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does not result in any injustice to the shipowner.[56] Finally, these circuits reason that even if an injustice does result to a shipowner, only Congress has the authority to correct such injustices by amending the LHWCA.[57] Recently in *Allied Towing Corp. v. Tatem*,[58] the Fourth Circuit extended the application of the *Edmonds* reduction of damages formula to a shipworker injured by the joint negligence of a shipowner and the shipworker's employer. Thus, the Fourth Circuit appears to be willing to extend the application of a reduction of damages according to a proportional fault formula to all worker's covered by section 905(b).[59] Thus, despite the contrary position of other circuits, a shipowner in the Fourth Circuit will be liable in any LHWCA action only according to its own degree of fault.

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III. BANKRUPTCY

Upon initiation of bankruptcy proceedings, the creditors[1] of a bankrupt debtor are primarily concerned with the distribution and allocation of the

[56] *See* Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884, 888 (5th Cir. 1978) (shipowner's liability for longshoreman's full damages offset by reduction allowable for longshoreman's contributory negligence and indemnity from negligent third parties other than longshoreman's stevedore); Shellman v. United States Lines, Inc., 528 F.2d 675, 680 (9th Cir. 1975) (joint tortfeasor cannot complain if he is held liable for injured party's full damages).

[57] Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884, 888-89 (5th Cir. 1978); Shellman v. United States Lines, Inc., 528 F.2d 675, 680 (9th Cir. 1975).

[58] 580 F.2d 702 (4th Cir. 1978). In *Allied Towing*, the plaintiff, a barge owner, moved for summary judgment on a worker's claim against the shipowner arising from an industrial accident aboard the owner's barge. *Id.* at 703. Since Allied was acting as the worker's immediate employer, Allied claimed that it should enjoy the statutory immunity of § 905(a) of the LHWCA. *Id.* at 704. Contrary to Allied's claim, the court held that merely being the worker's immediate employer would not give Allied full immunity from his claim. *Id.* Instead, the court held that the third sentence of § 905(b), which provides that a shipworker cannot sue a shipowner for injuries caused by the negligence of any person providing ship repair or work service to the owner, is to be read in apportionment terms. *Id., citing* Edmonds v. Compagnie Generale Transatlantique, 577 F.2d 1153 (4th Cir. 1978). Therefore, Allied was relieved of liability for the worker's injury only to the extent that the worker's fellow employees or the owner's personnel in charge of the repair work proportionally caused the worker's injury. 580 F.2d at 704.

[59] The provisions of § 905(b) apply to all persons covered by the LHWCA. 33 U.S.C. § 905(b) (1976). The LHWCA covers any person engaged in maritime employment including longshoremen and all classifications of harbor workers. *Id.* § 902(3). Only crew members, masters, or officers of a vessel are exluded specifically from LHWCA coverage. *Id.*

[1] Under the Bankruptcy Act, a creditor includes anyone who owns a debt, demand or claim provable in bankruptcy. Bankruptcy Act § 1(11), 11 U.S.C. § 1(11) (1976). Secured creditors comprise a sub-category within the general classification of creditors. Essentially, a secured creditor is one whose debts are secured by the property of the bankrupt and are of a nature assignable under the Bankruptcy Act. Bankruptcy Act § 1(28), 11 U.S.C. § 1(28) (1976); *cf.* U.C.C. § 9-105(1)(m) (defining secured party). *See generally* Moo, *The Secured Creditor in Bankruptcy*, 47 AM. BANKR. L. J. 23 (1973).

bankrupt's assets.[2] A creditor's share of the bankrupt estate is determined by his classification as secured or general,[3] and according to a characterization of the assets comprising the estate.[4] A conflict between the general creditors and a secured creditor may arise if the secured creditor's lien[5] covers income-producing property.[6] The ownership of the income generated by such property becomes the focus of controversy when the general creditors urge its inclusion in the bankrupt estate[7] and the secured creditor claims the income as further security for his defaulted loan.[8]

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[2] Each creditor is anxious to recoup as much of the debt owed to him by the bankrupt debtor as possible. Bankruptcy Act § 2a(7), 11 U.S.C. § 11(a)(7) (1976) vests the bankruptcy court with jurisdiction to "[c]ause the estates of bankrupts to be collected, reduced to money, and distributed and determine controversies in relation thereto. . . ."

[3] *See* note 1 *supra.* A creditor with a valid lien would be classified as a secured creditor and would have priority over the general creditors in any scheme of distribution. D. EPSTEIN, DEBTOR-CREDITOR RELATIONS 181 (1973) [hereinafter cited as EPSTEIN]. A lien is defined as "a charge or security or incumbrance upon property." BLACK'S LAW DICTIONARY 1072 (4th ed. 1957). The bankruptcy court determines the validity of a lien. EPSTEIN, *supra* at 183.

