. REV. 991 (1991).

72. *Granfinanciera*, 492 U.S. at 36. Chase voluntarily filed for a Chapter 11 reorganization in 1983. *Id.* The United States Bankruptcy Court for the Southern District of Florida appointed a bankruptcy trustee for Chase. *Id.*

73. *Id.*

commencement of Chapter 11 proceedings without giving consideration in return.<sup>74</sup> *Granfinanciera* and *Medex* requested a jury trial.<sup>75</sup> The bankruptcy court held that the defendants had no right to a jury trial in bankruptcy court.<sup>76</sup> The bankruptcy court dismissed the actual fraud claim and entered judgment for the trustee on the constructive fraud claim.<sup>77</sup> The District Court for the Southern District of Florida affirmed the bankruptcy court's decision.<sup>78</sup> The Court of Appeals for the Eleventh Circuit also affirmed, holding that fraudulent conveyances were core proceedings that were equitable in nature, and, therefore, no right to a jury trial attached.<sup>79</sup>

On appeal to the Supreme Court of the United States, the Court narrowly framed the issue as: "[W]hether a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer."<sup>80</sup>

The *Granfinanciera* Court addressed what types of actions invoked the Seventh Amendment guarantee to a jury trial.<sup>81</sup> The Court noted that the clause of the Seventh Amendment that grants the right to a jury trial restricts that right to "[s]uits at common law."<sup>82</sup> The Court observed that federal courts have interpreted this restriction to mean that the Seventh Amendment right to a jury trial attached only to "suits in which *legal* rights [are] to be ascertained and determined," as opposed to suits in which equitable rights are involved.<sup>83</sup> The Court further stated that the determination of whether a statutory right is a legal right depends on two factors.<sup>84</sup> The first is whether the action is the type of action to which a common law right to a jury trial would have attached in the Eighteenth Century.<sup>85</sup> The second and more important factor is

74. *Id.*

75. *Id.* at 37.

76. *Id.*

77. *Id.* The judgment on the constructive fraud claim was for \$1,500,000 against *Granfinanciera* and \$180,000 against *Medex*. *Id.*

78. *Id.*

79. *Nordberg v. Granfinanciera, S.A. (In re Chase & Sanborn Corp.)*, 835 F.2d 1341, 1349-50 (11th Cir. 1988), *rev'd*, 492 U.S. 33 (1989). The Eleventh Circuit further supported its reasoning by noting that the bankruptcy courts are courts of equity and, therefore, a right to a jury trial did not exist. *Id.* at 1348-49.

80. *Granfinanciera*, 492 U.S. at 36.

81. *Id.* at 40-42.

82. *Id.* at 41 (quoting U.S. CONST. amend. VII).

83. *Id.* (quoting *Parsons v. Bedford*, 3 Pet. 433, 447 (1830)). The Court distinguished suits involving legal rights from "those where equitable rights [are] recognized, and equitable remedies" are granted. *Id.* (quoting *Parsons v. Bedford*, 3 Pet. 433, 477 (1830)). For a further discussion of the law-equity distinction, see Warner, *supra* note 71, at 998-1000.

84. *Granfinanciera*, 492 U.S. at 42.

85. *Id.*; see also Conrad K. Cyr, *The Right to Trial by Jury in Bankruptcy: Which Judge is to Preside?*, 63 AM. BANKR. L.J. 53, 53-54 (1989) (noting historical analysis

whether the remedy available from the cause of action is essentially a legal or an equitable remedy.<sup>86</sup> The Court concluded that by evaluating these two factors, a court will be able to determine whether an action is legal or equitable.<sup>87</sup>

The *Granfinanciera* Court examined another labeling distinction it found influential on the jury trial issue: the distinction between “public rights” and “private rights.”<sup>88</sup> The Court stated that the Seventh Amendment is not implicated in public rights cases, even where a legal claim is asserted.<sup>89</sup> Congress may extinguish the right to a jury trial in legal claims in which public rights are asserted by assigning those claims to administrative bodies that do not utilize juries.<sup>90</sup> The Court noted, however, that in cases of private rights involving legal claims, the Seventh Amendment right to a jury trial does attach.<sup>91</sup> The Court warned that Congress may not circumvent the Seventh Amendment right to a jury trial in legal claims involving private rights by delegating the cause of action to an administrative body where facts are not determined by a jury.<sup>92</sup>

In applying these considerations to the case, the Court concluded that fraudulent conveyances were private rights.<sup>93</sup> The Court also con-

---

involved in determining whether Seventh Amendment right to jury trial attaches to newly created cause of action).

86. *Granfinanciera*, 492 U.S. at 42 (noting that “second stage of . . . analysis is more important than the first”).

87. *Id.*

88. *Id.* at 51. The Court defined “private” and “public rights” in a footnote. *See id.* at 51 n.8. The Court relied on *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932), where the Court defined “‘private right[s]’ as ‘the liability of one individual to another under the law as defined,’ . . . in contrast to cases that ‘arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.’” *Granfinanciera*, 492 U.S. at 51 n.8 (quoting *Crowell*, 285 U.S. at 50-51). The *Granfinanciera* Court gave an example of “public rights” as rights “‘where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights.’” *Id.* at 51 (quoting *Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n*, 430 U.S. 442, 458 (1977)). Examples the Court gave of traditional private rights were: “wholly private tort, contract, and property cases.” *Id.* (quoting *Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n*, 430 U.S. 442, 458 (1977)).

89. *Granfinanciera*, 492 U.S. at 42 n.4, 51. The Court stated that “[t]he Seventh Amendment protects a litigant’s right to a jury trial only if a cause of action is legal in nature and it involves a matter of ‘private right.’” *Id.* at 42 n.4.

90. *Id.* at 42 n.4, 51.

91. *Id.*

92. *Id.* at 52.

93. *Id.* at 55 (noting that “a bankruptcy trustee’s right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) seems to us more accurately characterized as a private rather than a public right”). The Court noted that “state-law causes of action for breach of contract or warranty are paradigmatic private rights.” *Id.* at 56. The Court then reasoned that “fraudulent conveyance actions by bankruptcy trustees . . . are quintessentially suits at common law that more

cluded that fraudulent conveyance actions were actions at law and not equity because of their roots in Eighteenth Century common law and because of the nature of their remedies.<sup>94</sup> The Court thus held that the designation of a fraudulent conveyance action as a "core proceeding" under the BAFJA could not extinguish *Granfinanciera* and Medex's right to a jury trial.<sup>95</sup>

After *Granfinanciera*, it is clear that a Seventh Amendment right to a jury trial exists in private rights cases when a legal claim is asserted.<sup>96</sup> Thus interpreted, the Seventh Amendment would grant a right to a jury trial in a limited number of cases that are now within the bankruptcy courts' jurisdiction under the BAFJA, including claims of fraudulent

---

nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.* Therefore, the Court determined that the right asserted in the fraudulent conveyance action in *Granfinanciera* was a "private right." *Id.* The Court also intimated that actions for preferential payments would fall into the same class as fraudulent transfers. *Id.* at 58 & n.13. The Court, however, did indicate that some preferential transfers could be distinguishable, stating that "in some cases preference avoidance actions are equitable in character." *Id.* at 58 n.13.

94. *Id.* at 49. The Court analyzed how fraudulent conveyances were handled at common law. *Id.* at 43-47. The Court concluded that under Eighteenth Century common law, the claim before the Court in *Granfinanciera* would have been under the mandatory jurisdiction of courts of law. *Id.* at 46-47. Furthermore, the Court found that the remedies available in fraudulent transfer claims were primarily remedies of law, not equity. *Id.* at 47-49.

95. *Id.* at 64. The Court left unanswered several critical questions concerning what forum was appropriate for the jury trial, and the problems created if the forum chosen would be a bankruptcy court. *Id.* at 50. The Court expressly limited its holding to avoid these issues. *Id.* The Court stated:

We are not obliged to decide today whether bankruptcy courts may conduct jury trials in fraudulent conveyance suits brought by a trustee against a person who has not entered a claim against the estate, either in the rare procedural posture of this case . . . or under the current statutory scheme . . . . Nor need we decide whether, if Congress has authorized bankruptcy courts to hold jury trials in such actions, that authorization comports with Article III when non-Article III judges preside over the actions subject to review in, or withdrawal by, the district courts. We also need not consider whether jury trials conducted by a bankruptcy court would satisfy the Seventh Amendment's command that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law," given that district courts may presently set aside clearly erroneous factual findings by bankruptcy courts.

*Id.*

96. See *Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.)*, 911 F.2d 380, 388-89 (10th Cir. 1990) (finding that Seventh Amendment right to jury trial still existed in action referred to bankruptcy court); *In re United Mo. Bank*, 901 F.2d 1449, 1451 (8th Cir. 1990) (same); *Ben Cooper, Inc. v. Insurance Co. of Pa. (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1400-02 (2d Cir.) (same); *vacated and remanded*, 111 S. Ct. 425, *reinstated*, 924 F.2d 36 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2041 (1991). For a further discussion of the Seventh Amendment right to jury trials in legal claims involving private rights, see *supra* notes 81-95 and accompanying text.



payment.<sup>97</sup> However, even assuming Congress expressly grants bankruptcy courts the authority to conduct jury trials in these limited types of cases, two Seventh Amendment concerns still exist: whether a jury trial in the bankruptcy courts satisfies the jury trial requirement of the Seventh Amendment and whether a jury trial in the bankruptcy courts would create Seventh Amendment problems concerning judicial review.<sup>98</sup>

#### b. The Jury Trial Requirement of the Seventh Amendment

The first Seventh Amendment concern regarding jury trials in bankruptcy courts is whether the Seventh Amendment guarantee to a jury trial is satisfied by a jury trial conducted in a bankruptcy court.<sup>99</sup> Some litigants have argued that to satisfy the Seventh Amendment, a jury trial must be conducted by an Article III judge, which bankruptcy judges are not.<sup>100</sup>

An example of how a court has resolved this Seventh Amendment issue is the decision of the United States District Court for the Eastern District of Pennsylvania in *Leonard v. Wessel (In re Jackson)*.<sup>101</sup> *Jackson* involved actions by a bankruptcy trustee against the attorneys of the debtor under both tort and contract theories.<sup>102</sup> After determining that the actions were core proceedings under the BAFJA, the *Jackson* court found an implied statutory power in bankruptcy courts to conduct jury trials.<sup>103</sup> On the Seventh Amendment issue, the *Jackson* court concluded that a jury trial in a bankruptcy court satisfied the Seventh Amend-

97. See *Granfinanciera*, 492 U.S. at 64.

98. For a discussion of the two Seventh Amendment complications, see *infra* notes 99-118 and accompanying text.

99. *Leonard v. Wessel (In re Jackson)*, 118 B.R. 243, 253 (E.D. Pa. 1990) (addressing whether jury trial in bankruptcy court would satisfy Seventh Amendment guarantee); Cyr, *supra* note 85, at 59-60. As Cyr notes, the substance of the Seventh Amendment right to a jury trial includes,

a jury trial presided over by a judge with authority to rule on questions of law, to aid the jury by explaining and commenting on the evidence, to direct a verdict when there is no substantial issue of fact for the jury, and to set aside the verdict if it is against the law or the weight of the evidence.

*Id.* at 54. For a thorough discussion of the relation between jury trials in bankruptcy courts and the Seventh Amendment guarantee to a jury trial, see S. Elizabeth Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967, 1034-38 (1988) [hereinafter Gibson, *Obeying Article III*].

100. See, e.g., *Jackson*, 118 B.R. at 253.

101. 118 B.R. 243 (E.D. Pa. 1990).

102. *Id.* at 244.

103. *Id.* at 248, 252 (determining that federal courts should give bankruptcy courts power to conduct jury trials in interest of administration of justice).

ment.<sup>104</sup> In support of this conclusion, the *Jackson* court commented that non-Article III judges have presided over jury trial cases in the past and that these cases have always satisfied the Seventh Amendment guarantee.<sup>105</sup>

The *Jackson* decision is congruent with commentators that have addressed the issue.<sup>106</sup> Thus, under the *Jackson* theory, a jury trial conducted in a bankruptcy court would satisfy a Seventh Amendment request for a jury trial.

### c. Judicial Review of Jury Decisions

The second Seventh Amendment concern regarding jury trials in bankruptcy courts is whether the system of judicial review of bankruptcy decisions established by the BAFJA creates a Seventh Amendment barrier to permitting jury trials in bankruptcy courts.<sup>107</sup> The BAFJA provides a system of review for core and non-core proceedings where the district courts are authorized to review the decisions of bankruptcy courts.<sup>108</sup> In contrast, the Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States."<sup>109</sup> Therefore, in order for bankruptcy courts to constitutionally conduct jury trials, the BAFJA system of review must not violate the Re-examination Clause of the Seventh Amendment.

