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THE UNMAKING OF A BANKRUPTCY COURT: AFTERMATH OF *NORTHERN PIPELINE v. MARATHON*

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On June 28, 1982, the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, a plurality decision joined in by two concurring Justices,[1] held that 28 U.S.C. § 1471[2] was unconstitutional because it authorized bankruptcy courts to adjudicate all matters related to a case arising under title 11 of the United States Code (Bankruptcy Code).[3] The Bankruptcy Code had established bankruptcy courts as article I legislative courts rather than article III constitutional courts. The Court stated that such broad jurisdiction can be validly given only to constitutional courts. Thus ended a decade of study,[4] legislative drafting,[5] and what many authorities had hoped were successful attempts to improve the administration of justice in bankruptcy cases.[6]

The *Northern Pipeline* case routinely began shortly before the Supreme Court decision was rendered. Marathon Pipe Line Company had filed a petition for relief under Chapter 11 of the Bankruptcy Code in the District of Minnesota and, in the course of the Chapter 11 case, brought an action in that bankruptcy court against Northern Pipeline for damages resulting from an alleged breach of contract. Northern Pipeline contested the constitutionality of section 1471, which granted the bankruptcy court jurisdiction to resolve the related contract dispute. Northern Pipeline lost in the bankruptcy court but won on appeal to the

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[1] *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982).

[2] Pub. L. No. 95-598, § 1471, 92 Stat. 2549, 2668-69 (1978).

[3] The Bankruptcy Reform Act of 1978 codified the substantive law of bankruptcy at 11 U.S.C. §§ 101-151326 (Supp. IV 1980). Hereinafter all citations to the Bankruptcy Code are references to title 11 of the United States Code unless otherwise indicated.

[4] In 1970, the Commission to Study the Bankruptcy Laws of the United States was established by congressional enactment to review the bankruptcy laws in light of the changed social and economic conditions of the country since 1898. *See* Pub. L. No. 91-354, 84 Stat. 468 (1970). The report of the Commission, filed in 1973, is in H.R. DOC. NO. 137, 93d Cong., 1st Sess., Pts. I and II (1973), *reprinted in* 2 App. COLLIER ON BANKRUPTCY I-1 (15th ed. 1982).

[5] Bills that preceded final enactment included H.R. 31, 94th Cong., 1st Sess. (1973); H.R. 6, 95th Cong., 1st Sess. (1977); H.R. 7330, 95th Cong., 1st Sess. (1977); and H.R. 8200, 95th Cong., 2d Sess. (1977). There were comparable bills introduced during this period in the Senate as well.

[6] *See* H.R. REP. NO. 595, 95th Cong., 1st Sess. 2-5 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963-67.

United States district court.[7] On direct appeal, the United States Supreme Court affirmed the district court's holding that section 1471 was unconstitutional.[8]

In 1970, the Commission on the Bankruptcy Laws of the United States began a study of bankruptcy law, practice, and administration with a view toward making all aspects of the system more relevant to the changed social and economic conditions in the country.[9] In the ensuing years Congress, through its subcommittees, held many hearings with respect to the proposed reform of the bankruptcy law. Several days of hearings were devoted to the issue of the type of court that the system required and the extent of jurisdiction that was necessary in order for that court to perform properly.[10] It was recognized relatively early that the bankruptcy court should have broad and pervasive jurisdiction to resolve any and all disputes related to a bankruptcy case pending before it. While the court need not be required to resolve such disputes, it was essential that the court have the option to do so. Prior to the Bankruptcy Code, a dichotomy in the bankruptcy law between "summary" and "plenary" jurisdiction[11] made for an extremely inefficient procedure. Generally speaking, instead of the bankruptcy court resolving matters involving the bankrupt estate and adverse parties rather quickly and expeditiously on the merits, the first round of judicial determinations, commencing in the bankruptcy court and flowing up to the appellate courts of all levels, centered on whether or not the bankruptcy court had jurisdiction to resolve the dispute. Only after much wasted time, money, and effort with respect to the jurisdictional question was it then possible to concentrate on the merits of the dispute.

In the House of Representatives an early draft of a bankruptcy bill provided not only for the bankruptcy courts to have pervasive jurisdiction but it also provided that the courts should be article III courts.[12]

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[7] *See* Marathon Pipe Line Co. v. Northern Pipeline Constr. Co., 5 COLLIER BANKR. CAS. 2D 114 (D. Minn. 1981).

[8] *See* 102 S. Ct. at 2880.

[9] *See supra* note 4.

[10] *See Statement of the National Bankruptcy Conference, 1982: Hearings on H.R. 6109 Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, House of Representatives*, 97th Cong., 2d Sess. 61 (1982); H.R. REP. NO. 807, 97th Cong., 2d Sess. 10 (1982).

[11] The Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, did not explicitly distinguish between summary and plenary jurisdiction. The developing case law, however, concluded essentially that summary jurisdiction existed in the bankruptcy court over matters involving the estate and third persons if the bankruptcy court had possession of the res involved in the dispute or if the third party consented, expressly or impliedly, to the exercise by the bankruptcy court of summary jurisdiction. Absent these factors, the estate, represented by the trustee in bankruptcy, had to bring suit against the third party in what would otherwise have been the proper forum, either state court or federal court, if an independent basis of federal jurisdiction existed. *See generally* 1 COLLIER ON BANKRUPTCY ¶ 3.01[1] (15th ed. 1982).

[12] *See* H.R. 6, 95th Cong., 1st Sess. (1977).

Soon after this bill was published controversy developed. But before considering the reasons for the controversy, it is worth noting why in that particular draft it was decided to go forward with the article III status for bankruptcy judges.*

As mentioned above, a consensus developed early in the legislative process that the bankruptcy court should have broad jurisdiction to determine all matters related to a bankruptcy case. The House subcommittee that considered the bankruptcy legislation made a determined effort to learn whether such jurisdiction could validly be given to an article III court. As part of its investigation, the subcommittee sought the considered judgment of experts in constitutional law and incorporated their advice in the House Committee Report.[13] Although the responses of the experts were inconclusive, efficiency considerations mandated that the bankruptcy court should be an article III constitutional court. Consequently, the House Judiciary Committee proposed such status for the bankruptcy judges in its draft bill.

The House Judiciary Committee's bill quickly stimulated controversy. Many members of the federal judiciary, particularly members of the district court bench, feared that the addition of a number of bankruptcy judges as article III judges would have the untoward effect of diluting the prestige of the existing district court judges. Thus, the opposition to the bill was led by the Judicial Conference of the United States, which is chaired by the Chief Justice of the Supreme Court, and had the support of the American College of Trial Lawyers.[14] At one stage in the legislative process a House bill, H.R. 8200, cleared the Judiciary Committee and came to the floor of the House. At that time an amendment was introduced and passed which changed the status of the bankruptcy judges from article III to article I judges.[15] The passage of the amendment, however, was only by the Committee of the Whole and not by the House itself. Final consideration of the amendment by the House was put off to a later date. Subsequently, new hearings were held both before the Senate subcommittee and before the House subcommittee relating exclusively to the issue of bankruptcy court status.[16] When the bill again reached the floor of the House, the amendment was defeated and the bill

[13] *See Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st and 2d Sess. 2682-2706 (1975-76), *reprinted in* H.R. REP. No. 595, 95th Cong., 1st Sess. 63 (1977).