During bankruptcy, the general creditors are paid on a pro rata basis after the secured creditors with valid liens and those general creditors with priority are paid. Bankruptcy Act § 65(a), 11 U.S.C. 105(a) (1976). The expenses of administration and certain tax obligations are among those claims which are given priority. *See* Bankruptcy Act § 64, 11 U.S.C. § 104 (1976). In the case of Golden Enterprises, the bankrupt estate would likely be exhausted upon satisfaction of the attorneys' fees and a United States government tax claim of approximately $50,000. Golden Enter., Inc. v. United States (*In re* Golden), 566 F.2d 1207, 1209, 1211 (4th Cir. 1977), *aff'd sub nom.*, Butner v. United States, 99 S. Ct. 914 (1979).

[4] The bankrupt estate generally consists of all property owned by the bankrupt at the time a petition in bankruptcy is filed. Bankruptcy Act § 70(a), 11 U.S.C. § 110(2) (1976). *See generally* 3 H. REMINGTON, REMINGTON ON BANKRUPTCY § 1177 (6th ed. 1955) [hereinafter cited as REMINGTON]. The definition of "property" is liberally construed to give creditors everything of value. Segal v. Rochelle, 382 U.S. 375, 379 (1966); *In re* Kokoszha, 479 F.2d 990, 994 (2d Cir. 1973).

[5] *See* note 3 *supra.*

[6] Income produced by secured assets may take various forms, such as proceeds from crops grown on secured property, Pollack v. Sampsell, 174 F.2d 415, 416 (9th Cir. 1949), or rents collected from tenants occupying mortgaged premises. Petition of Cox, 15 F.2d 764, 764 (1st Cir. 1926); *cf.* U.C.C. §§ 9-207, 9-306 (rights and duties when collateral in secured party's possession; treatment of proceeds resulting from sale of collateral).

The interests of the unsecured, or general, creditors are represented by the trustee appointed to administer the estate. *See* note 47 *infra.* In Chapter XI proceedings, creditors are defined as those holders of unsecured debts, demands or claims. Bankruptcy Act § 307(1), 11 U.S.C. § 707(1) (1976). Theoretically, Chapter XI arrangements affect only the rights of unsecured creditors. In practice, however, a secured creditor's rights would be affected, since the property securing his loan is subject to the Chapter XI arrangement. Bankruptcy Act § 308, 11 U.S.C. § 708 (1976). *See generally* Anderson, *Secured Creditors: Their Rights and Remedies Under Chapter XI of the Bankruptcy Act,* 36 LA. L. REV. 1, 1 (1975) [hereinafter cited as Anderson]; Miller, *The Automatic Stay in Chapter XI Cases—A Catalyst for Rehabilitation or an Abuse of Creditors' Rights?,* 94 BANKING L. J. 676, 677 n.7 (1977).

[7] Income included in the bankrupt estate is divided among the general creditors pursuant to § 65 of the Bankruptcy Act. *See* Bankruptcy Act § 65, 11 U.S.C. § 105 (1976). *See generally* note 3 *supra.*

[8] *See, e.g.,* Central Hanover Bank & Trust Co. v. Philadelphia & Reading Coal & Iron Co., 99 F.2d 642, 645 (3d Cir. 1938) (mortgage creditor entitled to net income of mortgaged property to extent required to satisfy his claim); Petition of Cox, 15 F.2d 764, 765 (1st Cir. 1926).

In *Golden Enterprises, Inc. v. United States* (In re *Golden*),[9] the Fourth Circuit considered a claim by William E. Butner[10] that as mortgagee[11] he was entitled to the income generated by property securing defaulted second mortgages.[12] Specifically, Butner claimed ownership of the accrued rents[13] issuing from the encumbered property during bankruptcy proceedings after default,[14] but prior to foreclosure of the mortgages.[15] The Fourth Circuit held that the income produced during bankruptcy proceedings comprised a part of the bankrupt estate, since the mortgagee did not establish that he would have attempted to assert a security interest in the income had bankruptcy proceedings not been instituted.[16] Prior to *Golden*, the Fourth Circuit had not considered the secured creditor's right to income produced during bankruptcy.[17] *Golden* presented a more complex situation than the basic issue of income allocation[18] in light of the proce-

[9] 566 F.2d 1207 (4th Cir. 1977), *aff'd sub nom.*, Butner v. United States, 99 S. Ct. 914 (1979).

[10] *Id.* at 1208. Butner held second mortages on Golden Enterprises' property totalling $360,000. Upon initiation of the bankruptcy proceedings, Butner purchased the property at a court-ordered sale for $174,000, offsetting the purchase price against Golden's debt to him. The unsatisfied balance on the debt following the sale totalled $186,000. *Id.* at 1209.