The United States Courts of Appeals for the Third and Ninth Circuits addressed the problem of compatibility between the Seventh Amendment and the BAFJA's judicial review provisions.<sup>110</sup> The cases

104. *Id.* at 253. The defendants argued that an Article III judge was required to preside over the jury trial to satisfy the Seventh Amendment. *Id.*

105. *Id.* Judge Pollak in *Jackson* stated: "We have had non-Article III courts administering federal justice with juries for the major part of our history. The sufficiency, for Seventh Amendment purposes, of a jury in a non-Article III court has never, so far as I know, been brought into serious question." *Id.*; see also Gibson, *Jury Trials*, *supra* note 62, at 163-64. Gibson notes that other non-Article III courts conduct jury trials that satisfy the Seventh Amendment. *Id.* For example, the courts of the District of Columbia have conducted jury trials without Article III powers. *Id.* at 164.

106. See, e.g., *In re Grabill Corp.*, 967 F.2d 1152, 1160 (7th Cir. 1992) (Posner, J., dissenting) (finding bankruptcy judges competent to preside over jury trials); Gibson, *Jury Trials*, *supra* note 62, at 163-65 (determining that jury trials conducted in core proceedings by bankruptcy judges would satisfy Seventh Amendment guarantee); Gibson, *Obeying Article III*, *supra* note 99, at 1038 ("The seventh amendment . . . appears to pose no constitutional obstacle to jury trials conducted by bankruptcy judges.").

107. *Ben Cooper, Inc. v. Insurance Co. of Pa. (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1403 (2d Cir.) (addressing problem of judicial review when bankruptcy courts conduct jury trials), *vacated and remanded*, 111 S. Ct. 425, *reinstated*, 924 F.2d 36 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2041 (1991); Cyr, *supra* note 85, at 60-61 (same); Gibson, *Jury Trials*, *supra* note 62, at 164-65 (same); Gibson, *Obeying Article III*, *supra* note 99, at 1045-48 (same).

108. See 28 U.S.C. § 158 (1988).

109. U.S. CONST. amend. VII.

110. *Taxel v. Electronic Sports Research (In re Cinematronics, Inc.)*, 916

before the Third and Ninth Circuits both dealt with *non-core* proceedings in which the parties had not consented to allow the bankruptcy judge to make a final determination.<sup>111</sup> Both the Third and Ninth Circuits recognized that pursuant to section 157 of the BAFJA, district courts have the power to conduct *de novo* review of non-core proceedings.<sup>112</sup> The Third and Ninth Circuits determined that if a jury trial was conducted on a non-core matter, the BAFJA would permit the district court to re-examine factual determinations made by the jury.<sup>113</sup> Thus, to avoid a conflict between the BAFJA, which authorizes judicial review of factual findings, and the Seventh Amendment, which prohibits such review, both circuit courts held that the Seventh Amendment prevented bankruptcy courts from conducting jury trials in non-core proceedings.<sup>114</sup>

The problem addressed by the Third and the Ninth Circuits, however, is not implicated in core proceedings or proceedings in which the parties have consented to allow the bankruptcy court to make all final determinations.<sup>115</sup> In upholding jury trials in bankruptcy courts against

F.2d 1444, 1450-51 (9th Cir. 1990) (holding that jury trials in bankruptcy courts were incompatible with Seventh Amendment in non-core proceedings); *Beard v. Braunstein*, 914 F.2d 434, 442-43 (3d Cir. 1990) (same).

111. *Cinematronics*, 916 F.2d at 1450 (finding that state law claim against company chief executive officer for post-petition misconduct was non-core proceeding); *Beard*, 914 F.2d at 445 (finding that action by bankruptcy trustee to recover pre-petition and post-petition rents from debtor's tenant was non-core proceeding).

112. *Cinematronics*, 916 F.2d at 1451; *Beard*, 914 F.2d at 443.

113. *Cf. Cinematronics*, 916 F.2d at 1451; *Beard*, 914 F.2d at 443; *see also* Gibson, *Jury Trials*, *supra* note 62, at 164 (noting that in non-core proceedings, district court could review findings by bankruptcy court jury).

114. *Cinematronics*, 916 F.2d at 1451 (finding that "grave Seventh Amendment problems would arise if a jury trial is conducted by the bankruptcy court"); *Beard*, 914 F.2d at 443 (finding that because of Seventh Amendment judicial review problems, "a bankruptcy court cannot conduct a jury trial in a non-core proceeding"); *see also* *Ben Cooper, Inc. v. Insurance Co. of Pa. (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1403 (2d Cir.), *vacated and remanded*, 111 S. Ct. 425, *reinstated*, 924 F.2d 36 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2041 (1991); *American Community Servs., Inc. v. Wright Mktg., Inc. (In re American Community Servs., Inc.)*, 86 B.R. 681, 689 (D. Utah 1988) (disallowing jury trials in non-core proceedings in bankruptcy court without consent of parties because of Seventh Amendment judicial review problems); Douglas G. Baird, *Jury Trials After Granfinanciera*, 65 AM. BANKR. L.J. 1, 11-12 (1991) (noting Seventh Amendment problem when district court reviews *de novo* findings of jury in bankruptcy court in core proceedings); Gibson, *Jury Trials*, *supra* note 62, at 164 ("[J]ury trials of noncore proceedings may not be conducted in the bankruptcy court under the current jurisdictional scheme that allows *de novo* review by the district court."); Gibson, *Obeying Article III*, *supra* note 99, at 1048 ("[D]e novo review required by the statute would violate the seventh amendment's reexamination clause.").

115. *Ben Cooper*, 896 F.2d at 1403 (holding that judicial review in core proceedings does not violate Seventh Amendment); *Walsh v. California Commerce Bank (In re Interbank Mortgage Corp.)*, 128 B.R. 269, 272 (N.D. Cal. 1991) (same); *McCormick v. American Investors Management, Inc. (In re McCormick)*, 67 B.R. 838, 843 (D. Nev. 1986) (finding that in non-core proceedings where parties consent, bankruptcy courts may conduct jury trials without contravening

a Seventh Amendment attack, the United States Court of Appeals for the Second Circuit in *Ben Cooper, Inc. v. Insurance Co. of Pennsylvania* (*In re Ben Cooper*)<sup>116</sup> stated that in core and consensual proceedings, the district court reviews the bankruptcy court decision only as an appellate court.<sup>117</sup> Under the current statutory scheme, therefore, a district court in such cases would not be permitted to re-examine the factual issues of a jury trial, which is consistent with the Seventh Amendment.<sup>118</sup>

As a result of the Seventh Amendment's proscription against appellate review of factual findings by a jury, bankruptcy courts are prevented from conducting jury trials in non-core proceedings under the current statutory scheme. However, this Seventh Amendment proscription does not provide a barrier to bankruptcy courts conducting jury trials in core proceedings. When combined with the fact that a bankruptcy judge's status as a non-Article III judge does not prevent a jury trial conducted by that judge from satisfying the Seventh Amendment, the Seventh Amendment poses no restriction upon a bankruptcy judge to conduct a jury trial in a core proceeding.

## 2. *The Relationship Between Article III and Jury Trials in the Bankruptcy Courts*

The power of the judicial branch is derived from Article III.<sup>119</sup> Section one of Article III states that "[t]he 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."<sup>120</sup> In comparison to Article III judges, bankruptcy judges under the BAFJA are appointed for fourteen year terms, and their salaries are subject to diminution by Congress.<sup>121</sup> Bankruptcy judges, therefore, are not Article III judges, and bankruptcy courts are not Article III courts.<sup>122</sup> Instead, bankruptcy courts are characterized as Article I courts created pursuant to Congress' authority over bankruptcy matters under Article I, section

---

United States Constitution); Gibson, *Jury Trials*, *supra* note 62, at 164-65 (noting that judicial review problems in non-core proceedings do not apply to core proceedings).

116. 896 F.2d 1394 (2d Cir. 1990), *vacated and remanded*, 111 S. Ct. 425, *reinstated*, 924 F.2d 36 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2041 (1991).

117. *Id.* at 1403 (noting that "jury verdict in a core proceeding is subject only to the traditional standards of appellate review"); *see also* 28 U.S.C. § 158(a). For a further discussion of the *Ben Cooper* decision, *see infra* notes 163-78 and accompanying text.

118. *Ben Cooper*, 896 F.2d at 1403; *see also* Gibson, *Jury Trials*, *supra* note 62, at 164-65 (determining that judicial review would not pose problem in core proceedings because district court review is limited).

119. U.S. CONST. art. III.

120. U.S. CONST. art. III, § 1.

121. *See* 28 U.S.C. §§ 152-53 (1988); *Plastiras v. Idell* (*In re Sequoia Auto Brokers, Ltd.*), 827 F.2d 1281, 1284 (9th Cir. 1987).

122. *Sequoia Auto Brokers*, 827 F.2d at 1284.

eight of the Constitution.<sup>123</sup> Under the separation of powers doctrine, Congress is prohibited from granting the essential attributes of the judicial branch to judges who are not appointed pursuant to Article III; such an act would infringe on the authority of the judicial branch.<sup>124</sup> While Congress is thus limited in the authority that it may grant to bankruptcy courts, the exact limits on that authority remain unclear.

The United States Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>125</sup> attempted to define the limits on the power Congress may confer to the bankruptcy courts.<sup>126</sup> The focus of the Supreme Court in *Northern Pipeline* was on the constitutionality of the 1978 Act.<sup>127</sup> The case involved a suit brought by Northern Pipeline Construction Company (Northern Pipeline) against Marathon Pipe Line Company (Marathon) in a bankruptcy court based on breach of contract, breach of warranty, misrepresentation, coercion and duress theories.<sup>128</sup> Marathon moved to dismiss the claims, asserting that the 1978 Act improperly granted Article III powers to "judges who lacked life tenure and protection against salary diminution," and was, therefore, unconstitutional.<sup>129</sup> The United States Supreme Court held the 1978 Act unconstitutional and granted the dismissal.<sup>130</sup> The Court, however, diverged in reasoning, with four separate opinions and three justices

123. U.S. CONST. art. I, § 8, cl. 4; *Sequoia Auto Brokers*, 827 F.2d at 1284. Article I, § 8, cl. 4 states that "[t]he Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. Art. I, § 8, cl. 4.

124. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-60 (1982). For an in-depth discussion of *Northern Pipeline*, see *infra* notes 125-49 and accompanying text.

125. 458 U.S. 50 (1982). For a general discussion of the *Northern Pipeline* decision, see Erwin Chemerinsky, *Ending the Marathon: It Is Time to Overrule Northern Pipeline*, 65 AM. BANKR. L.J. 311, 312 (1991) (discussing problems concerning *Northern Pipeline* decision and arguing that *Northern Pipeline* should be overruled, stating that "Congress [should] decide the status and jurisdiction of the bankruptcy courts").

126. See *Northern Pipeline*, 458 U.S. at 62-71.

127. *Id.* at 62.

128. *Id.* at 56. Northern Pipeline had filed for reorganization in January of 1980. *Id.* Marathon motioned for dismissal asserting that the 1978 Act conferred Article III powers on a non-Article III court. *Id.* at 56-57. The United States intervened to defend the statute. *Id.* at 57. The United States Bankruptcy Court for the District of Minnesota refused to dismiss the case. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co. (In re Northern Pipeline Constr. Co.)*, 6 B.R. 928, 931-32 (Bankr. D. Minn. 1980). The United States District Court for the District of Minnesota, however, reversed the holding of the bankruptcy court and granted the dismissal. *Marathon Pipeline Co. v. Northern Pipeline Constr. Co.*, 12 B.R. 946, 947 (D. Minn. 1981). The parties then appealed the case to the United States Supreme Court. *Northern Pipeline*, 458 U.S. at 57.

129. *Northern Pipeline*, 458 U.S. at 56-57.

130. *Id.* at 87-88. The Court, however, stayed its judgment to give Congress the opportunity to correct the problems with the 1978 Act. *Id.* at 88. For a discussion of the subsequent history of the 1978 Act, see *supra* notes 39-45 and accompanying text.

dissenting.<sup>131</sup>

Justice Brennan, joined by three other justices, announced the plurality opinion of the Court.<sup>132</sup> Justice Brennan listed the extensive powers conferred upon the bankruptcy courts under the 1978 Act, including the power to hear "suits to recover accounts," to "hear claims based on state law as well as those based on federal law" and "to hold jury trials."<sup>133</sup> According to Justice Brennan, the conveyance of such expansive powers to bankruptcy courts under the 1978 Act vested bankruptcy courts with the powers of Article III courts.<sup>134</sup> Justice Brennan stated that Article III required that the "judicial power of the United States . . . be exercised by courts having the attributes prescribed in Art. III."<sup>135</sup> Justice Brennan observed, however, that bankruptcy court judges were not entrusted with the same constitutional protection as judges in Article III courts.<sup>136</sup> The bankruptcy judges do not have life-time tenure and salary protection.<sup>137</sup> In light of these considerations, Justice Brennan concluded that under the 1978 Act, bankruptcy judges were not Article III judges.<sup>138</sup> Having determined that bankruptcy judges were not

131. *Northern Pipeline*, 458 U.S. at 92-118. The plurality was authored by Justice Brennan, joined by Justices Marshall, Blackmun and Stevens. *Id.* at 52-89. Justice Rehnquist, joined by Justice O'Connor, wrote a concurring opinion. *Id.* at 89-92. Chief Justice Burger and Justice White both wrote a dissenting opinion. *Id.* at 92-118. Justice White was joined by The Chief Justice and Justice Powell. *Id.* at 92-118. For a more thorough discussion of the *Northern Pipeline* decision and an analysis of its presidential value, see Leonard v. Wessel (*In re Jackson*), 118 B.R. 243, 245-47 (E.D. Pa. 1990).