[14] *See* Rifkind, *Bankruptcy Court—Specialized Court Opposed*, 52 AM. BANKR. L.J. 187 (1978); King, *Bankruptcy Code—Specialized Court Supported*, 52 AM. BANKR. L.J. 193 (1978).

[15] The Danielson-Railsback Amendment, 95th Cong., 1st Sess. (1977), was introduced on the floor of the House when the House began consideration of H.R. 8200 on October 27, 1977. The amendment was adopted by a vote of 183-158. *See* 1 COLLIER ON BANKRUPTCY ¶ 1.03[3][d] (15th ed. 1982).

[16] Hearings were held in December, 1977, before subcommittees of the House and Senate Judiciary Committees. *See* 1 COLLIER ON BANKRUPTCY ¶ 1.03[3][d] (15th ed. 1982).

was passed containing both broad jurisdiction and article III status for bankruptcy judges.[17]

Meanwhile, the Senate's version of the Bankruptcy Code, S. 2266, was wending its way through the Senate. The Senate bill, unlike the House bill, granted the bankruptcy court article I rather than article III status. In the last minutes of the 95th session of Congress, a compromise was reached on various differences between S. 2266 and H.R. 8200.[18] The final bill, as passed by the House and Senate, granted the bankruptcy court broad jurisdiction but established the court as an article I court. The fight was not over, however, even after the bill was passed. The Chief Justice launched a major lobbying effort to have the President veto the bill. To say that the effort was unsuccessful would be a misstatement. It was unsuccessful only in the end result. The opposition was sufficiently important that the President did not sign the bill until only hours before a pocket veto would have taken effect.[19] It was a close call.

The bill was signed on November 6, 1978, and by its terms became effective to cases commenced on and after October 1, 1979.[20] It was shortly after that date that Marathon filed its Chapter 11 petition and brought its cause of action in the bankruptcy court against Northern Pipeline.

After October 1, 1979, the jurisdiction of the bankruptcy court was not the only matter that generated controversy. Coincidentally with the Bankruptcy Code's effective date, a considerably larger number of case filings began. While this was principally due to the downward turn in the economy and the upward turn in interest rates and unemployment, the consumer credit industry was quick to allege that the Bankruptcy Code made it easier to file for bankruptcy. The National Consumer Finance Association, which is a coalition of different businesses involved in the extension of consumer credit, had legislation introduced, particularly in the Senate, that would change considerably all of the provisions in the Bankruptcy Code affecting consumer debtors.[21] The essence of the changes proposed by the Association would be to limit or take away entirely the advantages or benefits which the Bankruptcy Code has granted consumer debtors and reinstitute the possibility of creditor abuse that the Bankruptcy Code had attempted to eliminate.

Principal among the changes recommended by the consumer finance industry is a provision to require consumer debtors to file petitions under Chapter 13 of the Bankruptcy Code, which provides for repayment of debt under a plan out of future income, rather than under

[17] *See id.* ¶ 1.03[3][e].

[18] *See id.* ¶ 1.03[5].

[19] *See* Wall St. J., Oct. 9, 1978, at 7; N.Y. Times, Nov. 19, 1978, at 39; N.Y. Times, Editorial, Dec. 1, 1978, at A26.

[20] *See* Pub. L. No. 95-598, § 402(a), 92 Stat. 2549, 2682 (1978).

[21] *See* S. 2000, 97th Cong., 1st Sess. (1981).

Chapter 7, which provides for liquidation of the debtor's estate. Essentially, such a provision would make Chapter 13 relief mandatory rather than optional with the debtor. This provision would change the basic concept of the bankruptcy laws which has been in existence for many years. As a matter of fact the idea for mandatory Chapter 13 had been presented to Congress in 1964, and while it was approved by the American Bar Association, it was never even reported out by the House subcommittee.[22] In the 97th session of Congress, however, it was felt that the climate was right for another attempt at mandatory Chapter 13. Senate and House subcommittees held hearings and received testimony on both sides of the issue.[23] The credit industry presented testimony favoring the bill and introduced studies which concluded that many people who filed for bankruptcy were able to pay most if not all of their debts over a five-year period.[24]

The study that was most often mentioned in the congressional hearings was conducted at Purdue University. The study found that approximately forty percent of debtors who filed bankruptcy petitions could have proceeded under Chapter 13 and paid at least fifty percent of the debt over a five-year period.[25] Contrary testimony presented at the hearings attacked the Purdue study on the grounds that the data did not support the conclusions drawn and that the group conducting the study may have been biased because of prior involvement with the credit industry.[26]

In addition to making Chapter 13 mandatory for consumer debtors, the credit industry has sought also to limit or delete certain prodebtor provisions in the Bankruptcy Code. The bill introduced at the behest of

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[22] *See* H.R. 12784 introduced in the 88th Congress, H.R. 292 and S. 613 introduced in the 89th Congress, and H.R. 1057 and H.R. 5771 in the 90th Congress. Hearings were held before a subcommittee of the House Judiciary Committee on May 24 and 25, 1967, but these proposals were not approved by that subcommittee.

[23] *See Hearings Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 1 (1981); *Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. of the Judiciary*, 97th Cong., 2d Sess. 1 (1982).

[24] *See id.*

[25] *See* S. REP. No. 446, 97th Cong., 2d Sess. 8 (1982).

[26] *See Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. of the Judiciary*, 97th Cong., 2d Sess. (1982) (statement of Vern Countryman). It is interesting to note that Professor Robert W. Johnson directed the Purdue University bankruptcy study. In 1976 Senator Proxmire awarded his "Golden Fleece of the Month" award for July to the National Science Foundation program that had awarded an earlier contract to Professor Johnson and his research center to make a study of consumer legislation. Senator Proxmire found that the Purdue researchers had an overwhelming bias in favor of the consumer credit industry. He went on to say "this is like asking the Air Force to study the need for the B.1 bomber or the oil and gas industry to evaluate the depletion allowance." Press release from the office of Senator William Proxmire, Friday, July 30, 1976. This is the same outfit that made the study for the consumer credit industry on which the industry now relies so heavily to change a basic concept of the United States bankruptcy laws.

the consumer credit industry would affect the provisions in the Bankruptcy Code related to the nondischargeable debts of a debtor, the reaffirmation of discharged debts, the ability to redeem property from a lien, and the exemptions that are set forth in the Bankruptcy Code. In each one of these categories there was reason, both in policy and in legal thought, for the changes made by the Bankruptcy Code as compared with the former Act.