[11] A mortgage is an appropriation of real or personal property as security for a debt. Killebrew v. Hines, 104 N.C. 182, ____, 10 S.E. 159, 162 (1889). The mortgagee is the holder of the lien on the mortgaged property. *See* 3 REMINGTON, *supra* note 4, at § 1315.

[12] *In re* Golden Enterprises, Bankrupt No. ST-B-73-6, slip op. at 2 (W.D.N.C. Nov. 16, 1976). Essentially, a second mortgagee promises to lend the mortgagor the amount of the first mortgage by paying that amount to the first mortgagee, while the mortgaged property serves as security for the loan. G. OSBORNE, MORTGAGES § 266 (1970). The first mortgages in *Golden* were held by several financial institutions and the second mortgages were held by Butner and other individuals. 566 F.2d at 1208. By assignment, Butner became the sole owner and holder of the second mortgages. No. ST-B-73-6, slip op. at 2.

[13] 566 F.2d at 1209. Rents on the property began to accrue when Golden Enterprises filed its petition under Chapter XI, Bankruptcy Act §§ 301-399, 11 U.S.C. §§ 701-799 (1976), one year and nine months prior to adjudication. A court-appointed agent made authorized disbursements until adjudication, at which time a trustee was appointed. The trustee continued to make disbursements as authorized by the bankruptcy court. The accrued rents after disbursements amounted to $162,971.32. 566 F.2d at 1209.

[14] Neither the district court opinion, nor the Fourth Circuit opinion made clear the exact date of Golden's default under the second mortgages. The Fourth Circuit indicated, however, that default occurred by the time Golden was adjudicated bankrupt on February 14, 1975. 566 F.2d at 1209.

[15] Foreclosure of the mortgages occurred upon the court-ordered sale of the property. *Id.*; *see* note 10 *supra*.

[16] 566 F.2d at 1211. Upon ruling in favor of the general creditors, the Fourth Circuit reversed the district court and reinstated the ruling of the bankruptcy court. *Id.* at 1209.

[17] *Id.*

[18] The circuits are not in accord over the effect of bankruptcy on the secured creditor. The Third and Seventh Circuits are most sympathetic to the secured creditor, perceiving the initiation of bankruptcy proceedings as depriving the creditor of a remedy upon default of a loan, *see* Central Hanover Bank & Trust Co. v. Philadelphia & Reading Coal & Iron Co., 99 F.2d 642 (3d Cir. 1938); *In re* Wakey, 50 F.2d 869 (7th Cir. 1931); text accompanying notes 70-73 *infra*, while the Eighth and Ninth Circuits view the same situation as a suspension of the creditor's remedy, permitting the creditor to reinstate the suspended rights by following proper procedure. *See* Groves v. Fresno Guar. Sav. & Loan Ass'n., 373 F.2d 440 (9th Cir.

dure followed by Golden Enterprises prior to its adjudication as bankrupt.[19]

In 1973, Golden Enterprises filed a petition for arrangement[20] under Chapter XI[21] of the Bankruptcy Act.[22] A plan of arrangement was never confirmed, however, and the proceeding was converted into one of straight bankruptcy.[23] While the petition for the Chapter XI arrangement was pending, the court appointed an agent[24] to collect rents and to make authorized disbursements.[25] During the pendency of the petition for arrangement, the interest and principal payments due on the mortgages were paid by the agent to the mortgagee.[26] Upon adjudication of the debtor as bank-

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1967); Tower Grove Bank & Trust Co. v. Weinstein, 119 F.2d 120 (8th Cir. 1941); text accompanying notes 74-78 *infra*.

[19] 566 F.2d at 1209. Golden Enterprises first entered the bankruptcy arena by filing a petition under Chapter XI of the Bankruptcy Act. *Id.* at 1209. The Chapter XI case was transformed into a straight bankruptcy, causing procedural difficulties in ascertaining Butner's rights to the income. *Id; see* text accompanying notes 20-31 *infra*.

[20] An arrangement is a debtor's plan to provide for the satisfaction of his unsecured debts. The arrangement may be on any terms, including alternatives such as settlement or extension of the time of payment. Bankruptcy Act § 306(1), 11 U.S.C. § 706(1) (1976). An arrangement filed under Chapter XI is confirmed by the consent of a majority of the unsecured creditors. Bankruptcy Act § 362, 11 U.S.C. § 762 (1976). A "petition for arrangement" may be filed with the bankruptcy court under Chapter XI as a proposal of the arrangement. Bankruptcy Act § 306(5), 11 U.S.C. § 706(5) (1976). Such a petition may be filed by a debtor in a pending bankruptcy proceeding before or after his adjudication in bankruptcy. Bankruptcy Act § 321, 11 U.S.C. § 721 (1976). *See also* Bankruptcy Act § 322, 11 U.S.C. § 722 (1976) (debtor may file original petition under Chapter XI in absence of pending bankruptcy proceeding).