132. *Northern Pipeline*, 458 U.S. at 52-89 (Justices Marshall, Blackmun and Stevens joined in Justice Brennan's plurality opinion).

133. *Id.* at 54-55. Justice Brennan stated:

Included within the bankruptcy courts' jurisdiction are suits to recover accounts, controversies involving exempt property, actions to avoid transfers and payments as preferences or fraudulent conveyances, and causes of action owned by the debtor at the time of the petition for bankruptcy. The bankruptcy courts can hear claims based on state law as well as those based on federal law. . . .

. . . . In addition to this broad grant of power, Congress has allowed bankruptcy judges *the power to hold jury trials*, § 1480; to issue declaratory judgments, § 2201; to issue writs of habeas corpus under certain circumstances, § 2256; to issue all writs necessary in aid of the bankruptcy court's expanded jurisdiction, § 451 . . . and to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of Title 11, 11 U.S.C. § 105(a) (1976 ed., Supp. IV).

*Northern Pipeline*, 458 U.S. at 54-55 (emphasis added) (citations omitted) (footnote omitted). Justice Brennan also recognized the appellate process created by the 1978 Act. *Id.* at 55. The 1978 Act created special panels of bankruptcy judges to hear appeals. *Id.*

134. *Id.* at 87.

135. *Id.* at 59.

136. *Id.* at 59-61. Article III sets forth the characteristics of the power enjoyed by Article III judges. See U.S. CONST. art. III, § 1. For the relevant text of Article III, see text accompanying note 120.

137. *Northern Pipeline*, 458 U.S. at 60-61.

138. *Id.* at 61.

Article III judges, and that the 1978 Act conferred essential attributes of the judicial branch on bankruptcy judges, Justice Brennan concluded that the 1978 Act violated the separation of powers doctrine, and therefore, was unconstitutional.<sup>139</sup>

The concurrence, written by Justice Rehnquist and joined by Justice O'Connor, restricted the plurality's opinion.<sup>140</sup> Justice Rehnquist did not find the 1978 Act unconstitutional on the basis that the entire Act violated separation of powers, as did Justice Brennan.<sup>141</sup> Instead, Justice Rehnquist only found a portion of the 1978 Act unconstitutional.<sup>142</sup> Justice Rehnquist noted that the action before the bankruptcy court was a private right of action, which arose solely under state law prior to the filing of a bankruptcy petition.<sup>143</sup> The only connection the state causes of action against the defendant had with the bankruptcy court was that

---

139. *Id.* In addition to his holding, Justice Brennan expressly rejected two arguments raised by Northern Pipeline. *Id.* at 62. Northern Pipeline first argued that the bankruptcy courts were legislative courts, properly created under Article I of the Constitution. *Id.* The plurality found, however, that the 1978 Act did not fit into any of the categories of legislative courts previously recognized by the Supreme Court. *Id.* at 63-64. Justice Brennan recognized the validity of legislative courts in three narrow exceptions. *Id.* These exceptions, according to Brennan, constituted narrow situations where "the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers." *Id.* at 64. One of the three exceptions was the power of legislative courts to administer "public" rights. *Id.* at 67. Although Justice Brennan did not fully define matters of public right, he stated that they "at a minimum arise 'between the government and others.'" *Id.* at 69 (quoting *Ex Parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)). Brennan noted in dicta that matters of public right could be adjudicated by a legislative court, but that matters of private right "lie at the core" of judicial power and must be reserved to Article III judges. *Id.* at 70.

The second argument raised by Northern Pipeline and rejected by Justice Brennan was that under the 1978 Act, district courts maintain enough control over bankruptcy courts so that judicial power has in fact remained in Article III courts. *Id.* at 76. To support its argument, Northern Pipeline analogized the jurisdiction conferred to bankruptcy courts to that of magistrates and administrative agencies who act as adjuncts of the district courts. *Id.* at 67-70. Justice Brennan found that the 1978 Act intruded too deeply into the auspice of the Article III courts. *Id.* at 84. Therefore, the bankruptcy courts could not be considered adjuncts of the district court. *Id.*

140. *Id.* at 89-92 (Rehnquist, J., concurring).

141. *Id.* at 89-90 (Rehnquist, J., concurring). Justice Rehnquist stated: Were I to agree with the plurality that the question presented by these cases is "whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in 28 U.S.C. § 1471 (1976 ed., Supp IV) by § 241(a) of the Bankruptcy Act of 1978 violates Art. III of the Constitution," . . . I would with considerable reluctance embark on the duty of deciding this broad question.

*Id.* at 89 (Rehnquist, J., concurring) (quoting *Northern Pipeline*, 458 U.S. at 52 (Brennan, J., plurality opinion)).

142. *Id.* at 91 (Rehnquist, J., concurring).

143. *Id.* at 90-91 (Rehnquist, J., concurring). For a discussion of the dis-

the plaintiff had filed for reorganization in bankruptcy court prior to bringing the state causes of action.<sup>144</sup> Justice Rehnquist held that the exercise of power by a bankruptcy court over the state private right of action so over-extended the authority of the bankruptcy court that it violated the separation of powers doctrine.<sup>145</sup> Justice Rehnquist then determined that because the provision granting bankruptcy courts the authority over such cases could not be severed from the 1978 Act, the entire 1978 Act was invalid.<sup>146</sup>

The broad holding in *Northern Pipeline* delivered by Justice Brennan, contrasted with the narrower holding given by Justice Rehnquist has created uncertainty as to the amount of power Congress may confer upon a non-Article III court.<sup>147</sup> However, one constitutional interpreta-

---

tion between private rights of action and public rights of action, see *supra* note 88 and accompanying text.

144. *Northern Pipeline*, 458 U.S. at 90-91 (Rehnquist, J., concurring).

145. *Id.* (Rehnquist, J., concurring).

146. *Id.* at 90-91 (Rehnquist, J., concurring).

147. See Ferriell, *supra* note 4, at 127-33 (noting that subsequent Supreme Court decisions have seriously restricted Article III mandates of *Northern Pipeline*). A further Article III concern is the distinction between "private rights" and "public rights." This distinction is raised in dicta by both the plurality opinion of *Northern Pipeline*, and the majority opinion of *Granfinanciera*. See *Northern Pipeline*, 458 U.S. at 67-70; *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 52-55 (1988). The Court in *Granfinanciera* determined that a Seventh Amendment right to a jury trial is only implicated in legal actions involving "private rights." *Id.* at 51-52. The plurality in *Northern Pipeline*, however, implied that if the litigation concerned a matter of "private right," then a non-Article III court would not have jurisdiction. *Northern Pipeline*, 458 U.S. at 70 (stating that "only controversies in" public rights "category may be removed from Art. III courts and delegated to legislative courts or administrative agencies" and that "[p]rivate-rights disputes . . . lie at the core of the historically recognized judicial power"). The plurality in *Northern Pipeline* would mandate that bankruptcy courts not hear cases in which a Seventh Amendment jury trial right would arise because those cases always involve "private rights." Under this reasoning, therefore, it would be unconstitutional for bankruptcy courts to exercise jurisdiction over such cases whether or not a jury trial was requested. As a result, the issue of jury trials in bankruptcy courts where a Seventh Amendment guarantee was invoked would be moot. However, it is important to note that Justice Rehnquist's concurrence, did not hinge on the "public" and "private rights" distinction alone. *Northern Pipeline*, 458 U.S. at 89-92 (Rehnquist, J., concurring).

The *Granfinanciera* Court resurrected this problem, however, when it transformed the question of whether district courts could transfer actions invoking the Seventh Amendment to non-Article III courts and remove the right to a jury trial into the question of whether "Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal." *Granfinanciera*, 492 U.S. at 53. The *Granfinanciera* Court stated that if the case before the Court was not a matter of public right Congress could not "assign its adjudication to a specialized non-Article III court lacking 'the essential attributes of the judicial power.'" *Id.* at 53 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)). A possible inference from this dicta is that matters that implicate the Seventh Amendment right to a jury trial cannot be transferred to a non-Article III court. See *Torcise v. Community Bank*, 131 B.R. 503, 507 (S.D. Fla. 1991) (noting that *Granfinanciera* Court may dictate that an Article III court conduct jury trials when



tion is clear after *Northern Pipeline*: Congress is limited in the amount of power it may bestow on non-Article III courts by the separation of powers doctrine.<sup>148</sup> What remains unclear after *Northern Pipeline*, however, is whether a grant from Congress to bankruptcy courts to conduct jury trials conveys so much Article III power to an Article I court that the separation of powers doctrine is violated. The answer to this question cannot be ascertained in light of the narrowest holding of *Northern Pipeline*.<sup>149</sup> However, if it is constitutional for the BAFJA to authorize bankruptcy courts to make final determinations in core proceedings, among which are those proceedings implicating a Seventh Amendment right to a jury trial, then allowing bankruptcy courts to conduct jury trials in those cases does not appear to extend the power of bankruptcy courts so far into the realm of Article III courts as to violate separation of powers doctrine.<sup>150</sup>

### C. Circuit Court Split Regarding the Jury Trial Issue

With the statutory authority for bankruptcy courts to conduct jury trials unclear, and with the splintered decisions of the Supreme Court in both *Granfinanciera* and *Northern Pipeline*, it is no surprise that federal courts have not uniformly resolved the issue of whether bankruptcy courts are empowered to conduct jury trials.<sup>151</sup> Four circuit courts prior

---

“private rights” are involved). Some commentators have rejected this proposition. See, e.g., Ferriell, *supra* note 4, at 132 (suggesting some congressionally created “private rights” can be delegated to non-Article III forums). Such a broad reading of the majority’s opinion in *Granfinanciera*, however, ignores the express limitation the Court placed on its holding. For a further discussion of the express limitations of the *Granfinanciera* holding, see *supra* note 95. In addition, the inference ignores the fact that the Court in *Granfinanciera* may have only been addressing cases where the non-Article III forum had only a non-jury fact finder. *Granfinanciera*, 492 U.S. at 53. In fact, the *Granfinanciera* Court indicated that it was discussing courts of equity or administrative agencies “sitting without juries.” *Id.*

This Note, however, assumes that the BAFJA is constitutional in all respects other than possible provisions allowing for jury trials in bankruptcy courts. Therefore, this Note assumes that the current framework of the BAFJA allowing bankruptcy courts to enter final decisions in all core proceedings is constitutional.

148. See *Northern Pipeline*, 458 U.S. at 87, 91-92.

149. For a discussion of how the narrowest holding does not permit a conclusion that a grant of power to bankruptcy courts to conduct jury trials violates the separation of power doctrine, see *supra* notes 140-46. One court has determined that under the facts before it, jury trials in bankruptcy courts are not prohibited by separation of powers doctrine. *Ben Cooper, Inc. v. Insurance Co. of Pa.* (*In re Ben Cooper, Inc.*), 896 F.2d 1394, 1403-04, *vacated and remanded*, 111 S. Ct. 425, *reinstated*, 924 F.2d 36 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2041 (1991).

150. Note that other Article I courts have conducted jury trials without contravening the separation of powers doctrine, including magistrate courts and the courts of the District of Columbia. See *Ben Cooper*, 896 F.2d at 1403.

151. For a discussion of the impact of *Granfinanciera* on the jury trial issue, see *supra* notes 72-98 and accompanying text. For a further discussion of the

to the Seventh Circuit's decision in *Grabill* have addressed this issue in the context of core proceedings.<sup>152</sup> Recall that core proceedings are those proceedings in the BAFJA in which bankruptcy courts are permitted to enter final decisions and in which district courts have limited judicial review.<sup>153</sup> Three out of these four circuits have found that bankruptcy courts are without congressional authority to empanel juries in core proceedings.<sup>154</sup> Without addressing the constitutional issues, these three circuit courts based their conclusions on the determination that Congress did not grant bankruptcy courts, either explicitly or implicitly, the power to empanel juries in core proceedings.<sup>155</sup> By contrast, one circuit court has held that bankruptcy courts do have congressional authority to empanel juries; this court has also upheld the constitutionality of the authority based on the facts before the court.<sup>156</sup>

### 1. *The Reasoning of the Majority View*

The Sixth, Eighth and Tenth Circuits comprise the majority view, which rejects finding a statutory grant of authority to bankruptcy courts

---

impact of the *Northern Pipeline* decision on the jury trial issue, see *supra* notes 147-50 and accompanying text.