For example, section 522, which concerns exemptions, provides that a debtor has the option of using the law of exemptions as it exists in the state of domicile or the list of federal exemptions set forth in section 522(d). Under the former Bankruptcy Act, only the state law of exemptions was applicable.[27] The purpose of section 522 was to replace, for federal bankruptcy purposes, the state law of exemptions with a uniform federal law. The thought was to have a single and equitable provision that defined exempt property for debtors and creditors throughout the entire country.[28] The uniform law idea, however, did not receive universal acceptance and it became clear rather early that such a law would be defeated for political reasons in Congress. The first compromise between the two extremes that was reached in drafts of the bankruptcy bills allowed the debtor to choose between the appropriate state law and a new federal law.[29] The final compromise between the Senate and the House versions of the bills additionally gave authority to the states to limit their domiciliaries from using the federal law of exemptions.[30] It did

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[27] Section 6 of the Bankruptcy Act of 1898, ch. 541, § 6, 30 Stat. 544, 548, provided:

> This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the . . . State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State . . . .

[28] *See* REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess. 182 (1973):

> The Commission recommends that kinds of property that traditionally have been treated as exempt by state governments form the nucleus of the federal exemptions with appropriate federal maximums. This approach avoids the unfairness of existing state exemption laws, most of which are archaic, some of which are unduly generous, and some of which are exceedingly niggardly, particularly as to urban residents.

[29] *See* H.R. REP. NO. 595, 95th Cong., 1st Sess. 126-27, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6087-88:

> Though exemption laws have been considered within the province of State law under the current Bankruptcy Act, H.R. 8200 adopts the position that there is a Federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin his fresh start. Recognizing, however, the circumstances do vary in different parts of the country, the bill permits the States to set exemption levels appropriate to the locale, and allows debtors to choose between the State exemptions and the Federal exemptions provided in the bill. Thus, the bill continues to recognize the States' interest in regulating credit within the States, but enunciates a bankruptcy policy favoring a fresh start.

[30] Section 522(b)(1) of the Bankruptcy Code provides that "an individual debtor may ex-

not take long after the effective date of the Bankruptcy Code for states to enact legislation prohibiting their domiciliaries from using the federal exemptions of section 522(d). To date more than three-quarters of the states have enacted such legislation.[31] Obviously, the movement to enact this legislation was commenced by the consumer credit industry which preferred in many states to have the more restrictive state exemptions available to the debtor rather than the more beneficent federal exemptions.

The credit industry has sought also to modify the debtor's right of redemption, which is included in the Bankruptcy Code for the first time and is applicable only in a Chapter 7 liquidation case. Pursuant to section 722, an individual debtor may redeem tangible, personal, consumer property from a lien securing a dischargeable consumer debt.[32] The right of redemption exists if the property is exempted pursuant to section 522 or has been abandoned by the trustee under section 554. Section 722 specifies that the debtor exercises the redemption right by paying the secured creditor the amount of the allowed secured claim. In essence this means that the secured creditor will receive payment equal to its expectations but at the same time the debtor will be able to retain the property involved without having to purchase substitute property at a much higher price. Under section 722, the value of the secured claim equals the value of the collateral at the time of bankruptcy and it is this amount that the debtor must pay the secured creditor. The balance, if any, still owing to the secured creditor is considered an unsecured deficiency that is subject to the discharge.

A question that has arisen in the cases is whether the debtor may pay the secured creditor the value of the collateral in installments or whether the debtor must make a single lump-sum payment. It seems clear from the Bankruptcy Code, particularly when one considers section 524 in conjunction with section 722, and also considers the thrust of Chapter 13, that section 722 presupposes the debtor will make a lump-sum payment absent agreement to the contrary with the secured creditor. Most cases have so concluded but one or two have permitted a debtor, over the creditor's objection, to make installment payments.[33]

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empt from property of the estate either property that is specified under subsection (d) of this section [i.e., the federal exemptions], unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize, or, in the alternative . . . ."

[31] *See* 7 COLLIER ON BANKRUPTCY 1 (15th ed. 1982).

[32] For the purpose and policy behind the adoption of § 722, which is new to the bankruptcy law, see REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. No. 137, 93d Cong., 1st Sess. 184-85 (1973), *reprinted in* 2 App. COLLIER ON BANKRUPTCY 173-74 (15th ed. 1982).

[33] *See* Arizona Bank v. Carroll, 4 COLLIER BANKR. CAS. 2D 1042 (9th Cir. 1981) (lump sum payment required); First Bank & Trust Co. of Ithaca, 4 COLLIER BANKR. CAS. 2D 648 (N.D.N.Y. 1981) (lump sum payment required); *In re* Carroll, 3 COLLIER BANKR. CAS. 2D 627 (D. Ariz. 1981) (installment payments permitted).

The essence of the consumer finance industry's objection to section 722 is that the courts have been using a realistic value when determining how much the debtor must pay to the secured creditor. In effect, the courts have been assessing a value comparable to what the secured creditor would receive for the property if permitted to foreclose on its lien and sell. This value, of course, equals the secured creditor's real expectation when it took a security interest in the collateral in the first place. Nevertheless, the consumer finance industry would have section 722 amended so that the secured creditor received a higher value.[34] The industry would also amend section 722 to permit a debtor to extend payments over a five-year period. This amendment would in effect make section 722 similar to Chapter 13, which, of course, provides for payments under a plan out of future income. This result would negate the original purpose of section 722; under the original logic of the Bankruptcy Code if a debtor wishes to make installment payments then it may use Chapter 13 instead of Chapter 7. Additionally, permitting or requiring a debtor to extend payments over a five-year period would again tie up a debtor's future income and would subvert the basic fresh start concept of the liquidation provisions of the Bankruptcy Code.

In addition to changing dramatically provisions in Chapter 7, the credit industry's amendments would change significantly provisions in Chapter 13 as well. One provision the industry would change is section 1301, which is new to the Bankruptcy Code and provides an automatic stay of action against codebtors. Under section 1301, when a Chapter 13 petition is filed, a creditor may not then sue an uncompensated guarantor of a consumer debt. In essence, the section prevents collection efforts at that time against members of the family, friends, and coworkers of the debtor. The effect of the stay is to prevent creditors from harassing a Chapter 13 debtor and to prevent undue pressure from persons in a close relationship with the debtor. The stay is not perpetual and it does not prevent eventual collection from or liability of the codebtor. The stay merely gives the Chapter 13 debtor a little breathing time.

Section 1301 also provides that when the debtor proposes a plan the court shall lift the stay on request of the creditor with respect to any part of its claim that the plan will not pay. Once the debtor files a plan the creditor may seek relief from the stay and section 1301 directs the court to grant relief to the extent that the plan does not propose to pay the claim. Thus, if the plan proposes to pay fifty percent of all unsecured debts, the creditor may obtain relief from the stay to recover the balance of fifty percent from the codebtor. Even if the plan proposes to pay 100 cents on the dollar, the creditor may still obtain relief from the stay to seek interest accruing after the filing of the petition from the codebtor.

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[34] *See* S. 2000, 97th Cong., 1st Sess. § 5 (1981) (amending § 506(a) to provide that value for § 722 purposes is presumed to be established resale market price).