[21] Bankruptcy Act §§ 301-399, 11 U.S.C. §§ 701-799 (1976). Chapter XI of the Bankruptcy Act is a debtor rehabilitation provision available to individuals, partnerships and corporations. EPSTEIN, *supra* note 3, at 145-46. The purpose of the proceeding is to allow the debtor to rehabilitate his finances by effecting an arrangement with his unsecured creditors. The ultimate rehabilitation of the debtor is the goal of the Chapter XI proceeding. Nicholas v. United States, 384 U.S. 678, 687 (1966). *See generally* 9 REMINGTON, *supra* note 4, at §§ 3564-3565; Anderson, *supra* note 6, at 1-2.

[22] 566 F.2d at 1209. The provisions of the Bankruptcy Act are codified at 11 U.S.C. §§ 1-1255 (1976).

[23] Straight bankruptcy necessitates a liquidation of the debtor's property and the distribution of the proceeds among the creditors of the bankrupt debtor. EPSTEIN, *supra* note 3, at 136. A straight bankruptcy proceeding is commenced by filing a petition in the appropriate court. FED. BANKR. R. 101.

In *Golden*, such a plan of arrangement was not confirmed. 566 F.2d at 1209. If confirmation is not forthcoming, the bankruptcy court is empowered to either adjudge the debtor as bankrupt or dismiss the proceeding altogether, whichever is in the creditor's best interests. *See* Bankruptcy Act § 376(2), 11 U.S.C. § 776(2) (1976).

[24] 566 F.2d at 1209. On the motion of the debtor's attorney, the court appointed S.J. Golden as agent. No. ST-B-73-6, slip op. at 6.

[25] 566 F.2d at 1209; *see* Bankruptcy Act § 322, 11 U.S.C. § 732 (1970). The grant of power to a receiver or agent is within the discretion of the bankruptcy court and the authority of the receiver or agent is subject to court control. *In re* State Fin. Serv., Inc., 432 F. Supp. 129, 132 (M.D. La. 1977). *See generally* FED. BANKR. R. 201(1). In *Golden*, the authority of the agent consisted of collecting rents and paying taxes, insurance, and interest and principal payments due on the mortgages. 566 F.2d at 1209.

[26] 566 F.2d at 1209.

rupt, a trustee was appointed[27] to collect rents and make disbursements as authorized by the bankruptcy court.[28] However, the court directed that the trustee make no further payments on the mortgages.[29] Butner claimed that the debt owing to him[30] should be satisfied with the fund remaining after the trustee made the authorized disbursements.[31]

The Fourth Circuit determined that for Butner to be entitled to the disputed income he should have unequivocally asserted his claim to the generated income.[32] The court's determination was based on the fact that absent bankruptcy proceedings, even in the event of default, a mortgagee subject to North Carolina law[33] is not entitled to any income generated by mortgaged property until he has taken possession of the property.[34] Thus, the court reasoned that before Butner could receive the income, the law required that he gain possession of the mortgaged property through foreclosure of the mortgages.[35] The Fourth Circuit focused on the procedure followed by Butner *during* the bankruptcy proceeding in evaluating the mortgagee's efforts to gain possession of the mortgaged property to determine the validity of his claim to the income fund.[36] The court noted that during the bankruptcy Butner neither requested a sequestration of the rents nor the appointment of a receiver to collect them.[37] This observation of the Fourth Circuit suggests alternative rationales which may have been em-

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[27] 566 F.2d at 1209; *see* Bankruptcy Act § 378(a)(2), 11 U.S.C. § 778(a)(2) (1976); text accompanying notes 43-45 *infra*.

[28] 566 F.2d at 1209; *see* notes 13 & 25 *supra*.

[29] 566 F.2d at 1209. At the time Golden Enterprises was adjudicated bankrupt on February 14, 1975, nearly two years after the initial filing of the petition of arrangement pursuant to Chapter XI, the Butner mortgages were in default. No. ST-B-73-6, slip op. at 1; *see* note 14 *supra*.

[30] *See* note 10 *supra*.

[31] *Id.; see* note 13 *supra*.

[32] 566 F.2d at 1210; *see* text accompanying notes 37-46 *infra*.

