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Jurisdictional Uncertainties Under the 1984 Bankruptcy Amendments

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Note

Jurisdictional Uncertainties Under the 1984 Bankruptcy Amendments

Introduction

Although Congressional amendments to the 1978 Bankruptcy Code[1] represented an effort to correct constitutional infirmities found in *Northern Pipeline Construction Company v. Marathon Pipeline Company*,[2] the 1984 Amendments[3] have compounded rather than clarified the post-*Northern Pipeline* confusion.[4] In attempting to design a system that was workable as well as constitutional,[5] Congress instead produced a jurisdictional "rou-

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[1] 11 U.S.C. §§ 101-1329 (1985).

[2] 458 U.S. 50 (1982).

[3] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

[4] *See* Kamp, *Court Structure Under the Bankruptcy Code*, 90 Com. L.J. 203, 212 (May 1985) ("The 1984 Bankruptcy Amendments represent a regression in the quest for a workable legal system.").

[5] Several authorities have found the 1984 Amendments constitutional based on their similarity to the Emergency Rule, which was upheld as constitutional by every court of appeals that considered it. See notes 28-38 *infra* and accompanying text for a discussion of the Emergency Rule. See, for example, *In re* Tom Carter Enterprises, 44 B.R. 605 (Bankr. C.D. Cal. 1984) stating as follows:

> Hence, the bankruptcy structure created by the 1984 Act is virtually identical to the system established under the reference rule. The seven courts of appeal upholding the constitutionality of the reference rule thus provide strong precedent by which to sustain the constitutionality of the new system.

Id. at 609-10. *See also In re* Baldwin-United Corp., 48 B.R. 49, 54 (Bankr. S.D. Ohio 1985) (because § 157 is "essentially a Congressional enactment of the Emergency Rule," and because the Sixth Circuit upheld the Emergency Rule, that holding alone justifies the constitutionality). *But see In re* Ass'n Grocers of Nebraska Coop., Inc., 46 B.R. 173, 175 (Bankr. D. Neb. 1985) (§ 157(b)(2)(f) is unconstitutional); *In re* Lawson, 42 B.R. 206, 216 (Bankr. E.D. Ky. 1984) (§ 157 is probably unconstitutional), *rev'd*, Credithrift of America v. Lawson, 52 B.R. 369 (Bankr. D. Ky. 1985). The Bankruptcy Court for the Eastern District of Kentucky continues to believe that § 157 is unconstitutional, but is precluded from so holding. For a lengthy discussion of the court's reasoning, *see* L.T. Ruth Coal Co., Inc. v. Big Sandy Coal & Coke Co., Inc., Case No. 84-00197, Adv. No. 84-0137 (Bankr. E.D. Ky., May 14, 1986).

lette wheel,"[6] at which the lower courts are trying to decipher the rules of the game.

This Note will examine the jurisdictional controversies leading to the 1984 Amendments, the amendments themselves, and the arising interpretive caselaw.

I. JURISDICTION PRIOR TO THE 1984 AMENDMENTS

A. *Bankruptcy Reform Act of 1978*[7]

The controversy over bankruptcy court jurisdiction began in 1970 with Congressional attempts to expand the court's jurisdictional authority.[8] The House version of the bankruptcy bill proposed full Article III status for bankruptcy judges.[9] Policy considerations underlying this view included the desire to attract the most highly qualified judges to the bankruptcy system, which proponents argued the more limited Article I status would not accomplish; the added flexibility that Article III bankruptcy judges would create in the judicial system by being able to sit in other tenured courts, whereas non-tenured judges may not; and the desire to add more credibility generally to the bankruptcy system.[10] Furthermore, the House version was largely based on the belief that anything less than an Article III court would fail to pass constitutional muster.[11]

The Senate version, on the other hand, sought a more limited Article I status,[12] arguing that although a functionally independent bankruptcy court was needed, this could best be accomplished by designating bankruptcy courts as adjuncts of the

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[6] *See* Kamp, *supra* note 4, at 212 ("The image that comes to mind is the roulette wheel—no one knows where any proceeding will come to rest.").

[7] Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified at 11 U.S.C. § 101-1329).

[8] *See* 1 COLLIER ON BANKRUPTCY ¶ 3.01[1][a] at 3-6 (15th ed. 1985). In 1970, Congress created the Commission on the Bankruptcy Laws of the United States to enact a proposal for amending the 1898 Code. It took eight years before a compromise could be reached. *See* Butler, *Foreword* to COLLIER ON BANKRUPTCY at VII.

[9] See H.R. REP. No. 595, 95th Cong., 2d Sess. 5 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 5983.

[10] *See id.* at 5984.

[11] *See id.* at 5984-6000.

[12] Congress is empowered to enact uniform laws on bankruptcies in U.S. CONST. art. I, § 8, cl. 4.

Article III district courts.[13] The proponents of Article I tenure feared the fragmentation of judicial power and the creation of a permanent judiciary without adequate workload.[14] Also, the Judicial Conference strongly opposed Article III status, perhaps because all current bankruptcy judges would be mandatorily retired within five years under the House version.[15]

As a compromise, the Senate version was agreed upon, granting bankruptcy judges Article I status and giving jurisdictional authority to the district courts.[16] Section 1471 of the 1978 Bankruptcy Code granted "original and exclusive jurisdiction of all cases under title 11,"[17] as well as "original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11,"[18] to the district courts.

B. The Northern Pipeline Decision

In 1982, a U.S. Supreme Court plurality decided that the 1978 Code's broad jurisdictional grants violated Article III of the Constitution.[19] *Northern Pipeline Co. v. Marathon Pipe Line Co.*[20] involved a contract and breach of warranty claim brought in bankruptcy court by a Chapter 11 debtor.[21] The defendant challenged the constitutionality of the Code "on the ground that the Act unconstitutionally conferred Art[icle] III judicial power upon judges who lacked life tenure and protection against salary diminution."[22] The plurality concluded:

> that 28 U.S.C. § 1471 . . . has impermissibly removed most, if not all, of "the essential attributes of the judicial power"

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[13] *See* S. REP. No. 989, 95th Cong., 2d Sess. 5 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5801-02.

[14] *See* H.R. REP., *supra* note 9, at 5981-82.

[15] *See id.* at 5972-73.

[16] 28 U.S.C. § 1471(c) (repealed 1984).

[17] *Id.* at § 1471(a) (repealed 1984).

[18] *Id.* at § 1471(b) (repealed 1984).

[19] Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982). (Justice Brennan wrote the plurality opinion in which Justices Marshall, Blackmun, and Stevens concurred. Justice Rehnquist wrote a concurring opinion in which Justice O'Connor joined).

[20] *Id.*

[21] *Id.* at 56.

[22] *Id.* at 56-57.

> from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.[23]

Justices Rehnquist and O'Connor, in their concurrence, stated that they would hold unconstitutional only the Bankruptcy Courts' ability to determine an action based entirely on state law issues.[24]

The Court applied its holding prospectively and stayed its judgment until October 4, 1982, in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication. . . ."[25] This date proved to be optimistic, and because Congress failed to act as the deadline approached, the Court extended the stay until December 25, 1982.[26] When Congress again failed to reach a decision and a third stay was denied, the Judicial Conference of the United States proposed a Model Emergency Rule, which was subsequently adopted in every jurisdiction upon the expiration of the stay.[27]

C. *The Emergency Rule*

The Emergency Rule[28] was based upon the assumption that *Northern Pipeline* had invalidated only Subsection (c) of 28 U.S.C. Section 1471, the jurisdictional grant to the bankruptcy courts, and that jurisdiction over bankruptcy cases and proceedings was still validly placed in the *district* courts under section 1471(a)-(b).[29] The Rule continued the jurisdictional scheme set up in the 1978 Code, but added certain controls over the system to comply with *Northern Pipeline.*[30]

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[23] *Id.* at 87.

[24] *Id.* at 90-91.

[25] *Id.* at 87-88. The case was decided on June 28, 1982.

[26] *See* COLLIER, *supra* note 8, at 3-14 to 3-15.

[27] *See id.*

[28] The Emergency Rule is reprinted in full in COLLIER, *supra* note 8, ¶ 3.01[1][a][vi] at 3-15 to 3-19.

[29] *See id.* at 3-15.