152. *Rafoth v. National Union Fire Ins. Co. (In re Baker & Getty Fin. Servs., Inc.)*, 954 F.2d 1169, 1173 (6th Cir. 1992) (holding that bankruptcy courts lack statutory authority to conduct jury trials in core proceedings); *Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.)*, 911 F.2d 380, 392 (10th Cir. 1990) (same); *In re United Mo. Bank*, 901 F.2d 1449, 1457 (8th Cir. 1990) (same); *Ben Cooper*, 896 F.2d at 1404 (holding that in core proceedings, jury trials in bankruptcy courts were not statutorily or constitutionally barred).

Two circuit courts have held that in non-core proceedings, bankruptcy courts may not conduct jury trials because of constitutional considerations. *Taxel v. Electronic Sports Research (In re Cinematronics, Inc.)*, 916 F.2d 1444, 1450-51 (9th Cir. 1990); *Beard v. Braunstein*, 914 F.2d 434, 442-43 (3d Cir. 1990). For a further discussion of the constitutional concerns implicated by jury trials in non-core proceedings, see *supra* notes 108-14 and accompanying text.

153. 28 U.S.C. §§ 157(b), 158(c) (1988). For a discussion of core proceedings and non-core proceedings, see *supra* notes 51-58 and accompanying text.

154. *Baker & Getty*, 954 F.2d at 1173-74 (finding no express or implied authority in BAFJA for bankruptcy courts to conduct jury trials); *Kaiser Steel*, 911 F.2d at 391-92 (same); *United Missouri*, 901 F.2d at 1454-57 (1990) (same). For a further discussion of the three circuits that found no statutory authority for jury trials in bankruptcy courts, see *infra* notes 157-62 and accompanying text.

155. *Baker & Getty*, 954 F.2d at 1173 n.10 (noting that because "bankruptcy courts are not *statutorily* authorized to conduct jury trials, this court will not address whether such an authorization would violate Article III of and the Seventh Amendment to the United States Constitution"); *Kaiser Steel*, 911 F.2d at 389-92 (basing its holding on statutory grounds and not addressing constitutional issues); *United Missouri*, 901 F.2d at 1454-57 (invalidating jury trials in bankruptcy courts on statutory grounds, and noting that "we do not reach the constitutional issues"). *But see Cinematronics*, 916 F.2d at 1450-51 (invalidating jury trials in non-core proceedings on constitutional grounds); *Beard*, 914 F.2d at 442-43 (same).

156. *Ben Cooper*, 896 F.2d at 1403-04. For a further discussion of *Ben Cooper*, see *infra* notes 163-75 and accompanying text.

to conduct jury trials.<sup>157</sup> All three courts employed the same reasoning for invalidating jury trials in bankruptcy courts. These courts first stated that the BAFJA contained no express grant of authority from Congress.<sup>158</sup> After examining the statutory language and legislative history of the BAFJA, all three circuit courts then concluded that both the language and legislative history of the BAFJA were non-determinative in ascertaining congressional intent.<sup>159</sup> Thus, because the Sixth, Eighth and Tenth Circuits found the express language of the BAFJA and its legislative history unhelpful, they refused to imply from the BAFJA the power of bankruptcy courts to conduct jury trials.<sup>160</sup> For example, in *Rafoth v. National Union Fire Insurance Co. (In re Baker & Getty)*,<sup>161</sup> the Sixth Circuit concluded that the legislative history of the BAFJA was unhelpful because Congress, when enacting the BAFJA, did not contemplate the *Granfinanciera* decision that preserved a Seventh Amendment guarantee to a jury trial in proceedings transferred to bankruptcy courts.<sup>162</sup>

## 2. *The Reasoning of the Minority View*

In contrast to the Sixth, Eighth and Tenth Circuits, the United States Court of Appeals for the Second Circuit in *Ben Cooper* determined that Congress had in fact granted to bankruptcy courts the power to conduct jury trials under the BAFJA.<sup>163</sup> The Second Circuit recognized

---

157. For a list of the cases comprising the majority view, see *infra* note 159 and accompanying text.

158. *Baker & Getty*, 954 F.2d at 1173; *Kaiser Steel*, 911 F.2d at 391; *United Missouri*, 901 F.2d at 1454.

159. *Baker & Getty*, 954 F.2d at 1173; *Kaiser Steel*, 911 F.2d at 392; *United Missouri*, 901 F.2d at 1455. For example, in *United Missouri*, after the United States Court of Appeals for the Eighth Circuit found the legislative history and statutory language lacking any indication of congressional intent concerning jury trials in the bankruptcy courts, the court noted that the "authority may still be implied if it is incidental and necessary to make the legislation effective." *Id.* The *United Missouri* court, however, declined to imply the power "[g]iven the absence of supporting legislative history, and the serious constitutional problems posed by an alternative interpretation." *Id.* at 1457.

In *Kaiser Steel*, the United States Court of Appeals for the Tenth Circuit examined the holdings of the Eighth Circuit in *United Missouri* and the Second Circuit in *Ben Cooper*. *Kaiser Steel*, 911 F.2d at 390-91. The *Kaiser Steel* court found the reasoning of the Eighth Circuit compelling. *Id.* at 391. The court found particularly important the fact that Congress did not expressly provide for jury trials in the BAFJA. *Id.* at 391-92 (noting that "Congress in the past has provided expressly for jury trials in the Article I context").

In *Baker & Getty*, the Sixth Circuit determined that the statutory language of the BAFJA offered "no insight into whether Congress intended for bankruptcy courts to conduct jury trials in core proceedings." *Baker & Getty*, 954 F.2d at 1173. The *Baker* court emphasized the fact that there were no procedural rules for conducting jury trials in bankruptcy courts. *Id.*

160. *Baker & Getty*, 954 F.2d at 1173; *Kaiser Steel*, 911 F.2d at 392; *United Missouri*, 901 F.2d at 1457.

161. 954 F.2d 1169 (6th Cir. 1992).

162. *Id.* at 1173.

163. *Ben Cooper, Inc. v. Insurance Co. (In re Ben Cooper, Inc.)*, 896 F.2d

that the BAFJA contained no express provisions granting bankruptcy courts the power to empanel juries.<sup>164</sup> The *Ben Cooper* court instead implied the power from two provisions of the BAFJA, section 151 and section 157(b), in light of the Supreme Court's decision in *Granfinanciera*.<sup>165</sup> Section 151 of the BAFJA states that "[e]ach 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."<sup>166</sup> Section 157(b) gives bankruptcy courts in core proceedings the power to hear and determine cases and issue final decisions.<sup>167</sup> The *Ben Cooper* court determined that the bankruptcy courts' ability to conduct jury trials is essential for the court to hear, determine and issue final decisions in all cases referred to bankruptcy courts after *Granfinanciera*.<sup>168</sup> The court combined this determination with the language from section 157(b) and section 151 to conclude that Congress must have intended bankruptcy courts to conduct jury trials.<sup>169</sup>

The Second Circuit also addressed some of the constitutional ramifications of its decision. First, the *Ben Cooper* court addressed the issue of whether Article III precluded jury trials in bankruptcy courts.<sup>170</sup> The *Ben Cooper* court asserted that if bankruptcy courts could enter final decisions, then bankruptcy courts could also conduct jury trials.<sup>171</sup> Therefore, the dispositive question for the court was whether the ability

---

1394, 1404 (2d Cir.), *vacated and remanded*, 111 S. Ct. 425, *reinstated*, 924 F.2d 36 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2041 (1991). The case in *Ben Cooper* involved a contract between Ben Cooper, Inc. (Ben Cooper) and the Insurance Company of Pennsylvania. *Id.* at 1396-97. Ben Cooper entered into the contract with the insurance company after Ben Cooper had filed a Chapter 11 petition. *Id.* at 1396. The insurance company failed to pay a claim advanced by Ben Cooper. *Id.* at 1396-97. As a result, Ben Cooper, Inc. brought an action asserting a contract claim based on state law. *Id.* at 1397. The circuit court held that the claim was "an essential part of administering the estate" of Ben Cooper, Inc. *Id.* at 1400. Therefore, the *Ben Cooper* court concluded that a state law proceeding to recover under a post-petition contract was "core." *Id.*

164. *Id.* at 1402.

165. *Id.* at 1402-03.

166. *Id.* (quoting 28 U.S.C. § 151 (1988)).

167. *Id.*; see also 28 U.S.C. § 157(b) (1988). Section 157(b) states: "Bankruptcy judges 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 . . . and may enter appropriate orders and judgments . . ." *Id.*

168. *Ben Cooper*, 896 F.2d at 1402.

169. *Id.* The court in *Ben Cooper* stated that "[c]onstruing the Bankruptcy Code to allow jury trials in the bankruptcy court is the only way to reconcile" the statutory concerns with the United States Supreme Court's holding in *Granfinanciera*. *Id.*

170. *Id.* at 1403.

171. *Id.* The court noted that "the practice of jury trials in Article I courts has been upheld when the authority of the Article I judges does not otherwise run afoul of Article III." *Id.* The *Ben Cooper* court postulated that the "primary purpose of . . . [Article III] is to ensure a federal judiciary free from pressure from the other branches of government." *Id.* The court reasoned that juries were more insulated than bankruptcy judges from pressure applied by the legis-

of bankruptcy courts to enter final decisions in core proceedings was constitutional.<sup>172</sup> To reach its conclusion, the court distinguished the facts of *Ben Cooper* from those of *Northern Pipeline*, in which the Supreme Court held that the particular power exercised by the bankruptcy court was unconstitutional.<sup>173</sup> On this basis, the *Ben Cooper* court determined that it was constitutional for the bankruptcy court to enter a final decision.<sup>174</sup> Following from this determination, the *Ben Cooper* court held that Article III of the Constitution was not violated by the bankruptcy court's exercise of its power to empanel a jury.<sup>175</sup>

Second, the Second Circuit determined that congressional authority for bankruptcy courts to conduct jury trials did not violate the Seventh Amendment.<sup>176</sup> The court noted that in core proceedings, such as the case at bar, the district court was not authorized to retry facts determined in the bankruptcy court.<sup>177</sup> The court found that because there was no *de novo* review, the Seventh Amendment proscription against the retrial of facts determined by a jury was not implicated.<sup>178</sup>

### III. ANALYSIS OF *IN RE GRABILL CORPORATION*

With the precedent set by the Supreme Court and the split among circuit courts, the Seventh Circuit in *In re Grabill Corp.* was faced with analyzing the permissibility of jury trials in bankruptcy courts. This section of this Note presents the facts of the case, followed by a description of the court's decision and reasoning, followed by a critical analysis of the court's decision.<sup>179</sup> While agreeing with the *Grabill* court's conclu-

---

lative and executive branches. *Id.* The court therefore concluded that the purpose of Article III was furthered by utilizing jury trials in bankruptcy courts. *Id.*

172. *Id.*

173. *Id.* The circuit court distinguished the state contract claim in *Ben Cooper* from the state contract claim before the Supreme Court in *Northern Pipeline*. *Id.* The court detailed that the state law claim in *Northern Pipeline* arose prior to the debtor filing a bankruptcy petition, but that the debtor waited until after filing the petition to bring the state cause of action against the defendant. *Id.* at 1348. The court noted that while the contract claim in *Northern Pipeline* was a pre-petition contract claim, the contract claim at issue in *Ben Cooper* was a post-petition claim. *Id.* at 1403. The court found that this fact sufficiently distinguished the case from *Northern Pipeline*. *Id.* For a discussion of *Northern Pipeline*, see *supra* notes 125-50 and accompanying text.

174. *Ben Cooper*, 896 F.2d at 1403. The court stated that "[t]he conclusion that core jurisdiction is constitutional . . . is implicit in our analysis." *Id.*

175. *Id.* at 1403-04.

176. *Id.* at 1403.

177. *Id.*

178. *Id.* (stating that "[s]ince the jury verdict in a core proceeding is subject only to the traditional standards of appellate review, such proceeding does not violate the Seventh Amendment").