The consumer finance industry would place the burden of going forward with any procedural steps on the debtor or on the codebtor instead of on the creditor. Thus, the proposal would automatically permit the creditor to seek recovery from the codebtor when the debtor files the plan simply by notifying both the debtor and codebtor that such recovery is being sought. If the debtor or codebtor desires to have the stay continued, they must commence a proceeding in the bankruptcy court to obtain that kind of relief.[35] The proposal not only would change the burden of going forward with the necessary procedural steps, but would also provide a possible area of abuse. Thus, a creditor could seek recovery of the debt to an extent not permitted in the hope that the debtor or codebtor would refrain from filing any proceeding in the bankruptcy court for an extension of the stay or to obtain a determination of actual liability.

Another area of major concern with respect to Chapter 13 is the broad discharge that section 1328 presently permits. As distinguished from the prior bankruptcy law, on completion of payments under a plan, the debtor will obtain a discharge of almost all debts. In other words, section 1328 does not incorporate and does not make applicable to Chapter 13 cases section 523, which lists the various types of nondischargeable debts on which a discharged individual remains liable. The only nondischargeable debts in a Chapter 13 case are alimony and dependent support, as set forth in section 523(a)(5), and taxes entitled to priority, as set forth in section 1322. The amendment proposed by the consumer finance industry, however, would make all of section 523(a) applicable in Chapter 13 cases and it would not be possible on completion of a plan for a debtor to obtain any relief from nondischargeable debts.[36]

S. 2000 was introduced in the Senate containing all of the above proposed amendments to the Bankruptcy Code and more.[37] A comparable bill was introduced in the House of Representatives.[38] The day after the Supreme Court announced the *Northern Pipeline* decision, the *New York Times* quoted the Vice President and General Counsel of the National Consumer Finance Association as saying with respect to the Supreme Court decision, "it is manna from heaven."[39] What was meant by such a remark? Up until this time there was a strong likelihood that first the Senate Judiciary Committee and then the entire Senate would pass S. 2000 rather easily and quickly. On the other hand, the House was not acting as quickly on a comparable bill even though the bill had more

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[35] *See* S. 2000, 97th Cong., 1st Sess. § 15 (1981) (amending § 1301 of the Bankruptcy Code). Section 17 of S. 2000 would also make this type of debt separately classifiable thus permitting the consumer finance creditor to be paid in full while other unsecured creditors whistle.

[36] *See* S. 2000, 97th Cong., 1st Sess. § 19 (1981).

[37] *See* S. 2000, 97th Cong., 1st Sess. (1981).

[38] *See* H.R. 4786, 97th Cong., 1st Sess. (1981).

[39] N.Y. Times, June 29, 1982, at D6.

than two hundred cosponsors.[40] The reason for the delay in the House was that the Judiciary subcommittee was more aware of the dangers inherent in the amendments and the overall effect they would have on basic concepts contained not only in the Bankruptcy Code but which had been in the system under the Bankruptcy Act of 1898. Hearings were scheduled before the House subcommittee which was interested in receiving testimony from opponents of the amendments proposed by the consumer finance industry.

The characterization of the Supreme Court's *Northern Pipeline* decision as "manna from heaven" implied a recognition by the consumer finance industry that Congress would now have to enact legislation quickly to resolve the court problem. The credit industry felt that an ideal opportunity existed to attach to any such legislation the pro-creditor amendments discussed above. In effect, Congress' attempt to cure the problems inherent in the Supreme Court decision would provide the credit industry the opportunity to enact private interest legislation.

Even prior to the *Northern Pipeline* decision, Congressman Rodino, Chairman of the House Judiciary Committee and Chairman of the Subcommittee on Monopolies and Commercial Law, introduced H.R. 6109.[41] This bill established the bankruptcy courts as article III constitutional courts. Shortly after the announcement of the Supreme Court decision, both the House and Senate subcommittees announced dates for public hearings on the court issue. Both hearings were held in mid-July to determine how best to cure the problem.[42]

On the House side, most members of the subcommittee, including the chairman, were fully cognizant of the existence of a real problem that required a realistic solution. The Congressmen not only listened to the testimony of persons representing the academic, judicial, and practicing bar communities, but, through probing questions, understood the far-reaching effect of the various opinions issued by the Supreme Court in the *Northern Pipeline* case. The subcommittee members searched for all alternatives to resolve the problem. It was clear from the beginning, however, that multiple alternatives were nonexistent. The only possible solution consistent with the various opinions in *Northern Pipeline* was to create article III courts to handle bankruptcy matters.

Aside from the merits of the issue, it was also made clear during the subcommittee hearings that the corrective legislation must be a "clean"

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[40] *See* H.R. 4786, 97th Cong., 1st Sess. (1981). This does not mean the cosponsors approved the bill, only that they had been lobbied and agreed to lend their names without any real consideration of the pros and cons.

[41] *See* H.R. 6109, 97th Cong., 2d Sess. (1982).

[42] *See Hearings on H.R. 6109 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982); *Hearings on the Bankruptcy Reform Act of 1978 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982).

bill unencumbered by extraneous amendments. Private interest groups should not be permitted to lobby their amendments as attachments to the court bill because the effect would simply be to create controversy and hold up and perhaps make impossible eventual passage of a bill dealing with the court system.[43]

On the Senate side the testimony from the various groups and individuals was essentially the same as that on the House side except that the Senate reaction was quite different. The Chairman of the Senate Judiciary Committee, Senator Strom Thurmond, indicated in his opening statement that he had serious reservations about giving bankruptcy courts article III status.[44] Rather, Senator Thurmond wanted the experts testifying before the Committee to suggest other alternatives Congress might adopt to resolve the court problem that would not require creating article III courts. Witness after witness testified that there were no alternatives. Each witness testified that because pervasive jurisdiction to handle all matters relating to bankruptcy was essential to the effective, efficient, and expeditious operation of the bankruptcy system, conferring article III status to bankruptcy courts was the only solution.

One alternative the Committee mentioned was to permit the district court, which was an article III court, to refer matters to the bankruptcy judges as special masters and then to review reports or decisions of the bankruptcy judges de novo. It was pointed out that while it was possible to legislate such a system it would hardly be the proper thing to do. In fact, adoption of this alternative would be a backward step of some forty years rather than a forward-looking type of legislation. Previously, the bankruptcy judicial system was composed of the district judges and referees in bankruptcy. The district judges were able to review decisions of the referees de novo.[45] In the course of time, the process of review by the district court became more limited. Under the 1973 rules, for instance, the order of the bankruptcy judge was final unless a timely appeal was taken;[46] the rule for the standard of appeal or review by the district judge was the "clearly erroneous" rule.[47]

In August, 1982, Congressman Rodino and others introduced H.R.

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[43] *See Hearings on H.R. 6109 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 74, 98 (1982).

[44] *See Hearings on the Bankruptcy Reform Act of 1978 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 6 (1982).

[45] *See* 2A COLLIER ON BANKRUPTCY ¶ 39.28 (14th ed. 1974).

[46] FED. R. BANKR. P. 810 provided:

> Upon an appeal the district court may affirm, modify, or reverse a referee's judgment or order, or remand with instructions for further proceedings. The court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge the credibility of the witnesses.