[30] See text accompanying notes 32-34 *infra* for these controls.

Although the Rule continued automatic referrals of jurisdiction from the district court to the bankruptcy court,[31] the district court was authorized to withdraw such referrals at any time.[32] The Rule also limited the types of proceedings in which the bankruptcy court could enter final orders.[33] Finally, all orders and judgments issued by the bankruptcy judge were subject to *de novo* review by the district judge.[34]

The Rule's constitutionality was promptly questioned. Several early cases held the Rule unconstitutional, based upon the perception that the district courts were doing by rule what Congress must do by *statute*—i.e., find a legislative solution to *Northern Pipeline*.[35] Most commentators also found the Rule invalid, questioning the Rule's assumption that section 1471(a)-(b), granting district court jurisdiction, remained valid after *Northern Pipeline*.[36]

Nevertheless, every court of appeals that considered the Rule upheld its constitutionality, holding that *Northern Pipeline* had indeed invalidated only the jurisdictional grant to the bankruptcy courts and had left district court jurisdiction over bankruptcy matters intact.[37] Furthermore, a reason never enunciated, but

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[31] *See* Emergency Rule § (c)(1), *reprinted* in COLLIER, *supra* note 8, at 3-16.

[32] *See id.* at § (c)(2).

[33] *See id.* at § (d)(3)(B). The Rule described "related proceedings" as "those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court." *Id.* at § (d)(3)(A). In such proceedings, the bankruptcy judge was to submit proposed findings of fact and conclusions of law to the district court, unless the parties consented to an entry of judgment by the bankruptcy judge. *See id.* at § (d)(3)(B).

[34] *See id.* at § (e)(2)(B).

[35] *See, e.g., In re* Conley, 26 B.R. 885, 892-93 (Bankr. M.D. Tenn. 1983). *See also In Re* Wildman, 30 B.R. 133, 153 (Bankr. N.D. Ill. 1983) (Rule is invalid); *In re* Johnson County Gas Co., 30 B.R. 690, 704 (Bankr. E.D. Ky. 1983) (provision of Model Rule denying debtor trial before Art. III judge on a counterclaim is unconstitutional); Winters Nat'l Bank & Trust v. Schear Group, 25 B.R. 463, 470-71 (Bankr. S.D. Ohio 1982).

[36] *See generally* Countryman, *Emergency Rule Compounds Emergency*, 57 AM. BANKR. L.J. 1 (Winter 1983) (rule is invalid and totally unworkable); Vihon, *Delegation of Authority and the Model Rule: The Continuing Saga of Northern Pipeline*, 88 COM. L.J. 64 (Feb. 1983) (questions validity of rule).

[37] *See, e.g., In re* Kaiser, 722 F.2d 1574, 1580-81 (2d Cir. 1983); *In re* Braniff Airways, 700 F.2d 214, 215 (5th Cir.), *cert. denied*, 461 U.S. 944 (1983); White Motor Corp. v. Citibank, N.A., 704 F.2d 254, 263 (6th Cir. 1983); *In re* Hansen, 702 F.2d 728, 729 (8th Cir.), *cert. denied*, 463 U.S. 1208 (1983).

surely weighed in these decisions, was that the Emergency Rule was the glue holding the entire system together until further Congressional action was taken.[38]

II. THE BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984

The Bankruptcy Amendments and Federal Judgeship Act went into effect on July 10, 1984.[39] The Act is divided into three titles: Title I sets up a new bankruptcy court system to accommodate the *Northern Pipeline* decision; Title II creates eighty-five new district and circuit court judgeships; and Title III makes several substantive changes in the Code.[40]

Two principal provisions govern original jurisdiction.[41] First, section 1334 establishes the district court jurisdiction.[42] The language is identical to that in former section 1471(a)-(b); that is, the district court retains original and exclusive jurisdiction over all cases under title 11, and orginal but not exclusive jurisdiction over proceedings either arising under title 11 or arising in or related to a case under title 11.[43] Section 1334(c) further provides for two types of abstention by the district court; one is discretionary, the other, mandatory.[44]

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[38] *See* COLLIER, *supra* note 8, ¶ 3.01 [1][a][v] at 3-15. The purpose of the Emergency Rule was "to avoid the collapse of the bankruptcy system." *Id.*

[39] *See* Pub. L. No. 98-353, 98 Stat. 333 (1984). Section 122 provided that the Amendments were to be effective as of the enactment date, except for 28 U.S.C. § 1334(c)(2), the mandatory abstention provision, and 28 U.S.C. § 1411(a), the right to jury provision, which were not to apply to pending cases.

[40] *See* BKR.-L.ED., Summary § 1:13 (1985).

[41] Appellate jurisdiction, beyond the scope of this Note, is governed by 28 U.S.C. § 158 for appeals from bankruptcy court orders and 28 U.S.C. § 1291-92 for appeals from district court orders.

[42] 28 U.S.C. § 1334 (1985).

[43] *See* notes 17-18 *supra* and accompanying text.

[44] 28 U.S.C. § 1334(c) (1985) reads as follows:

> (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
>
> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11 with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the

Second, section 157 establishes the jurisdiction of the bankruptcy courts.[45] It should be noted that section 157 speaks of "bankruptcy judges" rather than "bankruptcy courts." The reason for this is unclear, but it may be based on the language found in section 151,[46] which states that bankruptcy judges constitute a "unit of the district court to be known as the bankruptcy court,"[47] clarifying that bankruptcy courts are to be considered district court divisions and not separate courts in their own right.[48]

Section 157(a) provides for the referral of "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 to the bankruptcy judges."[49] This referral is authorized, but is not automatic as it was under the 1978 Code. Congress hoped to address the constitutional question of control by giving the district judges referral discretion.[50] All districts have adopted by general rule such a policy.[51]

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district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

See notes 180-201 *infra* and accompanying text for a further discussion of § 1334(c).

[45] 28 U.S.C. § 157 (1985).

[46] 28 U.S.C. § 151 (1985) provides:

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. . . .

[47] *Id.*

[48] *See* COLLIER, *supra* note 8, ¶ 3.01[2][a] at 3-24. See also *In re* Northwest Cinema Corp., 49 B.R. 479 (Bankr. D. Minn. 1985) stating:

[T]here really is no bankruptcy court except in name. The term "bankruptcy court" is solely a phrase that is applied to the bankruptcy judges for a district insofar as those judges together are a unit of the district court. . .Thus while functionally there may appear to be a separate bankruptcy court, for jurisdictional purposes there is only one court, i.e., the district court.

Id. at 1094.

[49] 28 U.S.C. § 157(a) (1985).

[50] *See* COLLIER, *supra* note 8, ¶ 3.01[2][a] at 3-23 to 3-24 (one of the provisions Congress enacted to avoid constitutional infirmities).

[51] *See* Kamp, *supra* note 4, at 208 ("To my knowledge, all districts have promulgated a general order referring all bankruptcy cases to the bankruptcy judges.").

Section 157(b) further explains the adjudicatory authority of the bankruptcy judges. Section 157(b)(1) gives bankruptcy judges complete power to hear and finally determine[52] "all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11."[53] Core proceedings are "defined" in section 157(b)(2) by a list of fifteen matters that exemplify core proceedings, including issues concerning preferences, fraudulent conveyances, and the automatic stay. Although the list is extensive, core proceedings are not limited to these fifteen examples.[54]

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[52] At least one court has questioned the meaning of "hear and determine":

> It is unclear to me what it means to hear and determine a bankruptcy case. Obviously the drafters of this section did not understand that a bankruptcy case is not really a judicial proceeding at all, but rather an administrative backdrop within which various, sundry and sometimes numerous proceedings arise.

49 B.R. at 480 n.4.

[53] 28 U.S.C. § 157(b)(1) (1985).

