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Jury Trials in Bankruptcy Court? The Seventh Circuit Adds Its Voice to the Debate in *In Re Grabill Corp.*

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Note

Jury Trials in Bankruptcy Court? The Seventh Circuit Adds its Voice to the Debate in *In Re Grabill Corp.*

I. INTRODUCTION

To determine whether a bankruptcy court may conduct a jury trial in a particular proceeding, a court must consider two distinct issues.[1] The first is whether the party seeking a jury trial is constitutionally entitled to one.[2] The second issue is whether bankruptcy courts possess the constitutional and statutory authority to conduct jury trials.[3] In *Granfinanciera S.A. v. Nordberg*,[4] the Supreme Court expressly re-

1. *See, e.g.*, Rafoth v. National Union Fire Ins. Co. (*In re* Baker & Getty Fin. Servs., Inc.), 954 F.2d 1169, 1170-71 (6th Cir. 1992).

2. *Id.* at 1170. This first issue involves consideration of the type of proceeding in the case. In Granfinanciera S.A. v. Nordberg, 492 U.S. 33 (1989), the United States Supreme Court held that a defendant that has not entered a claim against the bankruptcy estate possesses a Seventh Amendment right to a jury trial when the bankruptcy trustee brings a preference and fraudulent transfer action against it. *Id.* at 36. In reaching this result, the Court employed its traditional Seventh Amendment analysis for determining whether a right to a jury trial exists. *Id.* at 42. First, the Court "compare[d] the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity." *Id.* The Court noted that in 18th-century England, preference and fraudulent transfer actions were adjudicated in courts of law and not in courts of equity. *Id.* at 43. These actions were therefore suits "at common law," invoking the Seventh Amendment's jury trial guarantee. *Granfinanciera,* 492 U.S. at 46-47. Second, the Court examined the remedy sought to determine whether it was legal or equitable in nature. *Id.* at 42. The Court reasoned that the nature of the relief sought by the respondent, namely, the recovery of "money payments of ascertained and definite amounts," supported the conclusion that the action was legal rather than equitable. *Id. at 49.*

After determining that the defendant had a Seventh Amendment right to a jury trial, the Court focused on whether Congress may eliminate that right in certain cases by assigning the proceeding to a non-Article III court. *Granfinanciera*, 492 U.S. at 42. The Court concluded that "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." *Id.* at 61 (citing S. Elizabeth Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967, 1022-25 (1988)).

3. *See Rafoth*, 954 F.2d at 1170.

4. 492 U.S. 33 (1989).

frained from considering this second issue,[5] and as a result the courts are split as to the proper answer to this important question.

The Sixth,[6] Eighth,[7] and Tenth[8] Circuits have held that bankruptcy courts do not have the statutory authority to conduct jury trials. All of these courts reached this conclusion on purely statutory grounds and did not confront whether the Constitution permits bankruptcy courts to conduct jury trials.[9] On the other hand, the Second Circuit[10] and many of the bankruptcy and district courts that have considered this matter have held that bankruptcy courts have both statutory and constitutional authority to conduct jury trials.[11]

In *In re Grabill Corp.*,[12] the United States District Court for the Northern District of Illinois held that bankruptcy courts possess both statutory and constitutional authority to conduct jury trials in core proceedings.[13] Due to the importance of this issue and the controversy

5. *Id.* at 64. The *Granfinanciera* Court expressly refrained from deciding whether 28 U.S.C. § 1411, the jury trial provision in the Bankruptcy Amendment and Federal Judgeship Act of 1984 ("1984 Bankruptcy Act" or "BAFJA"), confers authority upon bankruptcy courts to conduct jury trials in fraudulent conveyance actions. *Id.* ("We do not decide today whether the current jury trial provision—28 U.S.C. § 1411 (1982 ed., Supp. V)—permits bankruptcy courts to conduct jury trials."). The Court also declined to determine whether jury trials in the non-Article III bankruptcy courts would violate either the Seventh Amendment or Article III of the Constitution. *Id.* In addition to *Granfinanciera,* the Court avoided deciding this issue on one other occasion. *See* Ben Cooper, Inc. v. Insurance Co. of Pa. (*In re* Ben Cooper, Inc.), 896 F.2d 1394 (2d Cir. 1990), *vacated and remanded*, 498 U.S. 694 (1990), *reinstated*, 924 F.2d 36 (2d Cir. 1991), *cert. denied*, 111 S. Ct. 2041 (1991) (Although it granted certiorari on the issue, the Court ultimately remanded the case back to the Second Circuit without reaching the issue.).

6. Rafoth v. National Union Fire Ins. Co. (*In re* Baker & Getty Fin. Servs., Inc.), 954 F.2d 1169 (6th Cir. 1992).

7. *In re* United Missouri. Bank, 901 F.2d 1449 (8th Cir. 1990).

8. Kaiser Steel Corp. v. Frates (*In re* Kaiser Steel Corp.), 911 F.2d 380 (10th Cir. 1990).

9. *See infra* note 84 and accompanying text.

10. Ben Cooper, Inc. v. Insurance Co. of Pa. (*In re* Ben Cooper, Inc.), 896 F.2d 1394 (2d Cir. 1990) *vacated and remanded*, 498 U.S. 694 (1990), *reinstated*, 924 F.2d 36 (2d Cir. 1991), *cert. denied*, 111 S. Ct. 2041 (1991).

11. *See, e.g.*, M & E Contractors v. Kugler-Morris Gen. Contractors, 67 B.R. 260 (N.D. Tex. 1986); Leonard v. Wessel (*In re* Jackson), 118 B.R. 243 (E.D. Pa. 1990).

12. Steinberg v. NCNB Nat'l Bank (*In re* Grabill Corp.), 133 B.R. 621 (N.D. Ill. 1991), *rev'd*, 967 F.2d 1152 (7th Cir. 1992).

13. *Id.* at 627. With the 1984 Bankruptcy Act, Congress created a bifurcated jurisdictional system for the bankruptcy courts. Under this system, matters arising in the bankruptcy courts are classified as either "core" proceedings, which may be heard and determined by bankruptcy judges, or "non-core" proceedings. 28 U.S.C. § 157(b)(1), (c)(1) (Supp. II 1984). Congress neglected to define exactly what constituted a core or a non-core proceeding, although it provided a non-exclusive list of matters it considered to be core, such as "matters concerning the administration of the estate" or "allowance

surrounding it, the court certified the issue for interlocutory appeal to the Seventh Circuit.[14]

In *In re Grabill Corp.*,[15] the Seventh Circuit addressed only the statutory question[16] and concluded that the Bankruptcy Code does not authorize bankruptcy judges to conduct jury trials.[17] Consequently, under *Grabill*, bankruptcy proceedings in which a proper jury demand is made must be removed from the bankruptcy court to the district court for trial.[18] In a strong dissent, Judge Posner characterized the majority's appraisal of statutory language, legislative history, and Supreme Court precedent as misguided.[19] Judge Posner maintained that the court should have relied instead on practical considerations, which, he concluded, weigh in favor of allowing jury trials to be conducted in the bankruptcy courts.[20]

This Note analyzes the Seventh Circuit's *Grabill* decision and its contribution to the debate on the propriety of jury trials in bankruptcy court. First, the statutory and constitutional issues central to the debate are introduced.[21] Next, this Note reviews the facts of *Grabill* and the Seventh Circuit's conclusion that bankruptcy judges are not statutorily authorized to conduct jury trials.[22] This Note then examines the statutory issue and concludes that certain critical considerations support the view that the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA")[23] affords bankruptcy judges the power to conduct jury trials.[24] This Note also concludes that the Constitution permits jury trials in bankruptcy court, and that many practical considerations

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or disallowance of claims against the estate". 28 U.S.C. § 157(b)(2)(A)-(B) (Supp. II 1984). The character of this list suggests that Congress viewed core proceedings as "traditional matters at the heart of the bankruptcy power." S. Elizabeth Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967, 1007-1008 (1988). For a discussion of the jurisdictional significance of core and non-core proceedings, see *infra* notes 69-72 and accompanying text.

14. *Grabill*, 133 B.R. at 627.

15. 967 F.2d 1152 (7th Cir. 1992).

16. The Seventh Circuit addressed the issue of whether the 1984 Bankruptcy Act expressly or implicitly confers upon bankruptcy courts the authority to conduct jury trials. *Grabill*, 967 F.2d at 1158.

17. *Id.*

18. *Id.*

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

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

21. *See infra* part II.A. and B.

22. *See infra* part III.

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

24. *See infra* part IV.A.

weigh in favor of allowing jury trials in the bankruptcy courts.[25] Finally, this Note suggests that the *Grabill* decision will frustrate the goal of an efficient and workable bankruptcy system in the Seventh Circuit.[26]

II. BACKGROUND

Courts face two major issues in deciding whether bankruptcy courts may conduct jury trials. The first is whether statutory authority exists for bankruptcy court jury trials.[27] If this issue is resolved affirmatively, the next issue is whether Article III[28] and the Seventh Amendment permit jury trials in bankruptcy courts.[29]

A. Statutory Authority to Conduct Jury Trials

Article I of the Constitution expressly grants Congress the authority to promulgate bankruptcy law,[30] and since 1898 Congress has periodically enacted or amended statutes governing bankruptcy matters. The first such statute was the Bankruptcy Act of 1898 ("1898 Act").[31] The 1898 Act divided bankruptcy matters into two categories: summary matters and plenary matters.[32] Jurisdiction over summary proceedings

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25. *See infra* part IV.B.and C.

26. *See infra* part V.

27. Steinberg v. NCNB Nat'l Bank (*In re* Grabill Corp.), 133 B.R. 621, 623 (N.D. Ill. 1991), *rev'd*, 967 F.2d 1152 (7th Cir. 1992).

28. Article III provides in part: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

29. *Id.* at 626.

30. Article I provides Congress with the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

31. Act of July 1, 1898, ch. 541, §§ 1-70, 30 Stat. 544, 544-66, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1979). The 1898 Act designated the federal district courts as the newly created "courts of bankruptcy." Ch. 541, § 1(8), 30 Stat. at 544. The district courts, in turn appointed bankruptcy referees to conduct the statutory duties of the bankruptcy courts. Bankruptcy Act of 1898, § 34 (repealed 1979). Later, the Federal Bankruptcy Rules designated the referees as bankruptcy judges. Gibson, *supra* note 13, at 971-72 (citing FED. BANKR. R. 901(7), 11 U.S.C. app. at 1358 (1976)).