179. For a discussion of the facts of *Grabill*, see *infra* notes 181-91 and accompanying text. For a discussion of the reasoning of *Grabill*, see *infra* notes 192-272 and accompanying text. For an analysis of *Grabill*, see *infra* notes 273-310 and accompanying text.

sion that the BAJFA neither expressly nor impliedly authorizes bankruptcy courts to conduct jury trials, this Note asserts that several policy determinations made by the court were improper.<sup>180</sup>

#### A. *Facts and Procedural History*

In 1986, the National Bank of North Carolina (National) extended a twenty-five million dollar line of credit to Windsor-Hamilton, Ltd. (Windsor-Hamilton), which was a holding company owned by the Grabill Corporation (Grabill).<sup>181</sup> William Stoeker, the sole shareholder of Grabill, personally guaranteed the loans of Windsor-Hamilton.<sup>182</sup> The loans were partially repaid by money transfers from Windsor-Hamilton and Grabill to National.<sup>183</sup> On January 31, 1989, other creditors of Grabill and Windsor-Hamilton instituted involuntary Chapter 7 proceedings.<sup>184</sup> The bankruptcy trustee, appointed by the bankruptcy court, filed suit against National in the United States District Court for the Northern District of Illinois for the return of the payments made by Windsor-Hamilton and Grabill to National; the case was referred to a bankruptcy court.<sup>185</sup> The trustee alleged that the payments were preferential and fraudulent.<sup>186</sup> National requested a jury trial.<sup>187</sup> The parties agreed that National was entitled to a jury trial, but the parties contested whether the bankruptcy court had the power to empanel a jury.<sup>188</sup> National filed a petition for removal of the case to the district court.<sup>189</sup> The district court denied the petition holding that the bankruptcy court had the power to conduct jury trials.<sup>190</sup> National brought an interlocutory appeal to the United States Court of Appeals for the Seventh Circuit.<sup>191</sup>

#### B. *The Seventh Circuit's Holding and Reasoning*

On appeal, the Seventh Circuit reversed the district court's decision and held that Congress had not granted authority to bankruptcy courts

---

180. For the conclusion of this Note, see *infra* notes 311-15 and accompanying text.

181. Steinberg v. NCB Nat'l Bank (*In re Grabill Corp.*), 133 B.R. 621, 622 (N.D. Ill. 1991).

182. *Id.*

183. *Id.* On May 6, 1988 Windsor paid \$13,166,250 to National. *Id.* In addition, Grabill made payments to National totaling \$7,890,047 between February 9, 1988 and May 5, 1988 to National. *Id.*

184. *Id.* The Chapter 7 proceedings later evolved into a Chapter 11 proceeding. *Id.*

185. *Id.* at 622-23.

186. *Id.* at 623.

187. *Id.*

188. *Id.*; *In re Grabill Corp.*, 967 F.2d 1152, 1152 (7th Cir. 1992).

189. *Grabill*, 133 B.R. at 623.

190. *Id.* at 627.

191. *Grabill*, 967 F.2d at 1152.

to conduct jury trials, and, that “[w]here a jury trial is required by the Seventh Amendment, that trial must be held in the district court.”<sup>192</sup> The *Grabill* court directed the district court to remove the case from the bankruptcy court so that a district court could conduct a jury trial.<sup>193</sup> To reach this holding, the Seventh Circuit examined whether the BAFJA contained an express or implied grant of power for bankruptcy courts to conduct jury trials to bankruptcy courts.<sup>194</sup> The court also examined the policy considerations surrounding the jury trial issue.<sup>195</sup>

### 1. *The Statutory Grant of Power to the Bankruptcy Courts*

#### a. Analysis of the Language of the BAFJA

The *Grabill* court found no evidence in the BAFJA that Congress expressly granted authority to bankruptcy courts to conduct jury trials.<sup>196</sup> Furthermore, the *Grabill* court refused to find an implied grant of authority based on congressional intent.<sup>197</sup> To determine whether Congress intended to grant bankruptcy courts the power to conduct jury trials, the court first examined the language of the BAFJA. The *Grabill* court found two sections of the BAFJA applicable: sections 1411 and 157(b)(5).<sup>198</sup> Section 1411, the only section in the BAFJA expressly referring to jury trials, preserves the right to a jury trial in personal injury and wrongful death tort actions in a bankruptcy proceeding.<sup>199</sup> Section 157(b)(5) requires the removal of personal injury and wrongful death claims from bankruptcy courts to district courts.<sup>200</sup> The *Grabill* court

192. *Id.* at 1158.

193. *Id.* at 1158-59.

194. *Id.* at 1153-57.

195. *Id.* at 1157-58.

196. *Id.* at 1153. The court stated that “[t]here is no express statutory authority in the Bankruptcy Amendments and Federal Judgeship Act of 1984 . . . granting bankruptcy courts the power to conduct jury trials; even the Second Circuit recognizes this.” *Id.* (citing *Ben Cooper, Inc. v. Insurance Co. (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1402 (2d Cir.), *vacated and remanded*, 111 S. Ct. 425, *reinstated*, 924 F.2d 36 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2041 (1991)).

197. *Id.* at 1158 (noting that “it would be venturesome to hold that bankruptcy courts are impliedly empowered by BAFJA to conduct jury trials in core proceedings”).

198. *Id.* at 1153. Section 1411 of the BAFJA provides:

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.

(b) The district court may order the issue arising under section 303 of title 11 to be tried without jury.

28 U.S.C. § 1411 (1988).

199. 28 U.S.C. § 1411(a).

200. 28 U.S.C. § 157(b)(5) (1988); *see also Grabill*, 967 F.2d at 1153-54. 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 bank-

noted that the inclusion of section 1411 combined with section 157(b)(5) could be read to indicate three different congressional motives.<sup>201</sup> One interpretation of the express provision reserving the right to a jury trial in personal injury and wrongful death claims is that Congress intended that a right to a jury trial remain only in personal injury and wrongful death actions.<sup>202</sup> This interpretation infers from Congress' express removal of personal injury and wrongful death cases that Congress did not intend bankruptcy courts to conduct jury trials.<sup>203</sup> A second interpretation of sections 1411 and 157(b)(5) is that Congress intended all cases not expressly excluded from the bankruptcy court by section 157(b)(5) to remain in bankruptcy courts' jurisdiction.<sup>204</sup> Thus, under this interpretation, Congress intended bankruptcy courts to conduct jury trials in all cases except personal injury and wrongful death actions.<sup>205</sup> The final interpretation of sections 1411 and 157(b)(5), labelled by the *Grabill* court as the "realist" view, holds that Congress included the two provisions in the BAFJA to alleviate the concerns of personal injury attorneys that a right to a jury trial in personal injury and wrongful death actions would be lost in bankruptcy courts.<sup>206</sup> Under this view, the combination of sections 1411 and 157(b)(5) has a neutral effect, and the intent of Congress concerning jury trials in the bankruptcy courts cannot be ascertained.<sup>207</sup>

After considering these three interpretations, the *Grabill* court concluded that the combination of sections 1411 and 157(b)(5) implied that Congress did not intend bankruptcy courts to have the power to conduct jury trials.<sup>208</sup> The court cited its own reasoning in *N.I.S. Corp. v. Hallahan (In re Hallahan)*<sup>209</sup> to support its conclusion.<sup>210</sup> In *Hallahan*, the court noted that section 1411 replaced a broader jury trial provision.<sup>211</sup> Interpreting Congress' act as trying to narrow the scope of the jury trial provision, the court found it more appropriate to adopt a narrow read-

---

ruptcy 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.

28 U.S.C. § 157 (b)(5).

201. *Grabill*, 967 F.2d at 1153-54.

202. *Id.* at 1153.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 1153 n.3 (noting the possibility that "Congress inserted the right to jury trial in personal injury and wrongful death claims as a compromise with the lawyers who represent personal injury plaintiffs" (quoting *In re Clark*, 75 B.R. 337, 339-40 (Bankr. N.D. Ala. 1987))).

207. *Id.*

208. *Grabill*, 967 F.2d at 1153.

209. 936 F.2d 1496 (7th Cir. 1991).

210. *Grabill*, 967 F.2d at 1153.

211. *Hallahan*, 936 F.2d at 1507 (stating that § 1411 replaced former § 1480(a)).



ing of section 1411.<sup>212</sup> Based upon such an interpretation of section 1411, the court determined that Congress intended no right to a jury trial in any case but personal injury and wrongful death.<sup>213</sup>

Moreover, the *Grabill* court stated that other sections of the BAFJA similarly do not support the inference that Congress intended bankruptcy judges to conduct jury trials.<sup>214</sup> The court closely examined the language of section 157(b)(1), which provides that “[b]ankruptcy judges may hear and determine . . . all core proceedings.”<sup>215</sup> Once again, the court conceded that this language could buttress contradictory inferences of the intention of Congress concerning jury trials in bankruptcy courts.<sup>216</sup> In one sense, the language can indicate that Congress, in choosing the language “bankruptcy judges,” intended a personal power that extends to judges alone.<sup>217</sup> A contrary view noted by the court, is that Congress, in choosing the language that it did, intended a comprehensive grant of authority to hear and determine core proceedings, whether or not a jury was utilized.<sup>218</sup> The *Grabill* court determined that, in its view, Congress intended bankruptcy judges to have only a personal power to hear and determine core proceedings; this personal power does not include the ability to conduct jury trials.<sup>219</sup> The court placed paramount importance on the fact that Congress did not expressly provide for jury trials.<sup>220</sup> The court noted that in other circumstances where Congress wished to confer the authority to conduct jury trials upon a court, Congress did so with express language.<sup>221</sup>

The court further supported its interpretation of the “hear and determine” clause with the framework established for bankruptcy courts in section 157 of the BAFJA.<sup>222</sup> Section 157 establishes a system in which bankruptcy courts have more extensive authority in core proceedings than in non-core proceedings.<sup>223</sup> According to the court, it was to show this extension of power in core proceedings, not to authorize jury trials,

212. *Id.*; see also *Grabill*, 967 F.2d at 1154.

213. *Grabill*, 967 F.2d at 1154.

214. *Id.* at 1154.

215. 28 U.S.C. 157(b)(1); see also *Grabill*, 967 F.2d at 1154.

216. *Grabill*, 967 F.2d at 1154.

217. *Id.*

218. *Id.* (citing Gibson, *Jury Trials*, *supra* note 62, at 157 & n.113).

219. *Id.* at 1155. The court stated that “[w]e agree . . . that the language of 157(b)(1) . . . indicates that the power conferred is a personal one, limited to bankruptcy judges.” *Id.*

220. *Id.* The court stated that “[w]e are entitled to assume that Congress legislated with care in amending the Bankruptcy Act, and that had it intended to provide for jury trials in bankruptcy court, it would ‘not [have] left the matter to mere implication.’” *Id.* (citing *Palamore v. United States*, 411 U.S. 389, 395 (1973)).

221. *Id.* (citing 28 U.S.C. § 636(a)(3), (c)(1), which authorizes federal magistrates to conduct jury trials).

222. *Id.* at 1156; see also 28 U.S.C. § 157 (1988).

223. 28 U.S.C. § 157. For the text of § 157, see *supra* notes 49-52, 56-58.

that Congress authorized bankruptcy judges to *hear and determine* core proceedings while only giving the authority to *hear* non-core proceedings.<sup>224</sup> The court supports this determination with an analogy to the Magistrate Act, which contains similar *hear and determine* language.<sup>225</sup> Under the Magistrate Act, magistrates have the authority to conduct jury trials.<sup>226</sup> Unlike the BAFJA, Congress supplied a separate section in the Magistrate Act expressly authorizing magistrates to conduct jury trials.<sup>227</sup> This analogy supports the view that although the *hear and determine* language was to signal a more extensive authority for bankruptcy judges in core proceedings, it should not be read to extend the authority to conduct jury trials. According to the court, had Congress intended to authorize bankruptcy courts to conduct jury trials in the BAFJA, it would have stated that power explicitly in the BAFJA, as Congress did in the Magistrate Act.<sup>228</sup>

As a result of its analysis of the statutory language of the BAFJA, the *Grabill* court concluded that the language did not warrant the implication that bankruptcy courts possessed the power to conduct jury trials.<sup>229</sup>

#### b. Analysis of the Legislative History of the BAFJA

In a further attempt to determine congressional intent concerning juries in bankruptcy courts, the *Grabill* court examined the legislative history of the BAFJA. The court found the legislative history unhelpful in resolving the jury trial issue.<sup>230</sup> As an illustration of the quagmire created by an investigation of the legislative history, the court examined whether the history of the bankruptcy acts gave any indication of congressional intent.<sup>231</sup> Specifically, the court examined the invalidation of the 1978 Act and the institution of the Emergency Rules, which the

224. *Grabill*, 967 F.2d at 1156.

225. *Id.* (citing 28 U.S.C. § 636(b)(1)(A) (1988)).

226. *See* 28 U.S.C. § 636(c)(1) (1988). The Magistrate Act provides:

Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.

*Id.*

227. *See Id.*

228. *Grabill*, 967 F.2d at 1156. The court also noted that the Magistrate Act provides for direct appeal to an appellate court when a magistrate judge presides over a jury trial. *Id.* The *Grabill* court determined that a lack of such review procedure in the BAFJA is a further indication that jury trials in bankruptcy proceedings should be referred to district courts. *Id.*

229. *Id.*

230. *Id.* at 1154.