[33] 566 F.2d at 1210. State law is controlling where there is a mortgage involved in a bankruptcy proceeding. The Federal courts follow the general rule that the mortgagee is entitled to income generated by the mortgaged premises only if he takes actual possession, after a receiver takes possession in his behalf, or after he has made a proper demand for possession and has been refused, *In re* Brose, 254 F. 664, 666 (2d Cir. 1918), unless the law of the state of the situs of the mortgaged property applies a different rule, in which case the state's rule will apply. *Id.; see* Erie R.R. v. Tompkins, 304 U.S. 64 (1938); 4A W. COLLIER ON BANKRUPTCY § 70.16 (1978) [hereinafter cited as COLLIER]. *See generally* Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013 (1953); Note, *The Mortgagee's Right to Rents and Profits Following a Petition in Bankruptcy*, 60 IOWA L. REV. 1388, 1390 (1975).

[34] Under North Carolina law, a mortgagee has no right to the income generated by the mortgaged property, even after default. Parker Co. v. Commercial Bank, 204 N.C. 432, ____, 168 S.E. 681, 682 (1933). Such a right arises only after the mortgagee has taken possession of the mortgaged property either by consent of the mortgagor or pursuant to a court order. *Id. See generally* ABA Committee on Mortgage Law and Practice, *Disposition of Rents and Profits After Mortgage Default*, 2 REAL PROP. PROB. TR. J. 601, 623 (1967).

[35] 566 F.2d at 1210; *see* Kistler v. Wilmington Dev. Co., 205 N.C. 755, ____, 172 S.E. 413, 414 (1934).

[36] 566 F.2d at 1210.

[37] *Id.; see* text accompanying notes 42-47 *infra*.

ployed in denying Butner's claim to the income.[38] First, if the court did not consider the motion made by the debtor's attorney for appointment of an agent to collect rents as requested by Butner, then the literal provisions of the Bankruptcy Act would not be satisfied.[39] Similarly, the statutory requirements of the Act[40] would not be satisfied if any action undertaken during the pendency of the Chapter XI petition for arrangement and prior to adjudication was not considered by the court as being "during bankruptcy."[41]

The bankruptcy court appointed an agent to collect rents in response to the motion made by the debtor's attorney.[42] Therefore, this motion for the appointment of a receiver, which was made on behalf of the secured creditors, including Butner,[43] should have qualified as a formal request for such appointment under Bankruptcy Rule 201.[44] After bankruptcy ensued, a trustee was appointed by the court in compliance with Rule 122.[45] Butner argued that a further request by him for the appointment of a receiver after adjudication was not warranted since the trustee appointed by the court served the same function as a receiver.[46] In rejecting Butner's argument, the Fourth Circuit stated that the adjudication of bankruptcy terminated the receivership created in response to the initial motion prior to adjudication,[47] and that the trustee collected the rents for the bankrupt estate.[48] However, a receiver's appointment under Bankruptcy Rule 201

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[38] The Fourth Circuit's opinion does not indicate which of these rationales, if either, was used in deciding the case. *See* 566 F.2d 1207 (4th Cir. 1978).

[39] *See* text accompanying notes 42-47 *infra.*

[40] *See* 566 F.2d at 1210. *But see* text accompanying notes 51-63 *infra.*

[41] *See* text accompanying notes 42-47 *infra.*

[42] No. ST-B-73-6, slip op. at 6. The court gave no recognition to the fact that the agent was appointed pursuant to a motion made on behalf of the secured creditors, including Butner. 566 F.2d 1207 (4th Cir. 1978).

[43] No. ST-B-73-6, slip op. at 6.

[44] FED. BANKR. R. 201(c), provides that an agent may not be appointed except upon application to the bankruptcy court.

[45] FED. BANKR. R. 122 addresses the situation presented by a chapter case conversion into straight bankruptcy. The rule provides that "the case shall be deemed to have been commenced as of the date of the filing of the first petition initiating a case under the Act and shall be conducted as far as possible as if no petition commencing a chapter case had been filed." FED. BANKR. R. 122(1). In addition, the rule provides for the appointment of a trustee. FED. BANKR. R. 122(4).

[46] 566 F.2d at 1210. Although the court directed the trustee to withhold payments on the mortgages, the function of the trustee in collecting rents and making authorized disbursements was identical to that of the agent since both acted to preserve the assets of the debtor. *Id.*

[47] *Id.*

[48] *Id.; cf.* McNellis v. Raymond, 420 F.2d 51, 54 (2d Cir. 1970) (trustee serves dual function of representing both bankrupt and creditors). In Mortgage Loan Co. v. Livingston, 45 F.2d 28, 32 (8th Cir. 1930), the Eighth Circuit considered whether mortgagees were required to move separately for the appointment of a receiver to collect and hold rents issuing from mortgaged property. The receiver who collected the rents acted on behalf of all creditors. The court ruled that an assumption could be made that the receiver held the rents and issues for the party entitled to them and therefore, the mortgagees had no reason to request the appointment of another receiver. *Id.*

automatically terminates when a trustee qualifies to serve.[49] In view of this termination, the appointment of a qualified trustee obviates the need to appoint a receiver. Thus, the court's insistence that Butner should have requested the appointment of a receiver subsequent to the adjudication of bankruptcy is not supported by either statutory authority[50] or logic.[51]