32. Ann Van Bever & V. Craig Cantrell, *Jury Trials in the Bankruptcy Courts: Awaiting a Final Verdict*, 20 ST. MARY'S L.J. 799, 800-802 (1989). *See also* Gibson, *supra* note 13, at 971 n.20. Gibson defines the bankruptcy court's summary jurisdiction in terms of three separate categories of proceedings: (1) the exclusive jurisdiction of the bankruptcy court over all administrative matters arising under the bankruptcy proceeding; (2) the exclusive right to ascertain title to and possession of disputed assets within the bankruptcy court's possession; and (3) the power to rule on matters submitted to the bankruptcy court with the consent of the parties, regardless of whether the matter involved disputed property not within the court's possession. *Id.*

was given to bankruptcy referees, while state and federal courts resolved all other bankruptcy disputes in plenary suits.[33]

Under the 1898 Act, whether parties enjoyed a Seventh Amendment[34] right to a jury trial depended upon the forum in which the case was brought.[35] Because the summary jurisdiction of the bankruptcy courts was inherently equitable in nature, aside from two narrow statutory exceptions,[36] parties to summary proceedings had no jury trial right.[37] For plenary suits, courts applied either the Seventh Amendment or non-bankruptcy state or federal law to determine whether to confer a right to a jury trial upon a litigant.[38]

Other than the two express statutory exceptions providing for jury trials in summary proceedings, the 1898 Act did not provide for jury trials in bankruptcy cases. Furthermore, the 1898 Act offered no guidance on whether bankruptcy courts or district courts were to conduct jury trials when an exception arose.[39] In 1960 the Judicial Conference addressed this question and concluded that it was inappropriate for bankruptcy referees to hold jury trials.[40] In 1973, however, the Judicial Conference modified this position by announcing a new bankruptcy rule allowing bankruptcy referees to conduct jury trials in

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The bankruptcy court's plenary jurisdiction included "litigation involving the trustee and third parties brought in the form of an ordinary civil action" and was conducted in the state courts or federal district courts. Gibson, *supra* note 13, at 1013 n.213 (quoting J. MOORE & W. PHILLIPS, DEBTORS' AND CREDITORS' RIGHTS 6-1 to 6-2 (1966)).

33. Gibson, *supra* note 13, at 971-72.

34. The Seventh Amendment provides in pertinent part that "[i]n Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend VII. See *infra* notes 207-210 and accompanying text for an explanation of the relevance of this language to the issue of whether bankruptcy courts possess the constitutional authority to conduct jury trials.

35. Gibson, *supra* note 13, at 971.

36. The first statutory exception provided by the 1898 Act was that an individual against whom an involuntary bankruptcy petition was filed could demand a jury trial on the questions of insolvency and commission of acts of bankruptcy. Gibson, *supra* note 13, at 972-73 (citing Act of July 1, 1898, ch. 541, § 19, 30 Stat. 544, 551 (as amended) (repealed 1979)). The second exception involved a 1970 amendment to the 1898 Act, allowing a jury trial in a proceeding before the bankruptcy court to determine the dischargeability of debts. Gibson, *supra* note 13, at 972-73 (citing Act of Oct. 19, 1970, Pub. L. No. 91-467, § 7c(5), 84 Stat. 990, 993 (repealed 1979)).

37. Katchen v. Landy, 382 U.S. 323, 327-28 (1966).

38. Gibson, *supra* note 13, at 972.

39. *Id.* at 974.

40. *Judicial Conference of the United States, Report of the Proceedings of a Special Session of the Judicial Conference of the United States*, 22 ANN. REP. PROC. JUD. CONF. U.S. 375, 396 (1960) (concluding that "referees in bankruptcy should not preside upon jury trials of voluntary petitions in bankruptcy").

limited circumstances.[41] This was the state of relevant bankruptcy law when Congress enacted the Bankruptcy Reform Act of 1978 ("1978 Act").[42]

The 1978 Act granted the bankruptcy courts considerable powers and maximum jurisdiction over debtor property.[43] It authorized bankruptcy courts to exercise all "the powers of a court of equity, law, and admiralty"[44] in all civil proceedings arising out of bankruptcy matters.[45] The 1978 Act also included a new jury trial provision, which was codified at 28 U.S.C. § 1480.[46] Although section 1480 did not expressly grant bankruptcy courts the authority to conduct jury trials, and its legislative history is sparse and unclear,[47] many courts

41. Bankruptcy Rule 115(b)(1) permitted a bankruptcy referee to oversee a jury trial in involuntary petition cases in which the bankrupt's jury demand did not specifically request, and no local rule required, that a district court judge conduct the trial. Gibson, *supra* note 13, at 974 (quoting FED. BANKR. R. 115(b)(1), 11 U.S.C. app. at 1298 (1976)).

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

43. 1 COLLIER ON BANKRUPTCY, ¶ 3.01, at 3-13 (Lawrence P. King ed., 15th ed. 1979). The 1978 Act vested expanded bankruptcy jurisdiction in the district courts and designated bankruptcy courts as "adjuncts" to the district courts. Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: the Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 11-12 (1985). At 28 U.S.C. 1471(a), Congress provided that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy." 28 U.S.C. § 1471(a) (Supp. III 1979). Then, in § 1471(c), Congress assigned the entirety of this jurisdictional grant to the bankruptcy "adjuncts," declaring that "[t]he bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts." 28 U.S.C. § 1471(c) (Supp. III 1979).

44. 28 U.S.C. § 1481 (Supp. III 1979) (repealed 1984).

45. 28 U.S.C. § 1471(b) (Supp. III 1979).

46. *See* Gibson, *supra* note 13, at 975 (citing Pub. L. No. 95-598, § 241(a), 92 Stat. 2549, 2671 (1978) (codified at 28 U.S.C. § 1480 (repealed 1984))). This provision stated:

> (a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979.
>
> (b) The bankruptcy court may order the issues arising under section 303 of title 11 [governing involuntary bankruptcies] to be tried without a jury.

Id.

47. A Senate Committee report discussing § 1480(a) stated that this provision "continues any current right of a litigant in a case or proceeding under title 11 or related to such a case, to a jury trial." Gibson, *supra* note 13, at 984 n.70 (citing S. REP. NO. 989, 95th Cong., 2d Sess. 157 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5943). A House Report accompanying § 1480 explained that "[b]ankruptcy courts will be required to hold jury trials to adjudicate what are under present law called 'plenary suits,' that is, suits that are brought in State or Federal courts other than the bankruptcy courts." *Id.* (citing H. REP. NO. 595, 95th Cong., 1st Sess. 12 (1977), *reprinted in* 1978

concluded that Congress intended the provision to provide such authority.[48]

The 1978 Act's extensive jurisdictional grant generated immediate controversy. Many courts and commentators maintained that such a broad grant to a non-Article III tribunal violated the Constitution.[49] In 1982, the Supreme Court expressed a view on the issue in *Northern Pipeline Constr. Co. v. Marathon.*[50] In *Northern Pipeline* the Court deemed the 1978 Act unconstitutional due to violations of Article III,[51] and at the same time questioned the authority of bankruptcy judges to conduct jury trials.[52]

The Court ultimately stayed its *Northern Pipeline* decision to allow Congress the opportunity to revise the unconstitutional statutory provisions.[53] When the stay expired before Congress acted, the Judicial Conference promulgated the Model Emergency Rule to prevent a complete breakdown of the bankruptcy system.[54] This Rule, which

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U.S.C.C.A.N. 5963, 5973) (footnote omitted).

48. *See, e.g.,* Nickinello v. Roberson (*In re* Huey), 23 B.R. 804 (9th Cir. 1982); Lombard-Wall Inc. v. New York City Hous. Dev. Corp. (*In re* Lombard-Wall Inc.), 48 B.R. 986 (S.D.N.Y. 1985); Brown v. Frank Meador Buick (*In re* Frank Meador Buick, Inc.), 8 B.R. 450 (W.D. Va. 1981). Some courts reasoned that unlike the 1898 Act, which limited the right to a jury trial in a bankruptcy court to two narrow statutory exceptions, the 1978 Act authorized bankruptcy courts to conduct jury trials whenever a party had a right to a jury trial. *See, e.g., Huey*, 23 B.R. at 805; *Lombard-Wall Inc.*, 48 B.R. at 993; *see also supra* notes 34-41 and accompanying text (discussing the 1898 Act and the statutory exceptions).

49. 1 COLLIER *supra* note 43, ¶ 3.01 at 3-13, 14; Thomas G. Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L.J. 297 (1981).

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

51. A plurality found the Act unconstitutional primarily due to its violating the separation of powers doctrine. 1 COLLIER *supra* note 43, ¶ 3.01 at 3-13, -14. The plurality determined that parts of the Bankruptcy Act of 1978: "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct." *Northern Pipeline*, 458 U.S. at 87. The plurality concluded: "Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts." *Id.*

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

53. *Id.* at 88.

54. 1 COLLIER *supra* note 43, ¶ 3.01(1)(b)(vi) at 3-15. The Judicial Conference based the Emergency Rule on the theory that *Northern Pipeline* did not invalidate the grant of bankruptcy jurisdiction to the district courts. Hence, the district courts could continue to delegate some of their responsibilities to the bankruptcy judges without violating the Constitution. Gibson, *supra* note 13, at 987 n.87 (citing Charles F. Vihon, *Delegation of Authority and the Model Rule: The Continuing Saga of Northern Pipeline*, 88 COM. L.J. 64, 77 (1983)). The Emergency Rule "preserved and continued the system of bankruptcy adjudication established under the 1978 legislation, with the exception that in certain civil proceedings, 'related' to cases commenced under the Bankruptcy Code, bankruptcy judges could not enter final judgments or dispositive orders." 1 COLLIER

was adopted as a local rule by the district courts and governed bankruptcy proceedings until Congress finally responded to *Northern Pipeline* in 1984,[55] expressly prohibited jury trials in bankruptcy courts.[56] Pursuant to the Rule, while section 1480 granted a bankruptcy defendant a right to trial-by-jury, any such proceeding had to be transferred to the district court.[57]

Several months after promulgating the Emergency Rule, the Judicial Conference exhibited an apparent change of heart when it proposed the new Bankruptcy Rules of Procedure, which were subsequently approved by the Supreme Court and Congress.[58] Rule 9015 of these new Rules set out procedural guidelines for obtaining jury trials.[59] In doing so, the new Rules clearly contemplated bankruptcy judges conducting jury trials.[60] Many courts recognized that Rule 9015 thereby conflicted with the Emergency Rule and concluded that to the extent the two were inconsistent, Rule 9015 superseded the Emergency

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supra note 43, ¶ 3.01(1)(b)(vi) at 3-15. The Rule defined "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 3-17.

55. 1 COLLIER *supra* note 43, ¶ 3.01(1)(b)(v) at 3-15.

56. *Id.* ¶ 3.01(1)(b)(vi) at 3-17 (reprinting the resolution of the Judicial Conference of Sept. 23, 1982 and the Emergency Rule promulgated by the Administration Office of the Courts).