231. *Id.*

BAFJA ultimately replaced.<sup>232</sup> The court determined that the inferences it could draw from this history were susceptible to conflicting interpretations.<sup>233</sup> One interpretation noted by the *Grabill* court was that Congress intended the BAFJA to be restrictive concerning jury trials.<sup>234</sup> The *Grabill* court noted that the Emergency Rules contained an express prohibition against jury trials in the bankruptcy courts.<sup>235</sup> Because the Emergency Rules were a response to the limitation of the power of bankruptcy courts announced by *Northern Pipeline*, this interpretation holds that Congress intended to retain the limitations of the Emergency Rules.<sup>236</sup> An equally acceptable interpretation considered by the *Grabill* court was that by not incorporating the express prohibition against jury trials contained in the Emergency Rules, Congress intended bankruptcy courts to conduct jury trials.<sup>237</sup> As a result of the conflicting interpretations, the *Grabill* court concluded that “any attempt to glean implied congressional authorization from the scant legislative history amounts to an illusory search.”<sup>238</sup>

Without the aid of legislative history or statutory language to indicate the intent of Congress, the *Grabill* court refused to imply in the BAFJA a grant of power to bankruptcy courts to conduct jury trials.<sup>239</sup> Further prompting the court to decide not to infer the power from the BAFJA were the constitutional problems implicated by such an inference.<sup>240</sup> Finally, the court was influenced by the fact that there were no procedural rules enacted to control jury trials in bankruptcy courts.<sup>241</sup>

## 2. Policy Considerations

In addition to concluding that statutory authority does not support vesting bankruptcy courts with the power to conduct jury trials, the *Grabill* court also addressed the policy concerns raised by its decision. The court recognized that “efficiency was a key premise in developing the

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* (quoting *Leonard v. Wessel (In re Jackson)*, 118 B.R. 243 (Bankr. E.D. Pa. 1990)).

239. *Id.* (stating that “[a]bsent any discernible intent from either statutory language or legislative history, we are reluctant to *infer* in BAFJA authority that Congress has not in any clear manner *conferred*”).

240. *Id.* at 1157. The court stated that its “conclusion is also influenced by the constitutional issue lurking in the background.” *Id.* For a further discussion of the constitutional limitations on the power of Congress to confer authority on the bankruptcy courts, see *supra*, notes 66-150 and accompanying text.

241. *Id.* at 1155. The *Grabill* court recognized the repeal of Federal Rule of Bankruptcy Procedure 9015, which “once provided for jury trials.” *Id.*

modern bankruptcy scheme.”<sup>242</sup> First, the *Grabill* court dismissed fears as being “overstated” that requiring the district court to withdraw a case from the bankruptcy court would lead to strategic abuse of a Seventh Amendment right to a jury trial.<sup>243</sup> The *Grabill* court also opined that if strategic abuse will result from jury trials in bankruptcy matters, the abuse will occur whether the matter is handled in the bankruptcy court or the district court.<sup>244</sup> Second, the *Grabill* court found that rather than enhance efficiency, conducting jury trials in bankruptcy courts would in fact thwart the bankruptcy courts’ efficiency.<sup>245</sup> According to the *Grabill* court, bankruptcy courts have neither the physical capacity nor the staff needed to conduct jury trials.<sup>246</sup> Quoting the observations of other courts, the *Grabill* court argued that the inherently time-consuming nature of jury trials cuts against the intent of Congress to keep bankruptcy cases fast-paced.<sup>247</sup>

### C. *The Dissenting Opinion*

In contrast to the majority position in *Grabill*, the dissenting opinion, authored by Judge Posner, adopted a liberal approach to the jury trial issue.<sup>248</sup> Similar to the majority, Judge Posner determined that the legislative history and the statutory language of the BAFJA did not indicate a congressional intent to grant bankruptcy courts the power to conduct jury trials.<sup>249</sup> Judge Posner attributed this congressional silence to the fact that the issue was not “live” at the time the BAFJA was adopted

242. *Id.* at 1157 (citing *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 61 & 61 n.16).

243. *Id.* at 1157-58. The court invoked the United States Supreme Court’s reasoning in *Granfinanciera* to determine that strategic abuses would not result. *Id.* (citing *Granfinanciera*, 492 U.S. at 63 n.17 (1988)). The United States Supreme Court in *Granfinanciera*, when deciding whether to grant the right to a jury trial in certain bankruptcy matters, stated:

It warrants notice, however, that the provision of jury trials in fraudulent conveyance actions has apparently not been attended by substantial difficulties under previous bankruptcy statutes; that respondent has not pointed to any discussion of this allegedly serious problem in the legislative history of the 1978 Act or the 1984 Amendments; that in many cases defendants would likely not request jury trials . . . .

*Granfinanciera*, 492 U.S. at 63 n.17. For a discussion of the flaws of this reasoning, see *infra* note 297.

244. *Grabill*, 967 F.2d at 1158.

245. *Grabill*, 967 F.2d at 1157-58.

246. *Id.* at 1158 (quoting *In re G. Weeks Sec. Inc.*, 89 B.R. 697, 710 (Bankr. W.D.Tenn. 1988)).

247. *Id.* at 1158 (quoting *G. Weeks*, 89 B.R. at 710).

248. *Id.* at 1159-61 (Posner, J., dissenting).

249. *Id.* at 1159 (Posner, J., dissenting). Judge Posner illustrated how unavailing interpretation of the statutory language in this case is: “On the one hand the statute says that ‘bankruptcy judges [not juries] may hear and determine . . . all core proceedings’ but on the other hand this can be read as ‘bankruptcy judges may hear and determine . . . all core proceedings [whether they are jury or non-jury cases].” *Id.* (Posner, J., dissenting) (alteration in original).

because the BAFJA was drafted prior to the Supreme Court's decision in *Granfinanciera* preserving the right to a jury trial in proceedings referred to bankruptcy courts.<sup>250</sup> In contrast to the majority, the dissent concluded that courts are responsible for filling this statutory void and must determine which court—bankruptcy or district—should have the power to conduct jury trials in bankruptcy proceedings.<sup>251</sup>

According to Judge Posner, the “practical considerations” concerning jury trials in bankruptcy matters should determine which courts are appropriate to conduct jury trials.<sup>252</sup> Judge Posner objected to the policy decisions of the majority, particularly the majority's determinations that the efficiency of litigation would not suffer from its decision not to grant bankruptcy courts the power, and that strategic abuses would not result from the need to remove jury trials to the district courts.<sup>253</sup> Judge Posner found that policy in fact weighed heavily in favor of the court granting bankruptcy courts the power to conduct jury trials.<sup>254</sup> With respect to the issue of efficiency, Judge Posner noted that it is wasteful of both the litigants' and the courts' time and money to require a case, or part of a case, to be removed from the bankruptcy court to a different forum and a different judge.<sup>255</sup> Particularly troubling to Judge Posner was the possibility that bankruptcy proceedings would be split, with the segment requiring jury attention tried in the district court and the segment to which no right to a jury trial attaches heard in the bankruptcy court.<sup>256</sup> The other policy concern raised by the majority was strategic abuse of the federal court system.<sup>257</sup> Judge Posner concluded that strategic abuse could result from a system that did not allow bankruptcy judges to preside over juries.<sup>258</sup> A litigant who finds a particular bankruptcy judge displeasing could elect a jury trial and thereby obtain a

250. *Id.* (Posner, J., dissenting).

251. *Id.* (Posner, J., dissenting) (“Congress had never even dreamed there was such a question. We must decide.”). Judge Posner is not alone in this approach. Judge Louis H. Pollak of the United States District Court for the Eastern District of Pennsylvania also determined that because Congress was silent on the issue of jury trials in bankruptcy courts, it was the proper role of the court to decide whether to grant the authority. *Leonard v. Wessel (In re Jackson)*, 118 B.R. 243, 252 (E.D. Pa. 1990). Judge Pollak noted that “the responsible course for the judiciary to take with respect to an issue which Congress didn't look at, but which must now be resolved, is to resolve that issue along the lines that to the judiciary makes most sense as a matter of judicial administration.” *Id.* at 252. Judge Pollak concluded that it is more sensible to have the bankruptcy courts conduct the jury trial in core proceedings. *Id.* Therefore, Judge Pollak granted the bankruptcy court the power to conduct a jury trial. *Id.*

252. *Grabill*, 967 F.2d at 1159 (Posner, J., dissenting).

253. *Id.* at 1159-60 (Posner, J., dissenting).

254. *Id.* (Posner, J., dissenting).

255. *Id.* at 1159 (Posner, J., dissenting).

256. *Id.* (Posner, J., dissenting).

257. *Id.* at 1157-58 (Posner, J., dissenting).

258. *Id.* at 1159-60 (Posner, J., dissenting).

different judge.<sup>259</sup> Furthermore, a litigant could use the jury trial request to stall the proceedings.<sup>260</sup>

Judge Posner also found bankruptcy judges competent to conduct jury trials.<sup>261</sup> According to Judge Posner, the fact that bankruptcy judges lack life tenure does not make them unqualified to conduct jury trials.<sup>262</sup> He noted a full list of situations and exceptions in which judges who lack lifetime tenure conduct jury trials.<sup>263</sup> Most notable to Judge Posner were federal magistrates.<sup>264</sup> Although they lack life tenure, magistrates are permitted to conduct jury trials.<sup>265</sup> Judge Posner emphasized that while bankruptcy judges enjoy a fourteen year tenure, magistrates serve only an eight year term.<sup>266</sup> Judge Posner asserted that this point "makes the case for allowing bankruptcy judges to conduct jury trials stronger than the case for allowing magistrate judges to do so."<sup>267</sup>

Judge Posner also compared a bench trial to a jury trial.<sup>268</sup> He found the only real difference between the two were *voir dire* and jury instructions.<sup>269</sup> Judge Posner found bankruptcy judges competent to conduct *voir dire* and draft jury instructions.<sup>270</sup> As a result, Judge Posner found that bankruptcy judges were capable of conducting jury trials and found that lack of life tenure was not an obstacle to their presiding over juries.<sup>271</sup>

After finding bankruptcy judges competent to preside over jury tri-

259. *Id.* (Posner, J. dissenting).

260. *Id.* at 1159 (Posner, J., dissenting).

261. *Id.* at 1160 (Posner, J., dissenting).

262. *Id.* at 1161 (Posner, J., dissenting).

263. *Id.* at 1160 (Posner, J. dissenting). Judge Posner stated:

Very few state trial judges have life tenure either, yet the vast majority of jury cases in this country are tried in state courts and we do not hear howls of protest. Many federal judicial officers—not just bankruptcy judges—lack life tenure yet conduct jury trials. Judges of the District of Columbia superior court are one example. Judges of the territorial courts are another.

*Id.* (Posner, J., dissenting).

264. *Id.* (Posner, J., dissenting).

265. *Id.* (Posner, J., dissenting).

266. *Id.* (Posner, J., dissenting).

267. *Id.* (Posner, J., dissenting). Judge Posner also addressed the concern that litigants must consent to a jury before a magistrate judge, and therefore, arguably, Congress would require similar consent in bankruptcy proceedings. *Id.* Judge Posner dismissed this problem, however, by noting that the parties must consent to all proceedings before a magistrate judge, not just those cases involving a jury trial. *Id.* The BAFJA, on the other hand, does not require consent of the parties for bankruptcy judges to enter final decisions in core proceedings. *Id.*

268. *Id.* (Posner, J., dissenting).

269. *Id.* (Posner, J., dissenting).

270. *Id.* (Posner, J., dissenting).

271. *Id.* (Posner, J., dissenting).

als, the dissent determined that the *Grabill* court should entrust bankruptcy courts with the power to conduct jury trials.<sup>272</sup>

#### D. Critical Analysis

This Note asserts that the *Grabill* majority effectively analyzed the issue of whether bankruptcy courts had a statutory grant of authority from Congress to conduct jury trials.<sup>273</sup> The *Grabill* court was consistent with most courts and commentators when it noted that no express grant of authority is present in the BAFJA.<sup>274</sup> In addition, the *Grabill* court properly stated that, except for the wrongful death and personal injury jury reservation clause in section 1411 of the BAFJA, the BAFJA does not contain express language permitting jury trials in bankruptcy courts.<sup>275</sup> Finally, it would take a strained interpretation of section 157(b) of the BAFJA, which grants bankruptcy courts the power to “hear and determine” cases, to conclude that the “hear and determine” clause expressly includes the authority of the bankruptcy courts to empanel juries.<sup>276</sup>

Equally accurate was the *Grabill* majority’s determination that no implied power exists in the BAFJA for bankruptcy courts to conduct jury trials.<sup>277</sup> As the *Grabill* court properly noted, an attempt to infer from the language of the BAFJA any congressional intent concerning jury trials in bankruptcy courts leads to dual and conflicting conclusions.<sup>278</sup> The inclusion of sections 1411 and 157(b)(5) do not provide a solid foundation on which to imply the authority for bankruptcy courts to conduct jury trials. It is entirely possible that the “realist” view, which purports that Congress included sections 1411 and 157(b)(5) in the BAFJA to appease trial lawyers in order to hasten passage of the legislation, is the answer to why these sections are in the BAFJA.<sup>279</sup> Even if the realist view is inaccurate, the arguments for and against an inference of intent of Congress to authorize jury trials are equally strong. Thus,

---

272. *Id.* at 1160-61 (Posner, J., dissenting).