[54] 28 U.S.C. § 157(b)(2) provides:

> Core proceedings include, but are not limited to—
> (A) matters concerning the administration of the estate;
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interest for the purposes of confirming a plan under chapter 11 or 13 of title 11 but not the liquidated or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
> (C) counterclaims by the estate against persons filing claims against the estate;
> (D) orders in respect to obtaining credit;
> (E) orders to turn over property of the estate;
> (F) proceedings to determine, avoid, or recover preferences;
> (G) motions to terminate, annul or modify the automatic stay;
> (H) proceedings to determine, avoid, or recover fraudulent conveyances;
> (I) determinations as to the dischargeability of particular debts;
> (J) objections to discharges;
> (K) determinations of the validity, extent or priority of liens;
> (L) confirmations of plans;
> (M) orders approving the use or lease of property, including the use of cash collateral;
> (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and
> (O) other proceedings affecting the liquidation of the assests of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

Id. See In re Baldwin-United Corp., 48 B.R. 49, 53 (Bankr. S.D. Ohio 1985) ("Congress

The bankruptcy judge is given the authority to determine whether a proceeding is core or non-core in section 157(b)(3), which warns that this decision is not to be based solely on the fact that the resolution of the proceeding may involve issues of state law.[55] The statute rejects the view that a bankruptcy court is constitutionally disabled from hearing claims grounded in state law.

If the bankruptcy judge finds that a proceeding is non-core, section 157(c)(1) provides that he may nevertheless hear the proceeding if it is "otherwise related" to a case under title 11. However, it is the district judge who must enter any final orders, after reviewing the bankruptcy judge's findings and after a *de novo* review of matters to which specific objections have been made.[56] This provision was also responsive to *Northern Pipeline*'s holding that the Article I bankruptcy courts were impermissibly exercising Article III power.[57]

Furthermore, if both parties consent, non-core, related proceedings may be heard and decided by a bankruptcy judge as provided for in section 157(c)(2).[58] One issue that arises under this provision is how a party effectively consents to Bankruptcy Court jurisdiction.

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intended that list to be representative, not all-inclusive."). See also notes 81-153 *infra* and accompanying text for a further discussion of § 157(b)(2).

[55] 28 U.S.C. § 157(b)(3) provides:

> The bankruptcy judge shall determine, on the judge's own motion or on timely motion of 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. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

Id.

[56] 28 U.S.C. § 157(c)(1) reads in full:

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

Id.

[57] *See* COLLIER, *supra* note 8, ¶ 3.01[2][d][i] at 3-35 to 3-37. See notes 19-24 *supra* and accompanying text for a discussion of *Northern Pipeline*.

[58] 28 U.S.C. § 157(c)(2) provides:

In *Baldwin-United Corp.*,[59] the bankruptcy judge held that the defendant had consented to jurisdiction, explaining:

> The doctrine of consent which prevailed under the 1898 Act has been codified by Congress in Section 157(c)(2). It may be fairly assumed that Congress intended that consent to the Bankruptcy Court's jurisdiction could be manifested in the same fashion as under the 1898 Act. Thus consent under Section 157(c)(2) may be express; it may be implied from a timely failure to object to the Bankruptcy Court's jurisdiction; or it may be implied from any act which indicates a willingness to have the Bankruptcy Court determine a claim or interest.[60]

Thus, regardless of whether the defendant's counterclaims against the debtor were classified as "core" or "non-core" proceedings, he was *deemed* to have consented because he filed such counterclaims seeking affirmative relief from the court, and because he filed proofs of claim.[61]

While section 157(a) provides for a general discretionary referral of all cases and proceedings to the bankruptcy judge,[62] section 157(d) provides for the withdrawal of such referral.[63] The district court *may* withdraw "for cause shown." This per-

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> Notwithstanding the provisions of ¶ (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 ll 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.

[59] 48 B.R. 49 (Bankr. S.D. Ohio 1985).

[60] *Id.* at 54. On the other hand, COLLIER suggests that consent should not be so broad as to include consent implied from a failure to object to jurisdiction. *See* COLLIER, *supra* note 8, ¶ 3.01[2][d][ii] at 3-39.

[61] 48 B.R. at 54-55.

[62] *See* text accompanying note 49 *supra.*

[63] 28 U.S.C. § 157(d) provides:

> 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. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title ll and other laws of the United States regulating organizations or activities affecting interstate commerce.

Id.

missive withdrawal may be upon the court's own motion or the timely motion of any party. The district court *shall* withdraw "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." This mandatory withdrawal is only available upon the timely motion of any party.[64]

Sections 1334 and 157 represent the very heart of the present jurisdictional system.[65] Unfortunately, neither is a model of clarity. For example, what do "arising in," "arising under," and "related to" mean? What is the distinction between core and non-core proceedings? Congress did not define any of these key terms, but rather left the system shrouded in ambiguity, perhaps in an attempt to create a resulting constitutional scheme.[66] The courts are only now beginning to carve out some meaning for these provisions and terms.

III. JUDICIAL INTERPRETATION OF THE 1984 AMENDMENTS

A. Arising Under, Arising In, and Related To

The importance in differentiating among these terms becomes apparent upon reading the abstention provisions in section 1334 and the core determination in section 157(b)(2), each of which turns on how a proceeding is classified.[67] Several attempts have been made to define these terms.

In re American Energy, Inc.[68] involved an adversary action by the trustee to collect monies allegedly due the debtor under

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[64] *See id.* See notes 154-179 *infra* and accompanying text for a more detailed discussion of withdrawal.

[65] *See, e.g.*, BKR.-L.ED., Summary § 2:14.3 (Supp. 1985) ("Central to the congressional effort to enact a constitutionally valid but non-Article III bankruptcy court structure is the concept of 'core proceedings'.").

[66] "[D]ebate still attends the matter of the extent to which the jurisdictional structure provided by the 1984 Act . . . accommodates the decision of the Supreme Court in Northern Pipeline. . . ." *Id.* at § 1:14. *See also* 130 CONG. REC. H7490 (daily ed. June 29, 1984) (statement of Rep. Edwards) (jurisdictional powers granted bankruptcy judge not free from constitutional doubt); note 5 *supra*.

[67] *See* COLLIER, *supra* note 8, ¶ 3.01[1][b][ii] at 3-22.

[68] 50 B.R. 175 (Bankr. D.N.D. 1985).

several supply contracts.[69] The bankruptcy court divided its grant of jurisdiction into four categories and defined each. First, "cases under title 11" means "the original bankruptcy petition itself from which all other bankruptcy proceedings spring."[70] Second, "civil proceedings arising under title 11" means "the type of proceeding typically associated with bankruptcy adjudication. . .which spring from the operation and application of the Bankruptcy Code itself."[71] Third, "civil proceedings arising in cases under title 11" refers to "the type of claim or proceeding that secondarily springs from a pending case which arose under Title 11."[72] Finally, "civil proceedings related to cases under Title 11" means "those proceedings which do not arise under Title 11 or in a case under Title 11 but are nonetheless 'related' to cases under Title 11."[73]

This court's analysis is not very helpful because although it states the "magic word" standards that the court is following, it provides no examples to give these standards meaning. Therefore, the only clear statement from this case is that the adversary proceeding involved fell outside the four categories and resulted in the court's abstention.[74]

The court in *In re S.E. Hornsby & Sons Sand and Gravel Company*[75] followed a similar analysis,[76] but defined the terms a bit differently, relying heavily on *Collier*'s explanations. The court defined "case" as "the case upon which all of the proceedings which follow the filing of the petition are predicated."[77] Thus, when the bankruptcy petition is filed, voluntarily or involuntarily, the "case" is opened. In defining "arising under" the court also turned to *Collier*: "[W]here a cause of action is one that either is one [sic] created by Title 11 or which is concerned with what formerly were called 'administrative' mat-

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[69] *See id.* at 177.

[70] *Id.* at 178.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *See id.*

[75] 45 B.R. 988 (Bankr. M. D. La. 1985).

[76] *See id.* at 994-95 (The court used the same four categories as did the *American Energy* court.).

[77] *Id.* at 994 (quoting COLLIER, *supra* note 8, at ¶ 3.01).

ters in the sense that no adverse third party was involved. . . then that civil proceeding is one 'arising under Title 11.' "[78] Furthermore, the court stated that those proceedings "arising under" are those that would not arise *but for* the Bankruptcy Code, giving as examples (1) claims of exemption under the bankruptcy statute, (2) claims of discrimination against a debtor on account of filing bankruptcy, and (3) avoiding powers of the trustee.[79] The court held that the adversary proceeding brought by the trustee to require the debtor's shareholders to turn over the debtor's assets was a proceeding that arises under Title 11.[80]

As noted above, these are important terms in the 1984 Amendments and the distinction among them is the key for arriving at a correct application of the abstention provisions and the core/non-core dichotomy. It is regrettable that Congress left it to the courts to define these terms, resulting in a myriad of definitions, rather than formulating one definition for all courts to apply uniformly.