57. Huffman v. Brandon (*In re* Harbour), 59 B.R. 319, 324 (W.D. Va. 1986); Ravenna Indus. v. Reliable Patternworks (*In re* Ravenna Indus.), 34 B.R. 314, 316 (Bankr. N.D. Ohio 1983); Jahn v. Lamb (*In re* Lamb), 29 B.R. 950, 953 (Bankr. E.D. Tenn. 1983). The Emergency Rule directed that ". . . bankruptcy judges may not conduct . . . jury trials." COLLIER *supra* note 43, ¶ 3.01 at 3-17. Further, it provided that "[t]hose matters which may not be performed by a bankruptcy judge shall be transferred to a district judge." *Id.*

58. FED. BANKR. R. 9015, 11 U.S.C. app. at 140 (Supp. IV 1986); *see* 11 U.S.C. § 101 (1986). *See also* Dailey v. First Peoples Bank, 76 B.R. 963, 967 (D.N.J. 1987); Walsh v. Long Beach Honda (*In re* Gaildeen Indus.), 59 B.R. 402, 404 (N.D. Cal. 1986).

59. The rule provided in pertinent part:

> (a) Trial by Jury. Issues triable of right by jury shall, if timely demanded, be by jury, unless the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury.

FED. BANKR. R. 9015, 11 U.S.C. app. at 140 (Supp. IV 1986) (repealed, 11 U.S.C. app. at 287 (1988)).

60. *Gaildeen Indus.*, 59 B.R. at 404. Although there was no express provision of authority to bankruptcy judges to conduct jury trials in Rule 9015, the rule "nevertheless used the word *court* . . . which was defined by Rule 9001 to include bankruptcy courts established under the 1978 Act." Gibson, *supra* note 13, at 988 n.92 (citing FED. BANKR. R. 9001, 11 U.S.C. app. at 136 (Supp. VI 1986)). Furthermore, the advisory committee notes to Rule 9015 reinforce the conclusion that the Bankruptcy Rules authorized bankruptcy judges to conduct jury trials. *See* FED. BANKR. R. 9015 advisory committee's note, 11 U.S.C. app. at 287 (1988) (referring to "the procedures for requesting trial by jury in a matter [before the] . . . bankruptcy court").

Rule.[61]

Yet courts that interpreted Rule 9015 as authorizing bankruptcy court jury trials had different views on exactly how the Rule accomplished this. Many read it as a substantive grant of authority to conduct jury trials.[62] Others, while viewing Rule 9015 as procedural and therefore an unsuitable source of substantive authorization of jury trials, nonetheless saw Rule 9015 as an indication that the Judicial Conference had endorsed bankruptcy court jury trials.[63]

Then, in 1987, the Judicial Conference abrogated Rule 9015.[64] The Conference's Advisory Committee concluded that courts were improperly relying on Rule 9015 to justify jury trials before bankruptcy judges.[65] Invoking the mandate of Congress that the Bankruptcy Rules of Procedure should not result in the alteration of substantive rights, the Committee repealed Rule 9015.[66] The Committee recommended, however, that if an appellate court or the Supreme Court were to establish a jury-trial right in bankruptcy matters, the federal district courts should adopt local rules similar in form to Rule 9015.[67]

Three years earlier, in the wake of *Northern Pipeline*, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of

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61. *Gaildeen Indus.*, 59 B.R. at 404; Frank v. Arnold (*In re* Morrissey), 717 F.2d 100, 104 (3d Cir. 1983); Young v. Peter J. Saker, Inc. (*In re* Paula Saker & Co.), 37 B.R. 802, 809 (Bankr. S.D.N.Y. 1984) ("[L]ocal district court rules cannot prevail over nationwide uniform rules promulgated by the Supreme Court in the exercise of its exclusive authority.").

62. *Lombard-Wall Inc.*, 48 B.R. at 992 ("[R]ule 9015 . . . permits the bankruptcy courts to hold jury trials."); Hassett v. Weissman (*In re* O.P.M. Leasing Servs., Inc.), 48 B.R. 824, 830 (S.D.N.Y. 1985) ("Under Bankruptcy Rule 9015 there is no question that a bankruptcy court has the authority to conduct a jury trial."); Nashville City Bank & Trust Co. v. Armstrong (*In re* River Transp. Co.), 35 B.R. 556, 559 (Bankr. M.D. Tenn. 1983) ("Rule 9015 . . . contains absolutely no hint that the United States bankruptcy court's exclusive power to hold jury trials in bankruptcy cases and proceedings . . . is abridged or curtailed . . . .").

63. McCormick v. American Investors Mgmt., Inc. (*In re* McCormick), 67 B.R. 838, 843 (D. Nev. 1986) ("Although [Rule 9015 is] merely procedural and [does] not create any substantive rights . . . at the very least [it] recognize[s] that bankruptcy courts can conduct jury trials."); Lerblance v. Rodgers (*In re* Rodgers), 48 B.R. 683, 686 (Bankr. E.D. Okla. 1985) ("It is significant that Rule 9015 . . . contains no indication that the bankruptcy court's exclusive power to hold jury trials in cases and proceedings is abridged or curtailed by either *Marathon* or the Emergency Rule."); *Dailey*, 76 B.R. at 967 ("We do not, of course, find that Rule 9015 bestowed on the court the statutory authority to hear jury cases. Rather, we suggest that, acting with Rule 9015 in the background, Congress would have made explicit its desire to abrogate the authority to hear jury cases had it intended to do so.").

64. FED BANKR. R. 9015, 11 U.S.C. app. at 287 (1988).

65. FED. BANKR. R. 9015 advisory committee's note, 11 U.S.C. app. at 287 (1988).

66. *Id.*

67. *Id.*

1984 ("BAFJA").[68] BAFJA substantially restructured the jurisdiction of bankruptcy courts by dividing adjudication of bankruptcy court claims[69] into core and non-core proceedings.[70] For core proceedings, BAFJA allows bankruptcy judges to issue final orders subject only to the district court's plenary review on questions of law.[71] In non-core proceedings, however, bankruptcy courts may only issue proposed findings of fact and conclusions of law, which the district court reviews de novo.[72]

In certain circumstances, BAFJA preserves the right to a jury trial that a party would have under non-bankruptcy law.[73] In the case of a personal injury or wrongful death cause of action, pursuant to the BAFJA provision codified at 28 U.S.C. § 1411 the claimant's right to a jury trial is not affected by the debtor's ensuing bankruptcy. Yet the BAFJA provision codified at 28 U.S.C. § 157 also dictates that in the event a jury demand is made, these claims must be transferred to the district court for trial.[74] Aside from section 157, no BAFJA provision specifically addresses bankruptcy courts' authority to conduct jury trials.[75] In light of this, even the Second Circuit, which has held that BAFJA confers authority upon bankruptcy courts to conduct jury trials, conceded that on its face BAFJA's jury trial provision, section 1411, provides virtually no guidance on the issue.[76]

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

69. *In re* United Missouri Bank, 901 F.2d 1449, 1453 (8th Cir. 1990).

70. *Id.; see supra* note 13 and accompanying text.

71. *United Missouri Bank,* 901 F.2d at 1453.

72. *Id.*

73. *See* 28 U.S.C. § 1411 (1988) ("[T]his 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."). Many courts and commentators have concluded that this new jury trial provision acted as a repeal of § 1480, the jury trial provision in the 1978 Act. *See* Gibson, *supra* note 13, at 989 n.96 (citing American Universal Ins. Co. v. Pugh (*In re* Pugh), 72 B.R. 174, 177 (D. Or. 1986)).

74. 28 U.S.C. § 157(b)(5) (1988).

75. *United Missouri Bank*, 901 F.2d at 1453.

76. Ben Cooper, Inc. v. Insurance Co. of Pa. (*In re* Ben Cooper, Inc.) 896 F.2d 1394, 1402 (2d Cir. 1990), *vacated and remanded*, 498 U.S. 694 (1990), *reinstated*, 924 F.2d 36 (2d Cir. 1991), *cert. denied*, 111 S. Ct. 2041 (1991). Many had hoped that Congress would eliminate the confusion surrounding the jury trial issue when it responded to *Northern Pipeline*. Gibson, *supra* note 13, at 989. Yet, most courts and commentators have found that instead of providing clarification, BAFJA's jury trial provision "only further confused matters." *Id.* Professor Gibson charged that beyond the two types of cases that the jury trial provision did address—wrongful death and tort claims—Congress neglected the controversial issues of exactly "what bankruptcy matters are entitled to be tried by a jury . . . and the authority of bankruptcy judges to conduct jury

The legislative history surrounding BAFJA also provides little assistance in discerning congressional intent regarding section 1411. The history contains only limited answers as to whether Congress intended to authorize jury trials in bankruptcy proceedings, and if so, whether those jury trials may be conducted in bankruptcy courts.[77] Following *Northern Pipeline*, but prior to the enactment of BAFJA, both the House and Senate introduced bills to restructure the jurisdiction and powers of bankruptcy courts.[78] In response to conflicts between these two bills,[79] a conference committee of House and Senate members drafted a compromise bill.[80] That bill, which ultimately provided for the current section 1411, merely preserved the availability of jury trials for proceedings involving personal injury and wrongful death claims.[81] The Committee's broader intent for the bill, if any, is unclear because the conference report did not explain whether the bill changed the scope of the jury trial provision in the 1978 Act.[82]

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trials." *Id.* at 989-990.

77. Gibson, *supra* note 13, at 991.

78. *Id.* Several of the House bills proposed converting the bankruptcy courts from Article I courts to Article III courts while reenacting the jury trial provision of the 1978 Act, § 1480, "without change." *Id.* (citing H.R. 5174, 98th Cong., 2d Sess., 130 CONG. REC. H1727 (daily ed. Mar. 19, 1984); H.R. 3, 98th Cong., 1st Sess., 129 CONG. REC. H31-32 (daily ed. Jan. 3, 1983); H.R. 6978, 97th Cong., 2d Sess., 128 CONG. REC. H5884 (daily ed. Aug. 12, 1982)). A Senate bill proposed both maintaining the bankruptcy courts as Article I courts and a slightly reworded version of § 1480. *Id.* at 992 (citing S. 1013, 98th Cong., 1st Sess., 129 CONG. REC. S4259 (daily ed. Apr. 7, 1983)). That bill stated:

> (a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to jury trial.
>
> (b) The district court may order the issue arising under section 303 to be tried without a jury.

Id. at 992, n.109. The committee report for the bill suggested that this newly worded jury trial section "was intended to continue the jury trial practice existing under section 1480." Gibson, *supra* note 13, at 992. (citing S. REP. NO. 55, 98th Cong., 1st Sess. 20 (1983)). Professor Gibson concludes that "prior to enacting the 1984 Amendments there was no congressional sentiment on the part of the relevant congressional committees to change existing jury trial rights in bankruptcy." *Id.*

79. The House bill did not contain a jury trial provision, while the "Senate-passed bill contained a jury trial provision that either preserved or expanded jury trial rights beyond those that had existed in 1978." Gibson, *supra* note 13, at 994 n.123.