In addition to the evaluation of the trustee's purpose and function, the Fourth Circuit reasoned that Butner had not requested the sequestration of rents or the appointment of a receiver "during bankruptcy" because the proceedings were not "bankruptcy proceedings" until the date of adjudication.[52] The court viewed the adjudication of bankruptcy as the annulment of all acts performed pursuant to the Chapter XI petition[53] and held that since the trustee's appointment terminated the receivership, theoretically, the motion for appointment of the receiver was not made "during bankruptcy."[54] Significantly, the Fourth Circuit did not identify what constitutes "during bankruptcy" under the statutory provisions of the Bankruptcy Act and Rules.[55] Rule 122[56] provides that a case converted from a chapter proceeding into straight bankruptcy is to be conducted as though the chapter case had not been filed.[57] Thus, the date of the initial filing of the chapter case petition is deemed to be the commencement of bankruptcy. In addition, section 378 of the Bankruptcy Act[58] expressly states that the bankruptcy proceeding continues as though a voluntary petition for adjudication in bankruptcy had been filed at the time of the initial Chapter XI filing.[59] Consequently, a debtor is adjudicated bankrupt as of the date of an initial filing.[60] Rule 122 addresses the issue of continuity from the perspective of a straight bankruptcy,[61] while section 378 is a Chapter XI provision.[62] Together, they illustrate the objective of the Bankruptcy Act to assure the continuity of proceedings.[63] Clearly, these statu-

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[49] FED. BANKR. R. 201(a) provides that the appointment of a receiver is to be terminated by the bankruptcy court as soon as a trustee qualifies to serve.

[50] *See* FED. BANKR. R. 122 & 201; text accompanying notes 42-49 *supra.*

[51] *See* text accompanying notes 42-49 *supra.*

[52] 566 F.2d at 1210.

[53] *Id.*

[54] *Id.*

[55] *See* text accompanying notes 56-63 *infra.* The court limited the term "during bankruptcy" to the period of straight bankruptcy. 566 F.2d at 1210.

[56] FED. BANKR. R. 122.

[57] FED. BANKR. R. 122(a); *see* note 45 *supra.*

[58] Bankruptcy Act § 378, 11 U.S.C. § 778 (1976).

[59] Bankruptcy Act § 378(a)(2), 11 U.S.C. § 778(a)(2) (1976).

[60] *Id.*

[61] FED. BANKR. R. 122; *see* note 63 *infra.*

[62] Bankruptcy Act § 378, 11 U.S.C. § 778 (1976); *see* note 63 *infra.*

[63] *In re* Botany Indus., Inc., 403 F. Supp. 234, 236 (E.D. Pa. 1975). In *Botany Industries,* after termination of Chapter XI proceedings, the case progressed to liquidation in straight bankruptcy. The court emphasized that the general scheme of the Bankruptcy Act and Rules calls for the treatment of converted cases as single proceedings whenever possible. *Id., citing* United States v. Kalishman, 346 F.2d 514, 518 (8th Cir. 1965), *cert. denied,* 384 U.S. 103 (1966). The relationship between Rule 122 and § 378 is viewed as supportive of this position since each reflects the concept of continuity of proceedings. *Id.*

tory provisions indicate that a converted case should be viewed as a single proceeding, embracing "a concept of unitary administration."[64] Thus, the Fourth Circuit's conclusion that an action instituted prior to a chapter case conversion is not "during bankruptcy" disregards the thrust of the statutory mandates.

The *Golden* court also evaluated Butner's efforts to foreclose on the mortgaged property, noting that Butner took no formal action to have the property abandoned, a prerequisite to foreclosure.[65] While the court acknowledged that Butner made several informal requests for abandonment of the property,[66] these requests were not recognized as valid indicia of the mortgagee's efforts to gain possession of the property.[67] Apparently, the Fourth Circuit resolved that Butner should have filed a formal complaint under Rule 701[68] to render his informal efforts for abandonment indicative of an attempt to initiate foreclosure.[69] However, the court appears more demanding of the mortgagee than necessary. Since the bankruptcy court is equitable in nature,[70] it should examine all of the relevant circumstances before determining with whom the equities lie.[71] The district court recognized the equitable considerations involved[72] and concluded that Butner's efforts to secure abandonment were sufficient to evidence an attempt to foreclose, thus entitling him to the income generated by the property.[73] In view of Butner's requests to the bankruptcy court and the Fourth Circuit's apparent disregard of any extenuating equitable considerations,[74] the *Golden* court's refusal to recognize Butner's efforts to foreclose on the

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[64] *Id.*

[65] 566 F.2d at 1210-11.