[47] *Id.*

6978[48] to replace H.R. 6109. The new bill provided for the appointment of bankruptcy judges under article III of the Constitution and contained a great deal more detail with respect to court structure and jurisdiction than did its predecessor, H.R. 6109. In addition, the bill provided for a transition period during which existing bankruptcy judges would remain in office until new judges were appointed by the President and confirmed by the Senate. Congressman Rodino's bill was a "clean" bill, containing only provisions related to the bankruptcy court and bankruptcy judges. Since the October 4th deadline was quickly approaching, both the subcommittee and the entire Judiciary Committee promptly passed H.R. 6978.[49] Originally the bill contained a provision that permitted the reassignment of bankruptcy judges to the district court to hear civil and criminal cases as the need arose. This so-called "fungibility" concept stirred some protest and Congressman Rodino agreed to the deletion of this provision.[50] Congressman Rodino and others hoped that at some point in September, 1982, this bill would reach the floor of the House, be passed, and then sent on to the Senate for action.

In July, 1982, the Administrative Office of the United States Courts issued a memorandum which concluded that the *Northern Pipeline* decision did not create any major problem and certainly did not create a crisis situation.[51] The memorandum took the position that in *Northern Pipeline* the Supreme Court recognized that the bankruptcy court as it existed under the 1898 Act could continue to exist until Congress replaced it in 1984 pursuant to the Bankruptcy Code. The memorandum, however, either overlooked or disregarded two important considerations. First, the Bankruptcy Code repealed the Bankruptcy Act of 1898 and that repealer was effective on October 1, 1979.[52] Secondly, the only matter with respect to this issue that the Bankruptcy Code retained from the former Act from October 1, 1979, until April 1, 1984, was the definition of "bankruptcy court" in former section 2a.[53] The Administrative Office memorandum interpreted this to mean that the jurisdiction given to that bankruptcy court as set forth in section 2 was also carried forward. A clear reading of the Bankruptcy Code, however, shows that even that portion of section 2 and the rest of the Bankruptcy Act of 1898 was subject to the repealer.[54]

Subsequent to the issuance of the Administrative Office memoran-

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[48] *See* H.R. 6978, 97th Cong., 2d Sess. (1982).

[49] *See* H.R. REP. NO. 807, 97th Cong., 2d Sess. (1982).

[50] *Id.* at 95.

[51] *See* Memorandum of Administrative Office of the United States Courts dated July 22, 1982 from Mr. Carl Imlay to Mr. William E. Foley, *referred to in* H.R. REP. No. 807, 97th Cong., 2d Sess. 30-49 (1982).

[52] *See* Pub. L. No. 95-598, §§ 401(a), 402(a), 92 Stat. 2549, 2682 (1978).

[53] *Id.* § 404(a).

[54] *See* H.R. REP. NO. 807, 97th Cong., 2d Sess. 30-49 (1982) (statements in response to the Memorandum of the Administrative Office of the United States Courts).

dum, the Judicial Conference of the United States issued its report together with a proposal for legislation in September, 1982.[55] The Judicial Conference report takes a tack similar to the Administrative Office memorandum. The Judicial Conference report is a much longer document and contains inaccuracies and conclusions that do not withstand any analysis. The basic purport of the report is to convince the Congress not to establish the bankruptcy courts as article III courts but rather to continue them as article I courts inferior to the United States district courts. Essentially, the Judicial Conference of the United States is merely repeating the position it took in 1977 when it vehemently opposed the creation of article III courts in the bankruptcy system.[56]

The House subcommittee requested responses to both the memorandum of the Administrative Office of the U.S. Courts and to the report of the Judicial Conference of the United States. The Committee Report on H.R. 6978 contains a reference to the Administrative Office memorandum and the responses to it.[57] These responses all concurred in the judgment that the memorandum was wrong. A response was also sent to Congressman Rodino from Professors Countryman, Kennedy, and King that pointed out the major areas in which the report of the Judicial Conference of the United States was both factually and logically erroneous. That response did not discuss all of the errors contained in the report but concentrated on only the major errors. Nevertheless, the Judicial Conference of the United States, being a rather prestigious body, does carry much weight with members of the legislature and thus made it more difficult for Congress to pass a clean article III bill. The Judicial Conference legislative proposal, therefore, was introduced as a bill by Congressman Kastenmeier.[58] As a result, in September there were two bills in the House dealing with the same subject matter but of course in different ways.

On the Senate side, no bill had yet been introduced. The problem remained that even if the concept of article III status for bankruptcy courts was agreeable much pressure existed to tack other legislation on to any bill. All kinds of amendments to the Bankruptcy Code, particularly dealing with anticonsumer proposals, grain elevator bankruptcies, and greater protection for shopping center lessors, would be added to any court bill.

At this time, Congressman Rodino remained adamantly opposed to anything but a clean bill. In the late days of September just before Con-

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[55] *See* Report of the Judicial Conference of the United States to Congress on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co. et al.* and Proposals for Remedial Congressional Action (1982).

[56] *Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judiciary Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 411 (1977).

[57] *See* H.R. REP. No. 807, 97th Cong., 2d Sess. 30-49 (1982).

[58] *See* H.R. 7132, 97th Cong., 2d Sess. (1982).

gress' election day recess, which began on October 2nd, an impasse developed. The Senate would not accede to a clean article III bill. Congressman Rodino would not agree to an article III bill containing amendments to the substantive law. Additionally, the leadership of the House was concerned with the appropriateness for a Democrat-controlled House to permit legislation that would enable a Republican President and Senate to appoint a good number of article III judges.

On October 2nd Congress went into recess. The Solicitor General of the United States filed an application with the Supreme Court requesting that the Court extend the October 4th termination date of the stay granted in *Northern Pipeline*. On the first day of the new term of court, October 4, 1982, the Supreme Court issued an unsigned order extending the stay of its judgment in *Northern Pipeline* through December 24, 1982.[59] By this time it was known that Congress would return after the election for a lame duck session in order to consider the budget and pass appropriation bills so that the government in general could continue in operation. Congress returned to Washington for the lame duck session on November 29, 1982. The House remained in session until December 22, 1982, and the Senate until December 23. This was, of course, a short period of time during which it was essential to consider money bills necessary to keep the government operating, but it was hoped that Congress would pass legislation dealing with the bankruptcy court issue as well. A major problem was that bankruptcy matters do not have a high priority for a Representative or Senator at any given time. It is not the sort of legislation which affects constituents or from which votes are gained or lost.

In early October another bill was introduced on the House side by Congressman M. Caldwell Butler.[60] Congressman Butler was a member of the House Subcommittee on Monopolies and Commercial Law and was a member of the House Subcommittee on Civil and Constitutional Rights, which drafted the Bankruptcy Code. He was a principal actor along with Congressman Edwards in the total drafting of the Bankruptcy Code. The bill that Congressman Butler introduced was an omnibus court bill that would establish the bankruptcy court as an article III court but in a manner somewhat different from that contained in H.R. 6978. Congressman Butler's bill would create a bankruptcy division of the United States district court. In effect, this would make the judges appointed to the bankruptcy division district judges in all respects and would make them fully assignable to perform the tasks of all district judges. In addition, the bill contained many amendments to the Bankruptcy Code principally in the consumer area (similar to S. 2000). Congressman Butler's bill also proposed to abolish diversity of citizenship as a basis for jurisdiction of the United States district court, and

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[59] *See* 103 S. Ct. 199 (1982).