273. *Grabill*, 967 F.2d at 1153-57. For a further discussion of the majority’s analysis, see *supra* notes 196-247 and accompanying text.

274. *Grabill*, 967 F.2d at 1153. For a discussion of other courts and commentators which have determined that there is no express authorization in the BAFJA for bankruptcy courts to conduct jury trials, see *supra* note 62.

275. *Grabill*, 967 F.2d at 1153.

276. See *Torcise v. Community Bank*, 131 B.R. 503, 506 (S.D. Fla. 1991) (concluding that the “hear and determine” language does not expressly grant power to bankruptcy judges to conduct jury trials); *Growers Packing Co. v. Community Bank*, 134 B.R. 438, 442 (S.D. Fla. 1991) (noting that although “the bankruptcy court may ‘hear and determine’ all cases arising under Title 11 . . . that language does not, by itself, amount to an explicit grant of power to conduct jury trials”).

277. *Grabill*, 967 F.2d at 1158.

278. *Id.* at 1153-54. For a discussion of these conflicting conclusions, see *supra* notes 201-07 and accompanying text.

279. *Grabill*, 967 F.2d at 1153 n.3.

the two sections are non-determinative on the issue and the status quo, which precludes jury trials in bankruptcy courts without express or implied authority, remains.

Furthermore, as other courts have also noted, there exists no legislative history from which to glean congressional intent.<sup>280</sup> As the dissent pointed out, the only clear conclusion as to the intention of Congress concerning the BAFJA is that Congress did not anticipate the *Granfinanciera* holding that the Seventh Amendment guarantees a jury trial right in a limited number of bankruptcy proceedings.<sup>281</sup> Thus, Congress must never have considered the issue of jury trials in bankruptcy courts when drafting the BAFJA.

The *Grabill* majority also explored the possibility of implying the power of bankruptcy courts to conduct jury trials from the history of statutory grants of authority from Congress to the bankruptcy courts.<sup>282</sup> Through this investigation, the *Grabill* court attempted to ascertain whether the statutory grants of authority from Congress to bankruptcy courts in the past indicated a present congressional intent in the BAFJA concerning jury trials.<sup>283</sup> As the positions of other courts suggest, the *Grabill* court could have interpreted this legislative history as being: (1) neutral on the issue; (2) weighing against the grant of power to bankruptcy courts to conduct jury trials; or (3) weighing in favor of the grant of power.<sup>284</sup> The *Grabill* court chose to interpret the legislative history

280. See, e.g., *Citicorp N. Am., Inc. v. Finley* (*In re* Washington Mfg. Co.), 133 B.R. 113, 118 (M.D. Tenn. 1991) (noting that "the Congressional debates concerning the 1984 Act are silent as to whether bankruptcy courts can conduct jury trials"); *Torcise*, 131 B.R. at 507 (finding legislative history unhelpful in determining intent of Congress concerning jury trials in bankruptcy courts); *Leonard v. Wessel* (*In re* Jackson), 118 B.R. 243, 250 (E.D. Pa. 1990) (noting that issue of jury trials in bankruptcy courts was not addressed by Congress).

281. See *Grabill*, 967 F.2d at 1159 (Posner, J., dissenting) (noting that "Congress had never even dreamed there was such a question").

282. *Grabill*, 967 F.2d at 1154. For a discussion of the *Grabill* court's exploration of the statutes leading up to the BAFJA, see *supra* notes, 230-38 and accompanying text. For a further discussion of the history of statutory grants of authority from Congress to the bankruptcy courts, see *supra* note 34-46 and accompanying text.

283. *Grabill*, 967 F.2d at 1154.

284. Because Congress did not contemplate the bankruptcy court/jury trial issue when it enacted the BAFJA, courts may interpret the legislative history of the BAFJA as silent on the issue of jury trials in bankruptcy courts. See *Torcise*, 131 B.R. at 506 n.7 (noting that "[m]uch of the legislative history suggests that Congress never contemplated that jury trials would be required in proceedings designated as core"). Courts have interpreted the turbulent history of the previous bankruptcy acts, however, as indicating that Congress intended to grant bankruptcy courts minimal power, so as to prevent the BAFJA from being held unconstitutional. See, e.g., *Gumport v. Growth Fin. Corp.* (*In re* Transcon Lines), 121 B.R. 837, 844 (C.D. Cal. 1990). Some courts have interpreted the legislative history to imply that Congress wanted to give the bankruptcy courts as much power as possible without implicating the problems of *Northern Pipeline*. See *Citicorp North America*, 133 B.R. at 118 (finding that history of statutory grants from Congress to bankruptcy courts "suggests that Congress intended bankruptcy



as non-determinative on the issue.<sup>285</sup> Because the arguments for the three alternatives are equally strong, the court's decision to hold that the legislative history as non-determinative is credible.<sup>286</sup>

The majority's conclusions regarding the lack of value of the legislative history and statutory language appear to be supported by dicta in the *Granfinanciera* decision.<sup>287</sup> The Court in *Granfinanciera* recognized the ambiguity in the legislative history and in the statutory provisions of the BAFJA.<sup>288</sup>

Finally, the constitutional ramifications surrounding the presence of jury trials in bankruptcy courts required the *Grabill* court to approach the issue prudently. Jury trials in bankruptcy courts are susceptible to challenge on the basis of both the Seventh Amendment and separation of powers doctrine. As the majority in *Grabill* properly noted, a court "should 'avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative poses no constitutional question.'" <sup>289</sup> The majority was correct not to infer the power of bankruptcy courts to conduct jury trials in the face of constitutional trap-pings when the legislative history and statutory language of the BAFJA do not provide a strong indication of the intention of Congress.<sup>290</sup>

The *Grabill* majority did not fully address the dissent's method of

---

courts to" have the power to conduct jury trials). Other courts further support this proposition by noting that the Emergency Rule expressly forbade jury trials in the bankruptcy courts. *See, e.g., Dailey v. First Peoples Bank*, 76 B.R. 963, 967 (D.N.J. 1987). These courts reasoned that by omitting from the BAFJA the prohibition against jury trials contained in the Emergency Rule, Congress intended the bankruptcy courts to have the power to conduct jury trials. *See, e.g., id.* ("Had Congress intended to abrogate the bankruptcy court's authority to empanel juries, it would have enacted the Emergency Rule to accomplish that."); *McCormick v. American Investors Management, Inc. (In re McCormick)*, 67 B.R. 838, 842 (D. Nev. 1986) (emphasizing that Congress did not incorporate into BAFJA express prohibitions against jury trials in bankruptcy courts that were contained in Emergency Rule); *Walsh v. Long Beach Honda (In re Gaildeen Indus., Inc.)*, 59 B.R. 402, 406 (N.D. Cal. 1986) (finding dispositive of congressional intent the fact that Congress enacted most of rules of Emergency Rule but omitted express prohibition of jury trials in BAFJA).

285. *Grabill*, 967 F.2d at 1154.

286. For a discussion of the possible interpretations of the history of the statutory grants of power to the bankruptcy courts, see *supra* notes 230-38.

287. *See Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 40-41 n.3 (1989). The Court characterized the BAFJA as "notoriously ambiguous." *Id.* at 40 n.3. The *Granfinanciera* Court discussed the possible interpretations of the statutory language of the BAFJA with respect to Congress' intent concerning jury trials. *Id.* at 40-41 n.3. The Court also recognized the quagmire concerning the interpretation of BAFJA's legislative history. *Id.*

288. *Id.*

289. *Grabill*, 967 F.2d at 1157 (quoting *Gomez v. United States*, 490 U.S. 858, 864 (1989)).

290. *Id.* at 1158. For a further discussion of the constitutional implication of the grant of power to the bankruptcy court to conduct jury trials, see *supra* notes 66-150 and accompanying text.

empowering bankruptcy courts with the ability to conduct jury trials—that is, by allowing the court to decide which court should conduct the jury trials based on “practical considerations.”<sup>291</sup> Instead, the majority briefly discussed the policy implications of its decision, indicating that policy favored the exclusion of juries in bankruptcy courts.<sup>292</sup> This conclusion by the majority is misdirected. In fact, policy weighs *in favor* of bankruptcy courts having the power to preside over juries.<sup>293</sup> Three policy concerns point to this conclusion.

One policy concern is efficiency. While the majority emphasizes the time-consuming nature of jury trials generally, it failed to adequately address the possibility that gross inefficiency will result to the entire federal court system if bankruptcy courts are not permitted to conduct jury trials in “core proceedings” where the Seventh Amendment guarantees the right to a jury trial.<sup>294</sup> Such inefficiency outweighs any inefficiency that would occur in bankruptcy courts if bankruptcy courts were permitted to conduct jury trials. As an example of the inefficiency that results from the *Grabill* decision, consider that after *Grabill*, district courts will be required to remove bankruptcy proceedings from bankruptcy courts to district courts when a jury trial is requested. Litigants would then be required to re-docket their cases in the district courts, causing considerable delay in the proceedings.<sup>295</sup> A further example illustrates an extreme case of inefficiency that could result from the *Grabill* decision. Suppose, hypothetically, that a district court refers a case to a bankruptcy court pursuant to the BAFJA. The parties prepare for adjudication in that forum, and the case is docketed. A litigant then requests a jury trial where the case qualifies for a Seventh Amendment jury trial guarantee. Under *Grabill*, the case would be required to be removed back to the district court. In cases where a Seventh Amendment right attaches only to a specific portion of the claim, only that portion of the claim would be removed to the district court. As a result, the parties find themselves trapped in a bifurcated proceeding.<sup>296</sup>

---

291. See *Grabill*, 967 F.2d at 1153-58. For a further discussion of the method used by the dissent to grant authority to bankruptcy courts to conduct jury trials, see *supra* notes 248-72 and accompanying text.

292. See *Grabill*, 967 F.2d at 1157-58. The court was “unpersuaded by pragmatic arguments.” *Id.* at 1157. For a further discussion of the policy determinations of the majority, see *supra* notes 242-47.

293. See *Taxel v. Marine Midland Business Loans, Inc.*, (*In re Palomar Elec. Supply, Inc.*), 138 B.R. 959, 963 (S.D. Cal. 1992) (finding no statutory grant of power but noting that “it would be preferable for all core proceedings to be tried before the bankruptcy court”).

294. See *Grabill*, 967 F.2d at 1159 (Posner, J., dissenting) (noting that inefficiency will result if bankruptcy courts are not permitted to conduct jury trials).

295. See *Baird*, *supra* note 114, at 11 (noting that “if the bankruptcy judge cannot conduct a jury trial, the trustee has to wait for a place on the docket of the district court”).

296. See *Nashville City Bank & Trust Co. v. Armstrong* (*In re River Transp. Co.*), 35 B.R. 556, 560 (Bankr. M.D. Tenn. 1983) (discussing possibility of bifur-

A jury trial will slow court proceedings regardless of whether the case is in a bankruptcy court or a district court.<sup>297</sup> When a bankruptcy court is permitted to conduct the jury trial, however, the need to withdraw from a bankruptcy court and have the case re-docketed in a federal district court is eliminated.<sup>298</sup> Also eliminated is the need for the parties to prepare for a new forum. Finally, the risk that a bifurcated proceeding will burden the court and the litigants is diminished.<sup>299</sup> Although it can be argued that it was the intent of Congress for bankruptcy courts to function swiftly, and any inception of jury trials into bankruptcy courts will slow the courts and frustrate that intention, it does not appear that the introduction of jury trials into bankruptcy courts in the limited number of cases in which a Seventh Amendment guarantees a right to a jury trial would upset the entire bankruptcy court

---

cated proceedings if bankruptcy judges were not allowed to empanel jury). The court in *Nashville* stated that "the bifurcation of jury trials from other matters before the bankruptcy court would raise complex questions of procedure and cause needless delay." *Id.* In *McCormick v. American Investors Management, Inc.* (*In re McCormick*), 67 B.R. 838 (D. Nev. 1986), the policy consideration that the court found most dispositive in favor of jury trials in the bankruptcy courts was the problems created by bifurcated proceedings. *Id.* at 843. The court stated that "[m]ost importantly, bifurcating jury trials from other matters before the bankruptcy court would cause complex procedural questions and needless delay." *Id.*; see also *River Transportation*, 35 B.R. at 560 (raising procedural concerns that would result from bifurcated proceedings).