[66] *Id.* at 1210. According to the district court opinion, Butner contended that he and the first mortgagees made numerous futile attempts to get the bankruptcy court to abandon the property to them, thus allowing them to initiate foreclosure proceedings. No. ST-B-73-6, slip op. at 5.

[67] 566 F.2d at 1211; *see* text accompanying notes 68-69 *infra.*

[68] FED. BANKR. R. 701 deals with the initiation of a proceeding before a bankruptcy judge by a party attempting to establish an interest in property belonging to a bankrupt debtor.

[69] *See* text accompanying note 67 *supra.* The court stated explicitly that since no formal action was taken under Rule 701, the mortgagee had not fulfilled the necessary requirements for abandonment and foreclosure. 566 F.2d at 1211. The informal action for abandonment, though acknowledged, was disregarded by the court. *Id.* at 1210.

[70] Under § 2 of the Bankruptcy Act, bankruptcy courts are invested with equitable powers to exercise their jurisdiction. Bankruptcy Act § 2(a), 11 U.S.C. § 11(a) (1976). In addition, the Supreme Court has repeatedly emphasized that the bankruptcy courts are to afford overriding consideration to equitable principles. Bank of Marin v. England, 385 U.S. 99, 103 (1966). *See generally* Securities & Exch. Comm'n v. United States Realty & Imp. Co., 310 U.S. 434, 455 (1940); Pepper v. Litton, 308 U.S. 295, 303, 308 (1939).

[71] Pepper v. Litton, 308 U.S. 295, 308 (1939); *see* note 70 *supra.*

[72] No. ST-B-73-6, slip op. at 7. The Fourth Circuit acknowledged the district court's recognition of equitable considerations, but stated that those considerations were not enumerated in the district court's opinion, and that none existed in favor of the mortgagee that were ascertainable from the record. 566 F.2d at 1211. This observation apparently contradicts those made by the district court. No. ST-B-73-6, slip op. at 7; *see* text accompanying note 73 *infra.*

[73] No. ST-B-73-6, slip op. at 7.

[74] *See* 566 F.2d at 1211; text accompanying notes 70 & 71 *supra.*

property appears harsh and unreasonable.

Absent the procedural complications peculiar to *Golden*,[75] two theories are employed by other circuits in evaluating the secured creditor's right to income generated by secured property during bankruptcy proceedings.[76] The Third and Seventh Circuits have viewed the initiation of bankruptcy proceedings by or on behalf of the debtor as depriving a secured creditor of legal remedies to which he would otherwise be entitled upon default of the secured loan.[77] To counterbalance this deprivation of remedy, the secured creditor is accorded ownership status of the income generated by the security to the extent of the unsatisfied debt.[78] Since the income is considered to be additional security on the mortgage loan, the income is allocated to the mortgagee,[79] resulting in an equitable solution to protect the secured creditor's risk.[80] In deciding *Golden*, however, the Fourth Circuit adopted an alternative approach, employed by the Eighth and Ninth Circuits, which views the bankruptcy proceedings as suspending the secured creditor's legal rights.[81] Instead of automatically allocating the income to the secured creditor, this approach requires that before the secured creditor's claim on the income is allowed to prevail,[82] the creditor must petition the bankruptcy court for a sequestration order, obtain the appointment of a

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[75] *See* note 19 and text accompanying notes 20-31 *supra*.

[76] *See* Fidelity Bankers Life Ins. v. Williams, 506 F.2d 1242, 1243 (4th Cir. 1974); text accompanying notes 77-85 *infra*.

[77] The bankruptcy proceeding automatically vests title in the trustee, consequently depriving the mortgagee of his foreclosure remedy. Central Hanover Bank & Trust Co. v. Philadelphia & Reading Coal & Iron Co., 99 F.2d 642, 646 (3d cir. 1938). Because of the deprivation of the foreclosure remedy, inaccessibility of the income to the mortgagee is inevitable. *Id.* at 645. Thus, the mortgagee would have no right to the income absent foreclosure and possession. *Id. See also In re* Wakey, 50 F.2d 869 (7th Cir. 1931); Bindseil v. Liberty Trust Co., 248 F. 112 (3d Cir. 1917).