[60] *See* H.R. 7294, 97th Cong., 2d Sess. (1982).

contained other amendments affecting the jurisdiction of the Supreme Court of the United States. In total effect, the bill was an omnibus bill covering many subjects. This was just the sort of bill that was not needed at this particular moment. The bill not only had little prospect of passage but also tended to obfuscate the real issues involved.

On November 10, 1982, Senator Dole convened a hearing before the Subcommittee on Courts of the Senate Judiciary Committee concerning omnibus bankruptcy and court reform legislation. Testifying at that hearing, among others, was the Assistant Attorney General of the Office of Legal Policy of the Department of Justice, who made several observations.[61] Essentially, the Justice Department endorsed the proposal contained in H.R. 7294, the bill introduced by Congressman Butler, which was also contained in an unnumbered draft sponsored by Senator Dole. That position is to support the creation of a bankruptcy division in the

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[61] *See* Statement of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, Before the Subcomm. on Courts, Comm. on the Judiciary, United States Senate, Concerning Omnibus Bankruptcy and Court Reform Legislation 1-10 (Nov. 10, 1982) (copy of statement on file in Law Review office). Some of Mr. Rose's comments are worth quotation:

> I cannot overstate the need for the enactment of remedial legislation before the Supreme Court's stay expires. The plurality and concurring opinions in the *Northern Pipeline* case have left many important questions unanswered, and the extent to which the bankruptcy courts and the district courts will be able to adjudicate bankruptcy matters after December 24 is highly unclear. Some have, indeed, questioned whether *any* court will have jurisdiction over bankruptcy matters after December 24.
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> [I]t is doubtful that the proposal to reestablish an Article I bankruptcy court advanced by the Judicial Conference would provide a workable bankruptcy tribunal that would be both effective and capable of withstanding constitutional scrutiny.
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> [T]he Judicial Conference proposal would reduce the efficiency of the bankruptcy system established in 1978 by bifurcating proceedings between an Article I and an Article III tribunal. One of the most important purposes of the 1978 reforms was the consolidation of bankruptcy proceedings before a single forum with jurisdiction over all relevant matters. This put an end to costly delays and jurisdictional litigation which had plagued bankruptcy adjudication prior to 1978. The bifurcated system proposed by the Judicial Conference would resurrect some of these same problems. Moreover, it would place an additional caseload of uncertain dimensions on already overcrowded district court calendars.
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> [T]he Department has concluded that only an Article III approach will provide the workable and constitutional solution that is essential to assure the continued integrity of the bankruptcy system. Grave constitutional doubts would surround any further temporizing with an Article I solution and would cast a shadow on all bankruptcy cases raising the possibility of a new ruling that such a bankruptcy court structure is unconstitutional. In our judgment, a legislative proposal that simply offers an opportunity for more litigation to test its constitutional validity is no solution at all. The appointment of Article III judges will resolve any constitutional concerns, allow the consolidated disposition of all related bankruptcy matters, and attract the highest calibre of lawyers to the bench.

Id.

United States district court rather than to have a separate bankruptcy court as is contained in H.R. 6978. Thus, more United States district judges would be authorized in place of bankruptcy judges. The troublesome aspect with creating a bankruptcy division is that there would be too much temptation to assign the district court judges, who should be handling bankruptcy matters, to other work of the district court. As was recognized by the Department of Justice, district courts are generally overburdened with civil and criminal cases; a bankruptcy division in the district court would create a great deal of pressure to use the additional judges to be appointed under Senator Dole's and Congressman Butler's bills for general purposes of the district court. The net effect would be to have bankruptcy matters placed on the back burner and great delays caused in the administration of bankruptcy cases. The bankruptcy system itself cannot afford any great delays because of the general needs not only of creditors but of employees and all others connected with estates in the bankruptcy or reorganization process. But it is important to note that the Department of Justice fully recognized the need for a legislative solution to the problems created as a result of the Supreme Court decision in *Northern Pipeline*. A nonsolution is a further attempt at an article I court.[62] Additionally, the Department of Justice clearly maintained that it is so essential to provide a legislative solution to the court crisis that those with their own private interest legislation should not be permitted to attach to a court bill any other amendatory proposals.

During November and December, 1982, there was a good deal of jockeying for position in the Congress, particularly in the Senate. As positions moved more closely toward agreement in principle on an article III court, the laundry list of substantive law amendments grew. The anti-consumer lobby pushed harder for the contents of S. 2000. Senator Dole maintained his insistence on a grain elevator bankruptcy amendment, the shopping center people needed their provisions, and the Senate wanted numerous so-called technical amendments, originally contained in S. 863,[63] to be included in any subsequent legislation. On the House side, Congressman Rodino took the position, quite properly, that the only matter the Supreme Court held had to be taken care of was the court system. The Court had said nothing about consumer debtors, shopping centers, or grain elevators. It was irresponsible to change around so much of the Bankruptcy Code when all that needed immediate attention was the court.

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[62] It must be remembered throughout that footnote 31 of the plurality opinion in *Northern Pipeline*, 102 S. Ct. at 2876 n.31, has now called into question the validity of the pre-1978 court system. The former jurisdiction vested in the bankruptcy court had never been tested in the Supreme Court and footnote 31 raises the serious spectre that it was not a constitutional system.

[63] *See* S. 863, 97th Cong., 1st Sess. (1981).

Two reasons prevented any bill from reaching the floor of either side of Congress. In the Senate, Senator Metzenbaum had given notice that any bankruptcy bill or bankruptcy court bill that included the anticonsumer mandatory Chapter 13 provision would be subject to his filibuster. In a lame duck session, a filibuster can easily be the death knell of any bill. Senator Baker, the Republican leader, had indicated that he would not permit any such bill to come to the floor unless some accommodation could be made to prevent a filibuster. When it looked like this could be accomplished by deleting the mandatory Chapter 13 provision, a couple of other Senators threatened a filibuster against any article III proposal. Accordingly, no bill reached the floor of the Senate prior to its adjournment on December 23, 1982. On the House side, the Rodino bill could not go through the Rules Committee and come to the floor in ordinary course because it would be subject to amendments on the floor and there were Representatives ready to attach the consumer credit industry proposals. One alternative was to take the bill up on suspension calendar, meaning that it would not be subject to any amendments; however, such a procedure requires a two-thirds vote for passage. One factor of note that was printed in *Time* magazine prior to the November elections was that the consumer credit industry political action committee had contributed over $700,000 to congressional campaigns.[64] In any event, the House did not act prior to its adjournment on December 22, 1982.

At the time of adjournment, the Solicitor General filed an application with the Supreme Court for a further extension of the stay. On Friday, December 24, 1982, the Supreme Court denied the application.[65] The prospect of chaos in the bankruptcy court was imminent.