80. Gibson, *supra* note 13, at 994.

81. *Id.*

82. *Id.* at 994-95. Relying upon the statements of Senator DeConcini, a member of the Senate-House Conference Committee, some courts have concluded that "section 1411 was intended to supplement, rather than limit, the right to trial by jury by making clear that the right exists in personal injury and wrongful death cases." *McCormick*, 67 B.R. at 842; *see also Rodgers*, 48 B.R. at 687. Senator DeConcini stated in an interview published in an edition of the American Bankruptcy Institute Newsletter:

> I believe there was no intent on the part of Congress to alter or modify the

B. Constitutionality of Jury Trials in Bankruptcy Courts

The constitutional debate over allowing bankruptcy judges to conduct jury trials focuses on the Seventh Amendment and Article III. This debate continues after *Granfinanciera*, in which the Court expressly refrained from deciding whether the Seventh Amendment and Article III accommodate jury trials in the non-Article III bankruptcy courts.[83]

Courts have reached different conclusions on the constitutional questions raised by the prospect of jury trials in bankruptcy courts. Some courts, finding no statutory authority, never reach the constitutional questions.[84] Other courts conclude that allowing an Article I bankruptcy judge to conduct a jury trial violates Article III,[85] which grants "the judicial Power of the United States" to Article III courts only.[86] Still other courts, such as the Second Circuit, have ruled that both the Seventh Amendment and Article III allow bankruptcy judges to conduct jury trials.[87]

The Seventh Amendment issue centers on the amendment's reexamination clause, which dictates that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."[88] Courts generally agree that allowing

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> rights to jury trial that might have existed under the [1978 Act] . . . . There was no desire on the part of any of the conferees to limit the right to jury trial in other areas.

III AM. BANKR. INST. NEWSL. NO. 3, Winter 1984/1985, at 3. The Senator acknowledged that in drafting the conference bill, "the conferees inadvertently failed to pick up the broader language of [§ 1480 of the 1978 Act]," but the Senator believed this happened because "§ 1411 was drafted in response to a question of whether the right to jury trial would be protected in personal injury and wrongful death cases when tried in district court." *Rodgers*, 48 B.R. at 687 (citing III AM. BANKR. INST. NEWSL. NO. 3, Winter 1984/1985, at 3).

83. *Granfinanciera*, 492 U.S. at 64. *See also supra* notes 2-5 and accompanying text.

84. *See, e.g., United Missouri Bank*, 901 F.2d at 1449; *Kaiser Steel Corp.*, 911 F.2d at 380; *Rafoth*, 954 F.2d at 1169; Steinberg v. Mellon Bank (*In re* Grabill Corp.), 132 B.R. 725 (N.D. Ill. 1991), *rev'd*, 967 F.2d 1152 (7th Cir. 1992); Gumport v. Growth Fin. Corp. (*In re* Transcon Lines), 121 B.R. 837 (C.D. Cal. 1990).

85. *See, e.g.*, Hughes-Bechtol, Inc. v. Air Enterprises, Inc. (*In re* Hughes-Bechtol, Inc.), 107 B.R. 552 (Bankr. S.D. Ohio 1989); Ellenberg v. Bouldin, 125 B.R. 851, 856 (N.D. Ga. 1991). The court in *Ellenberg* found that, as a result of the Supreme Court's finding in *Northern Pipeline* "that presiding over a jury trial is one of the 'essential attributes of judicial power,'" allowing bankruptcy judges to conduct jury trials would violate Article III. *Ellenberg*, 125 B.R. at 855.

86. U.S. CONST. art. III.

87. Ben Cooper, Inc. v. Insurance Co. of Pa. (*In re* Ben Cooper), 896 F.2d 1394, 1403 (2d Cir. 1990), *vacated and remanded*, 498 U.S. 694 (1990), *reinstated*, 924 F.2d 36 (2d Cir. 1991), *cert. denied*, 111 S. Ct. 2041 (1991).

88. U.S. CONST. amend. VII.

jury trials of non-core proceedings to be held in bankruptcy courts would patently violate the reexamination clause, as factual findings in non-core proceedings are reviewed de novo by the district court unless the parties consent to the bankruptcy judge entering a final judgment.[89]

On the other hand, most courts conclude that jury trials in core proceedings do not offend the reexamination clause.[90] Upon appeal to the district court, the findings of fact in core proceedings are reviewed by the district court under the clearly erroneous standard set forth in Bankruptcy Rule 8013.[91] Because of this deferential standard of review, which is analogous to that which courts of appeals exert over district courts, jury trials of core proceedings may be held in bankruptcy courts without violating the reexamination clause.[92]

While the reexamination clause is a point of contention, Article III gives rise to the majority of the constitutional concerns over empowering bankruptcy courts to conduct jury trials. Article III vests the "judicial power of the United States" in Article III judges, who enjoy lifetime tenure and protection against salary reduction.[93] These characteristics are meant to keep Article III judges free from improper influence.[94]

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89. *See, e.g., Ben Cooper*, 896 F.2d at 1403 (stating that the Seventh Amendment makes jury trials in non-core bankruptcy proceedings unconstitutional due to the requirement that the district court review de novo the bankruptcy court's findings of fact); Taxel v. Electronic Sports Research (*In re* Cinematronics, Inc.), 916 F.2d 1444, 1451 (9th Cir. 1990) (stating that "grave Seventh Amendment problems would arise if a jury trial is conducted by the bankruptcy court, because § 157(c)(1) requires *de novo* review by the district court of non-core matters"); Walsh v. California Commerce Bank (*In re* Interbank Mortgage Corp.), 128 B.R. 269, 272 n.8 (N.D. Cal. 1991) (stating that the statutory requirement that an appellate court review *de novo* the findings of fact of a jury in a non-core bankruptcy proceeding would violate the Seventh Amendment). Generally, Seventh Amendment concerns arise in the context of non-core bankruptcy proceedings rather than in core proceedings.

90. *See, e.g., Ben Cooper*, 896 F.2d at 1403; *Ellenberg*, 125 B.R. at 855; *Grabill*, 133 B.R. at 626.

91. Bankruptcy Rule 8013 provides that:

> On an appeal the district court . . . may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses

FED. BANKR. R. 8013, 11 U.S.C. app. at 281 (1988). The clearly erroneous standard required by Rule 8013 is the identical standard of review applied by the courts of appeals to the appeal of jury verdicts from the district courts. *Grabill*, 133 B.R. at 627.

92. *Ben Cooper*, 896 F.2d at 1403; *Ellenberg*, 125 B.R. at 855; *Grabill*, 133 B.R. at 626-27.

93. U.S. CONST. art. III, § 1.

94. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 844 (1986) (citing

Some courts reason that because bankruptcy judges do not share the protected status of Article III judges,[95] bankruptcy judges should not be permitted to conduct jury trials.[96] These courts rely specifically on *Northern Pipeline* to conclude that presiding over jury trials is a power reserved exclusively for Article III judges.[97]

Other courts and commentators read *Northern Pipeline* differently.[98] They stress that the Court's comments regarding jury trials were meant only to illustrate bankruptcy courts' independence from district courts, rather than to suggest that Article III would never accommodate an Article I bankruptcy judge conducting a jury trial in a bankruptcy court.[99] They support this conclusion by noting that other Article I judges preside over jury trials with Supreme Court approval.[100]

III. THE *GRABILL* DECISION

In re Grabill Corp.[101] was the Seventh Circuit's first opportunity to address whether bankruptcy courts have the statutory and constitutional authority to conduct jury trials in core proceedings. At the time of *Grabill*, the Second Circuit had held that bankruptcy courts do have the power to conduct jury trials, and the Sixth, Eighth, and Tenth Circuits had held that they do not.[102]

Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 583 (1985)).

95. Bankruptcy judges are appointed for 14 year terms and may be removed from office during their term of appointment for "incompetence, misconduct, neglect of duty, or physical or mental disability." 28 U.S.C. § 152 (1985).

96. *See, e.g.*, Cameron v. Anderson (*In re* American Energy, Inc.), 50 B.R. 175, 181 (Bankr. D.N.D. 1985); Terry v. Proehl (*In re* Proehl), 36 B.R. 86, 87 (W.D. Va. 1984).

97. Gibson, *supra* note 13, at 1038. These courts view certain statements in *Northern Pipeline* as evidence that the Court determined that jury trials in bankruptcy courts were violative of Article III. *Id.* For instance, courts find particularly significant the Court's observation that under the 1978 Act "the bankruptcy courts exercise all ordinary powers of district courts, including the power to preside over jury trials . . . ." *Northern Pipeline*, 458 U.S. at 85. The *Northern Pipeline* Court concluded that such an expansive grant of power "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Article III district court, and has vested those attributes in a non-Article III adjunct." *Id.* at 87. Courts interpreting this dicta in *Northern Pipeline* maintain that it conclusively indicates the Court's belief that the authority to conduct jury trials is reserved for Article III judges. *Proehl*, 36 B.R. at 87; *American Energy*, 50 B.R. at 181.

98. *See, e.g., Ben Cooper,* 896 F.2d at 1403; Gibson, *supra* note 13, at 1038-39.

99. *See* Gibson, *supra* note 13, at 1038-39; *see also Ben Cooper,* 896 F.2d at 1403.

100. *Ben Cooper*, 896 F.2d at 1403. Congress has expressly empowered federal magistrate judges and local District of Columbia judges, both Article I judges, to conduct jury trials, and the Supreme Court has approved both grants of power. *See infra* notes 219-20 and accompanying text.

101. 967 F.2d 1152 (7th Cir. 1992).

102. *Id.* at 1153; *see* Ben Cooper, Inc. v. Insurance Co. of Pa. (*In re* Ben Cooper,

A. The Facts of Grabill

Grabill Corporation ("Grabill") held all of the stock in Windsor-Hamilton, Ltd. ("Windsor").[103] In November 1986, Windsor obtained a $20 million line of credit[104] from National Bank of North Carolina ("NBNC").[105] In May 1988, Windsor paid back to NBNC over $13 million of debt incurred under the line of credit.[106] Grabill also paid NBNC nearly $8 million toward the Windsor debt.[107]

In January 1989, certain creditors of Grabill and Windsor filed involuntary chapter 7 bankruptcy petitions against the two companies.[108] The Plan Trustee ("Trustee") for Grabill and Windsor demanded that NBNC return all the money paid to it by Windsor and Grabill within the previous year.[109] When NBNC refused, the Trustee sued NBNC in bankruptcy court, contending that Windsor's payment was a preference[110] and Grabill's payment a fraudulent transfer.[111]

Inc.), 896 F.2d 1394 (2d Cir. 1990), *vacated and remanded*, 498 U.S. 694 (1990), *reinstated*, 924 F.2d 36 (2d Cir. 1991), *cert. denied*, 111 S. Ct. 2041 (1991) (holding that bankruptcy courts have the constitutional and statutory authority to conduct jury trials); Rafoth v. National Union Fire Ins. Co. (*In re* Baker & Getty Fin. Servs., Inc.), 954 F.2d 1169 (6th Cir. 1992) (holding that bankruptcy courts do not have the statutory authority to conduct jury trials); *In re* United Missouri. Bank, 901 F.2d 1449 (8th Cir. 1990) (holding that bankruptcy courts do not have the statutory authority to conduct jury trials); Kaiser Steel Corp. v. Frates (*In re* Kaiser Steel Corp.), 911 F.2d 380 (10th Cir. 1990) (holding that bankruptcy courts do not have the statutory authority to conduct jury trials).