297. Although the majority in *Grabill* properly noted that permitting jury trials in bankruptcy courts might slow down the bankruptcy system, the efficiency analysis should not center on the bankruptcy courts alone. Instead, an additional consideration must be the benefit to the entire federal court system. See *M & E Contractors, Inc. v. Kugler-Morris General Contractors, Inc.*, 67 B.R. 260, 267 (N.D. Tex. 1986) (noting that delay of jury trials in bankruptcy court would frustrate efficiency of bankruptcy courts). Examining the effect of jury trials in the bankruptcy courts on the efficiency of the federal courts, the court in *M & E Contractors* noted that "a wholesale diversion of jury trials to district courts [would not] alleviate delays, considering the state of the typical federal district court docket." *Id.*; see also *Young v. Peter J. Saker, Inc.* (*In re Paula Saker & Co.*), 37 B.R. 802, 810 (Bankr. S.D.N.Y. 1984) ("[I]t [cannot] be gainsaid that referring all jury trials to the district court would serve the purpose of delay because of the district court's 'crowded calendars.'" (quoting *Salomon v. Kaiser* (*In re Kaiser*), 722 F.2d 1574, 1581 (2d Cir. 1983))).

The *Grabill* majority's analysis is further flawed because it misapplied the reasoning of the United States Supreme Court in *Granfinanciera*. See *Grabill*, 967 F.2d at 1157-58. In *Granfinanciera*, however, the United States Supreme Court was addressing policy concerns surrounding the introduction of jury trials in core proceedings as they affected the federal court system as a whole. *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 63 n.17 (1989). The Supreme Court was not addressing the virtues of one forum over another for the purposes of conducting jury trials, as the *Grabill* court attempted to do. *Id.*

298. See *Paula Saker*, 37 B.R. at 810 (noting that allowing cases to remain in bankruptcy courts for jury trials would "give 'all litigants a better opportunity to have their day in court'" (quoting *Salomon v. Kaiser* (*In re Kaiser*), 722 F.2d 1574, 1581 (2d Cir. 1983))).

299. For a further discussion of the problems created by bifurcated proceedings, see *supra* note 296 and accompanying text.

system. The negative effects of requiring removal to district courts, burdening individual litigants and the federal court system as a whole, are more probable in light of the need to change forums and far outweigh any detriment resulting from maintaining the action in the bankruptcy court.

The second policy concern raised by the *Grabill* court is strategic abuse of procedural rules.<sup>300</sup> The majority in *Grabill* failed to consider the fact that the tactical use of the right to a jury trial would result from its system.<sup>301</sup> As the dissent noted, after the majority's decision in *Grabill*, when a litigant requests a jury trial, a new judge and a new forum must accompany the jury trial.<sup>302</sup> The litigants can use the jury trial request to avoid the assigned judge in the bankruptcy court.<sup>303</sup> Thus, a rule requiring removal to a district court when a Seventh Amendment right to a jury trial is exercised turns the Seventh Amendment request for a jury trial into a pretext to forum shopping within the federal system.<sup>304</sup> A further tactical abuse is delaying the bankruptcy proceedings through the use of a jury trial request.<sup>305</sup> Delay would result from shifting the case from the bankruptcy court to the district court and having to re-docket the case in the district court.<sup>306</sup>

---

300. See *Grabill*, 967 F.2d at 1157, 1159.

301. See *Nashville City Bank & Trust Co. v. Armstrong* (*In re River Transp. Co.*), 35 B.R. 556, 560 (Bankr. M.D. Tenn. 1983). The *River Transportation* court stated that "[p]rocedural entanglements" resulting from removal to district court "will not only obstruct and hinder the administration of the bankruptcy estate but also tempt parties to use a jury trial request as a delaying device." *Id.*

302. *Grabill*, 967 F.2d at 1159 (Posner, J., dissenting). Judge Posner noted that in the federal system, usually "a demand for a jury trial is not a demand for a different judge, let alone a different kind of judge." *Id.* He noted that in bankruptcy cases, however, the demand for a jury trial will be accompanied by a different judge in a different forum. *Id.*

303. See *id.* (Posner, J., dissenting) (noting that after *Grabill* decision, "a party to a bankruptcy proceeding who for whatever reason would like to have a different judge has an incentive to demand trial by jury").

304. See *id.* (Posner, J., dissenting) ("Juries will be dragged into cases because litigants dislike particular judges.").

305. See, e.g., *Young v. Peter J. Saker, Inc.* (*In re Paula Saker & Co.*), 37 B.R. 802, 810 (Bankr. S.D.N.Y. 1984). In *Young*, the court determined under the facts that when the attorney in the case requested a jury trial for two litigants he did not represent, the attorney was using the request for the purpose of stalling the proceedings. *Id.* The court noted that the filing "serves to indicate that the demand was made primarily to achieve delay." *Id.* The court determined that retention in the bankruptcy court "would afford less opportunity for a party to achieve delay." *Id.*

306. See *Nashville City Bank & Trust Co. v. Armstrong* (*In re River Transp. Co.*), 35 B.R. 556, 560 (Bankr. M.D. Tenn. 1983) ("Procedural entanglements . . . will not only obstruct and hinder the administration of the bankruptcy estate but also tempt parties to use a jury trial request as a delaying device."); Baird, *supra* note 114, at 11 ("Negotiations are the lifeblood of bankruptcy practice and bargaining positions frequently turn on the procedures that can be invoked and the delays that accompany them."). As noted by the court in *Paula Saker*, bankruptcy litigation is particularly susceptible to delay. *Paula Saker*, 37 B.R. at 810.

A third policy concern, which was not addressed by the *Grabill* majority, is the burden a system not permitting the bankruptcy court to conduct jury trials will place on a litigant who is deciding whether to exercise a Seventh Amendment right to a jury trial.<sup>307</sup> The litigant is forced to decide if the benefits of the constitutional right to a jury trial are outweighed by the resulting change in judges, change in forums, bifurcation of proceedings and time delays. These burdens needlessly complicate a litigant's decision to request a jury trial, and in the extreme case, the burdens may be so oppressive to a litigant that, in practical terms, the right to a jury trial is no right at all.

Taking into consideration the increased burden placed on both the individual litigant and the court system, the policy in favor of bankruptcy courts conducting jury trials outweighs the policy militating against jury trials in bankruptcy courts. These policy concerns are sufficient to mandate legislation that would empower bankruptcy courts to conduct jury trials.

Ultimately, however, the policy considerations that support granting power to bankruptcy courts to preside over jury trials are irrelevant if such grant of power is unconstitutional. The constitutional ramifications of such a grant of power are unclear. This grant of power has the potential to implicate problems under both the Seventh Amendment and Article III of the Constitution.<sup>308</sup> Congress could incorporate certain safeguards into legislation expressly granting power to bankruptcy courts to conduct jury trials. These safeguards would increase the likelihood that federal courts would uphold the constitutionality of the grant.

To avoid constitutional problems, the legislature should provide safeguards that would limit the jury trial power strictly to core proceedings. If the grant of authority is limited to "core proceedings" then the legislation will not contravene the Seventh Amendment restriction on judicial review of jury decisions.

In addition, the power given to bankruptcy courts to empanel juries should be limited to cases where a Seventh Amendment guarantee to a jury trial is invoked pursuant to the *Granfinanciera* holding. The policy considerations for conducting jury trials in bankruptcy courts when the Seventh Amendment grants the right to a jury trial are compelling.

---

The court also noted that "[t]he function of a trustee, in large measure, concerns liquidating assets and recovering preferences and fraudulent conveyances so that the creditors of the estate may be paid quickly in accordance with the priorities accorded by the Code. Delay in that process is to be discouraged, not encouraged." *Id.*

307. *Grabill*, 967 F.2d at 1159 (Posner, J., dissenting) (noting that required removal from bankruptcy court to district court "injects extraneous considerations into a party's decision on whether to demand a jury trial").

308. For a complete discussion of the Seventh Amendment constraints on jury trials in the bankruptcy courts, see *supra*, notes 69-118 and accompanying text. For a complete discussion of the Article III limitations on jury trials in the bankruptcy courts, see *supra*, notes 119-50 and accompanying text.

These policy concerns, however, are not implicated if bankruptcy courts are given the authority to conduct jury trials when the Seventh Amendment does not guarantee a jury trial. If the federal courts find that jury trials in bankruptcy courts violate a federal rule, the federal courts are more likely to make an exception to the rule where compelling policy considerations are involved. Therefore, the legislature should not taint the grant of authority by making the grant over-expansive. Finally, Congress should provide the district courts with as much control over a bankruptcy court's power to conduct jury proceedings as possible to avoid unconstitutionality under *Northern Pipeline*; this control should fall just short of removal to the district court.<sup>309</sup> The district court should also maintain considerable appellate review. A possible safeguard to the Article III concerns is to submit the bankruptcy judge's determination of law to a stricter standard of review, increasing the control of district courts over bankruptcy proceedings. One commentator has even suggested allowing *de novo* review of bankruptcy judges' findings of law, while submitting the jury's findings of fact to a more deferential standard.<sup>310</sup> These safeguards would help to protect the legislation against Article III problems.

#### IV. CONCLUSION

In *Grabill*, the Seventh Circuit joined the majority of circuit courts in determining that the BAFJA does not contain either an express or an implied statutory grant of power to bankruptcy judges to conduct jury trials.<sup>311</sup> Constitutional considerations alone weigh heavily against the

---

309. The structure of the 1984 Act makes the bankruptcy courts an adjunct of the district courts. 28 U.S.C. § 157. The district courts maintain sufficient control over the bankruptcy courts so that the *Northern Pipeline* holding is not implicated. Cyr, *supra* note 85, at 55 (noting that *Northern Pipeline* holding not implicated by BAFJA because "bankruptcy judge may only exercise whatever jurisdiction is delegated by the district court"). Congress, when granting the power to bankruptcy courts to empanel juries, should reserve sufficient control in the district courts so that *Northern Pipeline* is not implicated. Cyr suggests that this may not be possible. *Id.* at 61. Cyr states that in order to meet the requirements of the Seventh Amendment, the federal courts would be restricted to appellate review. *Id.* Thus, the district court will have yielded too much control to bankruptcy courts in violation of Article III. *Id.*

310. See Baird, *supra* note 114, at 12-13. Baird stated:

One might argue that, when there is a jury trial, the district court could review the bankruptcy judge *de novo* on questions of law and apply a deferential standard of review to the jury verdict. Article III requires supervision only of what the judges does below, not of what the jury does. Hence, one can satisfy Article III by scrutinizing the decisions of the judge on questions of law, but satisfy the seventh amendment by applying a deferential standard of review on matters of fact.

*Id.* at 12.

311. For the *Grabill* court's determination that no express authority exists for the bankruptcy courts to conduct jury trials, see *supra* note 196 and accompanying text. For a discussion of the *Grabill* court's refusal to infer the power to

court implying the power.<sup>312</sup> However, while the court's decision is in keeping with present law, the court's decision does not change the fact that there are serious policy concerns that weigh against the court's interpretation of the BAFJA.<sup>313</sup> The only solution to resolving these policy concerns is for Congress to amend the BAFJA. Inefficiency and tactical abuses will result if the statute is not changed. Furthermore, a litigant's exercise of his or her right to a jury trial will continue to be chilled by unnecessary negative consequences that accompany the decision to request a jury trial. Congress should alleviate these problems by granting to bankruptcy courts the power to empanel juries in the specific "core proceedings" where a jury trial is required to satisfy the Seventh Amendment.<sup>314</sup> Congress can incorporate certain safeguards into the legislation to increase the likelihood that federal courts will find the grant of power constitutional.<sup>315</sup> In addition, such legislation would force federal courts to address directly the constitutionality of jury trials in bankruptcy courts. Direct consideration of this issue by federal courts would add clarity to bankruptcy law and eliminate wasteful litigation over the jury trial issue.

*William J. Delany*

---

conduct jury trials in the bankruptcy courts from the intent of Congress, see *supra* notes 197-221 and accompanying text.

312. For a discussion of the constitutional problems created if jury trials were conducted in the bankruptcy court, see *supra* notes 66-150 and accompanying text.

313. For a further discussion of the policy concerns created by the need to remove bankruptcy cases from bankruptcy courts to district courts when the Seventh Amendment guarantee is invoked, see *supra* notes 292-307 and accompanying text.

314. For a further discussion of the cases in which the Seventh Amendment right to a jury trial attaches, see *supra* notes 69-98 and accompanying text.

315. For a further discussion of the safeguards Congress can incorporate into legislation that grants bankruptcy courts the authority to conduct jury trials, see *supra* notes 308-10 and accompanying text.