[78] Central Hanover Bank & Trust Co. v. Philadelphia & Reading Coal & Iron Co., 99 F.2d 642, 645 (3d Cir. 1938). The court in *Central Hanover* emphasized equitable principles in determining that ownership in the income vested in the mortgagee with the removal of the property from the insolvent debtor's possession. *Id.* The court drew an analogy between a straight bankruptcy proceeding and a reorganization proceeding where the property is under the supervision of the court, since a mortgagee is similarly enjoined from pursuing the remedy of foreclosure. *Id.* The claim of a mortgagee to the generated income is limited to the amount necessary to satisfy the debt owed to him. *Id.*

[79] *Id.*

[80] The Third Circuit has stated that after bankruptcy proceedings have vested title to the debtor's property in the trustee, equity demands that the secured creditor become owner of the income. Bindseil v. Liberty Trust Co., 248 F. 112, 114 (3d Cir. 1917). Since the income was generated by the mortgaged property, it should not be diverted from the secured creditor to the general creditors. *Id.*

[81] *See, e.g.*, Groves v. Fresno Guar. Sav. & Loan Ass'n, 373 F.2d 440, 443 (9th Cir. 1967); Pollack v. Sampsell, 174 F.2d 415, 418 (9th Cir. 1949); Tower Grove Bank & Trust Co. v. Weinstein, 119 F.2d 120, 123 (8th Cir. 1941); Mortgage Loan Co. v. Livingston, 45 F.2d 28, 30 (8th Cir. 1930).

[82] Tower Grove Bank & Trust Co. v. Weinstein, 119 F.2d 120, 123 (8th Cir. 1941). In denying the mortgagee's claim to an income fund, the *Weinstein* court noted the lack of positive action by the mortgagee to assert his claim to the income generated by the mortgaged property. *Id. See generally* 4A COLLIER, *supra* note 33, at ¶ 70.16.

receiver to collect the income, or secure the court's consent to foreclose. Such an approach enables the mortgagee to receive the income from the mortgaged property, but only after he secures his rights as he would if the mortgagor were not involved in bankruptcy proceedings.[83] Although bankruptcy should not unnecessarily harm a secured creditor, he should not be excused from his responsibilities as a party to the mortgage. A mortgagor, as legal owner of the mortgaged property, is entitled to rents and profits issuing from the property absent default and foreclosure.[84] Thus, the bankrupt estate, as legal owner,[85] should similarly receive the income absent unequivocal action by the mortgagee to secure the income.

The Fourth Circuit favored the position espoused by the Eighth and Ninth Circuits because it best ensured a decision consistent with one that a state court would reach in the case of a defaulted mortgage if bankruptcy proceedings were not involved.[86] Although the theoretical basis employed by the court is sound in this regard, the court's analysis of the facts is narrow and obtuse. The court failed to discuss fully the facts of the case in relation to the theoretical base which has been established. Since Butner adequately demonstrated that he followed the requisite procedure to secure the income generated by the mortgaged property,[87] he should have prevailed on his claim for the income. The result in *Golden* is deceptive, however, for although the court's analysis of the mortgagee's actions is challengeable,[88] it laid a solid foundation for analyzing the issue of income allocation when income is generated by secured property during bankruptcy. By aligning with the Eighth and Ninth Circuits, the Fourth Circuit has indicated an intention to deal equitably with creditors involved in bankruptcy proceedings. The court demonstrated, however, the ease with which a court may stray from an equitable doctrine, arrive at a wholly inequitable result and thereby defeat its own efforts.[89]

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[83] Absent bankruptcy, Butner would have been required to foreclose on the mortgage before becoming entitled to the income from the property. *See* Gregg v. Williamson, 246 N.C. 356, ____, 98 S.E.2d 481, 484-85 (1957).

[84] Gregg v. Williamson, 246 N.C. 356, ____, 98 S.E.2d 481, 484-85 (1957).

[85] *See* note 77 *supra.*

[86] 566 F.2d at 1210; *see* note 34 *supra.*

[87] *See* text accompanying notes 42-46 & 65-67 *supra.*

[88] *See* text accompanying notes 36-41 *supra.*

[89] The result reached by the Fourth Circuit was challenged by Butner in a petition filed for certiorari which the Supreme Court granted on June 12, 1978. Butner v. United States, 436 U.S. 955 (1978). The petition, which presents four questions for review, challenges: (1) the constitutionality of the administration of federal bankruptcy law to vary from circuit to circuit on the question of the secured creditor's right to rents generated by encumbered property, (2) the necessity of the mortgagee to make preliminary attempts to gain possession of property in order to reach the rental income of mortgaged property of an insolvent debtor, (3) the Fourth Circuit's disregard of the actions of the mortgagee during the pendency of the Chapter XI proceeding in determining the mortgagee's right to the income generated by the mortgaged property, and (4) the Fourth Circuit's failure to recognize the mortgagee's actions under Chapter XI proceedings that converted to straight bankruptcy and thereby depriving the mortgagee of his established rights. Butner v. United States, 47 U.S.L.W. 3031 (U.S.