103. *Grabill*, 133 B.R. 621, 622 (N.D.Ill. 1991).

104. The line of credit was subsequently increased to $25,000,000. *Id.*

105. *Grabill*, 133 B.R. at 622.

106. *Id.*

107. *Id.*

108. *Id.* These chapter 7 cases were subsequently converted to chapter 11 cases with the consent of Grabill and Windsor. *Id.*

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

110. A preference is a pre-petition transfer of an insolvent or marginally solvent debtor's property to a creditor on account of an antecedent debt. *See* 11 U.S.C. § 547(b) (1988). Generally, a trustee may avoid the transfer and recover the transferred assets if the transfer was made within 90 days of the filing of the bankruptcy petition (or within one year if the transferee was an "insider") and if the transfer allows the transferee creditor to receive more than he would have under a Chapter 7 liquidation. *See id.*

111. *Grabill*, 133 B.R. at 623. Generally, a fraudulent transfer is any transfer made within one year before the commencement of bankruptcy proceedings if the debtor made the transfer with actual intent to hinder or defraud any creditor or if a nearly insolvent debtor received less than equivalent value for the transferred property. *See* 11 U.S.C. § 548(a) (1988). The trustee may avoid such a transfer and recover the property under § 548 or under applicable state law. *See id.*; 11 U.S.C. § 544(b) (1988); UNIF. FRAUDULENT CONVEYANCES ACT, 7A U.L.A. 427 (1985); UNIF. FRAUDULENT TRANSFER ACT, 7A U.L.A. 639 (1985).

Invoking *Granfinanciera*,[112] NBNC demanded a jury trial of its core proceeding and filed a petition asserting that the jury trial must be held in district court.[113] In ruling on the petition, the district court acknowledged that NBNC was entitled to a jury trial because the preference and fraudulent transfer actions involved the adjudication of legal rights.[114] The court denied NBNC's petition, however, on the ground that bankruptcy courts have both statutory and constitutional authority to conduct jury trials in core proceedings.[115] Due to the controversy surrounding the propriety of bankruptcy court jury trials, the district court certified the issue for interlocutory appeal to the Seventh Circuit.[116]

B. The Decision of the Seventh Circuit

Writing for the court,[117] Judge Flaum addressed whether any statutory authority exists for bankruptcy court jury trials.[118] The court looked initially to the language of BAFJA for an express grant of authority.[119] Finding none, the court reasoned that if any authority exists in BAFJA, it must be implicit.[120]

The court focused on 28 U.S.C. §§ 1411 and 157(b)(5) as potential sources of implicit authority.[121] Section 1411 provides that an individual's ordinary right to a jury trial for a personal injury or wrongful death tort claim is unaffected by the debtor's bankruptcy petition.[122] Section 157(b)(5) complements section 1411 by requiring that personal injury or wrongful death actions brought in a bankruptcy case be tried in district court.[123] The court reasoned that Congress, by granting the right to a jury trial in these actions, limited that right in all other bankruptcy matters.[124]

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112. *See supra* note 2.

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

114. *Grabill*, 133 B.R. 621, 623 (citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)); *see also supra* note 2 (discussing *Granfinanciera* and it ruling on when a bankruptcy litigant has a right to a trial by jury).

115. *Id.* at 627.

116. *Id.*

117. *Grabill*, 967 F.2d at 1152. Judge Coffey joined Judge Flaum in the majority opinion. Judge Posner dissented. *Id.*

118. *Id.* at 1153.

119. *Id.*

120. *Id.*

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

122. *Id.*; 28 U.S.C. § 1411 (1984). *See supra* notes 73-74 and accompanying text.

123. *Grabill*, 967 F.2d at 1153; 28 U.S.C. § 157(b)(5) (1984).

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

The court next turned its analysis to section 157(b)(1),[125] which grants bankruptcy courts the power to hear and determine all core proceedings.[126] The court found that this provision, like sections 1411 and 157(b)(5), was ambiguous and did not evidence congressional intent to authorize bankruptcy judges to conduct jury trials.[127] The court noted that the language of section 157(b)(1) is easily susceptible to conflicting interpretations.[128] For instance, a court may construe the language to be a grant of exclusively personal power to bankruptcy judges to hear and determine all core proceedings.[129] On the other hand, section 157(b)(1) might be interpreted to mean that bankruptcy judges have the power to hear and determine *all* core proceedings, including both bench and jury trials.[130]

Unable to discern congressional intent from the language of BAFJA, the court shifted its analysis to BAFJA's legislative history.[131] After identifying other courts' conflicting interpretations, the court concluded that it was futile to attempt to ascertain congressional intent from the scant legislative history available.[132] Finding no affirmative indication that Congress desired to continue the practice established under the 1978 Act of allowing jury trials in bankruptcy courts, the court declined to infer this authority.[133]

The court then turned to Congress's reaction to *Northern Pipeline*, a decision which the court saw as markedly reducing bankruptcy judges' powers.[134] The court observed that in the wake of *Northern Pipeline*, Congress repealed the portion of the 1978 Act that was codified at 28 U.S.C. § 1481,[135] which had granted bankruptcy judges the "powers of a court of equity, law and admiralty,"[136] and replaced it with 28 U.S.C. § 151,[137] which limits bankruptcy judges' powers to those conferred by BAFJA.[138]

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125. *Id.* at 1154.
126. 28 U.S.C. § 157(b)(1) (1988).
127. *Grabill*, 967 F.2d at 1154.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Grabill*, 967 F.2d at 1154 (citing *In re* Jackson, 118 B.R. 243, 243 (Bankr. E.D. Pa. 1990)).
133. *Grabill*, 967 F.2d at 1154.
134. *Id.* at 1154-55.
135. *Id.* at 1155.
136. *Id.* (referring to 28 U.S.C. § 1481 (1978) (repealed)).
137. *Grabill*, 967 F.2d at 1155 (citing 28 U.S.C. § 151 (1984)).
138. *Id.*

The court next examined 28 U.S.C. § 157(b)(1), which allows bankruptcy judges to determine all Title 11 cases.[139] It concluded that this power was granted to the bankruptcy judges alone and could not be delegated to juries.[140] The court further observed that Congress had expressly conferred the power to conduct jury trials upon magistrate judges,[141] who, like bankruptcy judges, are Article I judges.[142] The court posited that Congress had ample opportunity to expressly grant the same power to bankruptcy judges.[143] The court opined that in light of the ease with which Congress could have included such a provision in BAFJA, its absence was evidence that Congress had not intended to authorize jury trials in bankruptcy courts.[144]

The court decided *Grabill* on purely statutory grounds and never reached the constitutional issues.[145] In doing so, it invoked the principle against interpreting a federal statute on constitutional grounds when a sound and non-constitutional interpretation is possible.[146] The court suggested, however, that it was influenced by the untouched constitutional issues, noting that they "were lurking in the background."[147]

The court also opined that pragmatic considerations weigh against permitting jury trials in bankruptcy courts. The court recognized that a goal of efficiency has influenced the development of the modern

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139. *Grabill*, 967 F.2d at 1155. 28 U.S.C. § 157(b)(1) (1988) 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, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

28 U.S.C. § 157(b)(1) (1988).

140. *Grabill*, 967 F.2d at 1155. Thus the Seventh Circuit adopted the first of the two conflicting interpretations of the ambiguous language of § 157(b)(1). *See supra* notes 128-30 and accompanying text.

141. *Id.* (citing 28 U.S.C. § 636(c) (1988)).

142. *Grabill*, 967 F.2d at 1157.

143. *Id.* at 1155 (citing Palmore v. United States, 411 U.S. 389, 395 (1973)).

144. *Id.* at 1155-56 (citing *Palmore*, 411 U.S. at 395 n.5).

145. *See Grabill*, 967 F.2d at 1157.

146. *Id.* (citing *United Missouri Bank*, 901 F.2d at 1456-57 (quoting Gomez v. United States, 490 U.S. 858, 864 (1989))). The court recognized that if Congress had clearly expressed intent to permit jury trials in bankruptcy court in BAFJA, it would be obligated to adjudicate the constitutional issues. *Grabill*, 967 F.2d at 1157. However, because it was unable to discern any express or implicit indications that Congress intended to grant this power, the court concluded that it should respect the principle discouraging unnecessary constitutional adjudications, especially since the Supreme Court continues to do the same. *Id.* (citing Burns v. United States, 111 S. Ct. 2182, 2187 (1991); *Gomez*, 490 U.S. at 864; Crowell v. Benson, 285 U.S. 22, 62 (1932)).

147. *Grabill*, 967 F.2d at 1157.

bankruptcy system.[148] Yet the court was not convinced that requiring transfer of bankruptcy jury trials to district courts will defeat that goal.[149] Rather, the court reasoned that keeping jury trials in bankruptcy court could itself hamper efficiency.[150]

Thus the Seventh Circuit reached the same result as had the Sixth, Eighth and Tenth Circuits: under BAFJA, bankruptcy courts are not authorized to conduct jury trials.[151] Consequently, under *Grabill*, a bankruptcy proceeding in which there exists a constitutional right to a jury trial must be removed, in whole or in part, to the district court for trial.[152]

C. The Dissenting Opinion

Judge Posner began his dissent by criticizing the majority for reading into BAFJA a meaning which he maintained does not exist.[153] He posited that Congress neither authorized nor prohibited jury trials in BAFJA.[154] Judge Posner observed that at the time BAFJA was en-

148. *Id.* (citing *Granfinanciera*, 492 U.S. at 61-62 n.16).

149. *Grabill*, 967 F.2d at 1157.

150. *Id.* at 1158. The court reasoned that:

> [J]ury trials are, by nature, more time consuming then [sic] bench trials, and one could conclude that the court's docket and case pace demands do not accommodate jury trials . . . . The rapid pace of bankruptcy cases and proceedings do not mesh with jury procedures. Congress enacted the Bankruptcy Code to provide a prompt resolution of all bankruptcy causes of action in order to expedite the settlement of the debtor's estate. Jury trials would dismember the statutory scheme.