B. The Core/Non-Core Dichotomy

Section 157(b) gives bankruptcy judges authority to hear, determine, and issue judgments in all cases under title 11, and all core proceedings either arising under title 11 or arising in a case under title 11.[81] When comparing Sections 157(b) and 157(c), the importance of distinguishing between core and non-core proceedings is evident.[82] If the proceeding is *not* core, but is otherwise related to a title 11 case, the bankruptcy judge may not issue the final judgment, but only a proposed finding.[83] Therefore, the courts have been wrestling with this distinction since the Amendments were passed.[84]

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[78] *Id.* at 994-95 (quoting COLLIER, *supra* note, 8 at ¶ 3.01).

[79] *See id.* at 995.

[80] *See id.* at 998.

[81] *See* notes 52-54 *supra* and accompanying text.

[82] "The distinction in the bankruptcy courts' role in core versus non-core proceedings is the essence of the jurisdictional system designed by Congress in the wake of . . . Northern Pipeline. . . ." *In re* Lion Capital Group, 46 B.R. 850, 852 (Bankr. S.D.N.Y. 1985) (citation omitted).

[83] *See* notes 53, 56 *supra* and accompanying text.

[84] *See, e.g., In re* Illinois-California Exp., Inc., 50 B.R. 232, 235-36 (Bankr. D.

Core proceedings have been grouped into four general categories:[85] (1) matters of administration,[86] (2) avoiding actions,[87] (3) matters concerning property of the estate,[88] and (4) others.[89] Several types of proceedings are easily decided and produce little controversy.[90] Other proceedings are more difficult and lie at the heart of Congressional concern over jurisdiction.

One of the easier issues involves proceedings to adjust the automatic stay. In *In re Lion Capital Group*,[91] the trustee brought an adversary proceeding against the limited partners of the debtor

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Colo. 1985) ("[A]n analysis of . . . cases [discussing bankruptcy court jurisdiction] reflects the current uncertainty surrounding the parameters of the Bankruptcy Court's jurisdiction.").

[85] *See* COLLIER, *supra* note 8, ¶ 3.01[2][b][iii] at 3-28 to 3-30.

[86] This category includes 28 U.S.C. §§ 157(b)(2)(A), (B), (D), (G), (I), (J), and (L). See note 54 *supra* for the text of these subsections.

[87] This category includes 28 U.S.C. §§ 157(b)(2)(F) and (H). See note 54 *supra* for the text of these subsections.

[88] This category includes 28 U.S.C §§ 157 (b)(2)(E), (K), (M), and (N). See note 54 *supra* for the text of these subsections.

[89] This category includes 28 U.S.C. §§ 157(B)(2)(C) and (O). See note 54 *supra* for the text of these subsections.

[90] *See In re* L. A. Clarke and Son, Inc., 51 B.R. 31, 33 (Bankr. D.D.C. 1985) (adversary proceeding to recover post-petition account receivable falls under either § 157(b)(2)(A) or (B) as core); *In re* Republic Oil Corp., 51 B.R. 355, 358 (Bankr. W.D. Wis. 1985) (action to assume or reject executory contracts is "matter concerning the administration of the estate" and core); *In re* Heaven Sent, Ltd., 50 B.R. 636, 638 (Bankr. E.D. Pa. 1985) (proceeding by Chapter 11 debtor to preserve insurance policy is directly related to administration of estate under § 157(b)(2)(A)); *In re* Pied Piper Casuals, Inc., 50 B.R. 549, 550-51 (Bankr. S.D.N.Y. 1985) (proceeding to recover insurance proceeds allegedly due debtor is core, either under § 157(b)(2)(E), or under "significant nexus" of proceeding to bankruptcy considerations); *In re* Criswell, 44 B.R. 95, 97 (Bankr. E.D. Va. 1984) (claim against debtor for punitive damages is "claim against the estate" and core). Compare the following cases that find a proceeding is non-core: *In re* Omega Equip. Corp., 51 B.R. 569, 574 (Bankr. D.D.C. 1985) (civil contempt proceeding not core as it "entails a wholly collateral factual inquiry"); *In re* Cannon, 51 B.R. 349, 350-51 (Bankr. E.D. Tenn. 1985) (proceeding against non-creditor for alleged violations of state contract law and federal Truth-in-Lending Act does not become core merely because any recovery would go into bankruptcy estate); *In re* Pan American School of Travel, Inc., 47 B.R. 242, 244 (Bankr. S.D.N.Y. 1985) (action seeking injunction against Chapter 11 debtor whose plan has been confirmed "bears no relation to the administration of the bankruptcy estate or to any of the other categories of core proceedings," nor has any other "nexus" to the bankruptcy); *In re* Pierce, 44 B.R. 601, 602 (D. Colo. 1984) (" 'core proceedings' do not encompass separate state law contract actions"); *In re* Atlas Automation, Inc., 42 B.R. 246, 247 (Bankr. E.D. Mich. 1984) (although perimeters of §§ 157(b)(2)(E) and (O) are still undefined, they do not include action to recover account receivable, a purely contract law action).

[91] 46 B.R. 850 (Bankr. S.D.N.Y. 1985).

upon an alleged contractual obligation to make capital contributions.[92] The bankruptcy court granted the trustee's motion to stay defendants from bringing suit in district court and dismissed certain counterclaims brought by the defendants.[93] The defendants alleged that these proceedings were not core and thus the bankruptcy judge lacked authority to make a final determination.[94]

The court held that the trustee's motion seeking a stay was "undoubtedly a core proceeding," falling under "matters concerning administration of the estate," since it was "grounded on the harm to efficient administration of the debtor's estate that would likely occur absent a stay."[95] Also, the court found that the adversary proceeding itself fell within the meaning of "core" under either subsection (O), as a proceeding affecting the adjustment of the debtor-equity security holder relationship, or subsection (E), as a turnover proceeding.[96]

In re HBG Servicenter, Inc.[97] dealt with an adversary proceeding filed by debtors seeking to enjoin the state attorney general from continuing to prosecute them for sales tax violations.[98] The bankruptcy court found the matter to be a "core proceeding," subject to final resolution, for one of two reasons.[99] First, it could be considered core under subsection (G), "motions to terminate, annul, or modify the automatic stay." Although the debtors were not literally seeking to modify the automatic stay, the court found their action could be the equivalent, since the stay asked for was different from and broader than the automatic stay.[100] Alternatively, the court found the proceeding to be sufficiently similar to subsection (G) to have the "character" of a core proceeding:

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[92] *See id.* at 856.

[93] *See id.* at 852.

[94] *See id.*

[95] *Id.* at 854-55.

[96] *See id.* at 855-56.

[97] 45 B.R. 668 (Bankr. E.D.N.Y. 1985).

[98] *See id.* at 668-69.

[99] *See id.* at 671.

[100] *See id.* Since continuation of criminal proceedings against the debtor are exempted from the automatic stay under 11 U.S.C. § 362(b)(1), the debtors were asking that the court expand the stay using its power under 11 U.S.C. § 105.

> The specific enumeration of what are core proceedings in 28 U.S.C. Section 157(b)(2) is explicitly stated not to be exclusive. Evidently what was intended to be embraced were the traditional areas of bankruptcy jurisdiction. An application for injunctive relief to protect this Court's jurisdiction is of this traditional character.[101]

Thus under this interpretation, the most obvious core proceedings may be read expansively, resulting in the not-so-obvious proceedings also receiving core treatment.

Another example of this approach to interpreting "core" is *In re Harry C. Partridge, Jr. & Sons, Inc.*[102] The debtor, a subcontractor, brought suit against its general contractor, seeking a reduction in the percentage of payment withheld pending completion of the subcontract.[103] The district court stated that although the debtor's complaint was styled as a breach of contract and breach of fiduciary duty, in reality the debtor was seeking a turnover of the percentage differential that the debtor contended was wrongfully withheld.[104] Thus, this proceeding was expressly defined as core under section 157(b)(2)(E), "orders to turn over property of the estate."[105] Note that this court was willing to read allegations into the debtor's complaint that were not actually charged in order to reach the obvious core classification.