Recognizing the possibility that Congress would not act, and the Court would not extend the stay, the Judicial Conference of the United States had, at its September, 1982, meeting, authorized the drafting and transmission to the circuits of an emergency rule to fill the gap in the court system. Of course, while it was trying to fill the gap, the Judicial Conference was also trying to and successfully did maintain the gap by lobbying strongly against an article III court. The emergency rule took the position that residual jurisdiction was in the district court. Therefore, the rule provided, inter alia, for the district court to appoint, by adopting this rule, the bankruptcy judges in the district as special masters. After receiving comments on the emergency rule, presumably of an adverse nature, a revised draft was sent out to the judicial circuits with the recommendation that the rule be adopted by the district courts. It was adopted and made effective on December 25, 1982, in many circuits, and variations of that rule were adopted in other circuits.

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[64] *See* TIME, Oct. 25, 1982, at 24.

[65] The Supreme Court was not in session. A telephonic conference resulted in a 8-0 vote, Justice O'Connor could not be reached. Wash. Post, Dec. 24, 1982, at A1.

Essentially, the rule provides that all cases under the Bankruptcy Code and all civil actions arising under or related to such cases are referred to the bankruptcy judges. Orders and judgments by the bankruptcy judge in "unrelated proceedings" are final unless an appeal is taken to the district judge within ten days after entry of the order or judgment.[66] In "related proceedings" the bankruptcy judge submits findings, conclusions, and a proposed judgment or order to the district judge but the parties may consent to entry of final judgment by the bankruptcy judge.[67] Finally, in "unrelated proceedings," the bankruptcy judge may certify the matter to the district judge even if it is not controverted.

The emergency rule has only two flaws: it is invalid (illegal); and, it is unworkable. The rule is invalid because it tries to do what the Supreme Court has said Congress may not do. What gives the district court the authority to provide by rule that the bankruptcy judge may dispose of any matters? In *Northern Pipeline*, the Court held that all of the grant of jurisdiction to the article I court was unconstitutional.[68] It did not say anything about or distinguish between "related" and "unrelated" proceedings.

With respect to "related proceedings" the rule in effect appoints the bankruptcy judge as special master albeit without using the label. The only authority for district judges to appoint special masters is Rule 53 of the Federal Rules of Civil Procedure. The Supreme Court has said that the authority under Rule 53 is so limited as to be almost nonexistent.[69] Yet under the emergency rule, the district court is proposing to make a blanket appointment in all Bankruptcy Code cases.

The attempt at delineating what is an "unrelated proceeding" also must fall. One objection the Court had to the bankruptcy court's jurisdiction was that it extended over suits between private parties or state law causes of action. Yet, the emergency rule provides that some matters listed as unrelated remain so even if state law is involved.

Finally, the district court has no authority even to adopt a rule. Pursuant to what grant of power does it purport to do so? Not under former Bankruptcy Rule 927 (which permitted the district court to adopt local

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[66] *See infra* note 67 (definition of "related proceeding").

[67] "A related proceeding" is defined in the emergency rule as one that could have been brought in a federal or state court in the absence of the bankruptcy case. The rule then goes on to list a host of such actions involving a determination of state law that it deems to be "unrelated proceedings."

[68] 102 S. Ct. at 2879-80.

[69] FED. R. CIV. P. 53 provides, in part, as follows:

> (b) A reference to a master shall be the exception and not the rule .... [I]n actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

See LaBuy v. Howes Leather Co., 352 U.S. 249, 256, 259 (1957) ("The use of masters is 'to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause,' ... and not to displace the court").

bankruptcy rules).[70] It would certainly appear that the former rule would be in conflict with the Bankruptcy Code and, therefore, would be inapplicable pursuant to section 405(d) of that Act.[71] Moreover, there is no jurisdiction in the district court. The Supreme Court held that 28 U.S.C. § 1471(c) was unconstitutional. The way that section was structured, subsection (a) gave the district court jurisdiction over bankruptcy cases; subsection (b) gave the district court pervasive jurisdiction over all civil actions related to or arising under bankruptcy cases; but subsection (c) stated that such jurisdiction in subsections (a) and (b) was to be exercised by the bankruptcy court. Or, conversely, the district court could not exercise the jurisdiction granted by subsections (a) and (b). This is what Congress has said. The Supreme Court then said that the bankruptcy court could not exercise the jurisdiction because it was an article I court. But the Supreme Court did not say and could not say that, therefore, the jurisdiction may be exercised by the district court. Congress has said to the contrary. By what stretch of the legal imagination can a local rule of court override a congressional mandate and a Supreme Court holding?

Assuming that the rule will be upheld (after all, it will be considered by the very judges making up the Judicial Conference that ordered its drafting and promulgation), it nevertheless is unworkable and will not help the judicial system. In essence, a double hearing is required either because the matter is a "related proceeding" or because the bankruptcy judge will certify most other proceedings. The inefficiency, cost, and delay attendant upon two trials is inestimable. Such a proposal is also thoroughly irresponsible and evidences a complete lack of both understanding of an extremely important part of the federal judicial system and sympathy for it and those involved in it.

Additionally, because the very authority of the bankruptcy judge is called into question, it should prove difficult if not impossible to convince lenders to finance Chapter 11 debtors and third parties to purchase assets from the estate. If, for example, a lender will not provide financing, a plant or division of a business undergoing reorganization will be forced to close. Such closing will cause the layoff of many employees in that community. And a lender will not be willing to extend such financing if it cannot be secure that the court order authorizing the loan will withstand attack at some later date. The emergency rule says the bankruptcy court may issue such an order. But the rule offers little

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[70] *See* FED. R. BANKR. P. 927.

[71] Pub. L. No. 95-598, § 405(d), 92 Stat. 2549, 2685 (1978), provides that:

> The rules prescribed under section 2075 of title 28 of the United States Code and in effect on September 30, 1979, shall apply to cases under title 11, to the extent not inconsistent with the amendments made by this Act, or with this Act, until such rules are repealed or superseded . . . .

The reasons why the emergency rule is legally invalid and also unworkable are specified in detail in a statement of the National Bankruptcy Conference printed in 128 CONG. REC. H9640-43 (daily ed. Dec. 13, 1982).

solace when one is contemplating advancing hundreds of thousands of dollars or perhaps millions. The same problem exists with respect to prospective purchasers. If they cannot rely on an unimpeachable order authorizing the sale, why should they buy? If they do not buy, what will creditors receive from the bankrupt estate? This is the real harm that may be visited upon debtors and creditors, employees and landlords, suppliers and governmental agencies, and all those who ordinarily do business or are connected with a Chapter 11 debtor, including, by the way, shareholders.