Id. (citing *In re* G. Weeks Securities, Inc., 89 B.R. 697, 710 (Bankr. W.D. Tenn. 1988)). The court opined that allowing jury trials in bankruptcy court would be done "at the expense of all other matters handled by the bankruptcy courts." *Grabill*, 967 F.2d at 1158 (citing Rafoth v. National Union Fire Ins., Co. (*In re* Baker & Getty Fin. Servs., Inc.), 954 F.2d 1169, 1173 (6th Cir. 1992) (quoting Ellenburg v. Bouldin, 125 B.R. 851, 854 (Bankr. N.D. Ga. 1991))).

151. *See supra* note 84.

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

153. *Grabill*, 967 F.2d at 1159 (Posner, J., dissenting). Judge Posner recognized that many courts had found congressional intent in BAFJA which either allowed or prohibited jury trials in bankruptcy court. *Id.* However, he asserted that for every persuasive argument on one side of the issue, there is an equally persuasive one on the other side. *Id.* For instance, he opined that courts may interpret § 157(b)(1) as meaning that "'bankruptcy judges [not juries] may hear and determine . . . all core proceedings,'" or that "'bankruptcy judges may hear and determine . . . all core proceedings [whether they are jury or nonjury cases].'" *Id.* Judge Posner charged that both interpretations are valid and depend only on the particular emphasis placed upon the text of the statute. *Id.* Thus, Judge Posner had a skeptical view of the majority's conclusion that Congress did not intend for bankruptcy judges to conduct jury trials. *Id.* He stated: "The majority opinion, with refreshing candor, reports the parries as well as the thrusts, but insists that the statute has a meaning and that the court has found it." *Id.*

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

acted, the Supreme Court had not yet acknowledged a right to a jury trial in bankruptcy proceedings.[155] Thus, Judge Posner reasoned, Congress had little reason to specify in BAFJA the courts in which bankruptcy jury trials may be held.[156] He concluded that the courts must resolve the issue, and that statutory language, legislative history, and other sources of statutory interpretation will be of little use in doing so.[157] Consequently, Judge Posner resolved the matter solely on the basis of practical considerations, all of which, he asserted, weigh in favor of permitting bankruptcy judges to conduct jury trials.[158]

According to Judge Posner, the principal advantage of keeping bankruptcy jury trials in bankruptcy courts is that it avoids shifting part of the case to the district court.[159] This, he concluded, conserves the time and resources of the court and parties.[160] He added that authorizing bankruptcy court jury trials also prevents the abusive practice of demanding a jury merely to remove a matter from a particular bankruptcy judge.[161]

Judge Posner also rejected the proposition that bankruptcy judges are somehow not competent to conduct jury trials.[162] He noted that both state trial judges and federal magistrate judges routinely conduct jury trials, even though they lack the life tenure of federal judges.[163]

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155. *Id.* It was not until 1989, five years after Congress passed BAFJA, that the Supreme Court recognized that in certain proceedings, a party in a bankruptcy action possesses a Seventh Amendment right to a jury trial. *Id.* (citing *Granfinanciera*, 492 U.S. 33, 109 (1989)). However, though the Court defined the right to a jury trial in a bankruptcy proceeding, it refrained from deciding where this jury trial should take place. *Grabill*, 967 F.2d at 1159 (Posner, J., dissenting); *see supra* notes 2-5 and accompanying text.

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

157. *Id.*

158. *Id.*

159. *Id.*

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

161. *Id.* There are concerns that shifting the jury trial to the district court from the bankruptcy court allows abuse of the jury process by encouraging forum shopping. For instance, Judge Posner posited that under the majority's view, "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 that is unrelated to the ordinary considerations that motivate such a demand. Juries will be dragged into cases because litigants dislike particular judges." *Id.*

162. *Id.* at 1160.

163. *Id.* Judge Posner observed that, although a majority of state trial judges do not have life tenure, "the vast majority of jury cases in this country are tried in state courts." *Id.* Furthermore, in comparing bankruptcy judges to federal magistrate judges, Judge Posner concluded that "[t]he major difference between magistrate judges and bankruptcy judges, that the latter have a longer tenure—14 years versus 8—makes the case for allowing bankruptcy judges to conduct jury trials stronger than the case for allowing magistrate judges to do so." *Id.*

He observed that the same rules of evidence apply in both bench and jury trials.[164] Judge Posner identified voir dire and instructing the jury as the principal tasks demanded of a judge in a jury trial as opposed to a bench trial.[165] He observed that those tasks do not demand a district judge,[166] stressing that magistrate judges routinely conduct voir dire and that jury instructions are often drafted by a district judge's law clerk.[167]

Judge Posner concluded by suggesting that the courts should resolve this issue, "without concern that Article I judicial officers may appear to be encroaching on the turf—usurping the prerogatives—of Article III judges."[168] According to Judge Posner, the resolution that best promotes prudent judicial administration is allowing bankruptcy judges to conduct jury trials.[169]

IV. ANALYSIS

In the face of congressional silence and an ambiguous statute, should a court insist upon express statutory authority before allowing bankruptcy judges to conduct jury trials? Or may authority be inferred from the general statutory grant of powers to the bankruptcy courts to hear and determine all core proceedings? As Judge Posner recognized, there may not be a ready answer to these questions.[170] Yet despite the *Grabill* majority's conclusion, certain critical considerations strongly support the view that congressional authorization for bankruptcy judges to conduct jury trials can be found in BAFJA.

A. Statutory Authority is Implicit in BAFJA

Courts uniformly agree that no statutory provision either expressly authorizes or prohibits jury trials in bankruptcy courts.[171] Beyond this point, however, unanimity ends and conflict begins. Congress's failure to speak clearly on the issue in BAFJA, as well as BAFJA's sparse legislative history, have caused confusion and a split among the

164. *Grabill*, 967 F.2d at 1160 (Posner, J., dissenting).

165. *Id.*

166. *Id.*

167. *Id.* Judge Posner charged that although jury trials are more challenging to judges than bench trials, bankruptcy judges, who are "experienced, specialized judicial officers," are up to the challenge. *Id.*

168. *Id.* at 1161.

169. *Grabill*, 967 F.2d at 1161 (Posner, J., dissenting).

170. *Id.*

171. *See supra* notes 75-76 and accompanying text.

courts.[172]

Yet despite this lack of legislative direction, a majority of courts that have addressed the issue reject the result reached by the Seventh Circuit in *Grabill*.[173] These courts hold instead that bankruptcy courts are authorized by BAFJA to preside over jury trials.[174] Indeed, requiring removal of core proceeding jury trials to district courts does not comport with the framework of BAFJA, which is broad enough to imply the authorization necessary for bankruptcy judges to conduct jury trials.

The only BAFJA provision that deals directly with jury trials is 28 U.S.C. § 1411, which provides that "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."[175] Section 157(b)(5) clarifies any ambiguity in section 1411 by specifically requiring that all personal injury and wrongful death claims be tried in district court.[176]

The total effect of section 1411 on the bankruptcy courts' authority to conduct jury trials is unclear, particularly as compared to section 1480, which section 1411 replaced. Under section 1480(a), it was generally believed that bankruptcy judges possessed the power to conduct jury trials.[177] Some courts, comparing section 1411 with section

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172. One scholar commented that, "jury trials in Bankruptcy Courts [are presently] in a state of disarray." Mark S. Dugan, *Jury Trials in Bankruptcy Courts*, NORTON BANKR. L. ADVISER, 3 (Jan. 1986).

173. The following decisions hold that BAFJA authorizes bankruptcy court jury trials: Miller v. Baron (*In re* Great American Mfg. & Sales, Inc.), 129 B.R. 633 (C.D. Cal. 1991); Walsh v. California Commerce Bank (*In re* Interbank Mortgage Corp.), 128 B.R. 269 (N.D. Cal. 1991); Leonard v. Wessel (*In re* Jackson), 118 B.R. 243 (E.D. Pa. 1990); Raleigh v. Stoecker (*In re* Stoecker), 117 B.R. 342 (N.D. Ill. 1990); Citibank, N.A. v. Park-Kenilworth Indus., Inc., 109 B.R. 321 (N.D. Ill. 1989); McCormick v. American Investors Mgmt., Inc. (*In re* McCormick), 67 B.R. 838 (D. Nev. 1986); Walsh v. Long Beach Honda (*In re* Gaildeen Indus., Inc.), 59 B.R. 402 (N.D. Cal. 1986).

It must be noted that none of the foregoing decisions come from federal circuit courts, and that of the four circuits that had addressed this issue prior to *Grabill*, only one held that bankruptcy courts possess the statutory authority to oversee a jury trials. Ben Cooper, Inc. v. Insurance Co. of Pa. (*In re* Ben Cooper, Inc.), 896 F.2d 1394 (2d Cir. 1990), *vacated and remanded*, 498 U.S. 694 (1990), *reinstated*, 924 F.2d 36 (2d Cir. 1991), *cert. denied*, 111 S. Ct. 2041 (1991). The other three circuits concluded that bankruptcy courts are not statutorily authorized to preside over jury trials. Rafoth v. National Union Fire Ins. Co. (*In re* Baker & Getty Fin. Servs., Inc.), 954 F.2d 1169 (6th Cir. 1992); *In re* United Missouri. Bank, 901 F.2d 1449 (8th Cir. 1990); Kaiser Steel Corp. v. Frates (*In re* Kaiser Steel Corp.), 911 F.2d 380 (10th Cir. 1990).

174. *See supra* note 153.

175. 28 U.S.C. § 1411(a) (1988).

176. 28 U.S.C. § 157(b)(5) (1988). *See supra* notes 74-75 and accompanying text.

177. *McCormick*, 67 B.R. at 841. Section 1480(a) provided:

1480, have concluded that bankruptcy courts may no longer oversee jury trials other than in personal injury or wrongful death claims.[178] The better interpretation, however, is that through section 1411, Congress intended neither to expand nor diminish bankruptcy courts' then-existing jury trial powers, with the exception of the narrow class of cases falling within the section.[179]

Persuasive evidence demonstrates that section 1411 was meant only to affirm that the jury trial right exists in personal injury and wrongful death actions.[180] To illustrate, when promulgating BAFJA in 1984, Congress merely ratified most of the provisions of the Emergency Rule,[181] which had included a provision prohibiting jury trials in bankruptcy courts.[182] Yet the BAFJA jury trial provision, codified at section 1411, did not include the Emergency Rule's prohibition provision. That provision was one of only a few Congress chose not to include as part of BAFJA.[183] Had Congress intended to prohibit jury trials in bankruptcy courts, it could simply have incorporated the Emergency Rule's prohibition into BAFJA.[184]

Further proof of the purpose of section 1411 is found in a statement by Senator DeConcini, a member of the Senate-House Conference Committee, on the interpretation of section 1411:

> I believe there was no intent on the part of Congress to alter or modify the rights to jury trial that might have existed under the [1978 Act .] . . . There was no desire on the part of any of the conferees to limit the right to jury trial in other areas.[185]

Although the Senator's statement does not conclusively establish con-

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> Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by statute in effect on September 30, 1979.