On the other hand, one court has taken a seemingly obvious core proceeding and inserted a limitation upon its application that took it outside the core meaning. *In re Dr. C. Huff Co.* [106] involved a lien priority dispute between two creditors.[107] The court noted that this proceeding arguably could fall under section 157(b)(2)(K), "determinations of the validity, extent, or priority of liens," and thus be core.[108] However, the court added a

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[101] 45 B.R. at 671.

[102] 48 B.R. 1006 (Bankr. S.D.N.Y. 1985).

[103] *Id.* at 1006-07.

[104] *Id.* at 1010.

[105] *Id.* ("[T]he essence of this action implicates a turnover proceeding which is expressly defined as a core proceeding."). See also 50 B.R. 549 for an intrepretation of § 157(b)(2)(E) (trustee's action to recover insurance proceeds allegedly due debtor under policy was core).

[106] 44 B.R. 129 (Bankr. W.D. Ky. 1984).

[107] *Id.* at 130.

[108] *Id.* at 134.

further requirement that subsection (K) only applies when dealing with "determinations of the validity, extent, or priority of liens *upon the property of the estate.*"[109] As this proceeding was a private lien dispute between two creditors that did not affect the debtor or his property, the court held this to be non-core.[110] This analysis results in some question as to the "easy issues" determination, and further demonstrates how courts are willing to rework the literal wording of the statute to reach the desired result.

Although many of the examples of core proceedings listed in section 157(b)(2) are straightforward, two are especially open to interpretation and controversy.[111] These fall within the fourth category of "others,"[112] and include subsection (C), "counterclaims by the estate against persons filing claims against the estate" and subsection (O), "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship. . . ."[113]

In *In re Lombard-Wall, Inc.*,[114] the court interpreted section 157(b)(2)(C). A chapter 11 debtor, in response to a proof of claim filed by a creditor, challenged two withdrawals made by the creditor, a government agency, on letters of credit provided by the debtor as guarantees on a purchase of securities.[115] The court found this to be a core proceeding under subsection (C) and explained:

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[109] *Id.* (emphasis added).

[110] *Id.* at 135. The court went on to hold this proceeding to be unrelated because the decision would have "no effect whatsoever on any aspect of the debtor's bankruptcy proceeding." *Id. See also In re* McKinney, 45 B.R. 790, 791-92 (Bankr. W.D. Ky. 1985) (same court reached same conclusion).

[111] *See* COLLIER, *supra* note 8, at ¶ 3.01[2][b][iii] at 3-30 to 3-33. Collier suggests that subsection (C) will again open issues that existed under the Code as to when a party consents to jurisdiction. Subsection (C) provides that by filing a proof of claim, a party consents to jurisdiction. The question may arise as to other types of analogous conduct that may result in consent. For a further discussion of this issue, *see* notes 58-60 *supra* and accompanying text.

The interpretational problem under subsection (O) is how broadly courts are to interpret its reach; *see* notes 106-12, 151-153 *infra* and accompanying text.

[112] See text accompanying note 89 *supra* for the four categories of core proceedings and note 54 *supra* for the text of § 157(b)(2).

[113] 28 U.S.C. § 157(b)(2).

[114] 48 B.R. 986 (Bankr. S.D.N.Y. 1985).

[115] *Id.* at 988-89.

> Although this language [in subsection (C)] would appear to extend the bankruptcy court's jurisdiction to all counterclaims, courts have traditionally permitted bankruptcy courts to assert jurisdiction over counterclaims by a trustee only when there exists some connection between the claims of the creditor and those of the trustee.[116]

Thus, this court put some limitation upon the meaning of subsection (C) in that there must be "some connection" between the claims.

The court in the *Lion Capital* case[117] not only decided several easy issues,[118] but also dealt with the defendants' assertion that their fraud-based counterclaims and defenses inserted a state-law complexity into the proceeding which *Northern Pipeline* prohibited and thus made it non-core.[119] In holding the proceeding to be core, however, the court's reasoning was threefold: (1) claims and counterclaims against the estate fall under section 157(b)(2)(B) as core; (2) the counterclaims would have to be ranked in the bankruptcy proceeding itself and thus presented specialized bankruptcy issues; and (3) defendants' other defenses concerning the trustee's authority to bring this suit should be handled by the bankruptcy judge.[120] Thus, both *Lombard-Wall* and *Lion Capital* indicate that all counterclaims, either by the estate or by third parties, stand a good chance of being classified as "core."

In contrast to the *Lombard-Wall* decision,[121] requiring "some connection" between the claims of the estate and creditor, the court in *In re Marketing Resources Intern. Corp.*[122] held that because the creditor filed a proof of claim, the proceeding was core and the court had jurisdiction to address *all* claims brought by the debtor.[123] The fear that a "jurisdictional ambush" might occur under subsection (C) is clearly realized in this case.[124]

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[116] *Id.* at 990-91 (citation omitted).

[117] *See* notes 91-94 *supra* and accompanying text.

[118] *See* notes 95-96 *supra* and accompanying text.

[119] 46 B.R. at 860.

[120] *Id.* at 860-61.

[121] *See* notes 114-116 *supra* and accompanying text.

[122] 43 B.R. 71 (Bankr. E.D. Pa. 1984).

[123] *Id.*

[124] *See* BKR.-L.ED., Summary § 2:14.3 (Supp. 1984) which states:

> The *Marketing Resources* case illustrates the possibility of how the 1984

In contrast to the broad interpretation of subsection (C), subsection (O) is generally being read narrowly by the courts. In *Mohawk Industries, Inc. v. Robinson Industries, Inc.*,[125] the debtor argued that a suit for alleged breach of express and implied warranties fell under section 157(b)(2)(O).[126] The court noted that while such claims might arguably affect the liquidation of the estate's assets (that is, if the debtor prevailed, more assets would go into the estate for distribution to the debtor's creditors) such a reading of subsection (O) "would be unconstitutional because it would result in an Article I court finally adjudicating rights that are traditionally cognizable in Article III courts."[127]

In re Morse Electric Co. also interpreted subsection (O).[128] The debtor brought an adversary proceeding alleging breach of contract, bad faith and negligence.[129] The court stated: "Subsection O is a comprehensive residual category, the one in which the distinction between core and related proceedings is least clear. The breadth or narrowness with which this subsection is interpreted will be determined in future court decisions."[130] The court held this action was clearly non-core as a "prebankruptcy state common-law action related only peripherally to the bankruptcy itself."[131]

Once the bankruptcy judge determines that a proceeding is non-core, he or she must still determine whether it is "related

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> Act may lead to jurisdiction by ambush. . . .[i.e.,] by merely filing a proof of claim against the estate, a creditor may subject itself to counterclaims and to the general jurisdiction of the court.

See also Hendel & Reinhardt, *Evolution of Bankruptcy Court Jurisdiction after the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 90 COM. L.J. 272, 276 (June/July 1984) ("It remains to be seen whether [the *Baldwin-United*, *Lombard-Wall*, and *Marketing Resources*] decisions represent a major new current in jurisdictional thinking or are merely a small wave on a troubled sea."); notes 58-60 *supra* and accompanying text.

[125] 46 B.R. 464 (Bankr. D. Mass. 1985).

[126] *Id.* at 465.

[127] *Id.* at 465-66.

[128] 47 B.R. 234 (Bankr. N.D. Ind. 1985).

[129] *Id.* at 235.

[130] *Id.* at 236.

[131] *Id.* at 237. Indeed, the court stated, this suit was almost identical to the *Northern Pipeline* decision.

to" a title ll case before it can be heard under section 157(c)(1).[132] Several cases have attempted to define "related to."