In conclusion, the Supreme Court has created a mess. That was not totally unanticipated. But Congress has thus far acted irresponsibly in responding and private interest groups have acted out of pure selfishness to prevent Congress from responding unless they have their way. It is too bad and a sad commentary on our leaders in Washington. The 98th Congress came into session on January 3, 1983. It stayed for a few days and then recessed toward the end of that week not to reconvene again until the week of January 24th. Then some time is necessary for it to organize itself. In view of its past performance one may wonder why it bothers to do so. In any event, it is quite conceivable that no legislation will be forthcoming until June, 1983, if then. What will happen to the bankruptcy system and those who need the relief offered by it remains to be seen. As dire a prediction as one would care to make would not be an exaggeration.

Postscript

In the 98th Congress, convening on January 3, 1983, Congressman Rodino introduced H.R. 3 which would establish the bankruptcy courts as article III courts. On January 24, 1983, Senator Dole conducted hearings before the Senate's Subcommittee on Courts regarding not only the court problem, but also the amendments to the Bankruptcy Code proposed by the consumer credit industry, proposed changes with respect to shopping center lessors, grain elevator bankruptcy, time sharing arrangements and other measures. Of interest at this hearing was the change of position of the Department of Justice and presumably the Reagan Administration as announced by Mr. Jonathan Rose, Assistant Attorney General of the Office of Legal Policy of the Department of Justice. In his testimony, Mr. Rose supported a Judicial Conference proposal that had been sent to Congressman Butler on December 1, 1982.[72] Some participants in the hearings were surprised and disappointed by Mr. Rose's change of position since the Judicial Conference proposal did not recommend article III status for bankruptcy judges. That proposal would abolish bankruptcy courts, increase the number of federal district

[72] Statement of Jonathan Rose, Assistant Attorney General, Office of Legal Policy, Before the Subcomm. on Courts, Comm. on the Judiciary, United States Senate, Concerning Bankruptcy Reform (Jan. 24, 1983) (copy of statement on file in Law Review Office).

judges, and create the office of bankruptcy administrator. The latter functionary would approve various kinds of applications and the like but would not resolve contested matters. Parties could, however, take a matter from the administrator to the district judge by acting within ten days of the administrator's action. In effect, therefore, if no action were taken within that time, the administrator's action would become final. Furthermore, if a matter was taken to the district judge, he could refer it to a magistrate whose ruling would be final if the parties consented to it. If not, his proposed findings would go to the district judge.

The Judicial Conference's proposal is as unconstitutional as its emergency interim rule. Neither the bankruptcy administrator nor the magistrate is an article III judge, yet they are empowered to enter what are in effect final orders. The system is also tremendously inefficient because, with any luck, the litigants can have three trials on the same issue instead of one. By whatever name the proposal would call it, there would be a hearing before the administrator, then one before the magistrate, and finally, a hearing or trial before the district judge.

It may be recalled that the same Jonathan Rose testified on behalf of the Department of Justice on November 10, 1982, before the same subcommittee of Senator Dole.[73] At that time he stated flatly that article III status for bankruptcy judges was the only legal and sensible solution to the problem and that the proposed emergency interim rule of the Judicial Conference was unconstitutional. Yet here he was on January 24, 1983, asserting that article III status was not necessary, and that the proposed legislation was, at least inferentially, constitutional.[74]

Several decisions have come down with respect to the validity of the Judicial Conference's emergency interim rule. The most questionable of the lot is a decision of Judge Robert E. DeMascio, district judge in the Eastern District of Michigan (Detroit).[75] His decision upheld the validity

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[73] *See* supra note 61 and accompanying text.

[74] Hearings were also held before the House Subcommittee on Monopolies and Commercial Law on February 2, 1983.

[75] *In re* Northland Point Partners, No. 82-05387-W (E.D. Mich. Jan. 7, 1983). A contrary view was taken in Winters Nat'l Bank & Trust Co. of Dayton v. Schear Group, Adv. No. 3082-0491 (S.D. Ohio Dec. 27, 1982), in which the bankruptcy judge ruled that neither the bankruptcy court nor the district court has jurisdiction. *See also In re* Jorges Carpet Mills, Inc., No. 1-80-02516 (E.D. Tenn. 1983) (bankruptcy judge held that neither district courts nor bankruptcy court has jurisdiction to adjudicate action to avoid a preferential transfer); Braniff Airways, Inc. v. Civil Aeronautics Board, Misc. No. 4-221-E (N.D. Tex. Jan. 29, 1983) (district court held that bankruptcy court and district court had jurisdiction), *aff'd*, No. 83-1048 (6th Cir. 1983) (circuit court affirmed based on its reading of 28 U.S.C. § 1334).

In two excellently reasoned opinions, the emergency rule was held invalid: Color Craft Press, Ltd. v. Nationwide Shipper Sys., Inc. (*In re* Color Craft Press, Ltd.), Bktcy No. 81M-03184 (Bankr. D. Utah 1983); Gillman v. Preston Family Inv. Co. (*In re* Richardson), Bktcy No. 82C-00736 (Bankr. D. Utah 1983). These decisions were, however, reversed on appeal to the district court in a single opinion. ____ COLLIER BANKR. CAS. 2D ____ (D. Utah 1983).

On the legislative front, events subsequent to those referred to in the text at notes 72-74 of the rule. The difficulty with the decision, aside from its legal reasoning, is one of propriety. Judge DeMascio is also the chairman of the Bankruptcy Committee of the Judicial Conference, which had a most important role to play in the formulation of the policy, outline, and perhaps drafting of the rule itself. Not only is a serious question raised as to whether he should have heard the proceeding in the first place, but the appropriateness of his Chief Judge's subsequent action may also be questioned. Under date of January 7, 1983, John Feikens, Chief Judge for the Eastern District of Michigan, sent a copy of Judge DeMascio's decision to all Chief Judges of United States district courts with a cover letter suggesting that the decision "might be helpful to you in your District."

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have further clouded the prospects of any sensible solution. The Judicial Conference proposal was introduced by Senator Dole as S. 443 but it received no votes in the Senate Judiciary Committee. Instead, S. 1983, sponsored by Senator Heflin, was approved by that Committee by a vote of 14 to 1. The essence of the bill is to retain the bankruptcy court as an article I court, adjunct to the district court. The broad grant of jurisdiction granted the district court may be exercised by the bankruptcy court, and pursuant to 28 U.S.C. § 1471(c)(1) a party who fails to object by motion raised in his first pleading is deemed to consent to the bankruptcy court's exercise of such jurisdiction. Accordingly, what the Supreme Court said in *Northern Pipeline* was unconstitutional, Senator Heflin and the full Judiciary Committee would reenact. They would even permit an unconstitutional jurisdiction to be granted by consent. The bill also permits the district judge to recall any proceeding on his own motion or on motion of the bankruptcy judge. In the event of recall, the district judge may then refer the proceeding to a magistrate or to the bankruptcy judge as a special master.

It is apparent that the Senate Committee is acceding to the lobbying of the Chief Justice and federal judiciary generally and remains willing to adopt legislation of extremely questionable constitutional validity and certainly of extremely inefficient practical application.

Another difficulty of the Senate approach is that if the bill passes, it would provide for the bankruptcy courts to be article I courts. H.R. 3, on the other hand, provides for such courts to be article III courts. If both bills were passed and went to Conference could there be a compromise to constitute such courts as article II courts?

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