28 U.S.C. § 1480(a) (1978) (repealed 1984).

178. *See, e.g.*, Cameron v. Anderson (*In re* American Energy, Inc.), 50 B.R. 175, 180 (Bankr. D.N.D. 1985).

179. *McCormick*, 67 B.R. at 842. In general, courts conclude that in enacting § 1411, Congress did not intend to limit the authority of bankruptcy courts to preside over jury trials "in actions other than those for personal injury or wrongful death." *Gaildeen Indus., Inc.*, 59 B.R. at 405 (citations omitted).

180. *McCormick*, 67 B.R. at 842.

181. *Citibank, N.A.*, 109 B.R. at 328. *See supra* notes 41-43 and accompanying text.

182. *See supra* notes 55-57 and accompanying text.

183. *Citibank, N.A.*, 109 B.R. at 328.

184. *Id.*

185. *McCormick*, 67 B.R. at 842 n.3 (quoting Statement of Sen. Dennis DeConcini, III AM. BANKR. INST. NEWSL. NO. 3, Winter 1984/1985, at 3).

gressional intent in enacting section 1411,[186] the absence of any contrary statements in the legislative history indicates that Congress did not intend to abolish jury trials in bankruptcy courts.[187]

Another BAFJA provision, the broad grant of power conferred on bankruptcy courts in section 157(b), also indicates that bankruptcy courts may preside over jury trials in core proceedings.[188] The Seventh Circuit maintains that section 157(b)(1)[189] confers a personal power to hear and determine core proceedings which extends exclusively to bankruptcy judges.[190] Nonetheless, examining the language and purpose of section 157 and the interplay between that section and *Granfinanciera* demonstrates that the Seventh Circuit misinterpreted this jurisdictional grant.

Under section 157(b)(1), bankruptcy judges may "hear and determine *all cases* under Title 11 and all core proceedings arising under Title 11 . . . and may enter appropriate orders" subject only to the same standards of appellate review as that applied to orders of the district court.[191] This is power to enter final orders and judgments in *all* core proceedings, without regard to whether or not those proceedings take place in front of a jury.[192] Since section 157(b)(1) grants bankruptcy judges the authority to fully adjudicate all core proceedings, and inasmuch as *Granfinanciera* requires that any core proceeding involving legal rights include a right to a jury trial,[193] the section 157(b)(1) grant appears to include those bankruptcy cases which include a right to a jury trial.[194] It follows, then, that section 157(b)(1)

186. *McCormick*, 67 B.R. at 842 ("[T]he remarks of one senator are insufficient to establish legislative intent and statements made in floor debates are less authoritative than committee reports.") (citing Weinberger v. Rossi, 456 U.S. 25, 35 (1982) and United States v. O'Brien, 391 U.S. 367, 385 (1968)).

187. *McCormick*, 67 B.R. at 842.

188. Raleigh v. Stoecker (*In re* Stoecker), 117 B.R. 342 (N.D. Ill. 1990).

189. The section states that "[b]ankruptcy judges may hear and determine" various proceedings. 28 U.S.C. § 157(b)(1) (1988).

190. *Grabill*, 967 F.2d at 1155.

191. 28 U.S.C. § 157(b)(1) (1988) (emphasis added). *See supra* note 91 and accmpanying text.

192. *Stoecker*, 117 B.R. at 346 ("Section 157 affects a broad, open-ended grant of jurisdiction to the bankruptcy courts without any attempt to distinguish between jury and non-jury trials."). The *Grabill* Trustee argued that "nothing even remotely suggests that jury trials are not part of the universe of 'all proceedings' that may be referred to a bankruptcy court under Section 157(a). The plain meaning of such broad language can only be that jury trials fall within the purview of the bankruptcy court's authority." Plaintiff's Brief at 7, Steinberg v. NCNB Nat'l Bank (*In re* Grabill Corp.), 133 B.R. 621 (N.D. Ill. 1991) (No. 90 C 6807).

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

194. *Gaildeen Indus., Inc.*, 59 B.R. at 406.

grants bankruptcy courts the authority to preside over jury trials.

In addition to BAFJA itself, courts should also consider the Judicial Improvements and Access to Justice Act of 1988 ("Judicial Improvements Act"),[195] which contains several reforms pertaining to the district courts.[196] The legislative history of these reforms shows that Congress intended that they reduce the excessive caseloads of district courts.[197] By forcing bankruptcy jury trials into the district courts, *Grabill* undermines this intent.[198] Hence, the Judicial Improvements Act is persuasive authority that bankruptcy courts are the proper forum for jury trials in core bankruptcy matters.

In concluding that BAFJA confers no authority upon bankruptcy courts to conduct jury trials, the Seventh Circuit stressed that BAFJA lacks both explicit language and substantial legislative history supporting such authorization.[199] Yet the jurisdictional grant allowing bankruptcy judges to "hear and determine" *all* core proceedings[200] should be read to apply to both bench and jury trials.[201] Although no legislative history affirmatively shows that Congress intended to authorize jury trials in bankruptcy courts, no legislative expression pro-

195. Pub. L. No. 100-702, § 1007, 102 Stat. 4667 (codified at 28 U.S.C. § 455(f) (1988)).

196. Plaintiff's Petition for Rehearing at 10, Steinberg v. NCNB Nat'l Bank (*In re* Grabill Corp.), 133 B.R. 621 (N.D. Ill. 1991) (No. 90 C 6807). The Trustee raised the "Judicial Disqualification" provision of the Judicial Improvements Act, which allows judges with a financial interest in an assigned case to retain the case if they free themselves of the financial interest. *Id.* at 10-11 (citing The Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 1007, 102 Stat. 4667 (1988)). The Trustee contended that the intent of Congress in enacting this provision was to prevent the inefficiency and "costs of delay" resulting from "a change in judges midstream." *Id.* at 11 (citing H.R. Rep. No. 889, 100th Cong., 2d Sess. 68 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6029). Indeed, H.R. Rep. 889 states that the transfer of a case from one judge to another "disrupts the efficient administration of the case and can be very costly to litigants." H.R. Rep. 889, 100th Cong., 2d Sess. 68 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6029.

The Trustee also cited the provision which increased the amount in controversy requirement for federal diversity jurisdiction from $10,000 to $50,000. Plaintiff's Petition for Rehearing at 11 (citing Act, Pub. L. No. 100-702, § 201, 102 Stat. 4646 (1988)). The purpose of this reform is reflected clearly in the legislative history, which reveals the desire of Congress to "abolish diversity of citizenship" jurisdiction, and thereby resolve some of the federal courts' "caseload problems." H.R. Rep. No. 889, 100th Cong., 2d Sess. 45 (1988) *reprinted in* 1988 U.S.C.C.A.N. 5982, 6005.

197. Plaintiff's Petition for Rehearing at 12.

198. *Id.* at 13.

199. *Grabill*, 967 F.2d at 1155-58.

200. 28 U.S.C. § 157(b)(1) (1988).

201. S. Elizabeth Gibson, *Jury Trials and Core Proceedings: The Bankruptcy Judge's Uncertain Authority*, 65 AM. BANKR. L.J. 143, 159 (1991).

hibits them either.[202] Providing guidance for such congressional silence, the Court has stated, "[t]he absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question."[203]

Finally, the doctrine invoked by the Seventh Circuit that a court should not unnecessarily rule on constitutional grounds[204] does not justify disregarding legislative will.[205] The Seventh Circuit misused that doctrine in ignoring the clear meaning of BAFJA and the circumstances surrounding its adoption, which establish that bankruptcy judges are authorized to preside over jury trials.

B. Constitutional Implications

Because the Seventh Circuit decided *Grabill* solely on statutory grounds, it did not address the constitutional aspects of allowing jury trials of core proceedings.[206] If a court were to decide that bankruptcy judges are statutorily empowered to conduct jury trials, the next issue it would face is whether such a grant of authority is permitted by the Constitution.

Two constitutional issues are raised by jury trials in bankruptcy courts. The first is whether a jury trial conducted by a bankruptcy judge and subject to the standard of review set forth in section 157(b)(1) violates the Seventh Amendment's reexamination clause. The reexamination clause states that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States . . . ."[207]

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202. Gibson, *supra* note 201, at 159.

203. *Id.* (quoting United States v. Bornstein, 423 U.S. 303, 310 (1976)). Professor Gibson has noted that congressional silence on a particular issue does "not relieve the Court of its duty to apply the statutory language." Gibson, *supra* note 201, at 159 n.127. Gibson went on to cite another Supreme Court case for the proposition that when a statute fails to address an issue, it is probable that "the legislative history . . . will typically be equally silent or ambiguous on the question." *Id.* at 159-160 n.127 (citing Thompson v. Thompson, 484 U.S. 174, 179 (1988)). In such a case, a court has a duty to interpret congressional intent as it "appear[s] implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Id.* (citing *Thompson*, 484 U.S. at 179) (alteration in original).

204. The court stated that "[i]t is a long-established precept that [courts] should 'avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative poses no constitutional question.'" *Grabill*, 967 F.2d at 1157 (citing *United Missouri Bank*, 901 F.2d at 1456-57).

205. *Id.* (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986)).

206. The court did acknowledge that constitutional issues existed. *Grabill*, 967 F.2d at 1157.

207. U.S. CONST. amend. VII.

Bankruptcy courts, then, may not conduct jury trials in non-core proceedings without the consent of all parties because 28 U.S.C. § 157(c)(1) would require that the district court review the jury's findings of fact de novo.[208] However, under 28 U.S.C. § 157(b)(1) the bankruptcy courts' final orders in core proceedings are subject only to a standard of review analogous to that which courts of appeal exert over district courts.[209] This subjects a jury's findings of fact in a core proceeding to the traditional standard of appellate review, which does not violate the reexamination clause.[210]

The second issue, whether a jury trial in an Article I bankruptcy court comports with the Article III requirement that the "judicial power of the United States" be vested in Article III courts,[211] is somewhat more difficult. In *Northern Pipeline*, the Court invalidated the 1978 Act because it empowered bankruptcy courts to exercise judicial powers which are vested solely in Article III courts.[212] In dicta, the Court expressed concern that under the Act, bankruptcy courts exercised all the powers of district courts, including presiding over jury trials.[213] Several courts later concluded that this implicitly deemed bankruptcy court jury trials unconstitutional.[214]

The better view, however, is that adopted by a majority of the courts that have considered the issue: a jury trial of a core proceeding conducted in bankruptcy court does not violate Article III.[215] The Court did not invalidate the 1978 Act solely because bankruptcy courts were conducting jury trials. Rather, the Court "found that all of the powers exercised by the bankruptcy court, taken together, constituted an impermissible delegation of judicial power."[216] This "impermissible delegation" included the powers to preside over jury trials, issue declaratory judgments, issue writs of habeas corpus, and the power to issue any order, process, or judgment needed to enforce Title 11.[217]

208. 28 U.S.C. § 157(c)(1) (1984); *Ben Cooper*, 896 F.2d at 1403.