In *Matter of Boughton*,[133] the court defined related proceedings as: "[those] adversary cases and controversies which are triable only by Article III or State courts. . . . [They] are traditional state common-law actions not made subject to a federal rule of decision and related only peripherally to an adjudication of bankruptcy under federal law. . . ."[134] The court found that the proceeding by the trustee to recover damages from the debtor's insurer because of negligent and willful failure to accept a settlement offer fell within the meaning of "related," as a cause of action owned by the debtor at the time he filed for relief.[135]

Further, the court cited with approval the *Pacor* rule announced under former section 1471 interpreting the same language used in the 1984 Amendments.[136] *Pacor, Inc. v. Higgins*,[137] involved a products liability claim against the debtor, an asbestos supplier. The district court remanded the case back to state court, holding a lack of jurisdiction.[138] The court of appeals affirmed, defining a related proceeding as one which "could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts on the handling and administration of the bankrupt estate."[139]

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[132] Several bankruptcy judges seem to equate non-core and related as having the same meaning. *See, e.g.*, Matter of Boughton, 49 B.R. 312, 314 (Bankr. N.D. Ill. 1985) (non-core are those matters which are related to); *In re* Morse Elec. Co., 47 B.R. 234, 238 (Bankr. N.D. Ind. 1985) (proceeding cannot be core; accordingly, it is related). Thus, under this analysis, once a proceeding is held not to be core, it becomes non-core and related to, and may be heard under § 157 (c)(1).

However, this author agrees with a different analysis, as set forth by the *Huff* court, 44 B.R. at 134. The court explained that there are three types of controversies that may arise: core, non-core related, and non-core unrelated. *See also* 47 B.R. at 245 (not only is suit not core, it also is not related). This analysis results in a 2-prong test rather than one step only.

[133] 49 B.R. 312 (Bankr. N.D. Ill. 1985).

[134] *Id.* at 315 (quoting from Matter of Colo. Energy Supply, Inc., 728 F.2d 1283, 1285 (10th Cir. 1984)).

[135] *Id.* at 315.

[136] *Id.*

[137] 743 F.2d 984 (3d Cir. 1984).

[138] *Id.* at 985.

[139] *Id.* at 994.

The case of *In re American Energy, Inc.*[140] also attempts to define "related proceedings":

> [T]he cause of action must in some way *relate* to the administration of the bankrupt estate. That is to say, there must be some reason why adjudication of the claim is better placed with the bankruptcy court as opposed to a state court. Giving a very broad definition to the term would transform every state-created cause of action into a federal matter merely because a debtor were involved, but this would be a jurisdictionally infirm construction. Courts construing the term "related" have said that it means that there must exist a direct relationship to the administration of the bankrupt estate.[141]

The court held that the trustee's action to collect money allegedly due the debtor under a contract was only "incidentally related" to the bankruptcy proceeding, *since it was based solely on state law*, and that the court thus lacked jurisdiction.[142] This case indicates an interpretation that is keyed to the existence of a state law issue, precisely what Congress sought to discourage in section 157(b)(3).[143] The presence of a state law issue should not automatically result in a lack of jurisdiction.[144]

A final case on this issue is *Weaver v. Gillen*,[145] an action by the debtor against the trustee for breach of fiduciary duty.[146] The court held this to be a related proceeding, and possibly a core proceeding as well.[147] The court used a two-part analysis to find a related proceeding. First, the proceeding must be one that could have been brought in a district or state court absent the

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[140] 50 B.R. 175 (Bankr. D.N.D. 1985).

[141] *Id.* at 179.

[142] *Id.* at 180-81.

[143] See note 55 *supra* for the text of § 157(b)(3), wherein Congress provided that "[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law."

[144] An overly restrictive interpretation of *Northern Pipeline* would result in bankruptcy judges being incapable of hearing virtually any dispute arising during a bankruptcy proceeding, since almost all issues touch state law to some extent. *See* COLLIER, *supra* note 8, at ¶ 3.01[2][c] at 3-34.

[145] 49 B.R. 70 (Bankr. W.D.N.Y. 1985).

[146] *Id.* at 71.

[147] *Id.* at 72. Because the case was decided by the district court, a core determination was unnecessary to confer final adjudicatory authority upon the court.

bankruptcy petition.[148] Second, there must be a " 'significant connection' to the bankruptcy case."[149]

Thus, while it appears that the bankruptcy courts are holding both broadly and narrowly on what constitutes a core proceeding, the trend seems to be favoring a core classification.[150]

Perhaps the example listed in section 157(b)(2) with the greatest potential for expanding jurisdiction is subsection (O).[151] It is still uncertain how far the courts will go in expanding its interpretation.[152] However, as one court has put it, *Northern Pipeline* must be reckoned with:

> [T]he outer limits of what constitutes a core proceeding is left to be defined by the courts [citation omitted]. Yet, any exercise in interpreting the amendments must be done within the guidelines set forth by the Supreme Court, since the purpose of the amendments was to rectify the unconstitutional jurisdiction found in *Marathon*.[153]

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[148] *Id.* at 71. For the first prong, the court adopted the meaning of "related" announced in the Emergency Rule. See notes 28-38 *supra* and accompanying text for a discussion of the Emergency Rule.

[149] *Id.* at 72. For the second prong, the court relied on *In re* Turner, 724 F.2d 338 (2d Cir. 1983), decided under the Emergency Rule. In *Turner*, the debtor had sued her landlord for conversion. The bankruptcy judge, and district court on appeal, found in favor of the debtor. The court of appeals reversed, stating that the lower courts had given "related to" too broad a meaning; i.e., "no showing that [debtor's] action against [landlord] had any 'significant connection' with her bankruptcy case." *Id.* at 341. *See also In re* Herschell, 43 B.R. 680, 682 (Bankr. E.D. Wis. 1984) (using the "significant connection" test of *Turner*). The *Herschell* court noted that although *Turner* was decided under the Emergency Rule, the 1984 Act requires the same result. *Id.* at 682 n.2.

[150] *See* Hendel & Reinhardt, *supra* note 124, at 273-74, stating:

> It appears that the developing trend of the reported decisions on the question of what constitutes core proceedings is sufficiently liberal to allow the observation that doubt as to status (core v. non-core) will probably result in a classification of a matter as "core" in nature.

[151] *Id.* at 274 (Subsection (O) is "[t]he one subsection which will have a major influence on the determination of the scope of the bankruptcy courts' jurisdiction. . . .").

[152] One court adopted a novel approach, stating:

> A common sense interpretation of the term "core" would dictate that it include only those proceedings which are specifically defined in subsection (b)(2)(B) through (N) or in the Bankruptcy Code itself.

In re American Energy, Inc., 50 B.R. at 178.

[153] *In re* Illinois-Cal. Exp., Inc., 50 B.R. 232, 236 (Bankr. D. Colo. 1985). *See also In re* TWI, Inc., 51 B.R. 470, 470 (Bankr. E.D. Va. 1985), stating:

> Rightly or wrongly, we turn to *Marathon* alone to reach an answer, to the pure source. Yes, there is some existing case law, but it is not ripe. There

C. *Withdrawal of Reference*

Section 157(d) gives the district court discretion to withdraw any reference "for cause shown," but makes withdrawal mandatory in those proceedings that require consideration of title 11 and other federal laws regulating interstate commerce.[154] While the legislative history behind the mandatory withdrawal provision indicates a narrow construction, it gives little insight into the policy consideration underlying such withdrawal.[155] The mandate is most likely a Congressional decision that a bankruptcy judge should not hear and determine proceedings involving federal law issues, for example, those arising in antitrust and securities law cases.[156] Bankruptcy judges are very specialized and Congress believed that the district courts would be more skilled in deciding these issues, which often arise in the district courts.[157]

One issue under section 157(d) is what may be considered sufficient "cause" for permissive withdrawal.[158] In *In re Edward Pirsig Farms, Inc.*,[159] the court held that a party's contention that the bankruptcy court *might* be required to consider the constitutionality of a provision of the Code was insufficient cause for withdrawal.[160] The court in *United States v. LeBouf Bros. Towing Co.*[161] also found insufficient cause for withdrawal where the alleged cause was a conflict in jurisdiction between the district court and the bankruptcy court over several of the debtor's ships that were subject to a mortgage foreclosure action.[162] The court pointed out that no such conflict could ever

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is something there that rings untrue. Let us avoid the moons and go to the sun.

All parts of the riddle must be held up in the light of *Marathon*.

[154] See note 63 *supra* for text of § 157(d).

[155] *See* COLLIER, *supra* note 8, at ¶ 3.01[2][e] at 3-41.

[156] *Id.*

[157] *See id.* at 3-41 to 3-42. COLLIER suggests that section 157(d) was passed for two reasons: "to insulate the 1984 legislation against successful contitutional attack, and to single out a special type of adversary proceeding for separate treatment." *Id.* at ¶ 3.01 [2][e] at 3-40.