209. *Ben Cooper*, 896 F.2d at 1403 (citing 28 U.S.C. § 158 (1988)). *See supra* note 91 and accompanying text.

210. *Id.*

211. U.S. CONST. art. III, § 1, cl.1.

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

213. *Id.* at 85-86.

214. *See, e.g.*, Cameron v. Anderson (*In re* American Energy, Inc.), 50 B.R. 175, 180-81 (Bankr. D.N.D. 1985); Terry v. Proehl (*In re* Proehl), 36 B.R. 86, 87 (W.D. Va. 1984).

215. *See, e.g., Stoecker*, 117 B.R. at 346; Citibank, N.A. v. Park-Kenilworth Indus., Inc., 109 B.R. 321, 328 (N.D. Ill. 1989); *McCormick*, 67 B.R. at 843.

216. *McCormick*, 67 B.R. at 840.

217. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85 (1982).

Thus, jury trials constituted only a fraction of the sum-of-powers which the Court found unconstitutional.[218] Affording bankruptcy courts the power to conduct jury trials was not in itself found impermissible.

Furthermore, other non-Article III judges are allowed to conduct jury trials in certain circumstances. Congress has authorized United States magistrates to conduct jury trials with the consent of the parties.[219] Article I District of Columbia judges preside over jury trials, a practice which the Court has deemed permissible under Article III.[220] Therefore, because the practice of non-Article III courts conducting jury trials was firmly established as of *Northern Pipeline*, it is unlikely that the Court intended to prohibit bankruptcy judges from conducting jury trials in that decision.[221]

C. Practical Considerations

In his *Grabill* dissent, Judge Posner opined that BAFJA provides no instruction one way or the other on whether bankruptcy judges may conduct jury trials, and that therefore, the courts must resolve the issue on the basis of practical considerations.[222] Although Judge Posner's conclusion that BAFJA offers no guidance is questionable,[223] his position that practical considerations weigh heavily in favor of allowing jury trials in bankruptcy courts is correct.

Congress created the bankruptcy courts and their specialized judges so that debtor assets would be administered expediently.[224] Severing jury trials from other bankruptcy court matters squanders the time and resources of litigants, bankruptcy courts, and district courts.[225]

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218. *Id.*

219. *See* 28 U.S.C. § 636 (1988 & Supp. II 1990).

220. Pernell v. Southall Realty, 416 U.S. 363 (1974).

221. *McCormick*, 67 B.R. at 840.

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

223. *See supra* notes 153-157 and accompanying text.

224. Wilkey v. Inter-Trade, Inc. (*In re* Owensboro Distilling Co.), 108 B.R. 572, 576-77 (Bankr. W.D. Ky. 1989). *See also* H. R. CONF. REP. NO. 882, 98th Cong., 2d Sess. (1984) (statement of Rep. Kastenmeier), *reprinted in* 1984 U.S.C.C.A.N. 576, 579-580 (Conference Committee rejected proposed Senate limitations on bankruptcy judge's duties as contrary to the "basic purposes" of the 1978 Act.).

225. *See McCormick*, 67 B.R. at 843. *See also Grabill*, 967 F.2d at 1159 (Posner, J., dissenting) (stating that a shift of part of the case to the district court "interrupts an ongoing proceeding . . . [and] is wasteful of the time and resources of litigants and judges").

In Leonard v. Wessel (*In re* Jackson), 118 B.R. 243 (E.D. Pa. 1990), the court asked:

> Is it sensible to have the bulk of the aspects of the bankruptcy process committed to bankruptcy judges, but with transfer to a district court of those

Granted, some courts and commentators maintain that the time and expense involved in holding jury trials in bankruptcy courts will frustrate the effective administration of bankruptcy cases.[226] However, the alternative of removing part of the proceedings to district courts itself fosters inefficiency by compounding the backlogs of district courts.[227] Such an approach also undermines Congress's goal of increasing efficiency in core bankruptcy proceedings by resolving them in a single forum.[228]

Though jury trials may challenge bankruptcy judges, those judges can meet the challenge. Admittedly, jury trials are more complex proceedings than bench trials. They involve unique aspects such as jury selection and the providing of jury instructions.[229] Still, bankruptcy judges are experienced and competent jurists in their own right.[230] Moreover, magistrate judges frequently conduct voir dire with the parties' consent, and law clerks often draft the jury instructions tendered by a court;[231] there is no fundamental reason why skilled bankruptcy judges cannot do the same.

Also, as Judge Posner stressed, forum shopping should be discouraged.[232] Requiring bankruptcy jury trials to be transferred out of

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> claims that require jury treatment? On the face of it, that does not sound like an efficient use of the time either of bankruptcy courts or district courts.

Id. at 252.

226. Pennels v. Barnes (*In re* Best Pack Seafood, Inc.), 45 B.R. 194, 195 (Bankr. D. Me. 1984). *See also* Weeks v. Kramer (*In re* G. Weeks Sec., Inc.) 89 B.R. 697, 710 (Bankr. W.D. Tenn. 1988) ("[J]ury trials are, by nature, more time consuming than bench trials, and . . . the Court's docket and case pace demands do not accommodate jury trials."); Data Compass Corp. v. Datafast, Inc. (*In re* Data Compass Corp.), 92 B.R. 575, 583 (Bankr. E.D.N.Y. 1988) ("The rapid pace of bankruptcy cases and proceedings do not mesh with jury procedures.").

227. M & E Contractors, Inc. v. Kugler-Morris Gen. Contractors, Inc., 67 B.R. 260, 267. (N.D. Tex. 1986).

228. *See* Plaintiff-Appellee's Brief at 8-9, Steinberg v. NCNB Nat'l Bank, (*In re* Grabill) 967 F.2d 1152 (7th Cir. 1992) (No. 91-3381).

229. Kevin P. McDowell, Note, *Statutory Authority for Bankruptcy Judges to Conduct Jury Trials: Fact or Fiction? In re United Missouri Bank of Kansas City, N.A.*, 56 MO. L. REV. 729, 744-45 (1991).

230. *Grabill*, 967 F.2d at 1160 (Posner, J., dissenting). Judge Posner quoted a statement that "'the Bankruptcy Court now has the best bench, top to bottom, of any court in the City of Chicago.'" *Id.* (quoting *Council of Lawyers' Report on Bankruptcy Court*, CHICAGO L. BULL., Jan. 13, 1992, at 2). Judge Posner posited that this view quite possibly represented the opinion across the country. *Id.*

For a contrary view, see Data Compass Corp. v. Datafast, Inc. (*In re* Data Compass Corp.), 92 B.R. 575, 583 (Bankr. E.D.N.Y. 1988) (charging that bankruptcy jury trials "may breed trial error through judicial inexperience" (citing *In re* G. Weeks Sec., Inc., 89 B.R. 697, 710 (W.D. Tenn. 1988))).

231. *Grabill*, 967 F.2d at 1160 (Posner, J., dissenting).

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

bankruptcy court can create an inappropriate incentive to demand a jury trial.[233] Allowing jury trials in the bankruptcy courts will extinguish that incentive.

Granted, one very important practical consideration may weigh against bankruptcy court jury trials. At present, some bankruptcy courts do not possess the facilities or personnel needed to accommodate jury trials.[234] Some courts therefore conclude that the present structure of the bankruptcy system is incompatible with jury trials.[235] But physical and staffing limitations can be rectified. Moreover, the present limitations are not reason enough to transgress the clear congressional command voiced in BAFJA that bankruptcy judges conduct jury trials.

V. IMPACT

Grabill will frustrate the goal of an efficient and workable bankruptcy system in the Seventh Circuit. It will do so in two principal ways: by dividing bankruptcy proceedings between the bankruptcy and district courts, and by fostering inappropriate jury demands.

Grabill mandates a bifurcated bankruptcy system and thereby an inefficient division of labor. Removing a core proceeding jury trial to the district court takes the case away from a judge with special training in bankruptcy law and delivers it to a judge who is often without such training.[236] This necessitates a district court applying complex and sometimes unfamiliar law, which may delay adjudication. Finally, following the jury trial it may be necessary to return the case to the bankruptcy court for additional proceedings. This undermines the efficiency of the bankruptcy court[237] and adds to the backlog in district courts.

As Judge Posner noted, *Grabill* will also promote the use of jury demands as means of judge selection.[238] The potential for abuse is

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

234. *See, e.g., Data Compass Corp.*, 92 B.R. at 583 (citing *Astrocade*, 79 B.R. at 991); *Hughes-Bechtol, Inc.*, 107 B.R. at 572.

235. *See, e.g., Data Compass Corp.*, 92 B.R. at 583; *Astrocade*, 79 B.R. at 991; *Owensboro Distilling Co.*, 108 B.R. at 576.

236. *See* 1 COLLIER ON BANKRUPTCY, app. 2, at 81 (Lawrence P. King ed., 15th ed. 1990) (stating that "the adjudication should be performed by bankruptcy courts expert in the subject").

237. Ann Van Bever & V. Craig Cantrell, *Jury Trials in the Bankruptcy Courts: Awaiting a Final Verdict*, 20 ST. MARY'S L.J. 799, 825 (1989).

238. *Grabill*, 967 F.2d at 1159 (Posner, J., dissenting) (noting that "[j]uries will be dragged into cases because litigants dislike particular judges"); *see also supra* notes 232-

significant. Had the *Grabill* court assigned bankruptcy jury trials to the bankruptcy courts, the primary motivation for demanding a jury trial would have properly remained the desire to exercise a Seventh Amendment right.[239]

VI. CONCLUSION

In *Granfinanciera*, the Supreme Court preserved a litigant's Seventh Amendment right to a jury trial in certain core bankruptcy proceedings. In *Grabill*, the Seventh Circuit, contrary to implicit congressional direction, constitutional propriety, and overriding practical considerations, committed core proceeding jury trials to the least desirable forum. Until the Supreme Court rules otherwise, *Grabill* will significantly impede the use of specialized bankruptcy judges to efficiently adjudicate bankruptcy proceedings.

AMY FIELD HERZOG

33 and accompanying text.

239. *See supra* notes 232-33 and accompanying text.