[158] *See id.* at 3-40 stating: "What might constitute cause for withdrawal of the reference is unclear, and will have to await judicial development."

[159] 47 B.R. 376 (Bankr. D. Minn. 1984).

[160] *Id.* at 378.

[161] 45 B.R. 887 (Bankr. E.D. La. 1985).

[162] *Id.* at 891.

exist because it assumes two separate jurisdictional authorities and the bankruptcy court is merely a unit of the district court.[163]

In re Lion Capital Group further explains the meaning of permissive withdrawal.[164] In an adversary proceeding brought by the trustee to recover monies allegedly due the debtor from its investors, the defendant argued that the trustee's claims against him were non-core. The district court, therefore, would have to make the final order and withdrawal now by the bankruptcy judge would avoid duplication in two separate reviews, one by the bankruptcy judge and one by the district court.[165] The court stated that the "mere availability" of a *de novo* review by the district court was not sufficient cause to withdraw.[166] If it were, it would result in automatic withdrawal of any case in which a non-core claim was in any way involved.[167] Further, the court relied on the general legislative history of section 157 which read:

> [B]ankruptcy judges would be able to enter final judgments in about 95 percent of the cases that do not require an involvement by an article three judge. In the remaining five percent of bankruptcy cases, the bankruptcy judge would enter a proposed judgment and the district court, after reviewing the record but without holding a second hearing, could promptly enter a final judgment.[168]

If the court held this to be sufficient cause for withdrawal, the result would be avoidance of many proceedings by the bankruptcy courts, which obviously was not Congress' intent.

Another issue arising under section 157(d) is the interpretation of the mandatory withdrawal provision.[169] *In re White Motor Corp.*[170] involved a claim by the Pension Benefit Guaranty

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[163] *Id.*

[164] 48 B.R. 329 (Bankr. S.D.N.Y. 1985).

[165] *Id.* at 336.

[166] *Id.*

[167] *Id.*

[168] *Id.* (quoting 130 CONG. REC. H1846 (daily ed. March 21, 1984) (statement of Rep. Kastenmeier)).

[169] *See* COLLIER, *supra* note 8, at ¶ 3.01 [2][e] at 3-41 ("The second sentence of section 157(d) will assuredly be the cause of much litigation and interpretation."). *See also* note 63 *supra* for text of § 157(d).

[170] 42 B.R. 693 (Bankr. N.D. Ohio 1984).

Corporation, a federal government entity, against the debtor for withdrawal of reference.[171] The court relied heavily on legislative history[172] to reach its conclusion that withdrawal is mandated only when a "substantial and material consideration" of the non-Code federal statutes will be required.[173] Further, withdrawal is not required when mere *consideration* of such statutes is involved; rather, the statutes must be necessary for the *resolution* of the proceeding.[174] The court held that withdrawal was not warranted based upon speculation that the Internal Revenue Code and the Employee Retirement Income Security Act *might* arise and *might* be germane to the proceeding.[175] Also, the court pointed out that section 157(d) is not limited to "related proceedings," but applies to "core proceedings" as well.[176]

In re Lion Capital Group[177] also discussed the limits of mandatory withdrawal, relying on the legislative history to sup-

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[171] *Id.* at 694.

[172] *See id.* at 699-700. For example, Sen. DeConcini stated:

> The district court should withdraw such proceedings only if the court determines that the assertion that other laws regulating organizations or activities affecting interstate commerce are in fact likely to be considered, and should not allow a party to use this provision to require withdrawal where such laws are not material to resolution of the proceeding. The district court should refuse withdrawal if withdrawal would unduly delay administration of the case, considering the status of the case, the importance of the proceeding to the case, and the relative caseloads of the district court and bankruptcy judge.

(quoting from 130 CONG. REC. S6081 (daily ed. June 19, 1984)).

[173] 42 B.R. at 705.

[174] *Id.* at 703. The court noted:

> For this Court to grant the motion to withdraw reference based on speculation about ERISA and IRC issues which may or may not arise and may or may not be germane to resolution of core Code proceedings would be inconsistent with the purposes underlying the very existence of the Bankruptcy Court and would encourage forum shopping in a manner Congress disdained when it sought to avoid "creating a multiplicity of forums for the adjudication of part of a bankruptcy case."

Id. at 705 (quoting 130 CONG. REC. H7492 (daily ed. June 29, 1984) (statement of Rep. Kastenmeier)).

[175] 42 B.R. at 704-06.

[176] *Id.* at 701. *See also* Michigan Milk Producers Ass'n v. Hunter, 46 B.R. 214 (Bankr. N.D. Ohio 1985) (same court again applying a narrow interpretation of § 157(d)); COLLIER, *supra* note 8, at ¶ 3.01[2][e] at 3-41 (mandatory withdrawal encompasses core and non-core proceedings).

[177] 48 B.R. 329 (Bankr. S.D.N.Y. 1985).

port the view that section 157(d) should be construed narrowly.[178] The court relied on *White Motor*'s "substantial and material consideration" test to find that withdrawal was warranted in the adversary proceeding to recover money from a debtor's investors because none of the pleadings *as yet* involved federal laws—although the defendants argued that their amended pleadings would involve federal securities.[179]

While section 157(d) was obviously a precautionary measure by Congress to comply with *Northern Pipeline*, the above cases show that the courts are construing the provision narrowly.

D. Abstention by the District Court

Section 1334(c)(1) provides for discretionary abstention in any proceeding arising under title ll, or arising in or related to a case under title ll,[180] if "in the interest of justice, or in the interest of comity with State courts or respect for State laws."[181] In most cases, the abstention decision is being made by the bankruptcy judge,[182] but at least one case has held that only the district court has such authority.[183] The main issue arising under this provision is how broadly or narrowly the courts interpret the interest of justice and comity.[184]

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[178] *Id.* at 340 (quoting same legislative statements as did the *White Motor* court).

[179] *Id.* at 340-41.

[180] Discretionary abstention applies to core as well as non-core proceedings, as compared to mandatory abstention, which applies only to related proceedings. Neither abstention provision applies to cases, which are governed under 11 U.S.C. § 305. *See* COLLIER, *supra* note 8, at ¶ 3.01 [3][a] at 3-44.

[181] See note 44 *supra* for text of § 1334(c).

[182] *See, e.g., In re* Pioneer Corp., 47 B.R. 624, 627-28 (Bankr. N.D. Ill. 1985) (bankruptcy court has jurisdiction to decide on motion to abstain, pursuant to § 157 and 1984 Act as a whole). Most courts just decide the motion without questioning their jurisdictional authority to do so.

[183] *See In re* Atlas Automation, Inc., 42 B.R. 246, 249 (Bankr. E.D. Mich. 1984) (neither 1334(c) nor any other provision gives authority to bankruptcy judge to decide motion to abstain, so only district court may make such decision).

[184] *See, e.g., In re* Douthit, 47 B.R. 428, 431 (Bankr. M.D. Ga. 1985) (bankruptcy court not most appropriate forum to consider judgment creditor's claim for punitive and compensatory damages, attorney fees and costs); *In re* Schear & Assoc. Inc., 47 B.R. 544, 545 (Bankr. S.D. Fla. 1985) (abstain from adversary proceeding to recover accounts receivable where district court could not hear expeditiously a related proceeding); Maryland Nat'l Indus. Fin. v. Gold Dust Coal Co. 49 B.R. 288, 291-92 (Bankr. N.D. Ill. 1985) (abstain from dispute between two creditors over assets of debtor's

In *Matter of Boughton*, the court stated: "Comity and justice would dictate that this court abstain if the matter before it involves issues of State constitutional law, important State policy, or unsettled State law."[185] Because the good faith duty of an insurer to settle within policy limits was well-settled by state law, the court found no reason to abstain from the trustee's adversary proceeding to recover monies from the debtor's insurer.[186]

Furthermore, the court pointed out that some bankruptcy courts consider whether the outcome of the proceeding in question will have any effect on the estate—if so, the court should not abstain.[187] The court declined to abstain since this was a no-asset estate and the outcome of the proceeding would determine whether the creditors would receive anything at all.[188]

The court in *In re S.E. Hornsby & Sons Sand and Gravel Co.*[189] also refused to abstain from hearing a proceeding brought by the trustee to recover monies allegedly due the debtor, but for slightly different reasons. Since the proceeding was to recover property of the debtor and the district court exercises exclusive control over such property,[190] the court found that abstention would be inappropriate, especially because proceeding on the

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subsidiary which was not bankrupt); *In re* Weldpower Indus. Inc., 49 B.R. 46, 48 (Bankr. D.N.H. 1985) (abstain from adversary proceeding concerning a pre-bankruptcy transaction); *In re* Keyco, Inc., 49 B.R. 507, 509 (Bankr. E.D.N.Y. 1985) (abstain where dispute does not involve debtors, there is a pending state court action, and dispute involves issues of state law); *In re* Smith-Douglass, Inc., 43 B.R. 616, 618 (Bankr. E.D.N.C. 1984) (abstain from proceeding to recover accounts receivable where party contends § 157 is unconstitutional in order to avoid delay of United States intervention and a decision on the constitutionality issue).

[185] 49 B.R. 312, 316 (Bankr. N.D. Ill. 1985).

[186] *Id.* at 316.

[187] *Id. See, e.g.*, Ram Constr. Co. v. Port Auth. of Allegheny County 49 B.R. 363, 367 (Bankr. W.D. Pa. 1985) (collection of debtor's assets is essential part of estate administration and therefore inappropriate to abstain); *In re* Ghen, 45 B.R. 780, 782 (Bankr. E.D. Pa. 1985) (Court should abstain from proceeding "where its subject matter is identical to that of the pending state court suit, and its outcome would have no bearing on the administration of the estate.").

[188] 49 B.R. at 316.

[189] 45 B.R. 988 (Bankr. M.D. La. 1985).

[190] See 28 U.S.C. § 1334(d) (1985), which provides:

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

same matter had been languishing in state court for over a year.[191]

The court did abstain in *In re Franklin Press, Inc.*, a proceeding by a Chapter 11 debtor to recover a post-petition account receivable.[192] The court reasoned:

> The defendant intends to assert a significant counterclaim. The issues presented by both the debtor and the defendant involve soley questions of state law. The issue is substantial enough to probably require appeal or trial de novo before the district court. The bankruptcy court cannot perform its function of providing a speedy forum for all matters which can only be tried in this court if it undertakes the trial of a substantial number of matters as to which it has concurrent jurisdiction.[193]

Aside from this permissive abstention, section 1334(c)(2) mandates abstention in certain proceedings.[194] Several requirements must be met before section 1334(c)(2) applies. One court explained as follows:

> (1) There must be a timely motion; (2) the proceeding must be based upon State law; (3) the proceeding must be related to a case under Title ll, but not arising under Title ll or arising in a case under Title ll; (4) the proceeding must be one which could not have been brought in federal court absent the bankruptcy proceeding; and, (5) the suit must be one which is presently pending, and can be timely adjudicated, in a State court.[195]

Under the third requirement, it is clear that the mandatory abstention provision does not apply to core proceedings. Thus, the district courts will never be required to abstain from hearing core issues, probably because section 1334 grants them original jurisdiction.[196]

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[191] 45 B.R. at 996.

[192] 46 B.R. 522 (Bankr. S.D. Fla. 1985).

[193] *Id.* at 523.

[194] *See, e.g.*, Macon Prestressed Concrete Co. v. Duke, 46 B.R. 727, 729 (Bankr. M.D. Ga. 1985) (abstention would have been mandatory but for fact that diversity jurisdiction existed between the parties).

[195] Matter of Boughton, 49 B.R. at 315.

[196] *See* COLLIER, *supra* note 8, at ¶ 3.01 [3][b] at 3-45 to 3-46 (neither claims brought

One issue that has arisen falls under the fifth requirement, that "an action is commenced and can be timely adjudicated" in a state court. Some courts interpret this to mean that a state action must be pending at the time of abstention.[197] In the *Boughton* case, the court rejected the argument that the language means "is commenced *or can be* commenced. . .in a State forum," reasoning that had Congress wished to achieve that meaning, it would have used that language.[198]

On the other hand, some courts do accept the above argument as the correct interpretation.[199] In *In re Dakota Grain System, Inc.*, the court construed the requirement to be: "if the case *were* commenced in state court, it *could be* timely adjudicated."[200] The court, however, ultimately abstained from the debtor's breach of contract claim under permissive abstention.[201] The case was pending at the time of the passage of the Amendments and section 1334(c)(2) only applies prospectively.[202]

The standard of "timely" adjudication may be very difficult to apply, since "timely" is a relative concept. It may also be an escape hatch for the district courts to circumvent mandatory abstention since what may be "timely" in one case may have no bearing on timeliness in other cases.

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by creditors nor claims to adjust the automatic stay are subject to mandatory abstention because they are core). COLLIER suggests that most cases requiring interpretation of § 1334(c)(2) will be those proceedings brought by the debtor before bankruptcy, and those brought by the representative of the estate against third parties after bankruptcy.

[197] *See* note 200 *infra* and accompanying text.

[198] 49 B.R. at 315. *See also In re* S.E. Hornsby & Sons Sand and Gravel Co., Inc., 45 B.R. at 996 (section 1334(c)(2) only applies if action is commenced); Ram Constr. Co. v. Port Auth. of Allegheny County, 49 B.R. at 367 (section 1334(c)(2) inapplicable since no proof that action had been commenced in state court); Matter of Climate Control Eng's, Inc., 51 B.R. 359, 361-63 (Bankr. M.D. Fla. 1985) ("Because there is no action commenced in state court covering the same subject matter involved in Count I and because the power to abstain should be exercised sparingly." [sic]); Matter of First Landmark Dev. Corp., 51 B.R. 25, 27 (Bankr. M.D. Fla. 1985) ("mandatory abstention does not come into play unless the action involved has already been commenced in a non-bankruptcy forum and can be timely adjudicated there").

[199] *See* note 200 *infra* and accompanying text.

[200] 41 B.R. 749, 750 (Bankr. D.N.D. 1984) (emphasis added). *See also* State Bank of Lombard v. Chart House, Inc., 46 B.R. 468, 471 (N.D. Ill. 1985) (quoting with approval the *Dakota Grain* test).

[201] 41 B.R. at 751.

[202] Pub. L. No. 98-353, 98 Stat. 333 (1984).

CONCLUSION

The 1984 Amendments clearly demonstrate Congress' attempt to comply with *Northern Pipeline*. First, all bankruptcy jurisdication is orginally conferred to the district courts, and referral to the bankruptcy courts is no longer automatic. Second, those proceedings which are not core to the federal bankruptcy authority, such as those found in *Northern Pipeline*, are subject to *de novo* review by the district courts. Finally, the district courts are empowered to withdraw any reference "for cause shown."

Questions still exist over the effectiveness of these safeguards.[203] Fear has been expressed that "Marathon II" will be upon us any day.[204] From a perusal of the multitude of cases decided since July, 1982, it appears, however, that many if not most of the bankruptcy judges are interpreting the literal language of the Amendments with an overlay of the *Northern Pipeline* ruling to guide them.[205] This is the type of analysis which has the best chance of succeeding against a "Marathon II" challenge.

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[203] *See, e.g.*, BKR.-L.ED., Summary § 2:14.30 ("[I]t is questionable whether [district court's powers to revoke reverence and review *de novo*] constitute sufficient contitutional safeguards." *De novo* review is "mere fiction" anyway with crowded district courts.); *Id.* at § 2:14.28 (certain core proceedings listed in § 157(b)(2) may be insufficient to comply with Art. III mandate); 130 CONG. REC. H7490 (daily ed. June 29, 1984) (statement of Rep. Edwards) ("I fear that, rather than solving anything, . . . we have guaranteed that the issue will, again, soon be before us for its necessary resolution").

[204] *See* 130 CONG. REC. H7490-91 (daily ed. June 29, 1984) (statement of Rep. Edwards).

[205] See BKR.-L.ED., Summary § 2:14.25, stating:

> Several decisions issued shortly after adoption of the statute indicate that it may be ill advised to consider and apply the definitions standing alone and without considering the context out of which they arose—namely the jurisdictional questions that have plagued the bankruptcy community for some time now. . . . [S]ome courts which have considered juridictional issues not so much by construing the language of § 157 as by looking to underlying matters such as the dictates of *Northern Pipeline* or the necessity that property of the estate be involved.